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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAJMP, INC.; JOAN M. POLITTE;
MERRILL LYNCH BUSINESS
FINANCIAL SERVICES, INC.;
CHICAGO TITLE COMPANY; TBC
CORPORATION; SC TELECOM, LLC;
WELLS FARGO BANK, N.A.; PACIFIC
WESTERN BANK; OUTFRONT
MEDIA, INC.; HALLE PROPERTIES,
L.L.C.; POFACO, INC.; COUNTY OF
SAN DIEGO; MIDAS REALTY
CORPORATION; KELLY M. POLITTE
as the Personal Representative of the
ESTATE OF ROBERT A. POLITTE;
TED R. POLITTE as the Personal
Representative of the ESTATE OF
ROBERT A. POLITTE,

Defendants.

Case No.: 17-CV-515-AJB-DEB

ORDER:

**(1) GRANTING DEFENDANT
RAJMP, INC.’S MOTION FOR
LEAVE TO FILE AN AMENDED
ANSWER TO PLAINTIFF THE
UNITED STATES OF AMERICA’S
FIRST AMENDED COMPLAINT;**

**(2) GRANTING JOAN M.
POLITTE’S MOTION FOR LEAVE
TO FILE FIRST AMENDED
ANSWER TO FIRST AMENDED
COMPLAINT; AND**

**(3) GRANTING MOTION FOR
LEAVE TO FILE FIRST AMENDED
ANSWER TO FIRST AMENDED
COMPLAINT BY DEFENDANTS
KELLY M. POLITTE AS
PERSONAL REPRESENTATIVE OF
THE ESTATE OF ROBERT A.
POLITTE AND TED R. POLITTE AS
THE PERSONAL
REPRESENTATIVE OF THE
ESTATE OF ROBERT A. POLITTE**

(Doc. Nos. 176, 179, 185)

1 Presently before the Court are Defendant RAJMP, Inc.’s motion for leave to file an
2 amended answer to Plaintiff the United States of America’s first amended complaint, (Doc.
3 No. 176), Joan M. Politte’s motion for leave to file first amended answer to first amended
4 complaint, (Doc. No. 179), and motion for leave to file first amended answer to first
5 amended complaint by Defendants Kelly M. Politte as personal representative of the Estate
6 of Robert A. Politte and Ted R. Politte as the personal representative of the Estate of Robert
7 A. Politte, (Doc. No. 185). The United States filed a response to each of Defendants’
8 motions. (Doc. Nos. 187, 202, 203.) Based on the arguments presented in the briefing, the
9 Court **GRANTS** each Defendants’ motion for leave to file an amended answer.

10 **BACKGROUND**

11 In a telephonic status conference held with Magistrate Judge Gallo on September
12 24, 2019, counsel for the United States claimed that Defendants, in their respective
13 answers, conceded that the Government properly and/or lawfully rejected an offer in
14 compromise (“OIC”) submitted by RAJMP, Inc. (“RAJMP”). (Doc. No. 176-1 at 7; Doc.
15 No. 179-1 at 5; Doc. No. 185-1 at 4.) It had not previously occurred to Defendants or their
16 counsel that their operative answers might be construed to admit that the Government’s
17 alleged superficial rejection of the OIC was, in fact, legally effective. (*Id.*) Defendants
18 assert that they have consistently taken the position throughout this litigation that the
19 Government’s purported rejection of the OIC was not valid or effective. (*Id.*) However,
20 based on the Government’s assertion, Defendants each filed motions to amend their
21 answers to clarify Paragraph 70 or 71 of their respective answers and to articulate more
22 explicitly their accord-and-satisfaction affirmative defense¹.

23 RAJMP seeks leave to amend paragraph 70 of its answer to state:

24 RAJMP admits that a collection due process hearing for some,
25 but not all, periods and taxes was requested by RAJMP, but
26 denies the allegation that the statute of limitations for filing this
lawsuit was tolled for no less than 419 days during the period that

27
28 ¹ The Court notes that RAJMP only seeks leave to amend Paragraph 70 of its answer. (*See generally*
Doc. No. 176.)

