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Attorneys for Jonathan D. King as Chapter 7 Trustee

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: ZETTA JET USA, INC., a California corporation, Debtor.	Lead Case No.: 2:17-bk-21386-SK Chapter 7 Jointly Administered With: Case No.: 2:17-bk-21387-SK
In re: ZETTA JET PTE, LTD., a Singaporean corporation, Debtor.	Adv. Proc. No. 2:19-ap-1147-SK
JONATHAN D. KING, solely in his capacity as Chapter 7 Trustee of Zetta Jet USA, Inc. and Zetta Jet PTE, Ltd., Plaintiff, v. CAVIC AVIATION LEASING (IRELAND) 22 CO. DESIGNATED ACTIVITY COMPANY; and BOMBARDIER AEROSPACE CORPORATION, Defendants.	**TRUSTEE'S NOTICE OF MOTION AND MOTION FOR LEAVE TO AMEND ADVERSARY COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES** Hearing Date and Time: Date: June 30, 2021 Time: 9:00 a.m. (PDT) Place: Courtroom 1575 255 East Temple Street Los Angeles, CA 90012

TO THE HONORABLE SANDRA R. KLEIN, UNITED STATES BANKRUPTCY COURT JUDGE AND COUNSEL TO DEFENDANTS:

PLEASE TAKE NOTICE that Jonathan D. King, solely in his capacity as the duly appointed chapter 7 trustee (the "Trustee") in the jointly administered bankruptcy cases of Zetta Jet USA, Inc. ("Zetta Jet USA") and Zetta Jet PTE, Ltd. ("Zetta Jet PTE," and together with Zetta Jet USA, the "Debtors") and plaintiff in the above-captioned adversary case, hereby files this motion (the "Motion") seeking leave to file an amended complaint.

PLEASE TAKE FURTHER NOTICE that a hearing on the Motion is scheduled to take place on June 30, 2021 at 9:00 a.m. in the United States Bankruptcy Court for the Central District of California, Los Angeles Division, 255 East Temple Street, Courtroom 1575, Los Angeles, California 90012 (the "Court").

PLEASE TAKE FURTHER NOTICE that pursuant to the *Scheduling Order in Connection with Rule 15 Motion* [Adv. Docket No. 239], any opposition to the Motion must be filed with the Court and served no later than May 26, 2021 at 12:00 p.m. (PDT).

Dated: April 28, 2021

DLA PIPER LLP (US)
By: /s/ John K. Lyons
David B. Farkas (SBN 257137)
John K. Lyons (*Pro Hac Vice*)
Jeffrey S. Torosian (*Pro Hac Vice*)
Joseph A. Roselius (*Pro Hac Vice*)

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INTRODUCTION

Despite the history of the proceedings before this Court, this case is in its earliest stages. The Court has not yet entered a scheduling order or set a deadline to join other parties or amend the pleadings pursuant to Local Bankruptcy Rule 7016-1(a)(4)(A), let alone set a discovery schedule or a trial date. The Parties have engaged in no discovery. Although time has passed, that time was devoted to briefing and deciding a motion to dismiss, briefing and deciding a motion to compel, and court-ordered mediation.

This Court has already granted the Trustee leave to amend every count in the original Complaint. The Trustee has done so, adding dozens of pages of supporting facts, clarifying the allegations and Counts, and addressing issues raised by the Court in its motion to dismiss opinions. Those additions and changes are redlined in green in the attached redline, per the Court's request. The Court indisputably granted the Trustee leave to make these changes.

The Trustee does not seek to add any new claims.

The Trustee seeks leave only to add four new parties to one existing claim (reserving all rights about whether leave is necessary under the Court's motion to dismiss orders): three Defendants (the three CAVIC Statutory Trusts) and one nominal party (TVPX). Those parties are redlined in blue, again at the Court's request. The Trustee seeks to add these parties because of the Court's ruling that CAVIC is a necessary party whose joinder was feasible in *King v. Jetcraft Corp.*, No. 2:19-ap-01382-SK (C.D. Cal. Bankr.) ("*Jetcraft*"). [*Jetcraft* Dkt No. 109.] The same reasons this Court gave for finding that CAVIC was a necessary party in *Jetcraft* could apply to the parties the Trustee seeks to add here. Under binding Ninth Circuit precedent and Rule 19,[1] if these parties are necessary and can be feasibly joined, the Court *must* join them. It has no discretion on the point. Even if the Court did not have to join these parties, the Trustee seeks leave to add them under Rule 20's liberal joinder standards.

Pursuant to Local Bankruptcy Rule 7015(a), the Trustee attaches a copy of the proposed Amended Complaint as Exhibit 1. As requested by the Court, the Trustee also attaches as Exhibit

[1] Any "Rule" refers to the corresponding rule of the Federal Rules of Civil Procedure. Federal Rules of Bankruptcy Procedure 7015, 7019, 7020, and 7021 provide that Federal Rules of Civil Procedure 15, 19, 20, and 21 apply to adversary proceedings.

2 a redline to the original Complaint. That redline shows in green the changes for which the Court has undeniably granted leave and shows in blue the changes relating solely to the new parties.

ARGUMENT

I. The Court has already granted leave to amend the vast majority of the changes to the Amended Complaint.

a. The Court granted the Trustee leave to amend all counts in the Amended Complaint.

In its orders on the motions to dismiss the original Complaint, the Court expressly granted the Trustee leave to amend all counts against CAVIC, including Count I (declaratory judgment for recharacterization), Count III (declaratory judgment that CAVIC's security interest in the refund is not perfected), Count IV (avoidance of unperfected security interest), and Count V (recovery of refund). [Dkt. No. 174 at 2 (order stating that "Counts I, III, IV, VI, and VII of the Adversary Complaint are dismissed with leave to amend").][2] The Court also expressly granted the Trustee leave to amend all counts against Bombardier Aerospace Corporation ("BAC"), including Count II (declaratory judgment that the Plane 5 APA is terminated) and Count IV (turnover of refund). [Dkt. No. 175 at 2 (order stating that "Counts II and VI of the Adversary Complaint are dismissed with leave to amend").] These counts correspond exactly to the counts in the Amended Complaint.

b. The Trustee already has leave for every amendment to the factual allegations in the proposed Amended Complaint.

This Court has already granted leave to amend every count in the original Complaint. Every change to the factual sections in the proposed Amended Complaint relate to at least one count from that Complaint. Most changes and additions relate to Count I of the Complaint for a declaratory judgment for recharacterization, and directly respond to this Court's holdings in its motion to dismiss opinions. In the Court's opinion on Count I, it found the following:

- That the forum in the parties' contractual choice of law need not have any relation to the parties (except for contract formation issues). [Dkt. No. 168 at 14.] And, as a result, that English law should be applied to the Trustee's recharacterization claim because the parties "selected English law to govern" the relevant agreements to be

[2] The Trustee is not bringing Count VII (preference claims) because the Trustee "intends to commence a parallel proceeding in Singapore to recover unfair preferences under the laws of Singapore." (Ex. 1 ¶ 612.)

recharacterized. [*Id.* at 15.]

- That the Trustee cannot avoid the choice-of-law clause under cases like *Morse Tool, Inc.*, 108 B.R. 384 (Bankr. D. Mass. 1989), because those cases are distinguishable. Specifically, the Court stated that those cases are "distinguishable because [those courts] refused to enforce a choice of law clause in an allegedly fraudulent agreement, whereas here, there are no allegations of any fraudulent conduct." [*Id.* at 18.]
- That English law did not allow for recharacterization of the relevant documents. [*Id.* at 20.]

Therefore, to respond directly to and cure what this Court saw as deficiencies, the Amended Complaint adds, among other things:

- Allegations supporting the Trustee's argument that the relevant contractual choice-of-law provisions are void. (*See, e.g.*, Ex. 1 ¶¶ 455-78.)
- Allegations supporting the Trustee's argument that he is not bound by the relevant choice-of-law provisions under binding Ninth Circuit law, including because the Trustee is not party to the relevant agreements (*see, e.g., id.* ¶¶ 444-54) and because they are related to allegations of fraudulent conduct and actual intent or constructive fraudulent transfers (*see, e.g., id.* ¶¶ 18-40, 49-442).
- Allegations supporting the Trustee's argument that even if the relevant contractual choice-of-law provisions were valid and applied to the Trustee, English law allows for recharacterization of the relevant documents. (*Id.* ¶¶ 479-85.)

The remaining allegations are likewise related to other counts that the Court granted leave to replead, including the only remaining counts other than Count I (Counts II-VI). (*Id.* ¶¶ 481-566.) The Court has already granted the Trustee leave to replead the counts from the original Complaint identified above. [Dkt. No. 174 at 2; Dkt. No. 175 at 2.] And every change or addition to the factual allegations in the Amended Complaint relate at least to one count that the Court granted leave to replead. So the Trustee need not seek leave to amend for any change or addition to factual allegations in the Amended Complaint, nor must he seek leave to replead claims for which this

Court has granted leave to amend. *See Cholakyan v. Mercedes-Benz USA, LLC*, 2012 WL 12861143, at *13–14 (C.D. Cal. Jan. 12, 2012) (leave to replead counts also provided leave to replead facts related to those counts); *see also Michael Grecco Prods., Inc. v. BDG Media, Inc.*, 834 F. App'x 353, 354 (9th Cir. 2021) ("it was an abuse of discretion to exclude [a] claim as beyond the scope of permissible amendment" when the Ninth Circuit did not agree with the trial court's interpretation of its own order as "limiting amendment so severely").[3] Out of an abundance of caution, however, if for some reason the Court disagrees that the Trustee already has leave to amend, the Trustee expressly seeks leave to amend all of the claims that were previously dismissed and the related factual allegations.

II. Even if the Court had not already granted leave to amend, the Court should grant leave to amend under the extremely liberal standard of Rule 15.

a. The standard for leave to amend under Rule 15 is extremely liberal.

Rule 15(a)(2) provides that a "court should freely give leave [to amend] when justice so requires." When applying this rule, a court must be guided by the "underlying purpose of Rule 15 to facilitate decision on the merits, rather than on pleadings or technicalities[.]" *Bitton v. Truderma, LLC*, 774 F. App'x 404, 405 (9th Cir. 2019) (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)); *see also In re Zetta Jet USA*, 624 B.R. 461, 511 (Bankr. C.D. Cal. 2020). A "court must be *very liberal* in granting leave to amend a complaint." *Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys., Inc.*, 989 F. Supp. 1237, 1241 (N.D. Cal. 1997).[4] "Rule 15's policy of favoring amendments to pleadings should be applied with 'extreme liberality.'" *Bitton*, 774 F. App'x at 405 (quoting *Webb*, 655 F.2d at 979); *see also Zetta Jet USA*, 624 B.R. at 511. And a court should grant leave to amend unless "the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (cleaned up). "This liberality in granting leave to amend does not depend on whether the amendment will add parties or additional causes of action." *Puricle, Inc. v. Church & Dwight Co.*, 2008 WL 11343396, at *1 (C.D. Cal. Oct. 1, 2008).

[3] Pursuant to Local Bankruptcy Rule 9013-2(b)(4), all unpublished opinions are attached as Exhibit 3.

[4] All emphasis is added unless otherwise noted.

The party seeking leave to amend has the initial burden to show a legitimate reason for amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Once the movant meets that low burden, the burden shifts to the party opposing amendment to show that leave is not warranted. *Advanced Cardiovascular*, 989 F. Supp. at 1241. The party opposing amendment must show that denial is warranted based on five factors: (1) how many times the movant has amended, (2) the movant's bad faith, (3) any undue delay, (4) prejudice to the opposing party, and (5) the futility of amendment. *See M.H. v. City of San Bernardino*, 2020 WL 5167718, at *1 (C.D. Cal. July 17, 2020).

Appellate courts "strictly review a bankruptcy court's denial of leave to amend in light of the strong policy permitting amendment." *Gladstone v. U.S. Bancorp*, 811 F.3d 1133, 1144 (9th Cir. 2016) (cleaned up); *see also Ogle v. Stewart*, 230 F. App'x 646, 648 n.2 (9th Cir. 2007) (same); *In re Bekhor*, 2007 WL 7532283, at *6 (B.A.P. 9th Cir. Mar. 19, 2007) (same). "In the absence of an 'apparent or declared reason,' such as undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by prior amendments, prejudice to the opposing party, or futility of amendment, it is an abuse of discretion for a district court to refuse to grant leave to amend a complaint." *Masimo Corp. v. Apple Inc.*, 2021 WL 925885, at *9 (C.D. Cal. Jan. 6, 2021) (quoting *Foman*, 371 U.S. at 182)).

b. The Trustee has legitimate reasons to amend.

In addition to adding new parties, discussed more fully below, the Trustee's amendments are legitimate because they respond directly to this Court's motion to dismiss rulings. As noted above, the Amended Complaint adds numerous facts that respond directly to the Court's rulings. *See id.* ("Although the complaint has already been amended three times, [the plaintiffs] have addressed the [court's] previous concerns.").

c. The Defendants fail to carry their burden on any of the five factors.

The party opposing amendment must show that denial is warranted based on the five "*Foman* factors": (1) how many times the movant has already amended, (2) the movant's bad faith, (3) any undue delay, (4) prejudice to the opposing party, and (5) the futility of amendment. *M.H.*, 2020 WL 5167718, at *1. None of those factors are present here. And "[a]bsent prejudice, or a strong showing of any of the remaining *Foman* factors, there exists a presumption under Rule 15(a)

in favor of granting leave to amend." *Gocke v. United States*, 2018 WL 4945685, at *4 (C.D. Cal. Feb. 23, 2018) (quoting *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003)).

First, the Trustee has not previously amended his complaint. Parties opposing amendment face an especially steep burden when, as here, there has been no previous amendment. *See Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011). The Ninth Circuit routinely and with little discussion reverses denials of leave to amend when a party has not previously amended the complaint. *See, e.g., Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1011 (9th Cir. 2018).

Second, the Trustee has acted in good faith to bring claims on behalf of the Estates. Bad faith requires a showing of "wrongful motive by the [moving party]." *Williams v. City of Long Beach*, 2020 WL 5983256, at *3 (C.D. Cal. July 21, 2020). The party trying to show bad faith "must do more than complain about the timing of the [moving party's] actions." *Agua Caliente v. Coachella Valley Water Dist.*, 2020 WL 5775174, at *5 (C.D. Cal. July 8, 2020). They must also do more than show that "many of the allegations contained in the [proposed amended complaint] mirror those contained in the original complaint." *Williams*, 2020 WL 5983256, at *3.

There is no indicia of bad faith here. The Trustee has not "filed repetitious motions to amend." *N. Face Apparel Corp. v. Dahan*, 2014 WL 12596716, at *9 (C.D. Cal. Mar. 14, 2014). The Trustee has not filed amendments that "merely seek to prolong the litigation by adding new but baseless legal theories." *Doe v. Bridges to Recovery, LLC*, 2020 WL 5993151, at *4 (C.D. Cal. Aug. 31, 2020) (cleaned up). Rather, the Trustee has sought to address the Court's dismissal opinions, clarify his claims, and add parties to the same transactions and occurrences described in his original Complaint (to address the possibility that they are necessary parties). The Trustee's sole guiding purpose is and has always been to recover the maximum value for the Estates and the creditors.

Third, the Defendants cannot show undue delay. "[D]elay alone no matter how lengthy is an insufficient ground for denial of leave to amend." *Webb*, 655 F.2d at 979; *see also Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999) (same). And a defendant has a high burden to show undue

delay when, as here, amendment is sought before any deadline for motions to amend. *See Silas Braxton v. SEJ Assessment Mgmt. & Inv. Co.*, 2020 WL 9073068, at *3 (C.D. Cal. Oct. 22, 2020); *see also Kontos v. United States*, 2016 WL 2885862, at *4 (C.D. Cal. May 17, 2016) (granting leave to amend "particularly as no Scheduling Order [had] been issued"). This case is in its earliest stages: the parties are not at issue, discovery has not begun, no trial date is pending, and no pretrial conference is scheduled. There is thus "no evidence that [the defendants] would be prejudiced by the timing of the proposed amendment." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 188 (9th Cir. 1987) (finding no unjust delay even where the case was at the discovery stage).

Fourth, the Defendants will not be prejudiced in any legally recognized way by amendment at this early stage of the case. Increased cost or complexity of a case does not constitute prejudice under Rule 15. *See, e.g., Seneca Ins. Co. v. Hanover Ins. Co.*, 2017 WL 10434402, at *8 (C.D. Cal. Aug. 30, 2017) (holding that "if the very addition of claims were prejudicial, no party could seek leave to amend its complaint to add new causes of action—the additional claims would certainly always require additional time and expense to the detriment of the party opposing amendment"); *Fair Hous. Council of Cent. California, Inc. v. Nunez*, 2012 WL 217479, at *4 (E.D. Cal. Jan. 24, 2012) ("litigation costs alone are not grounds for denial of leave to amend"). Nor can the Defendants argue that the timing of amendment is prejudicial. Again, this case is in the earliest stages. "[T]he Court has not even set a scheduling conference or imposed a deadline for amendment of pleadings." *Fradkin v. Wunderlich-Malec Eng'g Inc.*, 2019 WL 7940670, at *4 (C.D. Cal. Nov. 5, 2019) (finding no prejudice or undue delay). The only parties who would be prejudiced by an adverse ruling are the Trustee, the Estates, and innocent creditors for whom the Trustee seeks to recover. *See Dordoni v. FCA US LLC*, 2020 WL 6082132, at *5 (C.D. Cal. Oct. 15, 2020); *see also Sabag v. FCA US*, LLC, 2016 WL 6581154, at *6 (C.D. Cal. Nov. 7, 2016); *Lara v. Bandit Indus., Inc.*, 2013 WL 1155523, at *5 (E.D. Cal. Mar. 19, 2013) ("This Court [ ] finds that precluding [the plaintiffs] from joining [the proposed defendant] would prejudice Plaintiffs because they would be required either to abandon a viable claim against [the proposed defendant] or to initiate a duplicative litigation in state court.").

Fifth, the amendments are not futile. "Amendment is futile only if no set of facts can be

proven under the amendment that would constitute a valid and sufficient claim." *Volungis v. Liberty Mut. Fire Ins. Co.*, 808 F. App'x 414, 417 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1264 (2021); *see also Howard v. Finander*, 2017 WL 10543342, at *5 (C.D. Cal. Mar. 27, 2017).[5] This is a "demanding standard" for the party opposing amendment. *Townsend Farms v. Goknur Gida*, 2016 WL 10570247, at *3 (C.D. Cal. June 2, 2016). "Denial of leave to amend on futility grounds is therefore rare." *Howard*, 2017 WL 10543342, at *5.

Regardless, the Court should defer any futility arguments. Futility arguments "concerning the sufficiency of the proposed pleadings, even if meritorious, are better left for briefing on a motion to dismiss." *Silas Braxton*, 2020 WL 9073068, at *3 (cleaned up). Courts thus "defer consideration of challenges to the merits of a proposed amended pleading until after leave to amend is granted and the amended pleading is filed." *Howard*, 2017 WL 10543342, at *5; *see also Silas Braxton*, 2020 WL 9073068, at *3 (same); *Gocke*, 2018 WL 4945685, at *5 (same); *Agua Caliente*, 2020 WL 5775174, at *5 (same); *Breier v. N. Cal. Bowling Proprietors' Ass'n*, 316 F.2d 787, 790 (9th Cir. 1963) (same); *Olivas v. Arizona*, 2020 WL 6290486, at *2 (D. Ariz. Oct. 27, 2020) (deferring evaluation of new claims to motion to dismiss briefing); *Incredible Features, Inc. v. BackChina, LLC*, 2020 WL 8457480, at *1 (C.D. Cal. Dec. 28, 2020) (refusing to "analyze merits-based arguments on a motion for leave to amend" when it was not "self-evident that no set of facts could be proved that would constitute a valid and sufficient claim or defense") (cleaned up); *Abu-Lughod v. Calis*, 2014 WL 12589358, at *1 n.1 (C.D. Cal. June 3, 2014) ("In the context of a motion for leave to amend, [a court] does not consider the merits of a plaintiff's case."). Futility arguments based on statute of limitations are likewise improper. *See, e.g.*, *Smith v. Costa Lines, Inc.*, 97 F.R.D. 451, 452–53 (N.D. Cal. 1983) (holding that a futility argument based on the statute of limitations

[5] The Ninth Circuit has repeatedly applied this standard rather than the more demanding analysis under *Twombly* and *Iqbal*. *See, e.g.*, *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017) ("An amendment is futile when *no set of facts* can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense."); *Volungis*, 808 F. App'x at 417 (same); *May v. Northrop Grumman Sys. Corp.*, 680 F. App'x 556, 559 (9th Cir. 2017) (same); *Ultrasystems Env't, Inc. v. STV, Inc.*, 674 F. App'x 645, 649 (9th Cir. 2017) (same). As a result, courts in this district continue to apply the same lenient standard. *See, e.g.*, *Townsend Farms*, 2016 WL 10570247, at *3; *Gocke*, 2018 WL 4945685, at *5; *CTC Cable Corp. v. Mercury Cable & Energy, LLC*, 2010 WL 11520676, at *1 (C.D. Cal. Oct. 18, 2010).

lacked merit "even assuming that a one-year limitation period applie[d]" to the relevant action because an opposition to amendment was "not the proper vehicle for raising the issue"); *Leibel v. City of Buckeye*, 2019 WL 4736784, at *3 (D. Ariz. Sept. 27, 2019) (allowing amendment even though the defendants argued that a claim was time-barred because that "issue [was] premature" and would "only be decided if and when the defendant . . . [brought] a motion to dismiss on [those] grounds"); Wright & Miller, 27A Fed. Proc., L. Ed. § 62:274 ("A defendant's argument that a claim, as amended, will be barred by the statute of limitations normally is not a sufficient ground for denying leave to amend, since the limitations defense is more properly asserted by answer as an affirmative defense and not by way of opposition to a motion to amend.").

The Court has already granted the Trustee leave to amend, and even if the Court had not, the Trustee easily satisfies the requirements for leave to amend under the extremely liberal standards of Rule 15 for the claims the Court dismissed without prejudice and the factual bases for the amended claims. The Trustee also satisfies the requirements to add new parties. The Trustee turns to that issue now.

III. The added parties are properly joined.

The Amended Complaint adds three defendants (the three CAVIC Statutory Trusts) and one nominal party (TVPX) to one count (Count I for recharacterization). Each of these Defendants is a nominal party to the agreements the Trustee seeks to recharacterize in Count I.

a. Under Rule 19, the Court must join necessary parties if joinder is feasible.

There is strong reason to believe that *none* of these parties are necessary. CAVIC, not the CAVIC Statutory Trusts or TVPX, is the real party in interest in the relevant transactions, and neither CAVIC nor Bombardier raised this issue in the first round of motions to dismiss. And none of these absent parties have claimed any legally protected interest. *See United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999) (holding that joinder analysis is unnecessary until the "the absent party claim[s] a legally protected interest relating to the subject matter of the action"). But neither had CAVIC in the *Jetcraft* action. Indeed, CAVIC later expressly *disclaimed* an interest in the fraudulent transfer claim in that case as opposed to the declaratory judgment claim already pending in *CAVIC*. [Consolidation Tr. 23:10-14, 24:7-13.] Yet, out of an abundance of caution, the Trustee

is compelled by the logic of this Court's opinions to add these parties.

In its ruling on Bombardier's motion to dismiss in *Jetcraft*, this Court held that CAVIC was a necessary party under Rule 19(a)(1)(B). [*Jetcraft* Dkt. No. 109 at 38.] According to the Court, CAVIC was a necessary party because, among other reasons, "[a]ny finding that the CAVIC Transactions involved disguised financings . . . would undoubtedly impact CAVIC's rights under whatever agreements they may have had with the Debtors (and with BAC)." [*Id.*] This Court also held that "it [was] *beyond dispute* that joinder of CAVIC is feasible[.]" [*Id.*]

This same logic could mandate adding the CAVIC Statutory Trusts and TVPX too. Like CAVIC, they are party to finance leases that the Trustee seeks to recharacterize in Count I. Indeed, if the Court finds that they, like CAVIC in *Jetcraft*, are necessary parties, and joinder is feasible, then they must be joined. Of course, joinder is feasible because they are all subject to service of process and adding them will not destroy jurisdiction. *See, e.g.*, *Dawavendewa v. Salt River Project*, 276 F.3d 1150, 1154 (9th Cir. 2002). If this Court determines that they are necessary, then this Court must join them as parties. *See Ward v. Apple Inc.*, 791 F.3d 1041, 1048 (9th Cir. 2015) ("Under Rule 19, a 'required party' *must be joined* as a party in an action if doing so is 'feasible.'"); *see also Mutti v. Rite Aid Corp.*, 2014 WL 12771117, at *8 (C.D. Cal. Apr. 22, 2014) ("A person falling within this scope *must be joined* under Rule 19(a) if feasible."); *Weeks v. La Quinta Holdings Inc.*, 2021 WL 230035, at *2 (C.D. Cal. Jan. 22, 2021) (the "Ninth Circuit explains [that Rule 19] *requires* joinder" of a necessary party); *Cappello Glob., LLC v. TEMSA*, 2020 WL 8994099, at *4 (C.D. Cal. Sept. 25, 2020) ("Rule 19 *requires* joinder[.]"). It is reversible error to dismiss a claim rather than join a necessary party whose joinder is feasible. *See, e.g.*, *Delgado-Caraballo v. Hosp. Pavia Hato Rey, Inc.*, 889 F.3d 30, 37 (1st Cir. 2018); *Askew v. Sherriff of Cook Cnty.*, 568 F.3d 632, 637 (7th Cir. 2009).

b. Even if the Court did not have to join these parties, they should be joined under the liberal standards of Rules 15 and 20.

An amendment adding a non-necessary party must meet the requirements of both Rule 15 and Rule 20(a). *See Desert Empire Bank v. Insurance Co. of N. America*, 623 F.2d 1371, 1374 (9th Cir. 1980). Under Rule 20(a), a defendant may be joined if (1) "any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction,

occurrence, or series of transactions or occurrences"; and (2) "any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a)(2). After that threshold Rule 20 showing, courts consider five factors, which are often analyzed at the same time as the Rule 15 factors because they are so similar: "(1) prejudice to existing parties; (2) the moving party's delay in seeking joinder; (3) the moving party's motive in amending its pleadings; (4) the closeness of the relationship between the new and old parties; (5) the effect of amendment on the court's jurisdiction; and (6) the new party's notice of the pending action." *Spellbound Dev. Grp., Inc. v. Pac. Handy Cutter, Inc.*, 2010 WL 11509228, at *1 (C.D. Cal. Aug. 31, 2010); *see also N. Face Apparel*, 2014 WL 12596716, at *6. Joinder is "construed liberally," *League to Save Tahoe v. Tahoe Reg. Plan Agency*, 558 F.2d 914, 917 (9th Cir. 1977), and "strongly encouraged," *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966). Amendments adding parties are "applied with extreme liberality." *Gordon v. Impulse Mktg. Grp., Inc.*, 2006 WL 8437849, at *2 (E.D. Wash. May 2, 2006) (cleaned up); *see also Puricle*, 2008 WL 11343396, at *1. "Once a defendant is properly joined under Rule 20, the plaintiff may join, as independent or alternative claims, as many claims as the plaintiff has against that defendant, irrespective of whether those additional claims also satisfy Rule 20." *Harris v. Lappin*, 2009 WL 789756, at *5 (C.D. Cal. Mar. 19, 2009) (citing Rule 18(a)).[6]

The Amended Complaint easily meets the first prerequisite because the allegations against the new defendants arise out of the same transactions as the existing recharacterization claim against CAVIC in Count I. The Ninth Circuit requires only "a degree of factual commonality underlying the claims." *Bravado Intern. Grp. Merch. Servs. v. Cha*, 2010 WL 2650432, *2, 5 (C.D. Cal. June 30, 2010) (citing *Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997)). The "rule simply requires related activities and similarity in the factual background of a claim." *Jacques v. Hyatt Corp.*, 2012 WL 3010969, *3 (N.D. Cal. July 23, 2012) (cleaned up). The recharacterization claims against CAVIC, the CAVIC Statutory Trusts, and TVPX arise out of the transactions involving the same agreements. These agreements in the Amended Complaint were the same

[6] If Rule 20's test for permissive joinder is not satisfied, Rule 21 gives the court discretion on "'its own initiative at any stage of the action and on such terms as are just' to add or drop parties so as to avoid dismissing an action." *Sams v. Beech Aircraft Corp.*, 625 F.2d 273, 277 (9th Cir.1980).

agreements in the previous Complaint.

The Amended Complaint also pleads issues of fact and law common to all relevant Defendants. These common issues include all the legal and factual issues about the recharacterization claims. And Because the new parties are named in the same claims as existing defendants, those issues necessarily overlap. *See N. Face Apparel*, 2014 WL 12596716, at *4 ("The amended complaint also pleads issues of law common to all defendants because every claim is alleged against each defendant."). Those same issues relate to whether the Trustee is bound by the choice-of-law clauses in various agreements with the new parties. *See In re Morse Tool, Inc.*, 108 B.R. 384, 386 (Bankr. D. Mass. 1989).

The Trustee has thus met his burden under the extremely liberal standard of Rules 15 and 20.

c. The Defendants cannot meet their burden to show that joining the new parties would be improper.

The Defendants likewise cannot meet their burden to show that the amendments adding new defendants are improper. The Trustee's motive is clear: responding in good faith to this Court's opinions. There has been no delay in seeking joinder. The amendment will not affect this Court's jurisdiction. The CAVIC Statutory Trusts are controlled by CAVIC and, thus undoubtedly had notice. *See Spellbound*, 2010 WL 11509228, at *1. TVPX is only a nominal party against whom the Trustee seeks no other relief. The Trustee has not previously sought leave to amend, and the Trustee is not acting in bad faith.

There is also no risk of prejudice to the Defendants. "New defendants are not prejudiced by the timing of their entry into a case when the 'case is still at the discovery stage with no trial date pending.'" *See DeHate v. Lowe's Home Centers, LLC*, 2020 WL 5875023, at *2 (C.D. Cal. July 9, 2020) (quoting *DCD Programs*, 833 F.2d at 188 (rejecting the defendant's argument that it had been unduly prejudiced when the district court allowed the plaintiff to a name defendant over a year after the complaint had been filed)); *see also Melingonis v. Rapid Capital Funding*, 2017 WL 1550045, at *3 (S.D. Cal. May 1, 2017) (rejecting the defendant's argument that "it w[ould] be prejudiced by being added as a defendant . . . because a number of deadlines in the Scheduling Order [had] already passed" because the case was in the early discovery stages). Here, the Court

has not yet set any deadlines for the addition of new parties, none of the existing parties to this case are at issue, and discovery has not even started. The proposed defendants will thus not face any prejudice because they will have more than enough "time to come up to speed and prepare [their] defenses[.]" *DeHate*, 2020 WL 5875023, at *2; *see also Williams*, 2020 WL 5983256, at *4 (quoting *DCD Programs* 833 F.2d at 188) (where a "case is still at the discovery stage with no trial date pending, nor has a pretrial conference been scheduled, there is no evidence that [the defendant] would be prejudiced by the timing of the proposed amendment").

Regardless, as described above, it is irrelevant whether these parties can show prejudice because they must be joined under Rule 19. But even if it were relevant, these parties cannot come close to meeting their burden to show prejudice. And they may not resist joinder as defendants by arguing the merits of the Trustee's claims. *See Abu-Lughod*, 2014 WL 12589358, at *2 (rejecting the defendants' arguments against joinder because "they argue[d] the merits of [the plaintiff's] case, rather than address[ing] the requirements of Rule 20(a)"). Nor may the Defendants argue that the Trustee should not be "given an opportunity to amend . . . to identify the proper defendants." *Cochran v. Wardian*, 580 F. App'x 522, 522 (9th Cir. 2014) (overturning denial of amendment).

CONCLUSION

For the reasons above, the Court should grant the grant the Trustee leave to file the proposed Amended Complaint in full (which is attached to this motion as Exhibit 1) and grant any other relief the Court considers appropriate.

Dated: April 28, 2021

DLA PIPER LLP (US)

/s/ John K. Lyons

David B. Farkas (SBN 257137)
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Attorneys for the Chapter 7 Trustee

EXHIBIT 1

(PROPOSED AMENDED COMPLAINT)

[Redacted pending ruling on Motion for Leave to File Complaint and Redline Under Seal]

EXHIBIT 2

(REDLINE TO ORIGINAL COMPLAINT)

[Redacted pending ruling on Motion for Leave to File Complaint and Redline Under Seal]

EXHIBIT 3

(UNPUBLISHED CASES)

2014 WL 12589358
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Samir ABU-LUGHOD
v.
Suhail CALIS, et al.

CV 13-2792 DMG (RZx)
|
Filed 06/03/2014

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Proceedings: IN CHAMBERS—ORDER RE PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT [Doc. # 45]

The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

***1** On February 14, 2014, Plaintiff Samir Abu-Lughod filed a motion for leave to file a First Amended Complaint ("FAC"). [Doc. # 45.] On March 7, 2014, Defendants Suhail Calis, Tocali Inc., and ASCII Media, Inc. filed an opposition. [Doc. # 60.] On March 14, 2014, Abu-Lughod filed a reply. [Doc. # 61.]

The motion was scheduled for hearing on March 28, 2014. On March 24, 2014, the Court took the motion under submission because it deemed the matter suitable for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15.

I.

DISCUSSION

Abu-Lughod seeks leave to amend the Complaint to add Magdalene Calis, Suhail Calis's wife, as a defendant. (Mot. at 1-7 [Doc. # 45-1].) Pursuant to Federal Rule of Civil Procedure 15(a)(2), "[t]he court should freely give leave [to amend] when justice so requires." "[R]equests for leave should be granted with 'extreme liberality.' " *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009) (citation omitted) (quoting Fed. R. Civ. P. 15(a)(2); *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001)). A "court considers the following five factors to assess whether to grant leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether plaintiff has previously amended his complaint." *In re W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 738 (9th Cir. 2013) (internal quotation omitted).

Abu-Lughod contends that amendment is appropriate under Rule 15 because discovery produced by Defendants suggests that Magdalene Calis was either (1) directly involved in her husband's business, or (2) received funds Abu-Lughod invested which were intended to pay for business expenses. (*Id.* at 3.) Defendants conclusorily assert that Abu-Lughod seeks to add Magdalene Calis as a defendant in order to harass Calis, but they provide no evidence in support of this assertion and they fail to respond to Abu-Lughod's arguments.

Defendants also argue that joinder of Magdalene Calis would not satisfy the requirements of Rule 20(a). [1] (Opp'n at 2-3.) Federal Rule of Civil Procedure 20(a)(2), which allows for permissive joinder, provides that "[p]ersons ... may be joined in one action as defendants if: (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action." *See also League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1977). Even if these requirements are met, the Court must examine whether permissive joinder would "comport with the principles of fundamental fairness or would result in prejudice to either side." *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1296 (9th Cir. 2000) (internal quotations omitted). Rule 20 is to be "construed liberally in order to promote trial convenience and to expedite the final determination of disputes, thereby preventing multiple lawsuits." *League to Save Lake Tahoe*, 558 F.2d at 917.

[1] Defendants use most of their brief to argue that the allegations in Abu-Lughod's Complaint are not supported by "a scintilla of evidence." (Opp'n at 3-5.) In the context of a motion for leave to amend, the Court does not consider the merits of a plaintiff's case. Defendants may renew such arguments in a motion for summary judgment.

***2** A plaintiff seeking to amend a complaint to add a defendant has the burden of demonstrating that the proposed amendment satisfies Rule 20(a). *See Desert Empire Bank v. Insurance Co. of North America*, 623 F.2d 1371, 1374 (9th Cir. 1980) (plaintiff's Rule 15 motion to amend to add a defendant implicated Rule 20); *see also* 4 James Wm. Moore, *et al.*, Moore's Federal Practice § 20.02[2][a][iii] (3d ed. 1999) (a plaintiff seeking to amend to add a party "has the burden of demonstrating that the proposed restructuring of the litigation satisfies both requirements of the permissive party joinder rule").

Here, Abu-Lughod's proposed amendment to add Magdalene Calis satisfies the requirements of Rule 20(a)(2). The gravamen of the Complaint is that Suhail Calis took funds from Abu-Lughod that were to be invested in a computer software business and transferred them to members of his family. (Compl. ¶¶ 10-28 [Doc. # 1].) The proposed FAC alleges that Magdalene Calis received funds that Abu-Lughod entrusted to Suhail Calis for business purposes. (Proposed FAC ¶¶ 26, 29 [Doc. # 45-3].) Indeed, Abu-Lughod's proposed FAC alleges the same claims against Magdalene Calis as it does against the other Defendants. Accordingly, Abu-Lughod's asserted right to relief against Magdalene Calis arises from the same transaction, occurrence, or series of transactions or occurrences and there are questions of fact and/or law common to all defendants. Fed. R. Civ. P. 20(a). Defendants' arguments to the contrary are inapposite, as they argue the merits of Abu-Lughod's case, rather than address the requirements of Rule 20(a). (*See* Opp'n at 2-3.)

II.

CONCLUSION

In light of the foregoing, Abu-Lughod's motion for leave to amend is **GRANTED**. Abu-Lughod shall file and serve the First Amended Complaint within **seven days** from the date of this Order. Defendants shall file their response within **15 days** after service of the First Amended Complaint. The Court will issue an amended Scheduling Order consistent with the parties' joint request for extension of pretrial and trial dates and deadlines [Doc. # 78].

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2014 WL 12589358

End of Document

2020 WL 5775174
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

AGUA CALIENTE BAND OF CAHUILLA INDIANS
v.
COACHELLA VALLEY WATER DISTRICT, et al.

Case No. EDCV 13-883 JGB (SPx)
|
Filed 07/08/2020

Attorneys and Law Firms

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Proceedings: Order (1) GRANTING-IN-PART and DENYING-IN-PART the Tribe's Motion for Leave to Amend (Dkt. No. 329) (IN CHAMBERS)

JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

***1** Before the Court is a Motion for Leave to Amend filed by Plaintiff Agua Caliente Band of Cahuilla Indians ("the Tribe"). ("Motion," Dkt. Nos. 329, 330. [1]) The Court finds the Motion appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After considering the papers filed in support of and in opposition to the Motion, the Court GRANTS-IN-PART and DENIES-IN-PART the Motion.

1 While the Tribe's motion is filed at Dkt. No 329, the points and authorities in support of the motion are filed at Dkt. No. 330. Any page number citations refer to Dkt. No. 330.

I. BACKGROUND

On May 14, 2013, the Tribe filed its complaint for declaratory and injunctive relief against Defendants James Cioffi, Coachella Valley Water District, Franz De Klotz, Desert Water Agency, Craig A. Ewing, Thomas Kieley III, Debi Livesay, Peter Nelson, Patricia G. Oygar, Ed Pack, John Powell Jr., and Joseph K. Stuart. ("Complaint," Dkt. No. 1.) In June 2014, the Court granted the United States' motion to intervene as a plaintiff in its capacity as trustee for the Tribe's reservation. (Dkt. Nos. 62, 70.)

The Court issued a civil trial scheduling order on February 28, 2014. ("Scheduling Order," Dkt. No. 56.) The Scheduling Order listed April 1, 2014 the "Last Day to Stipulate or File a Motion to Amend Pleadings or Add New Parties." (Id.) The Court subsequently extended that deadline to May 1, 2014 ("Deadline to Amend"). (Dkt. No. 59.)

In December 2013, the parties stipulated to trifurcate this action. (Dkt. No. 49.) Phase I addressed "whether the Tribe has a reserved right and an aboriginal right to groundwater." Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District, et al., 849 F.3d 1262, 1267 (9th Cir. 2017). Phase II addressed the Tribe's right to a specific quantity and quality of water. At the conclusion of Phase II, on April 19, 2019, the Court held that the Tribe lacked standing to pursue its water quantification and quality claims. ("Phase II Order," Dkt. No. 318.) The Court deferred to Phase III "the narrow issue of whether the Tribe owns sufficient pore space to store its federally reserved water right." (Id. at 21.) The Tribe moved for reconsideration of the Phase II Order, which the Court denied on August 14, 2019. (Dkt. Nos. 319, 324.)

On October 12, 2019, the Tribe filed this Motion. (See Motion.) Along with the Motion, the Tribe filed a proposed First Amended and Supplemental Complaint for Declaratory and Injunctive Relief. ("Proposed FAC," Dkt. No. 330-1.) Defendants opposed the Motion on November 25, 2019.

("DWA Opposition," Dkt. No. 333; "CVWD Opposition," Dkt. No. 334.) On December 16, 2019, the Tribe replied. ("DWA Reply," Dkt. No. 337; "CVWD Reply," Dkt. No. 338.)

II. LEGAL STANDARD

A. Amended Pleadings

Federal Rule of Civil Procedure 15 provides that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Ninth Circuit holds " '[t]his policy is to be applied with extreme liberality.' " Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003) (quoting Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001)). However, leave to amend is not automatic. The Ninth Circuit considers five factors when considering a motion for leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) the futility of amendment, and (5) whether the plaintiff has previously amended his or her complaint. Nunes v. Ashcroft, 375 F.3d 805, 808 (9th Cir. 2004). The Ninth Circuit instructs that "it is the consideration of prejudice to the opposing party that carries the greatest weight." Eminence Capital, 316 F.3d at 1052.

***2** "The party opposing amendment bears the burden of showing prejudice, unfair delay, bad faith, or futility of amendment." United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co., 2009 WL 650730, at *2 (C.D. Cal. Mar. 12, 2009) (citing Eminence Capital, 316 F.3d at 1052; DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186–87 (9th Cir. 1987)).

B. Supplemental Pleadings

Federal Rule of Civil Procedure ("Rule") 15(d) governs supplemental pleadings. Under Rule 15(d), "[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d); see also Eid v. Alaska Airlines, Inc., 621 F.3d 858, 874 (9th Cir. 2010) ("Rule 15(d) provides a mechanism for parties to file additional causes of action based on facts that didn't exist when the original [pleading] was filed."). A trial court has broad discretion in deciding whether to permit a supplemental pleading. Keith v. Volpe, 858 F.2d 467, 473 (9th Cir. 1988). In deciding whether to permit a supplemental pleading, a court's focus is on judicial efficiency. See Planned Parenthood v. Neely, 130 F.3d 400, 402 (9th Cir. 1997). "Supplementation is generally favored because it promotes judicial economy and convenience." Lyon v. U.S. Immigration & Customs Enf't, 308 F.R.D. 203, 214 (N.D. Cal. 2015) (citing Keith, 858 F.2d at 473). In considering whether a party should be granted leave to supplement a pleading, the Court considers the following factors: "(1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure of previous amendments, (4) undue prejudice to the opposing party, and (5) futility of the amendment." Lyon, 308 F.R.D. at 214.

C. Scheduling Order Modification

Modification of a court's scheduling order requires a showing of good cause. Fed. R. Civ. P. 16(b)(4); Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). The good cause standard considers primarily the diligence of the party seeking the amendment. Id. If a party shows good cause to modify the scheduling order, then their motion for leave to amend may be considered under the more liberal amendment policy of Fed. R. Civ. P. 15(a). See Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003) (quoting Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001)). The Ninth Circuit considers a motion for leave to amend under five factors: bad faith, undue delay, prejudice to the opposing party, the futility of amendment, and whether the plaintiff has previously amended his or her complaint. Nunes v. Ashcroft, 375 F.3d 805, 808 (9th Cir. 2004). "The party opposing amendment bears the burden of showing prejudice, unfair delay, bad faith, or futility of amendment." United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co., 2009 WL 650730, at *2 (C.D. Cal. Mar. 12, 2009) (citing Eminence Capital, 316 F.3d at 1052; DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186–87 (9th Cir. 1987)).

III. DISCUSSION

***3** The Tribe seeks to amend its Complaint to (1) add new factual allegations regarding standing, (2) revise the pore space claims so that the claims reflect the "constituent element" theory addressed in the summary judgment briefing, and (3) seek an injunction to prevent Defendants from producing ground water on the Tribe's

land without authorization. (See Motion at 1–2; CVWD Opposition at 1–2.)

The deadline to move for leave to amend has passed. (See Scheduling Order.) Typically, a party attempting to amend a pleading after the deadline to do so must demonstrate that there is good cause to modify the scheduling order to accommodate the request. See Fed. R. Civ. P. 16(b). The Tribe, however, argues they do not need to show good cause because the Deadline to Amend applied only to Phase I. (DWA Reply at 3–4.) The Court disagrees—the Deadline to Amend applies to the entire case.

First, while the Tribe insists that the Deadline to Amend does not apply to the current Motion, it fails to identify the applicable deadline. Presumably then, the Tribe assumes it is entitled to amend indefinitely. Such an assumption is both unreasonable and inconsistent with litigation in federal court. Second, there is no evidence in any of the Court's scheduling orders of plans to allow an amendment period in each phase. The Deadline to Amend includes no phase-specific modifiers, suggesting that it was the case-wide deadline.[2] After the Deadline to Amend had passed, the Court ordered the parties to "confer regarding scheduling of Phase 2 discovery, briefing, and trial and/or any potential request for interlocutory appellate review" within two weeks of the Phase I summary Judgment rulings. (Dkt. No. 69.) There was no mention of a new amendment period in either that order or the joint stipulation that prompted it. (Dkt. Nos. 66, 69.) On May 11, 2015, the parties submitted a joint report regarding Phase II, which opined on deadlines for discovery and briefing but made mention of a new amendment period. (Dkt. No. 120.) And accordingly, the Court's subsequent order did not include a Phase II deadline to move to amend the complaint. (Dkt. No. 121.) The Tribe failed to request a new Phase II amendment deadline when the Phase II scheduling orders were issued. It cannot now rely on a phantom Phase III deadline on the baseless assertion that each phase has a separate amendment period.[3]

[2] Relying on the parties' Joint Rule 26(f) Conference Report, the Tribe claims that April 1, 2014 was the "Phase I" deadline to amend the Complaint. ("Joint Report," Dkt. No. 52.) The Joint Report is not the Scheduling Order. It does not set out the schedule—the Court does. The April 1, 2014 date set by the Scheduling Order does specify that April 1, 2014 is limited to Phase I. Instead, it applies to the entire case.

[3] While the Court did apply Rule 15 to the Tribe's earlier attempt to amend, it ultimately found that motion was moot. (See Dkt. No. 266.) Accordingly, the Court did not allow the amendment and made no finding regarding the applicability of the Deadline to Amend. Moreover, unlike here, Rule 16 was not raised by any party.

Third, the Tribe's current theory that each phase includes a new amendment period is illogical. The parties trifurcated the litigation to streamline the resolution of the issues presented in the Complaint. Allowing the Tribe to revise its Complaint after each phase would allow the Tribe to undo what had just been resolved (just as the Tribe is attempting to do now with its standing supplements.) While undoing what was already resolved is sometimes justified, scheduling orders are meant to promote efficient resolution of the litigation, and the Court will interpret them with that goal in mind. The Deadline to Amend applies to the entire litigation—any party moving to amend after that date must satisfy the good cause requirement of Rule 16.

A. Pore Space Claim Revisions

***4** The Tribe moves to amend its Complaint to revise its pore space claim. The Complaint asserts the Tribe has an ownership interest in "sufficient pore space in the Groundwater Basin aquifer underlying the Coachella Valley and the Tribe's reservation to store its federally reserved right to groundwater for all present and future purposes." (Complaint ¶¶ 66, 76.) During the litigation, including at Phase II summary judgment, the Tribe argued instead that it owned the pore space underneath the land as a constituent element of the land. (See, e.g., Dkt. No. 203 at 19 ("Agua Caliente is entitled to a declaration that it is the beneficial owner of the pore space ... underlying the Agua Caliente Reservation.").) Because this "constituent element" theory was not properly before the Court, the Court was unable to resolve that issue. (See Phase II Order at 22.) Now the Tribe seeks to revise the Complaint to reflect the constituent element theory it advanced throughout the litigation. (Motion at 9–10.) Because this is an attempt to amend rather than supplement the Complaint, the Tribe must demonstrate good cause for a modification of the Scheduling Order.

"The good cause standard primarily considers the diligence of the party seeking the amendment." Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). The Tribe learned that the Complaint did not adequately allege the constituent element theory with the Court's Summary Judgment Order. (Motion at 9–10.) It moved the Court to allow the amendment approximately six months later. Although six months is certainly not a quick response, the Tribe was pursuing alternative remedies and meeting and conferring with opposing counsel during that time. (DWA Opposition at 6 n.4, 7.) Moreover, as DWA acknowledges, allowing the amendment "would not be prejudicial to the Water Agencies[ ] because they have already largely addressed the [constituent element] pore space issue ... in their Phase 2 motions and briefs." (DWA Opposition at 19.) Accordingly, good cause exists to modify the Scheduling Order to allow the pore space amendments. Because Defendants have waived their right to object to amendment under Rule 15, the Court will not address those factors. (See CVWD Opposition at 12.) The Court therefore GRANTS leave to amend the Complaint with the proposed pore space revisions.

B. New Standing Allegations

The Tribe also seeks to add several new factual allegations regarding their own use of the groundwater. (See generally Proposed FAC.) Since the Court issued the Phase II Order, the Tribal Council has established the Agua Caliente Water Authority and directed it to store 20,000 AF of the Tribe's groundwater per year. (Motion at 10.) The Tribe has also begun construction on new wells that were predicted to start producing water this past January. (Id.) The Tribe argues that these new factual allegations establish that it has standing to pursue quantification of its water rights, which the Court previously found to be lacking.

Because these events occurred after the filing of the Complaint, the Tribe's request to add these new standing allegations is a request to supplement, rather than amend, the Complaint. See Fed. R. Civ. P. 15 (supplemental pleadings "set[ ] out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented"). Defendants argue that the Deadline to Amend covers both amendment and supplementation. (DWA Opposition at 5; CVWD Opposition at 7.) It does not. First, while the Scheduling Order lists the Deadline to Amend, it is silent on a deadline to supplement. Because the Federal Rules distinguish the two, a deadline to amend does not automatically include supplementation. Second, because the need to supplement could presumably arise at any time during the litigation, it would be nonsensical to create a deadline for supplementation. Contra Anderson v. City of Rialto, 2017 WL 10562685, at *3 (C.D. Cal. May 17, 2017) (applying Rule 16(b) to a motion to supplement where supplementing party assumed Rule 16(b) applied). Accordingly, the Deadline to Amend does not apply to the new standing allegations, and the Court need only assess the Rule 15(d) factors.

1. Bad Faith

***5** Defendants argue that the Tribe is acting in bad faith because they filed the Motion after the Court granted summary judgment against them. (CVWD Opposition at 13–15.) Plainly, the Tribe could not have moved to supplement before the Phase II Order as the relevant events had not yet occurred. Defendants insist that the events themselves are evidence of bad faith: the Tribe could have created the Water Agency or planned the wells at any point and are only doing so now for the purpose of reversing the Court's Phase II Order. (CVWD Opposition at 15.)

Defendants ascribe improper motives to the Tribe for its actions without any evidence other than timing. But the Tribe offers an alternative, equally plausible explanation for its timing: that it "has taken steps to resume pumping groundwater" because "the Court decreed the existence of the Tribe's federal reserve right to groundwater" in Phase I. (Motion at 4.) Moreover, even if Defendants were correct regarding the Tribe's motives, taking extrajudicial action to make a formerly nonjusticiable action justiciable is not bad faith. It is strategic. The Court told the Tribe that it could not pursue quantification of its water rights because it was not using the water, so the Tribe started to use the water.

It is Defendants' burden to demonstrate bad faith. And to meet that burden they must do more than complain about the timing of the Tribe's actions. Accordingly, the Court concludes that the Tribe has not acted in bad faith.

2. Undue Delay

Defendants further argue, without much specificity, that the Tribe unduly delayed in seeking to supplement these new standing allegations. (CVWD Opposition at 9–10 (arguing that "many of [the] new allegations consist of facts regarding recharge and agency groundwater production know to the Tribe for months, if not years [ ]").) While some of the relevant events occurred shortly after the summary judgment briefing, others occurred only weeks before the Tribe moved

to amend, and others are still evolving in real time. Moreover, "[t]he passage of time is not, in and of itself, undue delay." Johnson v. Serenity Transportation, Inc., 2015 WL 4913266, at *5 (N.D. Cal. Aug. 17, 2015). The relevant inquiry for undue delay is "whether the moving party knew of the facts and legal bases for the amendments at the time the operative pleading was filed." Id. Accordingly, the Tribe did not unduly delay in seeking leave to supplement the standing allegations.

3. Prejudice to the Defendant

Defendants argue that allowing supplementation of the new standing allegations would unduly prejudice them—the Court already granted summary judgment and allowing the amendments would force the parties to reopen discovery and relitigate the issues. (CVWD Opposition at 15–19.) While allowing amendment will undoubtedly create an additional burden for Defendants, such a burden is not undue. The Court did not reach the merits of the Tribe's claims. Instead, it found that the Tribe lacked standing to pursue the quantification of its water rights. Such a holding is by nature transient and subsumes the possibility that should the Tribe's water rights become injured, the parties will need to litigate quantification. Accordingly, allowing the Tribe to supplement the Complaint will not unduly prejudice Defendants.

4. Futility of Amendment

Finally, Defendants argue that allowing the Tribe to supplement its Complaint with new standing allegations would be futile because the new allegations fail to confer standing. The Court need not decide whether the proposed amendments confer standing—such a decision is appropriate only after briefing on the merits. Cf. Hyun Ju Shin v. Yoon, 2019 WL 1255242, at *7 (E.D. Cal. Mar. 19, 2019) ("[I]n view of the Ninth Circuit's directive that leave to amend be granted with 'extreme liberality,' courts generally decline to reach the merits of such a dispute where the parties can more fully brief and argue the issues on a motion ..."); Netbula, LLC v. Distinct Corp., 212 F.R.D. 534, 539 (N.D. Cal. 2003) ("Denial of leave to amend on [futility] ground[s] is rare. Ordinarily, courts will defer consideration of challenges to the merits of a proposed amended pleading until after leave to amend is granted and the amended pleading is filed."). The Court found the Tribe lacked standing to quantify its water rights. (Summary Judgment Order.) Because these new allegations potentially alter that holding, the Tribe's proposed revisions are not futile.

***6** Each of the Rule 15(d) factors weigh in favor of allowing the Tribe to supplement its Complaint with new standing allegations. Accordingly, the Court GRANTS the Motion with respect to those allegations.

C. Proposed Injunction Request

Finally, the Tribe seeks to supplement the Complaint with a request to enjoin the Defendants from producing water on tribal land without authorization. (Proposed FAC at 22 (requesting that the Court "[e]njoin[ ] the Defendants from producing groundwater on the Reservation without authorization and from producing groundwater used by the Tribe to replenish the aquifer and partially offset the lingering harmful effects of long standing cumulative overdraft.").) Such a revision would dramatically broaden the scope of this litigation. For nearly seven years, the parties have been litigating the scope of the Tribe's water rights. While a resolution of the current issues could theoretically limit Defendants' ability to pump water, such a limit would be defined by the Tribe's water rights. In other words, Defendants' ability to pump would only be limited insofar is it infringes on the Tribe's rights. Conversely, the proposed injunction could prevent Defendants from pumping any water at all. Moreover, the proposed injunction is wholly divorced from the Tribe's water rights and appears to instead rely on a property right. Such a dramatic revision after so long would unduly prejudice Defendants. Accordingly, the Court DENIES the Tribe's attempt to supplement the Complaint with a request to enjoin Defendants from pumping water on tribal land without authorization.

IV. CONCLUSION

For the reasons above, the Court GRANTS-IN-PART and DENIES-IN-PART Plaintiff's Motion. The parties are DIRECTED to review the attached Appendix for the Court's specific ruling on each proposed revision. The amended complaint shall be filed no later than July 17, 2020.

IT IS SO ORDERED.

Appendix

Location	Proposed Amendment	Court's Order

Page 2, line 21	Deleted after “members”: “,”	GRANT
Page 2, line 22	Added after “Reservation”: “; recognize, declare, and quantify the Tribe's beneficial ownership of the volume of pore space underlying the Tribe's Reservation;”	GRANT
Page 2, line 25	Added after “water”: “and pore space”	GRANT
Page 4, line 4	Added after “rights”: “,”	GRANT
Page 4, line 6	Deleted after “Tribe's”: “right to use” Added: “beneficial ownership of a defined amount of subterranean”	GRANT
Page 4, line 6	Added after “space”: “—defined for purposes of this lawsuit as the void or open subterranean spaces that are not filled by solid material or the empty space between rocks, sand, and other solid soil where water can be stored—”	GRANT
Page 4, line 7	Deleted after “Valley”: “to store the Tribe's federally reserved water in an amount sufficient to meet all of the Tribe's present and future reasonable needs” Added: “and injunctive relief protecting the pore space from degradation or diminishment by Defendants”	GRANT
Page 4, line 21	Deleted after “water”: “, without any compensation to the Tribe” Added: “based on its claim that the pore space underlying the Reservation is subject to a public servitude allowing its use by CVWD”	GRANT
Page 4, line 23	Deleted after “Defendants”: “Franz De Klotz, Ed Pack,”	GRANT
Page 4, line 23	Added after “Nelson”: “, G. Patrick O'Dowd, Anthony Bianco, and Castulo R. Estrada” Deleted: “and Debi Livesay”	GRANT
Page 5, line 9	Deleted after “water”: “, without any compensation to the Tribe”	GRANT

	Added: "based on its claim that all pore space underlying the Reservation is a public resource available for use by DWA"	
Page 5, line 11	Deleted after "Oygar,": "Thomas Kieley, III" Added: "Kristin Bloomer"	GRANT
Page 12, line 7	Added new paragraphs after Paragraph 39 and renumbered remaining Complaint accordingly: "40. CVWD recently estimated, in an expert report that it filed in this case, that the annual natural groundwater recharge to the West Whitewater Area of Benefit, which underlies the majority of the Agua Caliente Reservation, is approximately 40,000 AF. See Doc. 200-4, Page.ID 7499. "41. DWA recently estimated the annual natural groundwater recharge (natural inflows less natural outflow) of the West Whitewater River Management Area, which includes most of the Agua Caliente Reservation, to be approximately 30,500 AF. Engineer's Report Groundwater Replenishment and Assessment Program for the West Whitewater River Subbasin, Mission Creek Subbasin, and Garnet Hill Subbasin Areas of Benefit, Desert Water Agency 2019/2020 (May 2019) (2019 DWA Replenishment Report) at III-1. "42. As of 2019, existing annual production of groundwater in the West (or Upper) Whitewater River Subbasin, also known as the Indio Subbasin, which underlies the majority of the Agua Caliente Reservation, is in excess of the annual natural groundwater recharge, meaning there is no excess groundwater in the aquifer."	GRANT
Page 12, line 13	Deleted after "it": "projects" Added: "has projected"	GRANT

Page 12, line 18	Added new paragraph after renumbered Paragraph 44 (i.e. Paragraph 41 in original Complaint) and renumbered remaining Complaint accordingly: “45. According to CVWD's records, CVWD has produced at least 170,000 AF of groundwater from wells located on the Agua Caliente Reservation since 1987, with annual production amounts ranging between approximately 1,532 AF and 9,705 AF. Since 2013, CVWD has produced 29,788 AF of groundwater from wells located on the Reservation, and continues to pump groundwater from wells located on the Reservation, without the Tribe's authorization. After the Tribe filed this lawsuit, CVWD ceased publishing, and otherwise making available including in response to California Public Records Act requests, reports showing how much water is pumped by individual pumpers in the Coachella Valley, including on the Agua Caliente Reservation.”	DENY
Page 12, line 25	Added new paragraph after renumbered Paragraph 47 (i.e. Paragraph 43 in original Complaint) and renumbered remaining Complaint accordingly: “48. Since 1987, according to DWA's records, DWA has produced at least 643,250 AF of groundwater from wells located on the Agua Caliente Reservation, with annual production amounts ranging from approximately 4,265 AF to 23,686 AF. Since 2013, DWA has produced 61,640 AF of water from wells located on the Reservation, and continues to pump groundwater from wells located on the Reservation, without the Tribe's authorization.”	DENY
Page 13, line 8	Added after “and”: “while the Defendants claim to have slowed or arrested ongoing overdraft through their recharge program, they concede that their recharge efforts will not reduce or diminish cumulative overdraft, see 2019	GRANT

	DWA Replenishment Report at II-29, nor will it address”	
Page 13, line 11	Added new paragraphs after renumbered Paragraph 51 (i.e. Paragraph 46 in original Complaint) and renumbered remaining Complaint accordingly: “52. The most up-to-date available estimates, published by DWA, indicate that the historic cumulative net overdraft— which takes into account the amount of imported water artificially recharged by the Defendants—totals 538,000 AF in the West Whitewater River Management Area and 109,000 AF in the Mission Creek Management Area. See id. These figures include all-time record artificial recharge in 2017 resulting from record-level precipitation the preceding winter. See id. at II-32 and Ex. 1. These figures also include more than 235,000 AF of so-called “advanced delivery” water that is stored in the aquifer for Metropolitan Water District (MWD), see id. at Ex. 6, and is subject to recall by MWD on demand. “53. This cumulative overdraft has resulted in a lowered groundwater table in the basin, including under the Agua Caliente Reservation. Lowering of the groundwater table increases the costs of producing groundwater by necessitating deeper wells, more powerful pumps, and higher energy costs for increased pump lifts. These cost increases are directly harmful to those who produce groundwater on the Reservation. “54. The Tribe has produced groundwater on the Reservation in the past for its own use. The Tribe is resuming groundwater production on the Reservation. It is currently installing wells in both of Defendants’ service areas that the Tribe anticipates will produce groundwater no later than January, 2020, likely sooner. The groundwater levels at both of these wells are lower than they would	GRANT

be but for Defendants' overdraft of the aquifer. As a result, the cost to the Tribe for pumping groundwater at these wells will be higher due to higher pump lifts. Deeper wells increase energy costs as well.

"55. The Tribe is taking additional affirmative, concrete steps, for additional groundwater production in the immediate future. The Tribe has invested in additional opportunities and is in negotiations to produce additional groundwater on the Reservation. The Tribe intends to fully develop and use its groundwater rights. Because of Defendants' over use of groundwater in the aquifer has caused groundwater levels under the Reservation to lower, the Tribe's cost to produce groundwater from all of its wells will be higher than it would be if the aquifer were at its natural, pre-Reservation level.

"56. August 6, 2019, Agua Caliente enacted an ordinance to establish the Agua Caliente Water Authority, a tribal government charged to "protect, manage, and regulate the Tribe's Groundwater, and to promote the public health, safety, welfare, and economic security of the Tribe, Tribal Members, Tribal Entities, and the Reservation Community." Agua Caliente Water Authority Ordinance (AC Water Ord.), Ch. 1 § I.C. 1 The Water Authority is directed and authorized to, "among other things, administer well permits, monitor and manage groundwater levels and groundwater quality, and administer the imposition of groundwater production fees on producers of the Tribe's Groundwater." Id., Ch. 1 § I.B.10.

"57. To begin restoration of the aquifer and offset the increased costs of on-Reservation groundwater production and other ill effects resulting from the Defendants' overdraft of the aquifer, the Tribe intends to put a portion of the federal reserved water right decreed in this litigation

to use by storing it to replenish the aquifer under the Reservation. To that end, on September 24, 2019, the Tribal Council adopted a resolution directing the Agua Caliente Water Authority to ensure that 20,000 AF of the groundwater reserved for the Agua Caliente Reservation by the United States is stored annually in the aquifer to alleviate depletion resulting from the Defendants' overuse. The Tribe's efforts, which will be implemented through the Tribe's permitting process, will be frustrated if the Defendants are allowed to continue to extract groundwater on the Reservation that the Tribe stores in an effort to reduce the effects of long standing cumulative overdraft. Moreover, the Tribe is unable to ascertain the amount of federal reserved groundwater available for storage absent a quantification of its federal reserved water right.

"58. The Tribe estimates its federally reserved groundwater right to be at least 60,000 AF per year. The Tribe intends to fully develop and use its groundwater rights.

"59. The Tribal Council seated the Water Authority Board on October 8, 2019. See Resolution 45-19. Pursuant to Ch. 2, § II.H of the AC Water Ord., the Water Authority is now preparing a report that will, inter alia, recommend water production fees to be applied to the production of the Tribe's groundwater on the Reservation, including by the Defendants. This report will be completed by November 4, 2019.

"60. Lessees of allotted land on the Reservation currently pump groundwater. Defendants regulate and unlawfully burden the Tribe's groundwater right by charge all non-de minimis pumpers of groundwater on the Reservation a replenishment assessment based on how much water the groundwater pumpers produce.

"61. On September 30, 2019, DWA sent the Tribe a statement

	claiming that the Tribe owes over $200,000 in fees for replenishment assessments that DWA levied on the Tribe when the Tribe pumped groundwater on the Reservation from 2009 to 2012. The Tribe anticipates that DWA will continue to assess this fee on the Tribe when it resumes pumping groundwater." Added: "1The Water Ordinance and related resolutions are found on the Tribe's website: http://www.aguacaliente.org/content/Agua%20Caliente%20Water%20Authority/"	
Page 15, line 1	Deleted paragraph after renumbered Paragraph 69 (i.e. Paragraph 54 in original Complaint) and added: "70. Pore space is a constituent element of the land reserved for Agua Caliente by the United States in the 1876 and 1877 Executive Orders."	GRANT
Page 15, line 4	Added new paragraphs after renumbered Paragraph 70 (i.e. Paragraph 55 in original Complaint) and renumbered remaining Complaint accordingly: "71. The Tribe has proprietary interests in the land comprising its Reservation, including in the pore space that it beneficially owns. "72. The Defendants' assertion of jurisdiction and/or a public servitude over the pore space underlying the Agua Caliente Reservation casts a cloud over the existence, scope, and extent of the Tribe's property right. "73. The Tribe has sovereign interests in and powers over its Reservation, including its federally reserved water rights and in the pore space that is a constituent element of the land beneficially owned by the Tribe and its members. The Defendants' actions identified herein undermine and infringe upon the Tribe's sovereign authority over its Reservation.	GRANT

	"74. Similarly, the Defendants' assertion of jurisdiction over and an unfettered right to use for their benefit the pore space reserved for Agua Caliente is an affront to the Tribe's sovereignty over its Reservation territory."	
Page 15, line 7	Replaced "56" with "74"	GRANT
Page 16, line 1	Added after "resources": "and constituent elements, including pore space,"	GRANT
Page 16, line 27	Replaced "sufficient" with "the volume of"	GRANT
Page 16, line 27	Deleted after "space": "in the Groundwater Basin aquifer"	GRANT
Page 17, line 1	Deleted after "the": "Coachella Valley and the"	GRANT
Page 17, line 1	Added after "Reservation": "and a declaration of the volume of pore space so owned" Deleted: "to store its Federally reserved right to groundwater for all present and future purposes"	GRANT
Page 17, line 6	Replaced "66" with "85"	GRANT
Page 17, line 8	Added after "groundwater": "and pore space"	GRANT
Page 17, line 15	Added after "groundwater": ", including but not limited to storing reserved water to partially offset the lingering ill effects of long standing cumulative overdraft"	GRANT
Page 18, line 14	Deleted after "Tribe's": "superior, prior and paramount ownership interest in sufficient pore space in the Groundwater Basin aquifer underlying the Coachella Valley and the Tribe's Reservation to store its Federally reserved right to groundwater for all present and future purposes" Added: "sovereign and proprietary interests in pore space or interfering with the Tribe's ability to use those rights"	GRANT

Page 19, line 17	Added new paragraph after Paragraph 5 and renumbered remaining Complaint accordingly: "6. Further declares that the Tribe is the beneficial owner of the volume of pore space underlying, and forming a constituent element of, the lands reserved for the Tribe by the United States;"	GRANT
Page 19, line 21	Added new paragraph after renumbered Paragraph 7 (i.e. Paragraph 6 in original Complaint) and renumbered remaining Complaint accordingly: "8. Quiets the Tribe's title to pore space and quantifies the volume of pore space beneficially owned by the Tribe;"	DENY
Page 20, line 1	Added new paragraph after renumbered Paragraph 10 (i.e. Paragraph 8 in original Complaint) and renumbered remaining Complaint accordingly: "11. Enjoins the Defendants from producing groundwater on the Reservation without authorization and from producing groundwater used by the Tribe to replenish the aquifer and partially offset the lingering harmful effects of long standing cumulative overdraft;"	DENY

All Citations

Slip Copy, 2020 WL 5775174

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2007 WL 7532283
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States Bankruptcy Appellate Panel,
of the Ninth Circuit.

In re Jonathan Elia BEKHOR, Debtor.
Vincent Rosati and Loretta Rosati, Appellants,
v.
Jonathan Elia Bekhor, Appellee.

Nos. CC–06–1160–MoDT, CC–06–1161–MoDT,
CC–06–1162–MoDT, CC–06–1269–MoDT.
|
Bankruptcy No. LA 03–30700–ER.
|
Adversary No. LA 03–02707–ER.
|
Argued and Submitted on Jan. 17, 2007.
|
Filed March 19, 2007.

Appeal from the United States Bankruptcy Court for the Central District of California, Honorable Ernest M. Robles, Bankruptcy Judge, Presiding.

Before: MONTALI, DUNN, and TCHAIKOVSKY,[2] Bankruptcy Judges.

2 Hon. Leslie J. Tchaikovsky, Bankruptcy Judge for the Northern District of California, sitting by designation.

MEMORANDUM [1]

1 This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (*see* Fed. R.App. P. 32.1), it has no precedential value. *See* 9th Cir. BAP Rule 8013–1.

***1** Creditors Vincent and Loretta Rosati ("Creditors") appeal from the bankruptcy court's judgment discharging their individual claims against debtor Jonathan Elia Bekhor a/k/a Jonathan Elia Sassoon Bekhor ("Debtor") and the order discharging Debtor generally. Creditors argue that they should have been granted leave to amend their complaint to plead a claim for nondischargeability of securities-related debts under Section 523(a)(19).[3] Creditors also argue that the bankruptcy court did not properly consider Debtor's failure to keep books and records for purposes of denying Debtor's discharge under Section 727(a)(3).

3 Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001–9036, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. 109–8, 119 Stat. 23, because the case from which this appeal arises was filed before its effective date (generally October 17, 2005).

We believe that the bankruptcy court applied an incorrect legal standard in denying Creditors leave to amend their complaint so we REVERSE the judgment discharging Creditors' claims and REMAND for further proceedings under Section 523(a)(19). We AFFIRM the discharge order under Section 727.

I. FACTS

Creditor Vincent Rosati was a plumber who became disabled in a job related explosion in 1992. He obtained a settlement and invested the funds with a broker, Alan Cohen ("Cohen"). Cohen later moved, with part of Creditors' account, to a firm called Island Securities, Inc. ("Island") which Debtor was purchasing.

Island engaged in day trading. There was conflicting evidence about Debtor's role at Island, whether Creditors' signatures were forged on some Island documents, and whether Debtor ever spoke with Creditors. Creditors allege that Cohen, Debtor, and others defrauded them out of most of their principal by, among other things, making approximately 18,000 buy/sell trades for 5,121,000 securities over roughly seven to nine months, charging commissions of between $17.00 and $85.00 per trade, and trading on margin at a cost of $151,403.21 in margin interest.

A. *The arbitration award*

Creditors obtained an arbitration award against Debtor, Cohen, and Cohen's supervisor John Lee ("Lee"), jointly

and severally, for compensatory damages of $113,316.00, punitive damages of $400,000.00, costs, pre- and post-judgment interest, and attorneys' fees. The award lists almost a dozen causes of action asserted by Creditors—including violation of federal securities law, breach of contract, and failure to supervise—but it makes no findings of fact and its only specific conclusion of law is that "Cohen, Lee, [Debtor], and [Island] violated Sections 517.211 and 517.301, Florida Statutes.[4]" The award was confirmed by a district court in Florida, except for attorneys' fees. The district court held that "an arbitration panel need not state any basis for its award," that Florida securities law (which apparently permits the scienter requirement to be satisfied by negligence as opposed to reckless disregard) was not necessarily the only basis for the award, and that punitive damages could have been awarded under either federal securities law or New York law. In 2001 the district court issued an amended judgment of slightly less than $550,000 against Debtor, Cohen, and Lee (the "Arbitration Judgment").

4 Both Florida statutes involve securities transactions. That is significant because Section 523(a)(19) (quoted in full in footnote 5 below) makes nondischargeable certain securities-related debts. Florida Statutes Section 517.211 provides for rescission or damages against (1) any purchaser or seller of a security in violation of Florida Statutes Section 517.301 (which is entitled "Fraudulent transactions; falsification or concealment of facts") and (2) jointly and severally, against "every director, officer, partner, or agent of or for the purchaser or seller, if [such person] has personally participated or aided in making the sale or purchase...." Fla. Stat. § 517.211(2) (2003).

***2** Creditors attempted to collect the Arbitration Judgment. They allege that Debtor lived a lavish lifestyle but hid his income and assets using entities that he secretly owns or controls. Debtor filed a Chapter 7 petition in 2002 (LA 02–35441–ER) which was dismissed for failure to file bankruptcy schedules or a statement of financial affairs. On August 6, 2003 (the "Petition Date"), Debtor filed the voluntary Chapter 7 petition commencing the present bankruptcy case (LA 03–30700–ER).

B. *Creditors' complaint and motions to amend it*

In November of 2003 Creditors filed their complaint commencing this adversary proceeding (Adv. No. LA 03–02707–ER). They later filed a motion to amend the complaint, which was granted, and they filed their first amended complaint (the "FAC") on March 25, 2005. Trial was set for September 26, 2005. On September 8, 2005, Creditors filed a motion for leave to amend the FAC under Rule 15(a) of the Federal Rules of Civil Procedure (incorporated by Fed. R. Bankr.P. 7015) ("Rule 15(a)") to add a claim under Section 523(a)(19) (the "Second Motion to Amend").[5]

5 Section 523(a)(19) provides, in full:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
> * * *
> (19) that—
> (A) is for—
> (i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or
> (ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and
> (B) results from—
> (i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;
> (ii) any settlement agreement entered into by the debtor; or
> (iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

11 U.S.C. § 523(a)(19).

The bankruptcy court vacated the existing trial date and set a briefing schedule on the Second Motion to Amend. After hearing oral argument the bankruptcy court denied the motion and set a new trial date of January 23, 2006.

C. *Evidence regarding Debtor's missing and incomplete financial records*

1. *Tax returns, wife's cancer*

At trial Debtor testified that he stopped filing tax returns in 1997 or 1998. He did not explain why, but he placed most of the blame for his later failure to keep or preserve financial

information on the fact that his wife was diagnosed with cancer "towards the end of 1999 to 2000" and that this cancer was "grade four" of a type that is "99.9 percent" terminal. Transcripts, Jan. 23, 2006, p. 57:21–22, Jan. 25, 2006, p. 113:9–20. According to Debtor, he and his family fell apart emotionally when this happened.

2. *Lack of computer or paper records*

Debtor explained that his computer crashed, wiping out his Quickbooks files, that he had prepared his original bankruptcy schedules and statement of financial affairs ("SFA") on an emergency basis, because of pending contempt proceedings, and that he had given his only copy of various financial documents, including bank records, to Creditors in response to discovery requests because it was too expensive to copy them. Debtor testified that when he later recovered copies of those financial records from Creditors he used them to prepare his amended bankruptcy schedules and SFA. Transcript, Jan. 24, 2006, pp. 9:4–5, 19:8–21. Debtor testified that he had produced "no W'2's or 1099's" from some entities because they did not provide him with those documents. Transcript, Jan. 23, 2006, p. 90:5–20.

3. *Payment of Debtor's bills by other persons*

Debtor's bank account had been garnished in the Spring of 2002 so he arranged for third parties who owed him consulting fees or salary to pay his landlord, credit card bills, auto insurance premiums, and some other debts directly. Transcript, Jan. 24, 2006, pp. 10:3–4, 43:21–25, 46:3–16, 61:10–21.[6] Creditors' attorney suggested that this was inconsistent with his deposition testimony. *Id.,* p. 11:8–11. Debtor testified that he may have misunderstood the deposition question (*id.* at 12:10–11) and that when he was asked about his health at the end of the deposition he stated that he was on medications and was feeling dizzy. Transcript, Jan. 25, 2006, pp. 183:15–186:11.

[6] Debtor's testimony was not entirely consistent on this point. At one point he stated, "I don't believe [one entity] ever paid my bills" (Transcript, Jan. 24, 2006, p. 39:10) but shortly afterwards he testified that this same entity paid his health insurance and auto insurance premiums in 2004. *Id.* p. 43:21–25.

4. *Current employment*

***3** Debtor alleges that he is employed at an internet café for $75 per day plus payment of his medical and automobile insurance premiums. Debtor testified that he has been barred from the securities industry, apparently for failing to satisfy the Arbitration Judgment.

5. *International and domestic connections*

Debtor's mother was raised in Shanghai, his father had connections in Asia, and Debtor testified that this facilitated his business dealings in Hong Kong and elsewhere. Debtor explained that a number of the transactions in his name or through his bank account were actually on behalf of others and did not reflect his own assets or income or control of various foreign and domestic entities. *See, e.g.,* Transcripts, Jan. 24, 2006, pp. 3:21–23, 53:10–56:7, 56:17–57:2, 67:1–9, Jan. 25, 2006, pp. 165:11–169:6.

6. *Loans to Debtor*

Debtor allegedly did not recall how much money was loaned to him by an entity he owns called Stock Trading Simulator ("Simulator") and had no loan agreement with that entity, but called it a loan for tax purposes. Debtor produced a letter agreement documenting a $2 million loan to him from another entity, which he claims not to own. Debtor testified that at Creditors' request he had asked that entity verbally for an accounting but that "[t]he whole transaction was on a handshake" and "[t]hey were insulted that I was asking." Transcript, Jan. 23, 2006, pp. 90:21–91:3, 91:22–92:16.

7. *Trade Fast and $750,000 transfer*

Debtor acknowledged that when a third party agreed to purchase an entity called Trade Fast (a/k/a Tradefast), which Debtor claims not to own, part of the consideration was one million unrestricted shares to be issued to "such parties as [Debtor] shall identify." According to Debtor he was "acting on behalf of Trade Fast" and not for his own benefit. Transcript, Jan. 23, 2006, pp. 80:18–81:7. He testified that certain other options to be granted to him personally for facilitating this transaction were never issued. *Id.*

Debtor did not include in his disclosures of income for 2000 deposits of $750,000 and $250,000 into his bank account because those deposits were made "for safekeeping," or at least that this is "kind of an abbreviation of what happened." Transcript, Jan. 23, 2006, p. 65:15–21. Debtor later explained that the third party deposited $750,000 in his bank account (or the account of a company he owns), pending completion of the sale transaction, and he did not regard these funds as his own and held them for only a few weeks. On cross

examination he admitted that in fact he transferred only $710,000 back out of his account, the remaining $40,000 may have been his fee, and he did not know where the money was. Transcript, Jan. 25, 2006, pp. 195:18–196:5.

D. *The bankruptcy court's post-trial rulings*

After a four day trial the bankruptcy court issued a Memorandum of Decision in Debtor's favor on all claims. The bankruptcy court agreed with Creditors that Debtor's records were inadequate and that this made it impossible for Creditors to determine his financial condition or material business transactions, but it also ruled that Debtor had carried his burden to justify the inadequacy and nonexistence of records under Section 727(a)(3):

> ***4** ... Debtor's failure to keep financial records was justified. Debtor testified that his wife was diagnosed with incurable cancer in 1999/2000, and that he basically fell apart. His daughter, Joanna, also testified that after her mother became ill, Debtor's focus was solely on his wife. In addition, his wife's illness took its toll on the rest of the family. During this time, Debtor's other daughter attempted suicide on more than one occasion and his youngest son dropped out of school. A person under like circumstances also would not ordinarily keep books or records.
>
> ... Debtor has met his burden of proving that [his] failure to maintain books and records was justified. The Debtor's discharge will not be denied under § 727(a)(3).

On April 12, 2006, the bankruptcy court entered its judgment that all claims of Creditors against Debtor "are hereby discharged." On the same day the bankruptcy court entered duplicative orders granting Debtor a discharge under Section 727. Creditors filed timely notices of appeal from the judgment and the orders, and also filed a notice of appeal from the bankruptcy court's order denying their Second Motion to Amend to add a claim under Section 523(a)(19) (BAP Nos. CC–06–1160 through CC–06–1162). In June the clerk of the BAP filed an order consolidating these appeals.

II. ISSUES

A. Did the bankruptcy court abuse its discretion under Rule 15(a) by denying Creditors' Second Motion to Amend to add a claim under Section 523(a)(19)? [7]

[7] Both parties argue about the merits of Creditors' claim under Section 523(a)(19). Debtor argues that the Arbitration Judgment has no preclusive effect because Florida Statutes Section 517.211 has been found to require only a showing of negligence to impose liability, citing *In re Goldbronn,* 263 B.R. 347, 361 (Bankr.M.D.Fla.2001). Debtor adds that there are unresolved issues of how to apply Section 523(a)(19) to joint and several liability and to punitive damages, and the claim "almost certainly" will implicate additional discovery. Creditors argue that there are no genuine factual issues, that neither fraud nor any intentional conduct is required under Section 523(a)(19), that all that is required is a debt based on a securities law violation and a judgment (citing *In re Whitcomb,* 303 B.R. 806, 810 (Bankr.N.D.Ill.2004)), and that if punitive damages are included in the award then they are necessarily nondischargeable.

We express no opinion on these disputes and reject Creditors' request that we enter judgment (or direct the bankruptcy court to enter judgment) in their favor. The merits of Creditors' Section 523(a)(19) claim and Debtor's defenses are not before us.

B. Did the bankruptcy court apply an incorrect legal standard to Debtor's justification of his failure to keep books and records under Section 727(a)(3) or did it clearly err in finding that Debtor's justification was adequate? [8]

[8] We dispose of several additional issues briefly. Debtor argues that Creditors waived legal issues by not including them in their statement of issues on appeal. We reject this argument because Creditors' opening brief clarified the issues on appeal, Debtor did not ask for more time to file his own brief, and Debtor has shown no prejudice. Debtor argues that Creditors' designation of record did not include transcripts. This argument has been mooted because a member of this panel granted Creditors' motions to supplement their designation and include the transcripts as part of the record on appeal. Creditors appealed from the bankruptcy court's order awarding costs (BAP No. CC–06–1269) but at oral argument before us the parties agreed that the award of costs would be treated as part of the judgment discharging Creditors' claims

and that appeal would be abandoned. That appeal is hereby DISMISSED.

III. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. § 157(b)(2)(I) and (J). We have jurisdiction under 28 U.S.C. § 158(c).

IV. STANDARDS OF REVIEW

Denial of a motion for leave to amend a complaint is reviewed for abuse of discretion. *Foman v. Davis,* 371 U.S. 178 (1962). A bankruptcy court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence. We also find an abuse of discretion if we have a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached. *In re Beatty,* 162 B.R. 853, 855 (9th Cir.BAP1994).

We review de novo Creditors' argument that the bankruptcy court applied an incorrect legal standard under Section 727(a)(3), and we review for clear error the bankruptcy court's determination that Debtor adequately justified his failure to keep or preserve financial information, which is a factual finding. *In re Lawler,* 141 B.R. 425, 428 (9th Cir.BAP1992). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Id.* at 429 (citation omitted). [9]

9 Debtor cites authority that gross abuse of discretion is the standard under Section 727(a)(3), citing *In re Cox,* 904 F.2d 1399, 1401 (9th Cir.1990) ("*Cox I*"), *appeal after remand,* 41 F.3d 1294 (9th Cir.1994) ("*Cox II* "). This is no different from reviewing legal conclusions de novo and findings of fact for clear error. *In re Roosevelt,* 87 F.3d 311, 314 n. 2, *amended,* 98 F.3d 1169 (9th Cir.1996), *overruled on other grounds by, In re Bammer,* 131 F.3d 788, 792 (9th Cir.1997) (en banc).

There is also authority for applying a de novo standard of review to the ultimate determination whether inadequate recordkeeping is "justified" under Section 727(a)(3). *Meridian Bank v. Alten,* 958 F.2d 1226, 1329–30 and n. 2 (3d Cir.1992). Creditors do not raise this issue and we believe that *Meridian* is distinguishable. The issue in *Meridian* was whether operating on a cash basis out of fear of creditors' liens was a justification for not keeping financial records. It was not, *Meridian* held. That was a legal issue or a mixed question of fact and law. In contrast, Debtor in this case claimed to be distraught and incapable of keeping adequate financial records because of his wife's cancer, his child's attempts at suicide, and other personal and family problems. Evaluating this justification, and how Debtor's emotional reaction compares to others in like circumstances, is heavily factual in nature. Therefore the bankruptcy court's finding of an adequate justification under Section 727(a)(3) is reviewed for clear error.

V. DISCUSSION

A. *The bankruptcy court should have granted Creditors leave to amend their complaint to add a claim under Section 523(a)(19)*

***5** The bankruptcy court denied the Second Motion to Amend under Rule 15(a). Rule 15(a) provides in relevant part that leave of court is required in cases such as this one and that "leave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a) (incorporated by Fed. R. Bankr.P. 7015). [10]

10 We are not actually convinced that Creditors needed to amend the FAC. Its first paragraph states, "This is a proceeding ... to determine the dischargeability of a *securities fraud judgment* ...." (Emphasis added.) Attached to the FAC and later admitted in evidence are copies of the arbitration award and the Arbitration Judgment confirming that award. The FAC is replete with phrases like "securities fraud" and "fraudulent trading practices." The FAC does not cite Section 523(a)(19), but notice pleading requires only factual allegations and a prayer for relief, not citation of any statutes. *See generally* Fed. R. Bankr.P. 7008 (incorporating Fed.R.Civ.P. 8) *and In re County of Orange,* 203 B.R. 983, 993 (Bankr.C.D.Cal.1996) ("If facts alleged by a plaintiff are sufficient to state a claim showing he is entitled to any relief, plaintiff need not set forth the

legal theory on which he relies.") (citation omitted), *aff'd in part, rev'd in part on other grounds,* 245 B.R. 138 (C.D.Cal.1997).

> This is not to say that Creditors were entitled to keep their legal theories secret. Those legal theories would normally be disclosed in response to contention interrogatories or a motion for a more definite statement or through similar procedures. The excerpts of record contain stipulated pretrial orders by which Creditors agreed that no legal claims remained to be tried other than those listed, which do not include Section 523(a)(19). In effect, Creditors voluntarily narrowed the scope of the FAC.
>
> Perhaps Creditors should have filed a motion to amend the stipulated pretrial orders so as to restore the FAC to its original scope. Instead they filed the Second Motion to Amend to add an explicit claim under Section 523(a)(19). We see no practical difference. No party has raised this issue and both parties and the bankruptcy court treated Rule 15(a) as the governing rule in the circumstances presented. So do we.

1. *Bankruptcy court's ruling*

The bankruptcy court's written order states that the Second Motion to Amend is denied "on the grounds that (1) [Creditors] had inexcusably *unduly delayed* in seeking [to amend], and (2) [Debtor] would be *prejudiced* if the [motion] was granted." (Emphasis added.) At the hearing on the Second Motion to Amend the bankruptcy court stated:

> With respect to *undue delay,* this is not a situation where the facts underlying the proposed amended complaint or the law was at all hidden or that it only came up during discovery ... This is ... a situation where the lightbulb just went off virtually at the eleventh's hour * * *
>
> ... In terms of *prejudice* to the Debtor, Debtor's law firm operating on a pro bono basis, has been going down the road that has been dictated by the extant complaint, and now to completely *switch gears,* I think, would be unfair to it and to the Debtor as well. And I'm not entirely sure that the 523(a)(19) [claim] promises to be the silver bullet that [Creditors think] it will be. I think that there are *significant issues of first impression* having to do with *punitive damages* and whether those are liable to dischargeable [sic] or not.
>
> The effect of a *joint and several liability judgment,* I think, is yet to be explored within the context of that statute here in this Circuit and this District, certainly. There are almost no findings of fact that I've seen with respect to the underlying [Arbitration Judgment]. So I'm not sure, when you get right down to it, how much is going to be dischargeable by way of 523(a)(19).
>
> All that is a precursor to another element, I think, of prejudice, and that is that the—if the Court were to grant the motion, that would not end in a trial. It would likely require *further briefing* by way of a summary judgment motion.... Somebody's probably going to make a counter motion, opposition.
>
> It's taking the litigation to a new direction that is going to be *quite expensive and I equate that with prejudice* to the firm and to its client. So, I think that that is an element that we need to really take into account when we talk about prejudice as well.
>
> * * *
>
> I want to make clear ... that the Court is not determining this solely on the basis of undue delay, but that it has also articulated ... the specific elements of prejudice....

Transcript, Oct. 17, 2005, pp. 1:18–3:24, 9:18–23 (emphasis added).

We reject Creditors' arguments that the bankruptcy court did not adequately state its reasons or confused prejudice to Debtor with prejudice to his pro bono counsel.[11] Nevertheless we hold below that Creditors' delay alone is insufficient to deny the Second Motion to Amend. There must also be prejudice, and Debtor has shown no cognizable prejudice.

11 Contrary to Creditors' assertions, this record "clearly indicates reasons" for denying leave to amend and the bankruptcy court was not required to reduce all of its reasons to writing. *DCD Prog's, Ltd. v. Leighton,* 833 F.2d 183, 186 (9th Cir.1987). We also reject Creditors' argument that prejudice to Debtor's pro bono counsel does not prejudice Debtor himself. The cases cited by Creditors do not hold otherwise. They merely follow the typical convention of not distinguishing between a party and its counsel. *See Howey v. U.S.,* 481

F.2d 1187, 1190 (9th Cir.1973); *DCD,* 833 F.2d at 186. It would be arbitrary to decide whether to allow an amendment based on whether the opposing party is represented by paid counsel or pro bono counsel. Analogous authority supports our conclusion. *See LeBrew v. Reich,* 2006 WL 1662595 at *5 (E.D.N.Y .) (denying extension to file answer and counterclaim because of prejudice to pro bono counsel who had "already expended considerable time, resources and funds in litigating their claims"). *Cf. Dennis v. Chang,* 611 F.2d 1302, 1308 (9th Cir.1980) (awarding costs to pro bono organization rather than prevailing party itself); *Brandenburger v. Thompson,* 494 F.2d 885, 889 (9th Cir.1974) (same).

2. *Extremely liberal standards for leave to amend*

***6** The Supreme Court has held:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded.... If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason —such as *undue delay,* bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, *undue prejudice to the opposing party by virtue of allowance of the amendment,* futility of amendment, etc.-the leave sought should, as the rules require, be "freely given."

Foman, 371 U.S. at 182 (citation omitted, emphasis added).

"[R]ule 15's policy of favoring amendments to pleadings should be applied with 'extreme liberality.' " *DCD,* 833 F.2d at 186 (citations omitted). The trial court has substantial discretion in determining when an amendment should be allowed, but denial of leave to amend is strictly reviewed. *Plumeau v. Sch. Dist. No. 40 Co. of Yamhill,* 130 F.3d 432, 439 (9th Cir.1997). The party opposing the amendment bears the burden of demonstrating why leave to amend should not be granted. *Butler v. Robar Enter., Inc.,* 208 F.R.D. 621, 623 (C.D.Cal.2002).

