IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

OCWEN USVI SERVICES, LLC,	)	
	)	
Plaintiff,	)	
v.	)	
	)	**CASE NO. 3:24-cv-00005**
THE UNITED STATES VIRGIN ISLANDS,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION and ORDER

Before the Court is Defendant the United States Virgin Islands' ("Government") Motion for Leave to Amend Answer, Defenses and Affirmative Defenses to Add Counterclaim [ECF 57] and its accompanying memorandum in support thereof [ECF 58]. Plaintiff Ocwen USVI Services, LLC ("Ocwen") opposes the motion [ECF 68], and the Government filed a reply [ECF 71]. For the reasons explained below, the motion will be denied in part and granted in part.

I. BACKGROUND[1]

This matter stems from an earlier civil lawsuit in the District Court of the Virgin Islands involving the same parties, wherein Ocwen sought refunds of its tax overpayments for tax years 2013–15. [ECF 1] ⁋ 54; *see* 3:22-cv-00066 ("Ocwen I"). The present matter ("Ocwen II") concerns the income tax refunds for these same tax years and the Government's purported breach of the settlement and closing agreement entered into by the parties in Ocwen I. *See generally* [ECF 1]. Ocwen is a loan servicer and the successor entity to Ocwen Mortgage Servicing, Inc. ("OMS"), the entity that filed the tax returns at issue. *Id.* ⁋⁋ 1–2.

[1] The parties are well familiar with this action. The Court writes for the parties and thus provides only a brief overview of the factual and procedural background, taking the facts from Ocwen's complaint and other filings.

OMS filed income tax returns with the Virgin Islands Bureau of Internal Revenue ("VIBIR") for tax years 2013–15 and sought refunds for those years based on alleged overpayments and carryback deductions. *See id.* at 2–4. The VIBIR did not issue the refunds as requested, but instead on July 23, 2018, initiated an audit of OMS for tax years 2013–16. *Id.* ⁋ 16. The VIBIR concluded its audit in 2021 and accepted OMS's amended returns and affirmative adjustments for tax years 2013–15, determining that OMS's refund claims for those years were allowable. *Id.* ⁋⁋ 27, 30–31; Exs. 12, 15–16; *see also* Ex. 17 (May 25, 2021 letter to OMS stating VIBIR had concluded its examination and was accepting OMS's returns). Thereafter, Ocwen began efforts to seek payment of the refunds. *See* [ECF 1] at 6–9. According to the complaint, on September 15, 2022, VIBIR Director Joel Lee sent an email to Ocwen stating "[t]he Bureau recognizes the outstanding refunds pending for Ocwen for tax years 2013, 2014 and 2015" and proposed a payment plan. *Id.* ⁋ 49. Ocwen submitted a counterproposal, but the VIBIR did not respond. *Id.* ⁋⁋ 52–53.

On November 5, 2022, Ocwen filed Ocwen I. *See* 3:22-cv-00066. After granting the Government's request for an extension of time to answer the complaint, the parties on December 28, 2022 entered an agreement settling the case (the "Agreement"). *See* [ECF 1] ⁋ 55; [ECF 9] (sealed exhibit). The Agreement states the parties' intention that it operate as a closing agreement under 26 U.S.C. § 7121, as applied to the Virgin Islands via the Mirror Code, and sets forth a payment schedule under which the Government agrees to pay Ocwen a total of $27,923,234.00, plus interest. *See* [ECF 9] ⁋⁋ 2(a), 4(a). The Agreement prohibits the Government from making "any determination, assessment, or adjustment" to Ocwen's tax liability for the years at issue "absent a showing of fraud, malfeasance, or misrepresentation of material fact," and further provides that the Government "releases and forever discharges Ocwen . . . from any and all claims (i) that the USVI asserted or could have asserted, against Ocwen in [Ocwen I] and/or (ii) arising

out of, in connection with, or otherwise related to Ocwen's [2013–15 Tax Refunds]." *Id.* ⁋⁋ 3(b), 4(a). On January 13, 2023, the parties filed a notice of stipulation of dismissal in Ocwen I, and the Court closed the case that same day. *See* Ocwen I [ECF 10].

In accordance with the Agreement, the Government sent to Ocwen payments on January 11, 2023, and June 29, 2023. [ECF 1] ⁋⁋ 61, 65; [ECF 58] at 1; *see* [ECF 15] ⁋ 61; [ECF 9] ⁋ 2(a). The next payment was due by December 31, 2023; however, the Government has made no payments to Ocwen under the Agreement since June 29, 2023. *See* [ECF 1] ⁋ 74; [ECF 9] ⁋ 2(a). Ocwen alleges it made efforts to inquire as to the status of its unpaid income tax refunds and interest owing but was unsuccessful. *See* [ECF 1] at 12–13.

Ocwen instituted the current action (Ocwen II) on February 8, 2024, alleging breach of the closing agreement and seeking a refund for the overpayments of its income taxes for 2013–15. *See generally* [ECF 1]. The Government filed its Answer on March 20, 2024 [ECF 15], with the Court entering an Order on March 26, 2024, which set a Rule 16 Scheduling Conference for April 25, 2024 [ECF 21]. In its March 26, 2024 Order, the Court instructed the parties – through counsel – to meet prior to the scheduling conference to address, among other things, the nature and basis of the parties' claims and defenses, the possibilities for a prompt settlement or resolution of the case, and the formation of a discovery plan. *Id.* at 1–2. The Court further instructed the parties to file individual discovery memoranda in accordance with LRCi 16.1. *Id.* at 3–4. In doing so, the Court advised the parties that it considered the memoranda to be of "significant value in that they require detailed thought about how the case must be discovered and prepared for trial." *Id.*

