

to the extent necessary to preserve their right to a jury trial, should a trial of these issues ever be necessary, Defendants hereby respectfully demand a jury trial of all issues so triable.

AMENDMENTS TO WHICH DEFENDANTS DO NOT OBJECT

Defendants have no objection to the following proposed changes:[†]

- Deletion of the words “substantial psychological and” in the first paragraph of the Amended Complaint and the deletion of the word “severe” as it modifies “emotional distress” from paragraphs 67, 71, 80, and 111;[‡]
- Deletion of the words “scandalous and outrageous contentions” from paragraph 1 of the Amended Complaint;[§]
- Deletion of the word “surveillance” from paragraph 29, deletion of the phrase “taken from an aircraft during a ‘flyover’” in paragraph 29, deletion of the words “using aerial and ground surveillance because, among other reasons, it involved the use of an aircraft flying through the airspace over Ms. Doe [REDACTED]’ private home in order to capture images of her private property,” and deletion of the words “aerial surveillance” from paragraph 73 of the Amended Complaint;^{**}
- The addition of paragraphs 30, 31, 35, 36, 37, 38, 39, 40, and 90.
- Deletion of the last sentence of paragraph 32 including the words “those images were obtained by agents of Defendants who had unlawfully accessed DoeCo [REDACTED] private property without authorization”;^{††}
- Deletion of the words “a private event” in paragraph 61, deletion of the words “private lifestyle” from paragraph 74, deletion of the words “attending, or engaging a third-party to attend, the wedding to which they were not invited or (b) gathering information about the wedding from an individual who was an invited guest,” and deletion of the words “the private event” from paragraph 98 of the Amended Complaint;^{‡‡} and

[†] All paragraph references are to the proposed Amended Complaint unless otherwise stated.

[‡] Plaintiff is apparently no longer claiming that the conduct of Defendants caused her substantial psychological distress or severe emotional distress.

[§] Plaintiff is apparently no longer claiming that the information provided with the Client [REDACTED] bid protest was scandalous or outrageous.

^{**} Plaintiff apparently now concedes that the photograph of her Doe [REDACTED] home submitted with the bid protest was obtained from the internet.

^{††} Plaintiff now concedes that the pictures of the DoeCo [REDACTED] parking lot submitted with the bid protest were not taken by a photographer who was trespassing on DoeCo [REDACTED] property.

^{‡‡} Plaintiff now concedes that the information about Ms. Doe [REDACTED] daughter’s wedding provided with the bid protest was obtained from a newspaper article about the wedding.

- Deletion of the word “fraud” from paragraph 122.

AMENDMENTS TO WHICH DEFENDANTS OBJECT

Plaintiff claims that the amendment “offers additional support to, and thereby narrows, the claims Ms. [REDACTED] already alleged, based on information Ms. [REDACTED] has learned through discovery.” Further, Plaintiff claims that the amendment will make the “remaining discovery period more efficient.” (Plaintiff’s Memorandum at p. 4.) As will be shown below, the addition of 40+ new allegations of fact will not narrow the claims or narrow the scope of discovery in this case. The proposed amendments are instead an effort to needlessly expand the scope of Plaintiff’s discovery from Defendants – increasing Defendants’ costs.

The amendments do not limit the discovery required from Ms. [REDACTED]

This Court recently granted Defendants’ motion to compel discovery in its entirety. Much of the information that Plaintiff is consequently required to produce concerns [REDACTED] finances. The [REDACTED] financial information was made relevant^{§§} by allegations made in the original Complaint and by Ms. [REDACTED] discovery answers about the causes of her emotional distress. Certain of the proposed amendments appear to be an effort to distance this litigation from the finances of [REDACTED]. For example, in paragraph 1 of the proposed Amended Complaint the allegation that Defendants were trying to “poison [REDACTED] relationships with its only client” is changed to an allegation that Defendants were trying to “poison her relationships with her only client.” Similarly, in paragraph 40 the allegation that Defendants intended to “irreparably damage and interfere with [REDACTED] relationship with its key clients” is changed to an allegation

^{§§} Although the Court found that Ms. [REDACTED] waived any relevance objections.

that Defendants intended to “irreparably damage and interfere with her relationship with [REDACTED] key clients.” However, paragraph 85 of the proposed Amended Complaint alleges that:

Ms. [REDACTED] has never shared information about her personal life with representatives of the U.S. Army, DLA or GAO and has intentionally maintained strict independence between her personal life and her business affairs.