Prejudice carries more weight than the other items mentioned in *Foman. Eminence Capital, LLC v. Aspeon, Inc.,* 316 F.3d 1048, 1052 (9th Cir.2003). The Ninth Circuit has called prejudice the touchstone of the inquiry. *Id.* Not any prejudice will do. In the Supreme Court's words, prejudice must be "undue." *Foman,* 371 U.S. at 182. Any amendment to a complaint is prejudicial in some sense, because any amendment worth making increases potential liability, but that is not typically a ground for denying leave to amend. C. Wright, A. Miller & M. Kane, 6 *Fed. Practice & Proc. Civ.2d* ("*Fed. Practice & Proc.*") § 1487, text accompanying n. 13. The party opposing leave to amend bears the burden of establishing undue prejudice. *DCD,* 833 F.2d at 187.

3. *Debtor established delay, but delay alone does not justify denial of the Second Motion to Amend*

Debtor met his prima facie burden to show delay. Creditors' Second Motion to Amend was filed within three weeks of trial and almost two years after the adversary proceeding was commenced. The burden shifted to Creditors to offer a reasonable explanation for the delay. *U.S. v. Pend Oreille Pub. Util. Dist. No. 1,* 28 F.3d 1544, 1552 (9th Cir.1994). Creditors' only explanation is oversight by all three of the law firms representing them, which is inadequate. *See King v. Cooke,* 26 F.3d 720, 723 (7th Cir.1994) (rejecting "some sort of discovery rule" based on ignorance of the law).

Nevertheless, delay alone is not enough. The delay must be "undue," as stated in *Foman,* and we interpret "undue delay" to mean either extreme delay or delay combined with other facts such as material prejudice or bad faith. The Ninth Circuit has stated, "delay, by itself, is insufficient to justify denial of leave to amend." *DCD,* 833 F.2d at 186. Even some cases cited by Debtor recognize this general principle. *See Roberts v. Arizona Bd. of Regents,* 661 F.2d 796, 798 (9th Cir.1981); *King v. Cooke,* 26 F .3d at 723. *See also* S. Bernstein, Annotation, *Timeliness of Amendments to Pleadings Made by Leave of Court Under Fed.R.Civ.P. 15(a),* 4 A.L.R. Fed. 123, text accompanying n. 9.

***7** Debtor cites authority that "when extreme, delay itself may be considered prejudicial." *King v. Cooke,* 26 F.3d at 723. This makes sense. It is comparable to laches or a statute of limitations. Parties are eventually entitled to some repose even at the expense of meritorious claims, but only if the delay is extreme. *See* 6 *Fed. Practice & Proc.* § 1488, text accompanying n. 30 ("Some courts also have held that a long delay by the movant constitutes laches so that a refusal to permit an amendment is warranted."). *See also Kaplan v. Rose,* 49 F.3d 1363, 1370 (9th Cir.1994) ("Expense, delay, and wear and tear on individuals ... count toward prejudice.") (quoting trial court's comment with apparent approval).

The two year delay in this case is not "extreme." In *King* itself the defendants took three years to realize that they had admitted rather than denied all the key allegations against them due to a "word processing error," they admitted filing their answer "without carefully reading it," and because of the delay evidence was lost and witnesses could not be located. *King,* 26 F.3d 720 (passim). Nevertheless, leave to amend was proper because the prejudice did not flow from "the tardy amendment" but from the inability of plaintiff, a prisoner, to obtain replacement counsel for several years. The Seventh Circuit held "we cannot, after finding that the admissions were inadvertent and that the amendment was not prejudicial, hearken back to the formalist days of common-law pleading and reject defendants' attempts to correct their mistake." *Id.* at 724. *See also Howey,* 481 F.2d at 1190 (abuse of discretion to deny motion to amend filed five years after original complaint was filed, on second day of trial, even though movant was "unable to establish any reason or excuse for its neglect in failing to bring a timely motion to amend"); *Hurn v. Retirement Fund Trust,* 648 F.2d 1252, 1254–55 (9th Cir.1981) (abuse of discretion to deny leave to amend after two year delay); *In re Gunn,* 111 B.R. 291, 292 (9th Cir.BAP1990) (same, and motion filed two-and-one-half months before trial).

Debtor cites cases that at first glance appear to deny leave to amend based on delay alone, or delay plus a prior opportunity to amend. On closer analysis these cases either involve longer delays than this case or other distinguishing facts like prejudice or knowing of the need to amend but delaying anyway. *See, e.g., Mir v. Fosburg,* 646 F.2d 342, 347 (9th Cir.1980) (leave to add federal claim denied after plaintiff "continually represented" that he sought recovery only on state law grounds and waited for three years to seek amendment, after prior appeal to the Ninth Circuit); *McGlinchy v. Shell Chem. Co.,* 845 F.2d 802, 809 (9th Cir.1988) (stating that undue delay was sufficient to deny leave to amend, but case also involved prejudice and "repeated failure to cure deficiencies by amendments previously allowed"); *Swanson v. U.S. Forest Serv.,* 87 F.3d 339, 345 (9th Cir.1996) (leave to amend properly denied, but despite invitation, movant inexplicably did not seek leave to amend until after court granted opponent's motion to dismiss and after due date for dispositive motions); *Westlands Water Dist. v. Firebaugh Canal,* 10 F.3d 667, 677 (9th Cir.1993) (leave denied, but "appellants filed no motion to amend their complaint and gave no indication of a desire to do so until after the district court rendered its decision"); *Texaco, Inc. v. Ponsoldt,* 939 F.2d 794, 798–99 (9th Cir.1991) (leave denied, but movant's complaint in related action had alleged most of same facts a year before proposed amendment); *Jackson v. Bank of Hawaii,* 902 F.2d 1385, 1388 (9th Cir.1990) (leave denied, but movant "inexplicabl[y]" delayed even after it had learned the new facts at issue and had "fully analyze[d]" them, and amendment would have prejudiced opposing parties by requiring relitigation of separate action); *Chodos v. West Publ'g Co., Inc.,* 292 F.3d 992, 1003 (9th Cir.2001) (leave denied, but delay was not the only relevant circumstance, because trial court found prejudice and "the motion was a dilatory tactic"); *Acri v. Int'l Ass'n of Machinists,* 781 F.2d 1393, 1398 (9th Cir.1986) (leave denied, but movant's attorney admitted that delay "was a tactical choice").

***8** In *Foman* the Supreme Court held that the trial court had abused its discretion in denying leave to amend even though there is no explanation in the decision for the delay and the proposed amendment "would have done no more than state an alternative theory for recovery" on the facts previously alleged. *Foman,* 371 U.S. at 182. There is language in some cases that may appear contrary, but lower courts' decisions cannot override Supreme Court precedent and must be interpreted consistent with *Foman. Compare Westlands Water Dist.,* 10 F.3d at 677 ("We have held that a district court does not abuse its discretion in denying leave to amend where the movant has presented no new facts but only new theories and has provided no satisfactory explanation for his failure to develop the new contentions originally") (citation omitted) *with Mir,* 646 F .2d at 347 ("when a party has a valid claim, he should recover on it *regardless of his counsel's failure to perceive the true basis of the claim at the pleading stage,* provided always that a late shift in the thrust of the case will not *prejudice* the other party in maintaining his defense upon the merits") (quoting 5 *Fed. Practice & Proc.* § 1219, text accompanying nn. 18–19) (emphasis added)). *See also Johnsen v. Rogers,* 551 F.Supp. 281, 284 (C.D.Cal.1982) (delay not justified by counsel's failure to think of RICO claims previously, but leave to amend was denied partly for other reasons including "the severity of the remedies available under RICO"); *Goss v. Revlon, Inc.,* 548 F.2d 405, 407 (2d Cir.1976) (denial of third motion to amend complaint after a "barrage of post-trial motions, all of them meritless," would not be an abuse of discretion because movant advanced "no reason for his extended and undue delay, other than ignorance of the law" which "has been held an insufficient basis for leave to amend"), *distinguished by Moore v. City of Paducah,* 790 F.2d 557, 560 (6th Cir.1986) (unjustified delay alone was not a basis to deny leave to amend, distinguishing *Goss* statements as dicta).

For all of these reasons, Creditors were entitled to amend their FAC unless their delay is coupled with prejudice.

4. *Prejudice depends on whether the delay itself made Debtor's defense more difficult*

As Creditors put it, the bankruptcy court "expressed concern at the hearing that [Debtor's] counsel had been preparing for trial and would have to oppose [Creditors'] summary judgment motion if the court granted leave to amend." Creditors argue that "this is the nature of litigation and is not prejudicial." Creditors cite decisions finding no prejudice even though an amendment would have required additional legal work. *See In re Christian Life Center,* 45 B.R. 905, 909 (9th Cir.BAP1984); *Hurn,* 648 F.2d at 1254–55. Many of Creditors' other cases, cited above, are to the same effect.

Debtor cites cases that at first blush seem irreconcilable. They find prejudice, but the only stated basis is that the party opposing leave to amend has already engaged in legal work or would have to do more legal work in future in response to the proposed amendment. *See McGlinchy,* 845 F.2d at 809 (prejudice because new claims "would have required additional discovery on a wide range of new issues ... additional research and rewriting of trial briefs"); *Kaplan,* 49 F.3d at 1370 (prejudice, as described in decision, consisted of past discovery); *Roberts,* 661 F.2d at 798. This proves too much. By definition any amendment worth making would require additional legal work by the opponent in the future, so leave to amend would never be granted if that were cognizable prejudice.

***9** We believe that the unstated premise of these cases is that the delay itself caused prejudice, not the amendment per se. For example, a delay would be prejudicial if a party had to do *more* legal work because of the delay than if the amendment had been made sooner. Another example would be if a delay undermined a statute of limitations. *See Kaplan,* 49 F.3d at 1370 (proposed amendment would have added claim barred by statute of limitations in related case).

The alleged prejudice in this case is the time and money already spent by Debtor's pro bono legal counsel. Therefore the issue is whether Creditors' delay has caused Debtor's counsel to spend *more* time and money than they would have if the Section 523(a)(19) claim had been raised in the original complaint or FAC.

5. *The bankruptcy court erred by finding undue prejudice*

Debtor's counsel argued to the bankruptcy court that they would be prejudiced if the Second Motion to Amend were granted because they had already spent approximately 1000 hours and substantial expenses in defending the existing claims. This overstates the point. The Section 727 claims are entirely independent of any amendment to the Section 523 claims. Section 727 occupied much of the trial and, undoubtedly, much of the pretrial preparation. Nevertheless, in theory we agree with Debtor that some amount of time and money already spent on the Section 523 claims might have been wasted if Section 523(a)(19) truly were a silver bullet that mooted those claims. [12]

12 Ironically, Debtor's argument is supported by Creditor's own papers filed in the bankruptcy court. Creditors' Second Motion to Amend argues that liability under Section 523(a)(19) is so obvious that "[a] trial of all the remaining and presently existing causes of action would be *superfluous, unnecessary and a waste of time* for the parties and the Court." (Emphasis added.) If Creditors were correct then perhaps, as Debtor argued to the bankruptcy court, all the discovery and trial preparation on other claims under Section 523 would have been "wasted."

Debtor did not establish that this was true. To the contrary, Debtor argued that the Section 523(a)(19) claim was not a silver bullet and implicated complex legal issues. Debtor claims that Section 523(a)(19) does not cover punitive damages (the bulk of Creditors' monetary claim against Debtor) and includes at most a portion of Debtor's joint and several liability. On this appeal Debtor adds that the Section 523(a)(19) claim would "almost certainly" implicate additional discovery. [13] And as noted in its ruling, supra, the bankruptcy court doubted that Section 523(a)(19) was Creditors' silver bullet and questioned how much of Creditors' claim would be nondischargeable.

13 Debtor argues that he would have to take discovery on how the arbitration award was decided. Debtor does not explain the relevance, but perhaps in Debtor's view it makes a difference under Section 523(a)(19) whether the arbitration was based on Florida securities law or federal or New York law and whether Debtor's joint and several liability was based on negligence or some greater degree of

> intent. We do not speculate further. As noted above, the merits of the Section 523(a)(19) claim are not before us.

In other words, the only indications in the excerpts of record are that the Section 523(a)(19) claim for relief is not a sure thing. So, regardless of whether that claim had been included in Creditors' complaint from the outset, the parties still would have had to litigate all the other claims. Therefore Debtor has not shown that any time or expense of defending against those claims was wasted. There was no showing of prejudice.

We recognize that, at the end of the day, the Section 523(a)(19) claim could turn out to be a silver bullet after all. We express no position on the merits of that claim. Our only point is that Debtor has not met his burden to show that Creditors' delay actually caused any prejudice, let alone undue prejudice.

6. *Alternatively, it would be improper to deny leave to amend based on a presumption of undue prejudice without taking into account the ways to cure any such prejudice*

***10** Creditors argue that if there were any prejudice it could have been alleviated. They point out that the bankruptcy court could have let Debtor and his counsel choose whether to address the Section 523(a)(19) claim by summary judgment rather than going to trial on the other claims, or could have awarded costs including attorneys' fees to compensate Debtor and his counsel for any extra expenditure of time or money caused by Creditors' delay, or might have imposed other appropriate remedies. *See General Signal Corp. v. MCI Tel. Corp.,* 66 F.3d 1500, 1514 (9th Cir.1995) (costs may be imposed on amending party as condition for granting leave to amend); *Dennis v. Dillard Dept. Stores, Inc.,* 207 F.3d 523, 526 (8th Cir .2000) (denial of leave to amend was error when prejudice could be ameliorated by reopening discovery and deposing witnesses if necessary and district court had discretion to order moving party to pay costs incurred as a result of amendment).

Debtor argues that Creditors have waived any argument about ameliorating prejudice because they did not raise this issue before the bankruptcy court. *See Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills,* 321 F.3d 878, 882 (9th Cir.2003). That puts the cart before the horse. Creditors were not required to respond to an argument that Debtor did not make. As discussed above, Debtor did not articulate any actual amount of time or money incurred because of Creditors' delay, so the burden was not on Creditors to speculate about prejudice and then rebut that speculation.

We also believe that any decision whether potential prejudice amounts to actual prejudice must include some consideration whether the hypothetical prejudice could be ameliorated. This approach is consistent with the Ninth Circuit's directive that "[R]ule 15's policy of favoring amendments to pleadings should be applied with 'extreme liberality.' " *DCD,* 833 F.2d at 186 (citations omitted).

For all of the above reasons, the bankruptcy court should have granted Creditors' Second Motion to Amend to add a claim under Section 523(a)(19). The judgment discharging all of Creditors' claims against Debtor must be reversed.

B. *Creditors have not shown clear error in the bankruptcy court's finding that Debtor justified his failure to keep or preserve financial information under Section 727(a)(3)*

Section 727(a)(3) provides, in full:

> (a) The court shall grant the debtor a discharge, unless—
>
> (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case[.]

11 U.S.C. § 727(a)(3).

The Ninth Circuit has stated:

> [T]he purpose of [Section 727] is to make the privilege of discharge dependent on a true presentation of the debtor's financial affairs. The initial burden of proof under § 727(a)(3) is on the plaintiff. In order to state a prima facie case under section 727(a)(3), a creditor objecting to discharge must show (1) that the debtor failed to maintain and preserve adequate records, and (2) that such failure makes it impossible to ascertain the debtor's financial condition and

> material business transactions. Once the objecting party shows that the debtor's records are absent or are inadequate, the burden of proof then shifts to the debtor to justify the inadequacy or nonexistence of the records.

***11** *Cox II,* 41 F.3d at 1296 (citations and quotation marks omitted).

The Ninth Circuit further held that "[j]ustification for [a] bankrupt's failure to keep or preserve books or records will depend on ... whether others in like circumstances would ordinarily keep them." *Cox II,* 41 F.3d at 1299 (citations omitted).[14] Creditors assert that sophisticated debtors are held to a higher standard, and that the bankruptcy court erred by not considering Debtor's education, intelligence, financial sophistication, business experience, and the complexity of his transactions and financial life. Creditors refer to these as critical "factors" and argue that the bankruptcy court committed an error of law by not considering such factors.

[14] Debtor argues that we and other courts have applied a more liberal standard, requiring only a "credible explanation" for a debtor's failure to keep or preserve financial information. We have reviewed the cases cited by Debtor and perceive no difference between the Ninth Circuit's standard and the requirement of a "credible explanation." The way for a debtor to offer a credible explanation is to show that others in like circumstances would not ordinarily keep the records at issue. *See In re Lawler,* 141 B.R. at 429.

We reject any formulaic list of factors. Creditors' own citations include authority that a debtor's justification for failing to keep books and records is evaluated based on the totality of the circumstances. *Meridian Bank,* 958 F.2d at 1231. There is nothing inconsistent between the totality of the circumstances approach and Creditors' other authority that "[m]ore sophisticated business persons are generally held to a high level of accountability in recordkeeping for purposes of § 727(a)(3)." *In re Pulos,* 168 B.R. 682, 692 (Bankr.D.Mn.1994). *See also Cox I,* 904 F.2d at 1403 and n. 5 (remanding for consideration of "*all* circumstances of the case" (emphasis in original) including debtor's "intelligence and educational background," her "experience in business matters," and "the extent of her involvement in the [relevant] businesses"); *Cox II,* 41 F.3d at 1299 (considering debtor's sophistication); *In re Hughes,* 354 B.R. 801, 809–11 (Bankr.N.D.Tex.2006) (sophisticated debtors held to higher standards); *In re Scott,* 172 F.3d 959, 969–70 (7th Cir.1999) ("where debtors are sophisticated in business, and carry on a business involving significant assets, creditors have an expectation of greater and better record keeping"); *In re Sigust,* 255 B.R. 822, 827 (Bankr.W.D.La.2000) ("More sophisticated business persons are held to a higher level of accountability"), *aff'd,* 281 F.3d 1280 (5th Cir.2001).

We do not doubt that Debtor was a sophisticated business person. We also have no doubt that the bankruptcy court took this into consideration. The bankruptcy court was clearly aware of the evidence that Creditors now cite because, as Debtor argues, they spent considerable time at trial presenting such evidence. The bankruptcy court's 33–page Memorandum of Decision carefully reviews much of that evidence.

The bankruptcy court was also aware of how little financial information Debtor kept or preserved. The Memorandum of Decision states:

> * [Debtor] has not filed federal and state income tax returns since 1998, and has no W–2 or 1099 forms for the tax years preceding 2003.
>
> * He has no accounting of monies loaned to him from Proxy.
>
> * There are no agreements evidencing the amounts loaned to him by [Simulator] during the years 1997 to 2001.
>
> ***12** * He has no record of any stock which he may have owned.
>
> * He stopped keeping financial records in 2001.
>
> * He has kept no records of his income and/or expenses.
>
> * He has kept no records of charitable gifts.

From our review of the bankruptcy court's decision and the trial transcripts we are persuaded that the bankruptcy court considered the totality of the circumstances including the facts highlighted by Creditors on this appeal. The next question is whether, having considered all of the circumstances, the bankruptcy court properly weighed them.

The bankruptcy court's Memorandum of Decision specifically discusses most of the facts cited by Creditors on this appeal. Those facts do establish Debtor's financial sophistication, and it is true that Debtor kept astonishingly few records, but knowing the importance of keeping records and being financially sophisticated is not the same thing as being mentally capable of keeping and preserving financial records when one is devastated because one's spouse has cancer, one's daughter is attempting to commit suicide, and one's personal and family life are falling apart. We cannot say that the bankruptcy court clearly erred by not finding otherwise.

Creditors argue that Debtor failed to keep or preserve records long before his wife became ill. That is not convincing. The only specific example they mention is Debtor's tax returns, which he admits he did not file for one or two years beforehand. The bankruptcy court acknowledged this lack of tax returns in its Memorandum Decision.

Creditors' most persuasive argument may be that Debtor was not too devastated to continue remunerative consulting but claims to have been too devastated to keep or preserve records. The excerpts of record certainly could be interpreted as evidence that Debtor's lack of recordkeeping is only what others would "ordinarily" do if they were trying to hide income, which is not an excuse. *See Meridian Bank,* 958 F.2d at 1234 ("Fear of liens by creditors can never by itself constitute adequate justification for failing to candidly disclose the financial status of a debtor.").

On the other hand, that is not the only possible conclusion. Debtor and others testified that after his wife was diagnosed with cancer he truly was devastated. Creditors did not prove that Debtor actually owns or controls the various entities from Hong Kong, Cayman Islands, and elsewhere with which he has done business. If those entities did not provide W–2s or 1099s then perhaps they have their own reasons for doing so or are simply negligent, as opposed to being controlled by Debtor or helping him not to keep or preserve financial information. We did not have the opportunity to observe the witnesses and we did not preside over a four day trial, as the bankruptcy court did.

We do not say that we would make the same decision as the bankruptcy court if we were sitting as the trial judge. That is not our role on this appeal. We are limited to reviewing the bankruptcy court's findings of fact for clear error. *Anderson v. Bessemer City,* 470 U.S. 564, 573; 105 S.Ct. 1504, 1511 (1985) (under Fed.R.Civ.P. 52(a), which parallels Fed. R. Bankr.P. 8013, appellate court oversteps its bounds if it reverses the finding of the trier of fact simply because it is convinced that it would have decided the case differently).

***13** We cannot say that the bankruptcy court clearly erred in believing that, whatever else might be true of Debtor and the persons with whom he does business, his wife's cancer and other family problems truly did devastate him. Nor can we say that other persons in like circumstances would necessarily keep or preserve adequate financial records. Creditors have not established reversible error in the bankruptcy court's rejection of their claim under Section 727(a)(3).

VI. CONCLUSION

In this unfortunate case, day trading squandered a substantial portion of Creditors' retirement savings-over $113,000 according to the arbitration award. Since then, protracted litigation has absorbed untold hours of attorneys' time and over $90,000 in costs incurred by Debtor's pro bono attorneys alone.

The opposing parties, their counsel, and the bankruptcy court had the Herculean task of sorting out vastly different versions of the facts and complex legal issues. Our role on this appeal is far more limited.

We hold that the bankruptcy court applied an incorrect legal standard in denying Creditors leave to amend their complaint under Rule 15(a). Debtor did not establish that he or his pro bono counsel would have spent any less time or money if Creditors had included their claim under Section 523(a)(19) at the outset. Debtor did not show any cognizable prejudice. Alternatively, even if we were to presume some amount of prejudice, we cannot presume that such prejudice was undue or could not be cured. Because there was no showing of undue prejudice, it was error to deny Creditors' Second Motion to Amend.

We reject Creditors' argument that the bankruptcy court applied an incorrect legal standard under Section 727(a)(3). Nor can we say that it clearly erred in believing that, whatever else might be true of Debtor, his wife's cancer and other family crises caused him to act as others would have in not keeping or preserving adequate financial information.

Consistent with these holdings, the bankruptcy court's judgment discharging all of Creditors' claims against Debtor is REVERSED; the orders discharging Debtor generally from his other debts are AFFIRMED; and we REMAND for further proceedings under Section 523(a)(19).

All Citations

Not Reported in B.R., 2007 WL 7532283

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774 Fed.Appx. 404 (Mem)
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Michael BITTON, on behalf of themselves and all others similarly situated; Brian O'Toole, on behalf of themselves and all others similarly situated; Robert Sokolove, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,

v.

TRUDERMA, LLC, a Nevada limited liability company, Defendant-Appellee.

No. 17-56329

Submitted May 31, 2019 [*] San Francisco, California

FILED August 2, 2019

[*] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Attorneys and Law Firms

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Steven Bradley Scow, David Richard Koch, Koch & Scow, LLC, Henderson, NV, for Defendant-Appellee

Appeal from the United States District Court for the Central District of California, Manuel L. Real, District Judge, Presiding, D.C. No. 2:14-cv-03754-R-E

Before: GOULD and HURWITZ, Circuit Judges, and RESTANI, [**] Judge.

[**] The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

***405** MEMORANDUM [***]

[***] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

In the original putative class action complaint in this action, plaintiffs Brian O'Toole, Robert Sokolove, and Michael Bitton asserted various state and federal claims against a series of defendants. After the district court dismissed the complaint, we affirmed in part and reversed l-0n part, remanding for further proceedings on several of the state law claims. *Bitton v. Gencor Nutrientes, Inc.*, 654 F. App'x 358, 364 (9th Cir. 2016). On remand, the plaintiffs filed an amended complaint. The district court again dismissed the complaint with prejudice, finding that the plaintiffs' claims all effectively sounded in fraud, and that under Federal Rule of Civil Procedure 9(b), they were required to "plead the who, what, when, where, why, and how of their claims." It concluded that the "when" and "where" of the claims were not pleaded with sufficient particularity because the operative complaint did not allege when and where the plaintiffs had purchased the defendants' products. The district court dismissed the complaint with prejudice, despite the plaintiffs' express request for leave to amend if the court found any deficiencies in the pleading.

While this appeal of that judgment was pending, a settlement was reached between the plaintiffs and all defendants but Truderma, LLC, and the appeal was dismissed as to those defendants. The only issue before us is whether the district court erred in dismissing the claims against Truderma with prejudice. We hold that it did.

Federal Rule of Civil Procedure 15(a)(2) provides that when confronted with a request to amend a pleading, a trial "court should freely give leave when justice so requires." In light of the "underlying purpose of Rule 15 to facilitate decision on the merits, rather than on the pleadings or technicalities," we have stressed that "Rule 15's policy of favoring amendments to pleadings should be applied with 'extreme liberality.' " *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981) (quoting *Rosenberg Bros. & Co. v. Arnold*, 283 F.2d 406, 406 (9th Cir. 1960) (per curiam)). The district court provided no reason for not allowing amendment.

Given the settlement of the claims against the other defendants, the only issue is whether the plaintiffs can allege where and when they purchased Testofen-based products manufactured by Truderma. It is not "apparent from the record" that they cannot. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 190 (9th Cir. 1987). In these circumstances, the "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Id*. (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). [1] We therefore vacate the judgment of dismissal and remand with instructions to allow the plaintiffs to amend their complaint.

[1] The plaintiffs' request for reassignment is denied as moot in light of Judge Real's passing.

VACATED and REMANDED. Each party shall bear its own costs.

All Citations

774 Fed.Appx. 404 (Mem)

End of Document

KeyCite Yellow Flag - Negative Treatment
Distinguished by Allen v. Barulich, Dugoni, and Suttmann Law Group, Inc., N.D.Cal., September 16, 2019

2010 WL 2650432
Only the Westlaw citation is currently available.
United States District Court,
C.D. California.

BRAVADO INTERNATIONAL GROUP MERCHANDISING SERVICES
v.
Jin O. CHA et al.

No. CV 09-9066 PSG (CWx).
|
June 30, 2010.

West KeySummary

1 **Copyrights and Intellectual Property** Parties

Federal Civil Procedure Misjoinder in Particular Actions

Plaintiff did not establish that defendants were involved in the same transaction or occurrence to satisfy joinder in a trademark and copyright infringement suit, and therefore dismissal of all but ten defendants was necessary. Plaintiff's complaint joined seventy six defendants, but the complaint was entirely devoid of any allegations that defendants conspired with one another to infringe plaintiff's trademarks and copyrights. Furthermore, plaintiff's allegations of transactional-relatedness were sufficient only to ten of the seventy six defendants. Fed.Rules Civ.Proc.Rules 20(a)(2), 21, 28 U.S.C.A.

Attorneys and Law Firms

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Kousha Berokim, Kousha Berokim, Alfred Eric Bjorgum, Karish & Bjorgum PC, Los Angeles, CA, for Defendants.

Proceedings: (In Chambers) Order Dismissing Defendants Without Prejudice

Honorable PHILIP S. GUTIERREZ, District Judge.

***1** Wendy K. Hernandez, Deputy Clerk.

Pending before the Court is Plaintiff's response to the Court's Order to Show Cause ("OSC") whether Defendants are improperly joined in this action. A hearing on the OSC was held on June 28, 2010. After considering the response and arguments presented at the hearing, the Court DISMISSES all Defendants with the exception of Jin O. Cha a/k/a Jin Cha, OK Sportswear, EZ Sportswear, Chang Oh Kim a/k/a Chang O. Kim a/k/a Chuck Kim, David Ahoubian a/k/a David Ahoubin a/k/a David Ahoubim, D & T Distribution, Paris Fashions, Clothing Island a/k/a ClothingIsland.com, Maggi Fashion Wholesale, Inc., and Mansour Rokhsarzadeh.

I. *Background*

On December 10, 2009, Plaintiff Bravado International Group Merchandising Services, Inc. ("Plaintiff") filed suit against a total of seventy-six Defendants (collectively, "Defendants") for allegedly infringing nine registered copyrights and several trademarks licensed to Plaintiff by the estate of Michael Jackson. *See Compl.* ¶ 8. Plaintiff alleges that "Defendants are unlicensed distributors who have been distributing and selling unauthorized shirts and/or posters and/or other items bearing the Michael Jackson trademarks (including Michael Jackson and/or King of Pop), the Michael Jackson likeness and/or artwork and/or photographs ." *See id.* ¶ 9. On May 28, 2010, the Court issued an Order to Show Cause ("OSC") whether Defendants were improperly joined in this action in violation of Federal Rule of Civil Procedure 20(a) (2). Plaintiff filed a timely Response on June 18, 2010.

II. *Legal Standard*

Federal Rule of Civil Procedure 20 provides that defendants may be joined if (1) any right to relief asserted against them jointly, severally, or in the alternative relates to or arises out of the same transaction, occurrence, or series of transactions or occurrences, and (2) any question of law or fact common to all defendants will arise in the action. *See* Fed.R.Civ.P. 20(a) (2);

Desert Empire Bank v. Ins. Co. of North America, 623 F.2d 1371, 1375 (9th Cir.1980). Thus, Rule 20 permits the joinder of multiple defendants only if two requirements are satisfied: transactional relatedness and commonality. Upon a finding of improper joinder, "the court may at any time, on just terms, add or drop a party." Fed.R.Civ.P. 21. Alternatively, the Court may sever claims against improperly joined parties. *Id.*

III. *Discussion*

The Court ordered Plaintiff to explain how the seventy-six Defendants in this case are properly joined. Plaintiff organizes Defendants into several groups that include "corporate affiliates and/or individuals who are employed by and/or own the corporate or unincorporated entities included in a particular group."[1] *See Response* 4 n. 3. For the following reasons, the Court finds that only three of these groups are properly joined in this action and that the remaining Defendants should be dropped from the lawsuit.

[1] Many Defendants have been dismissed from the case, and Plaintiff's Response is limited to those parties presently in the action. *See Response* 4 n. 2.

A. *Summary of Defendant Groups*

***2** Plaintiff provides evidence of varying degrees of specificity to connect the groups together for the purposes of joinder. *See id.* at 4:3-7:17. According to Plaintiff, these groups are sufficiently related because some groups purchased the same infringing shirts from other groups, other groups sold the same shirts, and the remaining groups might have purchased the same shirts from each other based on Plaintiff's "reasonable belief." Based on the strength of the alleged connections, the Court discerns four tiers of Defendant groups.

1. *Tier One*

Plaintiff provides the most concrete information with regard to the following groups:

- The "OK Sportswear Group" includes Jin O. Cha a/k/a Jin Cha, OK Sportswear, EZ Sportswear, and Chang Oh Kim a/k/a Chang O. Kim a/k/a Chuck Kim. *See Response* 4:3-7. Based on Plaintiff's investigations, the OK Sportswear Group has been "the source of many of the shirts sold by stores and wholesale operations in downtown Los Angeles including stores nearby or at locations of some of the defendants in this action." *Feinswog Decl.* ¶ 10. The OK Sportswear Group distributed shirts depicting an image of Michael Jackson posing with a tipped hat and sequined gloves, and referring to him as the "King of Pop." *See id.* ¶ 2, Ex. A ("Image No. 1").

- The "Clothing Island Group" includes David Ahoubian a/k/a David Ahoubin a/k/a David Ahoubim, D & T Distribution, Paris Fashions, and Clothing Island a/k/a ClothingIsland.com. *See Response* 18-21. Plaintiff's investigator purchased a shirt from the Clothing Island Group that depicts Image No. 1-the same image displayed on the OK Sportswear Group's shirt-and the shirt even has the same neck label. *See Feinswog Decl.* ¶ 3, Ex. B. Plaintiff's investigator also purchased a shirt from the Clothing Island Group that depicts an image of Michael Jackson apparently surrounded by zombies, as in his famed Thriller music video. *See id.* ¶ 4, Ex. C ("Image No. 2"). The investigator also purchased a shirt depicting a montage of Michael Jackson photos inscribed with the phrase "Never Say Good Bye." *See id.* ¶ 8, Ex. G ("Image No. 3").

- The "Maggi Fashion Group" consists of Maggi Fashion Wholesale, Inc. ("Maggi") and Mansour Rokhsarzadeh. *See Response* 5:2-3. The attorney for ClothingIsland.com informed Plaintiff's counsel that Maggi "supplied ClothingIsland.com with its infringing merchandise." *Feinswog Decl.* ¶ 9.

According to Plaintiff, these groups comprise a chain of distribution "from the OK Sportsear Group to the Maggi Fashion Group to the Clothing Island Group." *See Response* 5:5-7. The Court notes, however, that Plaintiff does not provide evidence that the Ok Sportswear Group sold any shirts with Image No. 2 or Image No. 3.

2. *Tier Two*

The following groups allegedly sold shirts with the same infringing images:

- The "Eden Sports Group" includes Eden Sports, Inc., Sy Sports, Susan Lee a/k/a Susan Yoon, and Lee's Family Inc. *See Response* 5:8-10.

***3** - The "Main Collection Group" comprises Main Collection, Inc. a/k/a Main Sportswear and Su Yong Cho. *See id.* at 5:12-14.

These groups apparently sold shirts that included the same images depicted on the shirts sold by the Clothing Island and Maggi Groups, which Plaintiff claims supports a "reasonable belief that said parties bought shirts from the same sources or from each other which satisfies the series of transactions test." *Response* 5:17-19.

3. *Tier Three*

The following groups are located in the downtown Los Angeles area:

- The "Right Thang Group" includes Right Thang and Hyo Jang Cho. *See id.* at 5:21-22.
- The "MB Sportsear Group" includes MB Sportswear and Choung H. Choe. *See id.* at 5:23-24.

Although Plaintiff has been unable to purchase any shirts from these groups, Plaintiff claims to have a "reasonable belief" that they "purchased their merchandise from other defendants and/or from common sources as the other defendants" based on Plaintiff's experience and knowledge of the wholesale industry in the downtown area. *See id.* at 5:20-6:3.

4. *Tier Four*

Plaintiff also names eight groups of Defendants without offering any clear connection between them or with any groups listed in the other tiers. *See id.* at 6:12-26. These groups are:

- The "Print Liberation Group" includes Print Liberation and Jaime Dillon.
- The "Bargin Group" includes Bargin Wholesaler Corporation a/k/a BarginWholesaler.com, WholeSaleClothingMarket.com, TBWholesaler.com, Top Brands Wholesaler, TopBrands, and Ahmad Jamhour. Plaintiff is in the process of settling with this group.
- The "Dr. Jays Group" consists of Dr. Jays, Inc. a/k/a Dr. Jays and Dr.Jays.com. [2]

[2] The Court previously granted Dr. Jays, Inc.'s motion to vacate entry of default against it. *See* Dkt. # 176.

- The "Watch Time Group" includes Watch Time, Inc. and Aziz R. Ali. Plaintiff admits that the Watch Time Group was not selling unauthorized Michael Jackson shirts, though Plaintiff's investigations have revealed "several parties that sell both infringing Michael Jackson watches and shirts." *Feinswog Decl.* ¶ 11.
- The "Wholesale Situation Group" includes Shoe Balance International Yak Shoe, Inc. a/k/a Wholesale Situation and Julio Aref. [3]

[3] On April 26, 2010, Plaintiff filed a Motion for Default Judgment against the Wholesale Situation Group, which the Court has taken under submission. Based upon the disposition of this Order, the Motion for Default Judgment is rendered MOOT.

- The "Setup Site Group" includes Kingsley Syme a/k/a Kingley Symes and Setup Site, Inc. a/k/a Harrington Outlets a/k/a Obamashirts.us.
- The "Progressive Rags Group" includes Jack Leiberman a/k/a Jack Lieberman and Progressiverags.com. Plaintiff is settling with this group.
- The "Gravity Trading Group" includes Gravity Trading, Inc. and Tony In Chong. Plaintiff is also settling with this group. Furthermore, counsel for Gravity Trading, Inc. informed Plaintiff that "his client purchased his shirts from a downtown Los Angles vendor, who plaintiff believes to be OK Sportswear." *Feinswog Decl.* ¶ 12.

Plaintiff claims that it has entered into settlement agreements with the Bargin, Gravity Trading, and Progressive Rags Groups and expects to dismiss these Defendants within 45 days (subject to certain undisclosed conditions). *See Response* 7:1-4. However, Plaintiff provides no evidence that the merchandise sold by the groups in Tier Four were in any way connected to other groups in Tier Four or to the groups in other tiers. *See Feinswog Decl.* ¶ 13. In conclusory terms, Plaintiff claims that the parties in Tier Four "were all selling merchandise on the Internet and any of the other defendants *might have* purchased Michael Jackson shirts from said defendants." *Response* 7:9-12 (emphasis added).

B. *Whether Joinder of the Defendant Groups Satisfies Rule 20(a)(2)*

***4** In order for Defendants to be properly joined under Rule 20(a) (2), Plaintiff must (1) assert a right to relief against them jointly, severally, or in the alternative arising out of the same transaction or occurrence or series of transactions or occurrences, and (2) raise a common question of law or fact. *See* Fed.R.Civ.P. 20(a)(2). As a preliminary matter, it is clear that Plaintiff's claims raise common questions of law or fact because the Complaint alleges that Defendants infringed "the Michael Jackson name, trademark and/or likeness and/or King of Pop mark." *Response* 3:15-18; *Compl.* ¶ 2. However, the mere fact that Plaintiff's claims against Defendants involve a common question of law or fact does not entail that its claims against Defendants are related to the same transaction or occurrence. *See Golden Scorpio Corp. v. Steel Horse Bar & Grill,* 596 F.Supp.2d 1282, 1285 (D.Ariz.2009) (finding that plaintiff's infringement claims did not arise out of same transaction where defendants were alleged to have acted independently in infringing the same trademark); *Nassau County Ass'n of Ins. Agents v. Aetna Life & Cas. Co.,* 497 F.2d 1151, 1154 (2d Cir.1974) (finding that, in the absence of an allegation of conspiracy, the same transaction or occurance requirement was not met where one hundred and sixty-four defendants acted independently and at different times).

The Ninth Circuit has interpreted the phrase "same transaction, occurrence, or series of transactions or occurrences" to require a degree of factual commonality underlying the claims. *See Coughlin v. Rogers,* 130 F.3d 1348, 1350 (9th Cir.1997). Proper joinder under Rule 20 requires that the "parties must assert rights, or have rights asserted against them, that arise from *related activities*-a transaction or an occurrence or a series thereof." *Coal. for a Sustainable Delta v. U.S. Fish & Wildlife Serv.,* 2009 WL 3857417, at *2 (E.D.Cal. Nov.17, 2009) (citation omitted) (emphasis added). For example, in *DirecTV v. Loussaert,* 218 F.R.D. 639, 641-44 (S.D.Iowa 2003), DirecTV, a satellite television service provider, sued seven defendants who allegedly purchased illegal access devices. DirecTV submitted that its claims against the defendants arose out of the same transaction or occurrence because the factual backgrounds of the claims were similar-they occurred roughly at the same time, involved a single distribution center, and each defendant intended to illegally intercept the same satellite signal. *See id.* at 642. The court found, however, that the defendants' alleged acts of piracy were not related. *See id.* at 643. As no defendant was alleged to have known of the other defendants' transactions or illegal purposes, "each transaction represents a separate and independent act." *See id.*

In this case, Plaintiff's Complaint is entirely devoid of any allegations that Defendants conspired with one another to infringe Plaintiff's trademarks and copyrights. *See Arista Records, LLC v. Does 1-4,* 589 F.Supp.2d 151, 155 (D.Conn.2008) ("The 'same transaction' requirement [of Rule 20(a)(2)] means that there must be some *allegation* that the joined defendants 'conspired or acted jointly.' " (citation omitted) (emphasis added)); *Magnavox Co. v. APF Elecs., Inc.,* 496 F.Supp. 29, 34 (N.D.Ill.1980) (finding joinder improper in patent infringement suit where "the complaint ... [was] devoid of *allegations* concerning any connection between" the items sold by one defendant retailer and those sold by another defendant." (emphasis added)). Furthermore, the Complaint does not seek joint or several liability against Defendants.

***5** In its response, however, Plaintiff explains that the groups in Tier One are part of the same chain of distribution. The OK Sportswear, Maggi Fashion, and Clothing Island Groups all sold shirts depicting Image No. 1, and counsel for the Clothing Island Group claimed that the Maggi Fashion Group supplied ClothingIsland.com with its infringing merchandise. However, the connection of the other tiers to this alleged transaction is too attenuated to support joinder. The groups in Tier Two allegedly sold shirts with the same images as the Maggi Fashion and Clothing Island Groups-including a shirt sold by the Eden Sports Group that depicted Image No. 2-Plaintiff fails to provide any further allegations that would connect the groups in Tier Two to the same transaction as Tier One. The groups in Tier Three are merely located in the same geographic area, and Plaintiff purports to have a "reasonable belief" that they purchased their merchandise from each other or from a common source. Finally, Tier Four is a catch-all of non-Los Angeles vendors, and Plaintiff does not even indicate that they are selling the same shirts as the groups in Tier One, let alone that they are selling the same shirts in the chain of distribution. Plaintiff leans on its "reasonable belief" that "any of the other defendants might have purchased Michael Jackson shirts from [them]." *See Response* 7:9-12. Therefore, Plaintiff's allegations of transactional-relatedness are sufficient only as to the groups in Tier One.

Furthermore, Plaintiff does not provide any case law to support its position that a "reasonable belief" is sufficient to tether several defendants together in the same action. *See Coal. for a Sustainable Delta v. United States Fish and wildlife Serv.,* 2009 WL 3857417, at *4 n. 1 (E.D.Cal. Nov.17, 2009) ("Plaintiffs point to no analogous cases that have found

any 'logical' or 'reasonable' relationship between claims such as those in the SAC."). Plaintiff merely distinguishes *Bridgeport Music, Inc. v. 11 C* Music, 202 F.R.D. 229 (M.D.Tenn.2001)-a case mentioned in the Court's OSC-on the grounds that, unlike the defendants who sampled songs without authorization in that case, "each of the parties in this action was selling unauthorized Michael Jackson shirts which could have been purchased from and/or sold to other defendants in this action and/or could have been received from common sources." *See Response* 7:18-23. However, the songs sampled in *Bridgeport* could have similarly been shared by the defendants in that case or purchased from each other. That several Defendants in this case may have engaged in similar transactions, or had the capability of doing so, is insufficient to establish joinder. For these reasons, only the groups in Tier One are properly joined in this action. All other Defendants are misjoined in violation of Rule 20(a)(2).

B. *The Consequence of Misjoinder*

Federal Rule of Civil Procedure Rule 21 governs the misjoinder of parties and permits the court "[o]n motion or on its own ... at any time, on just terms, [to] add or drop a party[, or] also sever any claim against a party." Fed.R.Civ.P. 21. The Court has considerable discretion in choosing among these options. *See Sams v. Beech Aircraft Corp.*, 625 F.2d 273, 277 (9th Cir.1980); *see also* 4 *Moore's Federal Practice,* § 21.02[4] (3d ed.2009). An accepted practice under Rule 21 is to dismiss all defendants except for the first defendant named in the complaint, s*ee Coughlin,* 130 F.3d at 1350; *see also Coal. for a Sustainable Delta,* 12009 WL 3857417, at *8, and dropping a defendant for improper joinder operates as a dismissal without prejudice, *see Harris v. Lappin,* 2009 WL 789756, at *7 (C.D.Cal.2009) (citing *DirecTV, Inc. v. Leto,* 467 F.3d 842, 845 (3d Cir.2006)).

***6** In the event that the Court finds misjoinder, Plaintiff requests severance. *See Response* 8:3-5. Plaintiff claims that it may be prejudiced if misjoined Defendants are dropped from this case because those Defendants may try to raise statute of limitations defenses in subsequent actions. *See id.* 8:22-9:3 ("Severance would avoid the possibility of plaintiff being denied a substantial right with a defendant raising a defense that it would otherwise not have but for having been dismissed form this action."). However, the Court declines to sever in this case for two reasons.

First, a statute of limitations defense is always a *possibility* when misjoined parties are dropped from a lawsuit. The possibility that a court may elect to drop misjoined parties is a risk assumed by the plaintiff who chooses to prosecute an action in violation of Rule 20. *See Funtanilla v. Tristan,* 2010 WL 1267133, at *6 (E.D.Cal. Mar.30, 2010) ("In any event, any prejudice resulting from the statute of limitations is a result of plaintiff combining seven unrelated claims in one complaint, instead of filing seven separate actions."). Furthermore, Plaintiff concedes that its claims against Defendants do not involve any statute of limitations issues. *See Response* 8:22-23.

Second, severance is not a practical option in this case because it is unclear how the Court would structure the severed actions. Plaintiff does not demonstrate which groups infringed which trademarks and copyrights. Plaintiff lumped all Defendants together in this action, and it is not the Court's responsibility to sort them out for Plaintiff. *See Don King Prods., Inc. v. Colon-Rosario,* 561 F.Supp.2d 189, 192 (D.Puerto Rico 2008) ("Besides concluding that the same transaction test was not met in the cases above, the courts also found that this type of 'shotgun action' against many unrelated defendants, creates 'unmanageable administrative problems in the clerk's office and ... unfairness, confusion and prejudice to defendants in their efforts to answer plaintiff's complaints, make responsive motions and conduct pretrial proceedings." (citation omitted)).

To vindicate its rights against these parties, Plaintiff must institute separate actions in conformity with the Federal Rules. *See Arista,* 2008 WL 4823160, at *5 ("[I]f ... Defendants are misjoined, Plaintiffs would be able to avoid paying $350 filing fees under 28 U.S.C. § 1914(a) for separate actions against each of the improperly joined Defendants."). Plaintiff may seek leave to amend the Complaint to conform the pleadings to the evidence in compliance with the Federal Rules. Alternatively, Plaintiff may attempt to consolidate later-filed actions if discovery reveals that they are related to the same transaction or occurrence. However, in light of the information provided by Plaintiff, only Defendants in Tier One are properly joined at this time. Accordingly, the Court drops all Defendants, with the exception of the OK Sportswear Group, the Maggi Fashion Group, and the Clothing Island Group.

III. *Conclusion*

***7** Based on the foregoing, the Court DISMISSES all Defendants without prejudice, with the exception of Jin O. Cha a/k/a Jin Cha, OK Sportswear, EZ Sportswear, Chang Oh Kim a/k/a Chang O. Kim a/k/a Chuck Kim, David Ahoubian a/k/a David Ahoubin a/k/a David Ahoubim,

D & T Distribution, Paris Fashions, Clothing Island a/k/a ClothingIsland.com, Maggi Fashion Wholesale, Inc., and Mansour Rokhsarzadeh.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 2650432

2020 WL 8994099
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

CAPPELLO GLOBAL, LLC, a California Limited Liability Company, et al., Plaintiffs,
v.
TEMSA ULASIM ARCLARI SANAYI VE TICARET A.S., formerly known as Temsa Global Sanayi ve Ticaret A.S.; Does 1-100, inclusive, Defendants.

Case No. 2:19-cv-10710-ODW (KSx)
|
Signed 09/25/2020

Attorneys and Law Firms

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ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' AMENDED MOTION FOR LEAVE TO AMEND THE COMPLAINT AND FOR REMAND [35], AND DENYING PLAINTIFFS' MOTION TO AMEND THE SCHEDULING ORDER [58]

OTIS D. WRIGHT, II, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

***1** Plaintiffs Cappello Global, LLC ("Cappello"), CH Bus Holdings, LLC ("CHB Holdings"), and Michael Haggerty (together, "Plaintiffs") have two motions pending before the Court: (1) an Amended Motion for Leave to Amend the Complaint and for Remand (MTA Compl., ECF No. 35), and (2) a Motion to Amend the Scheduling Order (MTA Sched., ECF No. 58). For the following reasons, Plaintiffs' Amended Motion for Leave to Amend the Complaint and for Remand is **GRANTED in part and DENIED in part**, and Plaintiffs' Motion to Amend the Scheduling Order is **DENIED**. [1]

[1] After carefully considering the papers filed in connection with the Motions, the Court deemed the matters appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.

II. BACKGROUND

Plaintiff Cappello, a broker dealer in the motor coach industry, is a California Limited Liability Company with its principal place of business in Santa Monica, California. (Notice of Removal ("NOR"), Ex. A ("Compl.") ¶¶ 1, 8, ECF No. 1-1.) Plaintiff CHB Holdings, a business engaged in the sale, leasing, and financing of motor coaches, is a Delaware Limited Liability Company with its principal place of business in Las Vegas, Nevada. (Compl. ¶¶ 2, 7.) Plaintiff Haggerty is the principal owner of CHB Holdings and a Nevada citizen. (Compl. ¶ 3.) Defendant TEMSA Ulasim Arclari Sanayi Ve Ticaret A.S. ("TEMSA") manufactures motor coaches and is formed under the laws of the Republic of Turkey, with its principal place of business in Turkey. (Compl. ¶ 4; Decl. of Deniz Çetin ISO Opp'n to MTA Compl. ("Çetin Decl.") ¶ 4, ECF No. 50-1.)

Three agreements are relevant here. First, on July 13, 2016, CHB Holdings engaged Cappello and non-party Niagara International Capital Limited ("Niagara") [2] to provide financial advisor services in connection with CHB Holdings' sales, financing, and distribution of TEMSA motor coaches. (MTA Compl. 4; Compl. Ex. 1.) Second, on May 10, 2017, non-party Main Street Capital executed a letter of intent to acquire CHB Holdings' assets. (MTA Compl. 4; Compl. Ex. 2.) Third, on July 4, 2017, Cappello entered into a written letter agreement with TEMSA under which Cappello and Niagara would provide information to TEMSA based on TEMSA's potential acquisition of CHB Holdings (the "Letter Agreement"). (MTA Compl. 4–5; Compl. Ex. 3 ("Letter Agreement").)

[2] Niagara has since been replaced by Camden through an assignment of assets and liabilities. (MAC 4.)

Under the Letter Agreement, TEMSA agreed among other things not to solicit or contact any employee, agent, supplier, customer, bank, or lender of CHB Holdings or its subsidiaries for a specified time period. (MTA Compl. 5; Letter Agreement ¶ 3.) TEMSA allegedly violated this non-

solicitation clause by "soliciting banks, customers, lenders, employees, business partners and/or entities under contract with [CHB Holdings] during the applicable contract period from July of 2017 through July of 2018." (Compl. ¶ 21.) Plaintiffs claim that, as a result of TEMSA's alleged breach of the Letter Agreement, "the business relationship, between Main Street Capital and [CHB Holdings], which included an intent by Main Street Capital to purchase [CHB Holdings] ... deteriorated and ultimately collapsed in November of 2017." (Compl. ¶ 23.) Further, Plaintiffs claim that other contractual relationships with entities such as Google, Inc. and Wells Fargo Bank similarly "deteriorated and fell apart" as a result of TEMSA's alleged breach of the Letter Agreement. (Compl. ¶ 15, 24.)

***2** Thus, on November 6, 2019, Plaintiffs sued TEMSA and 100 Doe Defendants in state court alleging (1) Breach of Contract; (2) Tortious Interference with Prospective Economic Relations; and (3) Tortious Interference with Contractual Relations. (*See* Compl.) TEMSA timely removed the action to this Court on December 18, 2019, on diversity grounds. (NOR ¶ 2–5, ECF No. 1.) After removal, Plaintiffs attempted to substitute non-parties TEMSA North America ("TNA"), Hagan Choi, and Robert Fioritto in place of Doe Defendants One, Two, and Three, respectively, which would have defeated diversity jurisdiction because Choi and Fioritto are California citizens.[3] (Doe Amendments, ECF Nos. 22, 24, 26, 27; Proposed Am. Compl. ¶¶ 7–8.) However, the Court struck Plaintiffs' Doe Amendments because Plaintiffs had failed to comply with Federal Rule of Civil Procedure ("Rule") 15 and this Court's Local Rule 15. (Order Striking Doe Amendments, ECF No. 28.)

[3] TNA is a company formed under the laws of Tennessee with its principal place of business in Chattanooga, Tennessee. (MTA Compl. Ex. 2 ("Proposed Am. Compl.") ¶ 6.)

Now, in accordance with Rule 15 and Local Rule 15, Plaintiffs seek leave to amend the Complaint to add TNA, Choi, and Fioritto as defendants. (MTA Compl. 4.) Plaintiffs also seek to add non-party Camden Financial Services ("Camden"), a California Corporation with its principal place of business in Los Angeles, California, as an additional plaintiff. (Proposed Amended Compl. ¶ 3; MTA Compl. 4 n.1.) TEMSA does not oppose joinder of Camden as a plaintiff or TNA as a defendant, neither of which would destroy diversity jurisdiction. (Opp'n to MTA Compl. 1 n.1, ECF No. 50.) However, TEMSA does oppose joinder of Choi and Fioritto. (*See generally* Opp'n to MTA Compl.)

In their Amended Motion to Amend the Complaint, Plaintiffs mention for the first time that CHB Holdings' subsidiary, non-party CH Bus Sales, LLC ("CHB Sales"), conducted business operations in a warehouse in San Francisco, California (the "Warehouse"). (*See* MTA Compl. 7, 10, 14.) Significantly, CHB Sales subleased the Warehouse from Choi. (Decl. of Michael Haggerty ISO MTA Compl. ("First Haggerty Decl.") ¶ 4, ECF No. 35.) Plaintiffs allege that, as part of an overarching plan to help TEMSA and TNA take over Plaintiffs' business, Choi and Fioritto conspired with TEMSA and TNA to evict CHB Sales from the Warehouse. (*See* MTA Compl. 7–8; Reply ISO MTA Compl. 5, ECF No. 53; Suppl. Memo. ISO MTA Compl. ("Suppl. Memo."), ECF No. 46.) Specifically, Plaintiffs aver that "Fioritto forwarded employment offer letters on behalf of [TNA] to Plaintiffs' employees[,] and Choi was working to remove Plaintiffs from their warehouse." (Reply ISO MTA Compl. 3–4.) Choi evicted CHB Sales from the Warehouse in December 2018 and allegedly subleased the Warehouse to TEMSA and/or TNA at a much higher market rate. (Decl. of Michael Haggerty ISO Suppl. Memo. ("Second Haggerty Decl.") ¶ 3, ECF No. 46).

TEMSA offers a different account of the events leading to CHB Sales' eviction from the Warehouse. TEMSA explains that Choi is the president and sole shareholder of non-party Optima Investments, Inc. ("Optima"), which occupied part of the Warehouse. (Opp'n to MTA Compl. 7.) Optima subleased the remaining space in the Warehouse to CHB Sales and non-party Coach, Coach, Coach, Inc. ("Coach 21"), a motor coach operator owned and operated by Fioritto. (Opp'n to MTA Compl. 7.) TEMSA asserts that CHB Sales vacated and subleased its space in the Warehouse to non-party Professional Charter Services, LLC ("Professional Charter") in violation of the terms of its sublease with Optima. (Opp'n to MTA Compl. 7.) Consequently, Choi and Optima evicted CHB Sales and Professional Charter from the Warehouse. (Opp'n to MTA Compl. 6–7; Decl. of Hagen Choi ISO Opp'n to MTA Compl. ("Choi Decl.") ¶¶ 11–12.)

In any event, Plaintiffs seek to amend the Complaint by adding, among other general allegations, a fourth cause of action against only Choi and Fioritto for Tortious Interference with Economic Relations premised on the above allegations.[4] (Proposed Am. Compl. ¶¶ 51–59.)

Additionally, Plaintiffs seek to amend the Court's Scheduling Order. (*See* MTA Sched.)

[4] Plaintiffs also seek to add Camden as a plaintiff with respect to claims one, two, and three, and TNA as a defendant with respect to claims two and three. (*See* Proposed Am. Compl.) As noted, TEMSA does not oppose these amendments. (Opp'n to MTA Compl. 1 n.1.)

III. PLAINTIFFS' AMENDED MOTION FOR LEAVE TO AMEND THE COMPLAINT AND FOR REMAND

***3** As mentioned, Plaintiffs seek to join Camden as a plaintiff and TNA, Choi, and Fioritto as defendants. (*See* MTA Compl.) TEMSA opposes joinder of Choi and Fioritto only. (Opp'n to MTA Compl. 1 n.1.)

A. Legal Standard

Generally, permissive joinder under Rule 20 "is to be construed liberally in order to promote trial convenience and to expedite the final determination of disputes, thereby preventing multiple lawsuits." *League to Save Lake Tahoe v. Tahoe Reg'l Plan. Agency*, 558 F.2d 914, 917 (9th Cir. 1977); *see also United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966) ("Under the rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.").

However, when a plaintiff seeks to join more defendants after removal, and that joinder would destroy subject matter jurisdiction, a court may deny joinder, or permit it and remand the case. 28 U.S.C. § 1447(e). Such a decision is up to "the sound discretion of the court." *See Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 691 (9th Cir. 1998).

Courts often consider six factors in deciding whether to allow such an amendment adding a non-diverse defendant: (1) whether the party to be joined must be joined under Rule 19(a); (2) whether the statute of limitations would preclude an original action against the new defendant in state court; (3) whether there has been unexplained delay in requesting joinder; (4) whether joinder is intended solely to defeat federal jurisdiction; (5) whether the claims against the new defendant appear valid; and (6) whether denial of joinder would prejudice the plaintiff. *IBC Aviation Servs., Inc. v. Compania Mexicana de Aviacion, S.A. de C.V.*, 125 F. Supp. 2d 1008, 1011 (N.D. Cal. 2000) (collecting cases identifying the factors). A court need not consider all the issues, as any factor can be decisive, and no one of them is a necessary condition for joinder. *Negrete v. Meadowbrook Meat Co.*, No. ED CV 11-1861 DOC (DTBx), 2012 WL 254039 at *3 (C.D. Cal. Jan. 25, 2012); *Yang v. Swissport USA, Inc.*, No. C 09-03823 SI, 2010 WL 2680800, at *3 (N.D. Cal. July 6, 2010). Granting leave to amend is only appropriate if the factors for joinder outweigh those against joinder. *See IBC Aviation*, 125 F. Supp. 2d at 1011.

B. Discussion

1. Joinder of Camden and TNA

First, the Court considers Plaintiffs' unopposed request to join Camden and TNA. "Rule 20(a) imposes two specific requisites for the joinder of parties: (1) a right to relief must be asserted by, or against, each plaintiff or defendant relating to or arising out of the same transaction or occurrence [or a series of transactions or occurrences]; and (2) some question of law or fact common to all the parties will arise in the action." *League to Save Lake Tahoe*, 558 F.2d at 917; *see also Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997). Here, Plaintiffs seek to add Camden as a plaintiff with respect to existing claims one, two, and three, and TNA as a defendant with respect to existing claims two and three. (*See* Proposed Am. Compl.) Thus, the Court finds that permissive joinder of Camden and TNA is appropriate because a right to relief is asserted by each Plaintiff, including Camden, and against each Defendant, including TNA, relating to or arising out of the same transaction or occurrence. *See* Fed. R. Civ. P. 20(a).

***4** Accordingly, Plaintiffs Motion for Leave to Amend the Complaint is hereby **GRANTED in part**, insofar as Plaintiffs seek to join Camden as a plaintiff and TNA as a defendant.

2. Joinder of Choi and Fioritto

Next, the Court considers Plaintiffs' request to join Choi and Fioritto as defendants. As joinder of Choi or Fioritto would destroy subject matter jurisdiction, the Court looks to the six factors identified in *IBC Aviation.*

a. Joinder Under Rule 19(a)

Rule 19 requires joinder of a person whose absence would preclude complete relief among existing parties. Fed. R. Civ. P. 19(a)(1)(A). Alternatively, joinder is required of any person

who claims an interest in the action and is so situated that disposing of the action in the person's absence may (1) impair or impede the person's ability to protect the interest, or (2) leave an existing party subject to a substantial risk of incurring inconsistent obligations because of the interest. Fed. R. Civ. P. 19(a)(1)(B). "Th[e] standard is met when failure to join will lead to separate and redundant actions." *IBC Aviation*, 125 F. Supp. 2d at 1012. It is *not* met when "defendants are only tangentially related to the cause of action or would not prevent complete relief." *Id.* "Complete relief is concerned with consummate rather than partial or hollow relief as to those already parties, and with precluding multiple lawsuits on the same cause of action." *Nash-Perry v. JTH Tax, Inc.*, No. CV 19-5843-GW-FFMx, 2019 WL 5902103, at *3 (C.D. Cal. Nov. 8, 2019) (quoting *Alto v. Black*, 738 F.3d 1111, 1126 (9th Cir. 2013)).

Here, Plaintiffs insist that "Fioritto and Choi played crucial roles in allowing TEMSA and [TNA] to interfere with Plaintiffs' warehouse and business operations in San Francisco." (MTA Compl. 7.) However, as was the case in *Nash-Perry*, Plaintiffs attempt to add a new cause of action against Choi and Fioritto without alleging that they are liable for any of the causes of action alleged in the original complaint against TEMSA. (*See* Proposed Am. Compl.) Indeed, "none of the causes of action in the [Proposed Amended Complaint] are alleged against both" Choi and Fioritto *and* TEMSA (or TNA). *See Nash-Perry*, 2019 WL 5902103, at *3.

Plaintiffs contend that *Nash-Perry* is inapplicable here because they "intend to sue all current and proposed defendants for tortious interference with economic relations for conduct that led to the hostile takeover of Plaintiffs' business." (Reply ISO MTA Compl. 5.) While it is true that Plaintiffs' second and fourth causes of action are both for tortious interference with economic relations, the actual interferences alleged are distinct. Specifically, Plaintiffs allege that TEMSA and TNA interfered with Plaintiffs' "economic relationships with various business entities" by "fail[ing] to act with reasonable care including the solicitation and/or interference *with said persons and/or entities involved in said economic relationships with the Plaintiffs*." (Proposed Am. Compl. ¶¶ 32, 34 (emphasis added).) As to Choi and Fioritto, on the other hand, Plaintiffs allege that they interfered with Plaintiffs' economic relationships "by engaging in conversations *with agents, employees and/or representatives of TEMSA and [TNA]* causing Plaintiffs to be evicted from their operations warehouse ... allowing Defendants TEMSA and [TNA] *to then steal away Plaintiffs' employees and to occupy the warehouse and take further control* of Plaintiffs' business and business operations." (Proposed Am. Compl. ¶ 54 (emphases added).) These allegations clearly demonstrate the distinct characters of the two interference claims.

***5** In short, Plaintiffs fail to show that the absence of Choi or Fioritto would prevent complete recovery as to their existing claims against TEMSA or TNA, even as amended. Plaintiffs equally fail to establish that disposal of the present case without Choi or Fioritto would impair Choi or Fioritto's abilities to protect their interests, or that Plaintiffs or TEMSA or TNA would be subject to inconsistent obligations in the absence of either Choi or Fioritto. Thus, this factor weighs against joinder.

b. Whether the Statute of Limitations Would Preclude an Original Action Against the New Defendants

Plaintiffs concede that the relevant statute of limitations for their claims against Choi and Fioritto have not expired. (MTA Compl. 8–9; Reply ISO MTA Compl. 6.) Thus, this factor weighs against joinder. *See Clinco v. Roberts*, 41 F. Supp. 2d 1080, 1083 (C.D. Cal. 1999); *Waring v. Geodis Logistics LLC*, No. CV 19-4415-GW-KSx, 2019 WL 3424955, at *4 (C.D. Cal. July 29, 2019).

c. Whether There Has Been Unexplained Delay in Requesting Joinder

"When determining whether to allow amendment to add a nondiverse party, courts consider whether the amendment was" timely. *Clinco*, 41 F. Supp. 2d at 1082. With respect to this factor, the Court considers "the amount of time between filings, as well as the reason for any delay." *Meggs v. NBCUniversal Media, LLC*, No. 2:17-cv-03769-ODW (RAOx), 2017 WL 2974916, at *6 (C.D. Cal. July 12, 2017). Further, under § 1447(e), a court has discretion to deny joinder of a party "whose identity was ascertainable and thus could have been named in the first complaint." *Murphy v. Am. Gen. Life Ins. Co.*, 74 F. Supp. 3d 1267, 1282 (C.D. Cal. 2015).

Here, Plaintiffs filed their action in state court on November 6, 2019, and TEMSA removed the case to this Court on December 18, 2019. (*See* NOR.) Plaintiffs first attempted to

join Choi and Fioritto as defendants on January 13, 2020. (*See* Doe Amendments.)

Plaintiffs admit that they were "certainly aware" of Choi and Fioritto's identities at the time of filing the Complaint, but they claim not to have learned of their allegedly tortious conduct until "mid-December 2019" when Haggerty spoke with his former colleague, Duane Geiger. (Suppl. Memo. 3; First Haggerty Decl. ¶ 4; MTA Compl. 10.) Plaintiffs also explain that the reason Geiger did not inform Haggerty of Choi and Fioritto's conduct sooner than December 2019 was because the two were "not on speaking terms" while engaged in a litigation that ended in September 2019. (First Haggerty Decl. ¶ 3.) Specifically, Haggerty claims that, prior to his conversation with Geiger, he did not know that Choi and Fioritto "were actually assisting [TEMSA and TNA] to either hire away [his] employees and/or to take over [his] business operations." (Second Haggerty Decl. ¶ 2.)

However, Plaintiffs also submit a declaration by Geiger which tells a somewhat different story. (Decl. of Duane Geiger ISO Suppl. Memo. ("Geiger Decl."), ECF No. 46.) Geiger does confirm that he had a conversation with Haggerty in December 2019 and that they had not spoken for an extended period due to the litigation between them. (Geiger Decl. ¶ 3.) However, Geiger merely declares he told Haggerty that he had been informed that "Choi was working with [TEMSA and TNA] to assume the facility lease in South San Francisco once CH Bus was evicted or vacated for other reasons," and that "[t]he plan was for [TEMSA] to continue operating with all or, mostly all, of the same staff as previously employed at the facility by CH Bus." (Geiger Decl. ¶ 3.) Significantly, Geiger also declares that *Haggerty told Geiger* that *Haggerty* "had heard [TEMSA] was planning to hire Mr. Fioritto to manage the San Francisco service facility on behalf of [TEMSA]." (Geiger Decl. ¶ 4.) Thus, Haggerty apparently knew of Fioritto's involvement prior to speaking with Geiger.

***6** Geiger's declaration, which Plaintiffs submit to justify their delay in seeking amendment, does not corroborate Plaintiffs' claims. To be sure, it is conceivable that Geiger's statement regarding Choi put Haggerty on notice that Choi planned to replace CHB Sales with TEMSA and TNA as tenants. However, Geiger's declaration does not go so far as to show that Geiger provided notice of *tortious* conduct by Choi evincing a conspiracy with TEMSA and TNA. Furthermore, Geiger's declaration directly refutes Haggerty's claim as to knowledge of Fioritto—Geiger declares that *it was Haggerty who informed Gieger* of Fioritto's plan to work for TEMSA. Further yet, Plaintiffs' own evidence appears to show that Haggerty received notice of Fioritto's involvement in July 15, 2019, when he received an email containing TEMSA's offer letters for certain CHB Sales employees. (*See* Second Haggerty Decl. Ex. 4.)

In short, Plaintiffs submit self-serving declaration testimony to show that they were unaware of Choi and Fioritto's actions before Haggerty's December 2019 conversation with Geiger. But these declarations are undermined or refuted by Plaintiffs' own evidence. Considering Plaintiffs' other evidence, the Court finds Plaintiffs' claims of ignorance as to Choi's actions dubious at best, and the claims of ignorance as to Fioritto's actions directly discredited. As much of Plaintiffs' delay remains unexplained, this factor does not favor amendment.

d. Whether Joinder Is Intended Solely to Defeat Federal Jurisdiction

Courts routinely exercise their discretion to deny joinder when it appears that the plaintiff's sole motivation for joining a defendant is to defeat diversity jurisdiction and avoid resolution of the case in federal court. *See Desert Empire Bank v. Ins. Co. of N. Am.*, 623 F.2d 1371, 1376 (9th Cir. 1980) (concluding that a trial court "should look with particular care at such motive in removal cases, when the presence of a new defendant will defeat the court's diversity jurisdiction and will require a remand to the state court").

Here, Plaintiffs submit that they simply want to streamline the litigation of their claims without unnecessary duplication. (MTA Compl. 11.) They also claim that their delay in seeking amendment further evidences their good faith motives because "[i]f Plaintiffs simply wanted to destroy diversity, it would have been more advantageous for them to immediately add [Choi and Fioritto] before TEMSA even had a chance to remove the action to this Court." (MTA Compl. 11–12.) TEMSA counters that Plaintiffs' real motive—to destroy diversity jurisdiction—is clear based on the same reasons that Choi and Fioritto are not necessary parties to this action. (*See* Opp'n to MTA Compl. 18–19.) On these arguments alone, "Defendant[s'] view of Plaintiff[s'] motive is no more compelling than Plaintiff[s'] explanation of [their] motive, and Plaintiff[s'] preference for state court is no less honorable than Defendant[s'] for federal court." *Oettinger v. Home Depot*, No. C 09-01560 CW, 2009 WL 2136764, at *3 (N.D. Cal. July 15, 2009).

However, Plaintiffs' Reply argument seriously calls their motive into question. Plaintiffs represent that they "never changed their theory of liability, continually maintaining that TEMSA, its representatives and DOE defendants ... which they now know included Choi and Fioritto, participated in a grand scheme to usurp Plaintiffs' business." (Reply ISO MTA Compl. 9.) But a quick look at Plaintiffs' Proposed Amended Complaint clearly shows the "takeover" theory *is* a new theory of liability. Plaintiffs seek to amend the Complaint to add a general allegation that TNA "hired officers, directors and/or employees of [CHB Holdings] and its divisions and subsidiaries in an effort to overtake the business and operations of [CHB Holdings] and its divisions and subsidiaries." (Proposed Am. Compl. ¶ 23.) Strikingly, this theory of Plaintiffs' case is absent from the original Complaint—for instance, the words "overtake," "take over," or any variations thereof are nowhere to be found. (*See* Compl.) Similarly, the Complaint makes no mention of any warehouse, much less a coordinated effort to assist TEMSA and TNA in taking over Plaintiffs' business by evicting CHB Sales from the Warehouse subleased by Choi and co-occupied by Fioritto's company. (*Compare* Compl., *with* Proposed Am. Compl. ¶¶ 51–59.) Whereas Plaintiffs' original Complaint appears to center on TEMSA's interference with Main Street Capital's potential acquisition of CHB Holdings and CHB Holdings' relationships with Google and Wells Fargo, Plaintiffs' Proposed Amended Complaint introduces a striking new spin-off to the story. Plaintiffs' attempt to spin the yarn that their takeover theory has remained "unchanged" undermines their credibility and casts doubt on their motives.

***7** As the proposed claim against Choi and Fioritto does not render them necessary parties, Plaintiffs' motive to join them as defendants is already suspicious. Plaintiffs' transparent efforts to pretend nothing has changed between the Complaint and the Proposed Amended Complaint only confirms that suspicion. Thus, the Court finds that joinder is solely intended to destroy the Court's jurisdiction, and this factor therefore weighs against joinder.

e. Whether the Claims Against the New Defendants Appear Valid

Courts also consider whether the claim to be added seems meritorious. *Clinco*, 41 F. Supp. 2d at 1083. Here, TEMSA argues that Plaintiffs lack standing to bring the proposed claim against Choi and Fioritto because the true party in standing is the one that was evicted, CHB Sales. (Opp'n to MTA Compl. 19–21.) TEMSA also argues that Optima had the legal right to evict CHB Sales for subleasing its space in the Warehouse to Professional Charter. (Opp'n to MTA Compl. 21; *see* Choi Decl. Ex. 2.) However, Plaintiffs provide declaration testimony tending to show that TEMSA has previously acknowledged CHB Holdings' right to bring such a claim arising from CHB Sales' eviction. (Decl. of Michael Haggerty ISO Reply ISO MTA Compl. ("Third Haggerty Decl.") ¶ 4, ECF No. 53.) Additionally, the Court generally agrees with Plaintiffs that the proposed claim against Choi and Fioritto is not simply limited to the issue of wrongful eviction. (*See* Reply ISO MTA Compl. 12.)

Moreover, Plaintiffs proffer evidence to show that Choi anticipated replacing CHB Sales with TEMSA and TNA as tenants prior to CHB Sales' eviction, and that Fioritto assisted TEMSA in the hiring of CHB Sales' employees as early as July 2018. (*See* Geiger Decl.; Decl. of Omar Orozco ISO Suppl. Memo. ¶¶ 3–5, ECF No. 46; Decl. of Raul Guzman ISO Suppl. Memo. ¶ 3, ECF No. 46; Second Haggerty Decl. Ex. 4.) Thus, without deciding whether Plaintiffs' proposed fourth cause of action sufficiently states a claim for relief, the Court finds that Plaintiffs' claim against Choi and Fioritto appears to have some measure of validity. Construing the proposed claim generously, this factor weighs in favor of joinder.

f. Whether Denial of Joinder Would Prejudice Plaintiffs

Lastly, courts consider whether denial of joinder would prejudice the plaintiff. *IBC Aviation*, 125 F. Supp. 2d at 1011. Here, despite Plaintiffs' insistence to the contrary, the Court finds that Plaintiffs would not be prejudiced by denial of joinder. As discussed above, Choi and Fioritto are not necessary parties to this action, and Plaintiffs are not time-barred from bringing their claims against Choi and Fioritto in state court. Further, the overlap in issues between this case and such a state court action would likely not be so great. As mentioned, the tortious interference claim against TEMSA and TNA is distinct from the claim proposed against Choi and Fioritto; resolution of one does not obviate the need to litigate the other. Thus, this factor weighs against joinder.

On balance, the factors discussed above weigh against joinder. Accordingly, the Court hereby exercises its discretion under 28 U.S.C. § 1447(e) in denying joinder of Choi and Fioritto as defendants. The Court **DENIES in part** Plaintiffs'

Amended Motion for Leave to Amend the Complaint, insofar as it pertains to Choi and Fioritto.

IV. PLAINTIFFS' MOTION TO AMEND THE SCHEDULING ORDER

Next, the Court addresses Plaintiffs' Motion to Amend the Scheduling Order. Rule 16 provides that "[a] schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). "Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). The court may modify the pretrial schedule "if it cannot reasonably be met despite the diligence of the party seeking the extension." *Id.* (quoting Rule 16 advisory committee's notes (1983 amendment)). "Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification. If that party was not diligent, the inquiry should end." *Id.* (citation omitted).

***8** Here, Plaintiffs seek (1) an increase in the estimated trial length from five days to twelve to fifteen; (2) leave for Plaintiffs to take up to twenty-five depositions without prejudice to filing another motion for leave to take more depositions; and (3) a continuance of the July 6, 2020 deadline to amend pleadings or add parties until November 6, 2020. (*See* MTA Sched.)

As to their first request, Plaintiffs remind the Court that the parties initially requested fifteen days for trial in their Rule 26(f) report, in which they identified fifty-four "material" witnesses. (MTA Sched. 4; *see* Rule 26(f) Joint Report, ECF No. 37.) Defendants do not oppose this request because they previously agreed to a request of fifteen days. (Opp'n to MTA Sched. 1 n.1, ECF No. 61.) Nevertheless, Plaintiffs have not shown good cause for why *fifty-four* witnesses would need to be called at trial. Indeed, Plaintiffs identify only a few issues of fact, plus damages, for which trial will be needed. (*See* MTA Sched. 3–4.) As Plaintiffs provide no other bases for increasing the estimated trial length, Plaintiffs' request to increase the estimation to twelve to fifteen days is **DENIED**.

As to Plaintiffs' second request, TEMSA argues that an increase in the deposition limit is premature because Plaintiffs have not even taken ten depositions yet. (Opp'n to MTA Sched. 4–5.) On Reply, Plaintiffs appear to concede this point. (*See* Reply ISO MTA Sched. 4, ECF No. 62 (requesting that the Court to wait ninety days to see if Plaintiffs exceed ten depositions). Considering the parties' apparent resolution of this issue, Plaintiffs' request to exceed the presumptive deposition limit is **DENIED**.

Further, the Court questions whether the parties ever discussed the issue prior to Plaintiffs' filing their Motion, as Plaintiffs clearly failed comply with other requirements of Local Rule 7-3. For instance, Plaintiffs' Notice of Motion does not contain any statement that the parties met and conferred at least seven days prior to Plaintiffs' filing of their Motion. (*See* MTA Sched.) Compliance with the Court's Local Rules is not optional. *See, e.g.*, *Lopez v. Wells Fargo Bank, N.A.*, No. SACV 16-01409 AG (KESx), 2016 WL 6088257, at *2 (C.D. Cal. Oct. 17, 2016) ("Local Rule 7-3 isn't just a piece of petty pedantry put down to trip up lawyers. Nor is Local Rule 7-3 a mere formalism simply there to be checked off by lawyers."). Moving forward, the Court will require strict compliance with Local Rule 7-3.

As to Plaintiffs' third request, Plaintiffs claim that they anticipate receiving massive amounts of discovery responses from TEMSA and TNA, and that they may want to amend their pleadings after reviewing those responses. (Reply ISO MTA Sched. 3.) The mere possibility that Plaintiffs may discover good cause to amend the Complaint does not in itself establish good cause to amend the scheduling order at this time. Thus, Plaintiffs' request to continue the parties' July 6, 2020, deadline to hear motions to amend the pleadings or add parties is hereby **DENIED**.

V. CONCLUSION

In summary, Plaintiffs' Amended Motion to Amend the Complaint and for Remand is **GRANTED in part** and **DENIED in part** as detailed above. (ECF No. 35.) The Court **ORDERS** Plaintiffs to file a First Amended Complaint consistent with this Order as a separate document in the Court's CM/ECF System **within ten days of the date of this Order**. TEMSA's deadline to answer or otherwise respond to the First Amended Complaint shall be **fourteen days from the date the First Amended Complaint is filed.** Additionally, Plaintiffs' Motion to Amend the Scheduling Order is **DENIED**. (ECF No. 58.)

***9 IT IS SO ORDERED.**

All Citations

Slip Copy, 2020 WL 8994099

2012 WL 12861143
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Tigran CHOLAKYAN, individually and behalf of all others similarly situated, Plaintiff,
v.
MERCEDES-BENZ USA, LLC, Defendant.

CASE NO. CV 10-05944 MMM (JCx)
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Signed 01/12/2012

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ORDER DENYING DEFENDANT'S MOTION TO STRIKE UNDER RULE 12(f); SETTING EVIDENTIARY HEARING ON DEFENDANT'S MOTION TO DISMISS UNDER 12(b)(1)

MARGARET M. MORROW, UNITED STATES DISTRICT JUDGE

***1** On August 10, 2010, plaintiff filed this putative class action against Mercedes-Benz, USA, LLC ("MBUSA") alleging (1) violation of California's Consumer Legal Remedies Act (CLRA), California Civil Code § 1750 et seq.; (2) violation of California's Secret Warranty Law, California Civil Code § 1795.90 et seq.; (3) violation of California's Unfair Competition Law ("UCL"), California Business & Professions Code § 17200 et seq.; and (4) breach of implied warranty under the Song-Beverly Consumer Warranty Act, California Civil Code §§ 1792 and 1791.1 et. seq. [1] On December 13, 2010, defendant filed a motion to dismiss and/or strike, which the court granted in part and denied in part on June 30, 2011. [2]

[1] Complaint, Docket No. 1 (Aug. 10, 2010) at 1.

[2] Motion to Dismiss Case for Lack of Standing and Failure to State a Claim and to Strike Class Allegations ("Motion"), Docket No. 11 (Dec. 13, 2010); Order Granting in Part and Denying in Part Motion to Dismiss Case ("First MTD Order"), Docket No. 70 (June 30, 2011).

On July 20, 2011, plaintiffs filed a second amended class action complaint. [3] Defendants filed a motion to strike the pleading and/or dismiss unauthorized amendments and to dismiss the second claim for relief on August 4, 2011. [4] On September 16, 2011, defendants filed another motion to dismiss, this one asserting under Rule 12(b)(1) that plaintiff lacked standing to sue. [5] Plaintiff opposes both motions. [6] Defendants then filed replies to the opposition. [7]

[3] Second Amended Class Action Complaint ("SAC"), Docket No. 86 (Jul. 20, 2011).

[4] Motion to Strike and/or Dismiss Unauthorized Amendments in the Second Amended Complaint and to Dismiss the Third Claim for Relief ("MT Strike"), Docket No. 91 (Aug. 4, 2011); Request for Judicial Notice re: Motion to Strike and/or Dismiss Unauthorized Amendments in the Second Amended Complaint ("Def.'s First RJN"), Docket No. 92 (Aug. 4, 2011).) Although defendant styles it motion in part as a motion to dismiss plaintiff's "third claim for relief," its arguments are addressed to plaintiff's secret warranty law claim, which is the second claim in the complaint.

[5] Motion to Dismiss Case for Lack of Standing ("Standing MTD"), Docket No. 95 (Sept. 16, 2011); Declaration of Eric J. Knapp in Support of Motion to Dismiss for Lack of Standing ("First Knapp Decl."), Docket No. 96 (Sept. 16, 2011).

[6] Memorandum in Opposition to Motion to Strike and/or Dismiss Unauthorized Amendments in the Second Amended Complaint ("MT Strike Opp."), Docket No. 99 (Sept. 26, 2011); Request for Judicial Notice in Support of Plaintiff's Opposition to Defendant's Motion to Strike and/or Dismiss Amendments in the Second Amended Complaint ("MT Strike Opp. RJN"), Docket No. 98 (Sept.

26, 2011); Memorandum in Opposition to Motion to Dismiss Case for Lack of Standing ("Standing MTD Opp."), Docket No. 107 (Oct. 10, 2011); Request for Judicial Notice in Support of Plaintiff's Opposition to Motion to Dismiss for Lack of Standing ("Plaintiff's Standing RJN"), Docket No. 106 (Oct. 10, 2011). Plaintiff also filed objections to Knapp's declaration. (Objection to Declaration of Eric Knapp ("Knapp Decl. Objections"), Docket No. 109 (Oct. 10, 2011).

7 Reply in Support of Motion to Strike and/or Dismiss Unauthorized Amendments ("MT Strike Reply"), Docket No. 101 (Oct. 3, 2011); Reply in Support of Motion to Dismiss Case for Lack of Standing ("Standing MTD Reply"), Docket 112 (Oct. 17, 2011). Defendant also filed objections to plaintiff's request for judicial notice. (Objections to Request for Judicial Notice ("First MTD Opp. Objections"), Docket No. 101 (Oct. 3, 2011.); Objections to Declaration of Dara Tabesh in Support of Opposition to Defendants' Motion to Strike and/or Dismiss SAC, Docket No. 103 (Oct. 3, 2011); Objections to Declarations of Martin Potok, Tigran Cholakyan, Curtis Nakashima, Robert Starr, and Dara Tabesh, Docket No. 115 (Oct. 17, 2011).) Finally, defendant filed a declaration providing further evidence supporting the motion to dismiss for lack of standing. (Declaration of Eric J. Knapp in support of MBUSA's Reply in Support of Motion to Dismiss ("Second Knapp Decl."), Docket No. 113 (Oct. 17, 2011).) It also filed a request for judicial notice containing supplemental authority. (Request for Judicial Notice in Support of MBUSA's Reply Brief re: Motion to Dismiss for Lack of Standing, Docket No. 114 (Oct. 17, 2011).

I. FACTUAL BACKGROUND

***2** Plaintiff Tigran Cholakyan is a California citizen who resides in Los Angeles County. [8] On August 7, 2008, Cholakyan purchased a Certified Pre-Owned 2005 E-320 Mercedes Benz, with approximately 28,841 miles on its odometer, from Mercedes-Benz of Calabasas, California. [9] In January 2010, he parked the vehicle at Burbank Airport before leaving for a weekend trip to Las Vegas. [10] Upon his return, Cholakyan discovered that it had rained in Los Angeles, and that water had entered and flooded the interior cabin of his vehicle. Subsequently, in March 2010, the interior cabin of plaintiff's vehicle flooded again; there were approximately 44,226 miles on the odometer at the time of this second incident. [11]

8 Complaint, ¶ 15.

9 *Id.*

10 *Id.*, ¶ 17.

11 *Id.*, ¶ 18.

Following the March 2010 incident, Cholakyan brought the vehicle to a Mercedes-Benz authorized dealer, and complained about the water leak and the damage it had caused. [12] He asserts that the dealer "verified" that the vehicle was experiencing a "water leak defect," [13] and advised Cholakyan that he would have to pay several hundred dollars, in addition to a diagnostic fee, to repair the water leak defect and resulting damage. [14] The cost of repairs was not covered by the Certified Pre-Owned vehicle warranty on the vehicle. [15] Cholakyan alleges that the dealer "failed to inform [him] about one of the many causes of the water leak defect," and stated that the water drainage system was blocked with " 'leaves and debr[is].' " [16]

12 *Id.*, ¶ 20.

13 As explained in paragraph three of plaintiff's complaint, the term "water leak defect" refers to "numerous distinct and serious latent design and/or manufacturing defects" that cause the class vehicles "to be highly prone to water leaks and flooding ... including but not limited to defects in the water drainage system." (*Id.*, ¶ 3.)

14 *Id.*, ¶ 18-19.

15 *Id.*, ¶ 19.

16 *Id.*, ¶¶ 20-21. Plaintiffs allege that the parties conducted a joint inspection of Cholakyan's vehicle as part of the discovery process. During this inspection, it was confirmed that plaintiff's vehicle's water drains were clogged with leaves and debris. Plaintiff alleges on information and belief

> that other drains of his vehicle's water manage system are also clogged. (*Id.*, ¶ 25.)

Thereafter, water leaked into the overhead dome light located next to the sunroof on Cholakyan's vehicle.[17] After noting this, Cholakyan looked at the vehicle's head liner to see if he could identify any other problems.[18] At that time, he noticed that water was leaking into the light that illuminates the front passenger side vanity mirror.[19]

17 *Id.*, ¶ 22.

18 *Id.*

19 *Id.*

Cholakyan also alleges that "over the last approximately seven months," his vehicle has experienced "unusual electrical problems."[20] These include the failure to make a sound when the doors are locked and unlocked or when the alarm is activated, a malfunction in the sensor that indicates whether the front passenger has fastened his or her seatbelt (which Cholakyan alleges, on information and belief, also tells the vehicle if the passenger side airbag should deploy during an accident), and problems with the vehicle's navigation system.[21] These electrical problems allegedly coincided with the vehicle experiencing multiple water leaks.[22]

20 *Id.*, ¶ 23.

21 *Id.*

22 *Id.*

Cholakyan seeks to represent a class of similarly situated persons who purchased or leased certain "defective Mercedes-Benz E-Class vehicles sold by defendant," specifically 2003 through 2009 Mercedes-Benz E-Class W-211 vehicles ("class vehicles").[23] He alleges that the class vehicles' water drainage system is defective because it fails to prevent water from entering the vehicles' interior cabins.[24] Cholakyan asserts that the defect is "substantially and unreasonably dangerous" because the water leaks and water damage cause the vehicles to experience electrical failures.[25] He asserts that, in light "of the danger of catastrophic engine and/or electrical system failure as a result of water entering and flooding a vehicle's interior cabin while the vehicle is in operation," the class vehicles pose a safety hazard and are unreasonably dangerous to consumers. Specifically, Cholakyan contends that "the water leak defect can cause engine failure, suddenly and unexpectedly, at any time and under any driving condition or speed, thereby contributing to traffic accidents, which can result in personal injury or death."[26]

23 *Id.*, ¶¶ 1, 91

24 *Id.*, ¶ 36.

25 *Id.* Cholakyan also asserts that the water leak defect is dangerous in a "relatively closed environment" because it can promote mold growth. He alleges that the mold can permeate the air inside the vehicle cabin, "thereby exposing Class Members, their passengers, and individuals with whom they come in contact to serious health risks." (*Id.*, ¶ 6 n. 3.) He contends the defect caused a "musty smell" inside his vehicle. (*Id.*)

26 *Id.*, ¶ 37.

***3** In addition to these safety hazards, Cholakyan asserts that the cost of repairing the water leak defect is exorbitant, since consumers are "required to pay hundreds, if not thousands, of dollars both to diagnose and repair the water leak defect and to repair the extensive damage that it causes to a vehicle's electrical system, computer system, and other" parts of the vehicle.[27] As a result, he alleges on information and belief, the Class Vehicles are not fit for their intended purpose of providing consumers with safe and reliable transportation.[28]

27 *Id.*, ¶ 7.

28 *Id.*, ¶ 8.

Cholakyan contends that defendant actively concealed the water leak defect from him and other putative class members at the time they purchased or leased their vehicles, and at all times thereafter. He asserts that defendant "acknowledged" the defect as early as October 22, 2002, when it published a Dealer Technical Bulletin ("DTB") stating that the class vehicles were experiencing "water ingress into the front footwells ... resulting in electrical malfunctions."[29] He asserts that between 2003 and 2007, defendant initiated at least three "clandestine service campaigns" to address the water leak defects.[30] In March 2004, defendant issued a bulletin noting that "[i]n certain vehicles, it is possible that the water drains located in the front wheelhouses ... may not

drain water properly."[31] An October 2004 bulletin stated that "[Mercedes-Benz] ha[d] determined that on affected vehicles ... it is possible that the water drains ... located in the front wheelhouses may not drain water properly."[32] In January 2007, defendant issued yet another bulletin reporting that "on affected vehicles ... the water drains located in the front wheel housings may not drain properly." It directed that dealers "remove the water drain nozzles, if present, and clear the water drain passages."[33] Cholakyan alleges that collectively, the bulletins affected "well over" 100,000 vehicles.[34]

29 *Id.*, ¶ 39. The 2002 DTB is attached to the complaint as Exhibit 2. The prior complaint referred to these bulletins as Technical Service Bulletins, or "TSBs."

30 *Id.*, ¶ 40.

31 *Id.* This bulletin is attached to the complaint as Exhibit 3.

32 *Id.* This bulletin is attached to the complaint as Exhibit 4.

33 *Id.* This bulletin is attached to the complaint as Exhibit 5.

34 *Id.*

In August 2007, defendant issued another DTB, which revised the 2002 DTB for all "Model 211" vehicles.[35] This DTB was titled "Water Entry Into Fuse Box and/or Front Footwell/Possible Malfunction of Electrical System," and addressed "malfunctions in the electrical system" caused by, *inter alia*, "a blocked drain valve ... causing water to enter the vehicle interior, front SAM and/or fuse box."[36] In February 2008, defendant published yet another DTB, which addressed "water entry in the driver/front passenger foot well and in some cases accompanied with electrical faults due to water in the control units."[37] This DTB identified a number of potential causes for the water entry, including:

> "(1) 'Blocked water drain in the upper longitudinal member under the front fender (blocked by debris);' (2) 'Rising water penetrates the interior compartment because of a lack of seam sealer on the double panel of the firewall/ longitudinal member on the inside at the top;' or (3) 'Mounting hole for the tilting/sliding roof drain hose, water may back up and over flow into interior.' ..."[38]

The DTB proposed three fixes for the problem. The first two directed dealers to "(1)'Clean the areas of the upper longitudinal member under the front fender,' [and] (2) 'Apply seam sealing to the double panel of the firewall/longitudinal member toward the cross member under the wind deflector....' "[39] The DTB also suggested that "[t]o permanently fix the water drain problem mentioned in possible cause 1," the dealer should create "a water drain hole with reinforcement plate...."[40]

35 *Id.*, ¶ 41.