In their April 23, 2024 Joint Proposed Scheduling Plan, the parties represented that there would be "minimal discovery needs" and agreed to complete discovery no later than August 30, 2024. [ECF 25] at 1–2. Ocwen suggested that "discovery should be limited to a.) whether and how much the USVI has paid Ocwen for income tax refunds and b.) those affirmative defenses that the

USVI can articulate with factual specificity during the scheduling conference." *Id.* at 2. The Government proposed that discovery also include "an examination of Ocwen's tax returns to determine the presence of any material misrepresentation which may have impacted any subsequent agreements." *Id.*[2] The parties agreed to commence mediation by August 1, 2024 or earlier, stating they were "eager to resolve the matter without the need for trial." *Id.* Following the conference, the Court entered a Trial Management Order setting a deadline of July 14, 2024 to seek to amend pleadings, a discovery deadline of August 30, 2024, and a dispositive motion deadline of October 31, 2024. [ECF 29] at 1. Trial is set for February 17, 2025. *Id.* at 2.

The Government filed the instant motion on July 15, 2024. [ECF 57]. The Government seeks to amend its answer based on its contention that the Agreement "is voidable under I.R.C. 7121(b) due to Plaintiff's material misrepresentations of fact." [ECF 58] at 1. Specifically, the Government alleges Ocwen inaccurately represented the sources of its income on its 2013–15 tax returns, and engaged in a "systematic pattern of disinformation" in its financial declarations and tax filings. *Id.* at 1–2. According to the Government, these inaccuracies "collectively birthed the premises upon which the Closing Agreement was forged," and "were crucial in prompting the Government to enter the . . . Agreement." *Id.* at 2–3. The Government therefore seeks to amend its answer to add as an affirmative defense misrepresentation of a material fact, and to bring a

[2] In its separately filed discovery memorandum, the Government stated:

> [U]pon reviewing Ocwen's recent financial data, we have raised concerns about the legitimacy of their income sourcing claims, particularly for the year 2019. This concern also casts doubt on their tax filings for the years 2013 to 2015.
>
> Even though we previously reached a financial settlement with Ocwen for those years, we are now wondering if the deal should stand, especially if there were significant mistakes or intentional misstatements involved. Specifically, we are looking into whether any potential false statements on Ocwen's tax filings were influential enough to affect any decisions made by the [VIBIR].

[ECF 26] at 1. Ocwen stated in response that "the Court should curtail such lines of discovery" because Ocwen's returns have already been audited by the VIBIR, the statute of limitations for assessment is expired, and the Agreement settling the refund claims may not be set aside. [ECF 27] at 2.

counterclaim for recession and restitution based on Ocwen's misrepresentation of the sources of its income for tax years 2013–15. *Id.* at 3; *see* [ECF 58-15] at 18–19.[3]

Ocwen opposes the motion, arguing that the Government's request is unduly delayed and prejudicial to Ocwen, that the proposed amendments are futile, and that the Government is equitably estopped from asserting the counterclaim and affirmative defense. [ECF 68]. Specifically, Ocwen contends the Agreement's plain language bars the proposed amendment, and further that the Government fails to plead a fraud in the inducement claim as required to seek recission and restitution. *Id.* at 8. Ocwen next argues that the Government could have taken discovery in Ocwen I on the issues it now seeks to pursue by way of amendment in Ocwen II, and that allowing amendment "will require significant discovery and completely change the nature of the litigation." *Id.* at 18 (internal quotations and citation omitted). Finally, Ocwen urges that the Government should be estopped from adding the counterclaim and defense because Ocwen has relied on the Government's representations that the refund claims were settled. *Id.* at 20–21.

II. LEGAL STANDARDS

Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend pleadings should be freely given when justice so requires. *See Katzenmoyer v. City of Reading*, 158 F. Supp. 2d 491, 497 (E.D. Pa. 2001) (the movant "has the burden of showing that justice requires the amendment"); *In re Engle Cases*, 767 F.3d 1082, 1119 n.37 (11th Cir. 2014) ("The party seeking leave to amend under Rule 15 bears the burden of establishing his entitlement to it."). Nonetheless, the policy favoring liberal amendments is not "unbounded." *Dole v. Arco Chem. Co.*, 921 F.2d 484, 487 (3d Cir. 1990). "[A] district court has discretion to deny a request to amend if it is apparent from the record that (1) the moving party has demonstrated undue delay, bad faith or dilatory motives, (2)

[3] A review of the red-line version of the proposed First Amended Answer also removes the defenses of abstention and failure to mitigate damages. *See* [ECF 58-15] at 16, 18. Ocwen did not state any objection to these deletions.

the amendment would be futile, or (3) the amendment would prejudice the other party." *Hill v. City of Scranton*, 411 F.3d 118, 134 (3d Cir. 2005); *see Foman v. Davis*, 371 U.S. 178, 182 (1962). A court may also "ground its decision . . . on consideration of additional equities, such as judicial economy/burden on the court and the prejudice denying leave to amend would cause to the [movant]." *Mullin v. Balicki*, 875 F.3d 140, 149–50 (3d Cir. 2017).[4]