1 the collection due process was pending before the IRS, plus the
2 period within which RAJMP could have appealed.

3 (Doc. No. 176-3 ¶ 70.)

4 Joan Politte seeks leave to amend paragraph 71 of her answer to state:

5 Joan Politte admits an offer in compromise was filed by RAJMP
6 with the IRS. The averment that the offer in compromise was
7 rejected is not a factual allegation, but an impermissibly pled
8 legal conclusion, which requires no response. For the avoidance
9 of doubt, Joan Politte denies that the offer in compromise was
validly or lawfully rejected. Joan Politte denies the remaining
allegations set forth in paragraph 71 of the Complaint.

10 (Doc. No. 179-2 ¶ 71.) She also seeks leave to amend paragraph 7 of her affirmative
11 defenses to state:

12 Plaintiff has overstated its alleged damages and has failed to
13 apply numerous payments and credits to the tax liabilities.
14 Further, Plaintiff has erroneously misallocated payments,
15 thereby failing to mitigate its damages and increasing the
16 purported liability of Joan Politte. Previous payments made
17 toward the assessments as described in paragraph 69 of the
18 Complaint have been or should be credited with such payments.
19 The underlying tax liabilities were subject of an offer-in-
20 compromise previously made by the taxpayer that was deemed
accepted by the Government by operation of law, and
accordingly the alleged damages are overstated and any actual
damages have already been fully or partially satisfied.

20 (*Id.* ¶ 7.)

21 The Co-Personal Representatives seek leave to amend paragraph 71 of their answer
22 to state:

23 The Co-Personal Representatives admit that RAJMP submitted
24 an offer in compromise request to the IRS, but deny any
25 inferences that may be drawn therefrom regarding whether the
26 offer in compromise encompassed all of the tax periods. The
27 allegation regarding tolling expresses a legal conclusion that
28 requires no response. To the extent the remaining allegations in
paragraph 71 express any legal conclusions, no responses are
required. The Co-Personal Representatives deny the remaining

1 allegations contained in paragraph 71 of the First Amended
2 Complaint.

3 (Doc. No. 185-2 ¶ 71.) They also seek leave to amend paragraph 7 of their affirmative
4 defenses to state:

5 Plaintiff has overstated its alleged damages and has failed to
6 apply numerous payments, credits, and offsets to the purported
7 tax, interest, penalties, costs and fees. Further, Plaintiff has
8 erroneously imposed such liabilities and has misallocated
9 payments, credits, and offsets, thereby failing to mitigate its
10 damages and increasing any purported liability of RAJMP and/or
11 the Estate of Robert A. Politte. The purported assessments as
12 described in paragraph 69 of the First Amended Complaint
13 should be credited with such payments, credits, and offsets. The
14 underlying tax liabilities were the subject of an offer-in-
15 compromise previously made by RAJMP that was deemed
16 accepted by the Government by operation of law, and
17 accordingly the alleged damages are overstated and any actual
18 damages have already been fully or partially satisfied.

19 (*Id.* ¶ 7.)

20 Plaintiff asserts that Defendants were informed of this issue in their answers twenty-
21 two months prior to the September 24, 2019 telephone call. (Doc. No. 202 at 8; Doc. No.
22 203 at 9.) Accordingly, Plaintiff opposes Defendants’ proposed amendments to their
23 respective answers. This Order follows.

24 **LEGAL STANDARD**

25 A district court has “broad discretion in supervising the pretrial phase of litigation.”
26 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir.1992) (citation
27 omitted). Generally, under Federal Rule of Civil Procedure 16(b), the pretrial scheduling
28 order can be modified only “upon a showing of good cause.” *Zivkovic v. S. Cal. Edison*
Co., 302 F.3d 1080, 1087 (9th Cir.2002) (citation omitted). “The pretrial schedule may be
modified ‘if it cannot reasonably be met despite the diligence of the party seeking the
extension.’” *Id.* (citing *Johnson*, 975 F.2d at 609). If the party seeking the modification was
not diligent, the motion to amend should not be granted. *Id.* Only after the moving party

1 has demonstrated good cause under Rule 16 does the court apply the standard under Rule
2 15 to determine whether the amendment is proper. *Johnson*, 975 F.2d at 608.