36 *Id.* This DTB is attached to the complaint as Exhibit 6.

37 *Id.*, ¶ 42. This DTB is attached to the complaint as Exhibit 7.

38 *Id.*

39 *Id.*

40 *Id.*

***4** The complaint also contains a number of allegations regarding defendant's warranty policy. Cholakyan contends that Mercedes-Benz has a "blanket policy" of not covering water leaks or the damage they cause under any of its express, certified pre-owned, or other warranties.[41] Defendant purportedly has this policy because it attributes water leaks to "outside influences" or class members' negligence.[42] Cholakyan asserts that, after issuing its 2008 DTB, defendant instituted "a blanket policy of secretly paying for the cost of clearing or cleaning any of the clogged drains that [ ]are part of the water drainage system ... even when the clogging of these drains occurred outside of the vehicle's 4-year/50,000-mile express warranty – as long as ... consumers complained about the clogged drains directly to MBUSA's headquarters and/or through its dealers."[43] Defendant effected this "extension" of express warranty protection despite its general policy of not covering water leak damage under other warranties.[44]

41 *Id.*, ¶ 49.

42 *Id.*

[43] *Id.*, ¶ 63. The complaint alleges that one class member sent an email to defendant on February 9, 2010, complaining about the water leak defect in his vehicle. (*Id.*, ¶¶ 63-66.) The customer had taken the car to his or her dealer, who stated that "drains which were designed to take water away from the car were plugged," and advised that the drains were not covered by the extended warranty because they were a "trim item." (*Id.*, ¶ 64.) In response, Mercedes-Benz allegedly communicated with the dealer, who eventually "cleaned out the drains." (*Id.*, ¶ 67.)
Plaintiff also contends that a representative of defendant admitted in deposition testimony that "thousands of water leak complaints" were received by its customer complaint line during the class period. (*Id.*, ¶ 68.) Defendant purportedly only offered to pay the cost of cleaning and clearing the water management drains, however, for customers who complained after the 2008 DTB was issued. (*Id.*) One of defendant's employees also stated in deposition that defendant did not implement procedures to assure that every consumer who incurred expenses cleaning and clearing the water drains was reimbursed. (*Id.*)
Finally, the complaint alleges that covering the cost of water leak-related damage, and offering to add seam sealer and/or additional drain holes to fix the water drain problem, are adjustment programs under California's secret warranty law. (*Id.*, ¶¶ 69-85.)

[44] *Id.*, ¶ 69.

In addition to the fixes mentioned earlier, the 2008 DTB suggests certain modifications to the class vehicles' water drainage systems.[45] Defendants allegedly did not notify class members whose vehicles were manufactured prior to the 2008 DTB that such modifications should be made; nor did it advise consumers who contacted its headquarters before the DTB issued of the modifications.[46] Cholakyan maintains that defendant made a decision to offer free, "clandestine" repairs under a "systematic policy" designed to cover repairs it does not consider to be warranty items, and to pacify angry customers, in order to conceal the extent and prevalence of the water leak defect.[47]

[45] *Id.*, ¶ 72. "These modifications require the dealer to 'apply seam sealing to the double panel of the firewall/longitudinal member' and to add an additional 'water drain hole' in an alleged attempt to 'permanently fix the problem' ('water drainage system modification')." (*Id.*)

[46] *Id.*, ¶ 74.

[47] *Id.*, ¶¶ 78-79.

The second amended complaint pleads five claims for relief: (1) violation of the California Consumer Legal Remedies Act ("CLRA"), California Civil Code § 1750 et seq.; (2) violation of California Business & Professions Code § 17200 et seq. (the Unfair Competition Law or "UCL"), based on unlawful conduct violating the "secret warranty law"; (3) violation of the UCL based on unlawful, unfair or deceptive practices; (4) violation of the Song-Beverly Act; and (5) common law fraud by omission. Defendant has moved to dismiss the complaint on the basis that Cholakyan lacks standing to sue. It has also moved to strike certain allegations in the second amended complaint and to dismiss his second claim for relief under the secret warranty law.

II. DISCUSSION

A. Whether Plaintiff Failed to File Timely Opposition

***5** Local Rule 7-12 provides that "[t]he failure to file any required paper, or the failure to file it within the deadline, may be deemed consent to the granting or denial of the motion." CA CD L.R. 7-12. Under Rule 7-12, the court can grant a motion based solely on an opposing party's failure to file timely opposition. See *Cortez v. Hubbard*, No. CV 07-4556-GHK (MAN), 2008 WL 2156733, *1 (C.D. Cal. May 18, 2008) ("Petitioner has not filed an [o]pposition to the [m]otion and has not requested any further extension of time to do so. Pursuant to Local Rule 7-12, his failure to do so could be deemed to be consent to a grant of the [m]otion"); *Mack-University LLC v. Halstead*, No. SA CV 07-393 DOC (ANx), 2007 WL 4458823, *4 n. 4 (C.D. Cal. Sept. 25, 2007) (holding, where a party "failed to oppose or in any way respond" to a motion, that "[p]ursuant to local Rule 7-12, the [c]ourt could grant [p]laintiffs' [m]otion on this ground alone"); *Ferrin v. Bias*, No. ED CV 02-535 RT (SGLx), 2003 WL 25588274, *1 n. 1 (C.D. Cal. Jan. 2, 2003) ("Under Local Rule 7-12, failure to file an opposition may be deemed consent to the granting of the motion").

Defendant contends that plaintiff failed to file timely opposition to its motion to dismiss for lack of standing,

despite the fact that defense counsel warned plaintiff's attorney that the deadline for filing opposition was October 7, 2011.[48] The hearing for this motion is calendared for October 31, 2011. According to Local Rule 7-9, "[e]ach opposing party shall, not later than ten (10) days after service of the motion in the instance of a new trial motion and not later than twenty-one (21) days before the date designated for the hearing of the motion in all other instances, serve upon all other parties and file with the Clerk" their opposition papers.[49] Therefore, plaintiff's opposition was due on October 10, 2011, which is a federal holiday. When computing deadlines, the last day of the period is included, "but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until *the end of the next day* that is not a Saturday, Sunday, or legal holiday." FED.R.CIV.PROC. 6(a)(1)(c) (emphasis added). The term "next day" is defined in Rule 6(a)(5), which states that "[t]he 'next day' is determined by continuing to count forward when the period is measured after an event and backward when measured before an event." FED.R.CIV.PROC. 6(a)(5). As the Local Rules measure the deadline to file opposition by counting backward from the date of the hearing, when that deadline falls on a holiday, the deadline for filing opposition runs until the "end of the next day" that is not a Saturday, Sunday, or legal holiday. Here, that deadline was October 7, 2011. Cf. *J & J Sports Productions, Inc. v. Phelan*, No. 08-CV-00486-0WW-DLB, 2009 WL 3748107, *3 (E.D. Cal. Nov. 5, 2009) ("According to Local Rule 78-230(c), Defendant's opposition to Plaintiff's motion was due not less than 'fourteen (14) days' preceding the noticed hearing date. Fourteen days prior to the noticed hearing date, October 26, 2009, is Monday October 12, 2009, Columbus day, which is a legal holiday. Under Rule 6(a)(3), when the last day of a period falls on a legal holiday, 'the period runs until the end of the next day that is not a Saturday, Sunday, [or] legal holiday.' ... Accordingly, Plaintiff's opposition was due the Friday before Columbus day, October 9, 2009. Defendant's opposition was filed on October 16, 2009. Defendant concedes it was untimely filed"). Plaintiff did not file his opposition to defendant's motion to dismiss for lack of standing until October 10, 2011, using the court's electronic filing system. Consequently, the opposition was filed three days late.

48 Notice of Plaintiff's Failure to Timely Oppose Mercedes-Benz USA, LLC's Motion to Dismiss for Lack of Standing ("Non-Opp. Notice"), Docket No. 105 (Oct. 10, 2011). Defendant states that during an email exchange between counsel about an unrelated matter, defense counsel noted that the filing deadline for plaintiff's opposition was October 7, 2011. (Declaration of Troy M. Yoshino ("Yoshino Decl."), Docket No. 105 (Oct. 10, 2011), ¶ 1.) Plaintiff disagreed, and construed defendant's comment as a demand to file the opposition before it was due. (*Id.*)
Plaintiff appears to have filed timely opposition to defendant's motion to strike unauthorized amendments in the complaint and plaintiff's second claim for relief; as a result, that motion is not involved in plaintiff's alleged failure to file in a timely fashion.

49 Local Rule 7-10 states that reply papers should be filed no later than fourteen days before the date of the hearing on the motion.

***6** As noted, the Local Rules grant the court the authority to deem a failure to file a timely opposition consent to the motion. CA CD L.R. 7-12 ("The failure to file any required paper, or the failure to file it within the deadline, *may* be deemed consent to the granting or denial of the motion" (emphasis added)). Despite plaintiff's failure to file, the court exercises its discretion to consider the merits of the motion for several reasons. First, the motion contends that plaintiff lacks standing to bring this action; deeming plaintiff's failure to comply with the Local Rules as consent to the granting of that motion would result in dismissal of the entire action. The court declines to dismiss the case, which parties have been litigating vigorously for more than a year, purely on the basis of an opposition that was filed several days late. Second, although defendant contends that "plaintiff's conduct shows deliberate intent to file late and prejudice [defendant] by unilaterally shortening its time to file a reply,"[50] the court discerns no such intent. Plaintiff's counsel filed a declaration stating that he had interpreted the Federal Rules and the Local Rules to mean that his filing deadline (absent holidays) was October 10, 2011.[51] To clarify the deadline, plaintiff's counsel contacted an ECF Help Desk Representative and the court's deputy clerk, who both advised that plaintiff's opposition could be filed on Tuesday, October 11, 2011.[52] In reliance on those representations, and his own reading of the Federal and Local Rules, plaintiff filed all documents in opposition to defendants' motion to dismiss before 5 p.m. on Monday, October 10.[53] Although counsel is obligated to read the Federal Rules and Local Rules and not rely solely on the court's personnel, it appears that counsel made diligent efforts to comply with the relevant

Rules, and even filed his opposition a day earlier than he believed necessary. Consequently, the court will consider the merits of this motion. See *Asafu-Adjaye v. Citibank, N.A.*, No. CV 10-9046 PSG (AJWx), 2011 Wl 61628, *3 (C.D. Cal. Jan. 4, 2011) ("Despite Plaintiff's untimely filing, the Court considers the Opposition filed on December 20, 2010, as it has the discretion to do under Local Rule 7-12"); *Boles v. Merscorp, Inc.*, No. CV 08-1989 PSG (Ex), 2008 WL 4414681, *2 (C.D. Cal. Sept. 25, 2008) ("Plaintiff did not file an opposition to Defendant's Motion to Dismiss before the deadline or anytime after. On that basis alone, the Court could grant Defendant NCM's Motion. However, in this particular case, the court has decided not to automatically dismiss Plaintiff's case for failure to comply with the Local Rules" (citation omitted)); cf. *Prawoto v. PrimeLending*, 720 F.Supp.2d 1149, 1151 n. 4 (C.D. Cal. 2010) ("Because of the unusual circumstances surrounding plaintiff's representation, however, the court reviews the merits of defendant's motion").

50 Non-Opp. Notice at 3.

51 Declaration of Payam Shahian in Response to Defendant's Notice of Plaintiff's Failure to Timely Oppose ("Non-Opp. Response"), Docket No. 109 (Oct. 12, 2011), ¶¶ 5-7.

52 *Id.*, ¶¶ 8-11.

53 *Id.*, ¶ 13.

B. Whether Plaintiff Made Unauthorized Amendments in the Second Amended Complaint That Should Be Stricken Under Rule 12(f)

The motions defendant has filed require the court to address the parties' arguments in a somewhat atypical fashion. As noted, the court issued an order on June 20, 2011, that granted in part and denied in part defendant's motion to dismiss the first amended complaint with leave to amend. [54] Specifically, the order found most of defendant's challenges to the complaint non-meritorious, but dismissed plaintiff's secret warranty law claim. Plaintiff filed a second amended complaint on July 20, 2011, which pled the same claims for relief as the first amended complaint, but made substantial changes in the factual allegations supporting the causes of faction that had not been dismissed. Plaintiff also included additional allegations supporting his secret warranty law claim.

54 First MTD Order.

Defendant's first motion asserts that certain allegations in the second amended complaint should be stricken under Rule 12(f) because they exceed the scope of the leave to amend the court gave plaintiff. Defendant contends that leave to amend was given only with respect to the secret warranty law claim, [55] and that plaintiff is attempting to recast the factual basis of his complaint. Specifically, defendant argues that the original basis of plaintiff's complaint was a defect identified in Mercedes-Benz's 2008 DTB; [56] this DTB is titled "Water Entry at A-Pillar," and discusses a defect that can cause "water entry in the driver/front passenger foot well" and "electrical faults due to water in the control units." [57]

55 The motion also asserts a Rule 12(b)(6) challenge to plaintiff's secret warranty law claim.

56 See SAC, Exh. 7.

57 *Id.*

After filing the motion to strike, defendant filed a motion to dismiss, which challenges Cholakyan's standing to sue under Rule 12(b)(1). One of the critical issues in that motion is whether plaintiff has failed to demonstrate, despite multiple inspections, that his vehicle suffers from the "A-Pillar" defect described in the 2008 DTB. Defendant contends that because plaintiff cannot show that his vehicle suffers from the defect that forms the basis for his complaint, he lacks standing. Cholakyan counters that it is undisputed his car has experienced *some* kind of water defect resulting in water leaks in the vehicle. [58] Even if he cannot demonstrate that the "A-Pillar" defect identified in the 2008 DTB is the cause of his injury, Cholakyan contends, his complaint does not rely exclusively on that DTB, but rather encompasses "numerous distinct and serious latent design and/or manufacturing defects that cause[ ] [class vehicles] to be highly prone to water leaks and flooding (the 'water leak defect'), including but not limited to defects in the Class Vehicles' water drainage system." [59]

58 Standing MTD Opp. at 15. Plaintiff also argues that the reduction in the value of his car, as well as its "propensity to clog," constitute injuries; as discussed *infra*, however, the alleged injuries must relate to some kind of alleged water leak for him to have standing.

59 SAC, ¶ 3.

***7** A Rule 12(b)(1) motion challenging standing raises a fundamental question regarding the court's jurisdiction, which should ordinarily be resolved before other questions. In this case, however, determining whether plaintiff has standing turns in part on whether the complaint's allegations encompass only the defect identified in the 2008 DTB, as defendants argue, or a broader range of possible defects, as plaintiff asserts. It appears that resolving the proper scope of the factual allegations in the second amended complaint is necessary to answer the jurisdictional question; indeed, the parties' arguments regarding standing are permeated by their dispute concerning the appropriate scope of the complaint. Consequently, the court first addresses defendant's motion to strike certain allegations in the second amended complaint under Rule 12(f). It will then turn to defendant's its Rule 12(b)(1) motion to dismiss for lack of standing.

1. Legal Standard Governing Motions to Strike Under Rule 12(f)

Under Rule 12(f) of the Federal Rules of Civil Procedure, the court may strike "any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." FED.R.CIV.PROC. 12(f). "[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial...." *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). "Immaterial matter is that which has no essential or important relationship to the claim for relief or the defenses being pleaded." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993) (quoting 5 Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1382, at 706-707 (1990)), rev'd on other grounds *sub nom. Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). "Impertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question." *Id.* See also *Federal Deposit Ins. Corp. v. Niblo*, 821 F.Supp. 441, 449 (N.D. Tex. 1993) (noting that Rule 12(f) motions will be granted when necessary to discourage parties from filing "dilatory" pleadings and papers).

"Motions to strike are regarded with disfavor because they are often used as delaying tactics and because of the limited importance of pleadings in federal practice. The possibility that issues will be unnecessarily complicated or that superfluous pleadings will cause the trier of fact to draw unwarranted inferences at trial[, however,] is the type of prejudice that is sufficient to support the granting of a motion to strike." *Benham v. American Servicing Co.*, No. C 09-01099 JSW, 2009 WL 4456386, *8 (N.D. Cal. Nov. 30, 2009) (citations omitted).

Federal courts have frequently exercised their power under Rule 12(f) to strike pleadings that exceed the scope of a permitted amendment. See, e.g., *Barker v. Avila*, No. 2:09-cv-00001 GEB JFM, 2010 WL 3171067, *1-2 (E.D. Cal. Aug. 11, 2010) (striking new allegations supporting a federal claim because the court had granted leave to amend only state law causes of action); *Carbajal v. Dorn*, No. CV-09-283 PHX DGC, 2010 WL 487433, *1-2 (D. Ariz. Feb. 4, 2010) (granting a motion to strike an amended complaint that "contain[ed] a host of entirely new facts, claims, and allegations against" existing defendants where leave had been granted to add a new defendant after the court found him to be a necessary party under Rule 19(a)); *U.F.C.W. Local 56 Health and Welfare Fund v. J.D.'s Market*, 240 F.R.D. 149, 154-55 (D.N.J. 2007) ("Because Counts Three through Six of Plaintiffs' SAC exceeded the scope of the leave Plaintiffs were given, the Court must strike these claims. While a motion to strike is 'generally viewed with disfavor and should b[e] used sparingly,' use of Rule 12(f) is appropriate here because to hold otherwise would be to essentially ignore ... the requirement that a plaintiff seek leave before amending its complaint.... Allowing Counts Three through Six to remain would ... allow Plaintiffs to circumvent the limitations Judge Donio expressed at the May 11, 2006 hearing"); *Hellauer v. Nafco Holding Co., LLC*, No. 97-4423, 1998 WL 472453, *3 (E.D. Pa. July 28, 1998) (holding that "the failure to seek the required leave of court when adding a new allegation is grounds for striking that allegation" under Rule 12(f), citing *Readmond v. Matsushita*, 355 F.Supp. 1073, 1080 (E.D. Pa. 1972)).

***8** Exceeding the scope of the amendment the court authorized does not, by itself, necessarily warrant striking the unauthorized allegations, however. See *Sapiro v. Encompass Ins.*, 221 F.R.D. 513, 518 (N.D. Cal. 2004) ("However tardy and conclusory they may be, plaintiffs' new claims are not wholly specious, and plaintiffs' inattention to procedural detail has not prejudiced defendants in any cognizable way. Encompass' motion to strike plaintiffs' amended complaint is denied accordingly"); *Allen v. County of Los Angeles*, No. CV 07-102-R (SH), 2009 WL 666449, *2 (C.D. Cal. Mar. 12, 2009) (holding that "[e]xceeding the scope of a court's leave to amend is not necessarily sufficient grounds for striking a pleading or portions thereof," and collecting cases in support of that proposition); *Schulken v.*

Washington Mut. Bank, Henderson, NV, 2011 WL 4804063, *5 (N.D. Cal. Oct. 11, 2011) ("Even assuming Plaintiffs made additional requests for relief in the 4AC, Defendants have not persuaded the Court that these relatively minor changes warrant granting a motion to strike pursuant to Rule 12(f). Viewing the pleading in the light most favorable to the pleader, there is no evidence that 4AC contains 'redundant, immaterial, impertinent, or scandalous matter,' " quoting FED.R.CIV.PROC. 12(f)); *Lamumba Corp. v. City of Oakland*, No. C 05-2712 MHP, 2006 WL 3086726, *3 (N.D. Cal. Oct. 30, 2006) ("Exceeding the scope of a court's leave to amend is not necessarily sufficient grounds for striking a pleading or portions thereof").

When determining whether unauthorized amendments should be stricken, courts weigh the prejudice to the opposing party. See *Ellison v. Autozone, Inc.*, No. C06-07522 MJJ, 2007 WL 2701923, *1 (N.D. Cal. Sept. 13, 2007) ("Accordingly, such motions [to strike] should be denied unless the matter has no logical connection to the controversy at issue and may prejudice one or more of the parties to the suit"); see also *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (identifying the factors that warrant denial of leave to amend, including "inordinate delay, prejudice to the defendants, the fact that the amended complaint would greatly change the nature of the litigation, and the potential futility of the claims"); *Ascon Properties, Inc. v. Mobil Oil Co.*, 886 F.2d 1149, 1161 (9th Cir. 1989) ("Mobil would suffer prejudice if Ascon were allowed to amend its complaint at this late date. Mobil has already incurred substantial litigation costs, which a more careful reading of RCRA by Ascon would have avoided. To put Mobil 'through the time and expense of continued litigation on a new theory, with the possibility of additional discovery,' would cause undue prejudice," quoting *Troxel Manufacturing Co. v. Schwinn Bicycle Co.*, 489 F.2d 968, 971 (6th Cir. 1973)).

When considering a Rule 12(f) motion, "[c]ourts must view the pleading under attack in the light most favorable to the pleader, treating as admitted all material facts alleged and all reasonable presumptions that can be drawn therefrom." *Rosales v. Citibank, Federal Savings Bank*, 133 F.Supp.2d 1177, 1180 (N.D. Cal. 2001). See also *State of California ex rel. State Lands Commission v. United States*, 512 F.Supp. 36, 39 (N.D. Cal. 1981) ("On a motion to strike, the Court must treat as admitted all material factual allegations underlying the challenged defenses and all reasonable presumptions that can be drawn therefrom"). "If there is any doubt whether the portion to be stricken might bear on an issue in the litigation, the court should deny the motion." *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F.Supp.2d 1048, 1057 (N.D. Cal. 2004).

2. The Hearing on Defendant's Motion to Dismiss the First Amended Complaint and the Court's Order Granting in Part and Denying in Part That Motion

To resolve the parties' dispute concerning the authorized scope of amendment, the court first reviews the language of the first amended complaint. That complaint alleged the existence of "numerous distinct and serious latent design and/or manufacturing defects" that rendered class vehicles "highly prone to water leaks...." [60] Plaintiff alleged that the "defects" were in the class vehicles' "water drainage system." [61] He asserted that the water drainage systems were "uniformly and inherently defective in materials, design, and/or workmanship because they bec[a]me clogged with leaves, twigs, debris, and other objects that enter[ed]" the system. [62] These flaws purportedly resulted in the system failing to "divert[ ] water away from the electrical components of the vehicle." [63] Cholakyan also alleged that the water leaks caused "electrical failure due to water damaging the computer, electrical system, and other interior components of the Class Vehicles." [64] The first amended complaint asserted that defendant "knew or should have known" of the defect's existence as early as 2002. [65]

60 FAC, ¶ 3.

61 *Id.*

62 FAC, ¶ 4.

63 *Id.*

64 *Id.*, ¶ 5.

65 See, e.g., ¶ 2.

***9** The first amended complaint identified the 2008 DTB (denominated a "technical service bulletin" or TSB), as "acknowledging one of the multiple manufacturing and/or design defects contained in the Class Vehicles." [66] The complaint focused heavily on the 2008 DTB as evidence of both the defects' existence and defendant's knowledge thereof. The 2008 DTB, which is titled "Water Entry at A-Pillar," is described in detail in the first amended complaint

and outlines three possible causes of leakage, including (1) blockage of the "upper longitudinal member;" (2) "lack of seam sealer on the double panel of the firewall/longitudinal member;" and (3) problems with a mounting hole for the "tilting/sliding roof drain hose." [67] The 2008 DTB was also the primary focus of plaintiff's secret warranty law claim; the relationship of the 2008 DTB to defendant's warranty policies was discussed extensively. [68]

66 *Id.*, ¶ 9. See also *id.*, ¶ 23 (stating that the Calabasas dealer "failed to inform Mr. Cholakyan about one of the many causes of the water leak defect – design and/or manufacturing defects contained in the Class Vehicles' water drainage system...").

67 *Id.*, ¶ 51.

68 FAC, ¶¶ 58-68.

At oral argument on the motion to dismiss the first amended complaint, the court gave the parties a tentative ruling, and asked if they wished to be heard. The parties offered competing interpretations of the allegations in the complaint and its reliance on the defect identified in the 2008 DTB. During one exchange, defendant's counsel and the court discussed whether plaintiff had adequately pled the existence of a defect:

> "MR. YOSHINO: One of the arguments that we made in our motion is that plaintiff should factually plead what the alleged defect is, explain what the part is and what the cause at issue is, as these plaintiff's counsel did in the *Erlich* case.
>
> ...
>
> THE COURT: *So let me just make sure I understand what this argument is. That alleging this TBS that Mercedes put out in which it talks about what has been termed the water leak defect is not adequate?*
>
> MR. YOSHINO: Well, your Honor, *I think the problem is that plaintiff in his opposition brief specifically said that they were not confining their claims to the TSB, the technical service bulletin. Plaintiff, of course, alleges four pages worth of stuff on the TSB.* The TSB does identify – ...
>
> MR. YOSHINO: It's true that the TSB identifies a specific part. It identifies three modes of causation. *The problem is that in opposition plaintiff came forward and said – in order to create standing, by the way – plaintiff came forward and said that his claims include but are not limited to the TSB.*
>
> Frankly, at various points in time in the opposition brief, it looks as though plaintiff is talking – plaintiff is equating the concept of a leak with the concept of a defect. So outside of what's pled as to the TSB, there's no part identified, and there's no cause identified.... Here what we're left with is if the car leaks, it must be defective. And we would respectfully submit that doesn't meet the factual pleading standard of *Iqbal.*
>
> THE COURT: *Well, so how the Court understood the complaint is that the TSB defined the alleged defect. And if that's the reading of the Court and if plaintiff accepts that reading, then aren't we over this hurdle that you're raising*?
>
> MR. YOSHINO: *On this one argument, that's true, your Honor. And that's quite frankly how we understood the complaint.*
>
> THE COURT: *I don't know how you could understand it any other way, actually.*
>
> MR. YOSHINO: Well, plaintiff in his briefing talks about the fact that – there's a specific section in the standing argument where plaintiff says that his claims are not limited to the TSB.
>
> THE COURT: *His claims are limited by what he pled in the complaint, though, that's for sure. ...*" [69]

The court and defense counsel went on to discuss whether plaintiff was required to plead technical details as to why the alleged defect rendered the car unsafe:

> ***10** THE COURT: What is it you want them to plead? The technical mechanics?
>
> MR. YOSHINO: On this particular point, on the safety consequences point, it's to plead some facts to show that these types of issues can in fact –
>
> THE COURT: They have pled that these kinds of issues can result from this defect. What beyond that is it that you want them to plead?
>
> MR. YOSHINO: I guess, your Honor, we would submit that that's pled in conclusory terms.
>
> THE COURT: So you want mechanical detail? I don't think they have to plead that.

MR. YOSHINO: Whether it's mechanical detail, whether it's that – whether or not it's that someone has experienced an engine failure, and we're not saying that they need to be injured necessarily, but there needs to be more than speculation about what can happen. Because in a car, otherwise, in a car, it would be very easy to make a claim that something is safety related....

THE COURT: Well, the distinction that appears in the case law is just saying that the ignition doesn't start or that there's some kind of a problem like that is not a safety concern. They have pled a lot more than that. I don't know whether they can prove it. You obviously don't think they can. But I mean they have pled a lot more than just some minor mechanical problem with the car.

MR. YOSHINO: They have speculated about how mechanical problems with the car could result in issues, your Honor. But we would just submit on that point.

THE COURT: Okay. [70]

Later in the hearing, plaintiff's counsel articulated his view of the scope of plaintiff's claims and their reliance on the 2008 DTB:

MR. SHAHIAN: I'm going to reemphasize the allegations we made in the complaint, which I believe the Court understands was misconstrued in defendant's papers and at today's oral argument. *We have alleged that the vehicle's water drainage system is susceptible to clogging. That means that the drains of the water drain system become clogged. And when that happens, water flows into the interior of the vehicle and causes damage.*

The TSB that we cited in our complaint identifies one of the drains that's susceptible to clogging. And I am going to quote from it now. Blocked water drain in the upper longitudinal member under the front fender blocked by debris. So the TSB is evidence that supports our theory that the vehicle's water drainage system is susceptible to clogging....

With respect to the injury, in fact, here we have alleged sufficient – raised sufficient allegations regarding injury in fact. Our client bought the vehicle, experienced the water leak defect as a result of the clogging, which was confirmed by a dealer before he brought this action. And they have not disputed that. They have not disputed the fact that the drains were clogged.

I think the emphasis is on the fact that the defect is that the water drains of the vehicle become clogged and water overflows into the vehicle, and that has been verified by a dealer who inspected Mr. Cholakyan's drains, and that has not been rebutted by any evidence that the defendant has produced in this case....

And obviously, your Honor, we were the counsel in *Erlich*, and Mr. Star and myself were also the counsel in *Marsikian*, and we know what we alleged in those cases. In *Erlich*, your Honor, we did not allege one design defect. We alleged multiple design defects, and that survived the motion to dismiss. And the same type of allegations that are being made in this case are – were made in the *Marsikian* matter.

***11** And I think your Honor hit it on the head. Basically, if the defendant does not believe what we're alleging is the cause of the defect, then that's a factual dispute that they can address at a later time like the defendants did in the *Smith v. Ford* matter, which they cited in their papers." [71]

As is apparent, the parties have disagreed about the scope of plaintiff's complaint since the early stages of this litigation; they have also disagreed about the allegations necessary to survive a motion to dismiss.

69 Reporter's Transcript of Proceedings ("Hearing Transcript"), No. CV 10-5944-MMM (Feb. 14, 2011) at 10:17-12:14 (emphasis added).

70 Hearing Transcript at 14:25-16:5.

71 Transcript at 17:6-19:7 (emphasis added).

After the hearing, the court considered the parties' arguments, denied defendant's motion to dismiss four claims, and granted its motion to dismiss the secret warranty law claim. [72] The court denied defendant's motion to dismiss for lack of standing, stating that Cholakyan had alleged injury in fact by pleading that he had suffered a "concrete financial loss" in the form of payments he made to have the water leak problem in his car diagnosed. [73] The court also addressed the causation requirement of Article III standing to determine whether Cholakyan's injury was "fairly traceable to the challenged conduct." [74] *Levine v. Vilsack*, 587 F.3d 986, 991-92 (9th Cir. 2009). Defendant had argued that even assuming Cholakyan suffered an injury of the type discussed in the 2008 DTB, it was not at all clear that injury had been caused by the alleged defect. In its order, the court observed:

> "The gravamen of Cholakyan's complaint is that defendant knew the Class Vehicles had a water leak defect, *as outlined in the TSB*, and defrauded customers by failing to disclose that the vehicles were prone to water leaks and flooding, and that the defect posed safety concerns for operators of the vehicles. To have standing to assert UCL and CLRA claims based on these allegations, therefore, *Cholakyan must allege that his vehicle experienced the water leak defect described in the TSB.*" [75]

The court then described the A-Pillar defect outlined in the 2008 DTB, and addressed defendant's contention that Cholakyan's car had experienced leaks in areas not identified by the 2008 DTB. The court noted that defendant had "proffer[ed] no evidence that compel[led] this conclusion," and that the section of the 2008 DTB quoted in the complaint mentioned that "leaks through the foot well can have other causes," suggesting that "at least one cause of foot well water may be leaking through the A-Pillar." [76] The court therefore concluded that Cholakyan had adequately pled that "he experienced the defect alleged in the complaint, and thus suffered injury in fact fairly traceable to defendant's conduct." [77]

72 First MTD Order.

73 *Id.* at 11-12.

74 *Id.* at 12.

75 *Id.* at 12 (emphasis added).

76 *Id.* at 13.

77 *Id.*

The court's analysis of Cholakyan's standing to sue was strongly influenced by its belief that the defect alleged in the complaint was the defect discussed in the 2008 DTB; the DTB featured prominently in the complaint and was the underpinning for plaintiff's secret warranty law claim. The court relied on this defect in concluding that Cholakyan had sufficiently alleged standing and in finding that his claims under the UCL and the CLRA had been pled with adequate specificity under *Iqbal* and Twombly. [78]

78 See *id.* at 21 ("The TSB instructs dealers that 'water entry in the driver/front passenger foot well' is, or may be, "in some cases accompanied with electrical faults due to water in the control units..."); *id.* at 22 ("It is not implausible that the 'electrical faults' described in the TSB could give rise to the safety concerns alleged in the complaint").

***12** Like the first amended complaint, however, the order did not rely exclusively on the defect discussed in the 2008 DTB in concluding that Cholakyan's claims had been adequately pled. The order contains a lengthy footnote on page 23, which addressed defendant's argument that "plaintiff had failed to allege the water leak defect with sufficient specificity because the complaint pleads that there are 'one or more design and/or manufacturing defects' that cause Class Vehicles 'to be highly prone to [leaks, flooding, etc.]' " [79] The court understood defendant's argument to be that since "the Class Vehicles do not have a water drainage system," plaintiff's references to defects in that system were insufficient as a matter of law. [80] The court disagreed, stating that plaintiff did not need to "plead the mechanical details of an alleged defect in order to state a claim."

79 *Id.* at 23 n. 60.

80 *Id.*

The court's discussion of this issue appears in a portion of the order that considered whether plaintiff had adequately alleged a "safety defect" in the vehicle. It was included in response to the exchange between the court and defendant's attorney quoted above as to whether the defect's "safety consequences" had been pled with adequate particularity. Although the court's understanding of the defect in question was definitely shaped by the 2008 DTB, the footnote acknowledged that more general allegations of a water leak defect would be sufficient to survive Rule 12(b)(6) dismissal. The court also confirmed that pleading the exact safety consequences of an electrical fault in the car was not necessary.

3. The Allegations in the Second Amended Complaint Defendant Seeks to Strike

While Cholakyan's second amended complaint does not assert additional claims for relief, the factual allegations that provide the basis for his claims have substantially changed. Defendant's motion to strike focuses on two types of amendments: (1) those that allegedly "expand[ ] the scope of the case beyond the 2008 DTB alleged in the FAC ... to include "any water-leak-related damage" of any type, as

well as "an insufficiently sealed firewall;" and (2) allegations related to plaintiff's standing.

Defendant notes numerous new factual allegations sprinkled throughout the complaint that detail a number of newly identified causes for the "water leak defect." Paragraph 4, for example, states that the class vehicles' "water drainage system is defective because of an insufficiently sealed firewall." [81] The complaint also states that "water intrusion" is an additional consequence of the "water leak defect." [82] Paragraph 63 states that defendant had a "blanket policy" of "secretly paying for the cost of clearing or cleaning any of the clogged drains that are part of the water drainage system (not only the drain identified in the 2008 DTB)...." [83] Other allegations are based on "any water-leak related damage." [84]

81 SAC, ¶ 4; see also *Id.*, ¶ 96(m) (raising as a common question of law "[w]hether Defendant should be declared financially responsible for notifying all Class Members of the problems with its Class Vehicles ... including their insufficiently sealed firewall").

82 *Id.*, ¶ 10.

83 *Id.*, ¶ 63.

84 *Id.*, ¶¶ 68-71.

The complaint expands the factual basis for the claims beyond the defects identified in the 2008 DTB, alleging that defendant issued "a series of ... 'DTBs' [and] Service Campaign Bulletins" related to the water leak defect. [85] The service bulletins mention problems with water drains located in wheelhouses, but do not state that electrical malfunctions can result from the drainage problems. [86] The new DTBs referenced were issued between 2002 and 2007. The 2002 DTB, which is attached to the complaint, reports that "W211 vehicles were experiencing water ingress into the front footwells ... resulting in electrical malfunctions." [87] It describes malfunctions caused by "water penetrating the windshield cover and running towards the air conditioning expansion valve," and warns that "[w]ater may enter the vehicle through the entry point of the air conditioning line." [88] The 2002 DTB states that the problem may result in "malfunctions in the electrical system." [89]

85 *Id.*, ¶ 9.

86 FAC, Exhs. 3-5.

87 SAC, ¶ 39.

88 FAC, Exh. 2 ("2002 DTB") at 1.

89 *Id.*

***13** The 2007 DTB covers all "Model 211" vehicles, and is titled "Water Entry Into Fuse Box and/or Front Footwell/ Possible Malfunction of Electrical System." [90] Among the causes cited for the malfunction is "a blocked drain valve ... causing water to enter the vehicle interior, front SAM, and/ or fuse box." [91] The 2007 DTB mentions "malfunctions in the electrical system," but attributes the problem to an "incorrectly installed module box cover or a blocked drain valve." [92] The relationship between these DTBs and the defects described in the 2008 DTB, if any, is not clear. Plaintiff asserts from 2003 to 2007, defendant undertook "at least three clandestine service campaigns" addressing "water drains in the left/front wheelhouses." [93]

90 *Id.*

91 *Id.*, ¶ 41.

92 *Id.*, Exh. 6 at 1.

93 FAC, ¶ 39-42.

In addition to these allegations regarding "water leak defects," defendant also requests that the court strike new allegations regarding Cholakyan's experience with water leaks in his vehicle. As examples of the allegations to which it objects, it cites to paragraphs 22 through 24. Paragraph 22 alleges that Cholakyan has noticed water leaking into the overhead dome light located next to his vehicle's sunroof, as well as into the light that illuminates the front passenger side vanity mirror. [94] Paragraph 23 describes the "unusual electrical problems" he has allegedly experienced, including problems with features designed to make sounds when doors are locked and unlocked, as well as the sensor that detects the presence of a passenger in the front passenger seat. [95] Finally, the complaint describes clogging in the water drains in the A-pillar, which are the area of the car discussed in the 2008 DTB, and alleges "on information and belief" that other drains in his vehicle's drainage system are similarly clogged. [96]

94 SAC, ¶ 22.

95 *Id.*, ¶ 23.

96 *Id.*, ¶ 24.

4. Whether Portions of the Second Amended Complaint Should Be Stricken Because They Reflect Amendments Not Authorized by the Court

Defendant contends that plaintiff's changes exceed the scope of the court's leave to amend. As noted, the court's June 30, 2011, order denied defendant's motion to dismiss under Rule 12(b)(1), and its motion to dismiss certain claims under Rule 12(b)(6).[97] The order stated that "[p]laintiff [could] file an amended complaint within twenty days of this order."[98] As the court did not dismiss most of plaintiff's claims, defendant asserts that the scope of authorized amendment was limited to repleading plaintiff's secret warranty claim.

97 First MTD Order at 37.

98 *Id.*

Cholakyan did more than simply replead his secret warranty claim in the second amended complaint; he added new substantive allegations that were not pled in the first amended complaint and that do not relate to the secret warranty claim. The new allegations plead the existence of defects in multiple parts of the class vehicles' water drainage system, and identify alleged defects not specified in the first amended complaint, whose relationship to the defects identified in the 2008 DTB is not clear. While the court did not envision this type of wholesale amendment when it issued the prior order, it did not expressly restrict the leave to amend granted to the repleading of the secret warranty claim. Thus, it is difficult to say that Cholakyan violated the terms of the court's order.

Even if the court were to conclude that Cholakyan had exceeded the scope of the leave to amend granted, however, it would not be compelled by that fact alone to strike the unauthorized allegations. Cholakyan has not added new causes of action, is not seeking new forms for relief, and has not named new parties. Had he done so, he would clearly have exceeded the scope of the leave to amend that was granted and have prejudiced defendant. See *Concerned Citizens for a Safe Community v. Office of Federal Detention Trustee*, CV. No. 09–01409 DAE, 2011 WL 2971000, *2 (D. Nev. July 19, 2011) ("In contravention of this Court's Order, Plaintiffs' Second Amended Complaint adds a new NEPA claim, a new prayer for relief, and two new defendants. Plaintiffs implicitly concede that they exceeded the scope of the leave granted by the Court..."); see also *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991) ("[Defendant] would have been unreasonably prejudiced by the addition of numerous new claims so close to trial, regardless of [plaintiff's] argument that they were 'implicit' in the previously pleaded claims").

***14** Rather, the new allegations Cholakyan added straddle the line between providing additional factual support for his existing claims and shifting the factual basis for Cholakyan's causes of action. The question the court must ask, therefore, is whether the new factual allegations are so substantially different from those previously alleged that they "greatly alter[ ] the nature of the litigation and ... require[ ] defendant[ ] to [undertake], at a late hour, an entirely new course of defense." *Morongo*, 893 F.2d at 1079 (denying leave to amend to include wholly new claims two years after filing of original complaint, including RICO and criminal depredation and trespass claims).

The first amended complaint alleged that the class vehicles "contain[ed] numerous distinct and serious latent design and/or manufacturing defects that cause[d] them to be highly prone to water leaks and flooding ..., including but not limited to defects in the Class Vehicles' water drainage system."[99] The overarching defect alleged in the first amended complaint was that the "water drainage systems are uniformly and inherently defective in materials, design, and/or workmanship because they become clogged with leaves, twigs, debris, and other objects that enter the water drainage system."[100] The new allegations included in the second amended complaint provide greater specificity concerning the "numerous" defects; the focus of the claim, however, remains the same – that debris enters the water drainage system, clogs it, and prevents water from draining properly.[101] The "insufficiently sealed firewalls" alleged in the second amended complaint were mentioned in the first amended complaint in allegations concerning the 2008 DTB. Defendant, therefore, should not have been surprised by the fact that alleged problems with the water drainage system and insufficiently sealed firewalls were discussed in greater detail in the second amended complaint.

99 FAC, ¶ 3.

100 *Id.*, ¶ 4.

101 SAC, ¶ 4.

The second amended complaint does appear, however, to broaden the factual bases for Cholakyan's claims by adding allegations concerning the 2003-2007 service bulletins. These bulletins address water leaks different from that discussed in the 2008 DTB. As noted above, the alleged connection between the purported water leaks and electrical malfunctions was critical to the court's determination that a safety defect had been adequately pleaded in the first amended complaint. Instead of an insufficiently sealed firewall, a blocked drain in the upper longitudinal member, and a problem with a mounting hole for the roof drain hose, the 2002 and 2007 DTBs address the possibility of electrical malfunctions resulting from water leaks caused by the penetration of water through "the windshield cover" and "an incorrectly installed module box cover or a blocked drain valve" respectively. [102] Although all of the allegations in both the first and second amended complaints broadly concern "water leak related defects," several of the amendments posit different factual bases for plaintiff's claims and may, if permitted, delay resolution of this action by necessitating additional discovery as to a broader range of defects with the water drainage system.

102 *Id.*, Exh. 2 and 6.

The question is whether plaintiff's new factual allegations are so new that they would significantly prejudice defendant at this stage of litigation. The main prejudice defendant identifies is that plaintiff has already filed a motion for class certification. [103] Defendant states that it has "expended great time and resources to prepare its substantive opposition to class certification;" among other things, it has taken the deposition of plaintiff's expert. Defendant notes that the fact discovery cutoff date is the end of this month. The court is aware, from the parties' representations during a telephonic status conference on October 5, 2011, that the resolution of a pending motion to compel has been delayed because the parties disputed the proper scope of plaintiff's claims, and that this alone may necessitate some extension of the discovery period. [104]

103 Motion to Certify Class, Docket No. 46 (June 20, 2011).

104 Minutes of Telephone Status Conference, Docket No. 104 (Oct. 5, 2011).

***15** Cholakyan represented at that status conference that, given the pendency of this motion and the motion to compel, he would seek leave to withdraw the motion for class certification and re-file it at a later time. The parties also requested that the court modify the scheduling order given the delays occasioned by their disagreement regarding the scope of the claims. While defendant would be prejudiced if plaintiff's new factual allegations were not stricken, and there was no modification of the court's scheduling order, the court has continued the case management dates and the hearing on class certification in order to eliminate any prejudice to defendant. [105]

105 Defendant asserted at oral argument that any prejudice to

Moreover, plaintiff's basic theory remains the same, i.e., the class vehicles' "water drainage systems are ... defective ... because they become clogged with leaves, twigs, debris, and other objects that enter the water drainage system." [106] Cholakyan has consistently advanced the position, both in pleadings and at oral argument, that the defect results from the "water drainage system's" tendency to fill partially or fully with debris, causing the vehicles' drains to malfunction, and water to enter the vehicle. The complaint's allegations concerning the DTBs and other documents that identify water leak problems in the class vehicles specifically reference clogging problems as the cause of the defect. [107]

106 FAC, ¶ 4.

107 SAC, ¶ 40 (describing a service campaign that recommended "clear[ing] the water drain passages"); ¶ 41 (quoting the 2007 DTB, which referred to a "blocked drain valve" as a potential cause for a water leak); ¶ 42 (identifying references in the 2008 DTB to "blocked water drains" and "water drain problems").

Consequently, the court concludes that the new factual allegations in the second amended complaint are not "redundant, immaterial, impertinent or scandalous" within the meaning of Rule 12(f) and should not be stricken. See *DeLeon v. Wells Fargo Bank, N.A.*, 729 F.Supp.2d 1119, 1128 (N.D. Cal. 2010) ("Allegations 'supplying background or historical material or other matter of an evidentiary nature will not be stricken unless unduly prejudicial to defendant.' Moreover, allegations which contribute to a full understanding of the complaint as a whole need not be

stricken" (internal citations omitted)). This is particularly true since motions to strike under Rule 12(f) are generally disfavored. See *Sapiro*, 221 F.R.D. at 518 ("That Rule 12(f) is to be applied sparingly buttresses this conclusion. Courts have long disfavored Rule 12(f) motions, granting them only when necessary to discourage parties from making completely tendentious or spurious allegations," citing *Augustus v. Board of Public Instruction of Escambia County, Fla.*, 306 F.2d 862, 869 (9th Cir. 1962) ("A disputed question of fact cannot be decided on motion to strike. It is true, also, that when there is no showing of prejudicial harm to the moving party, the courts generally are not willing to determine disputed and substantial questions of law upon a motion to strike. Under such circumstances, the court may properly, and we think should, defer action on the motion and leave the sufficiency of the allegations for determination on the merits"); see also *In re Facebook PPC Advertising Litig.*, 709 F.Supp.2d 762, 773 (N.D. Cal. 2010) ("Motions to strike generally will not be granted unless it is clear that the matter to be stricken could not have any possible bearing on the subject matter of the litigation"). [108]

108 Defendant also asserts that the "unauthorized amendments" should "be dismissed because they allege no facts stating a claim." (MT Strike at 7.) As noted, however, Cholakyan does not allege new legal claims or theories of relief in his second amended complaint; the amendments plead new *facts* supporting existing claims. Although defendant contends that the new allegations "cannot survive a Rule 12 motion," it does not identify the part of Rule 12 (aside from Rule 12(f)) that permits the court to "dismiss" factual allegations as opposed to claims. The court previously found all but the secret warranty claim sufficient, and sees no reason to revisit that ruling now.

Defendant also argue that Cholakyan's second amended complaint does not satisfy Rule 8. It cites *Oliver v. Ralphs Grocery Co.*, ___ F.3d ____, 2011 WL 3607014 (9th Cir. Aug. 17, 2011), for the proposition that "pleading by example" is forbidden by Rule 8. In *Oliver*, the Ninth Circuit reviewed a district court's refusal, on summary judgment, to consider issues identified in an expert report but *not alleged in the complaint. Id.* at *5. This motion addresses allegations in the complaint itself; *Oliver* is therefore inapposite.

The *Oliver* court relied, however, on *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963 (9th Cir. 2006). *Pickern* provides some support for defendant's position. There, the court held that a plaintiff's could not allege an ADA claim merely by listing barriers she characterized as "illustrative of the kinds of barriers a disabled person may confront," without alleging that those barriers existed at defendant's store. *Id.* at 968-69. The Ninth Circuit held that "[p]roviding a list of hypothetical possible barriers is not a substitute for investigating and alleging the grounds for a claim," and that such a practice did not comply with Rule 8. *Id.* at 969.

Although *Pickern* is closer to this case, defendant's reliance on it is nonetheless misplaced. Cholakyan does not plead "hypothetical" injuries; the complaint alleges specific injuries he has suffered, as well as specific defects his vehicle possesses. Although he may lack standing if he is unable to show that his vehicle has those defects, and that his injuries are fairly traceable to them, that is a Rule 12(b)(1) issue, not a matter to be determined under Rules 8 and 12(b)(6).

Although he opposed defendant's motion to strike, Cholakyan argued alternatively that the court should deem any unauthorized amendments a request for leave to amend and grant it because he has shown "good cause." (MT Strike Opp. at 14-15.) Given the court's conclusion, it denies this alternative request as moot.

***16** Because the parties have so vigorously disputed the scope of Cholakyan's claims throughout this litigation, the court wishes to confirm that the only defects pled in the second amended complaint, and thus the only defects on which Cholakyan may rely to prove his claims, are the specific defects referenced in the DTBs discussed in the complaint and the alleged clogging of the class vehicles' water drainage system.

C. Whether Cholakyan Lacks Standing to Bring This Action

1. Legal Standard Governing Motions To Dismiss Under Rule 12(b)(1)

A party mounting a Rule 12(b)(1) challenge to the court's jurisdiction may do so either on the face of the pleadings or by presenting extrinsic evidence for the court's consideration.

See *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) ("Rule 12(b)(1) jurisdictional attacks can be either facial or factual"); *Thornhill Publishing co. v. General Tel. & Electronics*, 594 F.2d 730, 733 (9th Cir. 1979) (facial attack); *Meliezer v. Resolution Trust Co.*, 952 F.2d 879, 881 (5th Cir. 1992) (challenge based on extrinsic evidence). Whatever the nature of the challenge, plaintiff bears the burden of demonstrating that the court has subject matter jurisdiction to hear the action. See *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

There is an important difference between Rule 12(b)(1) motions attacking the complaint on its face and those that rely on extrinsic evidence. In ruling on the former, courts must accept the allegations of the complaint as true. See *Valdez v. United States*, 837 F. Supp. 1065, 1067 (E.D. Cal. 1993), aff'd., 56 F.3d 1177 (9th Cir. 1995). In deciding the latter, courts may weigh the evidence presented, and determine the facts in order to evaluate whether they have the power to hear the case. See *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). "The court need not presume the truthfulness of the plaintiff's allegations." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); see also *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) ("With a factual Rule 12(b)(1) attack, however, a court may look beyond the complaint to matters of public record without having to convert the motion into one for summary judgment.... It also need not presume the truthfulness of the plaintiffs' allegations." (citations omitted)).[109] A "[j]urisdictional finding of genuinely disputed facts is inappropriate when 'the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits.' " *Safe Air for Everyone*, 373 F.3d at 1039 (quoting *Sun Valley Gas, Inc. V. Ernst Enterprises*, 711 F.2d 138, 139 (9th Cir 1983)) (quoting in turn *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983)). See also *Rosales v. United States*, 824 F.2d 799, 803 (9th Cir. 1987) ("A district court may hear evidence and make findings of fact necessary to rule on the subject matter jurisdiction question prior to trial, if the jurisdictional facts are not intertwined with the merits").

109 Cholakyan cites *Maya v. Centex Corp.*, 658 F.3d 1060 (9th Cir. 2011), for the proposition that when a motion challenging standing is filed at the pleading stage, as here, " 'courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party.' " *Id.* at 1068 (quoting *Warth v. Seidlin*, 422 U.S. 490, 501 (1975)). While this may be true if a defendant mounts a facial attack based on the pleadings, as defendants did in that case, here defendant has challenged plaintiff's standing factually. The court need not, therefore, presume his allegations to be true. *White*, 227 F.3d at 1242 ("The HUD officials moved for dismissal on the alternative grounds of standing and mootness. Because standing and mootness both pertain to a federal court's subject-matter jurisdiction under Article III, they are properly raised in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), not Rule 12(b)(6).... With a factual Rule 12(b)(1) attack, however, a court may look beyond the complaint to matters of public record without having to convert the motion into one for summary judgment. It also need not presume the truthfulness of the plaintiffs' allegations" (internal citations omitted)); *Ching Yee Wong v. Napolitano*, 654 F.Supp.2d 1184, 1187 (D. Or. 2009) (on a motion to dismiss for lack of standing, "a party may go beyond the allegations in the complaint and attack the factual basis for subject matter jurisdiction. In that event, no presumptive truthfulness attaches to the factual allegations in the complaint"); *Kingman Reef Atoll Investments, L.L.C. v. U.S. Dept. of Interior*, 195 F.Supp.2d 1178, 1183 (D. Haw. 2002) ("When, as here, a Rule 12(b)(1) attack is factual, the court may look beyond the complaint to matters of public record without having to convert the motion into one for summary judgment.... The court also need not presume the truthfulness of a plaintiff's allegations"); *Jones v. Thorne*, No. CIV. 97–1674–ST, 1999 WL 672222, *3 (D. Or. Aug. 28, 1999) (stating, with respect to a motion to dismiss for lack of standing, that "[i]f a party factually attacks subject matter jurisdiction, then no presumptive truthfulness attaches to the factual allegations in the complaint").

It is true that some Ninth Circuit decisions state that even when deciding a Rule 12(b)(1) factual challenge to standing, the court should accept all allegations in the complaint as true. See *McLachlan v. Bell*, 261 F.3d 908, 999 (9th Cir. 2001) ("This case was dismissed for lack of subject matter jurisdiction on a motion pursuant to Federal Rule of Civil Procedure 12(b)(1). Declarations were submitted on both sides, as

well as the complaint, but the district judge held no evidentiary hearing. Because no evidentiary hearing was held, we accept as true the factual allegations in the complaint"); *United ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1189 (9th Cir. 2001) (stating, in a case where the district court considered evidence outside the pleadings in ruling on a Rule 12(b)(1) motion, that "the reviewing court must accept as true the factual allegations of the complaint").

Those decisions conflict, however, with other Ninth Circuit cases holding that no presumption of truthfulness attaches to a plaintiff's allegations when the court considers evidence outside the complaint in ruling on a Rule 12(b)(1) motion. See *Thornhill Publishing Co., Inc. v. General Telephone & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) ("Faced with a factual attack on subject matter jurisdiction, 'the trial court may proceed as it never could under Rule 12(b)(6) or Fed.R.Civ.P. 56.... [N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims,' " quoting *Mortensen v. First Fed. Sav. & Loan Ass'n.*, 549 F.2d 884, 891 (3d Cir. 1977)); see also *Ritza v. International Longshoremen's and Warehousemen's Union*, 837 F.2d 365, 369 (9th Cir. 1988) (same); *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987) (same).

Dreier v. United States, 106 F.3d 844 (9th Cir. 1996), acknowledged this split in authority, but noted that "[t]he reliance by the district court on facts outside the complaint would be futile if on review we merely looked at the factual allegations in the complaint." *Id.* at 847. "To best reconcile these two views of 12(b)(1) motions," the court stated, "we will consider items outside the pleading that were considered by the district court in ruling on the 12(b)(1) motion, but resolve all disputes of fact in favor of the non-movant." *Id.* As noted earlier, courts have adopted this approach when addressing a factual attack on standing, and the court concurs. See *Ito v. Stanford University*, No. 5:10–cv–04750 EJD, 2011 WL 2847433, *3 (N.D. Cal. July 18, 2011) ("Under a factual attack, the court need not presume the plaintiff's allegations as true."); *In re Facebook Privacy Litigation*, 791 F.Supp.2d 705, 709 (N.D. Cal. 2011) ("The court need not presume the truthfulness of the plaintiff's allegations under a factual attack"); *Greene v. United States*, 207 F.Supp.2d 1113, 1119 (E.D. Cal. 2002) ("The court may view evidence outside the record, and no presumptive truthfulness is due to the complaint's allegations that bear on the subject matter [jurisdiction] of the court").

Cholakyan's further citation of *American Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586 (9th Cir. 1996), is inapposite, as that case addressed a challenge to personal jurisdiction under Rule 12(b)(2), not a motion under Rule 12(b)(1). See *id.* at 588 ("After being served with process in Belgium, GBL filed a motion to dismiss for want of personal jurisdiction").

***17** Where a Rule 12(b)(1) motion requires the court to resolve issues of credibility or disputed material facts, the court must first hold an evidentiary hearing before making a jurisdictional determination. See *Gould Electronics Inc. v. United States*, 220 F.3d 169, 177 (3d Cir. 2000) ("[I]f there is a dispute of a material fact, the court must conduct a plenary trial on the contested facts prior to making a jurisdictional determination"); *Mason v. Arizona*, 260 F.Supp.2d 807, 815 (D. Ariz. 2003) ("[T]he court must hold an evidentiary hearing before resolving issues of credibility or genuinely disputed material facts"). The district court has discretion to hold a pretrial evidentiary hearing or to postpone the hearing until trial. See *Commodities Export Co. v. U.S. Customs Service*, 888 F.2d 431, 436 (6th Cir. 1989) ("[A] motion to dismiss under Fed.R.Civ.P. 12(b) – and in particular a motion citing a jurisdictional defect under Fed.R.Civ.P. 12(b)(1) – requires a preliminary hearing or hearing at trial to determine any disputed facts upon which the motion or the opposition to it is predicated"); *Steele v. National Firearms Act Branch*, 755 F.2d 1410, 1414 (11th Cir. 1985) ("Disputed [jurisdictional] factual issues may be resolved at a pretrial evidentiary hearing or during the course of trial"); *Mason*, 260 F.Supp.2d at 815 ("The court has the discretion to order an evidentiary hearing before trial or postpone the motion until trial"); William W. Schwarzer et al., CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL, § 9:85.1 at 9-21 (2004) (same).

If the court resolves a Rule 12(b)(1) motion on declarations alone, without holding an evidentiary hearing, it should apply a standard similar to that used in deciding summary judgment motions. Evidence outside the pleadings may be considered, but all factual disputes should be resolved in favor of the

nonmoving party. See *Dreier*, 106 F.3d at 847 ("[W]e will consider items outside the pleading that were considered by the district court in ruling on the 12(b)(1) motion, but resolve all disputes of fact in favor of the non-movant.... [T]he standard we apply upon *de novo* review of the record is similar to the summary judgment standard that the district court purported to apply"); *In re Facebook Privacy Litigation*, 2011 WL 2039995 at *2 ("[I]n the absence of a full-fledged evidentiary hearing, disputes in the facts pertinent to subject-matter are viewed in the light most favorable to the opposing party. The disputed facts related to subject-matter jurisdiction should be treated in the same way as one would adjudicate a motion for summary judgment" (internal citation omitted)); *Ambros-Marcial v. United States*, 377 F.Supp.2d 767, 771 (D. Ariz. 2005) ("Where a motion 'properly should be labeled a dismissal for lack of jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1),' the Court may 'consider items outside the pleading ... but [shall] resolve all disputes of fact in favor of the non-movant ... similar to the summary judgment standard ...,' " quoting *Dreier*, 106 F.3d at 847); *Mason*, 260 F.Supp.2d at 815 ("[W]ithout an evidentiary hearing, genuinely 'disputed facts related to subject matter jurisdiction should be treated in the same way as one would adjudicate a summary judgment motion,' " quoting *Greene*, 207 F.Supp.2d at 1119 ("[I]n the absence of a full-fledged evidentiary hearing, disputes in the facts pertinent to subject matter are viewed in the light most favorable to the opposing party...," citing *Dreier*, 106 F.3d at 847). [110] "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003).

110 In *Augustine*, 704 F.2d 1074, the Ninth Circuit held that "where the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." *Id.* at 1077 (quoting *Thornhill Publishing Co.*, 594 F.2d at 733-35). Where jurisdiction is intertwined with the merits, "the moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.*; see also *Careau Group v. United Farm Workers of America, AFL-CIO*, 940 F.2d 1291, 1293 (9th Cir. 1991); *Roberts, supra*, 812 F.2d at 1177. In *Greene*, the court noted that in light of Ninth Circuit decisions such as *McLachlan*, 261 F.3d at 909, and *Hughes Aircraft*, 243 F.3d at 1189," [t]he rule of *Augustine* – permitting the district court to 'rule' on the evidence outside the pleadings regarding jurisdiction, except in situations where the facts on the merits are intertwined with the jurisdictional facts, has seemingly metamorphosed into a rule where the 'reviewing court' will presume the jurisdictional allegations in the complaint to be true, at least in the absence of an evidentiary hearing where live testimony is taken." *Greene*, 207 F.Supp.2d at 1119 n. 4.

2. Legal Standard Governing Article III Standing

***18** The standing doctrine ensures that a litigant is the proper party to bring an action by asking if that litigant has a sufficient stake in the matter to invoke federal judicial process. To establish Article III standing, "a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Raines v. Byrd*, 521 U.S. 811, 819 (1997). The plaintiff has the burden "of establishing the three elements of Article III standing: (1) that plaintiff[ ] ... suffered an injury in fact that was concrete and particularized, and actual or imminent; (2) that the injury is fairly traceable to the challenged conduct; and (3) that the injury was likely to be redressed by a favorable court decision." *Levine v. Vilsack*, 587 F.3d 986, 991-92 (9th Cir. 2009). Each of these elements "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). See also *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180 (2000) (explaining that to satisfy the standing requirements of Article III, a plaintiff must show, *inter alia*, that it has suffered "an 'injury in fact' that is ... concrete and particularized and ... not conjectural or hypothetical"); *Smelt v. County of Orange*, 447 F.3d 673, 682 (9th Cir. 2006) ("The burden of showing that there is standing rests on the shoulders of the party asserting it"); *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) ("The party invoking federal jurisdiction, not the district court, bears the burden of establishing Article III standing"). See also *Warth*,

422 U.S. at 518 ("It is the responsibility of the complainant [at the pleadings stage] clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers"). Article III standing is fundamental to subject matter jurisdiction, so a court must dismiss an action if it determines at any time that the plaintiff lacks standing and thus that it lacks subject matter jurisdiction. *Lujan*, 504 U.S. at 561.

In the class action context, "[t]he Lead Plaintiff['s] individual standing is a threshold issue." *In re VeriSign, Inc.*, No. C 02-02270 JW(PVT), 2005 WL 88969, *4 (N.D. Cal. Jan. 13, 2005) (citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)) ("[I]f none of the named plaintiffs purporting to represent a class establishes a requisite of a case or controversy with the defendant, none may seek relief on behalf of herself or himself or any other member of the class"); *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003) ("[O]ur law makes clear that 'if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class,' " citing *O'Shea*, 414 U.S. at 494). See also *Cornett v. Donovan*, 51 F.3d 894, 897 n. 2 (9th Cir. 1995) ("[I]f the representative parties do not have standing, the class does not have standing").

3. The Parties' Requests for Judicial Notice, Their Declarations and Objections

The parties have submitted various requests for judicial notice and declarations in support of their arguments. Because defendant relies on extrinsic evidence to support its attack on standing, the court construes its motion as a factual attack. See *Morrison v. Amway Corp.*, 323 F.3d 920, 924 n. 4 (9th Cir. 2003) ("In resolving a factual attack, the district court may consider extrinsic evidence such as testimony and affidavits. Appellees' motion to dismiss was a factual attack because it relied on extrinsic evidence and did not assert lack of subject matter jurisdiction solely on the basis of the pleadings"). "In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Safe Air for Everyone*, 373 F.3d at 1039. Each of the parties has objected to certain aspects of the opponent's requests for judicial notice.

a. Evidence Submitted in Support of Defendant's Motion to Dismiss for Lack of Standing and Plaintiff's Objections

In support of its motion to dismiss, defendant proffers the declaration of one of its attorneys, Eric Knapp. Knapp states that the "matters referenced" in his declaration are "based on [his] best personal knowledge and belief." [111] The exhibits to Knapp's declaration are largely court filings, deposition transcripts, responses to special interrogatories and requests for production, as well as correspondence between the parties regarding the meet and confer process that preceded the filing of this motion. [112] Plaintiff objects only to Exhibit J, which consists of two photographs of Cholakyan's vehicle that allegedly show it is missing waterproof covers. Plaintiff also objects to certain of Knapp's statements that concern possible alternative causes for any water leaks that have occurred in Cholakyan's vehicle. As Exhibit J and Knapp's statements regarding alternate reasons for the alleged water leaks are disputed, and are not necessary to resolution of this motion, the court declines to consider them. Cf. *Wren v. RGIS Inventory Specialists*, 256 F.R.D. 180, 180 (N.D. Cal. 2009) ("[T]the Court rules only on those objections that relate to evidence it relies upon in support of its decision").

111 First Knapp Decl., ¶ 1.

112 The exhibits to which plaintiff did not object are:

- Exhibit A – A copy of the court's June 30, 2011, order denying defendant's motion to dismiss in part and granting in part;
- Exhibit B – A copy of the reporter's transcript from the February 14, 2011, oral argument on the motion to dismiss;
- Exhibit C – Excerpts from the transcript of a June 20, 2011, deposition of Cholakyan;
- Exhibit D – Excerpts from the transcript of a July 21 2011, deposition of Martin Potok, plaintiff's expert;
- Exhibit E – Excerpts from Cholakyan's responses to defendant's special interrogatories, dated April 27, 2011;
- Exhibit F – Excerpts from Cholakyan's responses to defendant's request for production, dated April 27, 2011;
- Exhibit G – The declaration of Gary H. Bowne, filed in support of defendant's

opposition to plaintiff's motion to compel (First Motion to Compel Responses to Plaintiff's Interrogatories, Set One, and Requests for Production of Documents, Set One, Docket No. 41 (Jun. 6, 2011));

- Exhibit H – Excerpts from the transcript of a July 22, 2011, deposition of Wade Lenan, the owner and representative of Monaco Motors, which is the service facility plaintiff hired to inspect his vehicle in August 2010;
- Exhibit I – A copy of the court's March 7, 2011 order denying defendant's request that the court recuse itself due to the court's ownership of a 2000 E-Class vehicle;
- Exhibits K through Q – copies of emails, letters, and other correspondence that the parties exchanged in connection with the meet and confer process that led to the filing of this motion.

(First Knapp Decl., Exhs. A-Q).

***19** While Cholakyan did not object to consideration of the deposition transcripts attached to Knapp's declaration, the court notes that many of them suffer from authentication problems. In *Orr. v. Bank of America, NT & SA*, 285 F.3d 764 (9th Cir. 2002), the Ninth Circuit set forth clear requirements for the authentication of deposition transcripts in summary judgment and summary judgment-type proceedings:

> "A deposition or an extract therefrom is authenticated in a motion for summary judgment when it identifies the names of the deponent and the action and includes the reporter's certification that the deposition is a true record of the testimony of the deponent. Ordinarily, this would have to be accomplished by attaching the cover page of the deposition and the reporter's certification to every deposition extract submitted. *It is insufficient for a party to submit, without more, an affidavit from her counsel identifying the names of the deponent, the reporter, and the action and stating that the deposition is a 'true and correct copy.' Such an affidavit lacks foundation even if the affiant-counsel were present at the deposition.*" *Id.* at 774 (internal citations omitted, emphasis added)

The deposition transcripts submitted with Knapp's declaration largely fail this test. While they are accompanied by cover pages, none has a signed reporter's certification. Knapp's affirmation that he can testify to the authenticity of the documents is, standing alone, insufficient, as *Orr* clarified. The court therefore declines to rely on the excerpts of the Cholakyan and Lenan depositions that defendant proffers.

"[I]n a summary judgment motion proceeding," however, "documents may be authenticated not only through personal knowledge ... but also by any manner permitted by Fed. R. Evid. 901(b) or 902." *Holmes v. Home Depot USA, Inc.*, No. 1:06-cv-01527-SMS, 2008 WL 4966098, *8 (E.D. Cal. Nov. 20, 2008). Documents may be authenticated by "[d]istinctive characteristics and the like," including "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." FED.R.EVID. 901(b)(4). The transcript excerpts from the Potok deposition, although not accompanied by a signed reporter's certificate, reference Potok.[113] Considering the contents, nature, and appearance of the document, as well as the explicit reference to Potok, the court considers that deposition. See *Renteria v. Oyarzun*, CV No. 05-392-BR, 2007 WL 1229418, *2 (D. Or. Apr. 23, 2007) (in the absence of evidence showing that the excerpts were fraudulent, deposition transcripts that lacked a copy of the court reporter's certification but did include the cover page identifying the deponent, the action and the time and place of the deposition were authenticated under Rule 901(b)(4)); and the time and place of the deposition were authenticated under Rule 901(b)(4)); *Prineville Sawmill Co. v. Longview Fibre Co.*, CV No. 01-1073-BR, 2002 WL 31974434, *11 (D. Or. Sept. 23, 2002) (in the absence of evidence showing that they were fraudulent, deposition excerpts that included the cover page of the deposition identifying the deponent, the action and the time and place of the deposition and that were attached to an affidavit in which counsel stated that the excerpts were true copies of the transcripts provided by the court reporter who took the deposition were sufficiently authenticated under Rule 901(b)(4)); *Kenney v. Paderes*, No. Civ. 00–00315 EMK, 2002 WL 31863882, *2 (D. Haw. Aug. 21, 2002) ("Although the transcripts do not contain the reporter's signed certificate, the cover page of the deposition transcripts of both Dr. Allen and Dr. Lauer provide the name of the deponent, the case name and civil number, and indicates that it is a certified copy.... Furthermore, by reviewing its contents, this Court is able to make the determination that the deposition transcripts are authenticated. Fed.R.Evid. 901(b)(4)"). Compare *Orr*, 285 F.3d at 774 ("Nor can [the deposition excerpt of Castle's deposition] be authenticated by reviewing its contents because Castle's name is not mentioned once in the deposition extract," and citing FED. R. EVID. 901(b)(4)); see also *Holmes*, 2008 WL 4966098 at *9 (stating that while a document attached to deposition was not "authenticated

in the straightforward, complete way that is customary for depositions," the court would consider the report since "there is evidence warranting a reasonable person in believing that the report is the report he authored"). [114]

[113] First Knapp Decl., Exh. D ("Potok Depo.") at 298:16-17 (statement by videographer that "This is the continuation of the deposition of Martin Potok").

[114] While both parties have submitted voluminous evidence with their briefs, they have not adhered to the authentication requirements set forth in *Orr*, 285 F.3d 764. The parties are cautioned that they must meet the requirements of the Federal Rules of Evidence, as interpreted in *Orr*, to ensure that the evidence they proffer can be considered by the court.

***20** Knapp submitted a second declaration with defendant's reply brief, which attached additional documents. [115] Plaintiff has not objected to this declaration or the exhibits. Defendant has submitted two deposition transcript excerpts with this motion, from Potok and Cholakyan. Once again, these excerpts are not accompanied by signed reporter's certifications, but both of them contain internal references to the deponents. [116] Pursuant to the reasoning above and Rule 901(b)(4), the court will consider them in deciding this motion.

[115] The documents appended to Knapp's reply declaration are as follows:

1. Exhibit A – Further excerpts from Potok's July 21, 2011 deposition;
2. Exhibit B – A repair order for plaintiff's vehicle from Mercedes-Benz of Calabasas, March 1, 2010;
3. Exhibit C – Further excerpts from Tigran Cholakyan's June 20, 2011 deposition;
4. Exhibit D – A copy of a webpage authored by counsel about this case;
5. Exhibit E – A copy of an email from plaintiff's counsel to defendant stating that plaintiff would identify photographs of his vehicle. (Second Knapp Decl., Exhs. A-E.)

[116] Second Knapp Decl., Exh. A ("Potok Depo.") at 211:23-24 (videographer's statement that "[t]his is the continuation of the deposition of Martin Potok"); *id.*, Exh. C ("Cholakyan Depo.") at 163:2-3 ("Good afternoon, Mr. Cholakyan. When we broke for lunch, we were talking about repair orders and invoices...").

b. Plaintiff's Request for Judicial Notice, Declarations Submitted in Support of His Opposition, and Defendant's Objections

With his opposition, plaintiff asked that the court take judicial notice of deposition excerpts and other documents. As an initial matter, the court cannot take judicial notice of extrinsic evidence such as deposition testimony under Rule 201. Such items can be considered, however, if they are properly authenticated. See *Pavone v. Citicorp Credit Services, Inc.*, 60 F.Supp.2d 1040, 1044-45 (S.D. Cal. 1997) ("Judicial notice is proper where a fact is 'not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.' Fed.R.Evid. 201(b). Of course, documents that are not proper subjects of judicial notice may still be admissible as evidence if they are properly authenticated, that is, if the proponent introduces evidence sufficient to support a finding that the document is what the proponent claims. Fed.R.Evid. 901(a)"); *id.* at 1045 (stating that a deposition transcript is authenticated if the reporter's certificate is attached); see also *Orr*, 285 F.3d at 774 ("A deposition or an extract therefrom is authenticated in a motion for summary judgment when it identifies the names of the deponent and the action and includes the reporter's certification that the deposition is a true record of the testimony of the deponent"). [117] As most of the deposition excerpts Cholakyan has submitted include signed reporter's certifications attesting to the authenticity of the depositions, the court will consider them. One of the deposition transcripts, that of plaintiff's expert, Potok, contains a unsigned reporter's certification, however. Unlike the excerpts defendant proffered, plaintiff's excerpts contain no internal references to Potok nor any other information that would permit the court to conclude that the excerpts are authenticated under Rule 901(b)(4). Consequently, the court cannot consider those excerpts of Potok's deposition for purposes of this motion.

[117] The excerpts from depositions taken in the instant action are:

- Exhibit 1 – Excerpts from the July 22, 2011. deposition of Wade Lenan, a Monaco Motors employee;
- Exhibit 5 – Further excerpts from Potok's July 21, 2011 deposition;
- Exhibit 6 – Excerpts from the June 7, 2011. deposition of Gary H. Bowne, defendant's employee;
- Exhibit 7 – Excerpts from the July 14, 2011. deposition of Jason Smith, defendant's employee;
- Exhibit 12 – Excerpts from the June 10, 2011 deposition of Joseph Haller, defendant's employee. (Plaintiff's Standing RJN.)

***21** Cholakyan also asks the court to take judicial notice of two repair invoices for his vehicle, one from Calabasas Motorcars Repair and the other from Monaco Motors. Although defendant did not object to the court considering these exhibits, they are not proper subjects of judicial notice because they are not information that is "capable of accurate and ready determination by resort to source whose accuracy cannot reasonably be questioned." [118] FED. R. EVID. 201(b). The Monaco Motors invoice, however, is quoted in the complaint. [119] As the complaint explicitly references this document and relies on it in asserting claims, and as defendant does not object to consideration of the document, the court will consider it under the incorporation by reference doctrine. See *In re Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970, 986 (9th Cir. 1999) ("[The incorporation by reference doctrine] permits a district court to consider documents 'whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading,' " quoting *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), overruled on other grounds, *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002)). The court will consider the Monaco Motors invoice, but not the Calabasas invoice.

118 These documents are appended to plaintiff's request for judicial notice as:
- Exhibit 2 – The invoice from Monaco Motors for plaintiff's vehicle;
- Exhibit 4 – The invoice from Calabasas Motorcars Repair.

119 SAC, ¶¶ 20-21.

Defendant objects to the consideration of six other exhibits. Two of these are a news article and blog post that bear no apparent relation to the litigation; the former describes Mercedes-Benz's completion of "two climatic tunnels built to simulate extreme weather conditions for testing vehicles ...," while the latter discusses a judgment in an unrelated case involving "leaking seals" in non-class vehicles. [120] Two other exhibits are a repair invoice and vehicle booklet for non-class vehicles. [121] Finally, two of the exhibits are deposition transcripts from another action that involved vehicles not at issue in this litigation. [122]

120 *Id.*, Exhs. 3, 8.

121 *Id.*, Exhs. 10, 13.

122 *Id.*, Exhs. 9, 11.

Given that they discuss vehicles that are not the subject of this action, [123] the relevance of the documents is questionable at best. Defendant, moreover, disputes the facts contained in the documents. Consequently, the court will not rely on them in deciding the motion. "Rule 201 forbids taking judicial notice of facts that are subject to reasonable dispute," and "[c]ourts will not take judicial notice of factual propositions that are subject to reasonable dispute." See 1-201 Weinstein's FEDERAL EVIDENCE § 201.13 (emphasis added);FED.R.EVID. 201, Advisory Committee Notes ("[a] high degree of indisputability is essential" for judicial notice).

123 The New York Times article does not discuss any specific model of vehicle.

Plaintiff also proffers five declarations in support of his opposition. [124] Defendant objects to the court's consideration of parts or all of these declarations on various grounds, including that they lack foundation, that they contradict other testimony, and that the declarants do not base their statements on personal knowledge. To the extent the court relies on statements from these declarations to which defendant objects, the court discusses and rules on the objections below.

124 The following individuals submitted declarations:
- Dara Tabesh, Cholakyan's attorney;
- Cholakyan;
- Potok;
- Robert L. Starr, Cholakyan's attorney; and
- Curtis Nakashima, a Calabasas employee who was allegedly present at the July 20, 2011, inspection. Nakashima was apparently not disclosed as a potential witness in Cholakyan's

Rule 26 disclosures. (MBUSA's Objections to Declarations at 15.)

4. Whether Cholakyan Has Standing to Bring This Action

Defendant's primary challenge to Cholakyan's Article III standing is that he has failed to demonstrate that his vehicle experienced the water leak defect described in Mercedes-Benz's 2008 DTB or any of the DTBs and service bulletins alleged in the complaint. It contends that Cholakyan's failure to demonstrate that his car is affected by "the alleged defect at the heart of his case" is fatal to his claims.[125] The court has declined to strike Cholakyan's amendments to the complaint and allowed him to expand the factual basis for his claims beyond the defects described in the 2008 DTB. Defendant, however, has adduced evidence that calls into question whether Cholakyan's vehicle experienced a water leak resulting from *any* of the defects broadly alleged in the complaint or described in the attached DTBs and service bulletins. See *Contreras*, 2010 WL 2528844 at *5 ("First, Plaintiffs do not allege that their vehicles have manifested the alleged defect. Second ... Plaintiffs do not allege that they were forced to replace their vehicles after learning of the alleged defect or that they incurred any out-of-pocket damages"); *Whitson v. Bumbo*, No. C 07-05597 MHP, 2009 WL 1515597, *6 (N.D. Cal. Apr. 16, 2009) ("Whitson fails to allege that her seat manifested the purported defect.... In summary, Whitson does not have standing for her claims under a 'benefit of the bargain' theory or any other stated theory.... As such, the complaint as alleged does not meet the standing requirements of Article III, and this court cannot exercise jurisdiction. Since Whitson does not have standing, her motion to certify a class is moot").

125 Standing MTD at 6.

***22** The 2008 DTB referenced in the first and second amended complaints describes a specific problem with the class vehicles' "A-Pillar," one of the causes of which is debris in the "upper longitudinal member under the front fender."[126] The other DTBs describe water leaks that may result from "water penetrating the windshield cover,"[127] "an incorrectly installed module box cover or a blocked drain valve,"[128] or the failure of water in the vehicles' wheelhouses to "drain[ ] properly."

126 SAC, Exh. 7.

127 SAC, Exh. 2 (2002 DTB).

128 *Id.*, Exh. 6 (2007 DTB).

The complaint states that Cholakyan brought his vehicle to the Calabasas dealership complaining of water leaks and resulting damage.[129] He allegedly reported to the dealer that the car's trunk had "water in it after rains," and that "when opening [the] driver[']s door, water rushed out."[130] The dealership "found water entering trunk from [the] LIC panel[, which was] not seal[ed] properly," and "found [a] water leak from [the] driver[']s door seal[;] [when the vehicle was] inspect[ed, the dealership] found [the] driver['s] door seal leaking."[131]

129 SAC, ¶ 18.

130 Declaration of Eric J. Knapp in Support of MBUSA's Reply ("Second Knapp Decl."), Docket No. 113 (Oct. 17, 2011), Exh. B (Calabasas Dealer Report).

131 Calabasas Dealer Report at 1.

Cholakyan paid $136.50 for the diagnosis and was advised that he would have to pay significantly more to repair the problem.[132]

132 *Id.*, ¶ 19. At his deposition, Cholakyan testified that the mechanic who inspected the vehicle "told me that there's something with the door seal.... I don't know exactly what that means, but the driver's door seal was something wrong ...." (Knapp Decl., Exh. C (Cholakyan Deposition) at 164:4-7.)

On August 5, 2010, before Cholakyan filed suit, his lawyer paid an independent repair facility, Monaco Motors, to inspect Cholakyan's vehicle and examine its drains. A service invoice from that inspection states that the repair shop "found the drains to be filled with leaves and debr[is]" and that the "[d]rains need[ed] to be cleaned out."[133] The invoice did not explicitly state that water had leaked into the vehicle's interior.

133 Plaintiff's Standing RJN, Exh. 2.

After this action commenced, the parties conducted three inspections of the vehicle, on June 22, July 20, and August

12, 2011. [134] The June 22, 2011 inspection was visual only; no testing was conducted. [135]

134 Declaration of Dara Tabesh in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss for Lack of Standing ("Tabesh Standing Decl."), Docket No. 107 (Oct. 10, 2011), H5.

135 Declaration of Robert L. Starr In Opposition to Defendant's Motion to Dismiss for Lack of Standing ("Starr Standing Decl."), Docket No. 107 (Oct. 10, 2011), ¶ 2. The parties dispute the level of debris that had collected in the vehicle's drains, and appear to disagree about the meaning of the word "clog." (Compare Starr Standing Decl., ¶¶ 3, 6 ("After removal of the access panel it was immediately apparent that the cavity was filled with organic debris clogging the A-Pillar drains.... [T]he cavity was filled with organic debris") with Potok Depo. at 266:20-21 ("I did not see any clogs in the three vehicles [examined]").
The parties do not discuss the results of the August 12, 2011, inspection in any detail, but one of defendant's lawyers states that at that inspection, "plaintiff's counsel was made aware of the missing waterproof cover on the subject vehicle...." (First Knapp Decl., ¶ 15.) The parties dispute whether the cover that was purportedly missing explains the water leaking into Cholakyan's vehicle.

***23** On July 20, 2011, Cholakyan's expert, Martin Potok, conducted testing on the vehicle. [136] The following day, defendant deposed Potok. [137] Potok testified that he had been unable, based on the testing he conducted on July 20, to determine that Cholakyan's vehicle had experienced any water leaking into the interior of the car as a result of the defects identified in the 2008 DTB, the other DTBs, and the service bulletins. Potok stated:

> Q: In fact, all of the ways that were described by the DTBs and service actions that you read did not result in any leakage inside the car.
>
> A: Yes, sir. [138]
>
> ...
>
> Q: Other than the DTB, do you have any knowledge of water entering into the occupant compartment because of inadequate sealant at the A-pillar on the passenger side?
>
> A: Outside of the DTB?
>
> Q: Outside of the DTB.
>
> A: No, sir. [139]
>
> ...
>
> Q: The mere fact that somebody has a vehicle that has a lot of debris on it doesn't mean that you can say that's got a clog in any of the drains that you've defined as defective.
>
> A: Just by looking at it?
>
> Q: Right.
>
> A: Yes.
>
> Q: And that's been shown by your testing of the Cholakyan vehicle and the vehicles back in Pennsylvania?
>
> A: Yes, there was debris.
>
> Q: They all had debris?
>
> A: Yes.
>
> Q: But none had clogs?
>
> A; The water did eventually drain out of the vehicle.
>
> Q: Well, none had clogs that were clogging that movement of water from the sunroof out or from –
>
> A: Correct.
>
> Q: The cowl out?
>
> A: Correct.
>
> Q: And even if you have a clog, that does not necessarily mean that there's going to be a clog in one of those drains, doesn't mean necessarily you're going to have a – water inside the car?
>
> A: Not at that point, but maybe down the road, it can happen.

Q: Well, I mean it may be possible, but in terms you can't simply say, because I got a clog, therefore the leak is from the clog?

A: That is correct. [140]

...

Q: Okay. Now, plaintiff, Mr. Cholakyan, had no leaks that you were able to demonstrate from the conditions that are set forth in the DTBs as we discussed, is that correct?

A: Yes. [141]

136 First Knapp Decl., ¶ 7.

137 *Id.*

138 First Knapp Decl., Exh. D ("Potok Depo.").

139 Potok Depo. at 192:23-193:4.

140 *Id.* at 299:15-300:20.

141 *Id.* at 303:4-8.

While Potok could not conclude that any of the defects described in the DTBs caused leaking in Cholakyan's car, he did state that the vehicle had *some* water drainage problems. He observed that when he poured water into the "fender cavity drains," the water "eventually" drained out, but that "the water was building up in that area and staying that way. As long as I held the water in there, you had a substantial level of water." [142] He observed that the vehicle was "loaded with debris on both sides," [143] and that although he could not find evidence of leakage into the vehicle interior, "maybe two, three weeks from now, it could exhibit that condition that it does leak." [144] Potok also stated in a later-filed declaration that he was "able to replicate water ingress into the interior of the vehicle" at the "heater box located on the firewall, which resulted in water entering the driver's side of the vehicle." [145] He acknowledged, however, that this was the "only" place at which he could replicate water entry into the vehicle. Cholakyan has also proffered the deposition testimony of Jason Smith, defendant's employee, who agreed that "depending on where a person lived, what kind of organic debris may be around, how many trees they lived by, that some people may be more susceptible to clogging upper longitudinal member drains than others." [146]

142 Potok Depo. at 140:2-12.

143 *Id.* at 214:8-9.

144 *Id.* at 303:18-21.

145 Declaration of Martin Potok in Support of Opposition to Defendant's Motion to Dismiss for Lack of Standing ("Potok Standing Decl."), Docket No. 107 (Oct. 10, 2011), ¶ 5.

146 Plaintiff's Standing RJN, Exh. 7 (Smith Depo.) at 214:1-7.

***24** Although it appears that debris has collected in the drains of Cholakyan's vehicle at different points in time, and/or that water may be leaking into his car for some as-yet unidentified reason, the parties dispute (1) whether the collection of debris clogged the drains such that water could not escape from them, and (2) whether any water entered the vehicle's interior as a result of the clogging. The bulk of Cholakyan's argument focuses on the alleged injuries he has suffered as a result of the alleged "water leak defect." He advances several theories as to why he has standing to sue, including that he overpaid for the vehicle, that it has a "propensity to clog," and that the vehicle has a "water leak problem." [147] Cholakyan's single-minded focus on injury, however, misses a potentially fundamental problem with his standing to sue.

147 Standing Opp. at 9, 12, 13.

While he may be correct that any of these injuries constitutes "injury-in-fact" for purposes of Article III standing, Cholakyan must demonstrate not only that he has suffered injury, but also that the injury is "fairly traceable" to the alleged cause of injury identified in his complaint. Here, that cause is the "water leak defect" alleged in the complaint, which result from the "water drainage system's" alleged propensity to clog and fill with debris and/or from specific defects of another type discussed in the 2002, 2004, 2007 and 2008 DTBs. *Sprint Communications Co., L.P. v. APCC Services, Inc.*, 554 U.S. 269, 300 (2008) (framing the standing inquiry as "whether the plaintiff can demonstrate an injury in fact that is fairly traceable to the challenged actions of the defendant and likely to be redressed by a favorable judicial decision"). Linking the water leakage, if any, that Cholakyan has experienced to a defect alleged in the complaint is crucial to his ability to establish standing to sue. Moreover, as noted, the secret warranty law claim is explicitly tied to the 2008 DTB. Because it is not certain that

any injury Cholakyan may have suffered was caused by any of the defects discussed in the DTBs, or any alleged clogging of the water drainage system, it is unclear that he has standing to sue. [148]

148 In contrast to his other claims, Cholakyan's ability to show that he has standing to assert the secret warranty law claim is dependent on his ability to prove that his vehicle suffers from one or more of the specific defects identified in the 2008 DTB. The evidence he has adduced that his vehicle suffers from these defects is minimal at best. Specifically, he has adduced evidence that there was some debris in the A-pillar in his vehicle, although whether the amount of debris resulted in water drainage problems is questionable. (Plaintiff's Standing RJN, Exh. 2.) As discussed *infra*, the parties also dispute whether there was sufficient debris in Cholakyan's drains that they could be said to have been "clogged." For the reasons stated, the court is unable to resolve this question without an evidentiary hearing. It simply notes that Cholakyan must proffer this more specific type of proof to demonstrate that he has standing to prosecute the secret warranty law claim.

Despite Cholakyan's minimal showing regarding the cause of his alleged injury, he has adduced some evidence that his vehicle suffers from water leaks, and that some amount of debris has collected in its drains (although it is not clear that this clogging has necessarily caused any water leakage). The parties dispute whether the debris collection Cholakyan has experienced constitutes "clogging" of the vehicle's drains. [149] This dispute, and the fact that Cholakyan's expert testified that the results of one testing session cannot conclusively demonstrate that the water leaks alleged in the complaint are not present in the vehicle raise fact questions that the court cannot resolve through application of a summary judgment-type standard. [150] To resolve such disputes, and to examine the credibility of key witnesses, including Cholakyan and Potok, the court concludes it is appropriate to hold an evidentiary hearing to determine (1) whether Cholakyan's vehicle has suffered water leaks, and (2) whether those leaks were caused by clogging in the vehicle's "water drainage system" or by any of the specific defects discussed in the 2002, 2004, 2007 and 2008 DTBs. [151] See *James v. Harris*, No. CV-08-200-EFS, 2009 WL 1587901, *10 (E.D. Wash. Jun. 1, 2009) ("When a district court is presented with contradictory evidence bearing directly on the issue of standing, such that the district court is required to resolve factual disputes and make witness credibility determinations central to the standing issue, the court must hold an evidentiary hearing"); *Fordjour v. United States*, No. CV981977PHXR0SJRI, 2002 WL 31720161, *3 (D. Ariz. Aug. 29, 2002) ("However, the court must hold an evidentiary hearing before resolving issues of credibility or genuinely disputed material facts"); *Brace v. Lifeguard*, Inc., Civ. No. 92-20509 SW, 1995 WL 32868, *3 (N.D. Cal. Jan. 25, 1995) ("The Court must resolve any genuine disputed factual issue concerning standing either through a pretrial evidentiary hearing or during the trial itself"); see also *Access 4 All, Inc. v. Boardwalk Regency Corp.*, Civil Action Nos. 08-3817 (RMB/JS), 08-4679 (RMB/JS), 2010 Wl 4860565, *8 n. 16 (D.N.J. Nov. 23, 2010) ("Courts must conduct evidentiary hearings to determine standing when there are disputed factual issues and witness credibility determinations to be resolved"). [152]

149 Among their many disagreements, the parties dispute the meaning of the word "clog," or more precisely, what level of debris needs to enter a drain and how restricted the flow of water from the drain must be before the drain can be denominated "clogged." As noted, Cholakyan earlier took his vehicle to Monaco Motors, which observed that the "drains" were "filled" with debris. (Plaintiff's Standing RJN, Exh. 2.) Cholakyan calls this a "clog." (Opp. at 13.) Defendant asserts that the mere presence of debris in a drain does not mean the drain is "clogged," citing Potok's deposition testimony. (Potok Depo. at 299:14-24 (agreeing that "[t]he mere fact that somebody has a vehicle that has a lot of debris on it doesn't mean that you can say that's got a clog in any of the drains that you've defined as defective"); see also *id.* at 300:11-14 ("Q. And even if you have a clog, that does not necessarily mean that ... you're going to have a – water inside the car? A. Not at that point, but maybe down the road, it can happen. Q. Well, I mean it may be possible but in terms you can't simply say, because I got a clog, therefore the leak is from that clog. A. That is correct.").)
Defendant asserts that Potok's statement in his declaration that he "confirmed that the fender cavity drains [in plaintiff's vehicle] ... were clogged with organic debris" contradicts his deposition testimony that he "did not see any clogs" in the class vehicles he examined. (Def's Objections to Plaintiff's Declarations at 2-3.) Cholakyan counters

that Potok testified that the slow rate of water drainage through the fender cavity drains was indicative of "clogging," and that his declaration does not contradict that testimony. (Plaintiff's Response to Objections to Declarations, Docket No. 121 (Oct. 24, 2011) at 3-4.)

The parties use various definitions of "clog" that range from the mere existence of debris in a drain, to a level of debris that creates water flow problems without completely blocking a drain, to a level of debris that completely blocks a drain. Evidence regarding the extent of Cholakyan's debris problem, and more precise use of language, would benefit both the parties and the court.

