
**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

**IN RE OVERSTOCK SECURITIES
LITIGATION**

**THE MANGROVE
PARTNERS MASTER FUND,
LTD.,**

Lead Plaintiff,

vs.

**OVERSTOCK.COM, INC., PATRICK
M. BYRNE, GREGORY J. IVERSON,
and DAVID J. NIELSEN,**

Defendants.

**ORDER VACATING JUDGMENT AND
GRANTING LEAVE TO AMEND**

Case No. 2:19-CV-709-DAK

Judge Dale A. Kimball

This matter is before the court on Lead Plaintiff The Mangrove Partners Master Fund Ltd.’s Motion for Leave to Amend the Consolidated Complaint [ECF No. 105]. The parties have briefed the motion, and the court concludes that oral argument would not significantly aid in its determination of the motion. The court, therefore, enters the following Order based on the parties’ submissions and the law and facts relevant to the motion.

Under Federal Rule of Civil Procedure 15(a)(2), after the ability to amend as of right expires, a party may amend a pleading “only with the opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2). “The court should freely give leave when justice so requires.” *Id.*

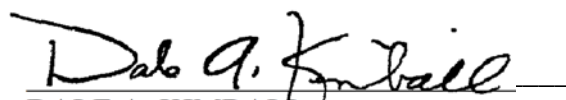
As an initial matter, Defendants assert that because the court entered Judgment in this case before Plaintiff sought leave to amend, Plaintiff must move to vacate or set aside the

judgment under Rules 59(e) or 60(b) before the court can entertain the motion to amend. In this case, the court finds that it is appropriate to provide Plaintiff with relief from Judgment based on the court's mistake. The court overlooked footnote 36 in Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss requesting an opportunity to file an amended complaint if the court granted the motion. While it would have been clearer had Plaintiff filed a separate motion for leave to amend, the request was asserted as an alternative position within Plaintiff's opposition and was made prior to the court's ruling on the motion to dismiss and entry of Judgment. In securities fraud cases and other motions to dismiss under Rule 9(b), it is the court's usual practice to allow plaintiffs the opportunity to amend, if so requested, due to the high pleading standards, unless such amendment would be futile. Because the court overlooked Plaintiff's request, it did not analyze whether amendment would be futile.

The parties disagree as to whether amendment would be futile in this case. However, given the new evidence Plaintiff provides in support of its motion to amend, the court believes it would be best procedurally for the court to address the sufficiency of that evidence in the context of a motion to dismiss rather than in a motion to amend. The court, therefore, vacates this court's Judgment [ECF No. 104] and grants Plaintiff's Motion for Leave to Amend Consolidated Complaint [ECF No. 105]. Plaintiff shall file the proposed Amended Complaint that is attached as an exhibit to its motion to amend within five days of the date of this Order.

DATED this 6th day of January, 2021.

BY THE COURT:


DALE A. KIMBALL,
United States District Judge