3 Once the opposing party has filed a responsive pleading, a party may amend its
4 pleadings “only with the opposing party’s written consent or the court’s leave.” Fed. R.
5 Civ. P. 15(a)(2). Rule 15(a) provides that courts should “freely give leave when justice so
6 requires.” *Id.* This rule is applied with “extreme liberality.” *Eminence Capital, LLC v.*
7 *Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). Nonetheless, the decision to grant or
8 deny a motion to amend is committed to the discretion of the district court. *See DCD*
9 *Programs, Ltd. v. Leighton*, 833 F.2d 183, 185–86 (9th Cir.1987). At the same time,
10 “refusal to grant the leave without any justifying reason appearing for the denial is not an
11 exercise of discretion; it is merely abuse of that discretion.” *Foman v. Davis*, 371 U.S. 178,
12 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). The Ninth Circuit has identified “four factors
13 relevant to whether a motion for leave to amend pleadings should be denied: undue delay,
14 bad faith or dilatory motive, futility of amendment, and prejudice to the opposing party.”
15 *United States v. Webb*, 655 F.2d 977, 980 (9th Cir. 1981) (citing *Foman*, 371 U.S. at 182);
16 *see also DCD Programs*, 833 F.2d at 186. “Prejudice is the touchstone of the inquiry under
17 rule 15(a).” *Eminence Capital*, 316 F.3d at 1052. Absent prejudice, there is a presumption
18 in favor of granting leave to amend. *Id.*

19 **DISCUSSION**

20 The Court will address each of the Defendants’ motions for leave to file first
21 amended answers to first amended complaint in turn.

22 A. RAJMP’s Motion for Leave to File an Amended Answer

23 RAJMP seeks leave to amend its answer due to a misstatement in paragraph 70 of
24 its Answer. (Doc. No. 176-1 at 6.) The Court will address each of the *Foman* factors.

25 *i. Bad Faith*

26 RAJMP asserts that there is a complete absence of bad faith as this was a simple
27 pleading error. (Doc. No. 176-1 at 17.) Plaintiff asserts that RAJMP did act in bad faith as
28 RAJMP has misled the Court about its reason for its motion, the contents of its filed answer,

1 and the scope of its proposed amendments. (Doc. No. 203 at 10.) In the context of a motion
2 for leave to amend, “bad faith” means acting with the intent to deceive, harass, mislead,
3 delay, or disrupt. *Cf. Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006). Plaintiff
4 asserts that RAJMP admitted that the IRS rejected the OIC in their answer. However, this
5 is the exact admission that RAJMP asserts was a misstatement. RAJMP has repeatedly
6 asserted throughout this litigation that the OIC was not properly rejected. In fact, RAJMP
7 did reject paragraph 71 of its answer, and did not admit that there was any formal statutory
8 required rejection. Further, RAJMP did identify an accord and satisfaction defense in its
9 answer. RAJMP has asserted time and time again that the OIC was not properly rejected.

10 Plaintiff also asserts the fact that RAJMP did not file a tax court case regarding the
11 OIC evidences bad faith. However, there is no requirement that RAJMP file a tax court
12 case. The fact that RAJMP did not file a tax court case does not establish bad faith in
13 amending its answer. The Court does not find bad faith in making this amendment.

14 *ii. Undue Delay*

15 RAJMP asserts that there is no undue delay as RAJMP realized on September 24,
16 2019 that Plaintiff intended to assert that its answer admitted that the OIC was rejected and
17 filed this motion on October 2, 2019. Plaintiff asserts that this defense should have been
18 raised 10 years ago. However, the first litigation was prior to the occurrence of the OIC.
19 Further, the amount of liability could not be contested in the first litigation. *See* 26 U.S.C.
20 § 7426(c). RAJMP filed its motion within one week once it was aware that Plaintiff was
21 interpreting its answer in this manner. RAJMP did not delay.

22 *iii. Futility*

23 Plaintiff does not argue that this amendment is futile. Accordingly, this factor weighs
24 in favor of granting leave to amend.