150 Defendant objects to this statement in Potok's declaration as unsubstantiated speculation, and asserts that it contradicts his deposition testimony. *Hynix Semiconductors, Inc. v. Rambus, Inc.*, No. CV-00-20905 RMW, 2006 WL 1991760, *2 (N.D. Cal. July 14, 2006) ("Testimony by an expert must be 'more than belief or unsupported speculation,' " quoting *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993)). Potok, however, offered similar testimony at his deposition, stating that "[e]ven though we did do the testing on the vehicle yesterday, maybe two, three weeks from now, it could exhibit that condition that it does leak." (Potok Depo. at 302:18-21.) His declaration provides a factual basis for this statement, stating that the incline of the vehicle and the angle of the water's entry can affect whether the vehicle exhibits leaks. (Potok Standing Decl., ¶ 8.) He cites his experience water testing "hundreds" of vehicles as the basis for his opinion. (*Id.*)

Defendant also argues that certain statements in Potok's declaration contradict his deposition testimony regarding the extent to which his testing duplicates real world conditions. The deposition testimony that appears to be most directly on point is as follows:

> "Q: And in some of your tests, you were actually putting a hose right on the heater box area?
>
> A: Initially, that's how I started to see where the water was coming from....
>
> Q: Now, is that *any way reasonably duplicative* of what will happen under a ... environmental conditions that a normal driver will experience?
>
> A: Yes.
>
> Q: You think it's reasonable to expect that you're going to have a hose actually directly pointing at the heater box while you're driving?
>
> A: The amount of water that comes off the windshield in a torrential downpour, like I live in Florida where we got two to three inches in 20 minutes, that's probably more severe than what I did exactly with that hose yesterday." (Potok Depo. at 167:12-168:2 (emphasis added).)

The phrase "environmental conditions that a normal driver will experience" is susceptible of at least two interpretations. It could be understood to be an inquiry as to whether Potok's testing was reasonably duplicative of environmental conditions a normal driver might experience during *typical weather conditions;* if so, Potok's response could be viewed as contradicting the statements in his declaration. The phrase could also be understood, however, to be an inquiry as to whether pouring water directly onto the heater box could *in any way* duplicate *any* type of weather a normal driver might experience. Interpreted in this fashion, Potok's response does not contradict his later statement that Cholakyan's car may leak "under real world conditions." (Potok Decl., ¶ 8.)

Given the ambiguity in the question, the court cannot conclude that Potok's declaration contradicts his deposition testimony. Potok asserts in his declaration that "[t]here are numerous factors that can affect why a vehicle will not leak during a test, but will leak under real world conditions, including ... the orientation of the vehicle (incline, decline, etc.), wind on the vehicle while driving and the amount of time a vehicle is exposed to rain and other factors." (*Id.*) While Potok's statement at deposition that a "torrential downpour" was more severe than the testing he conducted may undercut his declaration, it does not contradict it, since one of the factors he cites in his declaration is the amount of time a vehicle is exposed to rain, i.e., the amount of water that comes into contact with the vehicle. To the extent defendant challenges Potok's credibility as a witness, of course, the court cannot make such a determination at this stage of the proceedings.

151 Plaintiff contends that he has been prejudiced by defendant's "malfeasance" in delaying discovery, and that he is entitled to take discovery on the

standing issue. (Standing Opp. at 21.) He contends he has "held nothing back in discovery" but "has been denied the same by [defendant]." (*Id.*) While it may be that defendant has withheld certain discovery requested by Cholakyan pending resolution of the scope of his claims, this does not explain why plaintiff requires more discovery to establish his own standing to sue. Cholakyan controls all of the evidence he needs to establish the existence of an injury caused by the defects pled in the complaint, namely, his vehicle, his own testimony, and any expert he needs to demonstrate that the vehicle suffers from one of the alleged defects. Cholakyan fails to identify any information that defendant could produce via discovery that would help demonstrate his own standing; rather, it appears that he seeks additional discovery to "further develop his theories," i.e., to expand the number and types of defects on which his claims are based. (*Id.* at 21 n. 25.) This is not an appropriate use of discovery. A plaintiff must have a basis in fact and law for filing a lawsuit; he cannot file and then conduct discovery to see if there are facts that support his claim. Cf. FED.R.CIV.PROC. 11 (a lawyer's signature on a pleading is a representation that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances ... the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery").

152 Cholakyan asserts that the court should not grant defendant's motion to dismiss for lack of standing because the issue of standing is too closely tied to the merits of his claims. He offers no substantive argument on the point, however, except the conclusory assertion that his expert's "inability to reproduce water leaks into the left front footwell" of his vehicle "implicates the merits of Plaintiff's case," and a citation to *Centex Corp.*, 658 F.3d at 1068 (" 'Nor can standing analysis, which prevents a claim from being adjudicated for lack of jurisdiction, be used to disguise merits analysis, which determines whether a claim is one for which relief can be granted if factually true,' " quoting *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043, 1049 (9th Cir. 2010)). (Standing Opp. at 21.) Defendant does not respond to this contention in its briefs.

On the present record, the court believes that Cholakyan's standing is not inextricably linked with the merits of his claims. The claims focus on defendant's allegedly fraudulent conduct and its purported concealment of the existence of a material safety defect in its vehicles; this allegedly breached implied warranties and induced plaintiff to purchase his vehicle at a certain price. While plaintiff will ultimately need to prove that the defects in question are material, it does not appear that this is the relevant inquiry for purposes of standing. Rather, it appears that the court must ask whether plaintiff's vehicle actually possesses any of the alleged defects, not whether those defects have caused or could potentially cause electrical malfunctions or other safety problems in the vehicle. Compare *Roberts*, 812 F.2d at 1177 (noting that "court may not resolve genuinely disputed facts where 'the question of jurisdiction is dependent on the resolution of factual issues going to the merits' ") with *Rosales*, 824 F.2d at 803 ("A district court may hear evidence and make findings of fact necessary to rule on the subject matter jurisdiction question prior to trial, if the jurisdictional facts are not intertwined with the merits").

III. CONCLUSION

***25** For the reasons stated, the court denies defendant's motion to strike under Rule 12(f) in its entirety. The court denies defendant's motions to dismiss under Rule 12(b)(1) and 12(b)(6) without prejudice and will hold an evidentiary hearing on the question of plaintiff's standing.

Within seven days of the date of this order, the parties are directed to meet and confer and file a joint report as proposing a date for the evidentiary hearing. Twenty-one days before the evidentiary hearing, the parties are directed to file legal memoranda, a joint witness list, and a joint exhibit list. The further pleadings the parties submit and the evidence they offer at the evidentiary hearing should provide visual depictions of the areas of the vehicles described in the DTBs and service bulletins, and any additional parts of the vehicle they believe are relevant to resolving the standing issue.

All Citations

Not Reported in Fed. Supp., 2012 WL 12861143

580 Fed.Appx. 522 (Mem)
This case was not selected for publication in West's Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)
United States Court of Appeals, Ninth Circuit.

Howard COCHRAN, Plaintiff–Appellant,
v.
Mark WARDIAN, Police Officer; et al., Defendants–Appellees.

No. 13–15846.
|
Submitted June 12, 2014. [*]

[*] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).

|
Filed June 18, 2014.

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Appeal from the United States District Court for the District of Arizona, Robert C. Broomfield, District Judge, Presiding. D.C. No. 2:11–cv–02538–RCB.

Before: McKEOWN, WARDLAW, and M. SMITH, Circuit Judges.

MEMORANDUM [**]

[**] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

Arizona state prisoner Howard Cochran appeals pro se from the district court's summary judgment dismissing his 42 U.S.C. § 1983 action alleging constitutional violations in connection with his arrest. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion the denial of leave to amend. *Crowley v. Bannister,* 734 F.3d 967, 977 (9th Cir.2013). We may affirm on any ground supported by the record. *Thompson v. Paul,* 547 F.3d 1055, 1058–59 (9th Cir.2008). We affirm in part, reverse in part, and remand.

Denial of Cochran's motion to amend his complaint with respect to his excessive force claim against Wardian was not an abuse of discretion because amendment would have been futile. *See Johnson v. Buckley,* 356 F.3d 1067, 1077 (9th Cir.2004) ("Futility alone can justify the denial of a motion to amend." (citation and internal quotation marks omitted)); *see also Johnson v. Mammoth Recreations, Inc.,* 975 F.2d 604, 607–09 (9th Cir.1992) (the "good cause" standard of Rule 16 controls after a scheduling order is established).

However, denial of Cochran's motion to amend his complaint with respect to his excessive force claim against Feist and Ramsey was an abuse of discretion because Cochran should have been given an opportunity to amend this claim to identify the proper defendants. *See Crowley,* 734 F.3d at 978 (abuse of discretion to deny leave to amend where the complaint's deficiencies could be cured by naming the correct defendant); *Lopez v. Smith,* 203 F.3d 1122, 1130–31 (9th Cir.2000) (en banc) (reversing and remanding because the district court failed to grant prisoner leave to amend his complaint to name the correct defendants).

***523** Accordingly, we reverse the judgment in part and remand to allow Cochran an opportunity to file an amended complaint.

AFFIRMED in part, REVERSED in part, and REMANDED.

All Citations

580 Fed.Appx. 522 (Mem)

2010 WL 11520676
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

CTC CABLE CORPORATION, Plaintiff(s),
v.
MERCURY CABLE & ENERGY, LLC, Defendant(s).

Case No. SACV 09–261 DOC (MLGx)
|
Signed 10/18/2010

Attorneys and Law Firms

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ORDER ORDER GRANTING PLAINTIFF'S SECOND MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

DAVID O. CARTER, United States District Judge

***1** Before the Court is Plaintiff CTC Cable Corporation ("CTC")'s Second Motion for Leave to File Its Second Amended Complaint ("SAC") against Mercury Cable & Energy, LLC ("Mercury"). After considering the moving and opposing papers, the Court GRANTS CTC's Motion for Leave to File Its SAC.

I. Background

This case involves allegations of patent infringement related to the production of cores used for electrical transmission lines. *See* Mercury Memorandum in Opposition to Plaintiff's Second Motion for Leave to File Second Amended Complaint ("Mercury Opp."), at 1–2. In August, 2009, the Court stayed the proceeding so that CTC's patents could be reexamined. The Court lifted the stay in March 2010, and on June 8, 2010 CTC received its final patent reexamination certificates. Memorandum in Support of Plaintiff's Second Motion for Leave to File SAC ("CTC Memo") at 14–15. Roughly two weeks later, CTC filed its first motion for leave to amend. *Id.* The Court denied without prejudice CTC's motion for leave to amend, with instructions for it to provide more detail about the reasons it sought to add additional defendants. CTC now presents this Second Motion seeking leave to file its SAC.

II. Discussion

Generally, leave to amend a pleading "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Leave to amend lies within the sound discretion of the trial court, which "must be guided by the underlying purpose of Rule 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities." *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). Thus, Rule 15's policy of favoring amendments to pleadings should be applied with "extreme liberality." *Id.* (citation omitted); *see Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989).

The United States Supreme Court has identified four factors relevant to whether a motion for leave to amend should be denied: undue delay, bad faith or dilatory motive, futility of amendment, and prejudice to the opposing party. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962). The Ninth Circuit holds that these factors are not of equal weight; specifically, "delay alone no matter how lengthy is an insufficient ground for denial of leave to amend." *Webb*, 655 F.2d at 980; *accord Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999). The most important factor is whether amendment would prejudice the opposing party. *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973). Futility of amendment can, by itself, justify denial of a motion for leave to amend. *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). A proposed amended pleading is futile "only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff–Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

In its Motion, CTC has demonstrated that, based on the *Foman* factors, it should be given leave to amend, as it has addressed the Court's previous concerns about granting it leave to amend under Rule 15. In its previous Order denying CTC's motion for leave to amend, the Court took issue with CTC's failure to justify why it had not added its proposed additional defendants earlier and directed CTC to address the *Foman* factors. In the present motion, CTC has explained that it did not learn of the conduct giving rise to its claims against the additional defendants until the Spring of 2010, when it took depositions of Mercury's CEO and President. CTC Memo at 1; 3–5. Thus, there was no bad faith or dilatory motive on CTC's part. Furthermore, the

delay was not undue, as CTC had only just recently learned of the infringing activities and alter ego characterizations that led to its addition of new defendants. *See* CTC Memo, at 16. The allegations against the additional defendants are also not futile, as each additional defendant is alleged to have been involved in infringing CTC's patents. Though Mercury argues that the addition is futile because a claim patent infringement must necessarily involve action inside the United States, *see* Mercury Opp., at 11–12, the question of where the infringement occurred is a factual determination and a reasonable inference can certainly be made that conduct amounting to patent infringement occurred. Finally, and most significantly, CTC's proposed amendments would not result in undue prejudice to Mercury or the new defendants. As CTC correctly notes, the case is at an early enough stage that the addition of new defendants should not burden or complicate the case. *Id.* at 19.

***2** In order to add new defendants, CTC must also meet the permissive joinder tests of Rule 20: it must show that it is asserting a "right to relief ... relating to or arising out of the same transaction or occurrence or series of transactions or occurrences" as well as a "question of law or fact common to all parties" that has arisen. Fed. R. Civ. P. 20(a)(2). CTC has met both prongs of the test. The right to relief against the additional corporate defendants arises from the same transactions or occurrences as each of the additional corporate defendants CTC seeks to add is accused of being involved in the infringement through the manufacture, sale, use, or importation of Mercury's infringing conductor. Similarly, the individual defendants are alleged to have been involved in the infringement of CTC's patents through direct or induced infringement or as alter egos and are therefore alleged to be personally liable. *See* CTC Memo, at 6–13; *see also Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1579 (Fed. Cir. 1986). Because each of these defendants is alleged to have infringed CTC's patents, common issues of law and fact are implicated.

The Court must also consider "whether the permissive joinder of a party will comport with the principles of fundamental fairness." *Desert Empire Bank v. Ins. Co. of North Am.*, 623 F.2d 1371, 1375 (9th Cir. 1980). CTC alleges alter ego liability against the additional individual defendants, claiming that they created multiple "shell" entities in an attempt to evade personal liability for any wrongdoings. CTC Memo, at 10. Though Mercury contests the legitimacy of CTC's allegations of alter egos, *see* Mercury Opp., at 15–18, CTC details its many reasons for believing these corporate entities to be "shells," based on its investigation and depositions of the proposed defendants. *See id.* at 11–13. As a result, it explains that it must "pierce the corporate veil" and hold the proper parties liable. *Id.* at 13. The Court finds that adding these defendants will promote fairness. The Court further holds that, having addressed the Court's expressed concerns that led it to deny CTC's previous motion for leave to amend, CTC's second Motion has satisfied the Court.

III. Disposition

For the foregoing reasons, the Court hereby GRANTS Plaintiff CTC's Second Motion for Leave to File Second Amended Complaint.

The Clerk shall serve this minute order on all parties to the action.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2010 WL 11520676

End of Document

2020 WL 5875023
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

David DEHATE
v.
LOWE'S HOME CENTERS, LLC

Case No. EDCV 19-2505 JGB (SPx)
|
Signed 07/09/2020

Attorneys and Law Firms

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Proceedings: Order (1) GRANTING Plaintiff's Motion for Leave to File First Amended Complaint to Join Additional Defendant (Dkt. No. 15); and (2) VACATING the July 13, 2020 Hearing (IN CHAMBERS)

The Honorable JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

***1** Before the Court is a Motion for Leave to File First Amended Complaint to Join Additional Defendant filed by Plaintiff. ("Motion," Dkt. No. 15.) The Court finds the Motion appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After considering the papers filed in support of and in opposition to the Motion, the Court GRANTS the Motion. The Court VACATES the hearing set for July 13, 2020.

I. BACKGROUND

On October 18, 2019, Plaintiff David DeHate filed a complaint against Defendant Lowe's Home Centers, LLC. ("Complaint," Dkt. No. 17-1.) The action arises from an alleged personal injury that occurred in Defendant's store on November 26, 2018. (See id.) The Complaint asserts two causes of action: (1) negligence; and (2) premises liability. (Id.)

On March 24, 2020, the Court issued a scheduling order, which set a June 23, 2020 deadline to "Stipulate or File a Motion to Amend Pleadings or Add New Parties." ("Scheduling Order," Dkt. No. 13.) On May 22, 2020, Plaintiff filed the Motion. (See Motion.) In support of the Motion, Plaintiff filed the Declaration of Richard A. Jones. ("Jones Declaration," Dkt. No. 15-1.) Defendant Lowe's opposed the Motion on June 1, 2019. ("Opposition," Dkt. No. 16.) On June 5, 2020, Plaintiff replied. ("Reply," Dkt. No. 17.) [1]

1 The parties dispute whether Plaintiff complied with the Central District's meet-and-confer requirements. See L.R. 7-3. Plaintiff's counsel represents they sent correspondence and called Defendant's counsel to discuss the Motion, but Defendant Lowe's counsel failed to respond. (Jones Declaration ¶¶ 11–14.) Defendant Lowe's argues that Plaintiff's attempts to comply with Local Rule 7-3 were inadequate and preclude a decision on the Motion. (Opposition at 6.) Defendant Lowe's cannot ignore meet-and-confer attempts and then argue that the Motion is deficient for lack of compliance. Defendant must comply in good faith with meet-and-confer requirements. The court ADMONISHES both parties to fully comply with the Local Rules and confer to ensure compliance. Failure to comply with Local Rule 7-3 will be met with sanctions.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 15 provides that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Ninth Circuit holds " '[t]his policy is to be applied with extreme liberality.' " Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003) (quoting Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001)). However, leave to amend is not automatic. The Ninth Circuit considers five factors when considering a motion for leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) the futility of amendment, and (5) whether the plaintiff has previously amended his or her complaint. Nunes v. Ashcroft, 375 F.3d 805, 808 (9th Cir. 2004). The Ninth Circuit instructs that "it is the consideration of prejudice to the opposing party that carries the greatest weight." Eminence Capital, 316 F.3d at 1052.

***2** "The party opposing amendment bears the burden of showing prejudice, unfair delay, bad faith, or futility of amendment." United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co., 2009 WL 650730, at *2 (C.D. Cal. Mar. 12, 2009) (citing Eminence Capital, 316 F.3d at 1052; DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186–87 (9th Cir. 1987)).

III. DISCUSSION

Plaintiff's Complaint names a Doe defendant and alleges that Doe defendant was a Lowe's employee involved in the incident at issue. (Jones Declaration ¶ 4; see also Complaint ¶ 5.) After Defendant Lowe's served initial disclosures on March 9, 2020, Plaintiff learned the employee's name was Joshua O'Neal. (Id. ¶ 9.) Now, Plaintiff seeks leave to file an amended complaint to add Joshua O'Neal as a defendant. (See Motion.)

A. Bad Faith

The parties dispute Plaintiff's motive for filing the Motion. Plaintiff argues that he brings the Motion because he learned O'Neal's name after he filed the Complaint. (Motion at 6; see also Jones Declaration ¶ 4.) Defendant Lowe's argues that Plaintiff brings this Motion to enlarge the scope of the litigation and parties involved, thereby increasing the costs and prolonging litigation. (Opposition at 5.) Defendant Lowe's, however, fails to explain how amendment will either increase costs or prolong litigation. Defendant Lowe's therefore fails to meet its burden to establish bad faith. This factor weighs in favor of granting the Motion.

B. Undue Delay

Defendant Lowe's makes no assertion of undue delay, and the Court sees no evidence of any. Accordingly, this factor favors allowing amendment.

C. Prejudice to the Defendant

Defendant Lowe's argues that leave to amend will unduly prejudice O'Neal, the proposed defendant to be joined, because O'Neal will have to be brought up to speed on the litigation, present a defense, and prepare for trial. (Opposition at 5.) In support of this argument, Defendant Lowe's relies on Korn, where the Ninth Circuit considered whether a proposed defendant would be prejudiced by being named in the midst of litigation. See Korn v. Royal Caribbean Cruise Line, Inc., 724 F.2d 1397, 1400 (9th Cir. 1984). This reliance is misplaced. First, Korn addressed Fed. R. Civ. P. 15(c) and adding a party after a statute of limitation period has run. See id. at 1399; see also Valadez-Lopez v. Chertoff, 656 F.3d 851, 857–58 (9th Cir. 2011) (stating the primary purpose of Rule 15(c) is to address—and defeat—assertions that claims are barred by statutes of limitations). These are not the circumstances here. The statute of limitations has not run on Plaintiff's claim against O'Neal. See Cal. Civ. Proc. Code § 335.1 (two-year statute of limitations period for personal injury suits). Second, Korn held there was no risk of prejudice to newly added defendants maintaining their defense on the merits. Id. at 1401.

New defendants are not prejudiced by the timing of their entry into a case when the "case is still at the discovery stage with no trial date pending." DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 188 (9th Cir. 1987) (rejecting defendant's argument that it had been unduly prejudiced when the district court allowed plaintiff to name defendant over a year after the complaint had been filed); see also Melingonis v. Rapid Capital Funding, 2017 WL 1550045, at *3 (S.D. Cal. May 1, 2017) (rejecting defendant's argument that "it w[ould] be prejudiced by being added as a defendant at this point of the proceedings because a number of deadlines in the Scheduling Order have already passed" because the case was in the early discovery stages and any passed dates could be rescheduled). Here, discovery is currently in early stages and trial is not for another nine months. (Scheduling Order at 1.) O'Neal will have sufficient time to come up to speed and prepare his defenses, especially considering that his employer has been party to this litigation from the start. Therefore, the court sees no evidence of undue prejudice to O'Neal. This factor weighs in favor of granting Plaintiff leave to amend.

D. Futility of Amendment

***3** Defendant Lowe's alleges that Plaintiff's proposed amendment is futile because Defendant "bears respondeat superior liability," and therefore joinder of O'Neal is not necessary to afford complete relief among the parties.[2] (Opposition at 4.) This argument assumes that a Plaintiff may only amend to add necessary parties. See Fed. R. Civ. Pro. 19(a) (instructing that a party must be joined to an action if "in that person's absence, the court cannot accord complete relief among existing parties"). But the law does not limit amendment to necessary parties; it allows joinder of *both*

necessary and permissive parties. Desert Empire Bank v. Ins. Co. of N. Am., 623 F.2d 1371, 1374 (9th Cir. 1980) (holding that although Defendant was not a necessary party, court correctly allowed his joinder pursuant to provisions for permissive joinder under Rule 20). That O'Neal is a permissive, and not a necessary, party does not preclude adding him as a defendant. Plaintiff asserts a right to relief against both Defendant Lowe's and O'Neal arising out of the same occurrence. (Complaint ¶¶ 12–18; see also Fed. R. Civ. P. 20.) Because Defendant Lowe's futility argument is contrary to law, it fails. Accordingly, this factor weighs in favor of granting Plaintiff leave to amend.

2 To the extent that Defendant Lowe's implies that O'Neal's status as Defendant's employee somehow makes him immune from suit, it is wrong. Respondeat superior is not a theory of immunity but rather a theory of recovery. Perez v. Van Groningen & Sons, Inc., 41 Cal. 3d 962, 967 (1986).

Leave to amend "shall be given freely when justice so requires." Fed. R. Civ. P. 15(a). And the Court sees no reason why leave should not be granted. Plaintiff filed the Motion before the deadline to move to amend pleadings and the leave to amend factors weigh in favor of allowing the amendment. Accordingly, the Court GRANTS the Motion.

IV. CONCLUSION

For the reasons above, the Court GRANTS Plaintiff's Motion. The July 13, 2020 hearing is VACATED. Plaintiff shall file the amended complaint no later than July 17, 2020.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 5875023

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2020 WL 5993151
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Kris DOE and Nate Doe
v.
BRIDGES TO RECOVERY, LLC, et al.

Case No.2:20-cv-00348-SVW
|
Filed 08/31/2020

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Proceedings: ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT [75]

The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

I. Introduction

***1** Pseudonymous Plaintiffs Kris Doe and Nate Doe (collectively "Plaintiffs") filed a complaint in this lawsuit on January 13, 2020, against multiple defendants: (1) Les Katz (the alleged perpetrator), (2) Bridges to Recovery, LLC ("BTR") and Constellation Behavioral Health, LLC ("Constellation") (collectively "Corporate Defendants"), and (3) various supervisory employees at BTR, including Qemal Shaholli, Trevor Small, and Eric Strang (collectively "Employee Defendants"). On February 27, 2020, Plaintiffs filed their first amended complaint ("FAC"). On July 1, 2020, Plaintiffs filed the instant motion for leave to file a second amended complaint ("SAC"). For the below reasons, the Court GRANTS IN PART and DENIES IN PART Plaintiffs' motion for leave.

II. Factual and Procedural Background

Plaintiffs' claims arise out of Kris Doe's experience at BTR, a rehabilitation facility owned by Constellation and located in Pacific Palisades, California. FAC at ¶ 19. Plaintiffs allege that Katz, an employee at BTR, seduced Kris Doe with opioids and sexually abused her while she underwent treatment at BTR. *Id.* at ¶¶ 34–36. Plaintiffs further allege that Shaholli, Small, Strang, and other BTR employees knew or should have known about Katz's conduct and failed to intervene. *Id.* at ¶¶ 38– 42. Plaintiffs also assert that BTR and its employees failed to treat Kris Doe for opioid related issues despite her family's repeated requests to do so. *Id.* at ¶¶ 48–51.

On January 13, 2020, Plaintiffs filed the instant lawsuit asserting a number of common law and statutory violations by the defendants. Dkt. 1. Plaintiffs amended their complaint as a matter of course on February 27, 2020. Dkt. 25.

On April 22, 2020, after all defendants had answered or filed a motion to dismiss, the Court denied the motions to dismiss and bifurcated and stayed all claims against the Corporate Defendants and the Employee Defendants. Dkt. 59. The Court did so because "[t]he Corporate and Employee Defendants' liability under all causes of action [is] predicated on the factual findings of Claims 1–3 and 5 against Katz." *Id.* at 2.

The parties stipulated to a deadline for any amendments to the pleadings of May 22, 2020, absent a court order based on good cause. Dkt. 80-3 (Decl. of Robert Latham III), Ex. 1 at 1.

On June 26, 2020, the Court continued the Phase I trial to September 8, 2020. Dkt. 72 Plaintiffs' instant motion for leave to file the SAC was filed on July 1, 2020. Plaintiffs seek to add the following claims to their complaint: (1) claims under California Welfare and Institutions Code ("WIC") § 15600 *e seq.*, known as the Elder Abuse and Dependent Adult Civil Protection Act ("DACPA"); (2) addition of Katz as a defendant to the existing claim for negligence; and (3) claims for negligent misrepresentation. *See* SAC at ¶¶ 167–97. Plaintiffs also seek to clarify their claims under the Unruh Act, add claims that serve as the underlying violations for their UCL claim, and add facts in support of their proposed amendments. *See generally* SAC.

***2** On August 17, 2020, the Court continued the Phase I trial once again, this time to January 12, 2021. Dkt. 115.

III. Legal Standard

Rule 15(a) provides that after a responsive pleading is filed, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Amendments should be allowed with "extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990).

District courts have substantial discretion in determining when an amendment should be allowed. *See Plumeau v. Sch. Dist. No. 40 County of Yamhill*, 130 F.3d 432, 439 (9th Cir. 1997). Four factors generally guide a court's determination regarding whether to allow an amendment to a pleading: (1) undue delay, (2) bad faith, (3) prejudice to the opposing party, and (4) futility of amendment. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1482 (9th Cir. 1997).

However, "[f]utility of amendment can, by itself, justify the denial of a motion for leave to amend." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). A proposed amendment is futile if no set of facts can be proven under the amendment that would constitute a valid claim or defense. *See Miller v. Rykoff–Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

Ultimately, in deciding whether to grant leave to amend, "a court must be guided by the underlying purpose of Rule 15—to facilitate decision on the merits rather than on the pleadings or technicalities." *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981).

IV. Analysis

The Court will address each of the proposed amendments in turn. Before doing so, the Court notes that the defendants' arguments against leave to amend are largely driven by the prejudice that would result if leave to amend were granted shortly before a trial date of September 8, 2020.

However, as noted above, on August 17, 2020—after the parties' briefing on the instant motion was complete—the Court continued the Phase I trial to January 12, 2020. Dkt. 115. Accordingly, the Court finds that the prejudice to defendants arising from Plaintiffs' proposed amendments is mitigated by the four-month continuance of the Phase I trial.

1) Addition of Defendant Katz to Existing Claim of Negligence

Plaintiffs' FAC includes a claim for negligence by Kris Doe against the Corporate Defendants and the Employee Defendants. FAC at ¶¶ 158–65. Kris Doe now seeks to add Katz as a defendant to this negligence claim. SAC at ¶¶ 167–74. Katz does not oppose Kris Doe's addition of the negligence claim against him. Dkt. 81 (Katz's Opposition to Plaintiffs' Motion for Leave to Amend) at 2 ("Defendant Katz does not oppose Plaintiff Kris Doe's addition of the negligence cause of action against him.").

Accordingly, the Court grants Plaintiffs' motion for leave to add Katz as a defendant in the tenth cause of action for negligence.

2) Addition of Claim for Negligent Misrepresentation against Corporate Defendants and Employee Defendants.

Plaintiffs' SAC adds a claim for negligent misrepresentation against the Corporate Defendants and the Employee Defendants. SAC at ¶¶ 175–85. Plaintiffs allege that the Corporate Defendants and the Employee Defendants misrepresented to Plaintiffs that BTR was a suitable facility to deal with Kris Doe's substance abuse issues when, in fact, BTR does not specialize in substance abuse treatment. *Id.* at ¶¶ 176–78.

***3** Defendants assert that the negligent misrepresentation claim is made in bad faith, with undue delay, and would prejudice the Corporate and Employee Defendants. Dkt. 80 (Corporate Defendants, Small, and Shaholli's Opposition ("BTR Opp.")) at 5–6. Defendant Strang further asserts that the amendment would be futile to the extent it is asserted against him because he did not communicate with Kris or Nate Doe prior to Kris Doe's admission to BTR. Dkt. 79 (Strang Opposition ("Strang Opp.")) at 20.

Defendants correctly assert that Plaintiffs' negligent misrepresentation claim is brought with undue delay. In evaluating undue delay, a key factor is "whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading." *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 953 (9th Cir. 2006) (citing *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1388 (9th Cir. 1990)). The Ninth Circuit has

held that an eight-month delay between the time of obtaining a relevant fact and seeking leave to amend is unreasonable. *See Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 799 (9th Cir. 1991).

Here, Plaintiffs filed their original complaint on January 13, 2020. Dkt. 1. At that time, Plaintiffs had to have known of the facts underlying their negligent misrepresentation claim because any misrepresentations that form the basis of the claim were made *to* Plaintiffs before and during Kris Doe's stay at BTR. Indeed, Plaintiffs' original complaint consistently references these alleged misrepresentations. *See, e.g.*, Dkt. 1 at ¶ 21 (nothing that BTR "represented" that their staff could provide treatment for Kris Doe, including for her "addiction to opioids"); *id.* at ¶ 28 ("[BTR] actively represented over and over again that the cost of treatment was well worth the type of care that would be received."); *id.* at ¶ 29 (noting Kris Doe signed contract with BTR "in reliance on defendants' overt and implied representations of suitability, professional care, treatment, and oversight"). Accordingly, the Court finds that Plaintiffs' negligent misrepresentation claim is brought with undue delay.

However, the Ninth Circuit disapproves of denials of leave to amend on the basis of undue delay alone, particularly where there is a "lack of prejudice to the opposing party and the amended complaint is obviously not frivolous, or made as a dilatory maneuver in bad faith." *Howey v. United States*, 481 F.2d 1187, 1191 (9th Cir. 1973); *see also Willner v. Manpower Inc.*, 2013 WL 3339443, at *3 (N.D. Cal. July 1, 2013) (finding undue delay insufficient on its own to justify denial of leave to amend because "[t]he Ninth Circuit disfavors denials of leave to amend on the basis of undue delay").

Here, the Court finds that prejudice, futility, and bad faith are all lacking. First, as noted above, any prejudice to the defendants is mitigated by the four-month continuance of the trial date.

Second, the proposed negligent misrepresentation claim is not futile. A proposed amendment is only futile if it appears beyond a doubt that a plaintiff could prove no set of facts that would entitle him or her to relief. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 188 (9th Cir. 1987). Here, Plaintiffs' SAC contains sufficient factual allegations to raise a plausible inference of negligent misrepresentation. *See, e.g.*, SAC at ¶ 29 (alleging that prior to Kris Doe's admission to BTR, "Defendants, including STRANG, represented to Plaintiffs Nate Doe and Kris Doe that the BRIDGES facility was equipped to treat Kris Doe's substance abuse issues and dependency on opioids"); *id.* at ¶ 178 (alleging that Plaintiffs paid BTR $250,000 in reliance on defendants' representations regarding BTR's suitability for substance abuse treatment). [1]

1 The Court considered Strang's assertion that, contrary to these factual allegations, he did not communicate with Kris or Nate Doe prior to the former's admission to BTR. *See* Strang Opp. at ¶ 6. However, at this pleading stage, the Court must accept all factual allegations in the SAC as true. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

***4** Finally, the Court finds that the proposed negligent misrepresentation claim is not made in bad faith. Bad faith exists if there is "evidence in the record which would indicate a wrongful motive," *DCD Programs*, 833 F.2d at 187, or when the plaintiff "merely is seeking to prolong the litigation by adding new but baseless legal theories," *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 881 (9th Cir. 1999).

Here, as just discussed, Plaintiffs' negligent misrepresentation claim is not baseless at this stage. Moreover, the Court is not persuaded by Defendants' arguments that bad faith exists because Plaintiffs brought the instant motion after the parties' stipulated deadline for amendments (May 22, 2020) and notified the defendants of their intent to amend on the eve of Kris Doe's deposition. *See* BTR Opp. at 1; *see also* Strang Opp. 2. Although this conduct by Plaintiffs certainly indicates undue delay and poor case management, the Court is not persuaded that it rises to the level of bad faith. Moreover, denying leave to add the negligent misrepresentation claim based on a stipulated deadline would run counter to the Ninth Circuit's guidance regarding "the underlying purpose of Rule 15—to facilitate decision on the merits rather than on the pleadings or technicalities." *Webb*, 655 F.2d at 979.

Accordingly, the Court grants Plaintiffs' motion for leave to add their proposed negligent misrepresentation claim against the Corporate and Employee Defendants.

3) Clarification as to the Seventh Cause of Action for Violation of the Unruh Civil Rights Act and Civil Code Section 51.9

Plaintiffs also seek leave to amend their complaint by dividing the seventh cause of action into two counts. Specifically, the seventh cause of action in the FAC asserted violations of the

Unruh Act, Civil Code § 51 *et seq*, and Civil Code § 51.9. FAC at ¶¶ 124–35. In the SAC, Plaintiffs seek to divide this cause of action into two counts: (1) for violations of the Unruh Act, and (2) for violations of Civil Code § 51.9.

The Court interprets this amendment as a mere clarification of the pleadings. Accordingly, the Court grants Plaintiffs' motion for leave to clarify the seventh cause of action and divide it into two counts.

4) Addition of Claim Under DACPA

Plaintiffs move for leave to add claims under DACPA. Plaintiffs allege that, during her time at BTR, Kris Doe was a dependent adult who suffered abuse at the hands of her care custodians in violation of DACPA. SAC at ¶¶ 186–97. Plaintiffs allege that the necessity of a DACPA claim only became clear to Plaintiffs after defendants' discovery productions. Dkt. 75 (Plaintiffs' Motion for Leave to Amend) at 4.

Defendants respond that bad faith and undue delay exist because the discovery upon which Plaintiffs' argument relies was produced well in advance of the parties' May 22, 2020 stipulated deadline for amendments to pleadings. BTR Opp. at 5–6. Defendants also argue that any claim under DACPA is futile because Kris Doe does not qualify as a "dependent adult" under DACPA. *Id.* at 6–9.

The Court need not address the issues of bad faith or undue delay because the Court agrees with defendants that, under the terms of the statute, Kris Doe does not qualify as a "dependent adult."

Because this issue is one of California law, and because no state or federal court has expressly construed the relevant statutory provision, the Court interprets the statute "by applying California's rules of statutory construction." *CPR for Skid Row v. City of Los Angeles*, 779 F.3d 1098, 1104 (9th Cir. 2015). Under California law, the "fundamental task [for the Court] is to determine the California Legislature's intent so as to effectuate the law's purpose." *People v. Cornett*, 53 Cal. 4th 1261, 1265 (2012) (citing *People v. Murphy*, 25 Cal.4th 136, 142 (2001)).

***5** The relevant statute here defines "dependent adult" as follows:

> (a) "Dependent adult" means a person, regardless of whether the person lives independently, between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.
>
> (b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

WIC § 15610.23.

Kris Doe cannot qualify under prong (a) of the statute because she does not reside in California. FAC at ¶ 1. Accordingly, she must qualify under prong (b). That prong only applies to "24-hour health facilit[ies], as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code." WIC § 15610.23(b).

Before turning to those sections of the HSC, it is important to note that BTR is a type of "community care facility" ("CCF") as defined in Health and Safety Code ("HSC") § 1502(a). Specifically, it is licensed as a "social rehabilitation facility" ("SRF"), HSC § 1502(a)(7), and is regulated under 22 CCR §§ 81000 *et seq*.

Plaintiffs incorrectly assert that BTR's "specific licensure and scheme of organization are red herrings, as no such limitation appears within the language of the statutes." Dkt. 98 (Plaintiffs' Reply) at 2 n. 1. To the contrary, the statute limits prong (b) of WIC § 15610.23 to "24-hour health facilit[ies], *as defined in* Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code." WIC § 15610.23(b) (emphasis added). In other words, prong (b) is inapplicable if the facility at issue does not fall under §§ 1250, 1250.2, and 1250.3 of the HSC.

Indeed, a closer analysis of those sections and the regulations governing SRFs demonstrates that the facilities to which WIC § 15610.23(b) applies are distinct from SRFs. HSC § 1250 defines a "health facility" as any place that is "organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness, physical or mental." Based on this language, Plaintiffs suggest that "no additional 'analysis'

of this code section is necessary." Dkt. 98 (Plaintiffs' Reply) at 3.

However, the statute goes on to extensively list the types of facilities that are included under HSC § 1250: general acute hospitals, acute psychiatric hospitals, skilled nursing facilities, intermediate care facilities, congregate living health facilities, correctional treatment centers, and hospices. *See generally* HSC § 1250. The primary purpose of nearly all of these facilities is either (1) medical services, (2) nursing care, or (3) care for persons with developmental disabilities. *See, e.g., id.* at § 1250(a) ("general acute care hospital" has "organized medical staff" providing "medical" services); *id.* at § 1250(b) ("acute psychiatric hospital" has "organized medical staff" providing "medical" services); *id.* at § 1250(c) ("skilled nursing facility" provides "skilled nursing care"); *id.* at § 1250(d) ("intermediate care facility" serves patients "who have recurring need for skilled nursing supervision"); *id.* at § 1250(e) ("Intermediate care facility/developmentally disabled habilitative" provides for care for "persons with developmental disabilities who have intermittent recurring needs for nursing services") *id.* at § 1250(g) ("Intermediate care facility/developmentally disabled" serves patients "with developmental disabilities whose primary need is for developmental services"); *id.* at § 1250(h) ("Intermediate care facility/developmentally disabled-nursing" serves "medically fragile persons with developmental disabilities"); *id.* at § 1250(i) ("Congregate living health facility" has primary purpose of providing "skilled nursing care on a recurring, intermittent, extended, or continuous basis").

***6** Although HSC § 1250 does not expressly limit its applicability to the enumerated facilities, the above analysis suggests that HSC § 1250 is intended to apply primarily to nursing homes, facilities caring for developmentally disabled individuals, and facilities providing medical care.[2] Indeed, this conclusion is consistent with the California Legislature's intent in passing DACPA. *See* WIC § 15600(b) ("The Legislature desires to direct special attention to the needs and problems of elderly persons."); *see also id.* at § 15600(c) ("The Legislature further recognizes that a significant number of these persons have developmental disabilities and that mental and verbal limitations often leave them vulnerable to abuse and incapable of asking for help and protection.").

[2] This conclusion is further supported by prong (a), which is applicable to any individual with "physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights." WIC § 15610.23(a). This context suggests that the facilities to which prong (b) applies are those whose patients have similar physical or mental limitations— *i.e.*, elderly individuals, persons with developmental disabilities, or hospitalized individuals in need of medical care or skilled nursing.

By contrast, CCFs and SRFs expressly provide *nonmedical care*. *See* HSC § 1502(a) (" 'Community care facility' means any facility, place, or building that is maintained and operated to provide *nonmedical residential care*.") (emphasis added); *see also* 22 CCR § 81001(s)(5) (" 'Social Rehabilitation Facility' means any facility which provides 24-hour-a-day *nonmedical care*.") (emphasis added). Moreover, BTR's primary purpose is not skilled nursing care or providing for persons with developmental disabilities. Thus, BTR does not fit neatly into HSC § 1250.

The same conclusion is warranted for HSC §§ 1250.2 and 1250.3. The former covers "psychiatric health facilit[ies], defined to mean a health facility [ ] licensed by the State Department of Health Care Services." HSC § 1250.2. BTR, however, is licensed by the State Department of Social Services, a separate entity within the California Health and Human Services Agency. Dkt. 80-2 (Decl. of Qemal Shaholli), Ex. 1 (BTR license to operate and maintain a "Social Rehabilitation Facility" granted by Department of Social Services). And HSC § 1250.3—which defines chemical dependency recovery hospitals—requires that each facility have a medical director "who is a physician *and surgeon* licensed to practice in this state." *Id.* at § 1250.3. Plaintiffs have not alleged any facts suggesting that BTR employs any surgeons, let alone as its medical director.

Other defining aspects of SRFs and CCFs further support a finding that such facilities are not covered by prong (b) of WIC § 15610.23. For example, while HSC §§ 1250, 1250.2, and 1250.3 each consistently refer to the persons receiving services as "patients," the regulations governing SRFs repeatedly refer to those persons as "clients." *Compare* HSC §§ 1250, 1250.2, 1250.3 *with* 22 CCR § 81001. And, crucially, the SRF regulations include a provision for relocating a client from an SRF because "the client requires in-patient care in a health facility." 22 CCR § 81001(h)(1). In other words, this section envisions a distinction between SRFs and "health facilities" providing in-patient care. Indeed, that provision would be nonsensical if SRFs were also inpatient health facilities—the precise type of facility covered by prong

(b) of WIC § 15610.23. *See* WIC § 15610.23(b) (" 'Dependent adult' includes any person ... admitted as an *inpatient* to a 24-hour *health facility.*").

In light of these distinctions between SRFs and CCFs on the one hand and, on the other, health facilities under HSC §§ 1250, 1250.2, and 1250.3, the Court finds that BTR is not a "24-hour health facility" for the purposes of WIC § 15610.23(b).

***7** Accordingly, Kris Doe does not qualify as a "dependent adult" under DACPA, and any claim under that statute would be futile. The Court therefore denies Plaintiffs' motion for leave to add claims under DACPA.

5) Addition of Statutory Violations Underlying UCL Claim

Plaintiffs seek leave to add statutory and common law violations underlying their UCL claims. SAC at ¶ 200. These include the claim for negligent misrepresentation, claims under DACPA, violations of Civil Code § 43.93, and violations of Business and Professions Code §§ 337, 726, and 727.[3] *Id.*

[3] Plaintiffs' SAC also adds violations of Civil Code § 52 and Business and Profession Code § 728. SAC at ¶ 200. These violations were already asserted in the FAC, either independently or as violations underlying the UCL claims. *See* FAC at ¶¶ 126, 168. Accordingly, the Court does not consider these as "new" and grants Plaintiffs leave to add these underlying violations to their UCL claims.

Given that the negligent misrepresentation claim is itself newly asserted, the Court grants Plaintiffs leave to add that claim as an underlying UCL violation. However, in light of the Court's decision to deny Plaintiffs leave to add a DACPA claim against defendants, the Court denies Plaintiffs leave to add that claim as an underlying UCL violation.

As for the remaining new underlying UCL violations, the Court notes that Plaintiffs failed to identify these amendments anywhere in their briefing. Indeed, nowhere in Plaintiffs' briefing is the UCL cited. Although the party opposing amendment generally bears the burden of showing why leave to amend should not be granted, *DCD Programs*, 833 F.2d at 188, the Court will exercise its discretion to allow an amendment without any explanation from Plaintiffs whatsoever as to why this amendment is warranted. Accordingly, the Court denies Plaintiffs' motion for leave to add claims under Civil Code § 43.93 and Business and Professions Code §§ 337, 726 as underlying UCL violations.

V. Conclusion

For the foregoing reasons, the Court ORDERS as follows:

(i) Plaintiffs' motion for leave to add Katz as a defendant in the tenth cause of action for negligence is GRANTED.

(ii) Plaintiffs' motion for leave to add claims for negligent misrepresentation against the Corporate Defendants and Employee Defendants is GRANTED.

(iii) Plaintiffs' motion for leave to clarify the seventh cause of action and divide it into two counts is GRANTED.

(iv) Plaintiffs' motion for leave to add claims under DACPA is DENIED.

(v) Plaintiffs are GRANTED leave to add the following claims as underlying UCL violations: negligent misrepresentation and violations of Civil Code § 52 and Business and Profession Code § 728. Leave to add other claims underlying the UCL violations is DENIED.

(vi) Plaintiffs' motion for leave to amend with factual additions related to the above granted amendments is GRANTED.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 5993151

End of Document

2020 WL 6082132
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Sean Michael DORDONI, et al.
v.
FCA US LLC, et al.

Case No. EDCV 20-1475 JGB (SHKx)
|
Filed 10/15/2020

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Proceedings: Order (1) GRANTING Plaintiffs' Motion for Remand (Dkt. No. 17); (2) DENYING Defendant's Motion to Strike (Dkt. No. 19); and (3) VACATING the October 19, 2020 Hearing (IN CHAMBERS)

The Honorable JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

***1** Before the Court are two Motions: a Motion for Remand filed by Plaintiffs Sean Michael Dordoni and Martha Gina Dordoni, ("Motion to Remand," Dkt. No. 17,) and a Motion to Strike Plaintiff's First Amended Complaint by Defendant FCA US LLC ("Motion to Strike," Dkt. No. 19.) The Court finds both Motions appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After considering the papers filed in support of and in opposition to the Motions, the Court GRANTS the Motion to Remand and DENIES the Motion to Strike. The Court vacates the hearing set for October 19, 2020.

I. BACKGROUND

On June 9, 2020, Plaintiffs filed their Complaint in the Superior Court of the State of California for the County of Riverside against Defendants FCA US LLC ("FCA Defendant") and Doe Defendants. ("Complaint," Dkt. No. 1-2.) The Complaint alleges five causes of action: (1) Violations of California Civil Code Section 1793.2(d); (2) Violations of California Civil Code Section 1793.2(b); (3) Violations of California Civil Code Section 1793.2(a)(3); (4) Breach of Express Written Warranty; and (5) Breach of the Implied Warranty of Merchantability. (Complaint.) All causes of action arise out of Plaintiffs' April 14, 2019 purchase of a vehicle, a 2019 RAM 1500, which Plaintiffs allege was a lemon. Id. FCA Defendant manufactured the vehicle. Id. On July 27, 2020, Defendant filed its Answer in state court. (Dkt. No. 1-5.)

On July 24, 2020, FCA Defendant removed the action to federal court on diversity grounds. ("Notice of Removal," Dkt. No. 1.) On August 14, 2020, Plaintiffs amended their Complaint as of right and filed a First Amended Complaint adding DCH Temecula Motors LLC, ("Dealership Defendant,") a California Corporation, as a Defendant and alleging negligent repair. ("FAC," Dkt. No. 12.) The addition of Dealership Defendant destroyed diversity.

Plaintiff filed the Motion to Remand on August 27, 2020. ("Motion to Remand.") FCA Defendant opposed the Motion on September 4, 2020. ("Remand Opposition," Dkt. No. 18.) Less than a week later, FCA Defendant filed the Motion to Strike Plaintiff's First Amended Complaint. ("Motion to Strike.") Plaintiffs replied in support of the Motion to Remand on September 14, 2020. ("Remand Reply," Dkt. No. 22.) Plaintiffs opposed Defendant's Motion to Strike on September 28, 2020. ("Strike Opposition," Dkt. No. 26.) Defendants replied on October 5, 2020. ("Strike Reply," Dkt. No. 28.)

II. LEGAL STANDARD

A. Motion to Remand

Plaintiff's claims arise under state law, and Defendant removed on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332. Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute. Gunn v. Minton, 133 S. Ct. 1059, 1064 (2013). Under 28 U.S.C. § 1332(a), federal courts have original jurisdiction over state law actions where the amount in controversy exceeds $75,000 and the action is between parties of diverse citizenship. Diversity of citizenship must be complete, and the presence "of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action." Abrego Abrego v. The Dow Chemical Co., 443 F.3d 676, 679 (9th Cir.

2006) (citations omitted); see also Alvarado v. Fca US, LLC, 2017 WL 2495495, at *2 (C.D. Cal. June 8, 2017) (same).

***2** The right to remove is not absolute, even where original jurisdiction exists. A defendant may not remove on diversity jurisdiction grounds "if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such an action is brought." 28 U.S.C. § 1441(b)(2). And a defendant must remove "within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading." 28 U.S.C. § 1446(b).

Moreover, the Ninth Circuit "strictly construe[s] the removal statute against removal jurisdiction," and "[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). "The strong presumption against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper." Jackson v. Specialized Loan Servicing, LLC, 2014 WL 5514142, *6 (C.D. Cal. Oct. 31, 2014). The court must resolve doubts regarding removability in favor of remanding the case to state court. Id.; see also Carrillo v. FCA US LLC, 2020 WL 2097743, at *1 (C.D. Cal. May 1, 2020).

B. Motion to Strike

Under Rule 12(f) of the Federal Rules of Civil Procedure, a district court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." Whittlestone, Inc. v. Handi–Craft Co., 618 F.3d 970, 973 (9th Cir. 2010) (internal quotation marks omitted). Motions under Rule 12(f) are "generally regarded with disfavor because of the limited importance of pleading in federal practice[.]" Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1152 (C.D. Cal. 2003). A court has discretion in determining whether to strike matter from a pleading. Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1528 (9th Cir. 1993), rev'd on other grounds, 510 U.S. 517 (1994).

To analyze a motion to strike under Rule 12(f), the Court must determine whether the matter the moving party seeks to have stricken is: (1) an insufficient defense; (2) redundant; (3) immaterial; (4) impertinent; or (5) scandalous. 618 F.3d at 973–74. The Ninth Circuit defines "immaterial" matter as "that which has no essential or important relationship to the claim for relief or the defenses being pleaded." Fantasy, Inc., 984 F.2d at 1527 (9th Cir. 1993) (internal quotation marks and citation omitted) (citing 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1382, at 706–07 (1990)). " 'Impertinent' matter consists of statements that do not pertain, and are not necessary, to the issues in question.' " Id.; See also DeVore v. Metro. Life Ins. Co., 2019 WL 3017667, at *1–2 (C.D. Cal. Feb. 7, 2019) (applying the Rule 12(f) standard).

The grounds for a motion to strike must appear on the face of the pleading under attack, SEC v. Sands, 902 F. Supp. 1149, 1165 (C.D. Cal. 1995), aff'd by 142 F.3d 1186 (9th Cir. 1998), and courts generally do not determine disputed or substantial questions of law on a motion to strike, F.T.C. v. Medicor LLC, 2001 WL 765628, at *2 (C.D. Cal. June 26, 2001).

In addition, the Court must view the pleading under attack in the light more favorable to the pleader when ruling upon a motion to strike. Vogel v. OM ABS, Inc., 2014 WL 340662, at *2 (C.D. Cal. Jan. 30, 2014). If there is any doubt whether the portion to be stricken might bear on an issue in the litigation, the court should deny the motion. Jacobson v. Persolve, LLC, 2014 WL 4090809, at *2 (N.D. Cal. Aug. 19, 2014). As a rule, motions to strike are regarded with disfavor because striking is such a drastic remedy; as a result, such motions are infrequently granted. Vogel, 2014 WL 340662, at *2. Ultimately, whether to grant a motion to strike lies within the sound discretion of the district court. Jacobsen, 2014 WL 4090809, at *2; see also Whiting v. City of Palm Desert, 2018 WL 6034968, at *2 (C.D. Cal. May 17, 2018) (same).

C. Diversity-Destroying Defendants

***3** After removal, if a plaintiff "seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to State court." 28 U.S.C. § 1447(e). Federal Rule of Civil Procedure 15 provides that parties may amend their pleadings once as a matter of course, provided that amendment occurs within 21 days of service or, if the pleading is one to which a responsive pleading is required, 21 days after service of that responsive pleading. Fed. R. Civ. P. 15(a)(1). Rule 15 also states that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Ninth Circuit holds " '[t]his policy is to be applied with extreme liberality.' " Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003) (quoting Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001)). The Ninth Circuit considers five factors

when considering a motion for leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) the futility of amendment, and (5) whether the plaintiff has previously amended his or her complaint. Nunes v. Ashcroft, 375 F.3d 805, 808 (9th Cir. 2004). "The party opposing amendment bears the burden of showing prejudice, unfair delay, bad faith, or futility of amendment." United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co., 2009 WL 650730, at *2 (C.D. Cal. Mar. 12, 2009) (citing Eminence Capital, 316 F.3d at 1052; DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186-87 (9th Cir. 1987)).

However, some courts in this circuit have found that "the permissive amendment under Rule 15(a) does not apply when a plaintiff amends her complaint after removal to add a diversity destroying defendant." Chan v. Bucephalus Alternative Energy Group, LLC, 2009 WL 1108744, at *3 (N.D. Cal. 2009) (citing Bakshi v. Bayer Healthcare, LLC, 2007 WL 1232049, at *2 (N.D. Cal. 2007)). These courts consider the following six factors: "(1) whether the party sought to be joined is needed for just adjudication and would be joined under Federal Rule of Civil Procedure 19(a); (2) whether the statute of limitations would preclude an original action against the new defendants in state court; (3) whether there has been unexplained delay in requesting joinder; (4) whether joinder is intended solely to defeat federal jurisdiction; (5) whether the claims against the new defendant appear valid; and (6) whether denial of joinder will prejudice the plaintiff." See IBC Aviation Servs., Inc. v. Compania Mexicana de Aviacion, S.A. de C.V., 125 F. Supp. 2d 1008, 1011 (N.D. Cal. 2000); Boon v. Allstate Ins. Co., 299 F. Supp. 2d 1016, 1020 (C.D. Cal. 2002); Gloria Malijen v. Ford Motor Co., 2020 WL 5934298, at *2 (C.D. Cal. Aug. 20, 2020) (same).

III. DISCUSSION

The central issue for both the Motion to Remand and the Motion to Strike is whether the addition of Dealership Defendant in Plaintiffs' FAC is proper. FCA Defendant argues Plaintiffs added Dealership Defendant solely for the purpose of defeating diversity jurisdiction. (Opposition, Motion to Strike.) Plaintiffs argue that under the standards for fraudulent joinder, the addition of Dealership Defendant is proper. (Motion to Remand p. 12.) Even under the stricter standard required by the fact that Plaintiffs have added a diversity-destroying defendant, Plaintiffs prevail.

A. Necessary Parties Under Rule 19(a)

A "necessary party" under Rule 19 is one "having an interest in the controversy, and who ought to be made [a] part[y], in order that the court may act on that rule which requires it to decide and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it." See CP Nat'l Corp. v. Bonneville Power Admin., 928 F.2d 805, 912 (9th Cir. 1991) (citation omitted). "Although courts consider the standard set forth in Rule 19 in determining whether to permit joinder under Section 1447(e), amendment under [Section] 1447(e) is a less restrictive standard than for joinder under Rule 19." Avellanet v. FCA US LLC, 2019 WL 5448199, at *2 (C.D. Cal. Oct. 24, 2019) (alterations in original) (internal quotations omitted). The standard for joinder under section 1447(e) "is met when failure to join will lead to separate and redundant actions." IBC Aviation Servs., 125 F. Supp. 2d at 1011 (citing CP Nat'l, 928 F.3d at 910). In contrast, the joinder of non-diverse defendants is not necessary "where those defendants are only tangentially related to the cause of action or would not prevent complete relief." Id. at 1012.

***4** Dealership Defendant is a necessary party under Rule 19. Plaintiffs allege they "delivered the Vehicle to [Dealership Defendant] for repair on numerous occasions." (FAC ¶ 39.) They further allege that Dealership Defendants' "failure to properly store, prepare, diagnose and/or repair the Vehicle in accordance with industry standards" caused them damages. (Id. at ¶ 41.) These allegations fit into the broader context of Plaintiffs' allegations against FCA Defendant, which are, simply put, that their vehicle does not work the way it is supposed to. An action against FCA Defendant without Dealership Defendant enables an "empty chair" defense, in which a present Defendant can point to an absent one as the cause of Plaintiffs' damages. This factor supports joinder.

B. Statute of Limitations

"When a claim is timely filed in state court and then removed, a finding that the statute of limitations would preclude the filing of a new, separate action against a party whose joinder has been denied in the federal proceeding, may warrant remand." Murphy v. Am. Gen. Life Ins. Co., 74 F. Supp. 3d 1267, 1284 (C.D. Cal. 2015) (citing Petrosyan v. AMCO Ins. Co., 2013 WL 3989234, at *3 (C.D. Cal. Aug. 2, 2013)). Plaintiff's state law negligent repair claim is subject to a three-year statute of limitations. McAdams v. Ford Motor Co., 2019 WL 2378397, at *5 (N.D. Cal. June 5, 2019) ("Under

California law, the statute of limitations for a negligent repair claim is three years.") (citing Cal. Code Civ. Proc. § 338(c)(1)). Plaintiffs allege they purchased the vehicle in question on April 14, 2019. (FAC ¶ 1.) Because Plaintiffs would not be time-barred from filing a new action in state court, the second factor does not support joinder.

C. Timeliness

"When determining whether to allow amendment to add a nondiverse party, courts consider whether the amendment was attempted in a timely fashion." Clinco v. Roberts, 41 F. Supp. 2d 1080, 1083 (C.D. Cal. 1999). Here, Plaintiffs amended their Complaint fewer than 21 days after FCA Defendant filed its Answer. No dispositive motions have been filed. In similar circumstances, courts have found amendment timely. See, e.g., Lara v. Bandit Indus., Inc., 2013 WL 1155523, at *3 (E.D. Cal. Mar. 19, 2013) (finding delay of five months after filing and three months after removal timely where no dispositive motions had been filed and discovery had not been completed); Aqua Connect, Inc. v. Code Rebel, LLC, 2012 WL 1535769, at *2 (C.D. Cal. Apr. 27, 2012) ("The Court finds that the five-month delay in requesting for leave to amend is not an unreasonable amount of time."); Yang v. Swissport USA, Inc., 2010 WL 2680800, at *4 (N.D. Cal. July 6, 2010) (finding delay of nine months tolerable where no dispositive motions had been filed); Gloria Malijen v. Ford Motor Co., 2020 WL 5934298, at *3 (C.D. Cal. Aug. 20, 2020) ("Plaintiff filed the motion to amend a mere four months after the filing of the initial Complaint and just one month after removal.") The timeliness factor thus weighs in favor of joinder.

D. Purpose of Joinder

"[T]he motive of a plaintiff in seeking the joinder of an additional defendant is relevant to a trial court's decision to grant the plaintiff leave to amend his original complaint." Desert Empire Bank v. Ins. Co. of N. America, 623 F.2d 1371, 1376 (9th Cir. 1980). However, suspicion of amendment for the purpose of destroying diversity is not an important factor in this analysis, as section 1447(e) gives courts flexibility in determining how to handle addition of diversity-destroying defendants. See IBC Aviation Servs., 125 F. Supp. 2d at 1012 ("The legislative history to § 1447(e) ... suggests that it was intended to undermine the doctrine employed by some courts that amendments which destroyed diversity were to be viewed with suspicion.").

***5** Although Defendants submit compelling evidence to support a conclusion that Plaintiffs have added Dealership Defendant for the purposes of defeating diversity, (see Declaration of Michael J. Gregg, Dkt. No. 18-1,) Plaintiffs' underlying legal allegations against Dealership Defendant are not so threadbare as to support a conclusion of bad faith.

E. Validity of Claims Against New Defendant

As alluded to above, the Court finds Plaintiffs' negligent repair claim facially viable. To state a facially viable claim for purposes of joinder under section 1447(e), a plaintiff need not allege a claim with particularity or even plausibility. Instead, "under section 1447(e), the Court need only determine whether the claim 'seems' valid." Freeman v. Cardinal Health Pharmacy Servs., LLC, 2015 WL 2006183, at *3 (E.D. Cal. May 1, 2015) (quoting Hardin v. Wal-Mart Stores, Inc., 813 F. Supp. 2d 1167, 1174 (E.D. Cal. 2011)); see also Sabag, 2016 WL 6581154, at *6 ("In considering the validity of plaintiff's claims, the [c]ourt need only determine whether the claim seems valid which is not the same as the standard in either a motion to dismiss or a motion for summary judgment.") (internal quotations omitted).

To state a claim for negligent repair, a plaintiff need only establish the elements of a standard negligence claim: duty, breach, causation, and damages. Hayes v. FCA US LLC, 2020 WL 2857490, at *2 (C.D. Cal. June 2, 2020). Here, Plaintiffs allege all of the above. (FAC.) Plaintiffs' proposed allegations are sufficient to state a negligent repair claim that "seems valid." Freeman, 2015 WL 2006183, at *3 (internal quotations omitted).

F. Prejudice to Plaintiffs

The final factor weighs in favor of joinder because "[i]f the Court were to deny plaintiff's motion for leave to amend, plaintiff would be required to pursue two substantially similar lawsuits in two different forums — an action against [Defendant] before this Court and an action against [Proposed Defendants] in California state court." Sabag, 2016 WL 6581154, at *6 (C.D. Cal. Nov. 7, 2016); see also Lara, 2013 WL 1155523, at *5 ("This Court [ ] finds that precluding Plaintiffs from joining [the proposed defendant] would prejudice Plaintiffs because they would be required either to abandon a viable claim against [the proposed defendant] or to initiate a duplicative litigation in state court.").

Plaintiffs allege a viable cause of action against Dealership Defendant arising out of the same set of incidents giving rise

to their causes of action against FCA Defendant. Moreover, pursuant to Federal Rule 15, Plaintiffs were entitled to amend their Complaint once within 21 days of service of the Answer without leave of Court. Because Plaintiffs' legitimate amendment destroyed the Court's subject matter jurisdiction, remand is proper, and Defendants' Motion to Strike is DENIED.

IV. CONCLUSION

For the reasons above, the Court GRANTS Plaintiff's Motion to Remand and DENIES Defendant's Motion to Strike. This action is hereby remanded to the Superior Court of the State of California for the County of Riverside. The October 19, 2020 hearing is VACATED.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 6082132

2012 WL 217479
Only the Westlaw citation is currently available.
United States District Court,
E.D. California.

FAIR HOUSING COUNCIL OF CENTRAL CALIFORNIA, INC., et al., Plaintiffs,
v.
Henry D. NUNEZ, et al., Defendants.

No. 1:10cv02073 LJO DLB.
|
Jan. 24, 2012.

Attorneys and Law Firms

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Henry Dorame Nunez, Daniel L. Harralson, Law Offices of Henry D. Nunez, Fresno, CA, for Defendants.

ORDER DENYING PLAINTIFFS' MOTION TO COMPEL DEFENDANT HENRY NUNEZ TO COMPLY WITH DISCOVERY ORDER AS MOOT (Document 49)

ORDER GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT (Document 46)

ORDER DENYING PLAINTIFFS' MOTION TO MODIFY SCHEDULING ORDER AS MOOT (Document 51)

ORDER VACATING SCHEDULING ORDER AND SETTING STATUS CONFERENCE

DENNIS L. BECK, United States Magistrate Judge.

***1** Plaintiffs Fair Housing Council of Central California, Inc., Nelida Mendiola, Martha Lemos and Maria Nava ("Plaintiffs") filed the present motions (1) to compel Defendant Henry Nunez to comply with the Court's November 3, 2011 discovery order, (2) for leave to file a first amended complaint, and (3) to modify the scheduling order. The matters were heard on January 13, 2012, before the Honorable Dennis L. Beck, United States Magistrate Judge. Elizabeth Brancart appeared telephonically on behalf of Plaintiffs. Daniel Harralson appeared on behalf of Defendant Henry Nunez. Henry Nunez appeared as counsel on behalf of Defendant Minnie Avila.

INTRODUCTION

Plaintiffs Nelida Mendiola, Martha Lemos and Maria Nava are current or former tenants of the Cypress Estates apartment complex ("Cypress Estates"), each of whom resided there with minor children. Defendant Henry Nunez controls the management of Cypress Estates. Complaint, ¶¶ 8–9. Cypress Estates claims to be a housing complex for older persons under the Housing for Older Persons Act ("HOPA"), *42 U.S.C. § 3607(b)(2)*.

Plaintiffs and other residents complained of discrimination at Cypress Estates to the Fair Housing Council of Central California, a nonprofit corporation ensuring compliance with fair housing laws throughout the Central Valley. Complaint, ¶¶ 4–7. Plaintiffs allege that Defendants enforced unreasonable and discriminatory rules against them and their children, served them with eviction notices because of their protected familial status, and made derogatory statements about their national origin that interfered with the enjoyment of their tenancy. Complaint, ¶¶ 12–22.

Plaintiffs assert violations of the Fair Housing Act (*42 U.S.C. §§ 3601, et seq.*), the California Fair Employment and Housing Act (Government Code §§ 12955, et seq.), the *California Civil Code §§ 1714, 1927, 1940.2, 44–46,* and the *California Code of Civil Procedure §§ 1159 and 1160*. Plaintiffs seek monetary damages, including punitive damages, along with declaratory and injunctive relief.

I. MOTION TO COMPEL DEFENDANT HENRY NUNEZ TO COMPLY WITH DISCOVERY ORDER

On January 10, 2012, Plaintiffs filed a reply stating the motion to compel is now moot. Doc. 71. At the hearing, the parties confirmed that the motion to compel was resolved. Accordingly, Plaintiffs' motion to compel Defendant Henry Nunez to comply with discovery order is DENIED AS MOOT.

II. MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

A. Introduction

On November 10, 2011, Plaintiffs filed a motion for leave to file a first amended complaint. Plaintiffs seek to add two new defendants, Joy Nunez and Cypress Estates, Inc., and seek to add factual allegations (1) that defendant Henry Nunez holds a partial ownership interest in the Cypress Estates apartments, (2) that his use of the corporate form should be disregarded and (3) that defendants Henry Nunez, Joy Nunez and Cypress Estates, Inc. knew or should have known that Minnie Avila was an unfit manager and their continued employment of Ms. Avila as their agent was in reckless disregard of the rights of plaintiffs and other tenants of the Cypress Estates to live in an environment free of housing discrimination.

***2** On December 30, 2011, Defendant Henry Nunez filed an opposition to Plaintiffs' motion to amend. Doc. 61.

On June 6, 2011, Defendant Herminia (Minnie) Avila filed an untimely opposition to the motion to amend. Doc. 66.

On January 6, 2012, Plaintiffs filed a reply to Defendant Nunez. Doc. 65. On January 10, 2012, Plaintiffs filed a reply to Defendant Avila. Doc. 69. With leave of court, Plaintiffs also filed a supplemental reply to Defendant Nunez on January 11, 2012. Doc. 73.

On January 12, 2012, Defendants Henry Nunez and Herminia Avila filed an opposition to Plaintiffs' reply brief, a supporting memorandum and a request for judicial notice in support of their opposition. Docs. 74, 75 and 76.

B. SUMMARY OF PROPOSED AMENDMENT

As noted, Plaintiffs seek to add two new defendants to this action: (1) Joy Nunez, Defendant Henry Nunez's wife, who holds an ownership interest in Cypress Estates; and (2) Cypress Estates, Inc., a corporation wholly owned by Defendant Henry Nunez, which also holds an ownership interest in Cypress Estates. The proposed amended complaint also adds the following:

(1) allegations based on public records that some of the parcels on which the relevant apartments are located have been owned, in part, by defendant Henry Nunez, Joy Nunez and Cypress Estates, Inc. Plaintiffs note that Cypress Estates, Inc. filed a bankruptcy petition on March 9, 2010, but Plaintiffs were not listed as creditors. On July 7, 2011, the bankruptcy court issued its final decree and the automatic stay is now lifted;

(2) allegations seeking injunctive relief against Cypress Estates, Inc. to stop the discriminatory housing practices at the apartments. Plaintiffs seek to establish a right to collect damages from the liability policy maintained by Cypress Estates, Inc.;

(3) allegations that defendant Minnie Avila, acting as agent of the other defendants, repeatedly made derogatory statements to the occupants at the Cypress Estates apartments concerning families with children and persons of Mexican ancestry;

(4) acknowledgment that Ms. Avila filed a Chapter 13 bankruptcy petition and Plaintiffs are the primary unsecured creditors. Plaintiffs note the automatic stay imposed by the bankruptcy filing and represent that they have added no new claims or allegations against Ms. Avila;

(5) allegations concerning Defendants' prior history of alleged Fair Housing Act violations and their reckless disregard in retaining Defendant Minnie Avila. The allegations include instances of multiple lawsuits/discrimination complaints beginning in 2006 and continuing through 2010 involving Minnie Avila and the Cypress Estates apartments. Defendants Henry Nunez and Minnie Avila repeatedly agreed to attend fair housing training. Plaintiffs allege that Ms. Avila did not attend fair housing training as part of a conciliation agreement in 2010; and

(6) allegations that Defendant Henry Nunez manipulated the corporate form. He is the sole shareholder and president of Cypress Estates, Inc., he shares an address with the corporation and he is the only person at Cypress Estates with authority to issue notices or sign leases. Per public records, by a series of conveyances Defendant Henry Nunez transferred ownership of the parcels making up the Cypress Estates apartments to himself and to his wife, Joy Nunez, as joint tenants and they leased the property back to Cypress Estates, Inc. Between 2005 and 2007, Henry and Joy Nunez secured mortgages on the parcels. In July 2009, Henry Nunez executed a grant deed to Cypress Estates, Inc. conveying his interest in certain parcels, but didn't record it at that time. In November and December 2009, the trustees holding the deeds of trust executed by Henry and Joy Nunez recorded notices of default. On February 18, 2010, Defendant Henry Nunez had the July 2009 grant deed recorded. On March 9, 2010, Cypress Estates, Inc. filed Chapter 11 bankruptcy. The United States Trustee filed a motion to dismiss or convert the bankruptcy for lack of counsel. Facts showed that the corporation's counsel, Tomas D. Nunez, had the same address, telephone number,

fax number, email address and ECF filing account as Henry Nunez. The trustee withdrew the motion after new counsel was substituted.

C. Legal Standard

***3** *Federal Rule of Civil Procedure Rule 15(a)* provides that the court should "freely give leave [to amend] when justice so requires." The United States Supreme Court has stated:

> [i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). The Ninth Circuit has summarized these factors to include the following: (1) undue delay; (2) bad faith; (3) prejudice to the opponent; and (4) futility of amendment. *Loehr v. Ventura County Cmty. Coll. Dist., 743 F.2d 1310, 1319 (9th Cir.1984)*. Granting or denial of leave to amend rests in the sound discretion of the trial court. *Swanson v. United States Forest Serv., 87 F.3d 339, 343 (9th Cir.1996)*. Despite the policy favoring amendment under *Rule 15,* leave to amend may be denied if the proposed amendment is futile or would be subject to dismissal. *Saul v. United States, 928 F.2d 829, 843 (9th Cir.1991)*.

D. Analysis

As a preliminary matter, the Court addresses the pleadings filed by Defendants Henry Nunez and Minnie Avila on January 12, 2012. Defendants Nunez and Avila filed an untimely opposition to Plaintiffs' reply brief, along with a supporting memorandum and request for judicial notice. Docs. 74, 75 and 76. At the hearing, Defendant Henry Nunez, who also serves as counsel for Defendant Avila, indicated that the documents should not have been filed. Accordingly, the Court HEREBY ORDERS these documents STRICKEN FROM THE RECORD.

The Court now turns to the merits of the underlying motion.

1. Undue Delay

Plaintiffs argue that the proposed amendment is timely because the scheduling order sets no deadline to amend the pleadings and the claims asserted against the proposed defendants are within the statutory time limits.

Defendant Nunez counters that there was no reason why Plaintiffs could not have included the proposed amendments when they originally filed the complaint because they knew that he was an officer for Cypress Estates, Inc. However, Plaintiffs explain that they first became aware of the need to amend their complaint in response to the motion to dismiss filed by Defendant Henry Nunez in October 2011. In the motion to dismiss, Mr. Nunez claimed he could not be held liable as an officer of Cypress Estates, Inc. and that Cypress Estates, Inc. had not been named in the complaint. Doc. 38. When Mr. Nunez claimed he could not be liable, Plaintiffs' counsel reviewed public records identifying the transactions between Henry and Joy Nunez and Cypress Estates, Inc. in an effort to determine ownership interests in the Cypress Estates apartments.

To the extent defense counsel attempted to demonstrate that Plaintiffs' were aware of the proposed amendments prior to the outset of this action, they were unsuccessful. The Court finds no undue delay by Plaintiffs.

2. Bad Faith

***4** Defendant Henry Nunez argues that the proposed amendment is brought in bad faith to annoy him and Joy Nunez. Defendant argues that there is no conceivable reason, other than a failure to investigate, for not suing Henry Nunez in his individual capacity at the outset of this case. Defendant also asserts that Plaintiffs' counsel knew of a lease identifying both Henry and Joy Nunez as co-owners of the Cypress Estates properties since 2007 based on a prior case.

Plaintiffs counter that Defendant Nunez already was named in his individual capacity in the original complaint as an owner of Cypress Estates apartments. As to Defendant's claim that Plaintiffs knew of a lease identifying both Joy and Henry Nunez as co-owners of the properties, Plaintiffs' counsel indicated that they had never seen a copy of any lease because there was no discovery in the prior litigation.

Defendant Minnie Avila also claims bad faith on the part of Plaintiffs by including her in the proposed amendments. On June 6, 2011, Defendant Avila filed an untimely opposition to the motion for leave to file a first amended complaint. Doc. 66. In her motion, she explains that she filed for Chapter 13 bankruptcy on July 8, 2011, and there is an automatic stay against any action being taken against her without prior approval from the bankruptcy court. She contends that Plaintiffs failed to file a proof of claim with the bankruptcy court and therefore they cannot take any action against her in this case. Ms. Avila wants to reinstate the motion to dismiss the original complaint.

In the proposed amended complaint, Plaintiffs have not added any new allegations or claims against Ms. Avila. Further, Plaintiffs acknowledged that their claims against Ms. Avila are subject to the automatic stay. Proposed First Amended Complaint, Doc. 47–1. At the hearing, Ms. Avila's counsel admitted that the allegations against Ms. Avila have not changed. Instead, the proposed complaint contains allegations regarding the interactions of defendants with Ms. Avila.

The Court does not find that Plaintiffs are seeking to amend for an improper purpose.

3. Prejudice to Defendant

Plaintiffs assert that the proposed amendment adds no new claims against the current defendants and the new defendants will not be prejudiced because (1) they are so closely related to Defendant Henry Nunez; and (2) the insurance company providing liability insurance for the Cypress Estates complex is defending the action. Declaration of Elizabeth Brancart ("Brancart Dec.") ¶ 3.

Defendant Henry Nunez counters that he will be unduly prejudiced because these new allegations will increase litigation costs by adding Joy Nunez and by seeking to pierce the corporate veil. However, litigation costs alone are not grounds for denial of leave to amend. *See Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir.2001)*.

4. Futility

Defendant Nunez argues that the proposed amendments are futile. "Futility of amendment can, by itself, justify the denial of a motion for leave to amend." *Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir.1995)*. However, denial of leave to amend due to futility is rare. Ordinarily, courts will defer consideration of challenges to the merits of a proposed amended pleading until after leave to amend is granted and the amended pleading is filed. *Netbula v. Distinct Corp., 212 F.R.D. 534, 539 (N.D.Cal.2003); Britz Fertilizers v. Nationwide Agribusiness Ins. Co.,* 2011 WL 5118521 (E.D.Cal. Oct.27, 2011).

***5** Here, the Court defers ruling on the merits of the proposed amended complaint. Notwithstanding, the Court notes that certain of defendants' arguments regarding futility are unsupported or inaccurate. For example, Defendant Nunez argues that the amendments are futile because Plaintiffs failed to exhaust their administrative remedies under the California Fair Employment and Housing Act ("FEHA"), *Cal. Gov.Code §§ 12955 et seq.* However, FEHA does not require exhaustion of administrative remedies for housing claims. *See Cal. Gov.Code § 12989.1; House v. Cal. State Mortg. Co., 2009 WL 2031775, *18 (E.D.Cal.2009)* (denying motion to dismiss FEHA housing cause of action on exhaustion grounds).

As an additional example, Defendant Nunez argues that the proposed amendments are futile because Plaintiff Fair Housing Council of Central California, Inc. has no standing to bring the seventh claim for relief pursuant to the Unruh Civil Rights Act. However, the proposed amended complaint clearly states that the seventh cause of action for violation of the Unruh Act is brought only by Plaintiffs Mendiola, Nava and Lemos. Proposed First Amended Complaint p. 15, Doc. 47–1.

Following consideration of the relevant *Eitel* factors, Plaintiffs' motion for leave to file a first amended complaint is GRANTED. To accommodate service of the amended complaint, along with the possible retention of counsel and tender of defense to the insurance carrier for Cypress Estates, Inc., the Court HEREBY VACATES the Scheduling Order dated March 21, 2011. Doc. 16.

A status conference is SCHEDULED for February 7, 2012, at 9:00 a.m.

III. MOTION TO MODIFY SCHEDULING ORDER

On November 15, 2011, Plaintiffs filed a motion to modify the Scheduling Order pursuant to *Rule 16(b)(4) of the Federal Rules of Civil Procedure.* (Doc. 51.) As the existing scheduling order has been vacated, Plaintiffs' motion to modify the scheduling order is DENIED AS MOOT.

CONCLUSION

For the reasons stated above, the Court HEREBY ORDERS as follows:

1. Plaintiffs' motion to compel Defendant Henry Nunez to Comply with Discovery Order is DENIED AS MOOT;

2. The opposition to Plaintiffs' reply brief, supporting memorandum and request for judicial notice filed by Defendants Henry Nunez and Minnie Avila on January 12, 2012 (Documents 74, 75 and 76) are STRICKEN FROM THE RECORD;

3. Plaintiffs' motion for leave to file a first amended complaint is GRANTED;

4. Plaintiffs' claims, as set forth in the original complaint filed November 8, 2010, REMAIN STAYED as to Defendant Avila. Ms. Avila's answer to the original complaint, which was filed on January 7, 2011, shall stand as a denial to the first amended complaint and no further pleading shall be required;

5. The Scheduling Order dated March 21, 2011 is VACATED;

6. Plaintiffs' motion to amend the scheduling order is DENIED AS MOOT; and

7. A status conference is SCHEDULED for February 7, 2012, at 9:00 a.m. before the undersigned. The parties shall be prepared to discuss the status of service, legal representation and scheduling dates for discovery and trial.

***6** IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 217479

End of Document

2019 WL 7940670
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Edward FRADKIN
v.
WUNDERLICH-MALEC ENG'G INC., et al.

Case No. CV 19-6492-DMG (SKx)
|
Filed 11/05/2019

Attorneys and Law Firms

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Proceedings: IN CHAMBERS - ORDER RE PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT [10]

The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

***1** This matter is before the Court on Plaintiff Edward Fradkin's Motion for Leave to Amend Complaint ("MLA"). [Doc. # 10.] The Court deemed this matter suitable for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15. For the reasons set forth below, Plaintiff's Motion is **GRANTED**.

I.

FACTUAL AND PROCEDURAL BACKGROUND [1]

[1] All factual allegations are drawn from the operative complaint, Plaintiff's First Amended Complaint ("FAC"), unless otherwise stated.

Plaintiff is a California resident who began working for Defendant Wunderlich-Malec Engineering ("Wunderlich"), a Minnesota corporation, as a mechanical engineer in September 2017. Notice of Removal, Ex. D (FAC) ¶¶ 7-8 [Doc. # 1]. Plaintiff, who was 56 years old at the time, alleges that on his first day working at Wunderlich, his supervisor David Yamashiro noticed Plaintiff's birth date on an employment form and asked, "Wait, how old are you?" *Id.* ¶¶ 13, 15. Yamashiro allegedly disfavored older employees and made multiple disparaging remarks directed at Plaintiff. *Id.* ¶ 16. Yamashiro once asked Plaintiff whether he was too old to know how to "copy and paste on a computer." *Id.* ¶ 17. After a company dinner, Yamashiro threw the check toward Plaintiff and said, "[T]he senior citizen at the table should pay!" *Id.* ¶ 17. Around December 2017, Yamashiro hired a less qualified, younger employee and asked Plaintiff to train that employee "without the knowledge that [the employee] was meant to replace [Plaintiff]." *Id.* ¶ 18.

Later in December 2017, Plaintiff reported the unsafe storage of hazardous chemicals at a Wunderlich work site to several Tesla and Wunderlich shareholder employees. *Id.* ¶¶ 19-21. His employment was terminated about a week after Plaintiff reported the unsafe conditions. *Id.* ¶ 22. Plaintiff alleges he suffered mental anguish, emotional distress, and loss of income among other damages resulting from these events and his termination. *Id.* ¶¶ 84-85.

In the Second Amended Complaint ("SAC") that Plaintiff seeks leave to file, Plaintiff also asserts that on November 30, 2017, Yamashiro found out Plaintiff was looking for a new job and called Plaintiff, saying, "What the hell?! You posted your resume online?" Notice of Lodging, Redlined Second Amended Complaint ("SAC") ¶ 108 [Doc. # 13]. Plaintiff responded that he would continue to work at Wunderlich "if Yamashiro would treat him better," to which Yamashiro responded by ordering Plaintiff to delete his resume from three online job sites. *Id.* Plaintiff also alleges a greater degree of emotional distress than alleged in the FAC, physical manifestation of emotional distress, and ongoing medical expenses incurred as a result of Yamashiro's conduct. *Id.* ¶ 131.

After exhausting all administrative remedies under California's Fair Employment and Housing Act ("FEHA"), Plaintiff obtained a right to sue letter from the California Department of Fair Employment and Housing. FAC at ¶ 23; MLA, Ex. A at 38 [Doc. # 10]. [2] On February 15, 2019, Plaintiff filed a Complaint against Wunderlich and Yamashiro in Los Angeles County Superior Court. Notice of Removal Ex. A (Compl.) at 11 [Doc. # 1]. The Complaint alleged eight claims: (1) wrongful termination in violation of public

policy; (2) retaliation in violation of FEHA, Cal. Gov't Code section 12940(h); (3) whistleblower retaliation in violation of Cal. Lab. Code section 1102.5; (4) age discrimination in violation of FEHA, Cal. Gov't Code section 12940; (5) failure to prevent discrimination and harassment in violation of Cal. Gov't Code section 12940(k); (6) harassment and hostile work environment in violation of Cal. Gov't Code section 12940(j); (7) failure to timely pay wages on discharge in violation of Cal. Lab. Code sections 202 and 203; and (8) unfair business practices in violation of Cal. Civil Procedure Code section 17200. All claims were alleged against Wunderlich and Doe Defendants. *See generally id.* Only the sixth claim, for FEHA harassment and hostile work environment, was alleged against Yamashiro. *Id.* at 23; Notice of Removal ¶ 2.

[2] All page references herein are to page numbers inserted in the header of the document by the CM/ECF filing system.

***2** Plaintiff amended his original Complaint on April 25, 2019 and "accidentally omitted" the sole cause of action against Yamashiro. MLA at 5. Around May 7, 2019, the parties discussed Plaintiff dismissing Yamashiro with prejudice in exchange for Wunderlich consenting to state court jurisdiction. Opp., Ex. 3 at 2 [Doc. # 11-3]. No agreement was reached. According to an e-mail Plaintiff's counsel then sent to Wunderlich and Yamashiro's counsel on May 31, 2019, "there was a mistake made ... that Mr. Yamashiro should be named in the Fourth Cause of Action of the First Amended Complaint"—the FEHA discrimination claim. Opp., Ex. 4 at 23.

On July 22, 2019, Plaintiff sought to file a motion for leave to amend with the state court to add claims of harassment under FEHA and intentional infliction of emotional distress ("IIED") against Yamashiro, and a claim of hostile work environment under FEHA against both Yamashiro and Wunderlich. MLA at 6; *see* Notice of Removal, Ex. G (Pl.'s Mot. for Leave to Am. in Superior Court, Ex. 1) at 154-58 [Doc. #1]. Due to an error by Plaintiff's legal filing service, the motion was not filed until July 24, 2019—one day before Wunderlich's removal deadline. MLA, Ex. 6 (Yadegar Decl.) at 99-100 [Doc. # 10-1].

On July 25, 2019, Wunderlich filed a notice of removal on diversity grounds. Notice of Removal at ¶ 1. Wunderlich claimed it only recently discovered that the amount in controversy exceeded $75,000 and that diversity jurisdiction is proper because there is complete diversity between Plaintiff and Wunderlich. It also asserted that Yamashiro—a California citizen— was no longer a party to the action under the FAC. *Id.* ¶¶ 6, 9-11.

Plaintiff now seeks leave to amend the FAC to add new claims against Yamashiro and Wunderlich, as well as additional factual allegations that Yamashiro criticized Plaintiff for posting his resume online and that Plaintiff has suffered great emotional distress and has incurred expenses for medical and psychological treatment as a result of Wunderlich's and Yamashiro's actions. MLA at 7, 13; SAC ¶ 101-132 [Doc. # 13].[3] In opposition, Wunderlich argues that Plaintiff's proposed amendments are futile, unduly delayed, in bad faith, and prejudicial. Opp. at 2, 9-10 [Doc. # 11].[4]

[3] Confusingly, Plaintiff seeks to amend the FAC to add separate claims of harassment and hostile work environment under Cal. Gov't Code section 12923, which is a statement of legislative findings and purpose and does not itself give rise to a cause of action under FEHA. SAC ¶¶ 101-127. Wunderlich asserts that Plaintiff's claims actually constitute a claim for violation of a different section of FEHA, Cal. Gov't Code section 12940(j)—the claim that Plaintiff asserted in his original complaint and omitted in the FAC. *See* Opp. at 14. Section 12940(j) provides for an employer's responsibility to "prevent harassment from occurring" and that "[a]n employee ... is personally liable for any harassment prohibited by this section that is perpetrated by the employee." Cal. Gov't Code §§ 12940(j)(1), (3). Wunderlich is correct, and therefore the Court construes Plaintiff's proposed SAC to assert claims against Yamashiro and Wunderlich for harassment and hostile work environment under section 12940(j)—not the legislature's Findings and Declarations of Policy.

[4] Wunderlich also argues that Plaintiff failed to comply with both Local Rule 7-3's meet and confer requirements and the Court's standing order. But documents submitted by both parties indicate that Wunderlich was well aware that Plaintiff planned to move for leave to amend and that Plaintiff provided Wunderlich with the text of the SAC. The purpose of Rule 7-3, requiring parties to discuss the possibility of resolving the issue before a motion is noticed, was satisfied here. The Court also declines to elevate form over substance regarding Plaintiff's

request that the Court not consider Wunderlich's opposition because it failed to adhere strictly to the Local Rules' formatting guidelines. Reply at 7. The Court disregards, however, Plaintiff's "supplemental reply," which was filed without leave of court, substantively contravening Local Rule 7-13 and Initial Standing Order 4c [Doc. # 15]. The Court therefore **DENIES as moot** Wunderlich's Request to Strike and Request for Sanctions [Doc. # 16].

II.

DISCUSSION

3** Federal Rule of Civil Procedure 15(a) provides that a party may amend a pleading with the court's leave, and that "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2); *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009) (requests for leave to amend should be granted with "extreme liberality***") (emphasis added). A district court "may deny leave to amend due to 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment.' " *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). "Absent prejudice, or a strong showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to amend." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

The Court considers each factor *seriatim*, beginning with futility.

A. Futility

"An amendment is futile when 'no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense.' " *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017) (quoting *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988)). The standard when "determining the legal sufficiency of a proposed amendment is identical to the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6)." *Miller*, 845 F.2d at 214, *overruled on other grounds by Ashcroft v. Iqbal*, 556 U.S. 662 (2009). But "courts will [ordinarily] defer consideration of challenges to the merits of a proposed amended pleading until after leave to amend is granted and the amended pleading is filed." *Netbula, LLC v. Distinct Corp.*, 212 F.R.D. 534, 539 (N.D. Cal. 2003).

Harassment under FEHA, Cal. Gov't Code section 12940(j), "focuses on situations in which the social environment of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee." *Roby v. McKesson Corp.*, 47 Cal. 4th 686, 706 (2009). A hostile work environment under California's FEHA statute is evaluated under a "totality of the circumstances" approach. *Miller v. Dep't of Corr.*, 36 Cal. 4th 446, 462 (2005). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)). Unlike in a FEHA discrimination claim, as stated in Count 4 of Plaintiff's FAC, individual employees as well as employers can be held liable for a FEHA harassment and hostile work environment claim. *Roby*, 47 Cal. 4th at 706-07. Plaintiff alleges that Yamashiro can be held individually liable for harassment under FEHA for making numerous disparaging comments about his age, creating a hostile work environment, and causing severe emotional distress and mental anguish, as well as loss of income. SAC ¶¶ 15-20, 110-114. Given the numerous allegedly harassing incidents in the SAC and the need to assess the "totality of the circumstances," Plaintiff has pleaded facts sufficient to support a FEHA claim against Yamashiro. *Miller*, 36 Cal. 4th at 462.

As for Plaintiff's proposed IIED claim, the elements of intentional infliction of emotional distress are: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Hughes v. Pair*, 46 Cal. 4th 1035, 1050-51 (2009) (internal citations and quotations omitted). Plaintiff's proposed SAC alleges that Yamashiro's numerous age-related comments to him were extreme and outrageous, that Yamashiro acted with reckless disregard of the probability that Plaintiff would suffer emotional distress, and that Plaintiff suffered distress to a greater degree than previously alleged. SAC ¶¶ 129, 131-32. "Whether ... alleged

behavior is sufficiently extreme as to constitute 'outrageous' behavior is properly determined by the fact finder after trial or possibly after discovery upon a motion for summary judgment." *Angie M. v. Superior Court*, 37 Cal. App. 4th 1217, 1226 (1995). As such, the proposed IIED claim against Yamashiro is not futile and any effort to block the claim at this early stage of the proceedings through opposition to a motion to amend is premature.

B. Undue Delay and Bad Faith

***4** "Relevant to evaluating the delay issue is whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading." *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1388 (9th Cir. 1990). Relevant to evaluating bad faith, when a plaintiff seeks to add a party that destroys complete diversity, is whether the plaintiff can offer "a satisfactory explanation for their delay in naming [a non-diverse defendant] as a defendant." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). Because both inquiries examine Plaintiff's reasons for not raising the amendments in his original Complaint or FAC, the Court considers undue delay and bad faith together.

While Plaintiff's counsel has caused needless confusion by initially asserting and then omitting various claims against Yamashiro, the fact remains that this case is in the early stages of the proceedings and the Court has not even set a scheduling conference or imposed a deadline for amendment of pleadings. Under these circumstances, the Court cannot find that the proposed amendment is unduly delayed or untimely. Furthermore, to the extent the Court construes at least one of Plaintiff's amendments as one to reinstate the harassment and hostile work environment claim against Yamashiro, it will not attribute that to bad faith when Wunderlich and Yamashiro already were on notice of the existence of that claim in the pleading of the original Complaint and there is no indication that the claim was previously dismissed on the merits or that Plaintiff manufactured a new claim against Yamashiro solely to destroy diversity jurisdiction. Given the timeliness of this particular amendment, the Court need not opine as to Plaintiff's motives with regard to the other proposed amendments.

