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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

KERRY BOULTON

Plaintiff,

vs.

AMERICAN TRANSFER
SERVICES, INC., U.S. TAX LIEN
ASSOCIATION, STEVE
CLEMENTS, TONY MARTINEZ,
SAEN HIGGINS, SPIKE HUMER,
RICHARD MEDINA, JR., ANA
GUERRA DURAN, RUBEN
SANCHEZ,

Defendant.

CASE NO. 14cv00175-GPC-RBB

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR LEAVE TO FILE A
SECOND AMENDED COMPLAINT**

[Dkt. Nos. 26, 29.]

INTRODUCTION

Before the Court is Plaintiff Kerry Boulton's ("Plaintiff") Motion for Leave to File a Second Amended Complaint pursuant to Federal of Civil Procedure ("Rule") 15(a). (Dkt. No. 26.) Plaintiff seeks to add a civil RICO cause of action and to add additional Plaintiffs. (Dkt. No. 26.) Defendants Ruben Sanchez and American Transfer Services, Inc. ("ATS") also filed a motion to dismiss the first amended complaint. (Dkt. No. 29.) The motion is submitted on the papers without oral argument pursuant to Civil Local Rule 7.1(d)(1). Based on the reasoning below, the Court **GRANTS in part and DENIES in part** Plaintiff's motion for leave to file a

1 second amended complaint. Additionally, the Court **DENIES** Defendants Sanchez and
2 ATS's Motion to Dismiss for Failure to State a Claim as moot.

3 **FACTUAL BACKGROUND**

4 Plaintiff is a resident of Melbourne, Australia. (Dkt. No. 17, FAC ¶ 7.) In the
5 first amended complaint Plaintiff alleges Defendants ATS and Sanchez, as an employee
6 of ATS, fraudulently induced Plaintiff to purchase tax liens and/or tax deeds in the
7 United States. (Id. ¶ .) Defendant ATS purports to be a company “that will open up
8 a business for foreign citizens to acquire interests in real estate related to tax liens
9 and/or tax deeds for profit” by providing Sole Proprietorship Registration, U.S.
10 Employer Identification number, U.S. Banking Facilitation and a U.S. mailing address.
11 (Id. ¶¶ 12, 13.) Defendants receive funds from foreigners to “open and (sic) account”
12 and then takes controls of the funds. (Id. ¶ 15.) Defendants claim they will arrange
13 for transfers between appropriate bank accounts to pay ATS its fees and for Plaintiff
14 to have funds available to make investments in U.S. tax liens and tax deeds. (Id.) ATS
15 asks for money to be wired to an ATS account and then ATS will set up sub-accounts
16 for the clients to transfer money into in order to make the investments. (Id. ¶ 16.)
17 These representations were made to Plaintiff. (Id. ¶ 14.)

18 Plaintiff provided the total of \$156,000 to Defendants in two installments of
19 \$1,000 and \$155,000. (Id. ¶ 19.) Defendants assumed control of the funds and never
20 transferred them to the purported “sub account” which would have been made available
21 to her to exercise the proper control. (Id. ¶ 20.) She has made numerous demands for
22 the return of her funds which have failed. (Id. ¶ 21.) Plaintiff alleges causes of action
23 for breach of contract, conversion and money had and received.

24 **PROCEDURAL BACKGROUND**

25 On January 24, 2014, Plaintiff filed a complaint against Defendants ATS, Steve
26 Clements, Ana Guerra Duran, Saen Higgins, Spike Humer, Tony Martinez, Richard
27 Medina, Jr., Ruben Sanchez, and U.S. Tax Lien Association for (1) money had and
28 received, (2) conspiracy through conversion, (3) breach of contract, (4) fraud, and (5)

1 fraud–promise without intent to perform. (Dkt. No. 1.) On March 4, 2014, Defendant
2 Richard Medina, Jr. filed a Motion to Dismiss for Failure to State a Claim. (Dkt. No.
3 14.) On the same date, Defendants Ana Guerra Duran and Ruben Sanchez filed a
4 Motion to Dismiss for Failure to State a Claim.