25 *iv. Prior Amendments*

26 RAJMP has not sought a prior amendment to its answer in this case. Accordingly,
27 this factor weighs in favor of granting leave to amend.

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1 *v. Prejudice*

2 Plaintiff asserts that it will suffer prejudice in several ways if the Court allows the
3 proposed amendment. (Doc. No. 203 at 21.) First, Plaintiff asserts that it will suffer
4 prejudice from the degradation of any evidence. (*Id.*) Second, Plaintiff contends that had
5 RAJMP raised the OIC defense at the ENE, then Plaintiff would not have agreed to
6 bifurcate the case. (*Id.* at 22.) Third, Plaintiff asserts that this will over-burden the United
7 States in discovery. (*Id.*)

8 It is unclear to the Court how the bifurcation shows prejudice. The only issue
9 resolved in the bifurcation was the alter-ego issue, which did not require discovery. Further,
10 at the time this motion was filed, the Court had not issued a scheduling order, no discovery
11 had been propounded by any party, and the parties had not yet served their initial
12 disclosures under Fed. R. Civ. P. 26(a)(1). Plaintiff still has time to conduct discovery on
13 the OIC defense, to file motions for summary judgment, and to litigate the same. In regards,
14 to degradation of evidence, a correction of this pleading error would not cause the
15 degradation of evidence. Furthermore, Plaintiff brought this suit in 2017 rather than
16 bringing it sooner to the close of the previous litigation.

17 B. Joan M. Politte's Motion for Leave to File First Amended Answer

18 Joan M. Politte seeks leave to amend her answer to clarify paragraph 71 of her
19 answer and to articulate more explicitly her accord-and-satisfaction affirmative defense.
20 (Doc. No. 179-1 at 5–6.) The Court will address each of the *Foman* factors.

21 *i. Bad Faith*

22 Joan Politte argues that she only recently learned that Plaintiff interpreted paragraph
23 71 of her answer as an admission that the OIC was effectively rejected as a legal
24 conclusion. (Doc. No. 179-1 at 10.) Plaintiff asserts that Joan Politte is acting in bad faith
25 as she misrepresents the contents of her answer, misrepresents the impact of her proposed
26 amendments, and her actions before and after filing her answer suggest that she did not
27 plead her OIC defense. (Doc. No. 187 at 6–11.)

28 First, Joan Politte has been clear throughout the entirety of this litigation that she

1 contested whether the OIC was effectively rejected. Second, the fact that Joan Politte has
2 asserted the same language in all three of her answers is immaterial. Plaintiff has filed three
3 complaints that included the same allegation, however, this is the first time Joan Politte
4 was made aware that Plaintiff was choosing to interpret the language in her answer in this
5 manner. Second, despite not being labeled as “accord and satisfaction,” Joan Politte did
6 plead the substance of the defense. *See* Fed. R. Civ. P. 8(e). Third, the fact that Joan Politte
7 argues that Plaintiff’s contentions in paragraph 71 are impermissible legal conclusions does
8 not establish bad faith.

9 Plaintiff asserts that Joan Politte misrepresents the impact of her proposed
10 amendment. (Doc. No. 187 at 9.) However, Joan Politte attached her proposed amendment
11 to her motion. She has not misrepresented the impact of her proposed amendment.

12 Next, Plaintiff asserts that Joan Politte acted in bad faith because she has not raised
13 this defense in the roughly ten years this litigation has been pending. (Doc. No. 187 at 10.)
14 Again, Joan Politte recently learned of Plaintiff’s interpretation of paragraph 71 and her
15 corresponding answer. Further, during the previous action, the OIC had not been rejected.
16 There is also a presumption under 26 U.S.C. § 7426(a)(4) that the assessment of tax is
17 valid. Accordingly, Joan Politte could not raise the OIC issue during the previous action or
18 during the appeal to the Ninth Circuit. Furthermore, Joan Politte’s failure to raise the OIC
19 defense at the ENE that was focused on collateral estoppel does not show bad faith. Plaintiff
20 has failed to establish bad faith.