D. Prejudice to Wunderlich and Yamashiro

Among the various factors relating to whether to permit an amendment, "it is prejudice to the opposing party that carries the greatest weight." *Eminence Capital*, 316 F.3d at 1052. "Amending a complaint to add a party poses an especially acute threat of prejudice to the entering party." *DCD Programs*, 833 F.2d at 187.

Yamashiro makes the bare assertion that being "required to defend himself after he had previously been dismissed from the action" would prejudice him. Opp. at 18. Wunderlich asserts that it would suffer prejudice by losing a federal forum for this action. *Id.* But Yamashiro has been on notice for months that Plaintiff "accidentally" omitted him from the FAC and seeks to reinstate claims against him. And Yamashiro would not be prejudiced by joining an action at such an early stage of litigation. *Cf. Jackson*, 902 F.2d at 1388 (finding that permitting plaintiffs to amend the complaint would force defendants to relitigate the case after extensive discovery, with trial dates already set). Wunderlich also has not shown what prejudice would result from losing a federal forum, citing cursorily to *Westlands Water District v. United States*, 100 F.3d 94 (9th Cir. 1996), a case about voluntary dismissal under Federal Rule 41(a)(2), to argue that the loss of a federal forum may result in prejudice. In the Rule 41(a)(2) context, the Ninth Circuit has found that "the need to defend against state law claims in state court is not 'plain legal prejudice.' " *Smith v. Lenches*, 263 F.3d 972, 976 (9th Cir. 2001). The Court therefore declines to find prejudice to Wunderlich arising from defending state-law claims in state court.

The Court agrees with Plaintiff that his proposed amendments are not prejudicial because "[t]his case is only in the early stages, no trial date has been set, no depositions have been taken and Plaintiff has yet to propound discovery requests." Reply at 12 [Doc. # 12]; *see DCD Programs*, 833 F.2d at 187-88 ("Given that this case is still at the discovery stage with no trial date pending, nor has a pretrial conference been scheduled, there is no evidence that [the defendant to be added by amendment] would be prejudiced by the timing of the proposed amendment.").

***5** The purpose behind Rule 15's liberal grant of amendment, and for that matter, notice pleading in general, is to ensure that the litigation addresses not just one version of a pleading, but the merits underlying a cause of action. *Foman*, 371 U.S. at 182. Plaintiff seeks leave to amend to raise non-futile claims early enough in the proceedings so as not to prejudice Wunderlich or Yamashiro. Permitting Plaintiff to pursue all of his claims at this early stage of litigation fulfills the purpose of Rule 15.

V.

CONCLUSION

Accordingly, the Court **GRANTS** Plaintiff's motion for leave to amend.[5] Plaintiff shall file the Second Amended Complaint consistent with Local Rule 3-2 within **three (3) court days** of the date of this Order.

5 The Court does not take up Plaintiff's arguments, asserted for the first time in his reply brief, that Wunderlich's notice of removal was untimely. *See* Reply at 9; *see also* *U.S. ex rel. Giles v. Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000) ("It is improper for a moving party to introduce new facts or different legal arguments in the reply brief than those presented in the moving papers."). Plaintiff did not move to remand, but rather to amend his complaint. The Court therefore **DENIES** Plaintiff's request that Wunderlich pay Plaintiff's attorneys' fees associated with removal. *See* MLA at 14-15.

IT IS SO ORDERED.

All Citations

Slip Copy, 2019 WL 7940670

End of Document

2018 WL 4945685
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

John GOCKE
v.
UNITED STATES of America

Case No. CV-16-1560-MWF (DTBx)
|
Filed 02/23/2018

Attorneys and Law Firms

Bruce Emery Disenhouse, Disenhouse Law APC, Riverside, CA, James Patrick Ferraris, Homan & Stone, Redlands, CA, for John Gocke.

Jennifer R. Jacobs, Sarah M.S. Quist, Garrett Coyle, AUSA - Office of US Attorney, Los Angeles, CA, for United States of America.

Proceedings (In Chambers): ORDER RE: MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT [46]

MICHAEL W. FITZGERALD, U.S. District Judge

***1** Before the Court is Plaintiff's Motion for Leave to File Second Amended Complaint, filed on January 18, 2018. (the "Motion") (Docket No. 46). On February 5, 2018, Defendant United States of America (the "Government") filed an Opposition. (Docket No. 50). On February 9, 2018, Plaintiff filed a Reply. (Docket No. 51).

The Motion was scheduled to be heard on February 26, 2018. The Court read and considered the papers on the Motion and deemed the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); Local Rule 7-15. The hearing was therefore vacated and removed from the Court's calendar.

For the reasons discussed below, the Motion is **GRANTED**.

I. BACKGROUND

A. The First Amended Complaint

On July 17, 2016, Plaintiff filed his initial Complaint against the Government, the United States Department of Agriculture, Tom Vilsack (then the Secretary of the Department of Agriculture), the United States Forest Service, and Thomas Tidwell (then the Chief of the Forest Service). (Docket No. 1). On September 22, 2016, before any Defendant had responded to the Complaint, Plaintiff filed the operative First Amended Complaint, naming only the Government and Officer Ty Davis, a Government employee, as Defendants. (FAC (Docket No. 18)). On November 21, 2016, the caption of the First Amended Complaint was amended so that the Government was the sole named Defendant, and Davis was removed. (Docket No. 25).

As set forth in the Court's Order regarding the Government's Motion for Partial Judgment on the Pleadings dated January 16, 2018 (the "MJOP Order"), Plaintiff alleges the following in the First Amended Complaint:

On the evening of July 20, 2015, Plaintiff drove his vehicle into the San Bernardino County Fairgrounds on his way to a restaurant in Victorville, California. (FAC ¶ 14). Upon entering the Fairgrounds, Plaintiff noticed individuals who looked to be affiliated with the United States Forest Service and saw that his usual path through the Fairgrounds was blocked due to a fire in the area, so he exited the Fairgrounds and took another route to the restaurant. (*Id.*).

About an hour later, after eating dinner, Plaintiff returned to the Fairgrounds. (*Id.* ¶ 15). Plaintiff initiated contact with Ty Davis, a law enforcement officer with the Forest Service, to ask about the fire. (*Id.*). Davis identified himself as a federal agent and asked Plaintiff to produce identification. (*Id.* ¶¶ 15, 23). Rather than a driver's license, Plaintiff showed Davis a San Bernardino County Sheriff's Department identification, which displayed his status as a retired captain. (*Id.* ¶ 15).

Davis told Plaintiff to exit the vehicle. (*Id.*). Rather than exit the vehicle, Plaintiff drove away from Davis. (*Id.* ¶ 16). As Plaintiff was pulling away, Davis "jumped into the driver's side window of Plaintiff's moving vehicle," and Plaintiff pushed Davis out of the vehicle while driving between 5 and 10 miles per hour. (*Id.*).

***2** As Plaintiff was driving away, Davis fired 16 shots at Plaintiff's vehicle with a 40-caliber handgun, causing damage to Plaintiff's vehicle but not hitting Plaintiff. (*Id.* ¶ 17). With Davis and other federal officers pursuing him, Plaintiff pulled

his vehicle into a well-lit parking lot and exited his vehicle as officers arrived. (*Id.* ¶ 18).

Forest Service officers, including Davis, handcuffed Plaintiff and placed him under arrest. (*Id.*). After holding Plaintiff for "several hours," the federal officers turned Plaintiff over to the San Bernardino County Sheriff's Department and Plaintiff was released later that evening. (*Id.* ¶¶ 18, 20).

The San Bernardino County District Attorney filed criminal charges against Plaintiff relating to these events in a case captioned *People v. Gocke*, No. 16CR-013775 (the "Criminal Case"). (*Id.* ¶ 65). Plaintiff alleges that the Criminal Case was the result of Davis and/or others affiliated with the Government "fil[ing] false incident reports and/or provid[ing] false statements to the San Bernardino County Sheriff's Department related to the incident that occurred on July 20, 2015." (*Id.*).

Plaintiff asserted seven claims for relief against the Goverment: (1) "violation of Plaintiff's rights secured by the Fourth Amendment to be free from excessive use of force negligence, intentional assault and battery"; (2) false arrest and imprisonment; (3) conversion; (4) violation of section 52.1 of the California Civil Code (the "Bane Act"); (5) violation of section 51.7 of the California Civil Code (the "Ralph Act"); (6) negligence; and (7) malicious prosecution.

On November 23, 2016, upon stipulation of the parties, the Court dismissed Plaintiff's Bane Act and Ralph Act claims against the Government ***with prejudice***. (Docket No. 26).

B. The Ten-Month Stay and the MJOP Order

On January 9, 2017, the Court stayed this action pending resolution of the Criminal Case. (Docket No. 34). On October 6, 2017, the Criminal Case was resolved when Plaintiff entered a plea of no contest to a charge of disturbing the peace in violation of section 415(2) of the California Penal Code in exchange for the District Attorney dismissing a charge of resisting a peace officer in violation of section 69(a) of the Penal Code. (*See* Opp. at 2, Ex. 2; Docket No. 38). This Court lifted the stay on October 25, 2017. (Docket No. 39).

On November 13, 2017, the Government filed a Motion for Partial Judgment on the Pleadings, seeking dismissal of Plaintiff's false arrest and imprisonment and malicious prosecution claims. (Docket No. 40). In its MJOP Order, the Court granted that motion ***with leave to amend*** as to Plaintiff's false arrest and imprisonment claim, and ***without leave to amend*** as to Plaintiff's malicious prosecution claim. (*See* MJOP Order at 4-10). The Court directed Plaintiff to file a Second Amended Complaint, if any, by February 5, 2018. (*Id.* at 11). The Court also instructed that a Second Amended Complaint "shall not add any new claims for relief or re-assert any claims for relief that have already been dismissed." (*Id.*).

C. The Proposed Second Amended Complaint

Through his present Motion, Plaintiff requests permission to file a Second Amended Complaint that maintains his claims against the Government that have not been dismissed without leave to amend, and that joins the County of San Bernardino (the "County") and Detective Daniel Maddux, a County employee (the County and Maddux together, the "County Defendants"). (*See* Proposed SAC (Docket No. 46-1)). Plaintiff intends to assert six claims for relief against the County Defendants: (1) violation of California Bane Act; (2) violation of the California Ralph Act; (3) negligence; (4) violation of Plaintiff's Fourth Amendment rights, pursuant to 42 U.S.C. §§ 1983 and 1988; (5) "violation of civil rights, false arrest / imprisonment," pursuant to 42 U.S.C. § 1983; and (6) "violation of civil rights, supervisor liability," pursuant to 42 U.S.C. § 1983. (*See* Proposed SAC ¶¶ 63-107).

***3** The crux of Plaintiff's claims against the County Defendants is that, following Plaintiff's interactions with Davis and other Government agents, the San Bernardino County Sheriff's Department unreasonably detained him and subjected him to an "invasive blood draw" (*i.e.*, a blood-alcohol test) based upon a warrant obtained pursuant to Detective Daniel Maddux's allegedly falsified warrant application filed in the San Bernardino County Superior Court.

II. DISCUSSION

A. Rule 20

To add a new party to an action, the pleadings normally must be amended in accordance with Rule 15. But the issue of who may be added as a party is determined by Rules 19 and 20, which govern compulsory and permissive joinder. *See Desert Empire Bank v. Ins. Co. of North America*, 623 F.2d 1371, 1374 (9th Cir. 1980) ("In conjunction with Rule 15, Rule 20 ... allows the permissive joinder of parties, and in particular of party defendants..."); *see generally* 1 Beverly Reid O'Connell & Karen L. Stevenson, *Federal Civil Procedure Before Trial* ¶ 8:1380 (The Rutter Group 2017) ("*Rutter Guide*"). The Court

thus focuses first on whether Rule 20's permissive joinder requirements are satisfied.

Pursuant to Rule 20(a)(2), "[p]ersons ... may be joined in one action as defendants if: (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a)(2). "The last two requirements tend to merge because if the 'same transaction' requirement is met, there is almost always a 'common question.' " *Rutter Guide* ¶ 7:134. "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 (1966).

The Government first argues that joinder of the County Defendants is inappropriate because Plaintiff's "existing claims against the United States arise out of his verbal altercation with Officer Davis, his attempt to flee, and the shots that Officer Davis fired at his car," whereas "his new claims against the county defendants arise out of what happened later that day after he was arrested and turned over to the sheriff's department." (Opp. at 3).

The Government also argues that joinder is inappropriate because Plaintiff's claims against the Government and his claims against the County Defendants involve distinct legal and factual issues. "The key issues [implicated by Plaintiff's claims against the Government] are: (a) whether Officer Davis had probable cause to stop Gocke, (b) whether Officer Davis's decision to shoot was objectively reasonable, and (c) whether Gocke suffered any damages from the stop or the shooting." (Opp. at 3). "The key issues [implicated by Plaintiff's claims against the County Defendants] are: (d) whether the county detective made material false statements in getting the warrant to draw Gocke's blood; (e) whether the sheriff's department had probable cause to detain Gocke for several hours; (f) whether those violations were committed by threat, intimidation or coercion; (g) whether those violations were committed because of a protected characteristic; and (h) whether Gocke is entitled to compensatory damages, punitive damages, or attorney's fees for those violations."

***4** The Court is unpersuaded by the Government's joinder-related arguments. The entire theory of Plaintiff's case is that, but-for his encounter with the Government on the evening of July 20, 2015, the County Defendants would have had no occasion to detain him or draw his blood later that same evening. His claims against the Government and the County Defendants plainly "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences," as required by Rule 20(a).

And, while Plaintiff's claims may present legal and factual issues that are distinct as to the Government and the County Defendants, there are also overlapping issues. For example, Plaintiff alleges that Officer Davis had been "granted law enforcement authority in the County of San Bernardino by agreement between the United States of America and the Defendant County of San Bernardino" (Proposed SAC ¶ 36), which poses the common question of the scope of the authority the County granted the Government and whether the Government reasonably exercised that authority.

Plaintiff also alleges that he "was advised that during his detention by the San Bernardino County Sheriff's Department, the United States of America was demanding his blood be drawn for testing" (*Id.* ¶ 32), which poses the common question of whether the alleged "invasive blood draw" was the result of a coordinated effort between the Government and the County. These issues alone are sufficient to satisfy Rule 20(a)'s liberal commonality requirement. *See Desert Empire Bank*, 623 F.2d at 1375 (9th Cir. 1980) (joinder appropriate so long as there is "*some* question of law or fact common to all parties") (emphasis added); *see generally Rutter Guide* ¶ 7:151.

In sum, the permissive joinder requirements imposed by Rule 20(a) are satisfied with respect to Plaintiff's proposed new claims against the County Defendants.

B. Rule 15(a)(2)

Federal Rule of Civil Procedure 15(a)(2) provides that "[t]he court should freely grant leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). "In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.' " *Foman v. Davis*, 371 U.S. 178, 182 (1962). "Absent prejudice, or a strong showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of granting

leave to amend." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (emphasis in original).

The Government does not argue that it will be at all prejudiced by Plaintiff's proposed inclusion of new claims against the County Defendants. And in light of the fact that this case was stayed for ten months and discovery has not yet begun (in fact, there is not yet a pretrial schedule in place), there would be no undue prejudice to the County Defendants as a result of Plaintiff suing them in this action rather than a separate action.

Instead, the Government argues that Plaintiff unduly delayed seeking leave to assert claims against the County Defendants and that amendment would be futile. (*See* Opp. at 4-7).

Undue delay. The Government argues that Plaintiff understood before he filed his original Complaint that "the county defendants had detained him for several hours and had drawn his blood" in June 2015, and that the "county detective's allegedly false warrant application for the blood draw – a public document – was also filed in state court in July 2015." (Opp. at 4-5). In response, Plaintiff submitted a declaration indicating that "[i]t was impossible for me to learn of these matters prior to the filing of the initial complaint in this case, as the relevant documents were not provided to me until the pendency of my criminal prosecution through responses to discovery requests, and then provided to me by my criminal defense counsel on or about October 6, 2017." (Declaration of John Gocke (Docket No. 52) ¶ 5). While Plaintiff could perhaps have been more diligent in obtaining the allegedly fraudulent warrant application, that is not a basis to deny the Motion on undue delay grounds. In any event, "[u]ndue delay by itself ... is insufficient to justify denying a motion to amend." *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999).

5** ***Futility. "Challenges to the pleading are usually deferred until after the pleading has been granted, but leave to amend has sometimes been denied if the proposed amendment is futile." *Abels v. JBC Legal Group*, 229 F.R.D. 152, 157 (N.D. Cal. 2005) (citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 188 (9th Cir. 1987) and *Saul v. United States*, 928 F. 829, 843 (9th Cir. 1991)). "A proposed amendment is futile only if 'no set of facts can be proved under the amendment that would constitute a valid claim or defense.' " *Id.* (quoting *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988)).

The Government argues that Plaintiff's proposed Ralph Act and Bane Act claims against the County Defendants are futile because they are barred by the applicable two-year statute of limitations. (Opp. at 5). Plaintiff argues that these claims are not time-barred because he "did not become aware of the facts leading to the need to add the County defendants and the causes of action against those defendants until late 2017, prior to his plea agreement in the criminal proceedings on October 6, 2017" and that those facts were "not discoverable" prior to that time. (Reply at 4). As the Government acknowledges, "the statute of limitations is a defense belonging to the county defendants – not the United States..." (Opp. at 5). Rather than accept the Government's very brief argument (which it really has no stake in making) that certain of Plaintiff's claims against the County Defendants are time-barred and therefore futile, the better course is to allow Plaintiff to amend and the County Defendants to raise their own statute of limitations arguments if appropriate.

In sum, there is no basis to deny leave to amend under Rule 15(a)(2).

Including the County Defendants and related claims for relief does not necessarily mean that all the claims have to be tried together.

III. CONCLUSION

For the reasons set forth above, the Motion is **GRANTED**. Plaintiff shall file his proposed Second Amended Complaint by **February 27, 2018**. Plaintiff should promptly serve the new Defendants.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2018 WL 4945685

End of Document

2006 WL 8437849
Only the Westlaw citation is currently available.
United States District Court, E.D. Washington.

James S. GORDON, Jr., an individual residing in Benton County, Washington, Plaintiff,
v.
IMPULSE MARKETING GROUP, INC., a Nevada Corporation, Defendant.
Impulse Marketing Group, Inc., Third-Party Plaintiff,
v.
Bonnie Gordon, James S. Gordon, III, Jonathan Gordon, Jamila Gordon, Robert Pritchett and Emily Abbey, Third-Party Defendants.

No. CV-04-5125-FVS
|
Signed 05/02/2006

Attorneys and Law Firms

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Emily Abbey, Seattle, WA, pro se.

James S. Gordon, III, Pasco, WA, pro se.

Bonnie Gordon, Pasco, WA, pro se.

Jamila Gordon, Pasco, WA, pro se.

Jonathan Gordon, Pasco, WA, pro se.

Robert Pritchett, Richland, WA, pro se.

Floyd Edwin Ivey, Ivey Law Offices, Kennewick, WA, Sean A. Moynihan, Klein Zelman Rothermel & Dichter LLP, New York, NY, for Defendant/Third-Party Plaintiff.

ORDER

Fred Van Sickle, United States District Judge

***1 BEFORE THE COURT** is Plaintiff's Motion to Amend Complaint (Ct. Rec. 313). Plaintiff is represented by Robert Siegel. Defendant is represented by Floyd Ivey, Sean Moynihan, and Peter Glantz. The Third-Party Defendants are proceeding *pro se.*

BACKGROUND

Plaintiff, James Gordon, is a Washington resident and the registered user of the internet domain name "Gordonworks.com." Defendant, Impulse Marketing Group, Inc. ("Impulse Marketing"), a Nevada corporation, is an electronic marketing company that transacts business with Washington by sending commercial electronic mail messages (email) to Washington state residents. Impulse Marketing operates by collecting personally identifiable information from individuals who sign up to receive free products and/or services at websites run by Impulse Marketing and/or its marketing partners. In consideration for receiving free products and/or services from an Impulse Marketing related website, it requires that individuals using its websites agree to submit accurate personal subscriber information ("Subscriber Profile"). By submitting their Subscriber Profile, individuals grant Impulse Marketing the right transfer the Subscriber Profiles to third parties for marketing purposes. Impulse Marketing subscribes revenue from the licensing and/or use of accurate Subscriber Profiles.

Plaintiff's Complaint alleges Impulse Marketing violated Washington's Commercial Electronic Mail Act, RCW § 19.190 et seq., and Washington's Consumer Protection Act, RCW § 19.86 et seq., by initiating and/or conspiring with others to initiate unsolicited commercial emails to various addresses at Plaintiff's domain, "Gordonworks.com". On July 1, 2005, the Court denied Impulse Marketing's motion to dismiss Plaintiff's Complaint. On September 6, 2005, Impulse Marketing filed five counterclaims against Plaintiff Gordon and five separate causes of action against each of the Third Party Defendants. On November 28, 2005, Impulse Marketing filed a Second Amended Third-Party Complaint, which alleges claims against the Third-Party Defendants for (1) fraud and deceit; (2) tortious interference with business relationships; (3) contribution and indemnity; (4) breach of contract; and (5) injunctive relief.

Plaintiff now seeks leave to file an Amended Complaint. The Amended Complaint seeks to add claims under the Federal Can-Spam Act (15 U.S.C. § 7701 et seq.), Washington's Deceptive Offers statute (RCW 19.170), Washington's Identity Crimes statute (RCW 9.35), and a new provision of the CEMA (RCW 19.190.080). The Amended Complaint also seeks to add additional defendants, Jeffrey Goldstein, Kenneth Adamson, and Phillip Huston, officers and/or directors of Impulse Marketing. Plaintiff alleges these individuals are personally liable because they had knowledge

of, participated in, and/or approved the alleged unlawful conduct by the Defendant Impulse Marketing. Finally, the Amended Complaint seeks to add an additional plaintiff, Omni Innovations, LLC, a Washington company that owns the servers on which the domains hosting some of the email addresses that received some of the alleged unlawful emails at issue in this action. Plaintiff contends Omni is entitled to assert claims under the Federal Can-Spam Act.

DISCUSSION

***2** When an answer has been filed, a plaintiff may amend its complaint "only by leave of court or by written consent of the adverse party...." Fed.R.Civ.P. 15(a). The decision of whether to grant a motion for leave to amend a complaint rests in the sound discretion of the trial court. *Swanson v. United States Forest Service*, 87 F.3d 339, 343 (9th Cir. 1996). Leave to amend "shall be freely given when justice so requires." *Id.* In exercising its discretion, the Court is to be guided by the purpose of Rule 15, which is to facilitate decisions on the merits rather than a determination based on pleadings or technicalities. *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). Thus, the Ninth Circuit has held like other courts that the rule is to be applied with extreme liberaltiy. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (citations omitted). However, application of this policy is subject to the qualification that the amendment not cause the defendant undue prejudice, is not sought in bad faith, and is not futile. *Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir. 1999). Additionally, the Court may consider the factor of undue delay. *Id.* at 758. Undue delay by itself is insufficient to justify denying a motion to amend. *See Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973) (reversing denial of motion for leave to amend where court made a finding of undue delay but did not provide a contemporaneous specific finding of prejudice to the opposing party, bad faith by the moving party or futility of amendment). It is the consideration of prejudice to the opposing party that carries the greatest weight. *Eminence Capital*, 316 F.3d at 1051 (citations omitted). The opposing party "bears the burden of showing prejudice." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987).

Here, Defendant argues it will be unduly prejudiced by the filing of an amended complaint because additional causes of action and the naming of additional parties will require additional discovery. This is true, but the parties are currently still engaged in a discovery dispute involving the existing claims. Moreover, the existing scheduling order needs to be revised, regardless of whether the Court allows the filing of an amended complaint. Defendant also opposes the filing of an amended complaint on the basis that this will necessitate the filing of a motion to dismiss because Plaintiff's new claims are without merit.

The Court finds no evidence of bad faith on the part of the Plaintiff. Further, the Court finds that Defendant will not be prejudiced by the filing of the proposed amended complaint as long as the case is rescheduled to allow for discovery of the new claims. Further, at this juncture, the Court cannot determine that any of the proposed new causes of action are futile. Therefore, in light of the Ninth Circuit's command that Rule 15 is to be applied with "extreme liberality", *see supra*, the Court grants Plaintiff's request to file an amended complaint asserting additional causes of action and naming an additional party defendant. However, Plaintiff's request to name an additional party plaintiff is denied. Accordingly,

IT IS HEREBY ORDERED:

1. Plaintiff's Motion to Amend Complaint (**Ct. Rec. 313**) is **GRANTED IN PART AND DENIED IN PART**.

2. Plaintiff's Motion to Expedite (**Ct. Rec. 317**) is **MOOT**.

3. Defendant's Expedited Motion for Hearing of Plaintiff's Motion to Amend Complaint With Oral Argument (**Ct. Rec. 354**) is **DENIED**. Pursuant to LR 7.1(h)(3), the Court exercises its discretion and determines oral argument is not necessary.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this Order, furnish copies to counsel and to the **Third Party Defendants who are proceeding pro se**.

All Citations

Not Reported in Fed. Supp., 2006 WL 8437849

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Hefa v. Hanratty, W.D.Wash., January 13, 2021

2009 WL 789756
Only the Westlaw citation is currently available.
United States District Court,
C.D. California,
Eastern Division.

James Reed HARRIS, Plaintiff,
v.
Harley G. LAPPIN, et al., Defendants.

No. EDCV 06–00664 VBF (AJW).
|
March 19, 2009.

West KeySummary

1 **Prisons** Particular Conditions and Treatments

Sentencing and Punishment Medical care and treatment

United States Prisons

An inmate alleged sufficient facts to state a *Bivens* claim for deliberate indifference against a physician for the denial of adequate medical care, in violation of the Eighth Amendment. The inmate alleged that the physician did more than merely supervise and oversee the medical program in an administrative sense. The inmate alleged the physician clinically supervised and approved the allegedly inadequate treatment the inmate received from other medical staff members, and that he did so with knowledge of the inmate's medical problems and the "inhumane conditions" to which he was subjected in the dry cell. Moreover, the inmate alleged that he was confined for eleven days in a dry cell that was unventilated and had no bunk, sink, shower, or toilet. U.S.C.A. Const.Amend. 8.

8 Cases that cite this headnote

Attorneys and Law Firms

James Reed Harris, Lewisburg, PA, pro se.

John E. Nordin, II, AUSA-Office of US Attorney, Los Angeles, CA, for Defendants.

ORDER ADOPTING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

VALERIE BAKER FAIRBANK, District Judge.

***1** Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has reviewed the entire record in this action, the attached Report and Recommendation of Magistrate Judge ("Report"), plaintiff's objections thereto, and defendants' response to the objections. Good cause appearing, the Court concurs with and adopts the findings of fact, conclusions of law, and recommendations contained in the Report after having made a *de novo* determination of the portions to which objections were directed.

IT IS SO ORDERED.

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

ANDREW J. WISTRICH, United States Magistrate Judge.
Before the court is the motion of defendants Harley G. Lappin, Joseph G. Gunja, Bobby G. Compton, M. Dubuc, Robert Hodak, Joe Nunez, F.A. Perrin, Sterling Pollock, M.D., Joseph L. Norwood, Robert Allison, and Paulino Fontes to dismiss plaintiff's first amended complaint ("FAC") for misjoinder of defendants, failure to state a claim, failure to effect timely service of process, and failure to provide a short and plain statement of the claim ("Defendants' MTD"). *See* Fed.R.Civ.P. 8(a)(2), 12(b) (4),(5) & (6). Plaintiff filed an opposition to the motion ("Plaintiff's Opp.").

Proceedings

Plaintiff, a federal prisoner proceeding *pro se* and *in forma pauperis,* filed this action under *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 397, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Defendants Nunez, Hodak, Dubuc, Perrin, Pollock, Germaine [1], and Compton are identified

as Bureau of Prisons ("BOP") staff members employed at the United States Penitentiary at Lompoc, California ("USP Lompoc"), during plaintiff's incarceration at that facility. Defendants Nunez, Hodak, Dubuc, Allison, Fontes, and Norwood are identified as BOP staff members employed at the United States Penitentiary at Victorville, California ("USP Victorville") during plaintiff's incarceration at that facility. Defendant Gunja is identified as the then-current Director of the Western Regional Office of the BOP, while defendant Lappin was, and is, the Director of the BOP. [FAC 7–10]. Defendants are sued in their individual capacity.

[1] Germaine has neither appeared in this case nor been served with process.

Plaintiff's Allegations

The amended complaint and attached exhibits allege that plaintiff's federal rights were violated in 2004 during his confinement at USP Lompoc, and in 2005 and 2006 during his confinement at USP Victorville. The amended complaint alleges that at USP Lompoc, and later at USP Victorville, defendants violated plaintiff's federal rights by falsely charging him with ingesting contraband during a family visit; unlawfully confining him for eleven days in "inhumane conditions" in a "dry cell" where his urine, feces, and vomit were monitored for evidence of contraband; exposing him to conditions in the dry cell that caused him to contract hepatitis C; falsely claiming to have found heroin in his cell; using excessive force to extract him from his dry cell and confine him in restraints for 23 hours; fabricating numerous incident reports falsely charging him with rules violations; improperly collecting, analyzing, and discarding his urine samples; conducting defective disciplinary hearings; imposing unlawful disciplinary sanctions; violating mandatory BOP rules and policies; and exhibiting deliberate indifference to his serious medical needs by denying him adequate medical treatment.

***2** The FAC contains four numbered claims or counts, each of which is pleaded against multiple defendants in separately numbered sub-counts. Briefly summarized, those four claims are as follows.

Claim 1 of the FAC alleges that Nunez, Hodak, Dubuc, Perrin, Pollock, Germaine, Compton, Allison, Gunja, and Lappin violated plaintiff's due process rights at USP Lompoc in 2004 by falsely charging him with possessing or ingesting contraband and confining him in a dry cell under inhumane conditions, and at USP Victorville in 2005 and 2006 by using faulty drug testing procedures as a basis for disciplinary action against him. [FAC 10–39].

Claim 2 of the FAC alleges that Nunez, Hodak, Dubuc, Perrin, Pollock, Compton, Allison, Gunja, and Lappin used excessive force in extracting plaintiff from his dry cell at USP Lompoc in 2004 and placing him in restraints for 23 hours, in violation of plaintiffs' Eighth Amendment rights. [FAC 39–49].

Claim 3 of the FAC alleges that Nunez, Hodak, Dubuc, Perrin, Pollock, Compton, Allison, Gunja, and Lappin violated plaintiff's Eighth Amendment right to be free from cruel and unusual punishment by confining him under inhumane conditions and depriving him of basic human needs during his confinement in a dry cell at USP Lompoc between June 19, 2004 and June 30, 2004. [FAC 49–56].

Claim 4 of the FAC alleges that Nunez, Hodak, Dubuc, Perrin, Pollock, Compton, Allison, Gunja and Lappin violated plaintiff's Eighth Amendment rights by exhibiting deliberate indifference to his serious medical needs at USP Lompoc in 2004 in connection with treatment for his hepatitis C condition and his history of hernia, spine, and urinary tract problems. Claim 4 further alleges that defendants Nunez, Allison, Norwood, Gunja, and Lappin violated plaintiff's Eight Amendment rights by exhibiting deliberate indifference to his serious medical needs at USP Victorville in 2005 in connection with treatment for a testicular problem. [FAC 56–69].

The FAC seeks compensatory and punitive damages. [FAC 69–71].

Defendants' grounds for dismissal

Defendants have moved to dismiss the amended complaint on the following grounds: (1) the FAC fails to provide a short, plain statement of the claim showing entitlement to relief, in violation of Rule 8(a)(2) of the Federal Rules of Civil Procedure [Defendants' MTD 5–8]; (2) defendants who did not work at USP Lompoc (namely Fontes, Norwood, Gunja, and Lappin) are misjoined under Rule 20 and therefore should be dropped from this action pursuant to Rule 21 [Defendants' MTD 8–9]; (3) the FAC fails to state a federal claim against (a) supervisory defendants Norwood, Compton, Gunja, and Lappin; and (b) Pollock or any other defendant for deliberate indifference to plaintiff's serious medical needs under the

Eighth Amendment, and therefore those claims should be dismissed pursuant to Rule 12(b)(6) [Defendants' MTD 9–13]; and (4) the claims against Germaine and Gunja should be dismissed for failure to effect timely service of process. [2] Plaintiff contends that none of the grounds for dismissal advanced by defendants have merit.

[2] Although defendants seek dismissal of the FAC in its entirety on the aggregate grounds enumerated in their motion to dismiss, their motion to dismiss for failure to state a claim is not directed at the FAC as a whole, but rather is limited to specific claims and defendants. For example, defendants do not contend that the FAC as a whole fails to state an Eighth Amendment claim arising from the alleged conditions of confinement in the dry cell or from the alleged use of excessive force against plaintiff.

Discussion

"Prejudice" to plaintiff from motion to dismiss

***3** As a general matter, plaintiff contends that he has been prejudiced by having to respond to defendants' motion to dismiss, and that the motion was filed in bad faith and for purposes of harassment. He argues that the motion "unnecessarily burdens him to respond in great detail" to contentions that plaintiff asserts are conclusory or untrue. He speculates that the motion was filed for strategic reasons because defendants wanted more time to draft their answer and hoped that the application of *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007) would result in dismissal. In addition, plaintiff suggests that the court's having ordered marshal service means that the court screened the amended complaint and conclusively determined that it was free of any deficiencies. Lastly, plaintiff objects to defendants' raising the issue whether plaintiff's "friend," one Dr. Ziegler, may be functioning for practical purposes as his attorney in violation of court rules. [*See* Defendants' MTD 7 n. 6].

Defendants' motion to dismiss raises nonfrivolous arguments for dismissal, and there is no basis in the record for concluding that defendants filed that motion for an improper purpose. Plaintiff's disagreement with defendants' contentions and the burdensomeness of responding to them (which in due in part to the broad scope of the FAC) do not constitute prejudice.

Although the court did not dismiss the FAC after screening under 28 U.S.C. § 1915(e) and ordered the marshal to serve it, neither section 1915 nor the Federal Rules of Civil Procedure precludes defendants from thereafter filing (or the court from granting) a motion to dismiss. Section 1915 does not obligate the court to screen for every possible defect in a complaint, nor is the screening process infallible. Furthermore, the order directing service of process by the marshal merely directed defendants to "respond to the complaint" within the time limits provided by Rule 12 of the Federal Rules of Civil Procedure. *See* 42 U.S.C. § 1997e(g)(2).

Defendants' suggestion that plaintiff's friend, Dr. Ziegler, effectively may be functioning as his attorney is made in a footnote in their motion to dismiss in reliance on the record in this case and in another case filed in this court. [*See, e.g.,* Plaintiff's Request for Correction of Summons etc., filed August 27, 2007 (requesting that documents be sent to "plaintiff's friend and agent, Dr. Thomas Ziegler ("Ziegler") of Germany, whom plaintiff provided a durable general power of attorney for helping plaintiff with all of his private issues"); Order filed September 4, 2007 (denying plaintiff's request to "send documents to a third party who is not his attorney of record")]. Although defendants may be attempting to make a record regarding a possible violation of court rules, they do not contend that Ziegler's assistance to plaintiff constitutes a ground for dismissal of the amended complaint or other relief at this time. Therefore, defendants have not improperly raised or relied on the suggestion that Ziegler is acting as plaintiff's attorney.

***4** For these reasons, plaintiff's assertions that he is being harassed or has suffered prejudice are unmeritorious.

Dismissal under Rule 8

Defendants contend that the amended complaint should be dismissed because it violates the pleading requirements of Rule 8. [Defendants' MTD 5–8].

A complaint "must contain ... (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief sought...." Fed.R.Civ.P. 8(a). Rule 8(d) provides that "[e]ach allegation must be simple, concise, and direct." Rule 8 is designed to provide defendants with fair notice of the claims against them and the grounds on which those claims rest. *McKeever v. Block,* 932 F.2d 795, 798 (9th Cir.1991); *see McHenry v. Renne,* 84 F.3d 1172, 1176–1177 (9th Cir.1996) (affirming

dismissal of a complaint consisting of a "rambling" narrative containing "immaterial background information," along with lengthy, confused factual allegations and a "perfunctory reference" to the legal claims alleged "to arise from these undifferentiated facts").

Plaintiff's prior complaint was dismissed with leave to amend under Rule 8 because it "aggregate[d] multiple constitutional claims against multiple defendants," creating "multi-layered claims" that made it "prohibitively (and unnecessarily) difficult and time-consuming to pick out any barred or deficient claims, as well as to identify any remaining viable claims and potential defenses." [Order filed June 28, 2007 at 6]. The FAC itself is long, but that is unsurprising given the number of defendants and claims it encompasses and plaintiff's attempt to comply with the court's instructions to use separate counts to correct the shortcomings of his dismissed complaint. [*See* Order filed June 28, 2007 at 6].

Although the FAC as a whole undeniably is long and rather arduous to navigate, that does not mean that the individual claims are defective under Rule 8. Although the FAC contains some redundant and superfluous allegations, the claims against each defendant are relatively short and plain in the sense that the factual and legal bases for each claim are clearly articulated, without the interjection of extraneous matter. The FAC provides defendants with fair notice of the claims against them and the grounds on which they rest. Defendants have been able to frame a cogent response. Accordingly, defendants' motion to dismiss the amended complaint under Rule 8(a)(2) should be denied.

Dismissal for misjoinder of defendants

Defendants contend that defendants Fontes and Norwood, whose alleged misconduct was confined to USP Victorville, and defendants Gunja and Lappin, who worked in administrative positions at the BOP's administrative offices, are misjoined and should be dismissed under Rule 20. [MTD 8–9].

Originally, the complaint named 20 defendants and concerned disciplinary actions and other events that occurred in 2004, 2005, and 2006 at three federal correctional facilities. The FAC names twelve defendants and concerns events that occurred in 2004, 2005, and 2006 at USP Lompoc and USP Victorville. Those changes reduce, but do not entirely eliminate, the problem of misjoined defendants.

***5** Under Rule 20 of the Federal Rules of Civil Procedure, a plaintiff may join any persons as defendants if: (1) any right to relief asserted against the defendants relates to or arises out of the same transaction, occurrence, or series of transactions or occurrences; and (2) there is at least one question of law or fact common to all the defendants. Fed.R.Civ.P. 20(a); *Coughlin v. Rogers,* 130 F.3d 1348, 1351 (9th Cir.1997); *Desert Empire Bank v. Ins. Co. of North America,* 623 F.2d 1371, 1375 (9th Cir.1980). Once a defendant is properly joined under Rule 20, the plaintiff may join, as independent or alternative claims, as many claims as the plaintiff has against that defendant, irrespective of whether those additional claims also satisfy Rule 20. *See* Fed.R.Civ.P. 18(a); *Intercon Research Assoc., Ltd. v. Dresser Indus. Inc.,* 696 F.2d 53, 57 (7th Cir.1982) ("[J]oinder of claims under Rule 18 becomes relevant only after the requirements of Rule 20 relating to joinder of parties has been met with respect to the party against whom the claim is sought to be asserted; the threshold question, then, is whether joinder of [a defendant] as a party was proper under Rule 20(a)."); *accord,* 7 Charles A. Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice & Procedure Civil 3d* § 1655 (2008) (hereinafter *"Fed. Prac. & Proc. Civ.3d"*).

The "same transaction" requirement in Rule 20 refers to "similarity in the factual background of a claim; claims that arise out of a systematic pattern of events" and have a "very definite logical relationship" arise out of the same transaction and occurrence. *Bautista v. Los Angeles County,* 216 F.3d 837, 842–843 (9th Cir., 2000) (Reinhardt, J., concurring) (quoting *Coughlin,* 130 F.3d at 1350 and *Union Paving Co. v. Downer Corp. .,* 276 F.2d 468, 470 (9th Cir.1960)); *see Harris v. Spellman,* 150 F.R.D. 130, 132 (N.D.Ill.1993) (holding that the claims of two prisoners challenging the constitutional adequacy of disciplinary hearings did not arise from the same transaction or occurrence or the same series of transactions or occurrences where "the hearings were conducted by different people at different times to consider different charges" and "rais[ed] different issues of law"), *cited with approval in Coughlin,* 130 F.3d at 1350. In addition, "the mere fact that all [of a plaintiff's] claims arise under the same general law does not necessarily establish a common question of law or fact." *Coughlin,* 130 F.3d at 1351. Claims "involv[ing] different legal issues, standards, and procedures" do not involve common factual or legal questions. *Coughlin,* 130 F.3d at 1351. Rule 20, however, is interpreted broadly to promote judicial economy and convenience, especially at the pleading stage. *See Pena v. McArthur* 889 F.Supp. 403, 406 (E.D.Cal.1994); 7 *Fed. Prac. & Proc. Civ.3d* § 1653

("[C]ourts are inclined to find that claims arise out of the same transaction or occurrence when the likelihood of overlapping proof and duplication in testimony indicates that separate trials would result in delay, inconvenience, and added expense to the parties and to the court.").

***6** Plaintiff's *Bivens* claims challenging his conditions of confinement at USP Lompoc do not involve the same transaction, occurrence, or series of transactions or occurrences as those challenging his conditions of confinement at USP Victorville. First, and most obviously, USP Lompoc and USP Victorville are physically and organizationally separate and distinct. Although both USP Lompoc and USP Victorville are BOP penitentiaries governed by that agency's rules, regulations, and organizational structure, the conditions of confinement at those institutions necessarily reflect the differences between the two institutions' geographic location, size, physical plant, inmate population, staff, administration, chain of command, programs, and institution-specific practices and customs.

Second, the claims involving USP Lompoc and USP Victorville arose during two separate and distinct time periods. The events giving rise to plaintiff's claims involving USP Lompoc occurred in mid–2004. Exhibits to the FAC indicate that plaintiff was transferred to USP Victorville some time between September 27, 2004 and November 7, 2004. The events on which plaintiff's claims involving USP Victorville are based occurred between August 2005 and June 2006. The claims challenging the conditions of confinement at the two institutions do not overlap in time.

Third, the challenged conditions of confinement at USP Lompoc and USP Victorville are factually and legally distinguishable.

The counts setting forth plaintiff's claims illustrate the manner in which plaintiff has joined factually and analytically distinct claims. Claim 1 alleges that plaintiff's due process rights were violated in 2004 at USP Lompoc as a result of false disciplinary charges that he possessed or ingested contraband, and in 2005 and 2006 at USP Victorville due to defective urinalysis drug testing procedures. Claims 2 and 3 allege violation of plaintiff's Eighth Amendment rights due to his dry cell placement and forced cell extraction at USP Lompoc. Those claims have nothing to do with plaintiff's conditions of confinement at USP Victorville, and they are not pleaded against the two defendants who worked only at USP Victorville, Fontes and Norwood. Claim 4 alleges violations of plaintiff's Eighth Amendment rights stemming from the denial of adequate medical care for plaintiff's hepatitis C in 2004 and for the problem with his testicle, which arose on or about October 7, 2005. Although included in the same count, the hepatitis C claims concern his medical treatment at USP Lompoc, and his claims about the problem with his testicle concern his medical treatment at USP Victorville.

Plaintiff's allegations against defendants Nunez, Hodak, Dubuc, Perrin, Compton, Allison, Gunja, and Lappin (the "Lompoc defendants") arising from his dry cell placement, the conditions of confinement in the dry cell, his forced extraction from the dry cell, and disciplinary reports and hearings directly related to his dry cell placement at USP Lompoc share a similar factual background and have a definite logical relationship. The FAC alleges one or more common question of law or fact involving the Lompoc defendants, such as what conditions actually prevailed in the dry cell and whether those conditions triggered procedural due process protections, warranted the application of force to remove plaintiff from the dry cell, or posed an objectively serious risk of substantial harm to plaintiff. Accordingly, the Lompoc defendants are properly joined in this action under Rule 20, and any claims plaintiff has against any of those defendants are properly joined under Rule 18. [3]

[3] The conclusion that defendants and claims are properly joined under Rules 18 and 20 does not bar a determination that claims against those defendants may be unsound for other reasons.

***7** Defendants Fontes and Norwood, however, are identified as having worked only at USP Victorville. Plaintiff does not allege that those defendants were involved in the transactions or occurrences at USP Lompoc. Those defendants are misjoined under Rule 20.

Plaintiff argues that a sufficient nexus between events at USP Lompoc and USP Victorville exists because Nunez, Hodak, Allison, and Dubuc worked at each of those facilities during the period when plaintiff was confined there, and Gunja and Lappin supervised both facilities in their respective roles as Western Regional Director and Director of the BOP. Discrete incidents are not factually or logically related merely because some defendants were involved in more than one incident. Once it is established that the test for permissive joinder under Rule 20 is satisfied, however, Rule 18 permits plaintiff to join all of his claims against the properly joined defendants, regardless of where or how they arose. Therefore, plaintiff can

join all of his claims against the Lompoc defendants in this action.

If Rule 20's test for permissive joinder is not satisfied, Rule 21 gives the court discretion, " 'on motion of any party or of its own initiative at any stage of the action and on such terms as are just' to add or drop parties so as to avoid dismissing an action." *Sams v. Beech Aircraft Corp.,* 625 F.2d 273, 277 (9th Cir.1980); *see Coughlin,* 130 F.3d at 1350 (stating that a court may sever misjoined plaintiffs by dismissing them without prejudice to the institution of new, separate lawsuits by the dropped plaintiffs). "When a court 'drops' a defendant under Rule 21, that defendant is dismissed from the case without prejudice." *DirecTV, Inc. v. Leto,* 467 F.3d 842, 845 (3d Cir.2006).

For the reasons described above, defendants' motion for misjoinder should be granted as to defendants Fontes and Norwood, and plaintiff's claims against those defendants should be dismissed without prejudice. Defendants' motion for misjoinder should be denied as to defendants Gunja and Lappin.

Dismissal for failure to state a claim

A complaint may be dismissed for failure to state a claim upon which relief can be granted. *See* Fed.R.Civ.P. 12(b)(6). Under federal notice pleading standards, a "claim for relief" requires only a "short and plain statement showing that the pleading is entitled to relief," Fed.R.Civ.P. 8(a)(2), "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atlantic,* 550 U.S. at ——, 127 S.Ct. at 1964 (internal quotation marks and ellipsis omitted) (abrogating *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). To survive a Rule 12(b)(6) motion to dismiss, a complaint "does not need detailed factual allegations," but "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic,* —— U.S.at ——, 127 S.Ct. at 1964–1965 (internal quotation marks and ellipsis omitted). A complaint should be dismissed unless it contains "enough facts to state a claim for relief that is plausible on its face," *Bell Atlantic,* 550 U.S. at ——, 127 S.Ct. at 1974, and thereby "raise[s] a reasonable expectation that discovery will reveal evidence" to support the plaintiff's claim. *Bell Atlantic,* 550 U.S. at ——, 127 S.Ct. at 1966. [4]

4 Plaintiff argues that *Bell Atlantic* should not apply to this case because plaintiff filed this action before the Supreme Court decided that case, and because the order dismissing his complaint did not cite that case. That argument is meritless. First, although plaintiff filed this action before *Bell Atlantic* was decided on May 21, 2007, he filed his FAC after that date, on July 13, 2007. Second, the June 28, 2007 order dismissing plaintiff's complaint cited 28 U.S.C. §§ 1915(e) and 1915A and 42 U.S.C. § 1997e(c). Those statutes all authorize dismissal of a complaint for failure to state a claim upon which relief can be granted, a standard that necessarily had to be interpreted in light of controlling law, including *Bell Atlantic*. Third, *Bell Atlantic* did not involve a new statute or even a new procedural rule creating new rights or new liabilities, but rather an altered interpretation of the standard for applying an existing procedural rule by the Supreme Court, which has noted that "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity." *Landgraf v. USI Film Prods.,* 511 U.S. 244, 275 (1994). For all of these reasons, applying *Bell Atlantic* to analyze this motion to dismiss works is not forbidden and works no unfairness.

***8** To determine whether a complaint states a claim sufficient to withstand dismissal, a court considers the contents of the complaint and its attached exhibits, as well as matters properly subject to judicial notice. *Ramirez v. Galaza,* 334 F.3d 850, 854 (9th Cir.2003), *cert. denied,* 541 U.S. 1063, 124 S.Ct. 2388, 158 L.Ed.2d 963 (2004); *Lee v. City of Los Angeles,* 250 F.3d 668, 688 (9th Cir.2001). The court "must accept as true all of the factual allegations contained in the complaint," *Erickson v. Pardus,* 551 U.S. 89, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007), and construe them in the light most favorable to the plaintiff. *Lee,* 250 F.3d at 688. Conclusory allegations of law and unreasonable inferences, however, are insufficient to defeat a motion to dismiss. *In re Syntex Corp. Sec. Litig.,* 95 F.3d 922, 926 (9th Cir.1996).

Dismissal under Federal Rule 12(b)(6) may be based on either: (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal theory. *SmileCare Dental*

Group v. Delta Dental Plan of California, Inc., 88 F.3d 780, 783 (9th Cir.) (citing *Robertson v. Dean Witter Reynolds, Inc.,* 749 F.2d 530, 533–34 (9th Cir.1984)), *cert. denied,* 519 U.S. 1028 (1996). A motion to dismiss also may be granted if an affirmative defense or other bar to relief, such as the statute of limitation, is apparent from the face of the complaint. *See TwoRivers v. Lewis,* 174 F.3d 987, 991 (9th Cir.1999).

Eighth Amendment claims

Defendants contend that the amended complaint fails to state an Eight Amendment medical care claim against any defendant. [Defendants' MTD 12–13].

The standard governing the evaluation of a defendant's conduct under the Eighth Amendment is whether "the measure taken inflicted unnecessary and wanton pain and suffering." *Hudson v. McMillian,* 503 U.S. 1, 5–6, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992) (citations omitted); *see Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). What is necessary to establish an unnecessary and wanton infliction of pain varies according to the nature of the alleged constitutional violation. *Hudson,* 503 U.S. at 5; *Wilson v. Seiter,* 302 (1991); *Whitley v. Albers,* 475 U.S. 312, 320, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986). In order to assert a claim for inadequate medical care under the Eighth Amendment, a plaintiff must show that the defendant was deliberately indifferent to the plaintiff's serious medical needs. *Helling v. McKinney,* 509 U.S. 25, 32, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993); *Estelle,* 429 U.S. at 106; *Hallett v. Morgan,* 296 F.3d 732, 744 (9th Cir.2002). Mere negligence or medical malpractice in diagnosing or treating a condition is not a constitutional violation. *Estelle,* 429 U.S. at 106; *Hallett,* 296 F.3d at 744.

To establish deliberate indifference, a plaintiff must show that the defendant knew that the plaintiff faced a substantial risk of serious harm and disregarded the risk by failing to take reasonable measures to abate it. *Farmer,* 511 U.S. at 847; *Wallis v. Baldwin,* 70 F.3d 1074, 1077 (9th Cir.1995). The defendant "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer,* 511 U.S. at 837. Deliberate indifference may be manifested where the defendant purposefully ignores or fails to respond to the plaintiff's pain or medical needs, where the defendant intentionally denies, delays, or interferes with the plaintiff's medical care, or by the manner in which the medical care is provided. *Estelle,* 429 U.S. at 104–105; *Hallett,* 296 F.3d at 744–745. To meet this standard, a plaintiff must show that the course of treatment "was medically unacceptable under the circumstances," and that the defendant "chose this course in conscious disregard of an excessive risk to plaintiff's health." *Jackson v. McIntosh,* 90 F.3d 330, 332 (9th Cir.) (citing *Williams v. Vincent,* 508 F.2d 541, 543–544 (2d Cir.1974) and *Farmer,* 511 U.S. at 835–838), *cert. denied,* 519 U.S. 1029 (1996)).

Pollock

***9** Defendants contend that the FAC fails to state a claim against Pollock for the denial of adequate medical care.

Plaintiff alleges that Pollock's allegedly inadequate medical treatment violated both his due process rights and his Eighth Amendment rights. In Claim 1, plaintiff alleges that Pollock violated his due process rights by (1) exhibiting deliberate indifference to the fact that plaintiff was placed on dry cell status for an unreasonably long period of 11 days, which imposed an atypical and significant hardship on plaintiff with no reasonable relation to any legitimate penological interest, and (2) doing nothing in response to an entry in plaintiff's medical chart, which Pollock reviewed and approved, stating that plaintiff was suspected of having ingested drugs contained in a balloon that "may be slowly leaking"—which, if true, constituted a potentially life-threatening situation. [FAC 24–25].

Plaintiff's due process claims against Pollock are defective because the FAC includes no facts indicating that Pollock was in any way responsible for plaintiff's confinement in the dry cell. Pollock's role, according to allegations in the FAC, was supervising and approving plaintiff's medical treatment. [*E.g.,* FAC 8, 25, 63]. Moreover, a prisoner's Eighth Amendment right to be free from cruel and unusual punishment does not create a liberty interest protected by the Due Process Clause. *See Toussaint v. McCarthy,* 801 F.2d 1080, 1093 (9th Cir.1986) (rejecting an inmate's attempt to "parlay" his Eighth Amendment right into a due process right because, among other things, doing so would imply that some "amount of process can justify subjecting a prisoner to cruel and unusual punishment"), *cert. denied,* 481 U.S. 1069 (1987). Plaintiff's attempt to recast his Eighth Amendment medical care claims against Pollock as due process claims must fail, and those claims should be dismissed with prejudice.

In Claim 2 for excessive force, plaintiff alleges that he was physically examined on June 22 and 23, 2004 by

medical assistants under the supervision of Pollock. The first examination occurred after plaintiff allegedly was forcibly extracted from his cell, beaten, and placed in restraints; and the second occurred when his restraints were removed after 23 hours. Plaintiff alleges that Pollock "signed and approved" medical examination reports that misstated the obvious extent of his injuries. Plaintiff alleges that Pollock failed to medically examine him despite dramatic swelling in his hands and feet, which he alleges was indicative of the traumatic nature of the injuries he suffered. Plaintiff also alleges that Pollock disregarded the risk that plaintiff would come into contact with blood-borne pathogens in the dry cell and disregarded plaintiff's long history of hernia problems, complicated hernia surgery, and urinary tract infections. "By not intervening to the forced cell extraction and plaintiff's placement into ambulatory restraints, Pollock also applied excessive force in a malicious way on plaintiff since the denial of medically reasonable care which is likely to result in chronic and severe physical damage must be considered application of excessive force as well." [FAC 46].

***10** The Eighth Amendment protects a prisoner from excessive force, as well as against deliberate indifference to a serious medical need or other conditions of confinement posing a serious risk of substantial harm to the prisoner. *See Whitley,* 475 U.S. at 319 ("It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the cruel and unusual punishments clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock."). Although the Eighth Amendment is the source of protection against excessive force and conditions of confinement posing a serious risk of substantial harm, these are two distinct types of wrongs and are evaluated under different legal tests. The Eighth Amendment excessive force inquiry asks whether the use of force was a bona fide "prison security measure" undertaken "in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm," while the standard for evaluating conditions of confinement under the Eighth Amendment is whether the defendants were deliberately indifferent to a serious risk of substantial harm to the prisoner. *See Whitley,* 475 U.S. at 320–321.

Nothing in the FAC suggests that Pollock was involved in decisions or actions related to plaintiff's dry cell placement, the application of restraints, or the use of force against him. Equating the "denial of medically reasonable care" with the use of excessive force, as plaintiff does in Claim 2 [FAC 46], impermissibly conflates two distinct legal theories, only one of which arguably applies to Pollock. Accordingly, plaintiff's Eighth Amendment excessive force claims against Pollock should be dismissed with prejudice.

Claims 3 and 4 of the FAC adequately state an Eighth Amendment claim against Pollock for deliberate indifference to plaintiff's serious medical needs. Although the exact nature and timing of Pollock's involvement in plaintiff's medical care is not clear from the FAC, ambiguities should be resolved in favor of permitting this claim to proceed to discovery. Viewed in the light most favorable to plaintiff, the FAC adequately alleges that Pollock did more than merely supervise and oversee the medical program in an administrative sense. Plaintiff alleges that Pollock clinically supervised and approved the allegedly inadequate treatment plaintiff received from other medical staff members, and that Pollock did so with knowledge of plaintiff's medical problems and the "inhumane conditions" to which he was subjected in the dry cell. [*See* FAC 45–46, 53, 56–56, 63–64].

For purposes of his Eighth Amendment claims challenging his medical care and conditions of confinement in the dry cell, plaintiff has alleged facts demonstrating that he was subjected to conditions posing an objectively serious risk of substantial harm to him. The FAC alleges that plaintiff was confined for eleven days in a dry cell that was unventilated and had no bunk, sink, shower, or toilet. [FAC 50]. Plaintiff was stripped to his boxer shorts. He was provided with a thin blanket and pillow, and he slept on a mattress on the floor. [FAC 50]. Plaintiff alleges that the cell

> ***11** unimaginably dirty and filthy and vermin infested. The floor and the walls of the cell were all over covered with blood and feces and other human body fluids of inmates placed in this cell before. Plaintiff was not provided with any items to clean the cell, nor was he provided any basic personal hygiene items. Plaintiff had to eat from the floor and urinate and defecate into bowls provided by staff....

[FAC 50–51]. *See Young v. Quinlan,* 960 F.2d 351, 364–365 (3d Cir.1992) (holding that where an HIV-positive inmate

in poor physical condition alleged facts showing that he was exposed to unsanitary conditions and "dehumanizing treatment" for four days in a dry cell, his uncontested allegations "were sufficiently grave" so as to state Eighth Amendment *Bivens* claims against the "superior officer[ ] responsible for the dry cell" and unidentified officers who supervised the inmate during his dry cell confinement), *superseded by statute on other grounds as stated in Ghana v. Holland,* 226 F.3d 175, 184 (3d Cir.2000); *Hignite v. Felker,* 2008 WL 2782854, at *7 (E.D.Cal.2008) (holding that a prisoner stated an Eight Amendment claim where he alleged that "he was placed on contraband watch for an excessive 84 hours," was denied a mattress, had no running water, was forced to eat with his hands, was denied basic hygiene, and also was restrained), *report and recommendation adopted by Hignite v. Felker,* 2008 WL 3974369 (E.D.Cal.2008). Accordingly, plaintiff has alleged facts satisfying both the subjective and objective elements of his Eighth Amendment deliberate indifference claims against Pollock for the denial of adequate medical care.

For the foregoing reasons, defendants' Rule 12(b)(6) motion should be granted as to plaintiff's due process and excessive force claims (Claims 1 and 2) against Pollock, and those claims should be dismissed with prejudice. Defendants' motion to dismiss should be denied as to plaintiff's Eighth Amendment medical care claims against Pollock (Claims 3 and 4).

Nunez, Hodak, Dubuc, Perrin, and Allison

Defendants also contend that the FAC does not state an Eighth Amendment deliberate indifference claim against Nunez, Hodak, Dubuc, Perrin, or Allison.[5] [Defendants' MTD 12–13].

5 Plaintiff does not allege that Germaine, Fontes, or Norwood violated his Eighth Amendment rights in connection with his dry cell placement. [FAC 53–55]. Plaintiff's allegations against supervisory defendants Compton, Gunja, and Lappin are analyzed separately below.

Claim 3 of the FAC alleges that those defendants "had personal knowledge of the inhuman conditions plaintiff was subjected to and that plaintiff got deprived [of] basic human needs for 11 days" and exhibited deliberate indifference by failing to intervene to correct those conditions, in violation of plaintiff's Eighth Amendment rights. [FAC 52–54]. Claim 4 of the FAC alleges that those defendants "deliberately ignored plaintiff's urgent medical needs and failed to inform staff about the substantial risk that plaintiff might suffer harm" from plaintiff's placement in the dry cell and the application of ambulatory restraints for 23 hours following plaintiff's forced cell extraction, in violation of the Eighth Amendment. [FAC 59–63]. Those allegations are sufficient to withstand dismissal. *See Young,* 960 F.3d at 364–365; *Hignite,* 2008 WL 2782854, at *7; *see generally Helling,* 509 U.S. at 33 (holding that an inmate can state a claim against prison officials for "ignor[ing] a condition of confinement that is sure or very likely to cause serious illness and needless suffering" in the future, such as exposure to other inmates with infectious diseases like hepatitis, and that the prisoner-plaintiff had stated an Eighth Amendment claim where he alleged that the defendants, with deliberate indifference, exposed him to excessive levels of secondhand tobacco smoke). Therefore, defendants' motion to dismiss plaintiff's Eighth Amendment deliberate indifference claims against Nunez, Hodak, Dubuc, Perrin, and Allison should be denied.

Hepatitis C infection

***12** Defendants also contend that plaintiff's allegation that he contracted hepatitis C from "blood borne pathogens" in the dry cell is sufficiently frivolous to warrant dismissal as to all defendants. [Defendants' MTD 12–13]. Citing a fact sheet available on the website of the Centers for Disease Control and Prevention ("CDC"), defendants contend that "transmission of the disease 'occurs when blood from an infected person *enters the body* of a person who is not infected' ... usually 'through sharing needles .' " [Defendants' MTD 13 (citing Centers for Disease Control and Prevention, Hepatitis C Fact Sheet, at http://www.cdc.gov/ncidod/diseases/hepatitis/c/fact.htm)].

Plaintiff alleges that on or about September 30, 2004, he was diagnosed with a hepatitis C infection, "heavily contaminated by blood and feces from the inmate" previously confined in the cell [FAC 45], and that exposure to those contaminants caused plaintiff to become infected with hepatitis C. [FAC 50–53]. The court takes judicial notice of the following information available on the CDC's website cited by defendants. *See In re Wellbutrin SR/Zyban Antitrust Litig.,* 281 F.Supp.2d 751, 755 (E.D.Pa.2003) ("Courts have defined a public record to include published reports of administrative bodies. The fact that an agency report is 'published' on the world wide web does not affect the Court's ability to take judicial notice of the contents of that report.")

(internal quotation marks and citations omitted). Hepatitis C is spread primarily by direct contact with human blood. It is possible to contract the disease by exposure to an infected person's blood on shared supplies or equipment, including not only shared needles or medical equipment, but also shared household items such as razors or toothbrushes. The hepatitis C virus "may survive on environmental surfaces at room temperature at least 16 hours, but no longer than 4 days" and "dried blood ... can still be infectious" and should be removed from environmental surfaces using a bleach solution. *See* Centers for Disease Control and Prevention, Hepatitis C, Frequently Asked Questions (FAQs), available at http://www.cdc.gov/hepatitis/C/cFAQ.htm(last visited September 30, 2008).

The allegation that plaintiff contracted hepatitis C from exposure to contaminated blood on environmental surfaces within the dry cell may be difficult to prove, but it is not frivolous. Accordingly, defendants' motion to dismiss his Eighth Amendment claims alleging that his confinement in the dry cell caused him to contract hepatitis C should be denied.

Due process claims regarding disciplinary hearings

Defendants contend that plaintiff's claims challenging his prison disciplinary hearings are premature under *Edwards v. Balisok,* 520 U.S. 641, 648, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997) because his claims necessarily would imply the invalidity of disciplinary convictions that resulted in the loss of good conduct time credits. [Defendants' MTD 14].

***13** In *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), the Supreme Court held that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a section 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck,* 512 U.S. at 486–487. A civil rights damages claim challenging the legality of a conviction or the length of confinement that has not been so invalidated is not cognizable. *Heck,* 512 U.S. at 486–487; *Cunningham v. Gates,* 312 F.3d 1148, 1153 (9th Cir.2002), *cert. denied,* 538 U.S. 960, 123 S.Ct. 1749, 155 L.Ed.2d 511 (2003). Relying on *Heck,* the Supreme Court held in *Edwards* that an inmate may not bring a civil rights claim challenging the validity of procedures utilized during a prison disciplinary hearing that resulted in the deprivation of good conduct time credits unless the disciplinary convictions leading to the loss of credits have been invalidated. *See Edwards,* 520 U.S. at 643.

Plaintiff alleges that Hodak, Perrin, and Dubuc violated his civil rights by filing and conspiring to fabricate and file a false incident report (number 1234057 filed June 22, 2004 concerning heroin allegedly found in plaintiff's cell), and that Germaine violated plaintiff's due process rights in conducting the July 13, 2004 disciplinary hearing on that incident report. [FAC 17–18, 21–22, 24, 25–26]. Plaintiff further alleges that Nunez violated his due process rights by fabricating and filing a false incident report (number 1240134 filed July 13, 2004 for an alleged positive urine sample), and that Germaine violated plaintiff's rights in the manner in which he conducted the July 20, 2004 hearing on that incident report. [FAC 13–14, 25–29]. Plaintiff alleges that the disciplinary sanctions imposed as a result of those two hearings were expunged on October 28, 2004, but that his good time credits nonetheless were not restored. [FAC 28].

Plaintiff also alleges that Hodak, Fontes, and Norwood subsequently violated plaintiff's due process rights at USP Victorville in connection with a disciplinary hearing or hearings on March 29, 2006 regarding two incident reports. The first incident report (number 1439262 filed by Hodak on February 28, 2006) alleged that plaintiff threatened Nunez and Allison by placing their names on a website. The allegations made in the second incident report (number 1440615 filed by D. Johnson on March 3, 2006) are not clear from the FAC. [*See* FAC 18–20, 34–35]. Plaintiff alleges that the disciplinary convictions imposed as a result of the March 29, 2006 hearing(s) were expunged on June 12, 2006 and June 28, 2006. [FAC 34–35].

For the reasons described above, Fontes and Norwood are misjoined defendants who should be dismissed from this case, and therefore plaintiff's due process claims against those two defendants cannot proceed in this case.

***14** In addition, plaintiff cannot obtain restoration of his forfeited good time credits in this civil rights action. *See Edwards,* 520 U.S. at 643 (explaining that "the sole remedy in federal court for a prisoner seeking restoration of good-time credits is a writ of habeas corpus...."). Since, however, plaintiff has alleged that the disciplinary convictions resulting from the July 2004 and March 2006 disciplinary hearings

were expunged, *Edwards* does not bar his procedural due process claims for damages against Nunez, Hodak, Dubuc, Perrin, and Germaine [6] arising from those allegedly defective disciplinary hearings.

6 Germaine is alleged to have been the disciplinary hearing officer who presided over those hearings, but as previously noted, he has not yet appeared or been served.

The FAC also challenges disciplinary hearings and convictions resulting in sanctions that were not expunged or otherwise invalidated. Specifically, plaintiff contends that Nunez, Hodak, Allison, and Fontes filed or conspired to file fabricated or unfounded incident reports on or about June 25, 2004, June 27, 2004, August 14, 2005, October 11, 2005, and December 20, 2005, thereby violating plaintiff's due process rights. [FAC 13–22, 33–34; *see* Plaintiff's' Opp. 21–23]. Plaintiff contends that he is not attempting to invalidate the disciplinary hearings leading to the deprivation of good conduct time credits, but rather is attempting to show a "pattern of abuse and torture." [FAC 13, 22].

Plaintiff's damages claims challenging disciplinary hearings that resulted in the forfeiture of good conduct time credits on either procedural or substantive grounds (including evidentiary challenges based on fabricated or insufficient evidence) are premature under *Edwards* unless and until plaintiff can show that the resulting convictions have been expunged or invalidated. It is irrelevant that plaintiff does not seek to overturn those disciplinary convictions, because a judgment in his favor would still have the prohibited effect of implying the invalidity of the disciplinary hearings and resulting sanctions. *See Edwards,* 520 U.S. at 644–648; *Ramirez,* 334 F.3d at 858–860. Those claims should be dismissed without prejudice under *Edwards.*

In summary, *Edwards* does not bar plaintiff's due process claims against Nunez, Hodak, Dubuc, and Perrin challenging his disciplinary hearings on July 13, 2004, July 20, 2004, and March 29, 2006. That is not the end of the inquiry, however. A due process claim is cognizable only if a constitutionally protected liberty or property interest is at stake. *See Wolff v. McDonnell,* 418 U.S. 539, 556, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); *Schroeder v. McDonald,* 55 F.3d 454, 462 (9th Cir.1995). In the prison context, "these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner,* 515 U.S. 472, 480, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995).

***15** Plaintiff alleges that his placement in the dry cell constituted an "atypical and significant hardship" entitling him to due process protections. [*See* FAC 10–11]. That claim is cognizable under *Sandin,* and therefore the FAC states a procedural due process claim with respect to plaintiff's placement in the dry call. *See Sandin,* 515 U.S. at 494 (noting that " 'solitary confinement'—i.e., segregation 'in the usual disciplinary cell' or a 'dry cell' 'represents a major change in the conditions of confinement' ") (quoting *Wolff,* 418 U.S. at 552 n. 9 & 571–572 n .19); *cf.Mendoza v. Blodgett,* 960 F.2d 1425, 1429 (9th Cir.2002) (holding, pre-*Sandin,* that a prison's regulations governing dry cell placement created a protected liberty interest, and that a hearing held five days after dry cell placement was inadequate), *cert. denied,* 506 U.S. 1063, 113 S.Ct. 1005, 122 L.Ed.2d 154 (1993). [7] Although the FAC is not entirely clear on this point, it appears that plaintiff's July 13, 2004 and July 20, 2004 disciplinary hearings concerned incident reports obtained during plaintiff's placement in the dry cell (and thus implicated the grounds for, and duration of, that placement). [*See* FAC 14, 17–18, 26–27]. Plaintiff alleges that the July 2004 hearings were based on false, fabricated, and tainted evidence because defendants violated "mandatory" BOP regulations and procedures for collecting, maintaining, and documenting urine samples and other evidence of alleged drug infractions, preparing and filing incident reports, and conducting disciplinary hearings. [*See* FAC 12–14, 17–20, 21–24, 26–29]. Therefore, plaintiff's due process claims against Nunez, Hodak, Dubuc, Perrin, and Germaine challenging the adequacy of the July 2004 hearings are sufficient to withstand dismissal.

7 *Sandin* subsequently rejected the "mandatory language" methodology used by the Ninth Circuit in *Mendoza* to find a protected liberty interest, but, as noted above, *Sandin* also recognized that confinement in a dry cell constitutes a "major change" in an inmate's conditions of confinement. *Sandin,* 515 U.S. at 494. Moreover, the Ninth Circuit's analysis in *Mendoza* suggests that the court may well have reached the same result if it had applied *Sandin*'s "atypical and significant hardship" test:

> [The prisoner's] private interests were substantially affected by the dry cell watch.

> The watch procedures in effect at the time were extremely unpleasant. Pursuant to those procedures, [the prisoner] was permitted to wear only shorts. He was confined in the cell on a mattress on the floor without a blanket. He was not permitted to shower, although he was provided a wash cloth, a face towel, a bar of soap, toothbrush and tooth powder, and a wash basin at specified times. He was subjected to a continuous watch by a prison guard. He had to keep his hands in sight at all times, and his feces and urine were meticulously examined.
>
> *Mendoza,* 960 F.2d at 1430. Accordingly, *Mendoza* (which has not explicitly been overruled) still has persuasive value.

The situation with respect to the March 29, 2006 hearings is different. Plaintiff simply asserts that the incident reports leading to those hearings were based on faulty or insufficient evidence. He does not allege facts showing that as a result of those reports he was subjected to conditions amounting to an atypical and significant hardship triggering procedural due process protections. Absent any indication that plaintiff was deprived of a protected liberty interest, plaintiff has no Fifth Amendment entitlement to procedural protections. *See Ramirez,* 334 F.3d at 860 (explaining that if a prisoner shows a deprivation creating an atypical and significant hardship, the court will determine whether the procedures used comport with the requirements of due process). Because the FAC does not state a due process claim arising from the March 29, 2006 disciplinary hearing(s), plaintiff's due process claims challenging the procedures used in those hearings should be denied in their entirety.

For these reasons, defendants' motion to dismiss plaintiff's Fifth Amendment procedural due process claims against Nunez, Hodak, Dubuc, and Perrin challenging his July 13, 2004 and July 20, 2004 disciplinary hearings should be denied.[8] Defendants' motion to dismiss plaintiff's due process claims challenging disciplinary hearings other than those conducted on July 13, 2004 and July 20, 2004 should be granted, and those claims should be dismissed without prejudice as to all defendants.

8 As previously noted, this disposition does not affect Germaine, who has neither appeared nor been served.

Supervisory liability

***16** Defendants contend that the FAC fails to state a claim against supervisory defendants Gunja, Lappin, Compton, and Norwood because those defendants were not personally involved in any alleged deprivation of plaintiff's constitutional rights. [Defendants' MTD 10–11].

A supervisory official cannot be held liable in a *Bivens* action under a theory of *respondeat superior. Terrell v. Brewer,* 935 F.2d 1015, 1018 (9th Cir.1991). A supervisory official may be liable if he or she was personally involved in the constitutional deprivation, or if there was a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. *See Redman v. County of San Diego,* 942 F.2d 1435, 1446–1447 (9th Cir.1991) (en banc) (discussing liability under 42 U.S.C. § 1983), *cert. denied,* 502 U.S. 1074, 112 S.Ct. 972, 117 L.Ed.2d 137 (1992); *Hansen v. Black,* 885 F.2d 642, 646 (9th Cir.1989) (same); *see also Ting v. U.S.,* 927 F.2d 1504, 1511 (9th Cir.1991) (following the general trend of incorporating section 1983 law into *Bivens* suits).

Supervisors may be liable under § 1983 or *Bivens* for their "own culpable action or inaction in the training, supervision, or control of his subordinates; for [their] acquiescence in the constitutional deprivation; or for conduct that showed a reckless or callous indifference to the rights of others," provided the requisite causal link exists between the challenged conduct and the constitutional deprivation. *Blankenhorn v. City of Orange,* 485 F.3d 463, 485 (9th Cir.2007) (holding that a triable issue of fact existed as whether the defendant police chief "knowingly condoned and ratified actions" by a subordinate officer "that he reasonably should have known would cause constitutional injuries" like those alleged by the plaintiff) (quoting *Watkins v. City of Oakland,* 145 F.3d 1087, 1093 (9th Cir.1998)); *see Larez v. City of Los Angeles,* 946 F.2d 630, 646 (9th Cir.1991) (upholding a jury verdict holding a police chief liable under § 1983 for ratifying his officers' use of excessive force by denying the plaintiff's complaint where expert testimony showed that the chief should have disciplined the officers and established new procedures); *Watkins,* 145 F.3d at 1093–1094 (denying qualified immunity where a police chief signed an internal affairs report dismissing the plaintiff's excessive force complaint against an officer despite evidence that the officer used excessive force and had been involved in similar past incidents). The requisite causal link may be found where a supervisor "set in motion a series of acts by others, or

knowingly refused to terminate a series of acts by others, which he knew or reasonably should have known, would cause others to inflict the constitutional injury," *Blankenhorn,* 485 F.3d at 485, or where the supervisor "knew of the violations and failed to act to prevent them." *Harris v. Roderick,* 126 F.3d 1189, 1204 (9th Cir.1997) (quoting *Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir.1989)).

Gunja

***17** The FAC alleges that Gunja was informed of his subordinates' alleged misconduct in terminating plaintiff's family visit, placing plaintiff in dry cell status under "unusual and inhumane conditions," using excessive force during plaintiff's forced cell extraction, violating plaintiff's due process rights, and denying plaintiff adequate medical care because Gunja reviewed and/or signed incident reports, "after action" reports, videotapes, administrative appeals filed by plaintiff, and letters of complaint Ziegler sent on and after August 8, 2004. [FAC 37–38, 48–49, 55, 67–68]. The FAC also alleges that Gunja "ignored the blatant misconduct by staff by not informing the OIG about the incident" of excessive force. Plaintiff concedes that Gunja "was not personally involved in the application of excessive force" but was deliberately indifferent when informed about its use, and therefore that "the doctrine of *respondeat superior* does apply" to Gunja. [FAC 38, 49]. As noted above, a supervisor may not be held vicariously liable under *Bivens;* rather, there must be a causal link between the supervisors' acts or omissions and the alleged deprivation of the plaintiff's civil rights. Plaintiff argues that "the personal involvement of Gunja beyond mere supervisorial acts is clearly alleged for Gunja's order to take x-rays of plaintiff" on or about June 30, 2004 "in order to finally reveal whether or not [plaintiff] had swallowed contraband." [FAC 55]. Plaintiff alleges that by waiting 11 days after his placement in the dry cell to order an x-ray, instead of ordering the x-ray immediately to determine whether he had ingested contraband, Gunja violated plaintiff's due process and Eighth Amendment rights. [FAC 55, 67–68].

Accepting plaintiff's fact allegations as true and drawing reasonable inferences in the light most favorable to him, plaintiff has stated a claim against Gunja for his conduct as a supervisor insofar as the FAC states a claim against Gunja's subordinate officers. *See Blankenhorn,* 485 F.3d at 486 n. 4 (noting that a supervisor cannot be held liable unless the plaintiff has demonstrated a constitutional violation). Plaintiff alleges that Gunja knew about the allegedly false allegations that plaintiff ingested contraband, the "inhumane" conditions of confinement in the dry cell, the "unreasonable application of force upon plaintiff by the force cell removal team," and his subordinates' alleged due process violations.

At the "early stage of the proceedings" represented by a motion to dismiss, the plaintiff "does not need to show with great specificity how each [supervisory] defendant contributed to the violation of his constitutional rights." *Preschooler II v. Clark County Sch. Bd. of Trustees,* 479 F.3d 1175, 1183 (9th Cir.2007) (denying a motion to dismiss the plaintiff's allegations that supervisory school officials were individually liable under section 1983 for permitting an allegedly abusive teacher to continue working with the plaintiff and for failing to report or remediate the alleged abuse); *see Hydrick v. Hunter,* 500 F.3d 978, 988 (9th Cir.2007) (denying a motion to dismiss the plaintiffs' claims that supervisory defendants who "played an instrumental role in policymaking and enforcement" were "willfully blind to constitutional violations committed by their subordinates," and explaining that at the pleading stage, prior to discovery, the plaintiffs "need not specifically delineate how each Defendant contributed" to the violation of their constitutional rights and likely could not do so with any greater specificity). Whether plaintiff "will be able to establish the claimed knowledge or 'blind eye' acquiescence in the alleged" constitutional violations "is uncertain, but given the liberal requirements of notice pleading, no further specificity is expected of the complaint" at the pleading stage. *Preschooler II,* F.3d at 1183; *see Hydrick,* 500 F.3d at 988 (denying a motion to dismiss the plaintiffs' claims that supervisory defendants who "played an instrumental role in policymaking and enforcement" were "willfully blind to constitutional violations committed by their subordinates," and explaining that at the pleading stage, prior to discovery, the plaintiffs "need not specifically delineate how each Defendant contributed" to the violation of their constitutional rights and likely could not do so with any greater specificity); *cf. Young,* 960 F.2d at 357–358, 363–366 (reversing summary judgment in favor of supervisory prison officials where a triable issue of fact existed as to whether those defendants were aware of the HIV-positive plaintiff's four-day confinement and "dehumanizing treatment" in a dry cell under unsanitary conditions, and affirming summary judgment in favor of other supervisory defendants where the plaintiff had not shown that those defendants knew or should have known about of his dry cell placement or the conditions of confinement in his dry cell); *Hignite,* 2008 WL 2782854, at *2, *5–*7 (denying a motion to dismiss a prisoner's Eighth Amendment claim against a prison warden

alleging that the warden was aware that the prisoner was subjected to inhumane conditions of confinement for 84 hours during placement on "contraband watch").

***18** Plaintiff also alleges that Gunja personally violated his rights in responding to a letter from United States Senator Dianne Feinstein inquiring about plaintiff's treatment at USP Victorville. Plaintiff says that Gunja violated plaintiff's due process rights by releasing specific information about plaintiff to Senator Feinstein without plaintiff's consent and knowingly providing "false and defamatory" information to her. Specifically, Gunja told Senator Feinstein that plaintiff had committed drug related offenses at USP Lompoc and described those offenses in some detail. Gunja "deliberately lied to Senator Feinstein" because he was aware that the allegations against plaintiff by defendants Nunez, Perrin, and Hodak at USP Lompoc "had been expunged." [FAC 38].

Defamation alone does not state a federal constitutional claim, even when done under color of law. *Paul v. Davis,* 424 U.S. 693, 701–710, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); *Rutledge v. Arizona Bd. of Regents,* 660 F.2d 1345, 1353 (9th Cir.1981), *aff'd* 460 U.S. 719, 103 S.Ct. 1483, 75 L.Ed.2d 413 (1983). To state a claim for defamation under section 1983, a plaintiff must allege loss of a recognizable property or liberty interest in conjunction with the alleged injury to reputation. *Paul,* 424 U.S. at 701; *Cooper v. Dupnik,* 924 F.2d 1520, 1532 (9th Cir.1991) (citing *Vanelli v. Reynolds Sch. Dist. No. 7,* 667 F.2d 773, 777–78 (9th Cir.1982)), *aff'd on reh'g en banc,* 963 F.2d 1220, 1235 n. 6 (9th Cir.1992), *cert. denied,* 506 U.S. 953, 113 S.Ct. 407, 121 L.Ed.2d 332 (1992).

The amended complaint does not state a claim against Gunja based on his alleged disclosures to Senator Feinstein, and therefore that claim should be dismissed with prejudice. Plaintiff's allegations otherwise are sufficient to state a *Bivens* claim for supervisory liability against Gunja in his individual capacity, and in that respect the motion to dismiss should be denied.

Lappin

The FAC alleges that Lappin, the Director of the BOP, (1) acted with deliberate indifference to the termination of plaintiff's June 19, 2004 family visit at USP Lompoc "after plaintiff's friend and agent informed him on August 8, 2004 about the underlying facts and the misconduct of prison staff" [FAC 38]; (2) had "personal knowledge of the application of excessive force" against plaintiff and the "inhumane conditions" of plaintiff's dry cell confinement because he reviewed reports forwarded to him by Compton, the warden at USP Lompoc, as well as videotapes, and deliberately ignored mandatory rules [FAC 49, 55–56]; and (3) "had personal knowledge about plaintiff's serious health conditions at USP Lompoc and USP Victorville after plaintiff's friend and attorney-in-fact provided him with copies of all letters and complaints plaintiff had sent to defendants Compton, Norwood, Gunja, and the Medical Director at USP Victorville"[FAC 68]; and (4) "was deliberately indifferent to plaintiff's urgent medical needs by not ensuring that mandatory medical rules get applied and that plaintiff is safe from being further threatened by" defendants. [FAC 69].

***19** Like his allegations against Gunja, plaintiff's allegations against Lappin are sufficient, at the pleading stage, to state a *Bivens* claim for supervisory liability. *See Preschooler II,* F.3d at 1183; *Hydrick,* 500 F.3d at 988; *Young,* 960 F.2d at 357–358, 363–366; *Hignite,* 2008 WL 2782854, at *2, *5–*7. Therefore, defendants' motion to dismiss those claims should be denied.

Compton

The allegations against Compton, the warden at USP Lompoc, are similar to those against Gunja. The FAC alleges Compton reviewed and/or signed incident reports, after action reports, videotapes, administrative appeals filed by plaintiff, and letters of complaint sent on and after August 8, 2004 by Ziegler. [FAC 29–31, 46–48, 54, 64–65]. The FAC also alleges that Compton was deliberately indifferent to his subordinates' noncompliance with mandatory prison rules. Plaintiff alleges that Compton "was not personally involved in the application of excessive force but acted with deliberate indifference when defendants Dubuc and Perrin violated plaintiff's constitutional right, especially after having been noticed about the incident" by Ziegler's August 8, 2004 letter. [FAC 48].

Plaintiff's allegations against Compton, like those against Gunja and Lappin, state a *Bivens* claim against Compton for supervisory liability, and defendants' motion to dismiss those claims should be denied.

Service of process

Defendants contend that Germaine and Gunja have not been properly served with the summons and FAC, and therefore that the FAC should be dismissed as to those defendants under Rules 4(m) and Rule 12(b) (5).

The court's docket and file in this case indicates that neither Gunja nor Germaine have filed a waiver of service or been served in accordance with Rule 4(i)(3). Defendants' counsel submitted a declaration stating that a summons and FAC had been mailed to Gunja at his former BOP office address and had been forwarded to counsel, but that the service packet did not include a waiver of service form. Counsel requested the United States Marshal to resend the summons and FAC along with a waiver of service form and stated that he would forward those materials to Gunja when received. No waiver or proof of service has yet been filed, but there is no reason to conclude that service could not be effected.

Counsel entered an appearance on behalf of Gunja for purposes of this motion and made substantive arguments for dismissal on Gunja's behalf. There is no error in ruling on the merits of that motion with respect to Gunja. *See Wages v. IRS,* 915 F.2d 1230, 1235 & n .5 (9th Cir.1990), *cert. denied,* 498 U.S. 1096, 111 S.Ct. 986, 112 L.Ed.2d 1071 (1991).

In January 2008, plaintiff supplied the United States Marshal with a new address to attempt service of process on Germaine, who has retired from the BOP. The record does not support defendants' contention that plaintiff has not been diligent in attempting to provide the Marshal with the information needed to effect service.

***20** An order has been issued extending plaintiff's time to effect service of process on Germaine. For these reasons, defendants' motion to dismiss for insufficiency of process should be denied without prejudice.

Conclusion

For the reasons described above, defendants' motion to dismiss for failure to comply with Rule 8 should be denied.

Defendants' motion for misjoinder should be granted as to plaintiff's claims against Fontes and Norwood, and those claims should be dismissed without prejudice. However, the motion for misjoinder should be denied as to Gunja and Lappin.

Defendants' motion to dismiss for failure to state a claim should be granted in part and denied in part. Plaintiff already has had one opportunity to amend his complaint, and there is no reason to believe he can amend his complaint to cure the deficiencies in the dismissed claims. Accordingly, defendants' motion to dismiss for failure to state a claim should be: (1) granted as to plaintiff's due process and excessive force claims (that is, Claims 1 and 2) against Pollock, and those claims should be dismissed with prejudice; (2) denied with respect to plaintiff's Eighth Amendment claims (that is, Claims 3 and 4) against Pollock; (3) denied as to plaintiff's Eighth Amendment claims for deliberate indifference against Nunez, Hodak, Dubuc, Perrin, and Allison (Claims 3 and 4); (4) denied as to plaintiff's Eighth Amendment claims (Claims 3 and 4) alleging that his confinement in the dry cell caused him to contract hepatitis C; (5) denied as to plaintiff's due process claims (Claim 1) against Nunez, Hodak, Dubuc, and Perrin challenging his July 13, 2004 and July 20, 2004 disciplinary hearings; (6) granted as to plaintiff's due process claims (Claim 1) challenging plaintiff's disciplinary hearings other than those conducted on July 13, 2004 and July 20, 2004, and those claims should be dismissed without prejudice as to all defendants; (7) granted as to plaintiff's claim against Gunja for defamation (Claim 1), and that claim should be dismissed with prejudice; and (8) denied as to plaintiff's claims for supervisory liability against Gunja, Lappin, and Compton insofar as the FAC states a claim against those defendants' subordinates (Claims 1 through 4).

Finally, defendants' motion to dismiss for insufficiency of process should be denied without prejudice.

All Citations

Not Reported in F.Supp.2d, 2009 WL 789756

End of Document

2017 WL 10543342
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Ricky HOWARD, Plaintiff,
v.
Paulett FINANDER, Defendant.

Case No. CV 15-1317-PA (SP)
|
Signed 03/27/2017

Attorneys and Law Firms

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ORDER GRANTING LEAVE TO AMEND AND DENYING MOTION TO DISMISS AS MOOT

SHERI PYM, United States Magistrate Judge

I.

INTRODUCTION

***1** On February 24, 2015, plaintiff Ricky Howard, a California state prisoner proceeding pro se and in forma pauperis, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. In the Complaint, plaintiff alleged that while he was incarcerated at the California State Prison, Los Angeles County ("CSP-LAC"), defendant Paulett Finander, the Chief Medical Executive, retaliated against him for filing a grievance by denying him his leg braces.

On May 26, 2015, pursuant to the provisions of the Prison Litigation Reform Act ("PLRA"), the court screened the Complaint and found: (1) plaintiff failed to sign the Complaint, as required by Federal Rule of Civil Procedure 11; (2) defendant was immune from suit in her official capacity; and (3) plaintiff failed to state his claims separately, each identifying a discrete alleged violation of the Constitution or other law, as required by Federal Rule of Civil Procedure 8(a)(2). The court therefore dismissed the Complaint with leave to amend.

Plaintiff filed the operative First Amended Complaint ("FAC") on February 10, 2016. The FAC is brought against defendant Finander in only her individual capacity, and again complains that Finander retaliated against plaintiff by taking away his leg braces. The FAC appears to assert claims for retaliation in violation of the First Amendment, and deliberate indifference to medical needs in violation of the Eighth Amendment.

On August 8, 2016, defendant moved to dismiss the FAC under Federal Rule of Civil Procedure 12(b)(6) ("MTD"), arguing: (1) plaintiff failed to exhaust his administrative remedies; (2) plaintiff fails to state a claim for retaliation in violation of the First Amendment; and (3) plaintiff fails to state an Eighth Amendment claim for deliberate indifference.

Plaintiff filed an opposition to the motion to dismiss on October 24, 2016 ("MTD Opp."). There, plaintiff provided additional documentation that he argued established he appealed his grievance to the third level of administrative review, thereby exhausting his administrative remedies. Defendant filed a reply on November 7, 2016 ("MTD Reply") conceding that this evidence demonstrated plaintiff exhausted his administrative remedies, and therefore withdrew that argument from her motion to dismiss.

On January 27, 2017, plaintiff filed a request to stay the proceedings and for leave to file a Second Amended Complaint, which defendant opposed on February 25, 2017.

After careful review and consideration of the parties' positions, relevant legal authority, and the record in this case, the court grants plaintiff's motion for leave to amend the FAC, and consequently denies defendant's motion to dismiss as moot, for the reasons discussed below. In preparing his Second Amended Complaint, plaintiff should heed the discussion that follows regarding alleged deficiencies in the FAC and the parameters for adding new defendants.

II.

ALLEGATIONS OF THE FIRST AMENDED COMPLAINT

Plaintiff filed a grievance against defendant Finander and her subordinate, Dr. J. Marcelo. About June 11, 2013, defendant Finander arranged to compel the removal and relinquishment

of plaintiff's medically prescribed leg braces. Defendant Finander yelled at plaintiff that he would get his braces back when he dropped the grievance.

***2** A previous physician prescribed the leg braces and a walking cane as part of plaintiff's medical plan in June 2009. Since defendant Finander confiscated the leg braces because plaintiff refused to drop the grievance, plaintiff has been without the support of the braces, causing plaintiff's ankles and knees to swell beyond twice their normal size and throb with pain daily for hours at a time. About June 27, 2013, plaintiff filed another grievance concerning this retaliatory act of taking away his leg braces. This grievance was partially granted, but without providing plaintiff relief from the retaliatory act. Since June 11, 2013, plaintiff has been left to suffer from being denied his leg braces and excluded from medical aid, causing plaintiff's mobility to further deteriorate and placing him at serious risk of knee replacement, ankle surgery, and constant throbbing pain.

III.