5 On March 25, 2014, Plaintiff filed a first amended complaint (“FAC”) against
6 Defendants ATS and Ruben Sanchez. (Dkt. NO. 17.) On April 28, 2014, the Court
7 denied Defendants Ruben Sanchez and Anna Guerra Duran’s motion to dismiss the
8 original complaint as moot. (Dkt. No. 23.) On May 2, 2014, Plaintiff filed a Notice
9 of Voluntary Dismissal as to Defendant Ana Guerra Duran. (Dkt. No. 24.)

10 On June 10, 2014, Plaintiff filed a Motion for Leave to File Amended Complaint
11 to Add a Claim for Civil RICO and Additional Plaintiffs. (Dkt. No. 26.) On June 27,
12 2014, Defendants Ruben Sanchez and ATS filed an opposition. (Dkt. No. 28.) On July
13 11, 2014, Plaintiff filed a Reply. (Dkt. No. 31.)

14 On July 1, 2014, Defendants Ruben Sanchez and ATS filed a Motion to Dismiss
15 for Failure to State a Claim. (Dkt. No. 29.) On July 15, 2014, Plaintiff filed an
16 opposition. (Dkt. No. 32.) On July 22, 2014, Defendant filed a reply. (Dkt. No. 33.)

17 DISCUSSION

18 **I. Federal Rule of Civil Procedure 7(b)**

19 As an initial argument, Defendants argue that the Court should deny Plaintiff’s
20 motion for leave to file a second amended complaint by failing to meet the particularity
21 requirements of Rule 7(b) because Plaintiff failed to attach the proposed amended
22 complaint to her motion. Plaintiff opposes contending that neither the Federal Rules
23 nor the Local Civil Rules require that a proposed amendment be attached to a motion
24 for leave to amend a complaint.

25 Rule 7(b) of the Federal Rules of Civil Procedure provides that a motion must
26 “state with particularity the grounds for seeking the order; and state the relief sought.”
27 Fed. R. Civ. P. 7(b).

28 Defendants cite to other circuits to support their argument that a proposed

1 pleading must be attached with a motion for leave to amend a complaint. However,
2 these circuits also hold that a supporting brief that contains the basis of a proposed
3 amendment could be sufficient to grant a motion for leave to amend a complaint. See
4 Wolgin v. Simon, 722 F.2d 389, 396 (8th Cir. 1983) (appellant did not submit a
5 proposed amendment and in its brief, did not indicate what an amended complaint
6 would have contained); United States ex rel. Doe v. Dow Chem. Co., 343 F.3d 325,
7 330-31 (5th Cir. 2003) (“absence of any proposed amendments, compounded by lack
8 of grounds for such an amendment” justifies denial of the motion to amend the
9 complaint). Where a local rule requires that a party seeking leave to amend attach a
10 proposed pleading, the Ninth Circuit has held that district courts do not abuse their
11 discretion by denying leave to amend based on the party’s failure to attach a proposed
12 amended complaint. Gardner v. Martino, 563 F.3d 981, 991 (9th Cir. 2009); Waters
13 v. Weyerhaeuser Mortg. Co., 582 F.2d 503, 507 (9th Cir. 1978).

14 However, in this district, the Local Rules for the Southern District of California
15 do not require a party to file a proposed pleading when seeking leave to amend a
16 complaint. See Stone v. Advance America, No. 08cv1549-WQH(WMc), 2009 WL
17 2242350, at *2 (S.D. Cal. July 24, 2009) (failure to attach a proposed amendment was
18 not fatal because Plaintiff’s substantive claims would remain by the addition of two
19 proposed class representatives). Based on the caselaw, even if no proposed amended
20 pleading is attached to a motion for leave to amend, it appears that if the brief
21 supporting a motion for leave to amend the complaint, itself, provides the facts and
22 legal theories to support grounds for an amended complaint, the failure to attach a
23 proposed amended complaint is not critical. See Gardner, 563 F.3d at 991 (appellant
24 failed to include a proposed copy of the amended complaint and the court noted that
25 appellants did not propose any new facts or legal theories for an amended complaint
26 and gave the Court no basis to allow an amendment).