21 *ii. Undue Delay*

22 Plaintiff asserts that there was undue delay. However, as explained above, Joan
23 Politte filed this motion shortly after learning of Plaintiff’s interpretation of her answer,
24 and she could not have asserted this defense in the prior action. There is no undue delay
25 from the time Joan Politte learned of Plaintiff’s interpretation in September 2019 to Joan
26 Politte seeking leave to amend.

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1 *iii. Futility*

2 Plaintiff does not argue that this amendment is futile. Accordingly, this factor weighs
3 in favor of granting leave to amend.

4 *iv. Prior Amendments*

5 Joan Politte has not sought a prior amendment to its answer in this case. Accordingly,
6 this factor weighs in favor of granting leave to amend.

7 *v. Prejudice*

8 Plaintiff asserts that it will suffer prejudice in several ways if the Court allows the
9 proposed amendment. (Doc. No. 187 at 13.) First, Plaintiff contends that had RAJMP
10 raised the OIC defense at the ENE, then Plaintiff would not have agreed to bifurcate the
11 case. (*Id.*) Second, Plaintiff asserts that this will over-burden the United States in discovery.
12 (*Id.*) It is unclear to the Court how the bifurcation shows prejudice. The only issue resolved
13 in the bifurcation was the alter-ego issue, which did not require discovery. Discovery had
14 not yet started when Joan Politte’s motion was filed, thus Plaintiff has not shown how it
15 will suffer prejudice from granting leave to amend. Plaintiff still has time to conduct
16 discovery on the OIC defense, to file motions for summary judgment, and to litigate the
17 same.

18 C. Kelly M. Politte as Personal Representative of the Estate of Robert A. Politte and
19 Ted R. Politte as the Personal Representative of the Estate of Robert A. Politte’s
20 Motion for Leave to File First Amended Answer

21 Kelly M. Politte as Personal Representative of the Estate of Robert A. Politte and
22 Ted R. Politte as the Personal Representative of the Estate of Robert A. Politte (“the Co-
23 Personal Representatives”) seek leave to amend their answer to clarify paragraph 71 of
24 their answer and to articulate more explicitly their accord-and-satisfaction affirmative
25 defense. (Doc. No. 179-1 at 5–6.) The Court will address each of the *Foman* factors.

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1 *i. Bad Faith*

2 The Co-Personal Representatives assert that they did not act in bad faith as they only
3 recently learned that Plaintiff believes the legality of the OIC’s rejection is conceded by
4 their answer. (Doc. No. 185-1 at 11.) Plaintiff asserts that the Co-Personal Representatives
5 are acting in bad faith as they misrepresent the contents of their answer, misrepresent the
6 impact of their proposed amendments, and their actions before and after filing their answer
7 suggest that they did not plead their OIC defense. (Doc. No. 202 at 9–18.)

8 First, Plaintiff asserts that the Co-Personal Representatives acted in bad faith because
9 their answer currently does not contain qualifications to their responses or plead any facts
10 to the OIC defense. (*Id.* at 11–13.) Federal Rules of Civil Procedure Rule 8(b)(1) requires
11 a party to “admit or deny the allegations asserted against it by the opposing party.” Further,
12 “[i]n responding to a pleading, a party must: state in short plain terms its defenses to each
13 claim asserted against it.” *Id.* Accordingly, Rule 8 has been met here in the Co-Personal
14 Representative’s current answer. Thus, the fact that they did not qualify their responses
15 does not evidence bad faith.

16 Next Plaintiff asserts that the Co-Personal Representatives’ actions before and after
17 the filing of their answer demonstrate that they did not plead the OIC defense. (Doc. No.
18 202 at 15–16.) Plaintiff argues the fact that Co-Personal Representatives had not asserted
19 the OIC issue before now evidences bad faith. (*Id.*) However, the Co-Personal
20 Representatives were not parties to the previous litigation. Further, the previous action
21 occurred prior to the acceptance or rejection of the OIC. Robert Politte was also barred
22 from asserting the OIC defense in the previous litigation as explained above that it was
23 presumed that the tax was valid. *See* 26 U.S.C. § 7426(a)(4). Plaintiff also asserts the fact
24 that RAJMP did not file a tax court case regarding the OIC evidences bad faith. (Doc. No.
25 202 at 15–16.) However, there is no requirement that RAJMP file a tax court case. Further,
26 both the Court and Plaintiff have been aware for quite some time now that Co-Personal
27 Representatives have asserted that the OIC was not properly rejected.

