UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 04-60573-CIV-MORENO

SECURITIES AND EXCHANGE
COMMISSION,
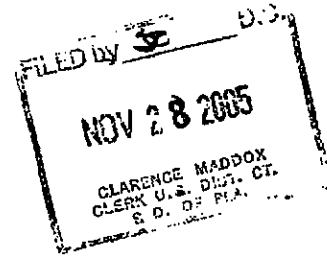
        Plaintiff,

vs.

MUTUAL BENEFITS CORP., *et al.*,

        Defendants,

VIATICAL BENEFACTORS, LLC, *et al.*,

        Relief Defendants.

_____/

ORDER DENYING SKS CONSULTING, INC.'S MOTION TO STRIKE IT FROM THE AMENDED COMPLAINT, GRANTING SEC LEAVE TO FILE AMENDED COMPLAINT, AND PROVIDING DEADLINE FOR RESPONSE

I. Background

The SEC filed its original complaint on May 3, 2004, which named SKS Consulting, Inc. as a Relief Defendant. On June 25, 2004, the Court granted SKS Consulting's Emergency Motion to Dismiss it as a Relief Defendant and lifted the asset freeze order as to SKS Consulting. In that order, the Court stated: "If the SEC has evidence of wrongdoing by SKS or its principal, Steven Steiner, then it should set out the nature of the allegations under the securities laws . . . . Absent any evidence of wrongdoing, this Court finds that SKS Consulting, Inc.'s legitimate claim over the funds it received from Mutual Benefits Corporation precludes a finding that it is a nominal or relief defendant." Order Granting SKS Consulting's Motion to Dismiss at 4. Nearly a year later, the SEC filed its Amended Complaint on June 17, 2005, in which it named Steven Steiner as a Defendant and renamed SKS

Consulting as a Relief Defendant.

Presently before the Court is SKS Consulting's motion to strike it from the amended complaint and to deny the SEC leave to name SKS Consulting as a Relief Defendant (**D.E. No. 1221**), filed on **July 25, 2005**. SKS Consulting makes three arguments in support of its motion. First, SKS Consulting asserts that the SEC did not follow the proper procedures under Federal Rule of Civil Procedure 15(a) because it failed to seek leave before refiling against SKS Consulting. Second, SKS Consulting argues that, because the Amended Complaint's allegations concerning it are nearly identical to those in the original complaint, allowing the SEC to refile is futile. Third, SKS Consulting asks the Court to grant its motion because of the SEC's extreme delay in refiling without providing any excuse. Finally, in a footnote, SKS Consulting requests ten days to file a motion to dismiss in the event the Court denies the present motion.

For the reasons set forth below, the motion to strike is DENIED. Further, the Court treats the SEC's response as a request for leave to amend and allows the amended complaint renaming SKS Consulting as a Relief Defendant. SKS Consulting shall file its motion to dismiss or otherwise respond to the complaint no later than **December 20, 2005**.

II. Analysis

A. Procedural Error

In response to SKS Consulting's assertion of procedural error, the SEC asserts that the Court's dismissal order invited it to amend the original complaint to include SKS Consulting, and thus, it did not need to seek leave to amend. Further, the SEC states that to the extent it committed any procedural error, it asks for leave to amend to correct any error.

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Although it requires an extremely strained reading, the dismissal order language cited above possibly could be read as inviting an amended complaint. Especially given the nearly a year that elapsed between the complaints, however, the SEC should have sought leave before refiling against a defendant that was dismissed from the case. Nevertheless, the SEC concedes the error to some degree in its response, and it now asks for leave to refile. The Court treats the response as a belated motion for leave and allows the amended complaint renaming SKS Consulting as a Relief Defendant.

B. Futility

Arguing that the Court should not grant the SEC leave to refile against it, SKS Consulting argues that the Court should strike it from the Amended Complaint because the allegations against it are futile. SKS Consulting asserts that the new claims are futile because the allegations against it are nearly identical to those dismissed in the original complaint. In response, the SEC argues that the Amended Complaint's new allegations against Steven Steiner establish the basis for naming SKS Consulting as a Relief Defendant. Further, the SEC states that this Court has already granted a preliminary injunction against the other Relief Defendants based on identical facts and legal theory. Finally, in its reply, SKS Consulting argues that regardless of the allegations against Steiner, the SEC has failed to allege the required elements for naming a relief defendant.

The Court agrees with the SEC. SKS Consulting apparently ignores the new allegations against Steven Steiner in arguing that the claims against it are futile. Further, SKS Consulting can make these arguments more fully in a motion to dismiss.

C. Delay in Filing Amended Complaint

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Next, SKS Consulting argues that the Court should deny leave to amend because the SEC has not provided any justification for the nearly one year delay in renaming SKS Consulting as a Relief Defendant. In its response, the SEC states that it quickly sought evidence against SKS Consulting and Steven Steiner following the lifting of the discovery stay. The SEC states that new evidence was the basis for the new claims against Steven Steiner, which in turn were the basis for the claims against SKS Consulting. In light of the discovery stay and new evidence, the Court finds that the delay in renaming SKS Consulting was justified.

IV. Conclusion

SKS Consulting's motion to strike is DENIED. The Court GRANTS the SEC's belated request for leave to amend included in its response. Accordingly, the Court allows the SEC's amended complaint renaming SKS Consulting as a Relief Defendant. Finally, the Court GRANTS SKS Consulting's request for a deadline by which it must file a motion to dismiss. SKS Consulting shall file its motion to dismiss or otherwise respond to the complaint no later than **December 20, 2005**.

DONE AND ORDERED in Chambers at Miami, Florida, this ___ day of November, 2005.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies provided to:

Magistrate Judge Andrea Simonton

All Counsel of Record

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