LEGAL STANDARD

Under Rule 15(a) of the Federal Rules of Civil Procedure, a party may amend a pleading once as a matter of course twenty-one days after serving, or if a response was filed, within twenty-one days after service of the response. Fed. R. Civ. P. 15(a)(1). Otherwise, a party may amend only by leave of the court or by written consent of the adverse party. Fed. R. Civ. P. 15(a)(2). Granting or denying leave to amend a complaint is in the discretion of the court (*Swanson v. U.S. Forest Service*, 87 F.3d 339, 343 (9th Cir. 1996)), though leave should be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). "[T]his policy is to be applied with extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987)).

"In the absence of ... undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment," leave to amend should be "freely given." *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed. 2d 222 (1962). These factors are not of equal weight; prejudice to the opposing party has long been held to be the most crucial factor in determining whether to grant leave to amend. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) ("As this circuit and others have held, it is the consideration of prejudice to the opposing party that carries the greatest weight"). "Denials of motions for leave to amend have been reversed when lacking a contemporaneous specific finding by the district court of prejudice to the opposing party, bad faith by the moving party, or futility of amendment." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186-87 (9th Cir. 1987).

IV.

DISCUSSION

Here, plaintiff filed the FAC on February 10, 2016 and defendant filed her motion to dismiss the FAC on August 8, 2016. On January 27, 2017, more than twenty-one days after defendant filed her motion to dismiss, plaintiff filed his motion for leave to file a Second Amended Complaint ("Mtn. to Amend"). Defendant has not consented to plaintiff filing an amended complaint, and filed an opposition to plaintiff's motion on February 15, 2017. Docket no. 40 ("Amend Opp."). Thus, plaintiff may only file a Second Amended Complaint with leave of court. Fed. R. Civ. P. 15(a)(2). The court therefore considers the five *Foman* factors in deciding plaintiff's motion for leave to amend the FAC.

A. Plaintiff's Previous Amendment Does Not Weigh Against Further Amendment

Courts have broader discretion in denying motions for leave to amend after leave to amend has already been granted. *Chodos v. W. Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002) (citing *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 879 (9th Cir. 1999)). In *Chodos*, the Ninth Circuit affirmed the district court's denial of leave to amend when the party knew of the factual basis for the amendment prior to a previous amendment. *Id.* Further, a party that contends it learned "new" facts to support a claim should not assert a claim it could have pleaded in previous pleadings. *Edwards Lifesciences LLC v. Cook Inc.*, 2008 WL 913328, at *3 (N.D. Cal. Apr. 2, 2008) (citing *Chodos*, 292 F.3d at 1003).

***3** Here, the court dismissed plaintiff's initial Complaint with leave to amend on May 26, 2015. The court alerted plaintiff to three deficiencies affecting the Complaint: (1) plaintiff failed to sign the Complaint, as required by Federal Rule of Civil Procedure 11; (2) defendant was immune from

suit in her official capacity; and (3) plaintiff failed to state his claims separately, each identifying a discrete alleged violation of the Constitution or other law, as required by Federal Rule of Civil Procedure 8(a)(2). *See* docket no. 6 at 4-7. Plaintiff filed the operative FAC on February 10, 2016, remedying at least the first two deficiencies the court identified. *See* FAC at 3, 9. [1] In his motion for leave to amend the FAC, plaintiff states leave to amend is necessary in order for him to "add two defendants to this action," and "actually state a cognizable claim for relief consistent with [Rule 8(a)]." Mtn. to Amend at 1. Plaintiff also notes he now has "the assistance of [an] experienced jailhouse lawyer" to help him with drafting his legal documents, and attaches a declaration from this inmate. *Id.* at 3, Declaration of Marvin Glenn Hollis. Thus, it appears plaintiff seeks leave in order to amend the FAC to comply with the requirements of Federal Rule of Civil Procedure 8(a)(2), presumably to address deficiencies defendant identified in her motion to dismiss.

1 Page references to the FAC correspond to the pages as numbered by the court's electronic case filing system.

Defendant notes in her opposition to plaintiff's motion for leave to amend the FAC that she has identified deficiencies in the FAC, has moved to dismiss the FAC on those grounds, and the parties have fully briefed that motion. Opp. at 2. Although defendant's desire for a ruling on the motion to dismiss is understandable, "where, as here, a plaintiff files a motion to amend after a defendant files a motion to dismiss, courts will still grant the motion to amend absent an independent showing by the defendant of at least one of the [other] factors." *Naranjo v. Bank of Am. Nat'l Ass'n*, 2015 WL 913031, at *6 (N.D. Cal. Feb. 27, 2015) (collecting cases). Although plaintiff has amended his Complaint once before, he is proceeding pro se, and the court's May 26, 2015 order dismissing the Complaint with leave to amend provided plaintiff with notice of no other deficiencies in the Complaint that may still be present in the FAC. Rather, it is in the interests of justice to allow plaintiff to have an opportunity to set forth his claims with more precision. Thus, absent a finding that another of the *Foman* factors weighs in favor of denying leave to amend, and given the policy of permitting amendment with "extreme liberality," the court finds this factor does not weigh against granting leave to amend.

B. The Court Finds No Undue Delay or Bad Faith

"[D]elay alone is not sufficient to justify the denial of a motion requesting leave to amend." *DCD Programs*, 833 F.2d at 187 (citing *Hurn v. Ret. Fund Trust of Plumbing, Heating & Piping Indus. of S. California*, 648 F.2d 1252, 1254 (9th Cir. 1981)). However, undue delay combined with other factors may warrant denial of leave to amend. See *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387-89 (9th Cir. 1990) (holding prejudice and undue delay are sufficient to deny leave to amend); *Morongo Band of Mission Indians*, 893 F.2d at 1079 ("delay of nearly two years, while not alone enough to support denial, is nevertheless relevant").

Defendant argues "amendment at this stage would neither promote judicial economy nor the speedy resolution of the action" because defendant's motion to dismiss the FAC is fully briefed. Opp. at 2. The court notes plaintiff waited more than five months after defendant filed her motion to dismiss the FAC before filing his motion for leave to amend, including more than two months after the parties fully briefed the motion to dismiss. Despite this delay, there is no basis to support a finding that plaintiff intentionally delayed filing a motion to amend until after defendant filed her motion to dismiss. It appears that plaintiff's desire to amend now is based on new advice he received from a fellow inmate as to how he may improve his pleading. *See Johnson v. Serenity Trans., Inc.*, 2015 WL 4913266, at *5 (N.D. Cal. Aug. 17, 2015) (the undue delay "inquiry focuses on whether the plaintiff knew of the facts or legal bases for the amendments at the time the operative pleading was filed and nevertheless failed to act promptly to add them to the pleadings.").

***4** Plaintiff seeks to amend in response to the deficiencies set forth in defendant's motion to dismiss – namely, that plaintiff fails to state claims that comply with Federal Rule of Civil Procedure 8(a)(2) and adequately allege retaliation in violation of the First Amendment and deliberate indifference in violation of the Eighth Amendment, respectively. MTD at 3-9; *see* Mtn. to Amend at 2-4. Given the procedural posture of this case, where no trial date has been set and where discovery has yet to commence, and the fact that plaintiff is proceeding pro se, the court finds the factor of undue delay does not weigh against amendment.

The court also finds no evidence to suggest plaintiff has acted in bad faith when he filed his motion for leave to amend. Bad faith may be shown when a party seeks to amend late in the litigation process with claims which were, or should have been, apparent early. *Bonin v. Calderon*, 59 F.3d 815, 846 (9th Cir. 1995). Defendant does not argue plaintiff seeks to amend in bad faith, nor does the record before the court indicate a bad

faith purpose for plaintiff's desire to amend. Thus, this factor does not weigh against amendment.

C. Further Amendment Will Not Prejudice Defendant

The potential prejudice to defendant carries "the greatest weight" in whether to grant leave to amend, as "[p]rejudice is the touchstone of the inquiry under rule 15(a)." *Eminence Capital*, 316 F.3d at 1052 (quotation omitted). "The party opposing amendment bears the burden of showing prejudice." *DCD Programs*, 833 F.2d at 187. Prejudice must be substantial to justify denial of leave to amend. *Morongo Band of Mission Indians*, 893 F.2d at 1079. There is a presumption in favor of granting leave to amend where prejudice is not shown under Rule 15(a). *Eminence Capital*, 316 F.3d at 1052.

Defendant appears to make the same argument to show prejudice as she does for undue delay: that defendant has filed a motion to dismiss and plaintiff has filed an opposition to that motion, thereby prejudicing defendant because the pending motion to dismiss is ready for decision. Opp. at 2. Defendant does not make a more particular showing of prejudice. Such generalized arguments are insufficient to meet defendant's burden of showing prejudice. *See In re Fritz Co. Sec. Litig.*, 282 F. Supp. 2d 1105, 1110 (N.D. Cal.2003) (finding no prejudice because "[w]hile the fading of witnesses' memory over time and the changes to the [defendant] company could perhaps prejudice defendants, they fail to show specifically how it would do so"). Moreover, as noted above, the procedural posture of this case does not present defendant with the risk of abandoning significant efforts if amendment is granted. *See Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1993) (finding prejudice where "parties ha[d] engaged in voluminous and protracted discovery" prior to amendment and "[t]rial was only two months away, and discovery was completed"); *Scognamillo v. Credit Suisse First Boston, LLC*, 587 F. Supp. 2d 1149, 1156 (N.D. Cal.2008) (finding prejudice where plaintiffs "sought leave to amend late in litigation, approximately twelve weeks before the ... discovery cutoff" and where the proposed theories were "a radical departure" such that "[g]ranting leave to amend at this point would require extensive additional discovery on entirely new topics and the redeposition of witnesses").

Though defendant's motion to dismiss was fully briefed when plaintiff filed his motion for leave to amend, the prejudice to defendant is nonetheless minimal. As such, defendant has failed to meet her burden of establishing prejudice sufficient to warrant denial of plaintiff's motion for leave to amend.

D. The Court Finds Leave to Amend Is Not Futile

***5** In her opposition to plaintiff's motion for leave to amend, defendant argues amendment of the FAC would be futile because plaintiff has failed to exhaust the administrative remedies related to his grievance against defendant. Amend Opp. at 2. Defendant claims plaintiff fails to explain in his motion how adding two defendants to this action will remedy his failure to exhaust his administrative remedies. *Id.*

The court is perplexed by defendant's argument on this point in opposition to amendment, since defendant previously withdrew the argument from her motion to dismiss that plaintiff failed to exhaust his administrative remedies after plaintiff attached additional documentary evidence to his opposition to the motion to dismiss establishing he fully appealed the administrative grievance at issue. *See* MTD Reply at 1 ("On review of Plaintiff's Opposition, Defendant concedes that Plaintiff has appealed his grievance to the third level of administrative review, thereby exhausting his administrative remedies."); *see also* MTD Opp., Ex. A. Thus, the court finds defendant's argument that plaintiff failed to exhaust his administrative remedies in her opposition to plaintiff's motion to amend to be not well taken. Nonetheless, the court addresses whether allowing plaintiff to amend the FAC would be futile, as required by *Foman.*

"Futility of amendment can, by itself, justify the denial of a motion for leave to amend." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). "A court may deny leave to amend due to futility or legal insufficiency if the amendment would fail a motion to dismiss under Rule 12(b)(6)." *Miller v. Rykoff-Sexton, Inc.*, 845 F. 2d 209, 214 (9th Cir. 1988)). "[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Id.*

A complaint may be dismissed for failure to state a claim "where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Zamani v. Carnes*, 491 F.3d 990, 996 (9th Cir. 2007) (citation omitted). In considering whether a complaint states a claim, a court must accept as true all of the material factual allegations in it. *Hamilton v. Brown*, 630 F.3d 889, 892-93 (9th Cir. 2011). But the court need not accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted). Although a complaint need not include detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to

'state a claim to relief that is plausible on its face.' " *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.Ed. 2d 868 (2009)). A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted).

"Ordinarily, courts will defer consideration of challenges to the merits of a proposed amended pleading until after leave to amend is granted and the amended pleading is filed." *Fair Hous. Council of Cent. California, Inc. v. Nunez*, 2012 WL 217479 at *4 (E.D. Cal. Jan.24, 2012) (citations omitted). Denial of leave to amend on futility grounds is therefore rare. *Netbula, LLC v. Distinct Corp.*, 212 F.R.D. 534, 539 (N.D. Cal. 2003).

***6** Here, aside from the argument concerning plaintiff's failure to exhaust his administrative remedies that was later withdrawn, defendant moved to dismiss the FAC on the grounds that plaintiff fails to state a claim for retaliation in violation of the First Amendment and fails to state an Eighth Amendment claim for deliberate indifference. MTD at 6-9. But because plaintiff's motion to amend only seeks leave to amend, and does not attach a proposed Second Amended Complaint, there is no way to tell that a Second Amended Complaint would be susceptible to the same arguments for dismissal presented in the motion to dismiss. This is not a case in which the record indicates it would be impossible for plaintiff to address the pleading deficiencies defendant identifies in an amended complaint. For example, defendant argues plaintiff fails to state a retaliation claim because he alleges no facts about the alleged grievance, including when it was filed or what issues it raised. There is no reason to find at this juncture that plaintiff would be unable to allege such facts in a Second Amended Complaint. Defendant also argues plaintiff fails to allege facts showing defendant's decision to deprive plaintiff of leg braces was medically unacceptable, and so constituted deliberate indifference. Whether plaintiff is able to allege additional facts is unknown, but the court cannot say on this record that it is impossible that plaintiff could do so.

The court therefore does not find further amendment necessarily would be futile because it cannot determine with certainty that "no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim." *Miller*, 845 F. 2d at 214. Given the Ninth Circuit's liberal policy favoring granting leave to amend, and because defendant established neither prejudice nor a strong showing of any other factor under *Foman*, defendant fails to meet her burden in opposing plaintiff's motion to amend. *Eminence Capital*, 316 F.3d at 1052. As such, the court grants plaintiff's motion to amend.

Though the court defers considerations of challenges to the merits of plaintiff's claims until a Second Amended Complaint has been filed, the court cautions plaintiff regarding his desire to add two defendants to this action. *See* Mtn. to Amend at 1. Under Federal Rule of Civil Procedure 18, which governs joinder of claims, a plaintiff may bring multiple claims, related or not, in a lawsuit against a single defendant. *See* Fed. R. Civ. P. 18(a). To name different defendants in the same lawsuit, however, a plaintiff must satisfy Rule 20, which governs joinder of parties. Permissive joinder of multiple defendants in a single lawsuit is allowed only if: (1) a right to relief is asserted against each defendant that relates to or arises out of the same transaction or occurrence or series of transactions or occurrences; and (2) some question of law or fact common to all parties arises in the action. *See* Fed. R. Civ. P. 20(a)(2). Unrelated claims involving different defendants belong in different suits. *See Aul v. Allstate Life Ins. Co.*, 993 F.2d 881, 884 (9th Cir. 1993) ("A claim based on different rights and established by different transactional facts will be a different cause of action.").

When there is a misjoinder of parties, the court may on its own initiative at any stage of the litigation drop any party. *See* Fed. R. Civ. P. 21 ("Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party."). Although pro se litigants are held to less stringent standards than represented parties (*Jackson v. Carey*, 353 F.3d 750, 757 (9th Cir. 2003)), they must still comply with the procedural or substantive rules of the court. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). The court therefore advises plaintiff that any claims against the two new defendants he seeks to add to a Second Amended Complaint should be limited to claims concerning the events that gave rise to his claims against defendant Finander, to the extent plaintiff is able to allege they were involved in these acts.

V.

LEAVE TO FILE A SECOND AMENDED COMPLAINT

For the foregoing reasons, plaintiff's motion for leave to file a Second Amended Complaint (docket no. 38) is GRANTED. Defendant's motion to dismiss the FAC (docket no. 30) is consequently DENIED as moot.

***7** Accordingly, **IT IS ORDERED THAT**:

1) Within 30 days of the date of this order, or by **April 26, 2017**, plaintiff shall file a Second Amended Complaint. The Clerk of Court is directed to mail plaintiff a blank Central District civil rights complaint form to use for filing the Second Amended Complaint, which plaintiff is encouraged to utilize.

2) In a Second Amended Complaint, plaintiff must clearly designate on the face of the document that it is the "Second Amended Complaint," it must bear the docket number assigned to this case, and it must be retyped or rewritten in its entirety, preferably on the court-approved form. The Second Amended Complaint must be complete in and of itself, without reference to the original complaint or any other pleading, attachment or document.

An amended complaint supersedes the preceding complaint. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). After amendment, the court will treat all preceding complaints as nonexistent. *Id.* Because the court grants plaintiff leave to amend as to all his claims raised here, any claim that was raised in a preceding complaint is waived if it is not raised again in the Second Amended Complaint. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012).

Plaintiff is cautioned that his failure to timely comply with this Order may result in a recommendation that this action be dismissed.

All Citations

Slip Copy, 2017 WL 10543342

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2020 WL 8457480
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

INCREDIBLE FEATURES, INC., et al.
v.
BACKCHINA, LLC

Case No. CV 20-943-DMG (RAOx)
|
Filed 12/28/2020

Attorneys and Law Firms

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Proceedings: IN CHAMBERS—ORDER RE DEFENDANT BACKCHINA, LLC'S MOTION FOR LEAVE TO AMEND ITS ANSWER [49]

The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

***1** Before the Court is Defendant BackChina, LLC's Motion for Leave to Amend ("MLA") its Answer. [Doc. # 49.] The motion is fully briefed. [Doc. ## 55, 56.] For the reasons set forth below, the MLA is **GRANTED**.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On January 29, 2020, Plaintiffs Incredible Features, Inc., Jeffrey R. Werner, and Brian R. Wolff filed a Complaint alleging that Defendant infringed their copyrights by posting several photographs to its website without obtaining permission from Plaintiffs to do so. [Doc. # 1.] Defendant filed its Answer on August 18, 2020, raising eight affirmative defenses and four counterclaims. [Doc. # 33.] On August 26, 2020, Plaintiffs filed a motion to dismiss ("MTD") Defendant's counterclaims. [Doc. # 36.] While the MTD was pending, Defendant filed the instant MLA on December 4, 2020. The MLA seeks to add affirmative defenses and counterclaims based on a safe harbor pursuant to 17 U.S.C. 512(d) and the statute of limitations.

On December 9, the Court granted both Plaintiffs' MTD and Defendant's *ex parte* application to expedite the hearing on its MLA, in order to have it heard before the December 30, 2020 deadline for amending the pleadings. [Doc. ## 53, 54.] In light of the Court's Order on the MTD, in its Reply to the MLA, Defendant submitted a revised Amended Answer which includes the 512(d) safe harbor and statute of limitations as defenses, but not as counterclaims. [Doc. # 56-1.]

II.

LEGAL STANDARD

Federal Rule of Civil Procedure 15(a) provides that a party may amend a pleading with the court's leave, and that "[t]he court should freely give leave when justice so requires." Fed. R. Civ. Pro. 15(a)(2); *see also Moss v. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009) (requests for leave to amend should be granted with "extreme liberality"). A court should not deny leave to amend except in the presence of (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, and/or (4) futility of amendment. *William O. Gilley Enters., Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 669 n.8 (9th Cir. 2009). "[T]his determination [to grant or deny leave to amend] should be performed with all inferences in favor of granting the motion." *Id.*; *see also Howey v. United States*, 481 F.2d 1187, 1190-91 (9th Cir. 1973) ("Where there is a lack of prejudice to the opposing party and the amended [pleading] is obviously not frivolous, or made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny such a motion").

III.

DISCUSSION

Plaintiffs challenge Defendant's proposed amendment solely on the ground that it would be futile. [1] The MLA is based on two new affirmative defenses—the 512(d) safe harbor and the statute of limitations—which Plaintiffs claim are legally insufficient. *See* Opp. [Doc. # 55].

[1] As Plaintiffs rightly recognize, the Court effectively already addressed the potential for bad faith, undue delay, and unfair prejudice in deciding to grant Defendant's *ex parte* application to allow the MLA to be heard.

Beginning with the safe harbor, Section 512(d) exempts service providers from liability for copyright infringement "by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link." 17 U.S.C. § 512(d). Defendant's proposed defense pursuant to this provision is based on the infringing photographs having allegedly been posted on its website solely in the form of links to third-party sites that hosted the works. MLA at 5-7; *see also* Amended Answer ¶¶ 83-87.[2] Plaintiffs claim that Defendant fails to satisfy a number of prerequisites necessary to qualify for the 512(d) safe harbor, including having a registered agent with the United States Copyright Office and having no knowledge that the works were infringing. Opp. at 9-11. The Court, taking Defendant's proposed amendments as true under the standard for reviewing a Rule 12(b)(6) motion to dismiss, declines to analyze these merits-based arguments on a motion for leave to amend as it is not self-evident that "no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). The Court will address the merits of Defendant's defenses in earnest if Plaintiffs file a Rule 56 motion at the appropriate time.

[2] All page references herein are to page numbers inserted by the CM/ECF system.

***2** Similarly, Plaintiffs challenge the sufficiency of Defendant's proposed statute of limitations defense, which the Court declines to rule on at this juncture. Defendant's amendment claims that the allegedly infringing works were taken down prior to three years before the action was filed, and thus are time-barred. *See* MLA at 7 (citing 17 U.S.C. § 507, which sets a three-year statute of limitations for copyright infringement actions); Amended Answer ¶¶ 88-89. Plaintiffs' opposition to this amendment is based largely upon an extrinsic declaration that attests the photographs were in fact displayed on Defendant's website within three years of commencement of the action. *See* Carreon Decl. ¶¶ 12-21. This evidence is not appropriate at the pleading stage, much less on a motion for leave to amend.

IV.

CONCLUSION

In light of the foregoing, the Court **GRANTS** Defendant's MLA. Defendant shall file its Amended Answer, in the form attached to its Reply brief [Doc. # 56-1], by **December 29, 2020**. The December 30, 2020 hearing is **VACATED**.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 8457480

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Yahoo!, Inc. v. Does 1 Through 510, Inclusive, N.D.Cal., August 15, 2016

2012 WL 3010969
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

Paul A. JACQUES and Jean L. Jacques, Plaintiffs,
v.
HYATT CORPORATION, a Delaware corporation, dba Maui Hyatt Resort, dba Hyatt Regency Maui Resort & SPA; Medical Technology, Inc., a Texas corporation, dba Bledsoe Brace Systems; and Does 1 to 125, inclusive, Defendants.

No. C 11–05364 WHA.
|
July 23, 2012.

Attorneys and Law Firms

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ORDER DENYING MOTION TO SEVER, DENYING MOTION TO DISMISS OR TRANSFER, AND VACATING HEARING

WILLIAM ALSUP, District Judge.

INTRODUCTION

***1** In this personal-injury action, defendant Hyatt Corporation moves to sever and to dismiss or transfer. For the reasons stated below, both motions are **DENIED.** The hearing scheduled for July 25 is **VACATED.**

STATEMENT

Defendant Hyatt Corporation moves to sever the claims against Hyatt Corporation from the claim against defendant Medical Technology, Inc. for misjoinder of parties pursuant to FRCP 21, and also moves to dismiss or transfer for improper venue pursuant to 28 U.S.C. 1406(a) and 28 U.S.C. 1391, or in the alternative, to transfer pursuant to 28 U.S.C. 1404(a). The motion to sever is **DENIED** because the claims arise out of a series of related occurrences, involve common questions of law and fact, and Hyatt has not demonstrated it will be prejudiced by maintaining the claims in a single action. The motion to dismiss or transfer is **DENIED** because Sections 1391 and 1406(a) do not apply to removed actions; venue is proper under the removal statute, 28 U.S.C. 1441(a); and Hyatt Corporation does not make a sufficiently strong showing of inconvenience to defeat plaintiffs' choice of forum and justify discretionary transfer pursuant to Section 1404(a).

Plaintiffs are Paul A. Jacques and his wife, Jean L. Jacques, individuals residing in California. Defendants are Hyatt Corporation, a Delaware corporation, dba Maui Hyatt Resort, dba Hyatt Regency Maui Resort & Spa ("Hyatt") and Medical Technology, Inc., a Texas corporation, dba Bledsoe Brace Systems ("Medical Technology"); and Does 1 through 125. While the complaint lists Hyatt Corporation as a Delaware corporation, and the California Secretary of State records show Hyatt's address as Chicago, Illinois, Hyatt contends that Hyatt Maui has its principal place of business in the state of Hawaii (*see* Pappas Decl. Exh. H; Johnson Decl. 1). [*] "Even though Hyatt Maui is part of the Hyatt corporate brand, it is an independent entity and is not managed by or in conjunction with any other Hyatt entity in the state of California" (Sever Br. 1). This issue will be discussed in greater detail below as it pertains to the motion to dismiss or transfer. Medical Technology is organized under the laws of Texas and its principal place of business is in Texas (Notice of Removal 3).

[*] This order takes judicial notice of the California Secretary of State "Business Entity Detail" for Hyatt Corporation, as the contents of this documents are not subject to reasonable dispute in that, as a government website, it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Plaintiffs brought this action as a result of personal injuries suffered by Mr. Jacques during plaintiffs' honeymoon in Hawaii and a subsequent incident in plaintiffs' backyard in California. The following facts are taken from the complaint. In July 2009, plaintiffs visited the Hyatt Regency Maui Resort & Spa in Maui, Hawaii. While descending stairs outdoors

near the pool area, Mr. Jacques slipped and fell, hitting his right knee on a lava boulder lining the staircase. The flagstone steps were very wet, and although the first and second sets of stairs had handrails, the third set—where Mr. Jacques fell—did not. Mr. Jacques suffered a ruptured patella tendon and was non-ambulatory and in extreme pain for the remaining four days of his honeymoon. Upon return to California, the tendon was surgically repaired at the orthopedic Kaiser clinic in South San Francisco (First Amd. Compl. ¶ GN–1).

***2** The second incident occurred two months later, while Mr. Jacques was wearing Medical Technology's orthopedic knee brace to stabilize his knee after the above-described injury. "While descending some stairs in his back yard, he at one point partially shifted his weight to the injured knee, causing the metal strap which holds the top and bottom portions of the knee brace together to bend, which in turn caused him to fall." His patella tendon re-ruptured and required another surgery (First Amd. Compl. Attachment Prod. L–1).

Plaintiffs assert three claims for relief: (1) general negligence against Hyatt, (2) premises liability against Hyatt, and (3) products liability against Medical Technology. Mr. Jacques seeks damages for the physical injury, pain and suffering, emotional distress, anxiety, and wage loss; Mrs. Jacques seeks damages for loss of consortium. Plaintiffs' complaint was first filed in San Mateo County Superior Court in June 2011, and an amended complaint was filed in September 2011 to add the products liability claim against Medical Technology.

On November 4, 2011, defendant Medical Technology removed the action to federal court pursuant to 28 U.S.C. 1332, 1441, and 1446. There is complete diversity among the parties, and Medical Technology asserts that based on the nature of the purported incidents and damages, and confirmation from plaintiffs' attorney, the amount in controversy exceeds $75,000, exclusive of interest and costs (Notice of Removal ¶¶ 5–9, 11). Medical Technology was served with the first amended complaint and summons on or about October 6, 2011, and Hyatt was served on or about October 5, 2011, therefore, removal was timely (*see id.* ¶ 10). Hyatt consented to removal and Medical Technology served all parties with notice on November 17, 2011 (Dkt. No. 9).

Hyatt now moves to sever for misjoinder of parties, and to dismiss or transfer for improper venue.

ANALYSIS

This order addresses two motions: (1) Hyatt's motion to sever claims against Hyatt and Medical Technology and (2) Hyatt's motion to dismiss or transfer for improper venue.

1. MOTION TO SEVER.

Hyatt moves to sever the claims against Hyatt and Medical Technology because it contends that the claims did not arise out of the same transaction, occurrence, or series of transactions or occurrences. Medical Technology and plaintiffs oppose the motion.

As set forth in FRCP 20(a)(2), multiple defendants may be joined together in one action if "(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action." "Although the specific requirements of Rule 20 ... may be satisfied, a trial court must also examine the other relevant factors in a case in order to determine whether the permissive joinder of a party will comport with the principles of fundamental fairness." *Desert Empire Bank v. Ins. Co. of N. Am.,* 623 F.2d 1371, 1375 (9th Cir.1980). Such factors may include judicial economy, prejudice, and whether separate claims require different witnesses and documentary proof. *SEC v. Leslie,* No. C 07–3444, 2010 WL 2991038, at *4 (N.D.Cal. Jul.29, 2010) (Fogel, J.). The FRCP 20(a) requirements and additional fundamental fairness factors will be considered in turn as follows.

A. Same Transaction or Occurrence.

***3** "The Ninth Circuit has interpreted the phrase 'same transaction, occurrence, or series of transactions or occurrences' to require a degree of factual commonality underlying the claims." Typically, this means that a party "must assert rights ... that arise from related activities—a transaction or an occurrence or a series thereof." *Bravado Int'l Grp. Merch. Servs. v. Cha,* 2010 WL 2650432, at *4 (C.D.Cal. Jun.30, 2010) (citing *Coughlin v. Rogers,* 130 F.3d 1348, 1350 (9th Cir.1997)). District courts have reached different conclusions regarding whether overlapping liability alone is sufficient to satisfy FRCP 20, and our court of appeals has not yet decided this issue. *See Oda v. United States,* No. CV 11–04514–PSG, 2012 WL 692409, at *1–2 (N.D.Cal. Mar.2, 2012) (Grewal, Mag. J.) (describing two lines of cases).

Hyatt argues that the claims against Hyatt and Medical Technology do not arise out of the same transaction, occurrence, or series of transactions or occurrences because the only thing they have in common is the location of the injury—Mr. Jacques's knee. The first injury was on Hyatt's property in Maui while the second was in California two months later, and the injuries allegedly occurred in a different manner (*see* Br. 3–4).

In contrast, plaintiffs contend that the claims arise out of the same "series of occurrences" because the injuries and damages overlap, and the evidence submitted will be relevant to both. Plaintiffs also anticipate that if this motion to sever is granted, defendants will employ an empty-chair defense "because this case involves injury, then re-injury, to the same body part in exactly the same way, and because the second injury would not have occurred but for the first" (Jacques Opp. 1–2). Plaintiffs argue that these two injuries to Mr. Jacques's knee are causally related, not coincidental (*id.* 2). Medical Technology puts forth similar arguments, pointing to the facts that the injuries occurred close in time, to the same plaintiff and part of his knee, and that Mr. Jacques would not have been wearing the knee brace in the second incident, but for the accident involving Hyatt (Medical Technology Opp. 6).

Hyatt oversimplifies the issue by arguing that the only thing the claims have in common is an injury to Mr. Jacques's knee. The rule simply requires "related activities" and "similarity in the factual background of a claim." *See Bravado,* 2010 WL 2650432, at *4. Plaintiffs have set forth several relationships between the accidents and factual similarities underlying the claims, specifically: that the injury and re-injury occurred to the same body part in exactly the same way, the second accident would not have occurred but for the first, and there are overlapping damages (Jacques Opp. 1–2). Plaintiffs' allegations therefore meet the threshold requirement.

The instant action is distinguishable from *Oda,* where although the two vehicular accidents "allegedly contribute[d] to [plaintiff]'s current injuries," the events were "wholly distinct" and were not causally related. *See Oda,* 2012 WL 692409, at *2. Here, Mr. Jacques's current injuries allegedly stem from two accidents that are alleged to be causally related. Unlike in *Oda,* Mr. Jacques's second accident allegedly would not have occurred but for the first accident, at least in part because he would not have been wearing the knee brace at issue (*see* Jacques Opp. 1; Medical Technology Opp. 6).

***4** The instant action is more analogous to *Wilson,* where the plaintiff sued for products liability and subsequent medical malpractice after an accident involving a dyeing machine:

> Although Dr. Schoenbach's treatment of [plaintiff]'s finger is a separate proposition from the injury of his finger in the machine, the two incidents are part of a series of occurrences which have allegedly contributed to the current condition of [plaintiff]'s finger. Common questions of law and overlapping questions of fact will arise both with regard to the cause of [plaintiff]'s disability and the extent of his damages.

Wilson v. Famatex GmbH Fabrik Fuer Textilausruestungsmaschinen, 726 F.Supp. 950, 951–52 (S.D.N.Y.1989). So too here. Because the injuries occurred only two months apart, the first accident was allegedly a causal factor in the second, and both incidents allegedly contributed to the current condition of Mr. Jacques's knee, this order finds the threshold "series of occurrences" requirement has been met.

B. Common Questions of Law or Fact.

Hyatt argues that in addition to the claims stemming from different incidents, the claims against Hyatt are based on negligence and premises liability, while the claims against Medical Technology are based on products liability (Br.4). Medical Technology counters by pointing to common questions of law such as plaintiffs' comparative negligence and that the claims against each defendant involve negligence, as well as multiple common questions of fact:

> Mr. Jacques' preexisting medical, mental, emotional and physical conditions that may have contributed to the incidents and/or his claimed damages; the circumstances surrounding Mr. Jacques' alleged initial injury and the circumstances surrounding his subsequent re-injury;

> the nature and extent of Mr. Jacques' alleged injuries and damages; the nature and extent of Mr. Jacques' injuries that could have continued on even had no second accident occurred and the extent of any exacerbation of those claimed injuries by the second accident; the circumstances involved in the initial surgery and pre and post-surgical treatment; the alleged mental and emotional injuries and potential contributing factors, if any such injuries exist; and facts relating to the alleged damages claims, including the purported wage loss claim and pre-existing contributing factors.

(Medical Technology Opp. 7). Medical Technologies also puts forth the argument that Hyatt may be liable for injuries and damages arising from the second accident caused or contributed to by the first accident, and analogizes to cases where medical malpractice during subsequent treatment was a reasonably foreseeable result of an original tortfeasor's act (*see id.* 7–8).

FRCP 20 requires at least one common question of law or fact. At a minimum, preexisting conditions, contributing factors, and the nature and extent of Mr. Jacques's injuries are a common questions of fact for both claims. Each of the defendants, moreover, will surely be pointing to the other as the primary cause of the ultimate injuries. Accordingly, plaintiffs' complaint meets the second threshold requirement under FRCP 20.

C. Fundamental Fairness.

***5** The remaining factors to be discussed pertain to the fundamental fairness analysis and require the defendant to show that joinder, despite satisfying the textual requirements of FRCP 20, should nevertheless be denied.

(1) Facilitation of Settlement or Judicial Economy.

Hyatt believes settlement and judicial economy will not be facilitated by keeping the claims joined because the length of time between the incidents—a mere two months—and existence of separate medical records pertaining to each incident would effectively result in two trials, one for each defendant. Hyatt contends that having defendants participate in one long trial would not make settlement any more likely.

Plaintiffs, on the other hand, argue that holding two separate trials will be inefficient because it will require physicians to testify twice, and Hyatt and Medical Technology will each likely have to testify at both trials (Jacques Opp. 2). Medical Technology similarly argues that there will be duplication of witnesses, and also that potentially different schedules for separate trials would hinder settlement (Medical Technology Opp. 8).

Largely as a result of the overlapping evidentiary matter discussed in greater detail below, this order finds that efficiency concerns weigh in favor of maintaining the claims in one action. Contrary to Hyatt's assertion, it has not shown that two separate trials will be shorter or less burdensome to the Court, parties, and witnesses; thus, this factor does not support severance.

(2) Prejudice.

Hyatt argues it will be prejudiced if severance is not granted, because of the possibility it will be found liable for incidents after the original accident, over which Hyatt had no control (Br.4). Hyatt also asserts that it will be prejudiced by the application of California law—as Hyatt notes in its motion to dismiss or transfer, California recognizes pure comparative negligence, while under Hawaii law, a plaintiff is barred from recovery if he is found to be over 50% negligent (Br.4).

Plaintiffs argue they will be prejudiced because they have limited financial resources to pursue litigation in Hawaii, and because with separate trials, each defendant may try to blame the absent defendant for all or part of the damages (Jacques Opp. 1–2; Jacques Decl. ¶ 8). Medical Technology adds that mechanisms such as jury instructions, bifurcation of issues, and other protective measures under FRCP 20(b) can prevent prejudice (Medical Technology Opp. 9).

With regard to Hyatt's concern that it may erroneously be found liable for incidents after the original accident, protective measures such as careful jury instructions will be sufficient to separate the allegations and evidence relevant to each claim, to the extent this is necessary. Hyatt has not offered any rationale for why such safeguards will not be feasible or effective.

Furthermore, Hyatt's argument raising a potential choice of law issue, which it claims may give rise to prejudice, assumes

prematurely that California law will be applied in this action (*see* Reply Br. 3). The choice of law rules for both California and Hawaii consider the interest of each jurisdiction in enforcing its laws when determining which state laws should be applied, so it is not clear that Hyatt will suffer any prejudice if the analysis proceeds under California choice-of-law rules. *Compare Downing v. Abercrombie & Fitch,* 265 F.3d 994, 1005–07 (9th Cir.2001) (California's governmental-interest test), *with Unified W. Grocers, Inc. v. Twin City Fire Ins. Co.,* 457 F.3d 1106, 1111 (9th Cir.2006) (Hawaii's modern approach).

***6** In contrast, plaintiffs would be subjected to prejudice if severance is granted. Each defendant is likely to argue that the other is responsible for Mr. Jacques's injuries. Additionally, plaintiffs have limited financial resources. Duplicative litigation in Hawaii would be unaffordable (*see* Jacques Opp. 1–2; Jacques Decl. ¶ 8). Whereas protective measures may be employed to prevent prejudice to Hyatt if necessary, the Court would be unable to construct similarly effective safeguards for plaintiffs.

Hyatt has failed to show it will suffer unavoidable prejudice if the instant action proceeds as a single lawsuit; therefore, this factor weighs against severance.

(3) Witnesses and Documentary Proof.

The parties disagree over the extent to which the claims will rely on overlapping documentary proof and witnesses. Hyatt argues that because the injury occurred in Hawaii, many of the witnesses are based in Hawaii, and that furthermore, Medical Technology will use entirely different expert testimony for its products liability claims than Hyatt will use for its personal injury claim (Br. 4; Reply Br. 2). Joining the claims in a lengthy trial would burden both witnesses and the court due to travel and scheduling (Reply Br. 2).

Mr. Jacques has submitted a declaration that Drs. Fang, Atkinson, and Richard, the doctors responsible for his orthopedic surgeries, primary care, and psychiatric care, are all located in Northern California, and that only emergency care was provided in Hawaii. Furthermore, plaintiffs have photographs of the Maui accident site, and Hyatt has since remediated the site such that it is no longer in the same condition as when the accident occurred (*see id.* ¶ 7). Mr. Jacques also alleges that he and his wife are the only known, direct witnesses to the slip and fall (*id.* ¶ 6). Medical Technology reiterates the common medical witnesses and adds that witnesses to support Mr. Jacques's wage loss and pain and suffering claims will likely be located in California (Medical Technology Opp. 10). Overlapping documentary evidence includes medical, insurance, and employment records (*ibid.*).

Although it is possible that witnesses from Hawaii will be called to testify, the majority of potential witnesses identified thus far, particularly the medical personnel responsible for treating Mr. Jacques in California after each injury, are overlapping in both claims. While Hyatt has argued that the medical records for each incident are separate, it is likely that both claims will rely on overlapping documentary evidence as to the common questions of fact discussed above, such as preexisting conditions, contributing factors, and the extent of injuries—the date of the second injury does not function as a bright line dividing the documentary evidence each claim may involve. The substantial evidentiary overlap weighs against severing the claims.

* * *

In sum, plaintiffs' complaint meets the two required elements of FRCP 20, and Hyatt fails to show that joinder does not comport with principles of fundamental fairness. Accordingly, Hyatt's motion to sever is **DENIED.**

2. MOTION TO DISMISS OR TRANSFER.

***7** Hyatt also moves to dismiss or transfer for improper venue pursuant to 28 U.S.C. 1406(a) and 28 U.S.C. 1391, or in the alternative, to transfer pursuant to 28 U.S.C. 1404(a). For the following reasons, this motion is **DENIED.**

A. Section 1406(a).

Section 1406(a) provides: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought ." 28 U.S.C. 1406(a). Hyatt argues that the Northern District of California is not the proper venue for this case, according to Section 1391(a):

> A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1)

> a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

Hyatt contends that application of Section 1391 shows venue is improper because neither defendant resides in the state of California; the events giving rise to the claim took place in Hawaii, not California; and Hyatt is not subject to personal jurisdiction in California. Hyatt is mistaken.

Venue in cases removed from state court is governed by Section 1441(a), not Section 1391 (the general venue statute). The Supreme Court explained this distinction in *Polizzi v. Cowles Magazines, Inc.,* 345 U.S. 663, 665–66, 73 S.Ct. 900, 97 L.Ed. 1331 (1953):

> Section 1391(a) limits the district in which an action may be "brought." ... This action was not "brought" in the District Court, ... the action was brought in a state court and removed to the District Court. Section 1441(a) expressly provides that the proper venue of a removed action is "the district court of the United States for the district and division embracing the place where such action is pending."

(citations omitted). Here, plaintiffs *brought* their case in San Mateo County Superior Court. The Northern District of California embraces San Mateo County, therefore, the proper venue of this removed action is the United States District Court for the Northern District of California.

Since Section 1406(a) only pertains to actions when venue is improper, it is inapplicable to the instant action. Likewise, Hyatt's arguments regarding choice of law following a 1406(a) transfer are irrelevant (*see* Br. 4).

In its reply brief, Hyatt "maintains that this action is improperly venued and should be transferred regardless of its removal from state court" (Reply Br. 1). Not so. As stated, venue is proper pursuant to Section 1441(a), and thus, Hyatt's motion will be construed solely as a motion for discretionary transfer pursuant to Section 1404(a).

B. Personal Jurisdiction.

***8** In arguing venue is improper under Section 1391, Hyatt recites our court of appeals's standard for exercising personal jurisdiction over an out-of-state defendant and asserts that "specific jurisdiction in the Northern District of California cannot be extended to Hyatt Maui in this case. Furthermore, Hyatt Maui's contacts with the state of California do not meet the threshold of the 'minimum contacts' test for general jurisdiction" (Br.2–3). Because the motion does not clearly indicate that it is a motion to dismiss for lack of personal jurisdiction, this order does not construe it as such. Moreover, although Hyatt objected to venue in its answer filed in state court, it did not object to personal jurisdiction, nor did it seek leave to so amend its state-court answer, which became its answer in federal court after it consented to removal (*see* FRCP 81(c)(2); Medical Technology Opp. 5; Pappas Decl. Exh. D). Because Hyatt failed to include an objection to personal jurisdiction in a responsive pleading, it has waived the defense. FRCP 12(h)(1)(B)(ii).

C. Section 1404(a) Discretionary Transfer.

This order now assesses Hyatt's motion under the proper statute, 28 U.S.C. 1404. Section 1404 states that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. 1404(a).

In determining whether to grant a motion to transfer pursuant to Section 1404(a), courts may consider: (1) the state that is most familiar with the governing law; (2) the plaintiff's choice of forum; (3) the respective parties' contacts with the forum; (4) the contacts relating to the plaintiff's claim in the chosen forum; (5) the difference in the costs of litigation between the two forums; (6) the availability of compulsory process to compel attendance of unwilling non-party witnesses; and (7) the ease of access to sources of proof. *Jones v. GNC Franchising, Inc.,* 211 F.3d 495, 498–99 (9th Cir.2000). Courts may also consider, "the administrative difficulties flowing from court congestion and [the] local interest in having localized controversies decided at home." *Decker Coal Co. v. Commonwealth Edison Co.,* 805 F.2d 834, 843 (9th Cir.1986) (quotation omitted). "The defendant must

make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum." *Ibid.* (citation omitted).

As an initial matter, Hyatt does not meet its burden to show that the action could have been brought in the District of Hawaii. It asserts that all of the events giving rise to the claims occurred in Hawaii, but does not demonstrate that the District of Hawaii would have subject-matter jurisdiction over the claims or personal jurisdiction over defendant Medical Technology. Even were Hyatt able to show that the action could have been brought in the District of Hawaii, the following factors weigh against transfer, and this order finds that Hyatt has not made a strong enough showing of inconvenience to deny plaintiffs' choice of forum.

***9** *First,* Hyatt appears to concede that "both the District of Hawaii and the Northern District of California are in the Ninth Circuit and each should be similar [sic] with the other's applicable law" (Br.6). In addition, the only potential difference in governing law that Hyatt has identified is the manner in which California and Hawaii apply the comparative fault rule, and either state's rule will be straightforward to apply here (*see* Jacques Opp. 6).

Second, plaintiffs have filed suit in their home forum and deference should be given to this choice. *See Jones,* 211 F.3d at 498–99. Hyatt contends that plaintiffs' choice of forum "is entirely unrelated to the events that took place in Hawaii which led to [Mr. Jacques]'s injury" (Br.6). The reasons for plaintiffs' choice of forum are not at issue in this factor. Even if they were, plaintiffs chose to file the lawsuit in California for financial and pragmatic reasons, and this order must give weight to plaintiffs' preference (*See* Jacques Decl. ¶ 8; Decker, 805 F.2d at 843). This factor weighs heavily in favor of keeping the action in the Northern District of California.

Third, the respective parties' contacts with the forum does not weigh significantly in either direction. While the plaintiffs have close contacts with the chosen forum, the defendants do not.

Fourth, the contacts relating to plaintiffs' claim in the chosen forum also do not weigh strongly for or against transfer, because some of the contacts related to the claim occurred in the chosen forum (the medical treatment after both injuries, and the incident in plaintiffs' yard) and some contacts occurred in the proposed transfer forum (the initial incident in Maui). On the whole, this factor weighs slightly in favor of maintaining the action in California, because plaintiffs have identified more witnesses in the chosen forum than Hyatt has suggested will be necessary in Hawaii, and more of the events in question—Mr. Jacques's medical care in particular—took place in California.

Fifth, as to the difference in the costs of litigation between the two forums, Hyatt offers insufficient information to show that the action would be less costly to litigate in Hawaii. Hyatt asserts that it would be more "convenient" to do so, and would be unfair to subject witnesses and Hawaii citizens (in particular, an expert witness on Hawaiian safety codes) to the extra cost of travel to California (Br. 6; Reply Br. 3). On the other hand, plaintiffs state that they cannot afford to pay the costs of: (1) having the treating physicians and experts travel to testify in Hawaii, (2) having their attorney travel or hiring another attorney in Hawaii; or (3) traveling to Hawaii themselves (Jacques Decl. 2). While Hyatt insists that "plaintiff has already demonstrated that he is capable of traveling to Hawaii because that is where he was when the alleged incident occurred," plaintiffs indicate their previous trip "was for [their] honeymoon and was a one-time event," and that they cannot afford another trip (*see* Br. 6; Jacques Decl. 2). Hyatt has not shown that transfer will do any more than "merely shift rather than eliminate the inconvenience" to the plaintiffs and Medical Technology. *See Decker,* 805 F.2d at 843. This factor does not weigh in favor of transfer to Hawaii.

***10** *Sixth,* compulsory process is available for Hyatt's employees as agents of a party, but anticipated non-party witnesses such as Mr. Jacques's physicians cannot be compelled to testify more than 100 miles from their places of residence and employment pursuant to FRCP 45(c)(3)(A)(ii) (*see* Jacques Opp. 6; Medical Technology Opp. 9). Although it is unknown whether the physicians will be unwilling witnesses, and Hyatt may identify non-employee witnesses for whom compulsory process will not be available, at present this factor nevertheless weighs slightly in favor of maintaining the action in California.

Seventh, the ease of access to sources of proof does not weigh in favor of transfer. Although Hyatt contends that access to its stairwell and Hawaiian experts is important, the same is true regarding plaintiffs' stairs in their backyard, and the experts can come to California at Hyatt's expense. In addition, plaintiffs allege that Hyatt has remediated the stairwell, and as such, the site is no longer in the same condition as it was at the time of the accident (Jacques Opp. 6). Furthermore, the majority of documentary evidence pertaining to Mr. Jacques's medical treatment is in California, and it is likely to be less

burdensome to transport any records related to the emergency care provided in Hawaii.

Eighth, Hyatt argues that "the District of Hawaii court system is certainly no more congested than that of the District of Northern California [sic], which is in a much larger and more populous state" (Br.6). Hyatt offers no supporting authority, and there is no reason to believe the claims will be adjudicated more quickly in Hawaii, particularly as this Court is already familiar with the matter and has established deadlines for case management going forward. Lastly, Hyatt raises the point that "as tourism is a major industry in Hawaii, Hawaiian courts have an interest in a case that involves both a local business and a potential safety issue involving visitors to Hawaii" (*ibid.*). This is a fair concern, however, in light of the preceding factors, it is insufficient to justify transfer.

In sum, the factors weigh in favor of maintaining the action here in the Northern District of California.

CONCLUSION

For the foregoing reasons, defendant Maui Hyatt's motion to sever is **DENIED,** and its motion to dismiss or transfer is **DENIED.** The hearing scheduled for July 25 is **VACATED.**

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 3010969

2016 WL 2885862
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Anthony KONTOS, Plaintiff,
v.
UNITED STATES of America, et al., Defendants.

Case No. EDCV 13-01398 DDP (KESx)
|
Signed 05/17/2016

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ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT TO REVIVE FTCA CLAIM

[Dkt. No. 75]

DEAN D. PREGERSON, United States District Judge

***1** Presently before the Court is Plaintiff Anthony Kontos's Motion for Leave to File an Amended Complaint. (Dkt. No. 75.) Plaintiff recently found counsel to represent him, leading to the filing of this Motion in an attempt to revive Plaintiff's Federal Torts Claim Act ("FTCA") cause of action against the United States. (Id.) The Government opposes this motion. (Dkt. No. 78.) Finding this matter suitable for decision without oral argument, the Court adopts the following Order based on the parties' submissions.

I. BACKGROUND

This case began as a civil rights case filed by pro se Plaintiff Anthony Kontos. (See generally Compl., Dkt. No. 4.) Plaintiff asserted claims against various defendants, including the United States, based on alleged violations of his Eighth Amendment rights. (Id.) Plaintiff alleged he received inadequate medical care when he was in federal custody. (Id.) This medical care was necessary because Plaintiff suffered a debilitating eye and face injury after another inmate threw a rock at Plaintiff's eye. (Id.)

Plaintiff acknowledged in his original complaint that he was unclear on the exact legal and procedural process required to make his claims, stating that he was pursuing an administrative claim with the Federal Bureau of Prisons ("BOP"). (Id. at 2.) Plaintiff attached his FTCA Form 95 Tort Claim to his complaint. (Id.) Plaintiff also stated that he filed the complaint so as to make sure he would not be time barred for his tort and Bivens claims. (Id. at 2-3.)

The Magistrate Judge screening Plaintiff's pro se complaint issued a detailed order dismissing the complaint with leave to amend, explaining how and what Plaintiff had to amend. (See generally Order, Dkt. No. 2.) Plaintiff filed a First Amended Complaint thereafter. (Dkt. No. 11.) This was also dismissed with leave to amend based on the Magistrate Judge's instructions. (Dkt. No. 12.) Plaintiff then filed a Second Amended Complaint. (Dkt. No. 13.) Then, the Magistrate Judge ordered Plaintiff to serve the parties the Magistrate understood to be the three remaining Defendants: Sterling, Quinn, and Ortiz. (Dkt. No. 15.) After some issues with service, Plaintiff served these three individuals, as well as serving the U.S. Attorney General, the U.S. Attorney in Los Angeles, California, and the prison where the events at issue in the case occurred. (Dkt. Nos. 21, 22.)

The United States and the three individual Defendants filed several ex parte applications for an extension of time to respond to the complaint. (Dkt. Nos. 24, 31, 39.) The Defendants then filed a motion to dismiss under Federal Rule of Civil Procedure ("FRCP") 12, arguing in part that the United States should be dismissed from the case because Plaintiff had no FTCA claims in the Second Amended Complaint. (Mot. Dismiss, Dkt. No. 38, at 11-12.) Plaintiff opposed the Motion, stating that he was confused about the United States' argument because "at least to Kontos this Court has made it abundantly clear the United States already was protected by sovereign immunity" and that the Court "explicitly instructed [Plaintiff] that he was not to sue the United States Government" in the Order dismissing Plaintiff's original complaint. (Opp'n, Dkt. No. 43, at 18-20.) Plaintiff stated he thought this order was in error and that he "would have the Defendants know that had the Court not advised him thusly that he would have vigorously sought to sue the United States in this instant matter and should this court allow him to

do so, Kontos would make any amendment or claim necessary to do so forthwith." (Id. at 19-20; see also id. at 14.)

***2** The Magistrate Judge issued a Report and Recommendation on the motion that did not address the United States. (Dkt. No. 49.) Both Plaintiff and Defendants filed objections to the Report. (Dkt. Nos. 54, 55.) This Court accepted the findings and recommendations of the Magistrate Judge in an Order on October 15, 2015. (Dkt. No. 61.) This Order (1) granted the motion to dismiss as to Defendant Sterling with leave to amend; (2) denied the motion as to Defendants Quinn and Ortiz; and (3) ordered Quinn and Ortiz to file an answer and Plaintiff to amend the complaint to a Third Amended Complaint against Sterling. (Id.)

The Magistrate Judge granted Defendants extensions of time to answer the complaint. (Dkt. No. 65.) They filed their answer on December 14, 2015. (Dkt. No. 68.) Thereafter, the case was referred to settlement. (Dkt. No. 69.) In February 2016, Plaintiff obtained counsel to represent him. (See Dkt. No. 70 (Pro Hac Vice Application).) Plaintiff, newly represented, filed a Motion for Leave to File an Amended Complaint to Revive FTCA Claim on March 17, 2016. (Dkt. No. 75.) The case was then referred to this Court for proceedings. The Government opposed the motion. (Dkt. No. 78.)

II. LEGAL STANDARD

FRCP 15(a) provides for leave to amend a pleading in two ways: (1) as a matter of right and (2) with the party's consent or the court's permission. Fed. R. Civ. P. 15(a). "The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Leave to amend should be granted with "extreme liberality" in order "to facilitate decision on the merits, rather than on the pleadings or technicalities." United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981) (internal quotation omitted). However, "when a district court has already granted a plaintiff leave to amend, its discretion in deciding subsequent motions to amend is particularly broad." Chodos v. West Publ'g Co., 292 F.3d 992, 1003 (9th Cir. 2002) (internal quotation omitted).

Despite the liberal amendment standard of FRCP 15(a), leave to amend "is not to be granted automatically." Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990). The court "considers the following five factors to assess whether to grant leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether plaintiff has previously amended his complaint." In re W. States Wholesale Nat. Gas Antitrust Litig., 715 F.3d 716, 738 (9th Cir. 2013) (internal quotation omitted).

"[T]he general rule that parties are allowed to amend their pleadings ... does not extend to cases in which any amendment would be an exercise in futility or where the amended complaint would also be subject to dismissal. Futility alone can justify a court's refusal to grant leave to amend." Novak v. United States, 795 F.3d 1012, 1020 (9th Cir. 2015) (internal quotation and citation omitted). "However, a proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988).

III. DISCUSSION

A. Plaintiff's Motion

Plaintiff argues that the Court should grant him leave to amend his complaint and revive his original FTCA claim. (Mot. Amend at 1.) Plaintiff's two-year pro se process of writing multiple complaints as ordered by the Magistrate Judge led him to drop his FTCA claims through confusion, despite his original inclusion of the claims in order to avoid a time bar and his subsequent exhaustion of the administrative procedures. (Id.) Plaintiff acknowledges that the First Amended and Second Amended Complaints do not specifically list the FTCA claims after the Magistrate Judge's first order to amend the complaint. (Id. at 2.) But the complaints do include the United States as a Defendant and Plaintiff did serve the complaint on the United States. (Id.) Further, in the Motion to Dismiss, the United States is listed as a Defendant and Plaintiff made arguments about his FTCA claim in his opposition. (Dkt. No. 43, at 14, 18-20.) The Court's October 29, 2014 Minute Order regarding Plaintiff's question about his FTCA claim demonstrates that Plaintiff, as a pro se Plaintiff amending his complaints various times, was confused as to the status of his FTCA claim, but never intended to waive it. (See Mot. Amend at 3.)

***3** Plaintiff argues that he properly filed his administrative claim with the BOP, which he attached to his original complaint. (Id. at 4.) However, Plaintiff did not state in his pro se original complaint that six months had passed since Plaintiff filed his administrative complaint. (Id.) Plaintiff argues that the six-month time period had been completed during the time that this case was pending and going through two years of complaint amendments. (Id. at 4-5.) Plaintiff claims that there is no prejudice to the United States here

because the Government was always named as a Defendant, the facts underlying the causes of action are the same, and service was completed on the United States. (Id.) Thus, injustice to Plaintiff would be avoided and no prejudice done to Defendant United States if Plaintiff is allowed to amend his complaint and reassert his FTCA claims. (Id. at 6.)

B. Defendant's Opposition

The United States argues that any amendment would be futile because Plaintiff's FTCA claims are time barred; thus, leave to amend should be denied. (Opp'n at 1.) The FTCA has both an administrative exhaustion requirement (28 U.S.C. § 2675(a)) and a statute of limitations requirement (28 U.S.C. § 2401(b)). According to Defendant, these requirements provide the window for filing a suit under the FTCA for a common law tort action based on the actions of federal employees in the scope of their employment. (See Opp'n at 1.) Under this scheme, a plaintiff must first present the claim administratively; until the agency finally denies the claim, no civil action can be filed. (Id. at 2.) After the claim is denied, the action must be filed in federal court within six months or the cause of action is barred. (Id.)

Here, Defendant argues, Plaintiff submitted his administrative tort claim on June 21, 2013. (Id. (citing Dkt. No. 4 at 11.) Thus, Defendant argues that Plaintiff had to wait until his claim was denied by the agency or at least six months had passed before filing in district court. (Id. (citing § 2675(a)).) Plaintiff filed his original complaint on August 20, 2013, which was too soon under the administrative exhaustion requirement. Plaintiff's next filings were his First Amended Complaint on October 24, 2013, and his Second Amended Complaint on December 5, 2013. However, six months after Plaintiff presented his administrative claim would have been December 21, 2013, and thus all these complaints were still premature. (Id.)

On May 14, 2014, the BOP denied Plaintiff's administrative tort claim, and thus he had six months from this date to file his complaint under the FTCA in federal court. (Id. at 3.) This window closed on November 14, 2014. (Id.) Plaintiff referenced his FTCA claim in his opposition to Defendants' Motion to Dismiss, but indicated that he did not have an active FTCA claim at that time. (Dkt. No. 43, at 14, 18-20.) Defendant argues Plaintiff could have sought leave to amend his complaint to add the FTCA claim as his claim was now administratively exhausted. (Opp'n at 3.) However, Plaintiff failed to do so and thus the claim is now time barred. (Id.)

Further, Defendant argues that Plaintiff is not subject to equitable tolling. (Id.) Defendant acknowledges that equitable tolling does apply to the FTCA statute of limitations. (Id. at 4 (citing United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1638 (2015)).) However, Defendant argues that equitable tolling does not apply in this case because Plaintiff cannot establish he pursued his rights diligently or that extraordinary circumstances occurred here to prevent Plaintiff from timely filing. (Id. at 4-5 (citing Menominee Indian Tribe of Wisc. v. United States, 136 S. Ct. 750 (2016)).) The Government argues that lacking legal knowledge or misunderstanding the Magistrate Judge's orders are insufficient reasons to show cause for equitable tolling. (Id.)

C. Plaintiff's Reply

***4** In Reply, Plaintiff asserts that equitable tolling is applicable here and is widely available in FTCA suits under the Supreme Court's decision in Kwai Fun Wong. (Reply, Dkt. No. 80, at 4-6.) Plaintiff argues that his facts are similar to the plaintiff in Kwai Fun Wong because that plaintiff also missed the statute of limitations due to multiple procedural filings and a pending motion. (Id. at 6.) Plaintiff argues that the Menominee Indian Tribe case is dissimilar to his case because there is no indication that Plaintiff was anything other than diligent in pursuing his rights. (Id. at 6-8.) Plaintiff argues that he did not make mistakes like the Tribe had (it failed to present its claim based on a legal mistake); instead, Plaintiff had included the FTCA claim and said he intended to preserve it in his opposition to the Motion to Dismiss. (Id. at 6-8; see also Opp'n, Dkt. No. 43, at 19-20.) Most importantly, Plaintiff claims, there is no indication or argument that the Government would be prejudiced by allowing equitable tolling in this instance. (Reply at 8-9.)

D. Court's Analysis

The Court holds that leave to amend should be granted here. The Government has been aware of this case since it was properly served in 2014. Plaintiff complied with the FTCA's administrative exhaustion requirement and had this case pending when that administrative procedure was completed. The Government was a defendant in this case at that time, as indicated in its arguments in the Motion to Dismiss. There is no indication that there would be any prejudice to the United States by allowing Plaintiff leave to amend because the United States has been on notice of this cause of action and had a chance to address the claim in the administrative proceedings.

Further, in his Opposition to Defendants' Motion to Dismiss, Plaintiff explicitly asked for leave to amend in order to add the FTCA claim if that was what was needed to preserve it. (Dkt. No. 43, at 19-20 ("Kontos would have the Defendants know that had the Court not advised him thusly that he would have vigorously sought to sue the United States in this instant matter ***and should this court allow him to do so, Kontos would make any amendment or claim necessary to do so forthwith***.") (emphasis added).) The Magistrate Judge's Report and Recommendation did not address this point or the United States' part in the case; neither did this Court's Order accepting the findings and recommendations of the Magistrate Judge. During the time that Plaintiff was waiting for the Court's order on these matters, Plaintiff's FTCA statute of limitations expired before he could amend his complaint and allege his exhausted claim. This is similar to the facts in Kwai Fun Wong.

Thus, the doctrine of equitable tolling is appropriate in this case. There is no indication that Plaintiff was anything other than diligent in pursuit of this action. These kinds of suits are challenging for all pro se plaintiffs faced with strict procedural requirements and challenging rules of law that control who and how to sue. Here, Plaintiff worked with the Magistrate Judge to perfect his complaint and to respond to the Defendants' Motion to Dismiss. The Government has not shown that Plaintiff failed to assert his claim based on a nonbinding legal decision as was found in the Menominee Indian Tribe case, or made some other negligent legal error. Therefore, to the extent necessary, the Court equitably tolls Plaintiff's FTCA statute of limitations so that Plaintiff can reassert the FTCA cause of action now.

Now that Plaintiff has counsel, Plaintiff should be allowed to amend his complaint, particularly as no Scheduling Order has been issued in this case, there has been no undue delay, there is no showing of prejudice to the Government, there is no allegation of bad faith, and amendment would not be futile.

IV. CONCLUSION

Therefore, the Court GRANTS Plaintiff thirty days leave to amend his complaint to a Third Amended Complaint. Plaintiff may reassert his FTCA claim. After the filing of the Complaint, the Court orders the parties to attend settlement proceedings pursuant to the Court's rules.

***5** IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 2885862

End of Document

2014 WL 12596716
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

The NORTH FACE APPAREL CORP., and VF Outdoor, Inc., Plaintiffs,
v.
Eyal Allen DAHAN, Individually and d/b/a/ Cavalier, Cavalier Sportswear, Cavalier Apparel, Cavalier Closeouts, and Le Cavalier Jeans & Sportswear; Cavalier Sportswear, Inc., a California corporation; Cavalier Closeouts, Inc., a California corporation, d/b/a Cavalier, Inc., Cavalier Sports, Inc., Cavalier Apparel, Inc.; Does 1–10, inclusive, Defendants

CASE NO. CV 13–04821 MMM (MANx)
|
Signed 03/14/2014

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ORDER GRANTING PLAINTIFFS' MOTION FOR LEAVE TO AMEND

MARGARET M. MORROW, UNITED STATES DISTRICT JUDGE

***1** On July 3, 2013, North Face Apparel Corp. and VF Outdoor, Inc. ("plaintiffs") filed this action against Eyal Allen Dahan, Cavalier Sportswear, Inc., Cavalier Closeouts, Inc., Cavalier Sports, Inc., and Cavalier Apparel, Inc. (collectively "defendants"). [1] On December 6, 2012, plaintiffs filed a motion for leave to file a first amended complaint seeking to join three new defendants. [2] Defendants oppose plaintiffs' motion. [3] Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7–15, the court finds North Face's motion appropriate for decision without oral argument. The hearing calendared for March 17, 2004 is therefore vacated, and the matter is taken off calendar.

1 Complaint, Docket No. 1 (July 3, 2013).

2 Motion for Leave to File First Amended Complaint ("Motion"), Docket No. 28 (Dec. 6, 2013).

3 Opposition to Plaintiffs' Motion for Leave to File First Amended Complaint ("Opposition"), Docket No. 30 (Feb. 24, 2014).

I. BACKGROUND

A. Defendants' Request for Judicial Notice

Defendants ask that the court judicially notice three documents related to the motion: [4] (1) the complaint filed by plaintiffs against defendants in a prior action; [5] (2) plaintiffs' voluntary dismissal of that complaint; [6] and (3) a complaint filed by plaintiffs in a third action against different defendants. [7] "The court may judicially notice a fact that is not subject to reasonable dispute because it is: (1) generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FED.R.EVID. 201(b).

4 Request for Judicial Notice ("RJN"), Docket No. 30–3 (Feb. 24. 2014).

5 *Id.*, Exh. A.

6 *Id.*, Exh. C.

7 *Id.*, Exh. B.

Under this standard, the court may take judicial notice of pleadings and court orders filed in related actions. See *Reyn's Pasta Bella, LLC v. Visa USA, Inc.* 442 F.3d 741, 746 n. 6 (9th Cir. 2006) (taking judicial notice of pleadings, memoranda, and other court filings); *Asdar Group v. Pillsbury, Madison & Sutro*, 99 F.3d 289, 290 n.1 (9th Cir. 1996) (court may take judicial notice of the pleadings and court orders in earlier related proceedings); *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (a court may take judicial notice "of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue"). The court may not, however,

take judicial notice of the truth of the pleadings' contents. See *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001) (holding that the district court erred in taking judicial notice of disputed matters); *Estate of Cartledge v. Columbia Cas. Co.*, No. CIV. 2:11–2623 WBS GGH, 2011 WL 5884255, *2 (E.D. Cal. Nov. 23, 2011) ("To the extent that defendant requests that the court take judicial notice that the Complaint in the underlying state action was filed, the request is granted. However, the court will not take judicial notice of any disputed facts contained in the document" (internal citation omitted)).

***2** Therefore, the court takes judicial notice of pleadings plaintiffs reference, and will consider them in deciding plaintiffs' motion.

B. Factual Background

Plaintiffs allege that since 1968, The North Face has been a leading producer of high-quality outdoor apparel, outerwear, recreational equipment, and accessories, including fleece jackets, all of which are manufactured, advertised, marketed, and sold under various trademarks and trade dresses. [8] North Face is the owner, and VF Outdoor the authorized licensee, of various federally registered trademarks, including Registration Nos. 983,624; 2,097,715; 3,538,773; 1,030,071; 2,897,197; and 3,294,604. [9] Five of these trademarks are incontestable under 15 U.S.C. § 1065. [10]

8 *Id.*, ¶ 17.

9 *Id.*, ¶ 18.

10 *Id.*, ¶ 21.

Plaintiffs allege that their continuous and worldwide use of the marks has enabled them to achieve worldwide renown in the outdoor performance apparel, casual apparel, outdoor recreational equipment, and footwear markets. [11] They assert that they have spent substantial time, money, and other resources developing, advertising, and otherwise promoting the trademarks, [12] including hundreds of millions of dollars in advertising over the past five years, and that they have, in this manner, generated billions of dollars in sales. [13] As a result of these efforts, plaintiffs contend, the marks are among the most popular in the world, and are widely recognized and exclusively associated by consumers, the public, and the trade with high quality products offered by plaintiffs. [14]

11 *Id.*, ¶ 23.

12 *Id.*, ¶ 24.

13 *Id.*, ¶ 28.

14 *Id.*, ¶ 24.

Plaintiffs allege that defendants are engaged in advertising, promoting, importing, distributing, selling, and/or offering for sale products bearing logos, source-identifying indicia, and design elements that infringe plaintiffs' marks. [15] They contend defendants are responsible for the sale of at least 15,966 fleece jackets bearing counterfeit reproductions of plaintiffs' marks; the same quantity of genuine merchandise purportedly has a retail value of $2,634,390. [16] The counterfeit goods were allegedly procured by Dahan's brother for resale and distribution by defendants. [17] Defendants allegedly sold the infringing products to other stores, including Factory Connection LLC ("Factory Connection") and Your Call Apparel and Distribution, LLC ("Your Call"). [18]

15 *Id.*, ¶ 29.

16 *Id.*, ¶ 30.

17 *Id.*, ¶ 10.

18 *Id.*, ¶¶ 37, 39–41.

On March 28, 2013, plaintiffs filed a complaint in the Middle District of North Carolina against Eyal Dahan; his brother, Jason Dahan; Cavalier Sportswear, Inc.; Cavalier Closeouts, Inc.; and Cavalier Apparel, Inc., alleging claims for trademark counterfeiting, trademark infringement, false designation of origin and false advertising, and trademark dilution by tarnishment. [19] As in this action, the complaint pled that defendants had sold infringing merchandise to Factory Connection and Your Call. [20] After defendants filed a motion to dismiss for lack of personal jurisdiction, [21] plaintiffs voluntarily dismissed the complaint on July 1, 2013, [22] and filed this action two days later. [23] Here, plaintiffs allege claims for trademark infringement, trademark counterfeiting, trademark dilution, and false designation of origin and unfair competition under the Lanham Act, 15 U.S.C. § 1051, *et seq.* [24]

19 RJN, Exh. A.

20 *Id.*, ¶¶ 42, 46, 47.

21 The court takes judicial notice of the motion filed by defendants in the North Carolina action. See *Reyn's Pasta Bella, LLC*, 442 F.3d at 746 n. 6.

22 RJN, Exh. C.

23 Complaint.

24 *Id.*, ¶ 1.

C. Procedural History

***3** On October 7, 2013, the court issued a scheduling order.[25] The court set various case management dates including, *inter alia*, a December 6, 2013 deadline for the filing of motions or stipulations seeking to amend pleadings to add new parties, new claims or new defenses. It also set a fact discovery cut-off date of April 11, 2014.[26] On December 6, 2013, plaintiffs filed a motion for leave to file an amended complaint.[27] The proposed first amended complaint seeks to add three defendants: Factory Connection, Your Call, and Christopher J. Delao (collectively "new defendants").[28] It adds no new claims and few new factual allegations;[29] it replaces black and white images of plaintiffs' marks with color images,[30] and increases the quantity of infringing products defendants allegedly sold to 20,000 items, and plaintiffs' lost sales to $3,300,000.[31] Plaintiffs contend they chose not to join the new defendants in their original complaint in this action because they had been engaged in productive settlement negotiations with the new defendants at the time this action was filed, and believed that naming them in the complaint would be counterproductive to those efforts.[32] They also assert that the full extent of the new defendants' culpability and wrongful profits did not become known until they took Allen Dahan's deposition on November 7, 2013, four months after they filed this action and one month prior to filing the motion to amend.[33]

25 Minutes of Scheduling Conference ("Scheduling Conf."), Docket No. 26 (Oct. 7, 2013).

26 *Id.*

27 Motion.

28 *Id.*, Exh. 1 ("Proposed FAC"), Docket No. 28–1 (Dec. 6, 2013); Reply in Support of Plaintiffs' Motion for Leave to File Amended Complaint ("Reply"), Docket No. 31 (Mar. 3, 2014) at 1.

29 Compare Complaint with Proposed FAC; Reply at 7.

30 Proposed FAC, ¶ 40.

31 *Id.*, ¶¶ 36, 41, 55.

32 Motion at 7.

33 *Id.*

On November 21, 2013, plaintiffs filed a separate action in the Southern District of Florida against Rysonn USA, LLC and Sharon S. Bail, alleging direct and contributory trademark infringement, trademark counterfeiting, and trademark dilution by tarnishment.[34] The complaint in the Florida action alleges that defendants planned to import 12,000 infringing fleece jackets into the United States,[35] but includes no allegations regarding the Dahan brothers, or the Cavalier companies.

34 RJN, Exh. B.

35 *Id.*, ¶ 37.

II. DISCUSSION

A. Whether Plaintiffs Complied with Local Rule 7–3

Defendants contend that plaintiffs did not comply with Local Rule 7–3 and assert that the court should deny their motion on that basis.[36] Local Rule 7–3 provides in relevant part:

> "In all cases not listed as exempt in L.R. 16–12, and except in connection with discovery motions ... and applications for temporary restraining orders or preliminary injunctions, counsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution. The conference shall take place at least seven (7) days prior to the filing of the motion." CA CD L.R. 7–3 (emphasis original).

36 Opposition at 3.

Plaintiffs filed their motion on December 6, 2013. They should thus have conferred with defense counsel no later than November 29, 2013. Plaintiffs concede that they did not meet

and confer with defendants until December 6, 2013, the day they filed their motion. [37]

37 Reply at 4; Declaration of Stephen Shaw, Docket No. 31–1 (Mar. 3, 2014), ¶ 3.

"Local rules have the 'force of law' and are binding upon the parties and upon the court." *Professional Programs Group v. Dep't. of Commerce*, 29 F.3d 1349, 1353 (9th Cir. 1994). The failure to comply with the meet-and-confer requirement in this district, however, does not automatically require denial of a party's motion. See *ECASH Techs., Inc. v. Guagliardo*, 35 Fed. Appx. 498, 500 (9th Cir. May 13, 2002) (Unpub. Disp.) ("The Central District of California's local rules do not require dismissal of appellee's motions for failure to satisfy the meet-and-confer requirements nor do they even provide for such a harsh penalty" (citations omitted)). Moreover, defendants identify no cognizable injury or prejudice to their interests caused by plaintiffs' noncompliance with Local Rule 7–3. Consequently, the court will consider the merits of plaintiffs' motion. See *Brodie v. Bd. of Trustees of Cal. State Univ.*, No. CV 12–07690 DDP (AGRx), 2013 WL 4536242, *1 (C.D. Cal. Aug. 27, 2013) ("Defendants argue that Plaintiff's Motion should be denied because she failed to meet and confer before filing this Motion pursuant to Local Rule 7–3 and because she has not shown good cause. The Court disagrees.... CSU does not argue that Plaintiff's violation of Rule 7–3 caused it prejudice. Because CSU 'suffered no real prejudice ... the court elects to consider the motion on the merits,' " quoting *Reed v. Sandstone Properties, L.P.*, No. CV 12–05021 MMM (VBKx), 2013 WL 1344912, *6 (C.D. Cal. Apr. 2, 2013)); *Thomas v. U.S. Foods, Inc.*, No. 8:12–cv–1221–JST (JEMx), 2012 WL 5634847, *1 n. 1 (C.D. Cal. Nov. 14, 2012) ("[T]he Court will consider the merits of Plaintiff's motion. However, the Court notes the seriousness of Plaintiff's failure to follow the Local Rules, and cautions Plaintiff to comply with Local Rule 7–3 in the filing of any future motions"). [38]

38 The court notes that the court will take a dim view of future failures to abide by Local Rule 7–3, and may deny the motion for a failure to comply.

B. Legal Standard Governing Motions for Leave to Amend the Complaint to Add Parties

***4** Rule 20(a) governs permissive joinder, and identifies two prerequisites to the joinder of defendants: (1) a right to relief must be asserted against the defendants jointly, severally or in the alternative with respect to or arising out of the same transaction, occurrence or series of transactions or occurrences; and (2) some question of law or fact common to all defendants will arise during prosecution of the case. FED.R.CIV.PROC. 20(a)(2); see also *League to Save Tahoe v. Tahoe Reg. Plan Agency*, 558 F.2d 914, 917 (9th Cir. 1977); 7 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL, § 1653 (1972). Joinder is to be construed liberally "in order to promote trial convenience and to expedite the final determination of disputes, thereby preventing multiple lawsuits." *League to Save Tahoe*, 558 F.2d at 917. Indeed, under the federal rules, "the impulse is toward the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966). Nonetheless, district courts retain broad discretion in applying Rule 20. See *Desert Empire Bank v. Insurance Co. of N. Am.*, 623 F.2d 1371, 1375 (9th Cir. 1980) (even if the requirements of Rule 20 are satisfied, courts must examine other relevant factors to determine whether permissive joinder will comport with the principles of fundamental fairness); *Real Money Sports, Inc. v. Real Sports, Inc.*, No. 2:12–CV–1714 JCM (CWH), 2013 WL 3043442, *2 (D. Nev. June 14, 2013) (" 'Rule 20(a) is permissive in character, joinder in situations falling within the rule's standard is not required.' The court has discretion in regards to joinder of parties," quoting and citing 7 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE, § 1652 (3d ed. 2001)); *Wynn v. Nat'l Broad Co.*, 234 F.Supp.2d 1067, 1078 (C.D. Cal. 2002) (even where the requirements of Rule 20 are satisfied, "there is no requirement that the parties must be joined"); see also *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1296–97 (9th Cir. 2000) (whether severance is appropriate under Rule 20 lies within the sound discretion of the trial court).

Amendments to pleadings that add new parties must also satisfy Rule 15. See *Privasys, Inc. v. Visa Int'l*, No. C 07–03257 SI, 2007 WL 3461761, *1–2 (N.D. Cal. Nov. 14, 2007) (applying Rules 15 and 20 in deciding plaintiff's motion for leave to amend its complaint to add new defendants); *Towhaul Corp. v. Birrana Engineering Pty. Ltd.*, No. CV 06–35–BU–RFC–CSO, 2007 WL 837235, *1–4 (D. Mont. Mar. 15, 2007) (same); *Johnson v. United States*, No. 05–4036–JAR, 2005 WL 3470343, *3–5 (D. Kan. Dec. 19, 2005) (same). Rule 15 of the Federal Rules of Civil Procedure governs the amendment of pleadings, and mandates that leave to amend be freely granted whenever justice requires. This standard is applied with "extraordinary liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.

1990). The Ninth Circuit "differentiate[s] between pleadings attempting to amend claims [and] those seeking to amend parties," however, and Rule 15 is construed less liberally when new parties are proposed. *Union Pacific R. Co. v. Nevada Power Co.* 950 F.2d 1429, 1432 (9th Cir. 1991) ("Amendments seeking to add claims are to be granted more freely than amendments adding parties," citing *Martell v. Trilogy Ltd.*, 872 F.2d 322, 324 (9th Cir. 1989)); *Lester v. IPC Intern. Corp.*, No. CV 11–06833 JGB, 2013 WL 990583, *2 (C.D. Cal. Mar. 12, 2013).

Under Rule 15(a), leave to amend should be granted as a matter of course until a responsive pleading is filed. See *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992). Once a responsive pleading has been filed, as is the case here, the court may deny leave to amend where the proposed amendment would be futile, where it is sought in bad faith, or where it would create undue delay. See *id.* See also *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991). "[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff–Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). The test is identical to the one used to consider the sufficiency of a pleading challenged under Rule 12(b)(6). *Baker v. Pacific Far East Lines, Inc.*, 451 F.Supp. 84, 89 (N.D. Cal. 1978).

***5** Courts may also deny leave to amend when "undue prejudice to the opposing party will result." *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973); see also *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Absent prejudice, or a strong showing on the remaining factors, "there exists a presumption under Rule 15(a) in favor of granting leave to amend." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

C. Whether Plaintiffs' Proposed Amendment Satisfies Rule 20

The amended complaint easily satisfies the second prong of the Rule 20 inquiry, because it alleges a common question of fact by pleading that each defendant named in the original complaint and each new defendant named in the proposed amended complaint sold the allegedly infringing products. Specifically, plaintiffs allege that between May and December 2012, the Cavalier defendants sold at least 15,966 infringing products, generating revenue of more than $204,963; that Factory Connection sold approximately 2,504 infringing products, generating revenue of at least $125,150; [39] and that Your Call sold approximately 2,259 infringing products for combined sales of at least $65,511. [40] They assert that Delao is the owner, manager, or agent of Your Call. [41] The amended complaint also pleads issues of law common to all defendants because every claim is alleged against each defendant.

39 Proposed FAC, ¶ 43.

40 *Id.*, ¶ 45.

41 *Id.*, ¶¶ 5, 13.

Plaintiffs assert that the new defendants' alleged misconduct also satisfies the first prong because it involves the same set of transactions and occurrences as alleged in the original complaint. [42] "The Ninth Circuit has interpreted the phrase 'same transaction, occurrence, or series of transactions or occurrences ' to require a degree of factual commonality underlying the claims." *Bravado Intern. Grp. Merchandising Servs. v. Cha*, No. CV 09–9066 PSG (CWx), 2010 WL 2650432, *2, 5 (C.D. Cal. June 30, 2010) (citing *Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997)). "The rule simply requires 'related activities ' and 'similarity in the factual background of a claim.' " *Jacques v. Hyatt Corp.*, No. C 11–05364 WHA, 2012 WL 3010969, *3 (N.D. Cal. July 23, 2012).

42 Motion at 6.

Defendants who merely infringe the same trademark do not satisfy the same occurrence and transaction requirement. See *Slep–Tone Entertainment Corp. v. Ellis Island Casino & Brewery*, No. 2:12–CV–00239–KJD–NJK, 2013 WL 530905, *3 (D. Nev. Feb. 11, 2013) ("[T]he conduct in this case allegedly involved many different, totally unrelated venues and [karaoke jockeys]. Like the Mainville defendants, the only relationship between the [karaoke jockey] Defendants is that they allegedly violated the same trademark. The claims in this case do not arise from related activities and are made against separate, competing entities. Under Ninth Circuit law, this is not sufficient to establish a logical relationship which satisfies Rule 20's 'same transaction or occurrence' requirement"); *Golden Scorpio Corp. v. Steel Horse Bar & Grill*, 596 F.Supp.2d 1282, 1285 (D. Ariz. 2009) (stating that "allegations against multiple and unrelated defendants for acts of patent, trademark, and copyright infringement do not support joinder under Rule 20(a)," and collecting cases).

***6** Where there is some factual commonality among infringement claims, however, this suffices to satisfy the "same transaction, occurrence or series of transactions or occurrences" test. See *Brighton Collectibles, Inc. v. RK Texas Leather Mfg.*, No. 10–CV–419–GPC (WVG), 2013 WL 2631333, *3 (S.D. Cal. June 11, 2013) ("Typically, ... a party 'must assert rights or have rights asserted against them, that arise from related activities—a transaction or an occurrence or a series thereof' "). Thus, "claims that arise out of a systematic pattern of events and have a very definite logical relationship" meet the "same transaction" requirement. *Id.* (internal quotation marks omitted). Where one defendant has supplied infringing goods to other defendants, or multiple infringers have supplied goods to a common retailer, the claims arise out of the "same transaction" for purposes of Rule 20. *Id.* at *3–4 ("Handbag Defendants argue that the claims of infringement of handbags do not arise from the same transaction, occurrence, or series of transactions as the claims of infringement of the watches as there is no fact overlap. The only connection between the two groups is Texas Leather, the retailer that sold both watches and handbags. The products and suppliers are different.... The connecting party that satisfies the 'same transaction, occurrence or series of occurrences ' is Texas Leather. Both sets of Defendants supplied allegedly infringing products to Texas Leather to be sold in its retail store. Moreover, there is overlap between the watch and handbag claims as the same copyrighted works appear on handbags and watches. The Court concludes that the allegations as to all Defendants arise out of the 'same transaction, occurrence, or series of transactions or occurrences ' "); compare *Bravado Intern. Grp. Merchandising Servs. v. Cha*, No. CV 09–9066 PSG (CWx), 2010 WL 2650432, *5, 5 (C.D. Cal. June 30, 2010) ("Plaintiff explains that the groups in Tier One are part of the same chain of distribution. The OK Sportswear, Maggi Fashion, and Clothing Island Groups all sold shirts depicting Image No. 1, and counsel for the Clothing Island Group claimed that the Maggi Fashion Group supplied ClothingIsland.com with its infringing merchandise. However, the connection of the other tiers to this alleged transaction is too attenuated to support joinder. The groups in Tier Two allegedly sold shirts with the same images as the Maggi Fashion and Clothing Island Groups—including a shirt sold by the Eden Sports Group that depicted Image No. 2—Plaintiff fails to provide any further allegations that would connect the groups in Tier Two to the same transaction as Tier One. The groups in Tier Three are merely located in the same geographic area, and Plaintiff purports to have a 'reasonable belief' that they purchased their merchandise from each other or from a common source. Finally, Tier Four is a catch-all of non–Los Angeles vendors, and Plaintiff does not even indicate that they are selling the same shirts as the groups in Tier One, let alone that they are selling the same shirts in the chain of distribution. Plaintiff leans on its 'reasonable belief' that 'any of the other defendants might have purchased Michael Jackson shirts from [them].' ... Therefore, Plaintiff's allegations of transactional-relatedness are sufficient only as to the groups in Tier One."). See also *Waterfall Homeowners Ass'n v. Viega, Inc.*, 279 F.R.D. 586, 591, 593 (D. Nev. Jan. 30, 2012) (holding that "joinder of property damage claims against two independent product manufacturers/suppliers" satisfied the same transaction and occurrence test under Rule 20(a) where "the Vanguard/Viega and Uponor/Wirsbo Defendants both supplied brass fittings for use in the construction of the Waterfall development," even though "there is no allegation that they engaged in any joint action or had any contractual or business relationship with each other. Defendants are joined based solely on the alleged common defects in their brass fittings and components which have allegedly caused damage to the Waterfall residences").

Moreover, members of a common distribution chain are jointly and severally liable for trademark infringement, and can be permissively joined under Rule 20. See *Lockheed Martin Corp. v. Network Solutions, Inc.*, No. CV 96–7438 DDP (ANx), 1997 WL 381967, *3 (C.D. Cal. Mar. 19, 1997) ("Courts have long held that in patent, trademark, literary property, and copyright infringement cases, any member of the distribution chain can be sued as an alleged joint tortfeasor. Since joint tortfeasors are jointly and severally liable, the victim of trademark infringement may sue as many or as few of the alleged wrongdoers as he chooses," quoting *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd.*, 647 F.2d 200, 207 (D.C. Cir. 1981)); *id.* at *2 (" '[A] tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability," quoting *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990)).

Here, plaintiffs' allegations go beyond a mere assertion that the original and new defendants have infringed a common trademark. Plaintiffs allege that the Cavalier defendants supplied the same infringing merchandise—counterfeit fleece jackets bearing plaintiffs' registered marks—to both Factory Connection and Your Call. [43] Moreover, plaintiffs allege that the original and new defendants are jointly and severally liable for the alleged infringement. [44] Accordingly, plaintiffs'

claims against the old and new defendants' share a "degree of factual commonality," and their alleged misconduct thus arises out of the "same transaction, occurrence, or series of transactions or occurrences."

43 Proposed FAC, ¶¶ 36, 41–43.

44 *Id.*, ¶¶ 4–6, 10, 16.

D. Whether the Court Should Exercise its Discretion to Permit the Amendment under Rule 20 and Whether Amendment Is Proper under Rule 15

Even when the specific requirements of Rule 20 have been met, a district court must still examine other relevant factors to determine whether permissive joinder "comport[s] with the principles of fundamental fairness." *Desert Empire Bank*, 623 F.2d at 1375; *Lennar Mare Island, LLC v. Steadfast Ins. Co.*, No. 2:12–CV–02182–KJM–KJN, 2013 WL 6623855, *4 (E.D. Cal. Dec. 16, 2013). These factors include "the possible prejudice that may result to any of the parties in the litigation, the delay of the moving party in seeking an amendment to his pleadings, the motive that the moving party has in seeking such amendment, the closeness of the relationship between the new and the old parties, the effect of an amendment on the court's jurisdiction, and the new party's notice of the pending action." *Desert Empire Bank*, 623 F.2d at 1375. These factors overlap with several of the factors a court must analyze in determining whether to grant leave to amend under Rule 15: whether the proposed amendment would be futile, whether it is sought in bad faith, whether it would create undue delay, or whether it would cause undue prejudice to the opposing party. *Johnson*, 975 F.2d at 607; *Howey*, 481 F.2d at 1190. Because they are similar, the court analyzes the Rule 15 and Rule 20 factors in tandem below.

1. Prejudice

***7** Courts determining whether joinder under Rule 20 will cause prejudice consider the likelihood that litigating the claims together will confuse the jury. See *Dehaven v. JP Morgan Chase Bank, N.A.*, No. CIV. 2:10–3039 WBS DAD, 2011 WL 4829422, *4 (E.D. Cal. Oct. 11, 2011) (finding that joinder would not create prejudice because "litigating all claims in one proceeding here would not confuse the jury"); *Pena v. McArthur*, 889 F.Supp. 403, 407 (E.D. Cal. 1994) ("[J]oinder may prejudice the defendant because the jury may confuse evidence showing McArthur's negligence with the evidence State Farm knew or should have known about at the time the Release Agreement was signed"); see also *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1297 (9th Cir. 2000) ("The district court properly considered the potential prejudice to Quaker created by the parade of terminated employees and the possibility of factual and legal confusion on the part of the jury"). Here, there appears no likelihood that joining the new defendants will prejudice the Cavalier defendants by confusing the trier of fact. As alleged in the proposed amended complaint, the Cavalier defendants sold the infringing merchandise to the new defendants, and are therefore jointly and severally liable for the new defendants' sales. There is thus little likelihood that evidence of the new defendants' infringing conduct will lead the jury to impute to Cavalier misconduct for which the Cavalier defendants bear no liability.

The situation is potentially different when the liability of the new defendants is considered. There are no allegations that Factory Connection and Your Call are affiliated or related in any way. If it is proved that one of these defendants sold infringing merchandise to the public, a jury could infer from that fact that the other defendant must have done so as well. This will be particularly true if both defendants obtained the merchandise they sold from the Cavalier defendants. There is thus some possibility that litigating the claims against Factory Connection with the claims against Your Call could confuse the jury and result in prejudice to one or both. Nonetheless, the court believes that any prejudice to Factory Connection and Your Call can be mitigated by appropriate limiting instructions to the jury should the matter proceed to trial. See *Duke v. Uniroyal*, 928 F.2d 1413, 1421 (4th Cir. 1990) (holding that no prejudice resulted to defendants in allowing joinder of cases because the trial court had provided a verdict form that called for a separate finding with respect to each plaintiff, and had instructed the jury to consider each plaintiff's claims, and the evidence given in support of those claims, separately).

Under Rule 15, prejudice results when an amended complaint would "greatly change the parties' positions in the action, and require the assertion of new defenses." *Kohler v. Flava Enterprises, Inc.*, No. 10–CV–730–IEG (NLS), 2011 WL 666899, *2 (S.D. Cal. Feb. 17, 2011). Prejudice also results when an amendment would unnecessarily increase costs or diminish the opposing party's ability to respond to the amended pleading. *BNSF Ry. Co. v. San Joaquin Valley R. Co.*, No.1:08–cv–01086–AWI–SMS, 2011 WL 3328398, *2 (E.D. Cal. Aug. 2, 2011). "Where a defendant is on notice of the facts contained in an amendment to a complaint, [however,]

there is no serious prejudice to defendant in allowing the amendment." *Kohler*, 2011 WL 666899 at *2. The party opposing amendment bears the burden of showing prejudice. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987).

Defendants contend they will be prejudiced if the motion is granted because the new defendants will not be brought into the case until after the discovery cut-off date.[45] By the time the new defendants are served and respond, this will be true; the hearing on plaintiffs' motion is scheduled for March 17, 2014, and the discovery cut-off date is less than a month later, on April 11, 2014.[46] Adding defendants at this late stage will most probably require resetting all case management dates. The Ninth Circuit has held that the need to reopen discovery and delay proceedings may prejudice a defendant. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (affirming the denial of plaintiff's motion for leave to amend where the proposed amendment would have added additional causes of action, requiring further discovery, and discovery was set to close five days after motion to amend was filed); *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) ("A need to reopen discovery and therefore delay the proceedings supports a district court's finding of prejudice from a delayed motion to amend"); *Solomon v. N. Am. Life & Cas. Ins. Co.*, 151 F.3d 1132, 1139 (9th Cir. 1998) ("Solomon made the motion on the eve of the discovery deadline. Allowing the motion would have required re-opening discovery, thus delaying the proceedings. The district court did not abuse its discretion in denying the motion to amend at that late date").