28 Plaintiff asserts that the Co-Personal Representatives misrepresent the impact of

1 their proposed amendment. (Doc. No. 202 at 16–18.) However, the Co-Personal
2 Representatives attached their proposed amendment to their motion. They have not
3 misrepresented the impact of their proposed amendment.

4 *ii. Undue Delay*

5 Plaintiff asserts that there was undue delay. (Doc. No. 202 at 19.) However, as
6 explained above, the Co-Personal Representatives filed this motion shortly after learning
7 of Plaintiff’s interpretation of their answer, and they could not have asserted this defense
8 in the prior action. There is no undue delay from the time the Co-Personal Representatives
9 learned of Plaintiff’s interpretation in September 2019 to them seeking leave to amend.

10 *iii. Futility*

11 Plaintiff does not argue that this amendment is futile. Accordingly, this factor weighs
12 in favor of granting leave to amend.

13 *iv. Prior Amendments*

14 The Co-Personal Representatives have not sought a prior amendment to their answer
15 in this case. Accordingly, this factor weighs in favor of granting leave to amend.

16 *v. Prejudice*

17 Plaintiff asserts that it will suffer prejudice in several ways if the Court allows the
18 proposed amendment. (Doc. No. 202 at 20–24.) First, Plaintiff contends that it will suffer
19 prejudice from the degradation of evidence. (*Id.* at 20–21.) Second, Plaintiff contends that
20 had the Co-Personal Representatives raised the OIC defense at the ENE, then Plaintiff
21 would not have agreed to bifurcate the case. (*Id.* at 21.) Third, Plaintiff asserts that this will
22 over-burden the United States in discovery. (*Id.* at 22.)

23 In regards, to degradation of evidence, Plaintiff brought this suit in 2017 rather than
24 bringing it sooner to the close of the previous litigation. Further, the Co-Personal
25 Representatives assert that the Government already has copies of the records that were
26 damaged in the flood/sewage leak. It is unclear to the Court how the bifurcation shows
27 prejudice. The only issue resolved in the bifurcation was the alter-ego issue, which did not
28 require discovery. Discovery had not yet started when the Co-Personal Representative’s

1 motion was filed, thus Plaintiff has not shown how it will suffer prejudice from granting
2 leave to amend. Plaintiff still has time to conduct discovery on the OIC defense, to file
3 motions for summary judgment, and to litigate the same. This would not overburden
4 Plaintiff with discovery as Co-Personal Representatives have been asserting this claim
5 throughout the entire course of the litigation.


6 In regards to all Defendants, leave to amend is to be freely given when justice so
7 requires. Defendants have asserted continually through this entire action their OIC defense,
8 and have never argued that the OIC was legally and effectively rejected. Plaintiff has not
9 established any of the *Foman* factors, especially prejudice, as discovery had not yet started
10 when Defendants filed for leave to amend. Accordingly, leave to amend should be given
11 in this matter.

12 CONCLUSION

13 Based on the foregoing, the Court **GRANTS** Defendant RAJMP, Inc.'s motion for
14 leave to file an amended answer to Plaintiff the United States of America's first amended
15 complaint, **GRANTS** Joan M. Politte's motion for leave to file first amended answer to
16 first amended complaint, and **GRANTS** motion for leave to file first amended answer to
17 first amended complaint by Defendants Kelly M. Politte as personal representative of the
18 Estate of Robert A. Politte and Ted R. Politte as the personal representative of the Estate
19 of Robert A. Politte. Defendants must file their amended answers **within thirty (30) days**
20 of the date of this Order.

21
22 **IT IS SO ORDERED.**

23 Dated: August 25, 2020

24 
25 Hon. Anthony J. Battaglia
26 United States District Judge
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