"In the Third Circuit, delay alone does not justify denying a motion to amend." *Synthes, Inc. v. Marotta*, 281 F.R.D. 217, 225 (E.D. Pa. 2012) (citing *Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 273 (3d Cir. 2001)). Rather, the delay must either be undue, such that it places "an unwarranted burden on the court," or it must be prejudicial, such that it places "an unfair burden on the opposing party." *Id.* (quoting *Adams v. Gould, Inc.*, 739 F.2d 858, 868 (3d Cir. 1984)). "Implicit in the concept of 'undue delay' is the premise that Plaintiffs, in the exercise of due diligence, could have sought relief from the court earlier." *Id.* (citation omitted). Thus, in determining whether delay is undue, a court must "focus on the movant's reasons for not amending sooner." *Cureton*, 252 F.3d at 273. This "includes consideration of whether new information came to light or was available earlier to the moving party," and whether the "movant has had previous opportunities to amend." *Williams v. Cost-U-Less, Inc.*, 2014 WL 2993667, at *4 (D.V.I. July 3, 2014) (first quoting *In re Adams Golf, Inc. Secs. Litig.*, 381 F.3d 267, 280 (3d Cir. 2004); and then quoting *Cureton*, 252 F.3d at 273). Additionally, "[t]actical decisions and dilatory motives may lead to a finding of undue delay." *Synthes*, 281 F.R.D. at 225 (citation omitted). Accordingly, in assessing delay, the court must balance any imposition or prejudice caused by the delay against

[4] Furthermore, "when a party moves to amend . . . after the deadline in a district court's scheduling order has passed, the 'good cause' standard of [Fed. R. Civ. P.] 16(b)(4) . . . applies. A party must meet this standard before a district court considers whether the party also meets Rule 15(a)'s more liberal standard." *Premier Comp Sols., LLC v. UPMC*, 970 F.3d 316, 319 (3d Cir. 2020). Whether the requisite good cause exists "depends in part on a plaintiff's diligence." *Id.* Thus, where a movant fails to meet its burden under Rule 16(b)(4) to show that, despite its diligence, it could not meet the court's scheduling order, the court need not determine whether the movant meets Rule 15(a)'s requirements. *See, e.g.*, *Barry v. Stryker Corp.*, 2022 WL 16948625, at *3–4 (D. Del. Nov. 15, 2022) (citing *Premier Comp Sols.*, 970 F.3d at 319).

the movant's reasons for the delay. *Id.* at 225–26 (citing *Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 520 (3d Cir. 1988)).

The factors of bad faith and dilatory motive involve similar considerations. Like undue delay, the question of bad faith requires the court to "focus on the plaintiffs' motives for not amending their complaint to assert th[e] claim earlier." *Adams*, 739 F.2d at 868. However, "[t]he scope of the court's inquiry is . . . limited to whether the motion to amend *itself* is being made in bad faith, not whether . . . conduct outside the motion to amend amounts to bad faith." *Trueposition, Inc. v. Allen Telecom, Inc.*, 2002 WL 1558531, at *2 (D. Del. July 16, 2002) (citing *J.E. Mamiye & Sons, Inc. v. Fidelity Bank*, 813 F.2d 610, 614 (3d Cir. 1987)). Additionally, "delay can itself be evidence of bad faith justifying denial of leave to amend." *Adams*, 739 F.2d at 868. Similarly, "[a] finding of dilatory motive is justified where the plaintiff acts 'in an effort to prolong litigation.'" *Maiden Creek Assocs., L.P. v. U.S. Dep't of Transp.*, 123 F. Supp. 3d 638, 653 (E.D. Pa. 2015) (citation omitted), *aff'd*, 823 F.3d 184 (3d Cir. 2016). "Such efforts are apparent when the motion attempts to plead additional information that was previously available, and the plaintiff fails to provide an explanation as to why the information was not included in the original complaint." *Id.*[5]

"'Futility' means that the [pleading], as amended, would fail to state a claim upon which relief could be granted." *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000). Thus, "[i]n assessing 'futility,' the District Court applies the same standard of legal sufficiency as [it] applies under [Fed. R. Civ. P.] 12(b)(6)." *Id.* In other words, the court must determine whether the pleading includes "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on

[5] *See, e.g.*, *Breyer v. Meissner*, 23 F. Supp. 2d 540, 543 (E.D. Pa. 1998) (finding plaintiff acted with dilatory motive seeking to delay immigration proceedings, where plaintiff could have brought claims sooner but instead parceled them out in amended and proposed petitions), *aff'd*, 214 F.3d 416 (3d Cir. 2000); *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 141 (5th Cir. 1993) (affirming district court's finding of bad faith and dilatory motive, where plaintiffs were aware of facts supporting claims before they filed suit, but did not move for leave to amend until defendant filed for summary judgment).

its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). In making this determination, the court takes all pleaded allegations as true and views them in the light most favorable to the movant. *Great W. Mining & Min. Co. v. Fox Rothschild LLP*, 615 F.3d 159, 175 (3d Cir. 2010). If the proposed amendment "clearly is frivolous, advancing a claim or defense that is legally insufficient on its face," amendment should be denied. 6 Wright & Miller, *Federal Practice & Procedure* § 1487 (3d ed., June 2024 update). "If a proposed amendment is not clearly futile, then denial of leave to amend is improper." *Id.*

"[P]rejudice to the non-moving party is the touchstone for the denial of an amendment," and such prejudice must be substantial or undue. *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993) (quoting *Cornell & Co. v. Occupational Safety & Health Rev. Comm'n*, 573 F.2d 820, 823 (3d Cir. 1978)). Thus, the opposing party "must do more than merely claim prejudice; 'it must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely.'" *Bechtel v. Robinson*, 886 F.2d 644, 652 (3d Cir. 1989) (citation omitted). Courts evaluate prejudice "by looking at whether the amendment would: (1) require the non-moving party to expend significant additional resources to conduct discovery and prepare for trial; (2) significantly delay the resolution of the dispute; or (3) prevent the non-moving party from bringing a timely action in another forum." *Debjo Sales, LLC v. Houghton Mifflin Harcourt Publ'g Co.*, 2017 WL 4404565, at *2 (D.N.J. Oct. 4, 2017); *see Cureton*, 252 F.3d at 273 (a court should consider "whether allowing an amendment would result in additional discovery, cost, and preparation to defend against new facts or new theories").