27 In her briefing, Plaintiff seeks to add civil RICO as another cause of action and
28 provides a sufficient factual basis to bring such a claim. To state a claim for civil

1 RICO, a plaintiff must allege “(1) conduct (2) of an enterprise (3) through a pattern (4)
2 of racketeering activity.” Odom v. Microsoft Corp., 486 F.3d 541, 547-48 (9th Cir.
3 2007). Elements of federal wire fraud are 1) a scheme to defraud; 2) use of the wires
4 in furtherance of the scheme and 3) the specific intent to defraud. U.S. v. McNeil, 320
5 F.3d 1034, (9th Cir. 2003). Plaintiff asserts that Defendants solicited individuals
6 abroad to conduct business with them with the intent to defraud. (Dkt. No. 31 at 4.)
7 Plaintiff alleges the funds were transferred via money wire. (Id.) Furthermore,
8 Plaintiff alleges that Defendant’s engaged in pattern racketeering activity, by reaching
9 out to several individuals. (Dkt. No. 26 at 6.) Therefore, the Court finds that Plaintiff
10 has provided sufficient particularity of the grounds it seeks to amend under Rule 7(b).¹

11 **II. Federal Rule of Civil Procedure 15**

12 Under Federal Rule of Civil Procedure (“Rule”) 15(a), leave to amend a
13 complaint after a responsive pleading has been filed may be allowed by leave of the
14 court and “shall freely be given when justice so requires.” Foman v. Davis,
15 371 U.S. 178, 182 (1962); Fed. R. Civ. P. 15(a). Granting leave to amend rests in the
16 sound discretion of the trial court. Internat’l Ass’n of Machinists & Aerospace
17 Workers v. Republic Airlines, 761 F.2d 1386, 1390 (9th Cir. 1985). This discretion
18 must be guided by the strong federal policy favoring the disposition of cases on the
19 merits and permitting amendments with “extreme liberality.” DCD Programs Ltd. v.
20 Leighton, 833 F.2d 183, 186 (9th Cir. 1987). “This liberality in granting leave to
21 amend is not dependent on whether the amendment will add causes of action or
22 parties.” Id.; but see Union Pacific R.R. Co. v. Nevada Power Co., 950 F.2d 1429,
23 1432 (9th Cir. 1991) (In practice, however, courts more freely grant plaintiffs leave to
24 amend pleadings in order to add claims than new parties).

25
26 ¹Courts ordinarily do not consider the validity of a proposed amended pleading
27 in deciding whether to grant leave to amend and defer consideration of challenges to
28 the merits of a proposed amendment until after leave to amend is granted and the
amended pleadings are filed. Netbula, LLC v. Distinct Corp., 212 F.R.D. 534, 539
(N.D. Cal. 2003) (citation omitted).

1 Because Rule 15(a) favors a liberal policy, the nonmoving party bears the burden
2 of demonstrating why leave to amend should not be granted. Genentech, Inc. v. Abbott
3 Labs., 127 F.R.D. 529, 530-31 (N.D. Cal. 1989). In assessing the propriety of an
4 amendment, courts consider several factors: (1) undue delay, (2) bad faith or dilatory
5 motive; (3) repeated failure to cure deficiencies by amendments previously permitted;
6 (4) prejudice to the opposing party; and (5) futility of amendment. Foman, 371 U.S. at
7 182; United States v. Corinthian Colleges, 655 F.3d 984, 995 (9th Cir. 2011). These
8 factors are not equally weighted; the possibility of delay alone, for instance, cannot
9 justify denial of leave to amend, DCD Programs, 833 F.2d at 186, but when combined
10 with a showing of prejudice, bad faith, or futility of amendment, leave to amend will
11 likely be denied. Bowles v. Reade, 198 F.2d 752, 758 (9th Cir. 1999). The single most
12 important factor is whether prejudice would result to the non-movant as a consequence
13 of the amendment. William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,
14 668 F.2d 1014, 1053 (9th Cir. 1981).