45 Opposition at 6.

46 Scheduling Conf.

***8** Defendants also assert that the new defendants will likely assert cross-claims for indemnification against them, and wish to conduct discovery concerning the cross-claims.[47] Plaintiffs counter that discovery concerning the new defendants has already begun, because they are witnesses to defendants' alleged misconduct.[48] See *Bridgeport Music, Inc. v. Universal Music Group, Inc.*, 248 F.R.D. 408, 414 (S.D.N.Y. 2008) ("It is unclear, however, exactly how many depositions MusicNet would need to retake or how much additional discovery would be required, given that the claims against them are virtually identical to those against the other defendants"); *Hampton Bays Connections, Inc. v. Duffy*, 212 F.R.D. 119, 123 (E.D.N.Y.2003) ("repetitive depositions may not be necessary" and "even if additional discovery is needed, such discovery would not be extensive" because new claim "arises from the same set of facts as the original claims"). Defendants correctly note that joining these parties as defendants will give them a right to conduct their own discovery.[49] Nonetheless, if plaintiffs filed a separate action against Factory Connection and Your Call, it is likely that the Cavalier parties would be drawn into that discovery either as third parties or as cross-defendants. Under these particular circumstances, the court cannot conclude that reopening discovery would be significantly prejudicial to the Cavalier defendants. Moreover, resolving the underlying issues in a single action—even if that action remains pending somewhat longer than it would have absent this motion—is most probably more cost effective for the Cavalier parties than litigating this case and then defending cross-claims in a second action. Consequently, the court does not believe that the Cavalier defendants would be prejudiced if amendment were allowed.

47 *Id.*

48 Reply at 8.

49 Opposition at 6–7.

2. Delay in Seeking Amendment

While undue delay is a relevant factor in determining whether to grant leave to amend under Rule 15, "[u]ndue delay by itself is insufficient to justify denying a motion to amend." *Bowles v. Reade*, 198 F.3d 752, 757–58 (9th Cir. 1999) ("We have previously reversed the denial of a motion for leave to amend [on the basis of undue delay] where the district court did not provide a contemporaneous specific finding of prejudice to the opposing party, bad faith by the moving party, or futility of the amendment"). Delay in combination with other factors, however, is a adequate reason to deny leave to amend. *In re Circuit Breaker Litig.*, 175 F.R.D. 547, 550 (C.D. Cal. 1997). A court can deny leave to amend due to undue delay where the subject matter of the amendment was known to it at the commencement of the lawsuit. See *Komie v. Buehler Corp.*, 449 F.2d 644, 648 (9th Cir. 1971). The party opposing the amendment has the burden of demonstrating undue delay. *DCD Programs*, 833 F.2d at 187.

Delay for purposes of Rule 20 is evaluated by considering whether it has impacted the fundamental fairness of the proceeding. *J.B.I. Industries, Inc. v. Suchde*, No.

99Civ.12435(AGS), 2000 WL 1174997, *18 n. 22 (S.D.N.Y. Aug. 17, 2000); see also *Novak v. TRW, Inc.*, 822 F.Supp. 963, 973 (E.D.N.Y. 1993) (stating that once the requirements of Rule 20(a) are satisfied, the court must determine whether joinder will comport with the principles of "fundamental fairness" (citations and internal quotation marks omitted)). Generally, courts evaluate the reasons plaintiffs offer for the delay in making this determination. *J.B.I. Industries*, 2000 WL 1174997 at *18 n. 22; *First Toronto Group, Inc. v. Hardage Group of Companies, Inc.*, No. 95 Civ. 3438(HB), 1996 WL 476902,*2 (S.D.N.Y. Aug. 21, 1996) (finding that many months of delay adversely affected fundamental fairness but that movants had justified such delay because it had been caused by counsel's conflict of interest in pursuing a claim against the proposed Rule 20 defendant and movant's attempt to obtain new counsel).

Defendants contend plaintiffs already amended their complaint with full knowledge of the activities of Factory Connection and Your Call, yet chose not to name them as defendants.[50] Defendants appear to base this argument on the fact that plaintiffs filed this action subsequent to filing an earlier action in the Middle District of North Carolina in March 2013,[51] which plaintiffs voluntarily dismissed before filing this case.[52] The court's "discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint." *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989). As plaintiffs correctly argue, however, their motion is their first attempt to amend their pleadings in this action.[53]

50 *Id.* at 5.

51 *Id.* at 5; RJN, Exh. A, ¶ 42.

52 RJN, Exh. C.

53 Reply at 6.

***9** Plaintiffs concede they knew of the new defendants' involvement prior to filing the original complaint in this action. They justify their delay in seeking to add the parties, however, asserting that they did not know the extent of the new defendants' culpability and the amount of the wrongful profits they had made until they took Dahan's deposition on November 7.[54] Although plaintiffs may have learned additional details regarding the new defendants' activities through discovery in this action, the allegations in the North Carolina complaint and the original complaint in this action demonstrate that they had sufficient knowledge of the new defendants' alleged conduct to have named them at the outset of the litigation.

54 *Id.*

Plaintiffs contend that naming the new defendants in the original complaint would have been counterproductive to settlement negotiations then underway.[55] Plaintiffs do not elaborate on this contention, and the record does not permit the court to assess the claim independently. Even if the explanation is true, however, plaintiffs' decision to wait until this point to seek to add new parties will effectively require that the court set a new case management schedule for the action. Consequently, for purposes of Rule 15, the court concludes that plaintiffs unduly delayed. As noted, however, delay alone is an insufficient basis upon which to deny leave to amend under that rule.

55 *Id.*

As respects Rule 20, the question is whether the delay is fundamentally unfair to the original defendants. For the reasons noted above, the court cannot conclude that it is.

Allowing plaintiffs to add the new defendants will permit the Cavalier defendants to resolve their liability for sales to Factory Connection and Your Call in a single action, rather than in multiple ones.

3. Motive and Evidence of Bad Faith

"Finding bad faith requires courts to focus on the plaintiff's motives for not amending the complaint to assert the proposed new claims earlier, and occasionally, delay in itself may be evidence of bad faith sufficient to justify denial of leave to amend." *Larios v. Nike Retail Servs., Inc.*, No. 11cv1600–GPC–NLS, 2013 WL 4046680, *3 (S.D. Cal. Aug. 9, 2013) (citing *Adams v. Gould Inc.*, 739 F.2d 858, 868 (3d Cir. 1984)). Bad faith can also be found where a plaintiff has filed repetitious motions to amend. *Id.* (citing *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515 (9th Cir. 1983)).

Defendants argue that plaintiffs' delay in filing this motion, prior knowledge of the basis for the proposed amendments, and failure to provide reasons justifying their delay demonstrate that the motion is brought in bad faith.[56]

They contend that plaintiffs' filing of a separate action on November 21, 2013 against Rysonn USA, LLC and Sharon S. Bail undercuts plaintiffs' proffered explanation for seeking leave to amend, which is that joinder will help prevent the risk of inconsistent determinations that might result if a separate action against the new defendants were filed. [57] Plaintiffs respond that the prior action was brought to obtain a temporary restraining order interdicting the planned importation of nearly 10,000 additional counterfeit jackets into the United States. [58]

56 *Id.* at 8.

57 Motion at 6; see RJN, Exh. B.

58 Reply at 9–10; RJN, Exh. B, ¶¶ 1–2.

The court finds no evidence of bad faith. As noted, plaintiffs have not previously sought leave to amend their complaint. While the court has concluded that plaintiffs unduly delayed under the circumstances, it cannot find that this is evidence of bad faith. See *DCD Programs, Ltd.*, 833 F.2d at 187 ("HFB argues that appellants' 'unjust delay' in seeking to name it as a defendant is evidence of bad faith. However, this suit is still in its early stages, and appellants have offered a satisfactory explanation for their delay in naming HFB as a defendant"). Defendants have thus failed to carry their burden of showing bad faith. *Capuano*, 2012 WL 2376675, *3 ("[L]eave to amend should be freely given unless the opposing party makes 'an affirmative showing of either prejudice or bad faith,' " quoting *Richardson v. United States*, 841 F.2d 993, 999 (9th Cir. 1988)).

4. The Closeness of the Relationship Between the Old and New Parties

***10** Plaintiffs allege that the Cavalier defendants sold infringing goods to the new defendants, and that the new defendants subsequently resold those same goods. The new defendants and old defendants are thus joint tortfeasors; if plaintiffs are able to prove their allegations, the Cavalier defendant will be jointly and severally liable with Factory Connection and with Your Call, although, based on the pleadings, there is no evidence that Factory Connection and Your Call will be jointly and severally liable with each other. See *TASER Intern., Inc. v. Stinger Sys.*, No. 2:09–cv–289–MMD–PAL, 2012 WL 3205833, *8 (D. Nev. Aug. 3, 2012) (" 'Since trademark infringement and unfair competition are torts, the doctrine of joint tortfeasors is applicable,' " quoting 4 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:23 (4th ed. 2007)); *Lockheed Martin Corp.*, 1997 WL 381967 at *3 ("Courts have long held that in patent, trademark, literary property, and copyright infringement cases, any member of the distribution chain can be sued as an alleged joint tortfeasor. Since joint tortfeasors are jointly and severally liable, the victim of trademark infringement may sue as many or as few of the alleged wrongdoers as he chooses"). Because they are allegedly joint tortfeasors, the new and old parties are sufficiently related. Joinder of the new defendants therefore does not violate principles of fundamental fairness.

5. The Effect of the Amendment on the Court's Jurisdiction

Because the court has federal question jurisdiction to hear this action under 28 U.S.C. § 1331, the citizenship of the new defendants will not divest the court of jurisdiction.

6. Futility

Where the underlying facts or circumstances on which a plaintiff relies "may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman*, 371 U.S. at 182. Rule 15 does not require that futile amendments be allowed, however. *DCD Programs, Ltd.*, 833 F.2d at 188; see also *Saul*, 928 F.2d at 843. "Futility of amendment can, by itself, justify the denial of a motion for leave to amend." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). Where the theory presented in an amendment is lacking in legal foundation, or where prior attempts have failed to cure a deficiency and it is clear that the proposed amendment also does not correct the defect, the court has discretion to deny a motion to amend. See *Shermoen v. United States*, 982 F.2d 1312, 1319 (9th Cir. 1992). A proposed amendment is futile if "no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff–Sexton*, 845 F.2d 209, 214 (9th Cir. 1988) (citing *Baker*, 451 F.Supp. at 89).

The standard used to test the legal sufficiency of a proposed amendment for purposes of Rule 15 is that employed in considering the sufficiency of a pleading challenged under Rule 12(b)(6). *Id.* (citation omitted). See *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998)

("Although there is a general rule that parties are allowed to amend their pleadings, it does not extend to cases ... where the amended complaint would also be subject to dismissal"). A defendant challenging an amended complaint bears the burden of establishing that the proposed amendments are futile. *Mead v. City First Bank of DC, N.A.*, 256 F.R.D. 6, 8 (D.D.C. 2009) ("A defendant bears the burden to show futility.... City Bank has not shown that there is no basis for this court's jurisdiction, and has not carried its burden of establishing that granting leave to amend the complaint would be futile").

Defendants argue that the proposed amended complaint would be futile because plaintiffs already seek damages for all goods sold to the new defendants, and therefore joining the new defendants would not add to plaintiffs' recoverable damages.[59] They do not assert that the claims against the new defendants cannot succeed as pled in the proposed amended complaint, however. Moreover, plaintiffs correctly respond that, as joint tortfeasors, the new defendants will be jointly and severally liable for any judgment obtained, giving them more parties from which to collect any judgment.[60] As defendants provide no basis upon which to find that "no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim," *Miller*, 845 F.2d at 214, they have failed to meet their burden of demonstrating that joining the new defendants would be futile.

59 Opposition at 6.

60 Reply at 8.

7. Conclusion

***11** For the reasons stated, the prerequisites to the joinder of additional parties are satisfied, and joinder comports with principles of fundamental fairness. Amendment is therefore permissible under Rule 20. As respects Rule 15, while the court concludes that plaintiffs have unduly delayed in seeking leave to amend, this alone is not sufficient to deny the motion. Rather, defendants must also show that they will be prejudiced, that the claims against the new defendants are futile, or that they were brought in bad faith. The court has concluded that the amendment would not be futile and that it was not brought in bad faith. The court has also concluded, under the particular circumstances of this case, that plaintiffs' delay, which will necessitate reopening discovery and setting a new case management schedule, will not prejudice the Cavalier defendants, who face the prospect of litigating with Factory Connection and Your Call in this action or in a separate one. Accordingly, the court grants plaintiffs leave to amend. They are directed to file the amended complaint within seven days of the date of this order, and to serve Factory Connection and Your Call within thirty days thereafter. All case management dates are vacated. The court sets a scheduling conference for **June 2, 2014 at 9:00 a.m.** All parties, including Factory Connection and Your Call, are directed to file a joint Rule 26(f) report on or before **May 27, 2014.**

III. CONCLUSION

For the reasons stated, the court grants plaintiffs' motion for leave to amend their complaint.

All Citations

Not Reported in Fed. Supp., 2014 WL 12596716

End of Document

2013 WL 1155523
Only the Westlaw citation is currently available.
United States District Court,
E.D. California.

Herlinda LARA, et al., Plaintiffs,
v.
BANDIT INDUSTRIES, INC., Defendant.

No. 2:12–cv–02459–MCE–AC.
|
March 19, 2013.

Attorneys and Law Firms

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MEMORANDUM AND ORDER

MORRISON C. ENGLAND, JR., Chief Judge.

***1** Through this action, Plaintiffs Herlinda Lara, Richard Lara, and Martin Lara, Jr. ("Plaintiffs") seek redress from Defendant Bandit Industries, Inc. ("Defendant") and Does 1–100 based on four causes of action: negligence, strict liability, negligence—product liability and breach of express and implied warranty. Presently before the Court is Plaintiffs' Motion for Leave to Amend and to Remand to State Court ("Plaintiffs' Motion"). (ECF No. 11.) Defendant filed a timely opposition to Plaintiffs' Motion. (ECF No. 12.) For the reasons set forth below, the Court grants Plaintiffs' Motion. [1]

[1] The Court ordered this matter submitted on the briefs because oral argument will not be of material assistance. E.D. Cal. Local R. 230(g).

BACKGROUND [2]

[2] Page references will be to the Court's ECF pagination.

On January 12, 2012, Martin Lara was decapitated and died while using a wood chipping machine that Defendant allegedly manufactured. (Pls.' Compl., ECF No. 1, at 9.) Lara was using the machine in the course of his employment in Nevada City, California. (*Id.*) Plaintiffs, the wife and children of Lara, are California residents. (*Id.* at 8.)

On August 20, 2012, Plaintiffs filed a complaint in the Superior Court of California for the County of Nevada. (*Id.*) Defendant, a Michigan corporation with its principal place of business in Remus, Michigan, was the only defendant named in PlaintiffsÕ original complaint. (ECF No. 1, at 2, 8.) On September 28, 2012, Defendant removed to this Court based on diversity jurisdiction. (*Id.* at 2.)

Plaintiffs filed the present Motion on January 10, 2013. (ECF No. 11.) PlaintiffsÕ Motion requests leave to file an amended complaint that will add two defendants: Cal–Line Equipment, Inc. ("Cal–Line"), a California corporation, and LOR Manufacturing Company, Inc., a Michigan corporation. (*Id.* at 2.) Defendant opposes only the addition of Cal–Line, (ECF No. 12 at 2 n. 1), whose joinder would destroy diversity and require remand under 28 U.S.C. 1447(c).

ANALYSIS

In support of their Motion for Leave to Amend, Plaintiffs rely on Federal Rule of Civil Procedure 15(a) [3] and 28 U.S.C. 1447(e). Rule 15(a) provides that courts "should freely give leave [to amend] when justice so requires." Fed.R.Civ.P. 15(a)(2). Section 1447(e) states: "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." 28 U.S.C. 1447(e).

[3] All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure.

Defendant contends that Rule 15(a) is not applicable and that only Section 1447(e) governs Plaintiffs' Motion. While the Ninth Circuit has not addressed the issue, several district courts have determined that "the proper standard for deciding whether to allow post-removal joinder of a diversity-destroying defendant is set forth in 28 U.S.C. 1447(e)." *Boon v. Allstate Ins. Co.*, 229 F.Supp.2d 1016, 1019 n. 2 (C.D.Cal.2002) (citations omitted); *see also Hardin v. Wal–Mart Stores, Inc.*, 813 F.Supp.2d 1167, 1173 (E.D.Cal.2011)

("Plaintiffs may not circumvent 28 U.S.C. 1447(e) by relying on Fed.R.Civ.P. 15(a) to join non-diverse parties.").

***2** Section 1447(e) is "couched in permissive terms" and "clearly gives" district courts discretion in deciding whether to permit or deny joinder of a non-diverse defendant. *Newcombe v. Adolf Coors Co.,* 157 F.3d 686, 691 (9th Cir.1998); *see also IBC Aviation Serv., Inc. v. Compania Mexicana de Aviacion, S.A. de C.V.,* 125 F.Supp.2d 1008, 1011 (N.D.Cal.2000) ("Under 1447, whether to permit joinder of a party that will destroy diversity remains in the sound discretion of the court."). In deciding whether to deny or permit joinder under 1447(e), courts typically analyze the following six factors:

> (1) [W]hether the party sought to be joined is needed for just adjudication and would be joined under Federal Rule of Civil Procedure 19(a); (2) whether the statute of limitations would preclude an original action against the new defendants in state court; (3) whether there has been unexplained delay in requesting joinder; (4) whether joinder is intended solely to defeat federal jurisdiction; (5) whether the claims against the new defendant appear valid; and (6) whether denial of joinder will prejudice the plaintiff.

IBC Aviation, 125 F.Supp.2d at 1011 (internal citations omitted). The Court will address each of these factors below.

A. Just Adjudication and Rule 19(a)

Rule 19 "requires joinder of persons whose absence would preclude the grant of complete relief, or whose absence would impede their ability to protect their interests or would subject any of the parties to the danger of inconsistent obligations." *Clinco v. Roberts,* 41 F.Supp.2d 1080, 1082 (C.D.Cal.1999) (citing Fed.R.Civ.P. 19(a)). This standard is generally met when "failure to join will lead to separate and redundant actions." *IBC Aviation,* 125 F.Supp.2d at 1011. "Although courts consider whether a party would meet [Rule] 19's standard for a necessary party, amendment under § 1447(e) is a less restrictive standard than for joinder under [Rule] 19." *Id.* at 1011–12 (citations omitted).

Here, Defendant implicitly concedes that denying Plaintiffs' Motion may lead to a separate and redundant action. (*See* ECF No. 12, at 8, 11.) However, Defendant argues that, under the Supreme Court's decision in *Temple v. Synthes Corp., LTD.,* 498 U.S. 5, 7, 111 S.Ct. 315, 112 L.Ed.2d 263 (1990),"it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." (ECF No. 12, at 7.) Defendant's contention is not persuasive. In *Temple,* the Court found that Rule 19 did not prohibit a plaintiff's litigation strategy of suing one defendant in federal court and other defendants in state court, even though the claims arose from a single occurrence. 498 U.S. at 7. Since the standard under Section 1447(e) is less restrictive than Rule 19's standard," *IBC Aviation,* 125 F.Supp.2d at 1011–12, *Temple* does not preclude this Court's finding that joinder of Cal–Line is necessary for just adjudication the purposes of Section 1447(e). Accordingly, the Court finds that this factor weighs in favor of granting Plaintiffs' Motion.

B. Statute of Limitations

***3** The parties agree that the statute of limitations would not bar Plaintiffs from bringing suit against Cal–Line in a separate action, as California has a two-year statute of limitations on actions for death by wrongful act. *See* Cal.Civ.Proc.Code 335.1.[4] Thus, the second factor favors denying Plaintiffs' Motion. *See Clinco,* 41 F.Supp.2d at 1083 ("[Plaintiff] does not argue that a new action against [the proposed defendant] would be time-barred. Therefore, this factor does not support amendment.").

[4] Since Lara died on January 12, 2012, Plaintiffs would still have several months to bring suit against Cal–Line in state court.

C. Unexplained Delay

"When determining whether to allow amendment to add a nondiverse party, courts consider whether the amendment was attempted in a timely fashion." *Id.* There are no well-developed guidelines for evaluating the timeliness of PlaintiffsÕ Motion. Generally, courts find delays of over six months after removal to be untimely. *See, e.g., Lopez v. General Motors Corp.,* 697 F.2d 1328, 1332 (9th Cir.1983). However, district courts in this circuit have found delays of less than six months to be reasonable. *See, e.g., Aqua Connect, Inc. v.Code Rebel, LLC,* 2012 WL 1535769, at

*2 (C.D.Cal. Apr.27, 2012) (five-month delay between filing of a complaint and request for leave to amend is not unreasonable); *Boon,* 229 F.Supp.2d at 1023 (motion filed ten weeks after the filing of the initial complaint is timely); *Clinco,* 41 F.Supp.2d at 1083 (motion to amend filed six weeks after filing of the initial complaint is timely). Additionally, even in cases of considerable delays, courts do not give this factor much weight if the "case is in its early stages and the delay does not appear to be prejudicial."

Dollens v. Target Corp., 2011 WL 6033014, at *2 (N.D.Cal. Dec.5, 2011); *see also Yang v. Swissport USA, Inc.,* 2010 WL 2680800, at *4 (N.D.Cal.2010) (granting plaintiffs' motion to amend filed nine months after removal where "no dispositive motions have been filed, and the discovery completed thus far [would] be relevant whether the case is litigated in [federal] court or state court").

Here, Plaintiffs filed the instant motion five months after filing the initial complaint and three months after the removal. Such delay is not unreasonable under this circuit's precedents. Additionally, this case is still in its early stages, the parties have not filed dispositive motions, and it does not appear that the parties have completed any substantial discovery. Although Defendant claims that it has been diligently pursuing discovery and thus will be prejudiced if the case is removed to state court, (*see* ECF No. 12, at 9), the Court fails to see why Defendant would not be able to use the obtained discovery in state court. Accordingly, the third factor favors granting Plaintiffs' Motion.

D. Plaintiffs' Motive

Relying on *Clinco v. Roberts,* 41 F.Supp.2d 1080 (C.D.Cal.1999), Defendant argues that the Court should deny Plaintiffs' Motion because Plaintiffs' motive is to defeat federal subject matter jurisdiction. (ECF No. 12, at 9–10.) In *Clinco,* the district court for the Central District of California viewed the plaintiff's post-removal attempt to join a non-diverse defendant with suspicion and explained that "one could justifiably suspect that [plaintiff's] amendment of the complaint was caused by the removal rather than evolution of his case." 41 F.Supp.2d at 1083. However, "[s]uspicion of diversity destroying amendments is not as important now that 1447(e) gives courts more flexibility in dealing with the addition of such defendants."

***4** *IBC Aviation,* 125 F.Supp.2d at 1012; *see also Trotman v. United Parcel Serv.,* 1996 WL 428333, at *1 (N.D.Cal. July 16, 1996) ("The legislative history to 1447(e) also suggests that it was intended to undermine the doctrine employed by some courts that amendments which destroyed diversity were to be viewed with suspicion.").

In sum, while "one could justifiably suspect" that Plaintiffs' Motion "was caused by the removal rather than evolution" of the case, *see Clinco,* 41 F.Supp.2d at 1083, the Court declines to impute an improper motive to Plaintiffs simply because Plaintiffs seek to add a non-diverse defendant post-removal. Because the Court does not construe Plaintiffs' preference for state court any more negatively than Defendants' preference for federal court, *see Taylor v. Honeywell Corp.,* 2010 WL 1881459, at *3 (N.D.Cal. May 10, 2010), this factor is neutral or weighs in favor of granting Plaintiffs' Motion.

E. Apparent Validity of Plaintiffs' Claims

"The existence of a facially legitimate claim against the putative defendant weighs in favor of permitting joinder under section 1447(e)." *Id.* at *3.

In the proposed amended complaint, Plaintiffs allege claims of negligence, strict liability, negligence product liability and breach of express and implied warranty against Cal–Line. (ECF No. 11 Ex. 1.) According to Defendant, "Cal–Line is the only authorized dealer for Bandit Industries, Inc., in Northern California." (Morey Decl., ECF No. 12–2, at 2.) Under California law, "a retailer engaged in the business of distributing goods to the public [ ] ... is strictly liable in tort for personal injuries caused by defects" in the goods that the retailer sells. *Vandermark v. Ford Motor Co.,* 61 Cal.2d 256, 263, 37 Cal.Rptr. 896, 391 P.2d 168 (1964). Thus, Plaintiffs' proposed amended complaint presents a viable claim against Cal–Line. Accordingly, this factor favors granting Plaintiffs' Motion.

F. Whether Denial of Joinder Will Prejudice Plaintiffs

Defendant claims that the Court's denial of Plaintiffs' Motion would not prejudice Plaintiffs because: (1) Defendant can fully satisfy the relief that Plaintiffs seek; (2) the Court can subpoena Cal–Line to testify at trial; and (3) Plaintiffs can pursue claims against Cal–Line in a separate action in state court. (ECF No. 12, at 11.) DefendantÕs contentions here bear a striking resemblance to the argument that the district court for the Northern District of California recently rejected in *Taylor v. Honeywell Corp.,* 2010 WL 1881459, at *4 (N.D.Cal. May 10, 2010). Specifically, the *Taylor* court explained that defendant's "alleged *present* ability to satisfy a judgment does not guarantee that it will, in fact, have the

ability to do so if and when a judgment is entered." *Id.* The court also found that denying the plaintiffs' motion would be "unduly prejudicial to Plaintiffs because it would require them either to abandon the potential claims [they have] against [the proposed defendant] or litigate the same legal issues and facts as this case in state court." *Id.* Because such duplicative and redundant litigation would "result in a waste of judicial and the Plaintiffs' resources, as well as risk inconsistent results," the *Taylor* court found that the final factor favored granting plaintiff's motion to amend and to remand. *Id.*

***5** This Court similarly finds that precluding Plaintiffs from joining Cal–Line would prejudice Plaintiffs because they would be required either to abandon a viable claim against Cal–Line or to initiate a duplicative litigation in state court. Thus, this factor favors granting Plaintiffs' Motion.

In sum, five of the six factors favor permitting Plaintiffs to amend their complaint to add Cal–Line as a defendant. Accordingly, the Court grants Plaintiffs' Motion for Leave to Amend. Plaintiffs' First Amended Complaint, which is attached to Plaintiffs' Motion as Exhibit 1, is hereby deemed filed. In light of the joinder of Cal–Line as a defendant, there is no longer complete diversity between the parties as required under 28 U.S.C. 1332.

Because remand is required if "at any time before final judgment it appears that the district court lacks subject matter jurisdiction," 28 U.S.C. 1447(c), this case should be remanded to state court.

CONCLUSION

For the reasons stated above, Plaintiffs' Motion For Leave to Amend and to Remand (ECF No. 11) is GRANTED. The Clerk of the Court is directed to remand this case to the Superior Court of California for the County of Nevada and to close the file.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 1155523

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2019 WL 4736784
Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

Kevin LEIBEL, et al., Plaintiffs,
v.
CITY OF BUCKEYE, et al., Defendants.

No. CV-18-01743-PHX-DWL
|
Signed 09/27/2019

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ORDER

Dominic W. Lanza, United States District Judge

***1** Pending before the Court is C.L.'s [1] motion for leave to file a first amended complaint ("FAC"). (Doc. 77.) For the following reasons, the Court grants C.L.'s motion.

[1] Because Plaintiffs Kevin and Danielle Leibel bring this action in their capacities as guardians ad litem of their 14-year old son, C.L, the Court will refer to Plaintiffs as "C.L" for ease of reference.

BACKGROUND

On June 6, 2018, C.L.—a 14-year-old autistic boy—filed a complaint against the City of Buckeye, the Buckeye Police Department ("BPD"), and three members of the BPD (collectively, "Defendants") (Doc. 1). [2] The complaint arises from a July 2017 incident in which Defendant Officer David Grossman is alleged to have slammed C.L. against a tree, wrestled C.L. to the ground, and then pinned C.L. down while attempting to handcuff him. Officer Grossman had approached C.L. because he witnessed C.L. "stimming"—self-stimulating with a piece of string, which is a common technique used by individuals with autism to calm their nerves—which he mistook for illegal drug use. There is no suggestion C.L. committed a crime before this encounter occurred.

[2] The parties have since stipulated to the dismissal of the BPD from this action. (Doc. 20.)

On December 10, 2018, the Court entered a Rule 16 scheduling order that established February 8, 2019 as the deadline for amending pleadings. (Doc. 35 ¶ 2.)

On January 30, 2019, the Court issued an order dismissing several counts of the complaint, including Count III, which asserted a claim failure to train and/or supervise. (Doc. 40.) C.L. had alleged the City of Buckeye failed to "enforce proper and adequate training and supervision on interacting and dealing with individuals with disabilities." (Doc. 7 ¶ 125.) The Court dismissed that claim because C.L. hadn't alleged "a pre-existing pattern of violations" sufficient to conclude that the City engaged in "deliberate indifference for purposes of failure to train." (Doc. 40 at 11-12.)

On June 27, 2019, C.L. conducted a Rule 30(b)(6) deposition of the City of Buckeye, with the City designating Assistant Police Chief Robert Sanders as its representative. (Doc. 77-3.) During that deposition, Sanders arguably testified that he had knowledge, predating the incident with C.L., that autistic individuals were at a higher risk than other citizens of being involved in encounters with police officers and that these encounters often resulted in the autistic individual's injury or death. (Doc. 77-1, citing Doc. 77-3 at 2, 15, 25-26.) Further, Sanders testified that he had watched a training video recommending that officers receive additional training to adequately raise awareness about autistic individuals. (Doc. 77-1 at 3, citing 77-3 at 19.) He also arguably testified that the BPD had sufficient time to train its officers on those issues but didn't. (Doc. 77-1 at 3-4, citing 77-3 at 19, 72.)

On August 14, 2019, C.L. filed a motion for leave to file a FAC. (Doc. 77.) The proposed FAC seeks to incorporate the newly-discovered facts elicited during the Rule 30(b)(6) deposition in order to resuscitate the failure to train/supervise claim. (Doc. 77-2 ¶¶ 16-42, 149-159.)

DISCUSSION

***2** C.L. moves for leave to amend under Rule 15's liberal amendment standard. (Doc. 77-1.) Defendants, on the other hand, argue C.L. must first show "good cause" under Rule 16 because the deadline to amend pleadings has passed. (Doc. 78 at 2-3.)

The Court agrees with Defendants that C.L. must first satisfy Rule 16 before turning to Rule 15's liberal amendment standard. The Court entered a Rule 16 scheduling order on December 10, 2018. (Doc. 35.) That scheduling order established a February 8, 2019 deadline for amending pleadings—a deadline that has already expired. After a deadline established in a Rule 16 scheduling order expires, a party seeking to amend its pleading must satisfy Rule 16's standards. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992).

Because those standards apply here, C.L. must first show "good cause" to amend his complaint. Fed. R. Civ. P. 16(b)(4). "Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment.... [C]arelessness is not compatible with a finding of diligence and offers no reason for a grant of relief.... [T]he focus of the inquiry is upon the moving party's reasons for seeking modification. If that party was not diligent, the inquiry should end." *Johnson*, 975 F.2d at 609.

I. Good Cause

C.L. argues that good cause exists because he is seeking amendment based upon new facts discovered during the 30(b)(6) deposition of the City of Buckeye. (Doc. 89 at 2-3.) Further, C.L. argues he moved for leave to amend "soon after obtaining and reviewing the transcript of Sanders's deposition." (*Id.*) [3]

[3] Defendants contend that C.L. didn't argue, in his motion, that he satisfied the good cause, so the Court should reject any arguments made in his reply regarding this standard. (Doc. 78 at 3.) Although C.L. didn't specifically use the words "good cause" in the motion, he still proffered reasons why the Court would be justified in granting the motion. Therefore, the Court will consider C.L.'s arguments.

Although "[d]iscovery of new information after the deadline for amended pleadings passes is a potential basis for good cause to modify the scheduling order," "[a] party must also show diligence in seeking amendment of the scheduling order." *Story v. Midland Funding LLC*, 2016 WL 5868077, *2 (D. Or. 2016). To determine whether a party exercised diligence, courts typically consider the amount of time between the discovery of the new information and when the party requested leave to amend. *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1087-88 (9th Cir. 2002).

On June 27, 2019, C.L. conducted the Rule 30(b)(6) deposition of the City, during which he discovered the new information that he seeks to incorporate into his proposed FAC. (Doc. 77-1 at 2-4.) C.L. moved to amend the complaint on August 14, 2019—just shy of seven weeks after discovering the new facts. (Doc. 77-1.)

"Ideally, a party will move to amend within weeks of learning new information." *Story*, 2016 WL 5868077 at *2-3. *See also Navarro v. Eskanos & Adler*, 2006 WL 3533039, *2 (N.D. Cal. 2006) ("A two-week delay does not constitute a failure in diligence."). However, a longer delay "can still be consistent with diligence, depending on the circumstances of the delay." *Story*, 2016 WL 5868077 at *2. For example, where plaintiffs presented sufficient justification, courts have held that plaintiffs were diligent after waiting more than a month to amend. *See e.g., id.* at 3 (determining plaintiff was diligent despite a three-month delay because, during the three months, plaintiff engaged in "ongoing settlement negotiations and s[ought] Defendants' stipulation to [the] amendment"); *Aldan v. World Corp.*, 267 F.R.D. 346, 358 (D. N. Mar. I. 2010) (holding that plaintiff was diligent where there was a delay of a month-and-a-half between discovery of the new information and the motion to amend because that period "included the holiday season").

***3** The Court concludes that, although it presents a close call, the seven-week delay between C.L.'s discovery of new facts and his motion to amend constitutes diligence. C.L. didn't just add a few additional facts to his proposed FAC—he added 25 detailed paragraphs of facts. (Doc. 77-2 ¶¶ 16-41.) Moreover, rather than immediately moving to amend based on his recollection of Sanders's testimony, C.L. moved to amend "after obtaining and reviewing the transcript of Sanders's deposition." (Doc. 77-1 at 6.) Obtaining the deposition transcript accounts for some of the delay, because procuring a deposition transcript can, in some circumstances, take up to 30 days. Therefore, in light of C.L. having to obtain the deposition transcript before seeking leave to amend, the seven-week delay is consistent with diligence.

II. Rule 15

"Rule 15 advises the court that 'leave [to amend] shall be freely given when justice so requires.' " *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). "This policy is 'to be applied with extreme liberality.' " *Id.* Thus, the Court shouldn't deny leave to amend unless "the amendment: (1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue delay in litigation; or (4) is futile." *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 951 (9th Cir. 2006). Of these factors, "it is the consideration of prejudice to the opposing party that carries the greatest weight." *Eminence Capital*, 316 F.3d at 1052.

Even though "[p]rejudice is the 'touchstone of the inquiry under rule 15(a),' " *id.* (citation omitted), Defendants only contest the propriety of C.L.'s amendment request on bad-faith and futility grounds. (Doc. 78 at 3 n.2 ["The City of Buckeye Defendants focus on futility and bad faith, with no argument on undue prejudice or undue delay."]).

First, Defendants argue C.L. seeks the amendment in bad faith because C.L. has " 'cherry-picked' facts from the Rule 30(b)(6) deposition, ignored the policy and training exhibits covered in the deposition, and ... skewed the facts to make more of the alleged claim than exists." (Doc. 78 at 15.)

This doesn't constitute bad faith. "A motion to amend is made in bad faith where there is 'evidence in the record which would indicate a wrongful motive' on the part of the litigant requesting leave to amend." *Nutrition Distribution, LLC v. Enhanced Athlete, Inc.*, 2019 WL 1429549, *2 (E.D. Cal. 2019) (quoting *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987)). Here, C.L.'s only motive in seeking leave to amend is the legitimate motive of trying to identify another valid claim for relief. Although Defendants have advanced a variety of reasons why the deposition testimony may not actually provide a solid foundation for a failure-to-train claim, this is not the same thing as showing that C.L. had a bad-faith motive for seeking the amendment.

Second, Defendants argue that C.L.'s proposed amendments are futile because the proposed FAC still fails to state a plausible claim for failure to train or supervise. (Doc. 78 at 4.) Although it's true that "the test for futility is whether the amendment can survive a motion to dismiss under Rule 12(b)(6)," *Fulton v. Advantage Sales & Mktg., LLC*, 2012 WL 5182805, *3 (D. Or. 2012), "[o]rdinarily, courts will defer consideration of challenges to the merits of a proposed amended pleading until after leave to amend is granted and the amended pleading is filed," *Fair Hous. Council of Cent. California, Inc. v. Nunez*, 2012 WL 217479, *4 (E.D. Cal. 2012). *See also Green Valley Corp. v. Caldo Oil Co.*, 2011 WL 1465883, *6 (N.D. Cal. 2011) (noting "the general preference against denying a motion for leave to amend based on futility").

It makes the most sense, therefore, to grant C.L. leave to file the FAC and then consider any motions to dismiss after it has been filed. *Williams v. Keybank Nat'l Ass'n*, 2016 WL 7107765, *3 (D. Or. 2016) (granting leave to amend and "find[ing] that it would be preferable to consider the futility arguments in the context of a motion to dismiss for failure to state a claim, whereby the parties could fully brief the sufficiency of plaintiffs' allegations under the appropriate briefing schedule, through a procedural mechanism that would allow optimal focus on those arguments (instead of their being first raised only in opposition briefing)"); *Bentley v. Arizona Dep't of Child Safety*, 2018 WL 8262769, *2 (D. Ariz. 2018) (finding that defendants' "arguments to the sufficiency of the proposed amendment, even if merited, remain better left for full briefing on a motion to dismiss").

***4** Accordingly, **IT IS ORDERED** that C.L.'s motion for leave to file a FAC (Doc. 77) is **granted**.

IT IS FURTHER ORDERED that C.L. must, consistent with LRCiv 15.1(a), file and serve the FAC within 14 days of this Order.

All Citations

Slip Copy, 2019 WL 4736784

End of Document

2020 WL 5167718
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

M.H.
v.
CITY OF SAN BERNARDINO, et al.

Case No. EDCV 20-242 JGB (KKx)
|
Filed 07/17/2020

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Proceedings: Order (1) GRANTING IN PART AND DENYING IN PART Plaintiff's Motion For Leave to File First Amended Complaint (Dkt. No. 26); and (2) VACATING the July 20, 2020 Hearing (IN CHAMBERS)

The Honorable JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

***1** Before the Court is Plaintiff's Motion for Leave to file a first amended complaint. ("Motion," Dkt. No. 26.) The Court finds the Motion appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After considering the papers filed in support of and in opposition to the Motion, the Court GRANTS IN PART AND DENIES IN PART the Motion. The Court VACATES the hearing set for July 20, 2020.

I. BACKGROUND

On December 4, 2019, M.H. ("Plaintiff") filed her complaint in California Superior Court for the County of San Bernardino against the City of San Bernardino ("Defendant"). ("Complaint," Dkt. No. 1-1.) On February 5, 2020, Defendant removed the matter. ("Notice of Removal," Dkt. No. 1). The Complaint alleges thirteen causes of action: (1) excessive force, in violation of 42 U.S.C. § 1983 ("section 1983"); (2) section 1983 liability under Monell for excessive force; (3) section 1983 liability under Monell for failure to properly train, supervise, and discipline; (4) wrongful death; (5) negligence; (6) assault; (7) battery; (8) discrimination in violation of California's Ralph Act, Cal. Civil Code § 51.7; (9) civil rights violations under California's Bane Act, Cal. Civil Code § 52.1; (10) section 1983 liability under Monell for denial of medical care; (11) section 1983 liability under Monell for denial of medical care and failure to properly train, supervise, and discipline; (12) violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132; and (13) violation of the Rehabilitation Act of 1973 ("Rehab Act"), 29 U.S.C. § 794(a).

On April 13, 2020, the Court issued a scheduling order, which set a July 13, 2020 deadline to "Stipulate or File a Motion to Amend Pleadings or Add New Parties." ("Scheduling Order," Dkt. No. 17.) On June 8, 2020, Plaintiff filed the Motion. (See Motion.) In support of the Motion, Plaintiff attached the Declaration of Yana G. Henricks, ("Henricks Declaration," Dtk. No. 26-1 (attaching Exhibits 1 to 3)), and the proposed first amended complaint, ("Proposed FAC," Dkt. No. 26-5.) Defendant opposed the Motion on June 15, 2020. ("Opposition," Dkt. No. 29.) In support of the Opposition, Defendant included the Declaration of Jill Williams ("Williams Declaration", Dkt. No. 29-1 (attaching Exhibits 1 to 3).) On June 22, 2020, Plaintiff replied. ("Reply," Dkt. No. 30.) Plaintiff submitted a second declaration in support of the Reply. ("Hendricks Declaration II," Dkt. No. 30-1.)

II. LEGAL STANDARD

Federal Rule of Civil Procedure 15 provides that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Ninth Circuit holds " '[t]his policy is to be applied with extreme liberality.' " Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003) (quoting Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001)). However, leave to amend is not automatic. The Ninth Circuit considers five factors when considering a motion for leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) the futility of amendment, and (5) whether the plaintiff has previously amended his or her complaint. Nunes v. Ashcroft, 375 F.3d 805, 808 (9th Cir. 2004). The Ninth Circuit instructs that "it is the consideration of prejudice to the opposing party

that carries the greatest weight." Eminence Capital, 316 F.3d at 1052.

***2** "The party opposing amendment bears the burden of showing prejudice, unfair delay, bad faith, or futility of amendment." United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co., 2009 WL 650730, at *2 (C.D. Cal. Mar. 12, 2009) (citing Eminence Capital, 316 F.3d at 1052; DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186–87 (9th Cir. 1987)).

III. DISCUSSION

The Complaint names Doe officers who allegedly participated in the events in this case. (Compl. ¶¶ 11-15.) When Plaintiff commenced the action, he did not know the identities of the defendant officers involved. (Mot. at 3.) After Defendant served initial disclosures on April 27, 2020, (id. at 4), Plaintiff learned the officers' names were Paul Carranza, Chris Johnson, Joaquin Larios, and Kerie Brown ("Officers"), (id. at 4). Now, Plaintiff seeks leave to amend to add the Officers as defendants. (Mot. at 1; Proposed FAC ¶¶ 11-14.)

The Court GRANTS Plaintiff's leave to amend to substitute the Does with the Officers for the following reasons. First, Plaintiff's motion is timely and amendment will not result in delay or prejudice. See Nunes, 375 F.3d at 808. Second, the proposed amendment is a simple substitution and Defendant does not argue the substitution is futile. Id. Finally, Plaintiff has not previously amended. Id.

Plaintiff also seeks leave to amend to add a preliminary statement. (Mot. at 8, 13; Proposed FAC at 2-3.) In the two-paragraph preliminary statement, Plaintiff highlights the difficulty faced in obtaining public records and discovery from Defendant. (Id.) Defendant opposes the inclusion of the preliminary statement on the grounds that it would be subject to a motion to strike under Fed. R. Civ. P. 12(f), because it is immaterial or impertinent. (Opp'n at 6.)

A complaint should contain short, plain statements of facts and the claims arising from those facts. Fed. R. Civ. P. 8. The complaint is not a proxy battleground for parties' discovery grievances. The Court therefore agrees with Defendant that the preliminary statement serves no purpose. The case is not about disclosure of records pursuant to Cal. Gov. Code § 6250, and none of the thirteen claims involves Defendant's asserted failure to disclose records. Accordingly, the Court DENIES Plaintiff leave to amend in so far as Plaintiff seeks to include immaterial background regarding public records requests and Defendant's litigation conduct in this matter.

To the extent Plaintiff has legitimate grievances regarding Defendant's conduct during discovery in this case, Plaintiff may obtain relief by filing a motion to compel, seeking discovery sanctions, or using any of the other various tools available under the Federal and Local Rules, the Standing Order, and the Magistrate Judge's procedures. In the future, Plaintiff should not conflate a motion for leave to amend with a discovery motion for non-terminating sanctions. Discovery matters are referred to the assigned Magistrate Judge pursuant to the Standing Order. [1]

[1] On July 8, 2020, Magistrate Judge Kenly Kiya Kato denied Plaintiff's motion to compel and request for sanctions. (Dkt. No. 34.)

IV. CONCLUSION

***3** For the reasons above, the Court GRANTS IN PART and DENIES IN PART Plaintiff's Motion. Plaintiff shall file a first amended complaint, if any, by August 3, 2020. The July 20, 2020 hearing is VACATED.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 5167718

End of Document

2021 WL 925885
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

MASIMO CORPORATION et al.
v.
APPLE INC.

Case No. SACV 20-48 JVS (JDEx)
|
Filed 01/06/2021

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Proceedings: [IN CHAMBERS] Order Regarding Motion to Dismiss Thirteenth Cause of Action of the Third Amended Complaint

The Honorable James V. Selna, U.S. District Court Judge

***1** Defendant Apple Inc. ("Apple") filed a motion to dismiss the thirteenth cause of action, alleging trade secret misappropriation, in the third amended complaint ("TAC") of Plaintiffs Masimo Corporation ("Masimo") and Cercacor Laboratories, Inc. ("Cercacor") (collectively – "Plaintiffs"). MTD, ECF No. 241. Plaintiffs filed an opposition. Opp'n, ECF No. 247-1. Apple filed a response. Reply, ECF No. 252-1. Apple also filed a request for judicial notice. RJN, ECF No. ECF 238-3. Plaintiffs did not file an opposition to the RJN. Plaintiffs subsequently filed a request for oral argument. ROA, ECF No. 262-1.

For the following reasons, the Court **GRANTS IN PART AND DENIES IN PART** the motion.

I. BACKGROUND

The background of this case is well known to the parties and is only recited here to the extent necessary to frame the discussion below. This case concerns technology for monitoring physiological parameters, such as pulse rate. See TAC, ECF No. 233, ¶¶ 9-16. In 2014, Apple recruited Marcelo Lamego, who was the Chief Technical Officer of Cercacor and a Research Scientist at Masimo. Id. ¶ 21, 24. Lamego had access to "highly confidential technical information," "was taught about the keys to effective non-invasive monitoring," and "learned guarded secrets regarding Plaintiffs' mobile medical products." Id. ¶ 22. Plaintiffs' thirteenth cause of action, for trade secret misappropriation under the California Uniform Trade Secrets Act ("CUTSA"), alleges that Apple misappropriated Plaintiffs' confidential information from former employees who left Plaintiffs to work for Apple, including Lamego. Id. ¶ 223-52.

The trade secrets that Plaintiffs allege Apple misappropriated "include, but are not limited to, Plaintiffs' technical information, sales and marketing information, and other business information relating to non-invasive monitoring of physiological parameters and products to perform such monitoring." Id. ¶ 39. Plaintiffs allege that "Apple misappropriated at least the following specific trade secrets": [redacted]

On June 25, 2020, the Court dismissed Plaintiffs' claim of trade secret misappropriation in its First Amended Complaint ("FAC") for Plaintiffs failing to plead its trade secrets "in a manner that gives Apple fair notice of the claim." FAC Order, ECF No. 60, at 8. Plaintiffs subsequently filed the SAC at issue in this case. SAC, ECF No. 89-1. On October 13, 2020, the Court dismissed the same claim on the same basis. SAC Order, ECF No. 219, at 7. Plaintiffs filed their TAC on November 13. TAC.

II. LEGAL STANDARD

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly,

550 U.S. 544, 570 (2007). A claim has "facial plausibility" if the plaintiff pleads facts that "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

***2** In resolving a 12(b)(6) motion under Twombly, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. Nor must the Court " 'accept as true a legal conclusion couched as a factual allegation.' " Id. at 678-80 (quoting Twombly, 550 U.S. at 555). Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." Id. at 679. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id.

III. DISCUSSION

A. Request for Judicial Notice

Because factual challenges have no bearing under Rule 12(b)(6), generally, the Court may not consider material beyond the pleadings in ruling on a motion to dismiss. Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001), overruled on other grounds, Galbraith v. County of Santa Clara, 307 F.3d 1119, 1125 (9th Cir. 2002). There are, however, three exceptions to this rule that do not demand converting the motion to dismiss into one for summary judgment. Lee, 250 F.3d at 688. First, pursuant to Federal Rule of Evidence 201, the Court may take judicial notice of matters of public record, but it "cannot take judicial notice of disputed facts contained in such public records." Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 999 (9th Cir. 2018), cert. denied sub nom. Hagan v. Khoja, 139 S. Ct. 2615 (2019) (citing Lee, 250 F.3d at 689); see Fed. R. Evid. 201(b). Second, the Court also may take judicial notice of documents attached to or "properly submitted as part of the complaint." Lee, 250 F.3d at 688. Third, if the documents are "not physically attached to the complaint," they may still be considered if the documents' "authenticity ... is not contested" and the documents are necessarily relied upon by the complaint. Id.; United States v. Corinthian Colleges, 655 F.3d 984, 998–99 (9th Cir. 2011). "However, if the document merely creates a defense to the well-pled allegations in the complaint, then that document did not necessarily form the basis of the complaint" and cannot be incorporated by reference. Khoja, 899 F.3d at 1002.

Apple requests that the Court take judicial notice of 22 separate documents. RJN at 1-5. The Court will take judicial notice of Exhibits 1, 2, 5, 7-12, and 14-16, as well as ECF Nos. 28-28, 28-29, 28-30, and 38-6 because each of these documents is a document filed by or with the United States Patent and Trademark Office ("USPTO") and publicly available through databases. See RJN at 5-6 (citing Threshold Enterprises Ltd. v. Pressed Juicery, Inc., 445 F. Supp. 3d 139, 145 (N.D. Cal. 2020) ("Materials in the online files of the USPTO and other matters of public record are proper subjects of judicial notice.")).

The Court also takes notice of Exhibits 3, the abstract of an article published in a scientific journal; 6, a press release on Masimo's website; and 13, a public document on the USPTO website, because each is a matter of public record. The Court does not, however, take judicial notice of any disputed facts within those documents. See Khoja, 899 F.3d at 999. The Court takes notice of Exhibit 17 and ECF 38-5 because each of those documents is relied on by the TAC. See TAC ¶¶ 44 (citing MASA00080451, the label given in discovery to Exhibit 17) and 229 (mentioning "a letter dated January 24, 2014, from Plaintiffs," which is ECF 38-5).

The Court declines to take judicial notice of Exhibit 4, a Wikipedia page for [redacted] however. There is no exception that allows a Court to take judicial notice of any fact found on the Internet. While Courts may sometimes take judicial notice of documents accessible on the Internet, that does not extend to Wikipedia pages, which can be freely edited by whoever has an Internet connection.

B. Trade Secret Misappropriation

***3** To prove a prima facie case of trade secret misappropriation, the CUTSA "requires the plaintiff to demonstrate: (1) the plaintiff owned a trade secret, (2) the defendant acquired, disclosed, or used the plaintiff's trade secret through improper means, and (3) the defendant's actions damaged the plaintiff." CytoDyn of New Mexico, Inc. v. Amerimmune Pharm., Inc., 160 Cal. App. 4th 288, 297 (Cal. Ct. App. 2008) (citing Sargent Fletcher, Inc. v. Able Corp., 110 Cal. App. 4th 1658, 1665 (Cal. Ct. App. 2003)). See also Cal. Civ. Code § 3426.1.

1. Ownership of a Trade Secret

"To adequately allege the existence of a trade secret, the plaintiff must describe the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those persons who are skilled in the trade, and to permit the defendant to ascertain at least the boundaries within which the secret lies." Acrisure of California, LLC v. SoCal Commercial Insurance Services, 2019 WL 4137618, at *3 (C.D. Cal. Mar. 27, 2019) (emphasis added) (internal citation and quotation marks omitted). Although the plaintiff need not define every minute detail, "[t]he Ninth Circuit has rejected the use of 'catchall' language, holding that such language is insufficiently specific 'because it does not clearly refer to tangible trade secret material.'" Id. (internal citation and quotation marks omitted). The pleadings "must have enough specificity to provide both the Court and defendants with notice of the boundaries of this case." Citcon USA, LLC v. RiverPay Inc., 2018 WL 6813211, at *4 (N.D. Cal. Dec. 27, 2018) (internal citation omitted). A "laundry list of items ... does not meaningfully define the trade secrets at issue." Invisible Dot, Inc. v. DeDecker, 2019 WL 1718621, at *5 (C.D. Cal. Feb. 6, 2019).

The Court notes that Plaintiffs have made several relevant changes to their trade secret allegations from the SAC. First, what used to be paragraph 39 has been deleted. See SAC ¶ 39. Second, the phrase "at least" has been removed from what used to be paragraph 40, which is now paragraph 39. TAC ¶ 39. Third, the word "including" no longer precedes each trade secret. Id. ¶¶ 40-45. Fourth, the term "Confidential Information" was defined to include the trade secrets listed in paragraphs 40 through 45. Id. ¶ 46. Finally, the word "appropriateness" was added to the final subparagraph of paragraphs 40 through 45 so that the TAC alleges that the "value, importance, and appropriateness" of the trade secrets alleged in the other subparagraphs are themselves a trade secret. Id. ¶¶ 40-45.

Apple makes several arguments for why these changes still are insufficient, each of which the Court addresses in turn.

a. Non-Exhaustive List of Trade Secrets

First, Apple makes several arguments for why it believes that Plaintiffs are alleging a non-exhaustive list of trade secrets. Mot. at 3-5. For example, "[f]or each and every alleged category of trade secrets, Plaintiffs now claim as a secret the ... 'value, importance, and appropriateness' of each alleged secret in the entire category." Id. at 3-4. Apple argues that this amounts to using "catchall" language that fails to describe the secret with sufficient particularity. Id. But Plaintiffs are referring to the "value, importance, and appropriateness" of a set list of trade secrets. The scope of this phrase is necessary circumscribed by the preceding lists of trade secrets, meaning that it cannot be later used as a means for claiming trade secrets about which Apple does not have notice. See Opp'n at 4-5.

***4** Apple next argues that Plaintiffs' use of the words "at least" suggests that their list of trade secrets is not exhaustive. Mot. at 4; Reply at 13-14. But Plaintiffs are not using the word "at least" in a way that leaves them room to assert new trade secrets later. Apple only points to instances where Plaintiffs use the phrase "at least one of the following," a phrase that in fact suggests selection of one or more items from a closed list. See TAC ¶¶ 43 (Nos. 4-5). [1]

1 Nor does stating that a method described in a trade secret could "optionally" include an additional feature make the overall list of trade secrets non-exhaustive. See Mot. at 6. What follows the word "optionally" is a single additional feature that could be incorporated and about which Apple has notice.

Apple also contends that Plaintiffs use the term "Confidential Information" in a way that would allow them to smuggle into the case what is broadly defined as "confidential information" in Lamego's Employee Confidentiality Agreement. Mot. at 4-5. But the TAC clearly defines "Confidential Information," with capital letters, as the trade secrets mentioned in paragraphs 40 to 45. This is unambiguous and does not allow for Plaintiffs to import the definition of confidential information in Lamego's Employee Confidentiality Agreement.

b. Distinction from Generally Known Information

Second, Apple contends that Plaintiffs do not describe some of their trade secrets in a way that allows for them to be distinguished from information generally known in the trade. Mot. at 5-11. As stated earlier, "[t]o adequately allege the existence of a trade secret, the plaintiff must describe the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of

those persons who are skilled in the trade, and to permit the defendant to ascertain at least the boundaries within which the secret lies." Acrisure, 2019 WL 4137618, at *3 (internal citation and quotation marks omitted). The Court clarifies that this standard does not mean that failure to describe one trade secret with sufficient particularity to separate it from matters of general knowledge will lead to dismissal of a misappropriation claim with respect to all trade secrets. So long as a single trade secret is alleged in a way that separates it from matters of general knowledge of the trade, then the defendant will have notice of the existence of that trade secret and the misappropriation claim against it for that trade secret. The scope of discovery can consequently be appropriately tailored, and the defendant will be capable of forming "complete and well-reasoned defenses" as to the misappropriation of that trade secret. See Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc., 226 Cal. App. 4th 26, 44 (2014). As such, the failure to describe one trade secret with sufficient particularity properly leads to the dismissal of the misappropriation claim with respect to that trade secret alone. [2]

2 By contrast, if the plaintiff describes its trade secrets at a level of generality that does not even allow the defendant to ascertain "the boundaries within which the secret lies," then the defendant does not have notice of the claim against it. This justifies wholesale dismissal because discovery may otherwise devolve into a fishing expedition or an opportunity for the plaintiff to discover the defendant's trade secrets. See Altavion, 226 Cal. App. 4th at 44.

***5** Moreover, to the extent that a defendant believes that an alleged trade secret is already disclosed by patents, see Mot. at 5-7, the appropriate time to raise such an argument is during summary judgment. "Whether the alleged trade secrets are actually generally known to the public is a question of fact and beyond the scope of a motion to dismiss." MACOM Technology Solutions Inc. v. Litrinium, Inc., 2019 WL 4282906, at *7 (C.D. Cal. June 3, 2019) (citing Nelson Bros. Professional Real Estate LLC v. Jaussi, 2017 WL 8220703, at *5 (C.D. Cal. Mar. 23, 2017)). Such an approach is consistent with the maxim that when deciding a motion to dismiss, the Court must assume all well-pleaded facts to be true. See Iqbal, 556 U.S. at 678. It also allows discovery's "iterative process[,] where requests between parties lead to a refined and sufficiently particularized trade secret identification," to run its course. InteliClear, LLC v. ETC Global Holdings, Inc., 978 F.3d 653, 662 (9th Cir. 2020). The Court therefore declines to dismiss Plaintiffs' misappropriation claim with respect to any of alleged trade secrets because of prior disclosure in patents. See Mot. at 5-7. See Macrom, 2019 WL 4282906, at *7 ("[T]he Court will not undertake a summary judgment-like review of the patents at issue in comparison to the alleged trade secret information to determine whether information has been made public, particularly at the pleading stage where all inferences are to be drawn in Plaintiffs' favor.").

As such, the Court instead turns to Apple's other arguments that certain alleged trade secrets are not sufficiently distinguished from generally known information. Most of Apple's arguments boil down to criticisms that the allegations do not specify how to achieve the stated trade secrets. [3] But merely saying that a trade secret is not sufficiently detailed is not sufficient to justify dismissal. As the Ninth Circuit has acknowledged, "plaintiffs in trade secret actions may have commercially valid reasons to avoid being overly specific at the outset in defining their intellectual property." InteliClear, 978 F.3d at 662. Trade secret identification is naturally refined during discovery, and so trade secrets do not have to be described in minute detail to survive a motion to dismiss. Id.; Acrisure, 2019 WL 4137618, at *3 ("The plaintiff need not, however, 'define every minute detail of its claimed trade secret at the outset of the litigation.' " (quoting Advanced Modular Sputtering, Inc. v. Superior Court, 132 Cal. App. 4th 826, 835 (2005)). Nor does the Court consider the trade secrets that Plaintiffs have alleged to be merely general "types of information" as Apple suggests. See Reply at 5 (citing Vendavo, Inc. v. Price f(x) AG, 2018 WL 1456697, at *4 (N.D. Cal. Mar. 23, 2018)). The Court therefore rejects these criticisms as a sufficient basis for dismissal.

3 [redacted]
[redacted]

Apple next makes arguments specific to individual trade secrets in the TAC. [redacted] Mot. at 6. But Apple does not provide any facts to support this assertion that the trade secret is so broadly known. Here, again, the Plaintiffs have adequately disclosed the boundaries.

Next, Apple contends that the business and marketing plans and strategies trade secrets does not include "allegations explaining how to implement these ideas or identifying how these alleged strategies are any different from those generally known in the physiological monitoring device industry." Mot. at 8-9. The Court does not agree. Although Apple asserts that

Plaintiffs' business and marketing plans and strategies are not trade secrets because "Plaintiffs' product sales' locations and dates are publicly available," Id. at 9, the Court fails to see why that is sufficient to justify dismissal of trade secrets that relate to far more than where and when its products are sold. See TAC ¶ 43.1.

The Court also rejects Apple's argument that [redacted] Id. ¶ 43.5 (emphasis added); see Mot. at 9. This secret instead is tied to the [redacted] TAC ¶ 43.1. Rather than summarizing the job of any medical professional, [redacted]

Apple then turns its attention to [redacted] does not distinguish public information from what is secret. Mot at 10. The Court concludes that Apple is holding Plaintiffs to too high of a bar. A compilation can be a trade secret, Altavion, 226 Cal. App. 4th at 47, and the trade secret is alleged with sufficient specificity for discovery's "iterative process[,] where requests between parties lead to a refined and sufficiently particularized trade secret identification," to run its course. InteliClear, 978 F.3d at 662. As noted previously, the Plaintiffs need not define in minute detail every contour of the trade secret to survive a motion to dismiss. Acrisure, 2019 WL 4137618, at *3.

***6** On the other hand, the Court agrees with Apple that [redacted] Although Plaintiffs dismiss this argument as an improper attack on the merits, Plaintiffs provide no reasoning for this proposition where, as here, the information is facially public. See Opp'n at 15-16. As the trade secrets relating to interacting with hospitals set forth in paragraphs 44.3 through 44.7 are dependent on the secret listed in paragraph 44.2, which the Court finds to be unprotectable, the Court **DISMISSES** the trade secrets in paragraphs 44.2 through 44.7.

Lastly, Apple argues that Plaintiffs need to have specified which trade secrets were owned by Masimo and which were owned by Cercacor. Mot. at 11. But Apple has cited to no law requiring that plaintiffs suing together specify which of them owns a particular trade secret. The only case that Apple does cite is one in which there was an individual plaintiff who did not allege ownership of the trade secrets at issue. California Police Activities League v. California Police Youth Charities, Inc., 2009 WL 537091, at *2 (N.D. Cal. Mar. 3, 2009). As such, the Court rejects this basis for dismissing Plaintiffs' trade secrets.

c. Efforts to Maintain Secrecy

The Court now turns to Apple's arguments that Plaintiffs have failed to allege that they took reasonable steps to maintain the secrecy of their trade secrets. Mot. at 12-15. Under the California Uniform Trade Secrets Act, a trade secret must be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Cal. Civ. Code § 3426.1(d). Apple argues, in essence, that Plaintiffs forfeited their rights to their alleged trade secrets by not promptly objecting to Apple's disclosure of Plaintiffs' trade secrets. See Reply at 18 ("Plaintiffs do not allege they took corrective action or objected to any breach in their confidential relationship with Lamego."); Mot. at 14 (Plaintiffs "never approached Apple nor warned against future publications.").

The Court disagrees that this is a basis for dismissal. The parties mainly argue about the applicability of HiRel Connectors, Inc. v. Department of Defense of the United States, 2005 WL 4958547 (C.D. Cal. Jan. 4, 2005). See Opp'n at 17-18; Reply at 18-19. As relevant, that case rejected the argument that equated "filing a 'timely' suit against a known misappropriator with taking 'reasonable' efforts to protect trade secrets as against the rest of the world." HiRel, 2005 WL 4958547, at *5 (emphasis added). The HiRel court's conclusion is sound; if the owner of a trade secret allows for one party to publish its trade secrets to the world, and the owner takes no reasonable efforts to counteract that misappropriation, the information can hardly be considered "secret" when other parties subsequently appropriate it. But this does not mean that a suit filed within the statute of limitations against a known misappropriator, alleged in this case to be Apple, must be dropped if the owner does not take immediate action against that misappropriator. Cf. id. at *6 ("While California law certainly provides Plaintiff with a three year period within which to file suit, this Court finds that merely filing suit against the alleged wrongdoer does not constitute "reasonable efforts" to protect the trade secrets against others who might be interested in obtaining those secrets."). Nor can Apple draw a line between itself and Lamego because Lamego was an employee of Apple when he is alleged of having publicly published Plaintiffs' trade secrets. HiRel therefore does not provide a basis for dismissal.

2. Remaining Elements of Misappropriation

***7** Apple finally makes a series of arguments for why Plaintiffs have failed to allege the elements of a trade secret misappropriation claim. The Court addresses them in turn.

a. Knowledge

To plead a claim for trade secret misappropriation, a plaintiff must "allege facts that tend to exclude general knowledge or innocuous (i.e., competitive marketplace) explanations." CleanFish, LLC v. Sims, 2020 WL 1274991, at *11 (N.D. Cal. Mar. 17, 2020). In determining whether the TAC's allegations are sufficient to allege knowledge, the Court must consider the entire sequence of events in context, and not the individual allegations in isolation. See Soo Park v. Thompson, 851 F.3d 910, 929 n.22 (9th Cir. 2017). "Plaintiffs allege Apple (1) met with Plaintiffs because it desired Plaintiffs' technology, (2) systematically recruited Plaintiffs' employees, including Masimo's Chief Medical Officer and Cercacor's CEO, when discussions broke down, (3) obtained extensive patent disclosures from Lamego in the short time he worked at Apple, and (4) selectively requested non-publication of Lamego applications containing Plaintiffs' trade secrets." Opp'n at 19 (citing TAC ¶¶ 19-24, 229, 248). Plaintiffs also allege that they sent Apple a letter on January 24, 2014, notifying the company that Lamego possessed Plaintiffs' confidential information. TAC ¶ 23.

Apple makes a series of arguments criticizing Plaintiffs' allegations of knowledge. See Mot. at 15-20. But Apple attacks these allegations in isolation and does not consider the entire sequence of events in context. See id. Indeed, the Court considers these allegations taken together to be sufficient to tend to exclude innocuous explanations. The allegations suggest that Apple had a demonstrated interest in Plaintiffs' technology, quickly obtained patentable information in Plaintiffs' field from Plaintiffs' former employees known to have confidential information shortly after negotiations with Plaintiffs broke down, and then requested non-publication such that Plaintiffs did not promptly have notice of the information Apple was patenting.

At their core, Apple's arguments assert that Plaintiffs have failed to allege that Apple hired employees because of their knowledge of specific trade secrets owned by Plaintiffs. [4] But Plaintiffs' need not allege that Apple had knowledge that the specific information Lamego and O'Reilly used was Plaintiffs' trade secret. To impose such a requirement would in effect place a burden on a trade secret owner to disclose its trade secrets to protect them, a course of action that would be contrary to the mandate that owners make reasonable efforts to maintain their secrecy. See supra Section III.B.1.c.

4 See Reply at 20 (allegations of meetings between Masimo and Apple in 2013 "fail to support an inference that Apple knew that the specific information Lamego or O'Reilly allegedly later used or disclosed contained Plaintiffs' trade secrets"); id. ("Plaintiffs offer no facts tending to show that Apple hired employees for their knowledge of Plaintiffs' trade secrets."); id. ("Apple argues here that general knowledge that Plaintiffs possessed trade secrets does not suffice to show that Apple knew it was wrongfully acquiring specific secrets.).

***8** Apple then argues that dismissal is appropriate because Plaintiffs are relying on a theory of inevitable disclosure. Mot. at 17-18. But, Apple's primary case, Hooked Media Group, Inc. v. Apple Inc., 5 Cal. App. 5th 323 (Cal. Ct. App. 2020), is inapposite because that case was on summary judgment. Id. at 329. Moreover, Plaintiffs are not relying on the doctrine of inevitable disclosure for their misappropriation claim does not rest on the idea that Lamego and O'Reilly inevitably used trade secrets gained in the course of their employment with Plaintiffs while employed by Apple. See Whyte v. Schlage Lock Co., 101 Cal. App. 4th 1443, 1458-59 (Cal. Ct. App. 2002) ("The doctrine's justification is that unless the employee has an uncanny ability to compartmentalize information the employee will necessarily rely—consciously or subconsciously—upon knowledge of the former employer's trade secrets in performing his or her new job duties." (citation omitted)). Rather, Plaintiffs contend that trade secret information was further specifically disclosed to the public as part of patent applications.

The Court therefore rejects this basis for dismissal.

b. Acquired, Used, or Disclosed Trade Secrets

"[T]here is no requirement that" a plaintiff "plead exactly how [d]efendants improperly obtained or used the alleged trade secret." Metricolor LLC v. L'Oreal S.A., 2020 WL 3802942, at *11 n.7 (C.D. Cal. July 7, 2020) (citing Autodesk, Inc. v. ZWCAD Software, Inc., 2015 WL 2265479, at *6 (N.D. Cal. May 13, 2015)). "That is because, at the pleading stage, 'discovery has not yet commenced,' and 'it would be

unreasonable to require a plaintiff to demonstrate the precise ways in which [d]efendants have used their trade secrets, given that [d]efendants are the only ones who possess such information." ' Id. (citing Autodesk, 2015 WL 2265479, at *6). Rather, Plaintiffs merely must plausibly allege that Apple misappropriated Plaintiffs' trade secrets. Iqbal, 556 U.S. 662, 678. Plaintiffs have done this.

Most of Apple's arguments that Plaintiffs have failed to state a claim for misappropriation fail. First, Apple acknowledges that Plaintiffs have identified "portions of three issued patents that purportedly include some alleged secrets. Mot. at 20-21 (citing TAC ¶¶ 233, 239), which is sufficient to state a claim. [5] Second, misappropriation of [redacted] is properly alleged because similarities between Apple's products and Plaintiffs' trade secrets, together with the allegations relating to Apple's knowledge of Plaintiffs' trade secrets, see supra Section III.B.2.b., is sufficient to plausible allege misappropriation. See Metricolor, 2020 WL 3802942, at *13. The same logic applies to Plaintiffs' business and marketing plans and strategies trade secrets. Cf. Mot. at 21-22.

5 The Court also fails to see why the allegation that Plaintiffs' trade secrets were not publicly known "at least at the time of Defendant's misappropriation" shapes the analysis. See Mot. at 21 (quoting TAC ¶ 225). That allegation merely states that the trade secrets became publicly known following the allege misappropriation. Furthermore, the order in which Apple is alleged to have improperly published Plaintiffs' trade secrets does not change the analysis of whether Apple misappropriated those trade secrets generally. Cf. Reply at 22.

However, Apple is correct in arguing that Plaintiffs' allegations of misappropriating [redacted] are conclusory. See Mot. at 22. The extent of Plaintiffs' allegations is that [redacted] TAC ¶ 244. This alone fails to provide any factual allegations that allow Plaintiffs' claim to rise to the level of plausiblity. The Court therefore **DISMISSES** Plaintiffs' misappropriation claim with respect to the oxygen saturation technique trade secrets.

c. Inducement

Next, Apple argues that the Court must dismiss Plaintiffs' inducement theory because it is merely based on "information and belief." Mot. at 22-23 (quoting TAC ¶ 230). [6] The extent of Plaintiffs' allegations of inducement are that "on information and belief, Defendant induced its employees, including Lamego and O'Reilly, to disclose Plaintiffs' Confidential Information and the employees disclosed Plaintiffs' Confidential Information for the benefit of Defendant while employed by Defendant." TAC ¶ 230. [7] The Court agrees that this allegation alone is insufficient to state a claim. Plaintiffs argue that they can allege inducement based on information and belief without a factual basis because the circumstances of inducement "is not presumptively in the knowledge of the pleading party. Opp'n at 23 (quoting Calendar Research LLC v. Stubhub, Inc., 2017 WL 10378336, at *4 (C.D. Cal. Aug. 16, 2017)). "But while facts may be alleged upon information and belief, that does not mean that conclusory allegations are permitted. A conclusory allegation based on information and belief remains insufficient under Iqbal/Twombly." Menzel v. Scholastic, Inc., 2018 WL 1400386, at *2 (N.D. Cal. Mar. 19, 2018). To find otherwise would contravene the basic teachings of those Iqbal, See Iqbal, 556 U.S. at 678. Merely stating that Apple induced Lamego and O'Reilly to disclose Plaintiffs' trade secrets without more detail is conclusory, and therefore Plaintiffs' theory of induced misappropriation is **DISMISSED**.

6 Plaintiffs argue that the Court need not address Plaintiffs' theory of misappropriation by inducement because it is "merely one way of showing improper acquisition." ROA at 3. But courts properly evaluate separate theories on which a claim is alleged and dismiss those theories that are insufficient. Cf. Dent v. National Football League, 968 F.3d 1126, 1132-35 (9th Cir. 2020) (dismissing a per se theory of negligence while concluding that a voluntary undertaking theory of negligence was sufficiently alleged).

7 While Plaintiffs cite to TAC paragraphs 19-24 and 229 as containing additional allegations of inducement, see Opp'n at 24; ROA at 3-4, those paragraphs only contain allegations about Lamego and O'Reilly's knowledge of the trade secrets and Plaintiffs' warning to Apple about Lamego and O'Reilly's possession of trade secrets. They do not contain allegations about how Apple induced misappropriation.

d. Respondeat Superior

***9** Finally, the Court agrees with Apple that Plaintiffs have failed to state a theory based on respondeat superior because they have failed to state a claim that Lamego and O'Reilly misappropriated their trade secrets. See Mot. at 23-24. The only allegations that Lamego and O'Reilly themselves misappropriated Plaintiffs' trade secrets are that they "used and disclosed Plaintiffs' Confidential Information within the scope of their employment for Defendant and for the benefit of Defendant," TAC ¶ 246, and they "disclosed Plaintiffs' Confidential Information, without Plaintiffs' consent to Defendant." Id. ¶ 228. These are conclusory allegations that are insufficient to state a claim. Without sufficient allegations to state a claim for misappropriation against Apple's employees, Plaintiffs cannot state a theory of respondeat superior against Apple itself. Brain Injury Association of California v. Yari, 2020 WL 3643482, at *6 (C.D. Cal. Apr. 30, 2020) ("[A]n employer may be vicariously liable for an employee's tort so long as it was committed within the scope of the employment." (emphasis added)) The Court therefore **DISMISSES** Plaintiffs' theory of respondeat superior.

C. Leave to Amend

Plaintiffs seek leave to amend the allegations of their complaint. Opp'n at 25. "A party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Fed. R. Civ. P. 15(a)(1). In all other cases, a party may amend its pleading only with written consent from the opposing party or the court's leave, which should be "freely give[n] ... when justice so requires." Fed. R. Civ. P. 15(a)(2); see Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990) (requiring that policy favoring amendment be applied with "extreme liberality").

In the absence of an "apparent or declared reason," such as undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by prior amendments, prejudice to the opposing party, or futility of amendment, it is an abuse of discretion for a district court to refuse to grant leave to amend a complaint. Foman v. Davis, 371 U.S. 178, 182 (1962); Moore v. Kayport Package Express, Inc., 885 F.2d 531, 538 (9th Cir. 1989). The consideration of prejudice to the opposing party "carries the greatest weight." Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). "Although there is a general rule that parties are allowed to amend their pleadings, it does not extend to cases in which any amendment would be an exercise in futility, or where the amended complaint would also be subject to dismissal." Steckman v. Hart Brewing, 143 F.3d 1293, 1298 (9th Cir. 1998) (internal citations omitted).

Here, the Court does not find that there was undue delay. Although the complaint has already been amended three times, Plaintiffs have addressed the Court's previous concerns. Where the Court did grant partial dismissal, it was for a reason different than that given in the Court's previous orders. The Court is not convinced that the action was filed in bad faith. Finally, the Court is not convinced that any amendment of the TAC would be futile or that Apple will be unduly prejudiced. Therefore, the Court **GRANTS** Plaintiffs 30 days leave to amend.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN PART** the motion. Having considered Plaintiffs' request for oral argument, the Court concludes that arguments were sufficiently presented in the briefing papers. The Court therefore **DENIES** the request. The Court asks the parties to meet and confer and notify the Court which parts of the order should be redacted within 7 days.

IT IS SO ORDERED.

All Citations

Slip Copy, 2021 WL 925885

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680 Fed.Appx. 556
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Titus MAY; Barry May; Jeffrey May; Traci May; Kelli Chavez; Gregory Mayo; Lori Moberly, Plaintiffs-Appellants,

v.

NORTHROP GRUMMAN SYSTEMS CORPORATION, individually and as successor in interest to The Grumman Aircraft Engineering Corporation and Grumman Aerospace Corporation, Defendant-Appellee.

No. 15-56219
|
Argued and Submitted February 6, 2017 Pasadena, California
|
Filed February 23, 2017

Synopsis

Background: Employees brought action against employer, asserting claims for negligence, strict products liability, and premises liability arising from death of employees' family member allegedly due to take-home exposure to asbestos. The United States District Court for the Central District of California, No. 2:14-cv-09374-WGY-JEM, William G. Young, J., dismissed complaint, denied employees' motion for leave to amend, and entered judgment in favor of employer. Employees appealed.

Holdings: The Court of Appeals held that:

[1] employees failed to include sufficient non-conclusory allegations in their original complaint to state plausible claim for relief or to put employer on notice of basis for employees' claims so that it could defend itself effectively, but

[2] employees' proposed amended complaint contained sufficient, non-conclusory allegations to plausibly state claim for relief under theory of premises liability.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (3)

[1] **Products Liability** Persons Liable
Products Liability Manufacturers in general; identification
Products Liability Asbestos

In action against employer arising from death of employees' family member allegedly due to take-home exposure to asbestos, employees failed to adequately allege identity of any specific product that employer itself manufactured, supplied, or was otherwise responsible for, and thus employees failed to state claims under California law for negligence or strict products liability.

[2] **Negligence** Dangerous situations and substances; strict liability
Negligence Premises Liability

In action against employer arising from death of employees' family member allegedly due to take-home exposure to asbestos, employees failed to adequately allege names of employees, specific facilities where they worked, what jobs they held, or any other information related to circumstances of their exposure to asbestos on employer's facilities, and thus employees failed to state claim under California law for premises liability.

[3] **Federal Civil Procedure** Form and sufficiency of amendment; futility
Negligence Dangerous situations and substances; strict liability
Negligence Premises Liability

Employees' proposed amended complaint contained sufficient, non-conclusory allegations to plausibly state claim under California law for relief under theory of premises liability and to put employer on fair notice of basis for employees' claim, and thus employees should have been granted leave to amend in action arising from death of employees' family member allegedly due to take-home exposure to asbestos; proposed amended complaint identified particular premises on which employees worked, how employer reasonably failed to maintain its premises to protect employees from airborne asbestos exposure, how decedent's husband was exposed to airborne asbestos through course of his employment, and how decedent was ultimately harmed by asbestos originating from employer's facilities through take-home exposure.

1 Cases that cite this headnote

Attorneys and Law Firms

***557** Sharon JoEllen Arkin, The Arkin Law Firm, Los Angeles, CA, Benno B. Ashrafi, Esquire, Attorney, Josiah W. Parker, Attorney, Weitz & Luxenberg, P.C., Los Angeles, CA, for Plaintiffs-Appellants

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Appeal from the United States District Court for the Central District of California, William G. Young, District Judge, Presiding, D.C. No. 2:14-cv-09374-WGY-JEM

Before: SCHROEDER, DAVIS,[*] and MURGUIA, Circuit Judges.

[*] The Honorable Andre M. Davis, United States Circuit Judge for the U.S. Court of Appeals for the Fourth Circuit, sitting by designation.

***558** MEMORANDUM[**]

[**] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Plaintiffs appeal the district court's dismissal of their original complaint for failure to state a claim and denial of their motion for leave to amend the complaint on futility grounds. After denying Plaintiffs' motion for leave to amend, the district court entered judgment in favor of Defendant Northrop Grumman Systems Corporation ("Northrop"). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in part and reverse and remand in part. [1]

[1] We grant Northrop's unopposed motion requesting judicial notice of Plaintiffs' complaint in a related state court lawsuit (Doc. 27), as the Court may take judicial notice of "matters of public record." *See Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).

1. We review de novo a district court's dismissal for failure to state a claim upon which relief can be granted. *See Daniels–Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). A district court's denial of a motion to amend a complaint is generally reviewed for an abuse of discretion, *see AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012), but we review de novo a district court's denial of leave to amend on grounds of futility, *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 557 (9th Cir. 2010). Denial of a motion to amend on futility grounds is proper if it is clear "that the complaint would not be saved by any amendment." *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892–93 (9th Cir. 2010) (citation omitted).

[1] **[2]** 2. The district court properly dismissed Plaintiffs' original complaint because it contained insufficient, non-conclusory allegations to state a plausible claim for relief or to put Northrop on notice of the basis for Plaintiffs' claims so that it could defend itself effectively. *See Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014). Notably, Plaintiffs' original complaint did not identify any specific product that Northrop itself manufactured, supplied, or was otherwise responsible for in a way that would give rise to a claim for products liability, which is fatal to both Plaintiffs' negligent and strict products liability claims. *See DiCola v. White Bros. Performance Prod., Inc.*, 158 Cal.App.4th 666, 69 Cal.Rptr.3d 888, 897 (2008). Further, the original complaint does not identify the names of the decedent's family members that worked at Northrop, the specific Northrop facilities where these family members worked, what jobs they held,

or any other information related to the circumstances of the family members' exposure to asbestos on Northrop's facilities. Without such basic information, Plaintiffs' original complaint fails to put Northrop on notice of the basis for Plaintiffs' premises liability claim. *See Levitt*, 765 F.3d at 1135.

3. The district court properly denied Plaintiffs' motion for leave to amend their negligent and strict products liability claims on futility grounds. Plaintiffs' proposed First Amended Complaint, like the original complaint, failed to identify any defective product that Northrop itself produced, manufactured, sold, or otherwise could be responsible for under a theory of products liability. To the extent Plaintiffs are attempting to hold Northrop liable for any defective products manufactured and supplied to Northrop by other companies, such claims are improper under California law. *See* ***559** *O'Neil v. Crane Co.*, 53 Cal.4th 335, 135 Cal.Rptr.3d 288, 266 P.3d 987, 991 (2012). Further, to the extent Plaintiffs are attempting to hold Northrop liable only for its use of defective products in the scope of its business, Plaintiffs have not persuasively established that this theory is sufficient to justify imposing liability under a theory of products liability, as opposed to liability under a theory of premises liability or general negligence. *Cf. Peterson v. Superior Court*, 10 Cal.4th 1185, 43 Cal.Rptr.2d 836, 899 P.2d 905, 913 (1995). Accordingly, the district court did not err in denying Plaintiffs leave to amend their negligent and strict products liability claims, and the district court did not abuse its discretion in dismissing these claims with prejudice. *See Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1167 (9th Cir. 2009).

[3] 4. However, the district court erred in denying Plaintiffs' motion for leave to amend their premises liability claim on futility grounds. The proposed First Amended Complaint alleges sufficient, non-conclusory allegations to plausibly state a claim for relief under a theory of premises liability and to put Northrop on fair notice of the basis for Plaintiffs' claim. *See Levitt*, 765 F.3d at 1135; *see also Kesner v. Superior Court*, 1 Cal.5th 1132, 210 Cal.Rptr.3d 283, 384 P.3d 283, 300, 305 (2016) (identifying the elements of a premises liability claim as (1) a legal duty of care, (2) breach of that duty, and (3) proximate cause resulting in injury, and holding that a property owner's duty to prevent take-home exposure extends to members of a worker's household). Specifically, the proposed First Amended Complaint identifies the particular Northrop-controlled premises on which the decedent's family members worked, how Northrop reasonably failed to maintain its premises to protect its employees from airborne asbestos exposure, how the decedent's husband was exposed to airborne asbestos through the course of his employment with Northrop, and how the decedent was ultimately harmed by asbestos originating from Northrop's facilities through take-home exposure. Because the proposed First Amended Complaint sufficiently states a claim against Northrop for premises liability, the district court erred in denying Plaintiffs leave to amend their complaint on futility grounds. *See Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988) (stating that the "proper test to be applied when determining the legal sufficiency of a proposed amendment is identical to the one used when considering the sufficiency of a pleading"). Accordingly, we reverse the judgment of dismissal on Plaintiffs' premises liability claim and remand for further proceedings.

5. The parties shall bear their own costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED.

All Citations

680 Fed.Appx. 556

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2017 WL 1550045
Only the Westlaw citation is currently available.
United States District Court, S.D. California.

Christopher MELINGONIS, individually and on behalf of all others similarly situated, Plaintiff,
v.
RAPID CAPITAL FUNDING, L.L.C.; and, Merchant Worthy, Inc., Defendants.

CASE NO. 16cv490-WQH-KSC
|
Signed 05/01/2017

Attorneys and Law Firms

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ORDER

WILLIAM Q. HAYES, United States District Judge

***1** The matters before the Court are the motion to dismiss the first amended complaint filed by Defendant Merchant Worthy, Inc. ("Merchant Worthy") (ECF No. 26) and the motion for leave to amend the complaint filed by Plaintiff Christopher Melingonis (ECF No. 27).

I. Background

On February 24, 2016, Plaintiff initiated this action by filing a complaint against Defendant Rapid Capital Funding L.L.C. ("Rapid Capital") alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq. (ECF No. 1). On April 15, 2016, Rapid Capital filed an answer. (ECF No. 4).

On August 16, 2016, the Magistrate Judge issued a Scheduling Order in this matter requiring that any motion to join other parties, to amend the pleadings or to file additional pleadings be filed on or before September 12, 2016. (ECF No. 17).

On October 18, 2016, Plaintiff filed a first amended complaint against Defendant Rapid Capital and the newly-added Defendant Merchant Worthy. (ECF No. 18).

On December 30, 2016, Defendant Merchant Worthy filed a motion to dismiss the first amended complaint. (ECF No. 26). Plaintiff did not file a response in opposition to this motion to dismiss. On January 30, 2017, Defendant Merchant Worthy filed a "Notice of No Opposition Filed in Response to Defendant Merchant Worthy Inc.'s Motion and Motion to Dismiss First Amended Class Action Complaint." (ECF No. 32).

On January 9, 2017, Plaintiff filed a motion for leave to file an amended complaint, in which Plaintiff states that he withdraws the first amended complaint. (ECF No. 27). On January 23, 2017, Defendant Merchant Worthy filed a response in opposition to the motion seeking leave to file an amended complaint. (ECF No. 29). On January 30, 2017, Plaintiff filed a reply. (ECF No. 31).

II. Plaintiff's Motion for Leave to File an Amended Complaint

Plaintiff states that he "withdraws the First Amended Complaint which was filed on October 19, 2016" and requests leave to amend the original complaint to add Merchant Worthy as a defendant. (ECF No. 27-1 at 2). Plaintiff states that he has no objection to Defendant Merchant Worthy's alternative request to set a new Case Management Conference to restart the deadlines in this action. *Id.* at 3. Plaintiff further requests that Defendant Merchant Worthy's motion to dismiss be denied as moot. *Id.* at 4. Plaintiff contends that good cause exists to amend his complaint because he could not have included Defendant Merchant Worthy in the original complaint. Plaintiff contends that he was not aware of the existence of Defendant Merchant Worthy or its relation to the current action until September 30, 2016 following the receipt of written discovery. *Id.* at 3; ECF No. 31 at 2. Plaintiff contends that during discovery, Defendant Rapid Capital represented that at least one of the phone calls received by Plaintiff was placed by Defendant Merchant Worthy. (ECF No. 27-1 at 3).

Defendant Merchant Worthy contends that Plaintiff should not be granted leave to amend because Plaintiff failed to obtain leave of Court to file the first amended complaint as

required by Federal Rule of Civil Procedure 15(a). (ECF No. 29 at 5). Defendant Merchant Worthy contends that it will be prejudiced if it is added as a defendant at this stage of proceedings because, absent intervention by the Court, it will have "no opportunity to participate in any class discovery or prepare for a class certification motion, and will have no meaningful opportunity to participate in fact discovery in this action." *Id.* at 6. Defendant Merchant Worthy contends that Plaintiff failed to obtain leave of Court to add Defendant Merchant Worthy as a defendant as required by Federal Rule of Civil Procedure 21. *Id.* Defendant Merchant Worthy contends that Plaintiff failed to seek leave of Court to modify the Scheduling Order. Defendant Merchant Worthy contends that Plaintiff has made no showing of good cause to modify the Scheduling Order as required by Federal Rule of Civil Procedure 16(b)(4). *Id.* at 8.

A. Legal Standards

***2** A motion for leave to amend filed after the time period specified in a district court's scheduling order is governed by the "good cause" standard of Federal Rule of Civil Procedure 16(b). *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992). Federal Rule of Civil Procedure 16 provides that a district court must issue a scheduling order that limits "the time to join other parties, amend the pleadings, complete discovery, and file motions." Fed. R. Civ. P. 16(b). Federal Rule of Civil Procedure 16(b) also provides that "[a] schedule may be modified only for good cause and with the judge's consent." *Id.* "Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking amendment. The district court may modify the pretrial schedule 'if it cannot reasonably be met despite the diligence of the party seeking the extension.' " *Johnson*, 975 F.2d at 609 (citing Fed. R. Civ. P. 16 advisory committee's notes (1983 amendment)). If the court finds that a plaintiff has shown good cause pursuant to Federal Rule of Civil Procedure 16(b), the court must consider whether leave to amend is proper under Federal Rule of Civil Procedure 15. *Id.* at 608.

Federal Rule of Civil Procedure 15(a) provides that after the time for amendment "as a matter of course" has passed, "a party may amend its pleading only with the opposing party's written consent or the court's leave." *Id.* Federal Rule of Civil Procedure 15 mandates that leave to amend "be freely given when justice so requires." *Id.* "This policy is to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (quotation omitted). In *Foman v. Davis*, 371 U.S. 178 (1962), the Supreme Court offered several factors for district courts to consider in deciding whether to grant a motion to amend under Rule 15(a):

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman, 371 U.S. at 182; *see also Smith v. Pac. Prop. Dev. Co.*, 358 F.3d 1097, 1101 (9th Cir. 2004). "Not all of the [*Foman*] factors merit equal weight. As this circuit and others have held, it is the consideration of prejudice to the opposing party that carries the greatest weight." *Eminence Capital*, 316 F.3d at 1052 (citations omitted). "The party opposing amendment bears the burden of showing prejudice." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). "Absent prejudice, or a strong showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to amend." *Eminence Capital*, 316 F.3d at 1052.

B. Discussion

Plaintiff concedes that he filed the first amended complaint without first seeking leave of Court pursuant to Federal Rule of Civil Procedure 15(a) and 21. (ECF No. 27-1 at 3; ECF No. 31 at 3). In the motion seeking leave to file an amended complaint, Plaintiff requests to withdraw the improperly filed first amended complaint and seeks leave to file the first amended complaint. The Court grants Plaintiff's request to withdraw the first amended complaint.

Because the Scheduling Order (ECF No. 17) was entered in this case, Plaintiff's motion for leave to amend is initially governed by Rule 16(b).[1] *See Johnson*, 975 F.2d at 608 (citing *Forstmann v. Culp*, 114 F.R.D. 83, 85 (M.D.N.C. 1987) ("party seeking to amend pleading after date specified in scheduling order must first show 'good cause' for amendment under Rule 16(b), then, if 'good cause' be shown, the party

must demonstrate that amendment was proper under Rule 15")).

[1] On March 8, 2017, the Magistrate Judge vacated the remaining dates on the scheduling order in light of these pending motions. (ECF No. 37).