Ultimately, whether to grant leave to amend lies within a court's discretion. *Pa. Emps. Ben. Tr. Fund v. Zeneca, Inc.*, 499 F.3d 239, 252 (3d Cir. 2007).

III. DISCUSSION

By way of amendment, the Government seeks to challenge Ocwen's claimed entitlement to a reduction of income tax liabilities under the EDC program, and to void the Agreement on this basis and refund to the Government payments already made. For the reasons set forth below, the Government's request to add a counterclaim and affirmative defense are denied.[6]

A. Undue Delay

The Government improperly conflates the timeliness of a motion under a court's scheduling order with a lack of undue delay.[7] *See* [ECF 58] at 3. But neither the federal rules nor the applicable law provide that a motion to amend filed within the court's deadline necessarily negates any implication of undue delay, and the Government points to no authority suggesting otherwise. Rather, there is "no presumptive period in which a motion for leave to amend is deemed 'timely' or in which delay becomes 'undue.'" *Arthur v. Maersk, Inc.*, 434 F.3d 196, 205 (3d Cir. 2006); *see also Premier Comp Sols.*, 970 F.3d at 319 (when a party moves to amend after the deadline in the scheduling order has passed, the party must show good cause for failure to meet the deadline before the court considers whether the party also satisfies Rule 15(a)(2)).

The Court finds that the Government has delayed in bringing this request given that it was a party to the prior litigation (Ocwen I) and thus had the opportunity to investigate and discover the alleged misrepresentations that now form the basis of its motion to amend. A comparison of the complaints filed in Ocwen I and Ocwen II show that the allegations asserted in the first 53 paragraphs of the respective pleadings mirror one another. It is in these 53 paragraphs that Ocwen

[6] Because the Court determines leave to amend should be denied for reasons of undue delay, futility, and prejudice, the Court declines to reach Ocwen's estoppel argument.

[7] The Court rejects Ocwen's position that the Government's motion to amend was late. *See* [ECF 68] at 18 n.15. The Court's Trial Management Order set a deadline of July 14, 2024, to seek leave to amend pleadings. [ECF 29]. That date was a Sunday; as such, the Court finds that the Government's July 15, 2024 motion was timely filed in accordance with the scheduling order.

alleges the tax returns and subsequent filings it made related to tax years 2013–15, the audits purportedly undertaken by VIBIR related to said returns, and the purported efforts of Ocwen to collect the refunds post-audits. The time to attack these allegations was in Ocwen I, when the issues were ripe. *See, e.g.*, *Rodsan v. Borough of Tenafly*, 2011 WL 2621016, at *21 (D.N.J. June 30, 2011) (denying amendment, reasoning in part that plaintiffs "failed to provide an adequate excuse for their neglect to discover [factual basis of proposed claim] in a timely manner," and "certainly could have undertaken diligent [] efforts" to discover the same sooner (citing *Romero v. Allstate Corp.*, 404 F.3d 212, 222 (3d Cir. 2005) ("a claim will accrue when the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim"))).[8]

The docket in Ocwen I indicates that the Government served no discovery requests before it ultimately agreed to settle Ocwen's 2013–15 tax refund claims and voluntarily dismiss the suit. Moreover, the Government in 2018 initiated an audit into Ocwen's 2013–16 returns and concluded that process in 2021 by accepting Ocwen's returns for the years at issue. The Government now alleges Ocwen inaccurately represented its income sources on its 2013–15 tax returns, but provides no explanation as to why it did not or could not discover the alleged misrepresentation(s) earlier. Nor does the Government specify exactly when or how it discovered the alleged misrepresentation(s). *See Katzenmoyer*, 158 F. Supp. 2d at 497 (movant has burden of establishing entitlement to amend under Rule 15); *Tarkett Inc. v. Congoleum Corp.*, 144 F.R.D. 289, 290 (E.D. Pa. 1992) ("the moving party bears the burden of proof in explaining the reasons for delay in seeking leave to amend"); *CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 629 (3d Cir. 2013) (the Third Circuit has affirmed "denials of motions for leave to amend where the moving

[8] Nor has the Government explained why it did not include the arguments it now seeks to assert by way of amendment when it filed its original answer to Ocwen's complaint. While the Government noted in its April 23, 2024 discovery memorandum that it was investigating any possible misstatements of Ocwen that might void the Agreement, it still waited until the last possible day to file its motion to amend. *See, e.g.*, *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 924 (3d Cir. 1990) (that plaintiff did not seek leave to amend until four and a half months after the information on which proffered amendment was based became available was an important factor in finding delay was undue).

party offered no cogent reason for the delay in seeking the amendment" (collecting cases)). Rather, the Government offers little more than the vague assertion in its discovery memorandum that it has "concerns about the legitimacy of [Ocwen's] income sourcing claims, particularly for the year 2019," and that "[t]his concern also casts doubt on their tax filings for the years 2013 to 2015." [ECF 26] at 1; *see also* [ECF 71] at 2 (reply in support of motion to amend, alleging Ocwen has "long been misrepresenting the sourcing of its income"); [ECF 58-1] at 24 ⁋ 14 (proposed counterclaim, stating the "Government became aware of Plaintiff's material misleading statements . . . as a result of the 2019 income tax examination").