Similar new allegations about the separation of her personal affairs from the business affairs of [REDACTED] are made in paragraphs 91 and 92 of the proposed Amended Complaint. Contrary to the apparent purpose of these allegations, [REDACTED] financial information will be necessary to test the credibility of these new allegations about the “strict independence between her personal life and her business affairs.”

The amendments are a transparent attempt to increase the costs and inconvenience of discovery to Defendants – for no good purpose.

Most of Plaintiff’s proposed amendments are an obvious attempt to make the finances of [REDACTED] and Mr. [REDACTED] discoverable. Plaintiff proposes to add the following new allegation to paragraph 1:

Defendants published the personal information despite knowing, based on their decades of experience in government contracting, that the information could have no possible bearing on the GAO’s consideration of Defendants’ protest of the contract awarded to [REDACTED]

Paragraphs 12-17, 19, 20, 24-26, 30, 31, 33, 35-36, 38-39, 41-65, 78, 83-87, 89-90, 94, 96, 99, and 102-106 are all new or substantially new. These new allegations provide the Court with a legal brief, complete with citations to authority,*** in support of Plaintiff’s claim that the personal information submitted with the bid protest was not relevant to the issues presented by the bid protest. At the same time, the allegations attempt to create a reason to claim access to

*** See, for example, paragraphs 45 and 54.

Defendants' financial records; Plaintiff will claim to need those records in order to prove that Defendants knew that Ms. [REDACTED] financial information was not relevant in the bid protest.

For example, paragraph 45 purports to provide a legal basis for concluding that the bid protest materials were not relevant:

45. GAO reviews protests of government contract awards on the basis of whether the agency's judgments were: (1) "reasonable", and (2) "consistent with the solicitation's evaluation criteria and procurement statutes and regulations." See Saif Industries, B-3024246, Mar. 16, 2010 CPD ¶78 at 2; see also 31 U.S.C. §3554(b)(1).

Paragraphs 51-53 then attempt to make Defendants' finances relevant in this litigation. The allegations claim that, that because of his own financial circumstances, Mr. [REDACTED] knew that Ms. [REDACTED] personal financial information was not relevant to the [REDACTED] bid protest:

51. Mr. [REDACTED] himself has a large amount of personal wealth such that his lifestyle is not unlike Ms. [REDACTED] if not grossly more extravagant.

52. Despite and notwithstanding Mr. [REDACTED] personal wealth, much if not all of which is believed to be derived from [REDACTED] has received sole source contracts in connection with its participation in the MSR protocol.

53. Among the reasons Defendants had no basis to believe that Ms. [REDACTED] personal financial information had any bearing on the sole-source award, and could have no bearing on GAO's consideration of the Bid Protest Letter, was that [REDACTED] itself has received sole-source awards despite the personal wealth and "lavish lifestyle" of its chairman and president, Mr. [REDACTED]

There are at least three major problems with this effort to make the financial circumstances of Defendants relevant to this litigation.

First, the threshold issue is the legal question of whether the personal financial information of Ms. [REDACTED] was relevant to the GAO consideration of the bid protest. Of course, it is only after a determination that the [REDACTED] financial information was not relevant, that the claim that Mr. [REDACTED] knew it was not relevant have any life at all. And it is clear that Ms. [REDACTED]

personal financial information was relevant to the agency's decision (even if the information was not considered). It is clear that the agency in this case based its decision, as was proper, on factors other than or in addition to, the minimum sustaining rate for [REDACTED]. The Contracting Officer's Report, dated August 23, 2011, responding to the [REDACTED] bid protest, stated that the solicitation was issued pursuant to the authority of 10 U.S.C. §2304(c)(3)(A) as an exception to the Competition in Contracting Act. That subsection provides, in relevant part, that:

(c) The head of an agency may use procedures other than competitive procedures only when-

(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization. . .