15 Defendants do not assert that granting Plaintiff leave to file a second amendment
16 complaint to add a civil RICO claim would be futile, sought in bad faith, would create
17 undue delay or otherwise prejudice Defendants. Accordingly, the Court GRANTS
18 Plaintiff's motion for leave to file a second amended complaint to add civil RICO as
19 a cause of action.²

20 **B. Permissive Joinder**

21 Plaintiff also seeks to join additional plaintiffs pursuant to Rule 20(a)(1)³, based
22 on newly discovered evidence. Defendant argues that permissive joinder is
23 inappropriate.

24 _____
25 ²The Court notes that Defendants only argue they will be prejudiced if the Court
26 were to allow the addition of two additional parties who live abroad as the cost of
27 discovery would increase exponentially. Since the Court DENIES Plaintiff's motion
28 to add additional plaintiffs, Defendants' argument is moot.

³The additional named plaintiffs are Ane Marie Lacy and Mark Carmelle
Chornohus.

1 Under Rule 20(a)(2), permissive joinder of defendants is proper if: “(A) any
2 right to relief is asserted against them jointly, severally, or in the alternative with
3 respect to or arising out of the same transaction, occurrence, or series of transactions
4 or occurrences; and (B) any question of law or fact common to all defendants will arise
5 in the action.” Fed. R. Civ. P. 20(a)(2). Rule 20(a)(2) is to be construed liberally to
6 promote judicial economy and trial convenience. League to Save Lake Tahoe v. Tahoe
7 Regional Planning Agency, 558 F.2d 914, 917 (9th Cir. 1977) (citing Mosley v. Gen.
8 Motors, 497 F.2d 1330, 1332-33 (8th Cir. 1974)). “The ‘same transaction’ requirement
9 of Rule 20 refers to ‘similarity in the factual background of a claim; claims that arise
10 out of a systematic pattern of events’ and have a ‘very definite logical relationship.’”
11 Hubbard v. Houglund, No. 09-0939, 2010 WL 1416691, at *7 (E.D. Cal. Apr. 5, 2010)
12 (quoting Bautista v. Los Angeles County, 216 F.3d 837, 842-43 (9th Cir. 2000)). In
13 addition, “the mere fact that all [of a plaintiff’s] claims arise under the same general
14 law does not necessarily establish a common question of law or fact.” Coughlin v.
15 Rogers, 130 F.3d 1348, 1351 (9th Cir. 1997).

16 However, “even once [the Rule 20(a)] requirements are met, a district court must
17 examine whether permissive joinder would ‘comport with the principles of
18 fundamental fairness’ or would result in prejudice to either side.” Coleman v. Quaker
19 Oats Company, 232 F.3d 1271, 1296 (9th Cir. 2000) (citing Desert Empire Bank v.
20 Insurance Co. of North America, 623 F.2d 1371, 1375 (9th Cir. 1980).

21 Here, Plaintiff seeks to add additional plaintiffs as they are victims to
22 Defendants’ fraudulent scheme. Besides stating that these additional plaintiffs are
23 victims, Plaintiff has failed to demonstrate that these additional plaintiffs seek relief
24 arising out of the same transaction and occurrence and that the same question of law
25 or fact is common to all plaintiffs. In fact, Plaintiff provides no facts to demonstrate
26 permissive joinder. As such, Plaintiff has failed to prove a definite logical relationship
27 between the claims of the additionally named plaintiffs and Plaintiff’s claim.
28 Accordingly, the Court DENIES Plaintiff’s motion for leave to add two additional

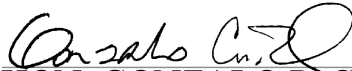
1 Plaintiffs.

2 CONCLUSION

3 For the above stated reasons, the Court **GRANTS** Plaintiff's Motion for Leave
4 to File a Second Amended Complaint to add a claim for Civil RICO. The Court
5 **DENIES** Plaintiff's Motion for Leave to File a Second Amended Complaint to add
6 additional plaintiffs. Plaintiff shall file a second amended complaint within seven days
7 of the "Filed" date of the Order. Since Plaintiff will be filing a second amended
8 complaint, the Court DENIES Defendants' motion to dismiss the first amended
9 complaint as moot. The hearing set for August 8, 2014 shall be vacated.

10 IT IS SO ORDERED.

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12 DATED: August 5, 2014

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14 HON. GONZALO P. CURIEL
15 United States District Judge
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