Additionally, as Ocwen points out, all of Ocwen's statements the Government points to in its proposed counterclaim as indicative of Ocwen's "materially false representations" occurred long before the instant case was filed. [ECF 58-1] at 23 ⁋ 11; *see, e.g.*, *id.* at 17 ⁋ 9 ("Plaintiff's tax returns for the 2013, 2014, and 2015 tax years misrepresented that 100% of its income attributable to its EDC activity was from sources within the USVI"); ⁋ 10 ("Plaintiff has made numerous material misrepresentations of fact . . . including Plaintiff's initial income tax return filings, written requests Plaintiff made for refunds, Plaintiff's amended income tax returns, and Plaintiff's responses to the Government's Information Document Requests during the administrative process of refund claim review."). The Government specifically points to Ocwen's income tax returns filed with the VIBIR between 2014–18 and a February 3, 2021 amended return; Ocwen's 2018 responses to VIBIR inquiries about its business operations; and Ocwen's annual reports filed with the Economic Development Commission in 2014–16, all of which predate Ocwen I. [ECF 58-1] at 18–23. Thus, prior to Ocwen I, the Government was in possession of all the documents that it now relies on to support its proposed amendment. As such, the Government cannot show despite diligence that it could not have reasonably moved to add the proposed defense and counterclaim sooner. *See Arthur*, 434 F.3d at 204 ("When a party fails to take advantage of previous

opportunities to amend, without adequate explanation, leave to amend is properly denied."); *In re Merck Mumps Vaccine Antitrust Litig.*, 2018 WL 1693348, at *3 (E.D. Pa. Apr. 6, 2018) ("delay can also be undue when a party has delayed moving to amend, despite having known the factual basis for a new claim for many months").[9]

In sum, the purported misrepresentations of Ocwen that the Government now seeks to raise via amendment predate Ocwen I. The Government had the opportunity to investigate Ocwen's 2013–15 returns and any misrepresentations contained therein presumably during the administrative audit process, and certainly when Ocwen I was filed. But, rather than challenge Ocwen's refund claims in Ocwen I, the Government instead chose to enter an Agreement to settle those claims "to avoid additional costs and burdens of litigation and for [the parties'] mutual convenience." [ECF 9-1] at 1. In short, the Government seeks amendment to pursue avenues that it could have, but chose not to, pursue earlier. Under these circumstances, the Court finds that the Government's request is unduly delayed. *See Goldfish Shipping, S.A. v. HSH Nordbank AG*, 623 F. Supp. 2d 635, 641 (E.D. Pa. 2009) (a party "should not be permitted a 'do-over' to assert new legal theories and permutations of its prior claims that it could have asserted much earlier"), *aff'd*, 377 F. App'x 150 (3d Cir. 2010);[10] *Hanover Ins. Co. v. Emmaus Mun. Auth.*, 38 F.R.D. 470, 473

[9] *See, e.g.*, *Great W. Min. & Min. Co. v. ADR Options, Inc.*, 882 F. Supp. 2d 749, 765 n.6 (D.N.J. 2012) (finding proposed amended complaint barred by res judicata, and further highlighting the "dilatory nature of the 'newly discovered evidence'" plaintiff sought to incorporate, finding there was no reason that, "with any due diligence, Plaintiff could not have discovered these alleged additional representations earlier" in prior litigations, and concluding that "Plaintiff's attempt to add allegations concerning representations that occurred almost 15 years ago are the picture of undue delay and prejudice to the defendant"), *aff'd*, 533 F. App'x 132 (3d Cir. 2013); *In re Merck Mumps Vaccine Antitrust Litig.*, 2018 WL 1693348, at *3 ("Plaintiffs' two year delay between the receipt of materials that alerted them to a potential new cause of action, and actually seeking leave to add the new cause of action, is far in excess of what courts have determined constitutes 'undue delay.'"); *Merrimack St. Garage, Inc. v. Gen. Motors Corp.*, 667 F. Supp. 41, 45 (D.N.H. 1987) (plaintiff sought leave to amend suit I's complaint to add claim asserted in suit II; court found plaintiff had "shown no adequate reason to excuse its delay" and had "made a tactical decision to proceed only on [certain claims] in Suit I," concluding that "[u]nder such circumstances of extended and unwarranted failure to raise initially claims of which [it] was well aware, . . . leave to amend must be denied").

[10] The court's reasoning in *Goldfish* is instructive. There, the court found that the plaintiff's "explanations for not amending sooner [we]re unavailing and its delay ha[d] placed a significant and unwarranted burden on the Court." 623 F. Supp. 2d at 640. The court explained:

(E.D. Pa. 1965) (in determining whether leave to amend should be granted, "the law favors a ruling which is designed to put an end to litigation").[11]

B. Futility

In addition to being unduly delayed, the Court finds that the Government's proposed amendment is futile for several reasons as well.[12] First, the plain language of the Agreement

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> First, it is plain that Goldfish had prior opportunities to amend its complaint to state the very same claims it now includes in its proposed Second Amended Complaint. . . . It does not argue that, since the drafting of the First Amended Complaint, it has obtained additional factual information, or that there has been a change in the law, that has permitted it to formulate new, more viable theories of recovery. Rather, it seems to argue that it simply did not think, earlier in the litigation, that it was necessary to advance its current theories of recovery or to allege the new facts that it sets forth, because it did not realize that the old theories were infirm or that the additional facts were important.