10 U.S.C. § 2304(c)(3)(A). The Contracting Officer made a number of specific findings, including the following: "The use of this authority is necessary to keep this vial supplier [REDACTED] in business in order to maintain a viable industrial base." [REDACTED] could not have been so financially troubled as to be in danger of going out of business and at the same time supporting Ms. [REDACTED] lifestyle. Consequently, Ms. [REDACTED] lifestyle was and is relevant to the issue of whether [REDACTED] properly fits within the exception to competitive bidding carved out by 10 U.S.C. §2304(c)(3)(A).

Second, the fundamental factual premise backing up the second part of Plaintiffs' new allegations – that Defendants knew that Ms. [REDACTED] financial information was irrelevant in the bid protest because "[REDACTED] has received sole source contracts in connection with its participation in the MSR protocol" -- is false. [REDACTED] has never sought or received a no-bid contract based on its Minimum Sustaining Rate or a no-bid contract that was in any way dependent upon a finding

that, without the contract, [REDACTED] Client might be forced to terminate its manufacturing operations. See, affidavit of [REDACTED] Client attached hereto as Exhibit 2.

Third, the amendments reflect the position taken by Ms. [REDACTED] Doe that if [REDACTED] DoeCo financial records are relevant, then [REDACTED] Client must also be relevant. This position ignores the differences in the uses to be made of the evidence. Defendants have argued, among other things that [REDACTED] DoeCo financial information is relevant to: (a) Ms. [REDACTED] Doe damage claims, because she claims to have been caused tremendous distress and concern over the future of [REDACTED] DoeCo and (b) Ms. [REDACTED] Doe intentional infliction of emotion distress claim – because if misleading information was provided to the government about [REDACTED] DoeCo precarious financial circumstance, Ms. [REDACTED] Doe emotional distress may have been caused by her own misconduct. Ms. [REDACTED] Doe argues, on the other hand, that because the Defendants are financially sound, they must have known that the information they provided to GAO (to show that [REDACTED] DoeCo was not in the difficult financial circumstances required to justify a non-bid contract) was irrelevant and improper. This is a stretch – at best.

The legal standard.

Leave to amend is properly denied when there is “undue delay, bad-faith, or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility of the amendment.” *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 698 (6th Cir. 2004) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). The Court need not address all five (5) factors to deny Plaintiff’s Motion to Amend, rather the illustration of merely one factor is sufficient basis in which to deny the Motion. *Ascon Properties, Inc. v. Mobile Oil Co.*, 866 F.2d 1149 (9th Cir. 1989). A district court may deny a plaintiff leave to amend his or her complaint when the proposed amendment would be futile. *Kottmyer v. Maas*, 436 F.3d 684, 692 (6th Cir.2006), citing *Yuhasz v. Brush*

Wellman, Inc., 341 F.3d 559, 569 (6th Cir.2003). Moreover, while the court must view the complaint in the light most favorable to the plaintiff, the court need not accept legal conclusions or unwarranted factual inferences as true. *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987).

In general, Plaintiff's proposed amendments add nothing to the claims of Ms. [REDACTED] Doe. As shown above, the amendments do not accomplish their transparent purposes, or even their stated purposes. They do not narrow the scope of the discovery to which Defendants are entitled. Nor should the amendments broaden the scope of discovery to which Plaintiff is entitled.

CONCLUSION

Those proposed amendments to which Defendants object should not be allowed. The amendments add nothing to the claims or defenses in this case, but, if allowed, are likely to substantially increase Defendants' costs and consume the Court's time in more needless wrangling over discovery issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2012, I served the foregoing pleading via the CM/ECF system which will automatically send notification to the following attorneys, who are participants in the CM/ECF system:

[REDACTED]

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