Id. The court further noted that, prior to plaintiff filing its FAC, defense counsel argued that plaintiff's claims failed as a matter of law. Thus, the court reasoned, when plaintiff filed its FAC, "one would reasonably expect that it was articulating its claims in the most effective way that it could in order to avoid any such statutory bar." *Id.* Evidently the plaintiff did not, and the court dismissed the FAC without leave to amend, finding in part that the claims were statutorily barred. *Id.* at 640–41. The court determined that under these circumstances, the plaintiff should not be permitted a "do-over" to raise "a new legal theory only after the court rejects its prior one." *Id.* at 641. Rather,

> If Goldfish had viable, alternative theories of recovery in this case, it was obligated to present those theories to the Court either in the First Amended Complaint or in response to Nordbank's Motion to Dismiss; it should not have withheld them while we invested considerable time and judicial resources evaluating what it now says was an incomplete set of theories, which emphasized the wrong facts, set forth the wrong sources of legal duties and, overall, charted the wrong course to the requested relief.

Id. Thus, allowing the plaintiff another opportunity "to state claims on the same body of facts and law would certainly subvert the very important interests of judicial economy and finality." *Id.* The court ultimately concluded that the plaintiff (1) "'had previous opportunities to amend' to assert the claims it now advances and yet it did not do so[,]" and (2) "failed to advance defensible 'reasons for not amending sooner,'" and that (3) the delay "'place[d] an unwarranted burden on the court' and undermines the interests of judicial economy and finality." *Id.* (citation omitted). For these reasons, the court denied leave to amend on the basis of undue delay. *Id.*

[11] Further, to allow amendment now would open the door to inviting parties to seek recission of agreements settling prior actions whenever they have buyer's remorse for their own failure to adequately investigate and challenge a claim before settling. *See Smith v. Comm'r*, 159 T.C. 33, 48 (2022) ("Closing agreements are meant to insure the finality of liability for both the taxpayer and the IRS. This is why courts have strictly enforced closing agreements, finding them binding and conclusive on the parties . . . ." (citation omitted)); *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010) (noting the "strong presumption in favor of voluntary settlement agreements" and "the strong policy favoring the finality of judgments and the termination of litigation").

[12] As an initial matter, the Court finds that the Government's counterclaim for recission and restitution states a remedy, not a cause of action, and thus is more properly styled as a counterclaim either for fraud in the inducement or misrepresentation of a material fact. *See Smith*, 159 T.C. at 70 ("a closing agreement may be set aside upon a showing of fraud or a misrepresentation of material fact"); *Asarkasaamsu v. FirstBank P.R.*, 2020 WL 7232318, at *10 (D.V.I. Dec. 7, 2020) ("Virgin Islands law recognizes rescission as an alternative contract remedy to a claim for money

supports a finding of futility. "A closing agreement entered into under section 7121 settles or 'closes' the liability of an individual for any tax covered by the agreement, and it is final and conclusive as to both the taxpayer and the Commissioner." *Hopkins v. Comm'r*, 120 T.C. 451, 456–57 (2003) (closing agreement generally precludes a party "from asserting any defense to a tax liability covered by the agreement"). As such, "[c]losing agreements may not be annulled, modified, set aside, or disregarded in any suit or proceeding unless there is a showing of fraud, malfeasance, or misrepresentation of a material fact." *Id.* at 457.

Under the Agreement here, the Government agreed to release Ocwen from "any and all claims" that the Government could have asserted against Ocwen in Ocwen I or "arising out of, in connection with, or otherwise related to" Ocwen's 2013–15 tax refunds. [ECF 9-1] ⁋ 3(b). The Agreement further provides that "Ocwen's income tax liability for the Tax Years at Issue shall be fixed by virtue of this Agreement to the amounts stated herein," and prohibits the Government from making "any determination, assessment, or adjustment of any kind whatsoever to Ocwen's tax liability for any of the Tax Years at Issue . . . absent a showing of fraud, malfeasance, or misrepresentation of a material fact." *Id.* ⁋ 4(a).[13] Accordingly, absent a showing of fraud or misrepresentation, the Government's proposed affirmative defense and counterclaim are plainly

damages when a contracting party establishes that the contract was the result of fraud in the inducement."); *Wilkinson v. Wilkinson*, 70 V.I. 901, 908 (2019) (discussing contract rescission as a remedy when the contract was executed as a result of fraudulent or material misrepresentations); *see also* Fed. R. Civ. P. 8(c)(2) ("If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.").

[13] This is consistent with 26 U.S.C. § 7121(b), which provides, in relevant part:

> [A] closing agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—
>
> (1) the case shall not be reopened as to the matters agreed upon or the agreement modified . . . , and
>
> (2) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

foreclosed under the terms of the Agreement. *See Smith*, 159 T.C. at 48; *see also Pennwalt Corp. v. Plough, Inc.*, 676 F.2d 77, 80 (3d Cir. 1982) (voluntary settlement agreements of civil controversies "are specifically enforceable and broadly interpreted"); 6 Wright & Miller, *Federal Practice & Procedure* § 1487 (3d ed., June 2024 update) (leave to amend is properly denied "when the claim sought to be added by amendment is barred by a judgment in a previous action").

Second, the proposed counterclaim fails to state a claim for fraudulent or material misrepresentation. As noted above, a § 7121 closing agreement may only be set aside on a showing of fraud or malfeasance, or misrepresentation of a material fact. To plead misrepresentation under § 7121, a party "must provide: 1) evidence of a statement or representation that is false or incorrect; 2) evidence that defendant knew the statement was false or incorrect; and 3) plaintiff's justified reliance on the false or incorrect statement." *Marathon Oil Co. v. United States*, 42 Fed. Cl. 267, 276 (1998), *aff'd*, 215 F.3d 1343 (Fed. Cir. 1999); *see Est. of Mitchell v. Comm'r*, 65 T.C.M. (CCH) 2157 (T.C. 1993) (to prove fraud under § 7121, a party must show more than justifiable reliance: "respondent must show that petitioner intended to deceive respondent").[14] "In general, a

[14] The Virgin Islands distinguishes between misrepresentation sounding in tort and misrepresentation sounding in contract. "In torts, misrepresentation involves assertions of fraud or deceit where the plaintiff seeks damages for the purported wrongdoing. In contracts, misrepresentation may enable a plaintiff to rescind a contract which the plaintiff was fraudulently induced to execute." *Jahleejah Love Peace v. Banco Popular de Puerto Rico*, 75 V.I. 284, 288–89 (2021). To state a tort claim for fraudulent misrepresentation, a party must show:

> (1) [the opposing party] misrepresented a material fact, opinion, intention, or law; (2) that it knew or had reason to believe was false; (3) and was made for the purpose of inducing [the recipient] to act or refrain from acting; (4) which [the recipient] justifiably relied on; and (5) which caused [the recipient] a pecuniary loss.

Id. at 291; *see Merchants Com. Bank v. Oceanside Village, Inc.*, 64 V.I. 3, 21–22 (Super. Ct. 2015).

> [T]o prevail on a claim to rescind a contract based upon fraud in the inducement, a party must show that: (1) there was a misrepresentation, (2) the misrepresentation was fraudulent or material, (3) the misrepresentation induced the recipient to enter the contract, and (4) that the recipient's reliance on the misrepresentation was reasonable.

Wilkinson v. Wilkinson, 70 V.I. 901, 914 (2019). Thus, under both Virgin Islands law and § 7121, the first step in evaluating a claim for fraudulent or material misrepresentation is to determine whether any misrepresentation was in fact made.

misrepresentation is an assertion that is not in accord with the facts, and is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so." *Smith*, 159 T.C. at 70; *accord Wilkinson*, 70 V.I. at 914.

Whether the Court analyzes the Government's proposed counterclaim under federal common law contract principles applicable to § 7121 or Virgin Islands law, the claim fails at the outset because the Government fails to show evidence of any false or incorrect representation made by Ocwen. The Government points to documents such as Ocwen's income tax returns, responses to VIBIR inquiries about its business operations, and annual reports filed with the Economic Development Commission. *See* [ECF 58-1] at 18–23. But the Government fails to show how any statement of Ocwen on any of these documents is false or incorrect. A general supposition of the Government that Ocwen misrepresented its income sources falls far short of providing a showing that Ocwen made a false or incorrect statement.[15]

Nor does the Government explain how any misrepresentation Ocwen made on a document years before the parties executed the Agreement induced the Government's assent to that Agreement. This is particularly true in light of the Agreement's provision that it "constitutes the settlement of disputed claims and it does not and shall not constitute an admission of liability by either of the Parties." [ECF 9-1] at 2. The Court further finds that the Government cannot show justifiable reliance on any false or incorrect statement of Ocwen. By signing the Agreement, the Government did not state it agreed that Ocwen was entitled to the claimed refunds or that it believed Ocwen's income sources were what Ocwen represented them to be. The Government therefore could not have relied on any misrepresentation of Ocwen when it executed the Agreement. Rather, the Government acknowledged that Ocwen's refund claims were in dispute

[15] For the same reasons, the Government further fails to show that Ocwen knew its statements were false or incorrect.

but that the parties were choosing to "compromise and settle" in order to "avoid additional costs and burdens of litigation and for their mutual convenience." *Id.* at 1.

In sum, the proposed counterclaim fails to state a claim for fraudulent or material misrepresentation because the Government has not shown a false or incorrect statement by Ocwen, likely to induce the Government's assent to the Agreement, that Ocwen knew to be false or incorrect. Further, under the facts of this case, the Government also cannot show justifiable reliance on any false or incorrect statement of Ocwen.[16]

C. Prejudice

The Government suggests that, under the Federal Rules, there is no substantial risk of prejudice to Ocwen because the case is still at the preliminary stage and only minimal discovery has occurred. [ECF 58] at 3. The Court is not persuaded.

As the Third Circuit has noted, substantial or undue "prejudice to the non-moving party is the touchstone for the denial of an amendment." *Lorenz*, 1 F.3d at 1414 (quoting *Cornell & Co.*, 573 F.2d at 823). Here, the Government seeks to insert a brand-new cause of action based on alleged materially false representations made by Ocwen in documents dating back to nearly 10 years before the instant case was filed. The Government did not previously allege facts to support the elements of this claim, and only in the proposed First Amended Answer have they now tried to establish a basis for demonstrating justifiable reliance on any false or incorrect representation of Ocwen. What was represented to the Government by Ocwen in its 2013–15 tax filings and the administrative audit of those returns would now open up an entirely new avenue of discovery

[16] For the same reasons, to the extent that an amendment to permit an affirmative defense should be analyzed under Rule 12(f) rather than Rule 12(b)(6), the Court finds that no pleaded or inferable set of facts support the Government's proposed affirmative defense of misrepresentation of a material fact. *See Bello v. United Pan Am Fin. Corp.*, 2022 WL 17324441, at *7 (D.N.J. Nov. 29, 2022) ("an amendment to an answer proposing an affirmative defense is futile if the proposed affirmative defense 'is not recognized as a defense to the cause of action,' or if the proposed affirmative defense 'could not possibly prevent recovery under any pleaded or inferable set of facts'" (internal quotations and citations omitted)); [ECF 58-1] at 15 ⁋ 20 (proposed affirmative defense alleging the "Agreement is voidable pursuant to I.R.C. 7121(b) because of material misrepresentations of fact by Plaintiff").

nearly two years after Ocwen I settled, and nearly four years after the Government concluded its audit of the 2013–15 returns. As with respect to undue delay, the time to investigate Ocwen's allegations supporting its refund claims has long since passed.

The Court further rejects the Government's argument that amendment would "change the case very little" for Ocwen in terms of discovery. [ECF 71] at 14. Ocwen's complaint presumes the validity of the Agreement. This suit is at its core a simple breach of contract action seeking to enforce a settlement agreement entered by the parties nearly two years ago; it is not a suit to re-litigate Ocwen's tax refund claims for the years or in the amounts that the parties already agreed to settle for in Ocwen I. In contrast, the Government seeks to challenge Ocwen's claimed entitlement to a reduction of income tax liabilities under the EDC program and to void the Agreement on this basis. If the Court were to permit amendment, Ocwen would have to defend against a charge that it misrepresented its income sources and is not entitled to the refunds that the Government already agreed to pay, rather than focusing on the relatively straightforward argument that the Government failed to make payments as set forth in the Agreement. Thus, the Government's assertion that amendment will have little impact on discovery because "the validity of Plaintiff's EDC status, the application for the 90% tax credit, the sourcing of 100% of Plaintiff's income to the USVI, and Plaintiff's factual misstatements are at the heart of Plaintiff's case" is simply incorrect. [ECF 71] at 14.

Moreover, the Government contradicts its own statements as to the potential impact of amendment on this litigation. In its motion to extend the Court's deadlines, the Government contends the discovery it seeks to support its proffered amendment "is characterized by an exceptional level of complexity" and "demands an inordinate dedication of time and resources . . . , way beyond what is typically expected in standard discovery processes." [ECF 67] at 4. Further, the Government essentially concedes that it refused to participate in mediation by the court-ordered

deadline—which it previously agreed to and proposed—because it believes that doing so without the extensive discovery it now seeks would be "pointless." *Id.* at 3. Indeed, the Government now seeks discovery from Ocwen's "extensive network of over twenty-seven affiliated entities," each of which could "potentially [hold] intricate and legally significant information." *Id.* at 4. In light of these representations, any claim by the Government of minimal impact on discovery and scheduling as a result of amendment is dubious at best.

In sum, allowing the amendment the Government seeks would require Ocwen to expend significant additional resources to conduct discovery and prepare for trial, and delay resolution of this dispute. The prejudice to Ocwen at this juncture given the agreement reached in Ocwen I is not only undue; it is massive. *See, e.g.*, *Williams*, 2014 WL 2993667, at *6 (collecting cases). Additionally, the burden on the Court and its ability to efficiently and effectively manage its docket is not insignificant, particularly in light of the parties' previous representations that this case would require minimal discovery and was amenable to early mediation. For this reason also, the amendment will be disallowed. *See Mullin*, 875 F.3d at 157 (equitable considerations of "judicial efficiency and effective case management" are relevant to prejudice inquiry and whether amendment should be allowed); *Firstbank P.R. v. Misite*, 2018 WL 10626390, at *5 (D.V.I. Jan. 29, 2018) ("allowing the counterclaims and the additional discovery that would necessarily follow from them would disrupt the Court's docket and require a wholesale rescheduling of this matter"), *report and recommendation adopted*, 2018 WL 10626472 (D.V.I. Feb. 15, 2018); *see also Williams*, 2014 WL 2993667, at *6 (allowing amendment to assert new claims involving different facts and elements than original claims would require reopening discovery, resulting in additional expense, delay, and undue burden on the opposing party); *Unlimited Holdings, Inc. v. Bertram Yacht, Inc.*, 2008 WL 4642191, at *7 (D.V.I. Oct. 15, 2008) (disallowing an extension of deadlines because to do so would "would prejudice the Defendants' efforts to adjudicate this matter in an

orderly and prompt manner").[17]

IV. CONCLUSION

The Court recognizes that "[t]he liberality of Rule 15(a) counsels in favor of amendment even when a party has been less than perfect in the preparation and presentation of a case." *Arthur*, 434 F.3d at 206. Here, however, the timing of the instant motion given the Government's conscious decision not to conduct discovery during Ocwen I precludes any finding that the Government's failure to act sooner was simply an excusable oversight. Futility of the Government's proposed affirmative defense and counterclaim further counsel against amendment. Finally, the Government's proposed amendments are predicated on previously unpled factual allegations necessitating substantial additional discovery that would require significant effort and expense, delaying this litigation and burdening the Court's ability to manage its caseload. Under the facts and circumstances of this case, leave to amend cannot be "freely given."

Accordingly, the premise considered, it is hereby ORDERED as follows:

1. The motion to amend to add an affirmative defense for misrepresentation of a material fact is DENIED;

2. The motion to amend to add a counterclaim for rescission and restitution is DENIED; and

3. The motion to amend to remove the defenses of abstention and failure to mitigate damages is GRANTED.[18]

ENTER:

Dated: November 5, 2024

/s/ G. Alan Teague
G. ALAN TEAGUE
U.S. MAGISTRATE JUDGE

[17] Nor is it the spirit of Rule 1 for the Government to agree to a short discovery period and early mediation deadline and then move on the last possible day to amend the answer to add an entirely new claim necessitating significant discovery, and to use that pending motion as an excuse to avoid discovery requests and refuse to mediate within the Court-ordered timeframe. *See* Fed. R. Civ. P. 1 (the federal rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding").

[18] Ocwen does not state any opposition to these deletions.