***3** Plaintiff contends that he did not learn of Defendant Merchant Worthy's existence and involvement in this matter prior to receiving discovery responses from Defendant Rapid Capital and filed the amended complaint "as soon as was practicable." (ECF No. 27-1 at 3). Plaintiff states that he "could not have amended the Complaint before the Court's cut off of September 12, 2016, because Plaintiff did not learn of the existence of [Defendant Merchant Worthy] until September 30, 2016[.]" (ECF No. 31 at 2). Plaintiff includes a declaration by his counsel which states that Plaintiff received Defendant Rapid Capital's written discovery responses on September 30, 2016 and that "Plaintiff first found out about the existence of [Defendant Merchant Worthy], and their relation to this case, from [Defendant Rapid Capital] in [Defendant Rapid Capital's] initial discovery responses." (ECF No. 31-1 at 2). Plaintiff filed the first amended complaint on October 19, 2016 and the motion for leave to file the amended complaint on January 9, 2017. (ECF Nos. 18, 27). Plaintiff provides evidence to establish that, despite proceeding diligently, he could not have met the Court's September 12, 2016 deadline to file a motion to join other parties or amend the pleading. *See Johnson*, 975 F.2d at 609. The Court concludes that Plaintiff has shown good cause to amend the complaint to include Defendant Merchant Worthy.

Because the Court finds that Plaintiff has shown good cause, the Court considers whether leave to amend is proper under Federal Rule of Civil Procedure 15. *See Johnson*, 975 F.2d at 608. Defendant Merchant Worthy contends that it will be prejudiced by being added as a defendant at this point in the proceedings because a number of deadlines in the Scheduling Order have already passed. In *DCD Programs*, the Ninth Circuit Court of Appeals noted that "[a]mending a complaint to add a party poses an especially acute threat of prejudice to the entering party." *DCD Programs*, 833 F.2d at 187 (quoting *Korn v. Royal Caribbean Cruise Line, Inc.*, 724 F.2d 1397, 1400 (9th Cir. 1984)). However, in *DCD Programs* the Court determined that the newly added defendant would not be prejudiced by the timing of the proposed amendment in because the case was at the discovery stage with no trial date pending or pretrial conference scheduled. *Id.* at 187-88. This case is currently in the discovery stage and no trial date is pending. Further, Plaintiff states that he has "no objection to [Defendant Merchant Worthy's] alternative request to set a new Case Management Conference to restart the deadlines in this action" and requests the Court reset the discovery deadlines. (ECF No. 27-1 at 3-4). Defendant Merchant Worthy has not satisfied its burden to demonstrate that it will be prejudiced if it is named in an amended complaint. The Court concludes that Defendant Merchant Worthy has not made a sufficiently strong showing of the *Foman* factors to overcome the presumption of Rule 15(a) in favor of granting leave to amend. *See Eminence Capital*, 316 F.3d at 1052.

III. Defendant Merchant Worthy's Motion to Dismiss

Defendant Merchant Worthy moves this Court for an Order dismissing the first amended complaint against Defendant Merchant Worthy and dismissing Merchant Worthy as a defendant in this action. (ECF No. 26-1 at 3). Defendant contends that Plaintiff has failed to comply with Federal Rule of Civil Procedure 15(a), Federal Rule of Civil Procedure 21, and the Court's Scheduling Order issued on August 16, 2016. Alternatively, Defendant Merchant Worthy requests that the Court "set a new scheduling conference to restart the deadlines in this action in order to allow [Defendant Merchant Worthy] to participate on a fair basis with the other parties and avoid such prejudice." *Id.* at 3.

Plaintiff did not file a response in opposition to this motion to dismiss. In his reply in support of the motion seeking leave to file an amended complaint, Plaintiff states, "Plaintiff did not file an opposition to [Defendant Merchant Worthy's] motion, as they were correct in pointing out Plaintiff's error in failing to request leave to amend the complaint. Plaintiff thought it would be best to instead make that request for leave to amend and offer the court a different remedy than dismissal." (ECF No. 31 at 2-3). The Court has granted Plaintiff's request to withdraw the first amended complaint. The Court denies the motion to dismiss as moot.

IV. Conclusion

***4** IT IS HEREBY ORDERED that Plaintiff's request to withdraw the first amended complaint is GRANTED. (ECF No. 27).

IT IS FURTHER ORDERED that the motion for leave to amend the complaint is GRANTED. (ECF No. 27). Plaintiff has leave to file an amended complaint adding Merchant Worthy as a defendant. Plaintiff shall file the amended

complaint within fourteen (14) days of the date this Order issues.

IT IS FURTHER ORDERED that the motion to dismiss filed by Merchant Worthy is DENIED as moot. (ECF No. 26).

Any requests regarding a new scheduling order or additional discovery matters are referred to the Magistrate Judge.

All Citations

Not Reported in Fed. Supp., 2017 WL 1550045

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834 Fed.Appx. 353 (Mem)
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

MICHAEL GRECCO PRODUCTIONS, INC., dba Michael Grecco Photography, Inc., Plaintiff-appellant,
v.
BDG MEDIA, INC.; Does, 1 through 10 inclusive, Defendants-Appellees.

No. 20-55441
|
Argued and Submitted January 12, 2021 Pasadena, California
|
FILED January 25, 2021

Attorneys and Law Firms

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Appeal from the United States District Court for the Central District of California, Andre Birotte, Jr., District Judge, Presiding, D.C. No. 2:19-cv-04716-AB-KS

Before: WATFORD, FRIEDLAND, and BENNETT, Circuit Judges.

MEMORANDUM [***]

[***] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Michael Grecco Productions, Inc. (Grecco) appeals from the district court's judgment dismissing its action for copyright infringement on statute-of-limitations grounds. We affirm in part and reverse in part.

***354 1.** The district court erred in holding that Grecco's claim based on the Flashlight Photo was time-barred. Copyright infringement claims must be "commenced within three years after the claim accrued," 17 U.S.C. § 507(b), which occurs "when a party discovers, or reasonably should have discovered, the alleged infringement." *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 971 F.3d 1042, 1047 (9th Cir. 2020). This discovery rule analysis is a factual one, *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 707 (9th Cir. 2004), and Grecco's allegations suffice to survive a motion to dismiss with respect to the Flashlight Photo. Grecco alleged discovering defendant's infringing uses of the Flashlight Photo in January and February 2019, and it is not apparent from the face of the complaint (or from the judicially noticeable facts) that Grecco should have discovered the alleged infringements before May 2016 (three years before it filed the original complaint). Grecco's amended complaint alleges facts that establish the difficulty of detecting online infringements, even when plaintiffs like Grecco invest in both in-house infringement detection using Google image search as well as third-party reverse image search software. At what time these search processes would or should have captured alleged infringements is a question of fact that cannot be determined on a motion to dismiss.

Grecco's amended complaint added a new claim related to the September 2016 re-upload of the Flashlight Photo. That claim "arises out of the same conduct, transaction, or occurrence as that set forth in the original complaint." *ASARCO, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1005 (9th Cir. 2014). The claim thus relates back to the filing of the original complaint and is timely without regard to the discovery rule. Although the district court also held that Grecco's amended complaint went beyond the scope of the court's order granting leave to amend, we do not read the order as limiting amendment so severely, particularly because we hold that the re-upload claim relates back to the original complaint. *See Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009) ("Courts are free to grant a party leave to amend whenever justice so requires, and requests for leave should be granted with extreme liberality." (internal quotation marks omitted)). Consequently, it was an abuse of discretion to exclude this claim as beyond the scope of permissible amendment.

2. The district court correctly dismissed Grecco's claim based on the Hallway Photo, which Grecco first discussed in its amended complaint. That claim does not relate back to the filing of the original complaint because it rests on a separate act of infringement involving a different photograph from the one that formed the basis for the original complaint. *See ASARCO*, 765 F.3d at 1005. Grecco alleges that it had actual knowledge of defendant's infringing use of the Hallway Photo in October 2016, which is more than three years before it filed the amended complaint in December 2019. The claim related to the Hallway Photo is therefore time-barred and was properly dismissed with prejudice.

We do not reach Grecco's arguments based on the separate-accrual rule, as those arguments were raised for the first time on appeal. *See Zixiang Li v. Kerry*, 710 F.3d 995, 1000 & n.4 (9th Cir. 2013).

AFFIRMED in part; REVERSED and REMANDED in part.

The parties shall bear their own costs.

All Citations

834 Fed.Appx. 353 (Mem)

End of Document

2014 WL 12771117
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

John F. MUTTI
v.
RITE AID CORPORATION, et al.

Case No. CV-14-01593-MWF (Ex)
|
Filed 04/22/2014

Attorneys and Law Firms

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Proceedings (In Chambers): ORDER DENYING MOTION FOR REMAND [15]

MICHAEL W. FITZGERALD, U.S. District Judge

***1** This matter is before the Court on the Motion for an Order Remanding the Case to State Court and for Attorneys' Fees or $2,100 from Defendants and Their Counsel (the "Motion"), filed by Plaintiff John F. Mutti. The Court read and considered the papers on the Motion, and held a hearing on **April 21, 2014**. For the reasons stated below, the Motion is **DENIED**.

Background

On January 10, 2014, Mutti initiated this action by filing a Complaint in Los Angeles County Superior Court. (Docket No. 1, Ex. A). On March 4, 2014, Defendant Rite Aid Corporation ("Rite Aid") removed this action to federal court (the "Notice of Removal"). (Docket No. 1). On March 13, 2014, this action was reassigned to this Court for all further proceedings. (Docket No. 9). On March 14, 2014, the Court dismissed Mutti's claims against Defendant James Wickens pursuant to the parties' stipulation. (Docket No. 14).

On March 20, 2014, Mutti filed this Motion. (Docket No. 15). On March 31, 2014, Rite Aid filed an Opposition to Plaintiff's Motion for an Order Remanding the Case to State Court and for Attorneys' Fees (the "Opposition"). (Docket No. 21). That same day, Defendants Richard Denny, Steve Middleton, and Traci Burch joined the Opposition. (Docket No. 22). On April 7, 2014, Mutti filed a Reply to Defendants' Opposition to Plaintiff's Motion for an Order Remanding the Case to State Court and for Attorneys' Fees of $2,100 from Defendants and their Counsel (the "Reply"). (Docket No. 23).

According to the Complaint, Mutti was employed by Rite Aid from April 2013 to November 7, 2013. (Compl. ¶ 11). Defendants Denny, Middleton, and Burch are alleged to have been Mutti's supervisors while he worked at Rite Aid. (Compl. ¶¶ 3-6). The Complaint alleges that Defendants discriminated against and harassed Mutti on the basis of his disability, sexual orientation, gender, and complaints of illegal activity. (Compl. ¶¶ 12, 27).

The Complaint thus asserts fourteen claims for relief for: discrimination, harassment, retaliation, and wrongful termination based on disability, sexual orientation, gender, and complaints of harassment; failure to engage in the interactive process; and failure to accommodate disability. These claims are brought under California's Fair Employment and Housing Act ("FEHA"), with the exception of the wrongful termination claim, which arises under common law.

In the Motion, Mutti argues that this action should be remanded because jurisdiction did not exist at the time of removal. (Mot. at 5-7). Alternatively, Mutti seeks leave to amend the Complaint to add a new Defendant who would destroy diversity. (Mot. at 8-10).

Requests for Judicial Notice

"The court may judicially notice a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). It is appropriate for the Court to "take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

***2** Rita Aid has filed two requests for judicial notice.

First, on March 4, 2014, Rite Aid filed a Request for Judicial Notice in Support of Defendant Rite Aid Corporation's Notice of Removal of Action to United States District Court Pursuant to 28 U.S.C. §§ 1332 and 1441 (Diversity) (the "First Request"). (Docket No. 4). Rite Aid requests that the Court take judicial notice of court records, which reflect

the damages and attorneys' fees awarded in other cases for employment claims similar to those alleged in this action. (Request at 1-3).

The documents for which Rite Aid seeks judicial notice are court records, and thus, the accuracy of their sources cannot reasonably be questioned. Moreover, the court records are relevant to determining the amount in controversy, and whether the Court has diversity jurisdiction over this action.

Accordingly, the First Request is **GRANTED**, and the Court takes judicial notice of Exhibits A through J, which are attached to the First Request.

Second, on April 15, 20154, Rite Aid then submitted a Request for Judicial Notice in Support of Defendant Rite Aid Corporation's Opposition to Plaintiff's Motion for Remand (the "Second Request"). (Docket No. 25). Rite Aid requests that the Court take judicial notice of the Joint Rule 26(f) Report (the "Rule 26(f) Report") (Docket No. 24), which the parties filed in this action.

While the Court need not take judicial notice of the Rule 26(f) Report because it is part of the record in this action, the Court has the authority to do so. The Rule 26(f) Report is a court record whose accuracy cannot reasonably be questioned, and it contains information relevant to determining the amount in controversy.

Accordingly, the Second Request is **GRANTED**, and the Court takes judicial notice of the Rule 26(f) Report.

Motion for Remand

Removal to federal court is governed by 28 U.S.C. § 1441. Actions may be removed to a federal court if the federal court would have had original jurisdiction. *See* 28 U.S.C. § 1441(a); *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 163, 118 S. Ct. 523, 139 L.Ed. 2d 525 (1997) (stating that removal is proper when "the case originally could have been filed in federal court").

Federal courts have original jurisdiction over civil actions, where the matter in controversy exceeds $75,000 and the suit is between citizens of different states. 28 U.S.C. § 1332(a)(1). Section 1332 requires complete diversity, such that each plaintiff must be diverse from each defendant. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553, 125 S. Ct. 2611, 162 L.Ed. 2d 502 (2005) ("[T]he presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action.").

The Court "strictly construe[s] the removal statute against removal jurisdiction." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). "Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Id.* "[T]he defendant always has the burden of establishing that removal is proper." *Id.*

Diversity of Citizenship

***3** Mutti argues that at the time of removal Rite Aid failed to demonstrate complete diversity of citizenship because the Notice of Removal alleges only that each of the individual Defendants is domiciled in either Pennsylvania or New York without providing additional proof of such allegations, such as sworn declarations by Defendants. (Mot. at 5).

The Court is unpersuaded that the Notice of Removal itself was defective. Upon removal, Rite Aid was "merely required to allege (not to prove) diversity." *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001). The Notice of Removal sufficiently alleged that Denny was a citizen of New York, Middleton was a citizen of Pennsylvania, and Burch was a citizen of Pennsylvania. (Notice of Removal at ¶¶ 14-16).

Mutti further argues that because the Motion challenges whether there is diversity of citizenship, Rite Aid is now required to support the allegations in the Notice of Removal with competent proof, and it has failed to do so. (Reply at 4).

Rite Aid has submitted the Declaration of Glenn L. Briggs (the "Briggs Declaration") (Docket No. 21-2). Briggs is one of Rite Aid's attorneys. (Briggs Decl. ¶ 1). Briggs testifies that prior to filing the Notice of Removal, he "engaged in one-to-one communications with each of the Individual Defendants to verify the accuracy of each of the facts alleged in the [Notice of] Removal regarding their citizenship." (Briggs Decl. ¶ 2).

The Court has no reason to doubt Briggs's testimony, which was made under the penalty of perjury and as an officer of the Court. Additionally, the Notice of Removal contains very specific allegations as to each individual Defendant, which diminishes the likelihood that they are false. The Notice of Removal asserts that Denny has lived in New York for 55 years, owns a house in New York, and works and resides in New York with the intention of remaining there indefinitely. (Notice of Removal ¶ 14). Similarly, the

Notice of Removal asserts that both Middleton and Burch live in Pennsylvania, own a home there, and work and reside there with the intention of remaining there indefinitely. (Notice of Removal ¶¶ 15-16). Moreover, in support of Defendants' Motion to Dismiss (Docket No. 7), which was heard concurrently with this Motion, Defendants submitted declarations by Denny, Middleton, and Burch, in which each attests that he or she intends to remain where he or she resides indefinitely. (*See* Declaration of Richard Denny ¶ 3 (Docket No. 7-1); Declaration of Steve Middleton ¶ 3 (Docket No. 7-2); Declaration of Traci Burch ¶ 3 (Docket No. 7-3)).

A natural person's state of citizenship is "determined by her state of domicile," which is "where she resides with the intention to remain." *Kanter*, 265 F.3d at 957. Therefore, Briggs's testimony that the assertions in the Notice of Removal are true, together with each individual Defendant's declaration filed in support of the motion to dismiss, are sufficient to establish the individual Defendants' citizenship because they describe each individual's intention to remain where he or she reside indefinitely. In light of the fact that there is no evidence contradicting the citizenship of the individual Defendants, their citizenship has been established by a preponderance of the evidence, which is all that is required at this stage. *See Gaus*, 980 F.2d at 567 (stating that the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of the evidence).

Amount in Controversy

***4** Mutti also argues that the Notice of Removal does not demonstrate that the amount in controversy exceeds $75,000. (Mot. at 6-7).

Mutti cites to *Kenneth Rothschild Trust v. Morgan Stanley Dean Witter*, 199 F. Supp. 2d 993, 1001 (C.D. Cal. 2002), for the proposition that Rite Aid "must submit 'summary-judgment type of evidence' to establish that the actual amount in controversy exceeds $75,000." (*See* Mot. at 7). In support of this proposition, the district court in *Kenneth Rothschild* cites a non-binding Eastern District of Louisiana case and a Ninth Circuit case. The Ninth Circuit case, *Singer v. State Farm Mutual Automobile Insurance Co.*, 116 F.3d 373 (9th Cir. 1997), demonstrates that the court in *Kenneth Rothschild* misstated the standard. In *Singer*, the Ninth Circuit stated, in determining the amount in controversy on removal, "the court may consider facts in the removal petition, and ***may*** 'require parties to submit summary-judgment-type-evidence relevant to the amount in controversy at the time of removal.' " 116 F.3d at 377 (emphasis added). Therefore, the Court agrees with Rite Aid that summary-judgment-type evidence is not necessarily required to establish amount in controversy.

Instead, "where it is unclear or ambiguous from the face of a state-court complaint whether the requisite amount in controversy is pled," the removing party must show by "a preponderance of the evidence" that the amount in controversy exceeds the jurisdictional amount. *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 699 (9th Cir. 2007). "Under this burden, the defendant must provide evidence establishing that it is 'more likely than not' that the amount in controversy exceeds that amount." *Id.* (quoting *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996)).

The Complaint seeks recovery for special damages, general damages, punitive damages, and attorneys' fees (Compl. at p.31), all of which are included in the amount in controversy for the purpose of determining diversity jurisdiction. *See Simmons v. PCR Tech.*, 209 F. Supp. 2d 1029, 1031 (N.D. Cal. 2002) ("The jurisdictional minimum may be satisfied by claims for special and general damages, attorneys' fees and punitive damages.") (citation omitted).

The special damages include "substantial losses of earnings and other employment benefits." (*See, e.g.*, Compl. ¶ 37). The Notice of Removal alleges that Mutti earned an annual salary of $112,000, benefits are generally valued at 30% of an employee's pay, and Mutti was eligible for a bonus of up to 15% of his salary. (Notice of Removal ¶ 21). Mutti has not disputed these allegations. In fact, in the judicially noticed Rule 26(f) Report, Mutti acknowledges that he is seeking economic damages based on his annual salary of $112,000. (*See* Rule 26(f) Report at p.6, ¶ e).

The Court declines to project lost wages until a hypothetical trial date and to include the potential bonus in the lost wages calculation because the Court lacks a reasonable basis for estimating those figures, and thus, those figures would be highly speculative. However, the Court can estimate the lost wages and benefits for the approximately four months that elapsed between Mutt's alleged termination and the date of removal. *See, e.g.*, *Simmons*, 209 F. Supp. 2d at 1032 (estimating lost wages between the date of termination and the date of removal for the purpose of determining the amount in controversy). Lost wages for those four months would be a quarter of Mutti's annual salary, which is $28,000. Lost benefits would be a quarter of the annual value of his benefits, which is $8,400. Accordingly, lost wages and benefits would

amount to approximately $36,400, which does not satisfy the jurisdictional amount on its own.

***5** The amount that Mutti seeks to recover from the other sources of relief are unclear from the Complaint. To establish probable damages, which are unclear from the face of the Complaint, the Court may look to evidence of jury verdicts in cases involving analogous facts. *See Simmons*, 209 F. Supp. 2d at 1033 (considering jury verdicts in analogous cases to determine if alleged punitive damages and damages for emotional distress met the amount in controversy requirement in a case alleging FEHA claims).

Rite Aid has provided evidence of jury verdicts establishing that damages for emotional distress in similar employment cases have exceeded $75,000. For example, in *Betson v. Rite Aid Corp., et al.*, Case No. BC427992 (Cal. Super. Ct. May 27, 2011), the jury awarded the plaintiff $500,000 for past and future emotional distress resulting from a claim for disability harassment alone, which was brought against Rite Aid. (*See* Docket No. 4 at Ex. A, p.16). Similarly, in *Polk v. Metropolitan Transportation Authority*, Case No. BC44358 (Cal. Sup. Ct. Jan. 23, 2012), the jury awarded the plaintiff $250,000 for past and future non-economic damages on a claim for failure to engage in the interactive process under FEHA. (Docket No. 4, Ex. H, at p.4-5). Additionally, in *Kamali v. California Department of Transportation*, Case No. BC426247 (Cal. Super. Ct. Dec. 20, 2012), the jury awarded the plaintiff $100,000 for past non-economic damages on claims for disability discrimination and harassment, failure to engage in the interactive process, and failure to provide reasonable accommodation. (Docket No. 4, Ex. I, at p.6).

It is thus clear that, on employment claims, damages for emotional distress alone can exceed $75,000. *See Simmons*, 209 F. Supp. 2d at 1034 (finding that emotional distress damages in successful employment discrimination cases may be substantial).

The other court records judicially noticed by the Court do not indicate in sufficient detail what amount of damages was awarded for punitive damages. Therefore, Rite Aid has not offered persuasive evidence as to the probable amount of punitive damages at stake.

Rite Aid has also offered evidence of attorneys' fees awarded to Mutti's counsel in similar employment cases. "[W]here an underlying statute authorizes an award of attorneys' fees, either with mandatory or discretionary language, such fees may be included in the amount in controversy." *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998). Attorneys' fees are recoverable as a matter of right to the prevailing party under FEHA. Cal Gov't Code § 12965(b). Therefore, attorneys' fees may be included in the amount in controversy.

However, there is a split of authority regarding whether attorneys' fees must be measured at the time of removal or whether possible future attorneys' fees may form part of the amount in controversy. On the one hand, some courts have held that future attorneys' fees can be considered as part of the amount in controversy. *See, e.g.*, *Simmons*, 209 F. Supp. 2d at 1034-35 (including future attorneys' fees in the amount in controversy because the Ninth Circuit in *Galt G/S* "must have anticipated that district courts would project fees beyond removal"). On the other hand, it appears that there may be an emerging consensus among district courts in the Ninth Circuit that only fees incurred up to the point of removal may count toward the amount in controversy. *See Reames v. AB Car Rental Servs., Inc.*, 899 F. Supp. 2d 1012, 1020 (D. Or. 2012) (collecting cases and concluding that "a nascent consensus may be emerging among the district courts of the Ninth Circuit" that only attorneys' fees incurred until removal form a part of the amount in controversy).

***6** The Court agrees with the cases finding that attorneys' fees beyond removal are too speculative. Here, there is no evidence of the attorneys' fees earned at the time of removal in this action, and thus, the Court cannot conclude whether the attorneys' fees would satisfy the amount in controversy requirement.

Nonetheless, there is no evidence contradicting Rite Aid's evidence of probable damages for lost wages and emotional distress. Therefore, Rite Aid has established by a preponderance of the evidence that the amount in controversy with regard to damages for lost wages and emotional distress more likely than not exceeds $75,000.

Moreover, the Court has taken judicial notice of the Rule 26(f) Report in this action, in which Mutti concedes that he is seeking emotional distress damages between $2 and 4 million. (*See* Rule 26(f) Report at p.6, ¶ e). This statement as to the damages sought is an admission, which the Court may consider in determining the amount in controversy. *See Singer*, 116 F.3d at 376 (finding that the district court did not abuse its discretion in considering the plaintiff's admission that the amount in jurisdiction exceeded the jurisdictional

limit). Mutti's admission in the Rule 26(f) Report conclusively establishes that the amount in controversy exceeds $75,000.

Accordingly, the Court does not find that Rite Aid improperly removed this action. The Court thus denies Mutti's request for attorneys' fees, which is based on the contention that Rite Aid lacked an objectively reasonable basis for removal. (*See* Mot. at 9-10).

Motion for Leave to Amend

"If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." 28 U.S.C. § 1447(e). "The language of § 1447(e) is couched in permissive terms and it clearly gives the district court the discretion to deny joinder." *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 691 (9th Cir. 1998).

When considering whether to permit joinder under § 1447(e), courts consider the following factors: (1) whether the new party is "needed for just adjudication" and would be joined under Federal Rule of Civil Procedure 19(a); (2) whether the statute of limitations would affect the plaintiff's ability to bring a separate suit against the new party; (3) whether there has been unexplained delay in seeking joinder; (4) whether joinder is solely for the purpose of defeating federal jurisdiction; and (5) whether the claim against the new party seems valid. *See Clinco v. Roberts*, 41 F. Supp. 2d 1080, 1082 (C.D. Cal. 1999) (applying these five factors); *Boon v. Allstate Ins. Co.*, 229 F. Supp. 2d 1016, 1018 (C.D. Cal. 2002) (applying these five factors and additionally considering the prejudice to plaintiff if joinder was denied); Schwarzer, et al., *California Practice Guide: Federal Civil Procedure Before Trial* ¶¶ 2:3645-2:3651 (The Rutter Group 2014) (citing cases).

Mutti seeks leave to amend the Complaint to add a new individual Defendant, William Karper, who is a citizen of California, and thus, would destroy diversity. (Mot. at 8-10). Together with the Motion, Mutti submitted a proposed First Amended Complaint (the "Proposed FAC"). (Docket No. 15-3, Ex. 3).

The Proposed FAC alleges:

> Defendant Karper, an IT Manager for Rite Aid, after becoming aware of Plaintiff's sexual orientation, participated in concerted acts to harass Plaintiff because of his sexual orientation, beginning in April of 2013. Specifically, Karper continually ignored Plaintiff's requests for IT help and assistance even though he would help and assist others, and he also purposefully informed and instructed others to shun Plaintiff, to not assist him, and to create a hostile and difficult environment for Plaintiff whenever he visited Southern California supply locations.
>
> ***7** (Proposed FAC ¶ 15).

The Proposed FAC only includes Karper as a Defendant in claims for harassment on the basis of physical disability, which is alleged against all Defendants. The other thirteen claims are alleged against Rite Aid and/or the other individual Defendants. However, based on the context of the Proposed FAC, this pleading of the claims appears to be a clerical error. For the purposes of this Motion, the Court assumes that the Proposed FAC includes Karper as a Defendant in the claims for harassment on the basis of sexual orientation and gender.

To determine whether Karper should be added as a Defendant, the Court will consider whether Karper is a sham defendant, as well as the factors listed above.

Sham Defendant

"In the Ninth Circuit, a non-diverse defendant is deemed a sham defendant if, after all disputed questions of fact and all ambiguities in the controlling state law are resolved in the plaintiff's favor, the plaintiff could not possibly recover against the party whose joinder is questioned." *Nasrawi v. Buck Consultants, LLC*, 713 F. Supp. 2d 1080, 1084 (E.D. Cal. 2010) (citing *Kruso v. Int'l Tel. & Tel. Corp.*, 872 F.2d 1416, 1426 (9th Cir. 1989)). However, "a defendant seeking removal based on an alleged fraudulent joinder must do more than show that the complaint at the time of removal fails to state a claim against the non-diverse defendant." *Padilla v. AT*

& T Corp., 697 F. Supp. 2d 1156, 1159 (C.D. Cal. 2009). "The defendant must also show that 'there is no possibility that the plaintiff could prevail on any cause of action it brought against the non-diverse defendant.' " *Id.* (citation omitted).

Rite Aid argues that amendment should be denied because Karper is a sham defendant. (Opp. at 6-8). Rite Aid specifically argues that the Proposed FAC does not allege that Karper directed an incident of harassment at Mutti, but only that Karper was making management decisions about whether and when to provide IT assistance to Mutti. (Opp. at 7-8).

This argument is unpersuasive. The Proposed FAC alleges that Karper created a "hostile and difficult environment" for Mutti. (Proposed FAC ¶ 15). When a plaintiff asserts this type of harassment claim, it appears that he or she need not allege specific instances of verbal, physical, or visual harassment. *See Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264, 277-78, 42 Cal. Rptr. 3d 2 (2006) ("Here, plaintiff does not contend defendants subjected her to unwelcome sexual advances as a condition of employment; rather, she alleges defendants created a hostile or abusive work environment. For this type of claim, plaintiff need not show evidence of unwanted sexual advances.").

To properly allege a claim based on a hostile work environment, Mutti must allege that harassment was "*severe enough or sufficiently pervasive to alter the conditions of [his] employment and create a hostile or abusive work environment.*" *Lyle*, 38 Cal. 4th at 283 (emphasis in original). "With respect to the pervasiveness of harassment, courts have held an employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature." *Id.* While the allegations in the Proposed FAC against Karper do not include much detail, they sufficiently allege that Karper engaged in a pattern of conduct with regard to ignoring Mutti's requests for assistance, and instructing others to ignore Mutti's requests and shun him. It is thus possible that these allegations state a claim for harassment.

***8** Rite Aid also cites to *Reno v. Baird*, 18 Cal. 4th 640, 645, 76 Cal. Rptr. 2d 499 (1998) for the proposition that harassment is "a type of conduct not necessary to a supervisor's job performance, and business or personnel management decisions." (Opp. at 8). Rite Aid is correct that a claim for employment discrimination is generally based on "some *official action taken by the employer*," while a claim for harassment "often does not involve any official exercise of delegated power on behalf of the employer." *Roby v. McKesson Corp.*, 47 Cal. 4th 686, 706, 101 Cal. Rptr. 3d 773 (2009). However, the court in *Roby* was careful to note that "in some cases the hostile message that constitutes the harassment is conveyed through official employment actions, and therefore evidence that would otherwise be associated with a discrimination claim can form the basis of a harassment claim." *Id.* at 708. Therefore, even though Karper is alleged to have harassed Mutti in part by refusing to take official action, such allegations do not preclude the possibility that Mutti can state a claim for harassment.

Accordingly, Rite Aid has not demonstrated that there is no possibility that Mutti could prevail on a harassment claim.

Rule 19 Considerations

Federal Rule of Civil Procedure 19(a) requires joinder of parties whose absence would preclude the grant of "complete relief," or whose absence would "impede the[ir] ability to protect the[ir] interest" or would subject any "existing party to a substantial risk" of redundant or inconsistent obligations. Fed. R. Civ. P. 19(a). A person falling within this scope must be joined under Rule 19(a) if feasible. *See id.*

Rite Aid argues that Karper is not a necessary party because Rite Aid is strictly liable for Karper's actions, and thus, complete relief can be accorded in Karper's absence. (Opp. at 10). Rite Aid is correct that "FEHA makes the employer strictly liable for harassment by a supervisor," if "the supervisor [was] acting in the capacity of supervisor when the harassment occur[red]." *State Dep't of Health Servs. v. Superior Court*, 31 Cal. 4th 1026, 1041 & n.3, 6 Cal. Rptr. 3d 441 (2003). Rite Aid is willing to stipulate that Karper's actions as alleged in the Proposed FAC, if proven true, were within the course and scope of his employment. (Opp. at 11).

Mutti argues, however, that relief would not be complete in Karper's absence because he would not be able to hold Karper personally liable for his actions. (Reply at 7). Mutti is correct that California courts have held that in enacting FEHA it was Congress's intent "to place individual supervisory employees at risk of personal liability for personal conduct constituting harassment." *Janken v. GM Hughes Elecs.*, 46 Cal. App. 4th 55, 62, 53 Cal. Rptr. 2d 741 (1996).

However, Mutti's argument misconstrues the standard with regard to complete relief. Completeness is determined "as to those already parties," rather than as between a party and

the absent person. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983); *see also Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 313 (3d Cir. 2007) ("Completeness is determined on the basis of those persons who are already parties, and not as between a party and the absent person whose joinder is sought."). Here, relief would be complete between existing parties if Karper is not joined. Mutti is seeking only monetary damages, which he can recover from the existing Defendants.

At the hearing, Mutti's counsel conceded that Rite Aid is strictly liable for Karper's actions taken within the scope of his employment. But Mutti nonetheless argued that Karper was indispensable because Mutti would be barred by res judicata from bringing an action against Karper in the future. This argument was not raised in the briefs, and thus, was inappropriately raised for the first time at oral argument. *See, e.g.*, *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1130 (9th Cir. 2012) ("We generally do not consider issues raised for the first time during oral argument, unless 'failure to do so would result in manifest injustice' and the appellee would not be prejudiced by such consideration.").

***9** Moreover, the Court is unpersuaded by the merits of this new argument. To determine whether Karper is indispensable, Mutti must first establish that Karper is necessary. As stated above, the inquiry for a necessary party focuses on whether complete relief can be accorded between existing parties, whether the absent party's ability to protect his interest would be impaired, and whether an existing party would be subject to inconsistent obligations. *See* Fed. R. Civ. P. 19(a). The inquiry does not ask whether the plaintiff can bring additional actions against absent parties in the future. It was Mutti's choice not to include Karper as a defendant when he initially filed this lawsuit. There is no indication that the proposed amendment is based on newly discovered facts. Indeed, it seems that Mutti has been aware of a possible claim against Karper since the alleged harassment occurred since April 2013. To the extent that Mutti's initial pleading decision precludes a future lawsuit against Karper, it was within Mutti's control to prevent such preclusion.

Furthermore, "[c]ourts disallow joinder of non-diverse defendants where those defendants are only tangentially related to the cause of action or would not prevent complete relief." *IBC Aviation Servs., Inc. v. Compania Mexicana de Aviacion, S.A. de C.V.*, 125 F. Supp. 2d 1008, 1012 (N.D. Cal. 2000). While Karper's alleged actions are not tangentially related to the harassment claim, Karper is not the sole or primary Defendant. The harassment claim is alleged against Rite Aid and three other individual Defendants. As discussed above, there is also no danger that Mutti would receive incomplete relief if he pursues the harassment claim against Rite Aid. Therefore, Karper is not a necessary party. *See Hardin v. Wal-Mart Stores, Inc.*, 813 F. Supp. 2d 1167, 1174 (E.D. Cal. 2011) (finding that an assistant manager at a Wal-Mart store was not a necessary party to a harassment claim under FEHA because it did not appear that he was the primary employee allegedly harassing the plaintiff, there was no danger that the plaintiff would not receive incomplete relief from Wal-Mart, the assistant manager could be subpoenaed as a witness, and there was concern that the assistant manager was joined to defeat diversity).

Because Karper is not a necessary party under Rule 19(a), this factor weighs against allowing amendment.

Statute of Limitations

Mutti has not argued that a new action against Karper would be time-barred. Therefore, this factor does not support amendment.

Timeliness of Amendment

Mutti filed his original Complaint on January 10, 2014. (Docket No. 1, Ex. A). Rite Aid removed this action on March 4, 2014. (Docket No. 1). Mutti then filed the pending Motion on March 20, 2014. (Docket No. 15). Mutti thus sought leave to amend the Complaint a little more than two months after filing the original Complaint, and a little more than two weeks after this action was removed. Based on this timeline, Mutti did not unreasonably delay in seeking to join Karper. *See, e.g.*, *Boon*, 229 F. Supp. 2d at 1023 (finding that plaintiffs did not unreasonably delay in filing their first amended complaint when it was filed less than three months after the original complaint, and less than a month after removal). This factor thus weighs in favor of permitting amendment.

Motive for Joinder

"[T]he motive of a plaintiff in seeking the joinder of an additional defendant is relevant to a trial court's decision to grant the plaintiff leave to amend his original complaint." *Desert Empire Bank v. Ins. Co. of N. Am.*, 623 F.2d 1371, 1376 (9th Cir. 1980). "[A] trial court should look with particular care at such motive in removal cases, when the presence of a new defendant will defeat the court's diversity jurisdiction and will require a remand to the state court." *Id.*

Here, it appears that Mutti's primary motive for seeking leave to join Karper is to destroy diversity. Mutti did not seek leave to join Karper until after this action was removed. Additionally, the request for joinder is being sought as an alternative to a motion to remand. The Proposed FAC is not substantially different than the original Complaint, except to allege harassment against Karper and to allege that Karper is a citizen of California. Furthermore, there is no indication that Mutti would not have been aware of a possible claim against Karper when he filed his original Complaint because the claim against Karper is based on harassment that began in April 2013.

***10** Therefore, this factor weighs against amendment.

Validity of Claim Against New Party

As discussed above, the Proposed FAC states a possible claim against Karper for harassment. This claim most likely would survive the liberal plausibility standard on a motion to dismiss. However, there are insufficient allegations to determine whether this claim would survive a motion for summary judgment. As discussed above, the validity of the claim against Karper depends, in large part, on the severity and pervasiveness of the alleged harassment. The Proposed FAC lacks allegations regarding how long and how often the harassment occurred, how effective Karper was in recruiting others to shun Mutti and ignore his requests, and what effect such harassment had on Mutti's work environment. Because there is insufficient information to assess the validity of the claim against Karper, this factor does not assist the Court in determining whether to allow amendment.

Prejudice to Plaintiff

In addition to the five factors discussed above, a number of courts also consider whether the plaintiff would be prejudiced if joinder is denied. *See, e.g.*, *Boon*, 229 F. Supp. 2d at 1025 (assessing whether the plaintiff would be prejudiced if joinder is denied); *IBC Aviation Servs.*, 125 F. Supp. 2d at 1011 (listing prejudice to the plaintiff as a sixth factor to be considered when determining whether to allow amendment to add non-diverse defendants).

If Mutti can succeed on his harassment claims, he will be able to recover against Rite Aid and any other individual Defendants found to be liable. Therefore, he is not prejudiced in this respect.

It is unclear if Mutti would be barred from suing Karper in the future. Res judicata bars a subsequent action if three elements are satisfied: (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between the parties. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003) (quoting *Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1143 n.3 (9th Cir. 2002)); *Consumer Advocacy Group, Inc. v. ExxonMobil Corp.*, 168 Cal. App. 4th 675, 685-86, 86 Cal. Rptr. 3d 39 (2008). Accordingly, whether Mutti is barred from pursuing a separate action against Karper depends in large part on the scope of the harassment claim in this action, and on whether there is privity between Karper and Rite Aid. If Mutti proceeds with the current Complaint, which does not include any allegations against Karper, Mutti may still be able to pursue a separate claim against Karper in the future. If Mutti, however, litigates the harassment claim in this action based in part on the allegations against Karper, he may be precluded from pursuing a separate claim against Karper. While it was Mutti's decision not to include Karper in this action, the Court nonetheless finds that the possibility that res judicata will prevent Mutti from suing Karper in the future weighs slightly in favor of amendment.

With four factors weighing against amendment and two factors weighing in favor of amendment, the balance of equities does not support amendment.

***11** Accordingly, the Motion is **DENIED**.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2014 WL 12771117

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230 Fed.Appx. 646
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Anthony Keith OGLE, Plaintiff—Appellant,
v.
Terry STEWART, sued in his individual and official capacity, Defendant—Appellee.

No. 04–17534.
|
Submitted Nov. 17, 2006. *
* This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).
|
Filed Feb. 12, 2007.

Synopsis

Background: State inmate brought § 1983 action against former Director of Arizona Department of Corrections, alleging violation of his Eighth Amendment rights. The United States District Court for the District of Arizona, Neil V. Wake, J., denied his motion to amend his complaint to add as defendants two correctional officers. Inmate appealed.

Holdings: The Court of Appeals held that:

[1] inmate could not recover, on summary judgment motion, from director of Department of Corrections for alleged violation of his Eighth Amendment rights, and

[2] district court abused its discretion in denying state inmate's motion to amend complaint to add two correctional officers as defendants.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (3)

[1] **Civil Rights** Criminal law enforcement; prisons

State inmate could not recover from director of Department of Corrections under § 1983 for alleged violation of his Eighth Amendment rights, absent showing that director acted with a sufficiently culpable state of mind. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

[2] **Federal Civil Procedure** Amendments

District court abused its discretion in denying state inmate's motion to amend complaint to add two correctional officers as defendants in his § 1983 action alleging violation of Eighth Amendment, where inmate had adequately stated a claim against correctional officers and was diligent in his efforts to discover their identities, and Arizona Attorney General's office was already aware that officers would be named as defendants, so it would not be prejudiced by allowing inmate to add officers to complaint. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

[3] **Limitation of Actions** Suspension or stay in general; equitable tolling

Doctrine of equitable tolling allowed state inmate to amend his § 1983 complaint to add two correctional officers 21 days after running of limitations period. 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

Attorneys and Law Firms

***646** Anthony Keith Ogle, Buckeye, AZ, pro se.

Wanda E. Hofmann, Esq., Tucson, AZ, for Defendant–Appellee.

Appeal from the United States District Court for the District of Arizona, Neil V. Wake, District Judge, Presiding. D.C. No. CV–03–00200–NVW.

***647** Before: HUG, TASHIMA, and GOULD, Circuit Judges.

MEMORANDUM [**]

[**] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

****1** Anthony Keith Ogle, an inmate in the Arizona state prison system, appeals pro se from the district court's grant of summary judgment in his 42 U.S.C. § 1983 action against Terry Stewart, the former Director of the Arizona Department of Corrections ("ADC"). Ogle also appeals the district court's denial of his motion to amend his complaint to add as defendants two correctional officers. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in part, reverse in part, and remand.

While temporarily confined at the Alhambra Reception Center, a unit of the Arizona state prison system, on March 22, 2002, Ogle tripped over a mattress that was placed on the floor and severely injured himself. Seeking damages for his injury, Ogle sued Stewart, among others, pursuant to 42 U.S.C. § 1983 for violating his Eighth Amendment rights. Proceeding pro se, Ogle also attempted to discover the names of the two correctional officers who confiscated his crutches and purportedly disregarded the orders of medical staff so that he could include them as defendants. The Arizona Attorney General's office delayed responding to Ogle's discovery requests, however, and did not provide this information until after the statute of limitations had lapsed. When Ogle sought to amend his complaint to add the officers, the Arizona Attorney General's office objected based on the expiration of the statute of limitations. The district court denied Ogle's motion to amend the complaint for failure to state a claim against the officers but did not address the statute of limitations issue. Later, the district court granted Stewart's motion for summary judgment because Ogle failed to produce any evidence indicating that Stewart knew of, and was deliberately indifferent to, the risk of harm posed to Ogle's safety. In this appeal, Ogle challenges the district court's grant of summary judgment. In his reply brief, Ogle also raised a challenge to the district court's denial of his motion to amend his complaint.

[1] Ogle asserts that Stewart violated his Eighth Amendment right to humane conditions of confinement and is responsible for his injuries. The district court granted Stewart's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(c) because Ogle did not establish the necessary elements of his § 1983 claim. [1] To survive summary judgment, Ogle must offer some evidence that Stewart knew of and disregarded an excessive risk to Ogle's safety presented by the conditions of his confinement. *See Farmer v. Brennan,* 511 U.S. 825, 834, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *Robinson v. Prunty,* 249 F.3d 862, 866 (9th Cir.2001). Ogle failed to demonstrate, however, that Stewart acted with a sufficiently culpable state of mind. Therefore, the district court's grant of summary judgment in favor of Stewart was proper.

[1] We review the district court's grant of summary judgment de novo. *Buono v. Norton,* 371 F.3d 543, 545 (9th Cir.2004).

[2] In addition to his claim against Stewart, Ogle also argues that two correctional officers are directly responsible for his accident. As such, Ogle sought to amend his complaint to add the officers as defendants, but the district court rejected his request. [2] Although Ogle raised this ***648** issue in his reply brief instead of his opening brief, we have discretion to consider his argument pursuant to Federal Rule of Appellate Procedure 2. *See United States v. Ullah,* 976 F.2d 509, 514 (9th Cir.1992). The district court failed to follow the "strong policy" in favor of permitting parties to amend pleadings established by Federal Rule of Civil Procedure 15(a). *See Howey v. United States,* 481 F.2d 1187, 1190 (9th Cir.1973). Ogle adequately stated a claim against the correctional officers and was diligent in his efforts to discover the officers' identities. [3] Moreover, the Arizona Attorney General's office was already aware that the officers would be named as defendants, so it would not be prejudiced by allowing Ogle to add the officers to his complaint. *See Brown v. Georgia Dep't of Revenue,* 881 F.2d 1018, 1023 (11th Cir.1989). Consequently, the district court abused its discretion in denying Ogle's motion to amend his complaint. *See United States v. SmithKline Beecham, Inc.,* 245 F.3d 1048, 1052–53 (9th Cir.2001).

[2] We review a district court's denial of a motion to amend a complaint for abuse of discretion. *Caswell v. Calderon,* 363 F.3d 832, 836 (9th Cir.2004). Such a denial is " 'strictly' reviewed in light of the strong policy permitting amendment." *Plumeau v. Sch. Dist. No. 40,* 130 F.3d 432, 439 (9th Cir.1997) (quoting *Pierce v. Multnomah County,* 76 F.3d 1032, 1043 (9th Cir.1996)).

[3] In fact, Ogle worked assiduously to uncover the identities of the correctional officers, even after being met with strong resistence and persistent delays by attorneys from the Arizona Attorney General's office.

**2 [3] The Arizona Attorney General's office argues that allowing Ogle to amend his complaint to add the correctional officers would be futile because the statute of limitations had lapsed by the time he sought to add them as defendants. It is true that Ogle did not file his motion to add the two correctional officers as defendants until approximately twenty-one days after the applicable statute of limitations had expired.[4] Even so, Ogle should be allowed to amend his complaint pursuant to the doctrine of equitable tolling.[5] *See Kyles v.* **649 *Contractors/Eng'rs Supply, Inc.,* 190 Ariz. 403, 405, 949 P.2d 63, 65 (1997); *Jepson v. New,* 164 Ariz. 265, 271, 792 P.2d 728, 734 (1990) (in banc); *see also S.J. v. Issaquah Sch. Dist.,* 470 F.3d 1288, 1291 (9th Cir.2006) (holding that for § 1983 claims tolling provisions are governed by the law of the forum state). Thus, we remand to the district court to allow Ogle to amend his complaint and pursue his claim against the officers. We also instruct the district court to reopen discovery so that Ogle may ensure that he has identified the correct defendants and also so that he may collect relevant evidence in support of his claim. Finally, we suggest that the district court appoint counsel to represent Ogle during the course of his lawsuit. Each party shall bear its own costs on appeal.

[4] The federal statute providing for Ogle's cause of action against the officers, § 1983, does not contain its own limitations period. As such, federal courts borrow the most applicable statute of limitations from the forum state. *Wilson v. Garcia,* 471 U.S. 261, 268, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). In § 1983 cases arising out of Arizona, this court applies the statute of limitations for personal injury claims. *Cholla Ready Mix, Inc. v. Civish,* 382 F.3d 969, 974 (9th Cir.2004). The applicable statute of limitations for personal injury claims in Arizona is two years. *See* ARIZ.REV.STAT. § 12–542. Under federal law, a § 1983 claim begins to accrue "when the plaintiff knows or has reason to know of the injury." *TwoRivers v. Lewis,* 174 F.3d 987, 991 (9th Cir.1999). In this case, Ogle's injury occurred on March 22, 2002, so the statute of limitations was March 22, 2004. He did not move to amend his complaint until April 12, 2004.

[5] In addition to equitable tolling, it is highly likely that Ogle would be able to pursue his claim against the correctional officers in three additional ways. First, Ogle's claim against the officers may relate back to his original complaint pursuant to Arizona Rule of Civil Procedure 15(c). *See Ritchie v. Grand Canyon Scenic Rides,* 165 Ariz. 460, 465–67, 799 P.2d 801, 806–08 (1990) (in banc); *Brink v. First Credit Res.,* 57 F.Supp.2d 848, 857 (D.Ariz.1999); *G.F. Co. v. Pan Ocean Shipping Co.,* 23 F.3d 1498, 1503–04 (9th Cir.1994); *Korn v. Royal Caribbean Cruise Line, Inc.,* 724 F.2d 1397, 1400–01 (9th Cir.1984); *see also Merritt v. County of Los Angeles,* 875 F.2d 765, 768 (9th Cir.1989) (holding that the relation back provisions of state law, rather than federal law, govern § 1983 actions). Second, the statute of limitations may be tolled pursuant to the doctrine of fraudulent concealment because the State continually refused to disclose the names of the correctional officers despite Ogle's repeated attempts to obtain the information. *See London v. Green Acres Trust,* 159 Ariz. 136, 143, 765 P.2d 538, 545 (Ariz.Ct.App.1988). Third, the doctrine of equitable estoppel may prevent the State from relying on the statute of limitations as a defense where the State's conduct misled Ogle and caused him to file his second amended complaint too late. *See Tucson Elec. Power Co. v. Arizona Dep't of Revenue,* 174 Ariz. 507, 513–18, 851 P.2d 132, 138–43 (Ariz.Ct.App.1992). Because we hold that Ogle may amend his complaint pursuant to the doctrine of equitable tolling, however, we need not address these additional methods at this time.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

All Citations

230 Fed.Appx. 646, 2007 WL 465670

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2020 WL 6290486
Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

Josue OLIVAS, Plaintiff,
v.
State of ARIZONA, et al., Defendants.

No. CV-19-02698-PHX-DWL
|
Signed 10/27/2020

Attorneys and Law Firms

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Neil Todd McKay, Office of the Attorney General, Phoenix, AZ, for Defendants.

ORDER

Dominic W. Lanza, United States District Judge

***1** Plaintiff Josue Olivas ("Olivas"), who was previously employed as a correctional officer by the State of Arizona ("the State"), has sued the State and various state employees for violations of the Family and Medical Leave Act ("FMLA") and Title I of the Americans With Disabilities Act ("ADA"). (Doc. 26.) Now pending before the Court is the State's motion to dismiss Count IV of the amended complaint, which is Olivas's ADA claim. (Doc. 29). In response, Olivas concedes that Count IV is barred by sovereign immunity. (Doc. 30 at 1.) Count IV is therefore dismissed.

In his response to the motion to dismiss, Olivas requests leave to amend and argues that the "deficiencies in Count IV may be cured by amendment." (*Id.* at 2.) In reply, the State argues that Olivas's amendment request should be denied without prejudice because Olivas failed to comply with Rule 15(a)(2) of the Federal Rules of Civil Procedure and Local Rules 7.2 and 15.1. (Doc. 31 at 1-2.) In the State's view, Olivas should be required to file a formal motion for leave to amend that addresses the relevant factors governing amendment requests under Rule 15(a)(2). (*Id.* at 3-4.)

Although Olivas's rather informal mechanism for requesting leave to amend (*i.e.,* tucking the request into his response to the State's motion to dismiss) is not a preferred practice, it is not necessarily improper under Ninth Circuit law. *See, e.g., Edwards v. Occidental Chem. Corp.*, 892 F.2d 1442, 1445 n.2 (9th Cir. 1990) ("Edwards did not call the request in her opposition to OPC's motion for summary judgment a 'motion for leave to amend,' and she did not tender a formal amendment. But these circumstances did not preclude the district court from granting leave to amend."); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 700-01 (9th Cir. 1988) (as amended), *overruled on other grounds by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562-63 (2007) (concluding that "the district court erred in refusing to grant [Balistreri's] request to amend her complaint," where "[i]n her response to defendants' motion to dismiss, Balistreri specifically asked for leave to amend her complaint if the court found that she had not recited sufficient facts to state a cause of action," because "[t]he fact that Balistreri did not present her request to amend her complaint in a separate formal motion is not a bar"). [1] Additionally, although Local Rule 15.1(a) requires a party moving for leave to amend to provide a redlined version of the proposed new pleading, the State's objection here isn't based solely on the absence of a redlined draft—it also faults Olivas for failing to provide detailed briefing concerning the Rule 15(a)(2) amendment factors. But as noted, Ninth Circuit law arguably does not require such briefing in this circumstance.

1 *See also* 1 Gensler, Federal Rules of Civil Procedure Rules and Commentary, Rule 15, at 425 (2020) ("[A] request for leave to amend made in an opposition paper may be considered to constitute a motion if it is clearly stated, sufficiently supported, and consistent with local rules and practice.").

***2** In any event, even assuming that Olivas's approach violated the Local Rules, the Court will exercise its discretion to overlook his non-compliance. *Pro. Programs Grp. v. Dep't of Com.*, 29 F.3d 1349, 1353 (9th Cir. 1994) ("[T]he district court has broad discretion to depart from the strict terms of the local rules where it makes sense to do so and substantial rights are not at stake."). The State does not explain why it believes Olivas would be unable to establish an adequate basis for amendment under Rule 15(a)(2). (Doc. 31 at 3-4.) And to the extent the State believes any amendment effort would be futile, many courts (including this Court) prefer to evaluate futility-based objections to new claims in the context of a motion to dismiss rather than in the context of a motion for leave to amend. *See generally Leibel v. City of Buckeye*, 2019 WL 4736784, *3 (D. Ariz. 2019) (citing

cases). Thus, it makes sense—and is consistent with Rule 15(a)(2)'s textual mandate to "freely give leave" to amend and the Ninth Circuit's exhortation to apply this mandate with "extreme liberality," *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (internal quotation marks omitted)—to construe Olivas's informal request as a motion for leave to amend, grant it, and then allow the State to move to dismiss the new claim Olivas includes in the next iteration of his complaint.

Accordingly,

IT IS ORDERED that the State's motion to dismiss Count IV (Doc. 29) is **granted**. Count IV is **dismissed**.

IT IS FURTHER ORDERED that Olivas is granted leave to amend his complaint. Olivas shall file and serve a Second Amended Complaint ("SAC") within 14 days of the date of this Order and shall, consistent with LRCiv 15.1(a), attach a redlined version of the pleading as an exhibit to the SAC. The changes in the SAC shall be limited to the addition of a claim for "disability discrimination under the Rehabilitation Act" (Doc. 30 at 2) because that is the scope of amendment that Olivas requested.

All Citations

Slip Copy, 2020 WL 6290486

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2008 WL 11343396
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

PURICLE, INCORPORATED
v.
CHURCH & DWIGHT CO., INC.

Case No. CV 08–3082 ABC (OPx)
|
Signed October 1, 2008

Attorneys and Law Firms

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Proceedings: PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT (In Chambers)

Audrey B. Collins, District Judge

***1** Pending before the Court is Plaintiff Puricle, Inc.'s ("Plaintiff") Motion for Leave to File Second Amended Complaint ("Motion"). Defendant Church & Dwight Co., Inc., ("Defendant") filed an Opposition, and Plaintiff filed a Reply. The Court found the Motion appropriate for resolution without oral argument and vacated the hearing. See Fed. R. Civ. P. 78; Local Rule 7–15. Upon consideration of the materials submitted by the parties and the case file, the Court hereby **GRANTS** the Motion.

I. BACKGROUND

Plaintiff's First Amended Complaint states ten state-law causes of action relating to the parties' business relationship as established by their Manufacturing Agreement, pursuant to which Plaintiff manufactured its "NeverScrub" line of self-cleaning toilet products for distribution by Defendant. Plaintiff now seeks to file a Second Amended Complaint ("SAC"), which eliminates three of its claims and adds five trademark/trade dress claims, three claims for fraud, a claim for unfair competition under Cal. Bus. & Prof. Code 17200, a claim for misappropriation of trade secrets, and a claim for intentional interference with prospective economic advantage. In total, the SAC asserts fourteen claims. Defendant opposes the Motion on the grounds of futility, undue delay, and prejudice.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 15(a) provides that a party may amend its complaint once "as a matter of course" before a responsive pleading is served. Fed. R. Civ. P. 15(a). Thereafter, the "party may amend [its] pleading only with the opposing party's written consent or the court's leave." Thus, "after a brief period in which a party may amend as of right," leave to amend lies "within the sound discretion of the trial court." United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981).

In exercising its discretion, "a court must be guided by the underlying purpose of Rule 15—to facilitate decision on the merits rather than on the pleadings or technicalities." Webb, 655 F.2d at 979. The Ninth Circuit has noted "on several occasions ... that the 'Supreme Court has instructed the lower federal courts to heed carefully the command of Rule 15(a), Fed. R. Civ. P., by freely granting leave to amend when justice so requires.' " Gabrielson v. Montgomery Ward & Co., 785 F.2d 762, 765 (9th Cir. 1986) (quoting Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973) (citations omitted)).

Thus, "Rule 15's policy of favoring amendments to pleadings should be applied with 'extreme liberality.' " Webb, 655 F.2d at 979 (citing Rosenberg Bros. & Co. v. Arnold, 283 F.2d 406 (9th Cir. 1960) (per curiam)). This liberality in granting leave to amend does not depend on whether the amendment will add parties or additional causes of action. Rather, leave to amend should be granted unless the amendment is unduly delayed, would cause prejudice to the opposing party, is sought in bad faith, or is futile. Foman v. Davis, 371 U.S. 178, 182 (1962).

Not all of the factors merit equal weight. The consideration of prejudice to the opposing party carries the greatest weight. See DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 185 (9th Cir.1987); Howey, 481 F.2d at 1190 (stating that "the crucial factor is the resulting prejudice to the opposing

party"). "Absent prejudice, or a strong showing of any of the remaining Foman factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend." Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (citation omitted).

III. DISCUSSION

***2** Having reviewed the proposed SAC and the parties' papers, none of the Foman factors are present in this case. The Court will address Defendant's arguments briefly below.

A. The Amendments Are Not Futile.

A motion for leave to amend may be denied if it appears to be futile or legally insufficient. Gabrielson v. Montgomery Ward & Co., 785 F.2d 762, 766 (9th Cir.1986). "However, a proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." Miller v. Rykoff–Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988) (citation omitted). The test for determining the legal sufficiency of a proposed amendment is identical to the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6)). Id. (citing 3 J. Moore, Moore's Federal Practice ¶ 15.08[4] (2d ed. 1974).

Although it is unfortunate that Plaintiff appears to have opted for a shotgun approach in its SAC, at this stage, the Court finds it unnecessary to address each of Plaintiff's new claims individually. This is because Defendant's challenges to the new claims go to their merits, not to whether they are sufficiently pled. For example, Defendant's analysis of Plaintiff's trademark claims invites the Court to determine the scope of each parties' trademark, and determine as a matter of law that Defendant's marks cannot be infringing. Similarly, Defendant asks the Court to disallow the trade dress claims by accepting its factual assertion that the trade dress Plaintiff says it owns is in fact Defendant's. Both challenges ask the Court to review evidence and draw factual conclusions therefrom. Such arguments are irrelevant to—and improper for—a futility inquiry.

C. Defendant Has Not Demonstrated Undue Delay or Prejudice.

Mere delay is not sufficient grounds to deny leave to amend. DCD Programs, 833 F.2d at 186 (delay alone insufficient to deny amendment). Defendant argues that because Plaintiff's new claims arise out of the same facts upon which the FAC is based, Plaintiff should have asserted them sooner, and the amendment is therefore unduly delayed. However, Defendant cites only out-of-circuit authority in support of its theory that an amendment seeking to assert alternative theories of recovery based on the same facts manifests undue delay. These authorities are not binding and, indeed, are inconsistent with the standards long-applied in this Circuit. See, e.g., Heay v. Phillips, 201 F.2d 220, 222 (9th Cir. 1953) (affirming grant of leave to file second amended complaint to add alternative causes of action related to the same set of circumstances). Furthermore, that the amendment was not unduly delayed is obvious given that the original complaint was filed only five months before this Motion was made. During the interval in which Defendant asserts Plaintiff should have moved to amend, Plaintiff was required to oppose Defendant's serial applications for a temporary restraining order and motions for a preliminary injunction. That Plaintiff filed this Motion shortly after Defendant's second Motion for a Preliminary Injunction was denied signals that Plaintiff did not unduly delay. Finally, this litigation is in its early stages: no discovery has been conducted, and the scheduling conference is yet to take place.

***3** Defendant's claim of prejudice is also unavailing. Defendant's sole argument is that because it has already "spent significant amounts of time and energy responding to Puricle's ever-changing theories," requiring Defendant to respond to yet new theories would be especially prejudicial. (Opp'n 19:22–24.) This argument rings hollow both factually and legally. As a factual matter, it is Defendant who has been responsible for triggering litigation costs by filing its serial motions. That Plaintiff asserted multiple theories to oppose Defendant's motions is neither surprising nor blameworthy. Furthermore, because discovery has yet to begin, there is no risk that Plaintiff's new legal theories will render already-conducted discovery futile. As such, the amendment will not result in wasted resources. Finally, as a matter of law, that litigation expenses were incurred before an amendment is sought is does not constitute prejudice. Owens v. Kaiser Foundation Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001). Delaying an amendment *for the purpose of* forcing a party to incur unnecessary expenses would demonstrate *bad faith*, id., however, Defendant does not assert that this amendment is sought in bad faith, and this Court detects none.

IV. CONCLUSION

For the foregoing reasons, the Court finds that the proposed Second Amended Complaint satisfies Rule 15(a) and hereby **GRANTS** Plaintiff's Motion. **IT IS SO ORDERED.**

All Citations

Not Reported in Fed. Supp., 2008 WL 11343396

End of Document

2016 WL 6581154
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Yossi SABAG
v.
FCA US, LLC et al.

Case No. 2:16-cv-06639-CAS(RAOx)
|
Signed 11/07/2016

Attorneys and Law Firms

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Proceedings: PLAINTIFF YOSSI SABAG'S MOTION TO REMAND (Dkt. 13, filed September 30, 2016)

CHRISTINA A. SNYDER, District Judge

I. INTRODUCTION

***1** On August 1, 2016, plaintiff Yossi Sabag filed Los Angeles County Superior Court against defendants FCA US, LLC ("FCA") and Does 1–10, inclusive. Dkt 1-1 ("Compl."). The complaint alleges six claims: (1) violation of California Civil Code § 1793.2(d) arising from the failure to service or repair plaintiff's vehicle to conform to the applicable express warranties and the failure to promptly replace the vehicle or make restitution; (2) violation of California Civil Code § 1793.2(b) arising from the failure to service or repair plaintiff's vehicle so as to conform to the applicable warranties within 30 days; (3) violation of California Civil Code § 1793.2(a)(3) arising from the failure to make available to authorized service and repair facilities sufficient service literature and replacement parts to effect repairs during the express warranty period; (4) breach of express written warranty, pursuant to California Civil Code §§ 1791.2(a) and 1794; (5) breach of the implied warranty of merchantability, pursuant to California Civil Code §§ 1791.1(a) and 1794; and (6) violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(3). Id.

On September 2, 2016, defendant FCA filed an answer to plaintiff's complaint, dkt. 1-3, and removed this action to this Court, dkt. 1 ("Notice of Removal").

On September 22, 2016, plaintiff timely filed his first amended complaint. Dkt. 8 ("FAC"). In the FAC, plaintiff includes as a defendant San Fernando Motor Company and no longer seeks to recover under the Magnuson-Moss Warranty Act. Id.

On September 30, 2016, plaintiff filed a motion to remand this action to California state court. Dkt. 13-1 ("Motion"). On October 17, FCA filed its opposition, dkt. 16 ("Opp'n"), and on October 24, 2016, plaintiff filed his reply, dkt. 17.

The Court held oral argument on plaintiff's motion on November 7, 2016. Counsel for FCA did not appear.

II. BACKGROUND

Plaintiff alleges that, on or about August 24, 2014, he purchased a 2014 Chrysler 300 ("Vehicle") that was manufactured and or distributed by "Defendant." [1] FAC ¶ 7.

[1] Plaintiff uses the term "Defendant" to refer to all defendants named in the FAC. FAC ¶ 2.

In connection with the purchase of the Vehicle, plaintiff avers that he received an express written warranty in which "Defendant" promised "to preserve or maintain the utility or performance of the Vehicle or to provide compensation if there is a failure in utility or performance for a specified period of time." Id. ¶ 8. The warranty provided that plaintiff could deliver the vehicle for repair services to "Defendant's representative" if a defect developing during the warranty period. Id. Plaintiff alleges that the vehicle developed defects relating to the engine, the steering, loss of power and drivability, the "check engine" light, clicking noises, grinding noises, and the engine belt. Id. ¶ 9. Plaintiff contends that defendants have been unable to service or repair the vehicle to conform to the applicable express warranties "after a reasonable number of opportunities." Id. ¶ 10. Plaintiff further avers that defendants have willfully failed to replace the vehicle or make restitution. Id. ¶¶ 10, 13. As a result, plaintiff brings this action under the Song-Beverly Consumer Warranty Act, Cal. Civ. Code §§ 1790 et seq., known as California's "Lemon Law."

***2** FCA removed this action to federal court on the basis of diversity jurisdiction. FCA contends that plaintiff is a citizen

and resident of California, while FCA is organized under the laws of Delaware and has its headquarters and principal place of business in Michigan. Notice of Removal ¶¶ 6–7. Relying on the allegations in plaintiff's complaint, FCA argues that plaintiff seeks at least $111,345 in damages, comprised of: $25,000 in actual damages, a civil penalty up to two times the amount of actual damages, and the contract price of the vehicle ($37,115), in addition to attorneys' fees. Id. ¶ 8.

III. LEGAL STANDARDS

Federal courts are courts of limited jurisdiction, having subject matter jurisdiction only over matters authorized by the Constitution and statute. See, e.g., Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). A defendant attempting to remove an action from state to federal court bears the burden of proving that jurisdiction exists. See Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986). Removal is proper where the federal courts would have had original jurisdiction over an action filed in state court. 28 U.S.C. § 1441(a). Courts recognize a "strong presumption" against removal jurisdiction and place the burden on the removing defendant to demonstrate that subject matter jurisdiction exists. See Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). As a result, the party seeking removal bears the burden of establishing federal jurisdiction. See Prize Frize, Inc. v. Matrix, Inc., 167 F.3d 1261, 1265 (9th Cir. 1999). "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). In general, a federal district court has subject matter jurisdiction where a case presents a claim arising under federal law ("federal question jurisdiction"), or where the plaintiffs and defendants are residents of different states and the amount in controversy exceeds $75,000 ("diversity jurisdiction"). See, e.g., Deutsche Bank Nat'l Trust Co. v. Galindo, 2011 WL 662324, *1 (C.D. Cal. Feb. 11, 2011) (explaining the two types of jurisdiction).

Jurisdiction founded on diversity requires that the parties be in complete diversity and that the amount in controversy exceed $75,000. Matheson v. Progressive Specialty Ins. Co., 319 F.3d 1089, 1090 (9th Cir. 2003); see 28 U.S.C. § 1332(a)(1). Pursuant to 28 U.S.C. § 1332(c)(1), "a corporation shall be deemed to be a citizen of every State ... by which it has been incorporated and of the State ... where it has its principal place of business."

An exception to the requirement of complete diversity exists where it appears that a plaintiff has fraudulently joined a "sham" non-diverse defendant. Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998). If a court finds fraudulent joinder of a sham defendant, it may disregard the citizenship of the sham defendant for removal purposes. Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1067 (9th Cir. 2001). A nondiverse defendant is said to be fraudulently joined where "the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state." McCabe v. Gen. Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987).

Accordingly, "[t]he burden of proving a fraudulent joinder is a heavy one. The removing party must prove that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court ...." Green v. Amerada Hess Corp., 707 F.2d 201, 205 (5th Cir. 1983) (citations omitted); see also Hunter v. Philip Morris USA, 582 F.3d 1039, 1044 (9th Cir. 2009); Dodson v. Spiliada Mar. Corp., 951 F.2d 40, 42 (5th Cir. 1992) ("We do not decide whether the plaintiff will actually or even probably prevail on the merits, but look only for a possibility that he may do so. If that possibility exists, then a good faith assertion of such an expectancy in a state court is not a sham ... and is not fraudulent in fact or in law." (citations and internal quotation marks omitted)); Good v. Prudential Ins. Co. of Am., 5 F. Supp. 2d 804, 807 (N.D. Cal. 1998) ("[T]he defendant must demonstrate that there is no possibility that the plaintiff will be able to establish a cause of action in state court against the alleged sham defendant." (citing Dodson, 951 F.2d at 42)).

***3** In accordance with this high standard, courts must resolve all issues of fact and all ambiguities in the law in favor of the non-removing party when deciding whether fraudulent joinder exists in a given case. Dodson, 951 F.2d at 42; see also Hunter, 582 F.3d at 1042 (9th Cir. 2009) (in deciding whether removal is proper, "the court resolves all ambiguity in favor of remand to state court"). Courts may consider "affidavits or other evidence (presented by either party) on the issue of whether a particular defendant's joinder is sham or 'fraudulent.' " Judge William W. Schwarzer et al., California Practice Guide: Federal Civil Procedure before Trial ¶ 2:2456 (The Rutter Group 2016) (citing W. Am. Corp. v. Vaughan–Basset Furniture, 765 F.2d 932, 936 n.6 (9th Cir. 1985)). However, a court's inquiry into fraudulent joinder ought to be "summary" because "the inability to make the requisite decision in a summary manner itself points to an inability of the removing party to carry its burden." Hunter, 582 F.3d at 1045 (quoting Smallwood v. Illinois Central R.R. Co., 385 F.3d 568, 574 (5th Cir. 2004) (en banc).

Courts in the Ninth Circuit disagree as to what standard applies when a plaintiff seeks to amend a complaint to add a party that destroys diversity. McGrath v. Home Depot USA, Inc., 298 F.R.D. 601, 606 (S.D. Cal. 2014) (collecting cases). Some courts apply the liberal amendment standard under Federal Rule of Civil Procedure 15(a). See, e.g., Barnes & Noble, Inc. v. LSI Corp., 823 F. Supp. 2d 980, 985 (N.D. Cal. 2011) (recognizing an amended complaint that "merely added certain claims and parties and deleted certain claims, as [p]laintiffs were permitted to do under Rule 15(a)"); In re CBT Grp. PLC Sec. Litig., 98-cv-21014–RMW, 2000 WL 33339615 at *5 n. 6 (N.D. Cal. Dec. 29, 2000) ("[A]s this court has previously held, joinder of a party when amending the pleadings should be analyzed under the liberal amendment policy of Rule 15.").

By contrast, other courts have found that once a case has been removed to federal court, the court must scrutinize a diversity-destroying amendment to ensure that it is proper under 28 U.S.C. Section 1447(e). See, e.g., Boon v. Allstate Ins. Co., 229 F. Supp. 2d 1016, 1019 n. 2 (C.D. Cal. 2002) ("[T]he proper standard for deciding whether to allow post-removal joinder of a diversity-destroying defendant is set forth in 28 U.S.C. 1447(e)." (citations omitted)); Hardin v. Wal–Mart Stores, Inc., 813 F. Supp. 2d 1167, 1173 n.2 (E.D. Cal. 2011) ("Plaintiffs may not circumvent 28 U.S.C. 1447(e) by relying on Fed. R. Civ. P. 15(a) to join non-diverse parties."); Dooley v. Grancare, LLC, No. 15-cv-3038-SBA, 2015 WL 6746447, *2 (N.D. Cal. 2015) ("[F]ederal courts have concluded that when an amendment would deprive the court of subject matter jurisdiction, a party may not rely on Rule 15(a) to amend a pleading without leave of court; such an amendment must instead be analyzed pursuant to § 1447(e).").

Having considered these conflicting authorities, the Court adopts the approach of the line of cases applying Section 1447(e) to scrutinize the propriety of a diversity-destroying amendment pursuant to Rule 15(a). The Court is persuaded by the reasoning set out in McGrath:

> First the majority of district courts in the Ninth Circuit addressing the specific situation of a plaintiff attempting to use a Rule 15(a) amendment "as a matter of course" to destroy diversity jurisdiction by adding claims against a non-diverse defendant have scrutinized the plaintiff's purposes for amendment under section 1447(e). Second, while Rule 15(a) addresses amendment of pleadings generally, 28 U.S.C. section 1447(e) addresses the specific situation of post-removal joinder of non-diverse defendants. Third, the Ninth Circuit has recognized that a plaintiff's motives are relevant to the question of whether district courts should allow amendment to a complaint to add a party even under the liberal amendment policy set forth in Rules 15 and 20. Desert Empire Bank v. Ins. Co. of N. Am., 623 F.2d 1371, 1375 (9th Cir. 1980) ("[W]e conclude that a trial court should look with particular care at [plaintiff's] motive in removal cases, when the presence of a new defendant will defeat the court's diversity jurisdiction and will require a remand to the state court.").

***4** McGrath, 298 F.R.D. at 608.

Pursuant to Section 1447(e), "[i]f after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." 28 U.S.C. § 1447(e).

When deciding whether to allow amendment to add non-diverse defendants under Section 1447(e), courts generally consider the following factors:

> (1) whether the new defendants should be joined under Federal Rule of Civil Procedure 19(a) as "needed for just adjudication"; (2) whether the statute of limitations would preclude an original action against the new defendants in state court; (3) whether there has been unexplained delay in requesting joinder; (4) whether joinder is intended solely to defeat federal jurisdiction; (5) whether the claims against the new defendant appear valid; and (6) whether denial of joinder will prejudice the plaintiff.

Calderon v. Lowe's Home Ctrs., LLC, No. 2:15-cv-01140-ODW-AGR, 2015 WL 3889289, *3 (C.D. Cal. 2015) (citing Palestini v. Gen. Dynamics Corp., 193 F.R.D. 654, 658 (C.D. Cal. 2000)). "Any of these factors might prove decisive, and none is an absolutely necessary condition for joinder." Cruz v. Bank of N.Y. Mellon, No. 5:12-cv-00846–LHK, 2012 WL 2838957, at *4 (N.D. Cal. July 10, 2012)(quotation marks omitted).

IV. DISCUSSION

A. Joinder

If plaintiff's joinder of the San Fernando Motor Company ("SFMC")—a California corporation—is proper, complete diversity is not satisfied and the Court may not exercise its diversity jurisdiction. Therefore, the Court first considers whether plaintiff's joinder of the SFMC is proper.

1. The Extent to which SFMC is Necessary for Just Adjudication

"Federal Rule of Civil Procedure 19 requires joinder of persons whose absence would preclude the grant of complete relief, or whose absence would impede their ability to protect their interests or would subject any of the parties to the danger of inconsistent obligations." Clinco v. Roberts, 41 F. Supp. 2d 1080, 1082 (C.D. Cal. 1999); Fed. R. Civ. P. 19(a). However, while courts consider the standard set forth under Rule 19 in determining whether to permit joinder under section 1447(e), "amendment under § 1447(e) is a less restrictive standard than for joinder under [Rule 19]." IBC Aviation Services, Inc. v. Compania Mexicana de Aviacion, S.A. de C.V., 125 F. Supp. 2d 1008, 1011–12 (N.D. Cal. 2000). "The standard is met when failure to join will lead to separate and redundant actions," but it is not met when "defendants are only tangentially related to the cause of action or would not prevent complete relief." Id. at 1012.

Plaintiff alleges that the SFMC is the dealership that sold the Vehicle to plaintiff and serviced the Vehicle. Motion at 11. Plaintiff argues that he alleges the same Song-Beverley Act claims against SFMC and FCA and that his claims "involve the same Vehicle, the same alleged transmission defect, and the same protracted and, ultimately unsuccessful attempt to repair the Vehicle." Id. He avers that the resolution of his claims would "require many of the same documents and witnesses and turn on many of the same legal and factual questions." Id. In addition, plaintiff contends that the addition of SFMC may be necessary in the event that FCA argues that plaintiff is not in vertical privity with FCA. Id. at 12. Accordingly, the Court finds that it cannot be said that SFMC is only "tangentially related" to the existing claims against FCA; rather, SFMC is directly related to these claims for relief, and was, allegedly, a direct participant in the conduct which gives rise to plaintiff's existing claims against FCA. This factor, therefore, weighs in favor of granting plaintiff leave to amend the complaint.

2. Statute of Limitations

***5** Plaintiff's action against SFMC is not time-barred by the statute of limitations because he alleges, and FCA does not dispute, that he purchased the Vehicle less than two years ago. FAC ¶ 7. "[A]lthough [t]he Song-Beverly Act does not include its own statute of limitations, California courts have held that the statute of limitations for an action for breach of warranty under the Song-Beverly Act is governed by the same statute that governs the statute of limitations for warranties arising under the [California] Commercial Code." Philips v. Ford Motor Co., No. 5:14-cv-02989-LHK, 2016 WL 1745948, at *6 (N.D. Cal. May 3, 2016) (quotation marks omitted). "[T]he statute of limitations for an action for breach of warranty under the Song-Beverly Act is four years pursuant to section 2725 of the Uniform Commercial Code." Mexia v. Rinker Boat Co., 174 Cal. App. 4th 1297, 1306 (2009). Accordingly, this factor supports remand.

3. Timeliness

"When determining whether to allow amendment to add a nondiverse party, courts consider whether the amendment was attempted in a timely fashion." Clinco, 41 F. Supp. 2d at 1083.

Here, plaintiff filed his FAC within 21 days after service of FCA's answer and notice of removal, and less than two months after filing his initial complaint.[2] This delay is "not unreasonable under this circuit's precedents," as the parties have yet to file dispositive motions. Compare Lara v. Bandit Industries, Inc., No. 2:12-cv-02459-MCE-AC, 2013 WL 1155523, at *3 (E.D. Cal. March 19, 2013) (holding that filing five months after the initial complaint and three months after removal was not untimely when the parties had not filed dispositive motions), with Lopez v. Gen. Motors Corp., 697 F.2d 1328, 1332 (9th Cir. 1983) (finding that it "was too late" to add a diversity-destroying defendant over six months after removal and just four days before a hearing was set on the motion for summary judgment); see also Yang v. Swissport USA, Inc., No. 3:09-cv-03823-SI, 2010 WL 2680800, at *4 (N.D. Cal. 2010) (granting plaintiffs' motion to amend filed nine months after removal where "no dispositive motions have been filed, and the discovery completed thus far [would] be relevant whether the case is litigated in [federal] court or state court"); Stout v. Int'l Bus. Machines Corp., No. 2:16-cv-4914-MOA-JW, 2016 WL 4528958, at *7 (C.D. Cal.

Aug. 30, 2016) (finding plaintiff's filing of a first amended complaint within one month of removal timely); Boon, 229 F. Supp. 2d at 1023 ("Plaintiffs did not unreasonably delay in filing their First Amended Complaint where it was filed less than three months after they filed their original complaint in Superior Court, and less than a month after removal.").

2 Because plaintiff filed his FAC within 21 days of the filing of FCA's answer, plaintiff's amendment was timely under Rule 15(a)(1)(B) and—contrary to FCA's assertion, see Opp'n at 5—plaintiff need not seek leave to amend.

Accordingly, the Court concludes that this factor weighs in favor of remand.

4. Motive behind Joinder

FCA argues that the Court should deny plaintiff's motion for leave to amend because plaintiff's motive in adding SFMC as a defendant is "to defeat diversity jurisdiction." Opp'n at 5. FCA further contends that "[t]he dealership is not a necessary party in this action. Warranty obligations belong in principal with the manufacturer, and there is no benefit to the consumer in adding the dealer as a defendant." Id. at 6.

In some cases, courts have inferred an improper motive where the plaintiff's proposed amended complaint contains only minor or insignificant changes to the original complaint. For example, in Clinco, the court "suspect[ed]" that plaintiff had joined the new defendants in an effort to defeat federal jurisdiction because plaintiff was aware of the removal and filed an amended complaint that was substantially similar to the original complaint. See Clinco, 41 F. Supp. 2d at 1083 n.2. Here, plaintiff's original and first amended complaints are substantially similar. The FAC differs primarily because of the addition of SFMC as a defendant and the omission of plaintiff's claim under the Magnus-Moss Warranty Act.

***6** Notwithstanding the similarities between the original and first amended complaints, other factors weigh in favor of remand. First, the question of whether joinder is solely intended to defeat jurisdiction is "intertwined" with the question of whether the claims against the new defendant appear valid. See McGrath, 298 F.R.D. at 608 ("[A]n assessment as to the strength of the claims against the proposed new Defendants bears directly on whether joinder is sought solely to divest this Court of jurisdiction."). As described below, the Court finds that plaintiff's claim against SFMC is facially legitimate and, therefore, that plaintiff's motive is not *solely* to destroy diversity. Second, "[s]uspicion of diversity destroying amendments is not as important now that § 1447(e) gives courts more flexibility in dealing with the addition of such defendants." IBC Aviation, 125 F. Supp. 2d at 1012 (citing Trotman v. United Parcel Service, No. 3:96-cv-1168-VRW, 1996 WL 428333, at *1 (N.D. Cal. July 16, 1996)). Third, plaintiff "is doing nothing more than exercising her right to amend the complaint 'once as a matter of course[.]' " Stout, 2016 WL 4528958, at *8 (quoting Fed. R. Civ. P. 15(a)(1)).

The Court therefore concludes that plaintiff's motive is a neutral factor or weighs modestly in favor of denying plaintiff's motion.

5. Apparent Validity of Plaintiff's Claims

"The existence of a facially legitimate claim against the putative defendant weighs in favor of permitting joinder under § 1447(e)." Taylor v. Honeywell Corp., No. 09-cv-4947-SBA, 2010 WL 1881459, at *3 (N.D. Cal. May 10, 2010). In considering the validity of plaintiff's claims, "the [c]ourt need only determine whether the claim seems valid" which is not the same as the standard in either a motion to dismiss or a motion for summary judgment. Freeman v. Cardinal Health Pharm. Servs., LLC, No. 2:14-cv-01994-JAM-KJN, 2015 WL 2006183, *3 (E.D. Cal. 2015) (rejecting defendant's assertion that "the Court should consider whether the amended complaint could be defeated by a motion to dismiss") (quotation marks omitted).

As stated above, plaintiff seeks to add claims against SFMC for violations of the Song-Beverly Act. In its opposition, FCA does not directly address the validity of plaintiff's proposed claims against SFMC. Instead, in addressing plaintiff's "motive" for amendment, FCA briefly states that plaintiff's "sole purpose is to defeat federal jurisdiction" because "[t]he dealership is not a necessary party in this action. Warranty obligations belong in principal with the manufacturer, and there is no benefit to the consumer in adding the dealer as a defendant." Opp'n at 6. However, FCA cites no authority for its assertion that a car dealer is not subject to warranty obligations. Moreover, courts have found car dealers liable for breach of warranty under the Song-Beverly Act. See, e.g., Jones v. Credit Auto Ctr., Inc., 237 Cal. App. 4th Supp. 1, 4 (2015) (concluding that the dealership breached the

implied warranty of merchantability under the Song-Beverly Act when, within three months of sale, a latent defect was discovered); Reveles v. Toyota by the Bay, 57 Cal. App. 4th 1139 (1997) (permitting recovery against the car dealer, pursuant to the Song-Beverly Act) disapproved of on other grounds by Gavaldon v. DaimlerChrysler Corp., 32 Cal. 4th 1246, 90 P.3d 752 (2004).

Accordingly, FCA has failed to demonstrate that plaintiff does not have "facially legitimate" claims against SFMC. This factor, therefore, weighs in favor of granting plaintiff's motion.

6. Prejudice

"Prejudice exists if the proposed defendant is 'crucial' to the case. Prejudice does not exist if complete relief can be afforded without that defendant." McCarty v. Johnson & Johnson, No. 1:10-cv-00350-OWW-DLB, 2010 WL 2629913, *9 (E.D. Cal. 2010) (citation omitted). FCA makes no argument that it will suffer prejudice if plaintiff is permitted to amend his complaint.

As stated above, plaintiff has facially legitimate claims against SFMC that arise out of the same series of transactions and occurrences as his claims against FCA. If the Court were to deny plaintiff's motion for leave to amend, plaintiff would be required to pursue two substantially similar lawsuits in two different forums—an action against FCA before this Court and an action against SFMC in California state court. See Lara, 2013 WL 1155523, at *5 ("This Court ... finds that precluding Plaintiffs from joining Cal-Line would prejudice Plaintiffs because they would be required either to abandon a viable claim against Cal-Line or to initiate a duplicative litigation in state court."). Because SFMC is a potentially responsible party, plaintiff will be prejudiced in its absence.

***7** Accordingly, the Court finds that this factor weighs in favor of remand.

7. Summary

In sum, the Court finds that five of the six relevant factors under Section 1447(e) counsel in favor of remand; the sixth factor is either neutral or weighs modestly against remand. Given the balance of these factors, the "strong presumption" against removal jurisdiction, and the heavy burden of proving fraudulent joinder, the Court concludes that plaintiff's joinder of SFMC was proper.

B. Motion for Remand

Pursuant to 28 U.S.C. § 1332(a), federal courts have original jurisdiction over state law actions where the amount in controversy exceeds $75,000 and the action is between parties of diverse citizenship. In its notice of removal, FCA argued that diversity jurisdiction existed because the amount in controversy exceeded $75,000 and the parties were diverse—specifically, plaintiff is a citizen of California where as FCA is a citizen of Delaware and Michigan. However, with the addition of SFMC as a defendant, this action is no longer between parties of diverse citizenship: both plaintiff and SFMC are citizens of California.

As jurisdiction no longer exists on the basis of diversity, the Court **GRANTS** plaintiff's motion to remand. See 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."); id. § 1447(e) ("If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, *or permit joinder and remand the action to the State court.*") (emphasis added). [3]

[3] The Court does not address whether FCA has established that the amount in controversy exceeds $75,000 because the Court concludes that joinder is appropriate and, as a result, the parties are not in complete diversity.

V. CONCLUSION

In accordance with the foregoing, the Court **GRANTS** plaintiff's motion to remand this action to state court.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 6581154

End of Document

2017 WL 10434402
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

SENECA INSURANCE CO., INC.
v.
The HANOVER INSURANCE CO.

Case No. CV 16-06756 BRO (JCx)
|
Filed 08/30/2017

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Proceedings: (IN CHAMBERS)

ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT [28] AND DENYING DEFENDANT'S REQUEST FOR MODIFICATION OF THE SCHEDULING ORDER [29]

BEVERLY REID O'CONNELL, United States District Judge

I. INTRODUCTION

***1** Pending before the Court is Plaintiff Seneca Insurance Company's ("Seneca" or "Plaintiff") Motion for Leave to File a Second Amended Complaint ("SAC"). (Dkt. No. 28 (hereinafter, "Motion" or "Mot.").) Also pending before the Court is Defendant The Hanover Insurance Company's ("Hanover" or "Defendant") request modification of the Scheduling Order. (Dk. No. 29 ("Opposition" or "Opp'n") at 23-25.) After considering the papers in support of and in opposition to the motion, the Court deems the matter appropriate for decision without oral argument of counsel. *See* Fed. R. Civ. P. 78; C.D. Cal. L. R. 7-15. For the following reasons, the Court **GRANTS** Plaintiff's Motion and **DENIES** Defendant's request.

II. BACKGROUND

A. FACTUAL BACKGROUND

Both Plaintiff and Defendant are insurance companies who conduct business in California. (Dkt. No. 11 (hereinafter, "First Amended Complaint" or "FAC") ¶¶ 4-5.) Plaintiff is incorporated and has its principal place of business in New York, New York. (FAC ¶ 4.) Defendant is incorporated and has its principal place of business in New Hampshire. (Dkt. No. 17 (hereinafter, "Counterclaim") ¶ 1.) This Action is an equitable subrogation action. The central issue in this case is a dispute regarding whether Defendant owes Plaintiff an additional $1,000,000 as a result of the settlement in *Flor Quinto v. Tuna 2009 Trust et al.*, No. BC546761, ("the Underlying Lawsuit"), a Los Angeles County California Superior Court case which involved both Parties' insureds.

The Underlying Lawsuit involved three parties: (1) Ms. Quinto, the original action's plaintiff and an employee of Artstock; (2) the Tunas, the original action's defendant, Artstock's landlord, and plaintiff in the cross-complaint against Artstock; and, (3) Artstock, the defendant in the cross-complaint, the Tunas' tenant, and Ms. Quinto's employer. (Mot. at 3.) Ms. Quinto sued the Tunas for personal injuries suffered on May 11, 2014 from an allegedly 500-pound gate located on the Tunas' property falling on her. [1] (*Id.*; FAC ¶ 28.) At the time of her injury, Ms. Quinto was on the Tunas' property in her capacity as an employee of Artstock. (Mot. at 3; Opp'n at 6.) Tunas filed a cross-complaint against Artstock, and Artstock denied all liability. (Mot. at 3; FAC ¶ 30.)

1 Defendant asserts that the gate was 700 pounds. (Opp'n at 6.)

At the time of Ms. Quinto's injury, Plaintiff insured Mr. Tuna to a stated limited of $1,000,000 per occurrence. (Mot. at 2-3.) Massachusetts Bay Insurance Company ("MBIC") and Defendant insured Artstock to a stated limit of $1,000,000 and $3,000,000 per occurrence, respectively. (*Id.*) Plaintiff alleges that the Tunas are additional insureds under both MBIC and Defendant's insurance policies, as required by the lease agreement between Artstock and the Tunas (*Id.*) Plaintiff further contends that the lease also required Artstock to fully indemnify and defend the Tunas from and against all "claims loss of rents and/or damages, liens, judgment, penalties, attorneys' and consultants' fees, expenses, and/or

liabilities arising out of, involving, or in connection with, the use and/or occupancy of the premises." (Mot. at 1.)

***2** On May 25, 2016, the parties to the Underlying Lawsuit came to a global settlement agreement for $4,000,000 (hereinafter, "Settlement Agreement"). (Mot. at 3; Opp'n at 3-4.) The actual contributions to the settlement were as follows: $1,000,000 by MBIC; $2,000,000 by Defendant; and $1,000,000 by Plaintiff. (Mot. at 3.) Plaintiff alleges that included in the settlement was an equitable subrogation clause in which Defendant agreed to be named as a party in place of Artstock for any claims that Plaintiff or the Tunas have against Artstock. (*Id.*)

Plaintiff asserts that because its policy covering Mr. Tuna was in excess of all other valid and collectible insurance available to the insured and Mr. Tuna was indemnified by Artstock, the contributions to the settlement should have been paid as follows: $1,000,000 by MBIC and $3,000,000 by Defendant. (Mot. at 2-3.) Additionally, Plaintiff contends that Hanover "voluntarily" paid $30,000 to the Tunas' personal counsel. (*Id.*) Plaintiff thus seeks to recover $1,000,000 from Defendant.

Defendant, on the other hand, contends that its policy was an excess policy, and the Tunas were not entitled to any coverage under Defendant's umbrella policy. (Opp'n at 10-12.)[2] Further, Defendant argues the Tunas were not entitled to indemnification under the lease agreement because they were grossly negligent in the maintenance of the gate, and Artstock had no indemnification obligation in the event of the Tunas' gross negligence. (*Id.*) Thus, Defendant asserts it was correct to contribute $2,000,000 to the settlement because that was what was owed after MBIC paid its $1,000,000 limit and Plaintiff paid its $1,000,000 limit. (*Id.*) Further, Defendant seeks to recover the $30,000 in attorneys' fees that it paid to the Tunas' personal lawyer, which Defendant asserts that Plaintiff was obligated to pay in defense of its insureds and Defendant advanced in order for the settlement to proceed. (Counterclaim ¶¶ 13-18.)

[2] The proposed second amended Complaint removes coverage under the umbrella policy as grounds for Defendant's obligation to contribute the disputed $1,000,000. Instead, it focuses on Defendant's obligation as a result of the indemnity provision in the lease contract.

B. PROCEDURAL BACKGROUND

Plaintiff filed its original complaint against Defendant on September 8, 2016. (Dkt. No. 1.) The Parties agreed that Plaintiff would not file proof of service in order to give the Parties time to negotiate in an effort to eliminate the need for pleading motions. (Dkt. No. 13.) Upon completion of negotiations and prior to the filing of a responsive pleading, Plaintiff filed its First Amended Complaint on December 14, 2016. (FAC.) The FAC brings four causes of action: (1) declaratory relief; (2) equitable subrogation; (3) equitable indemnity; and, (4) contractual indemnity. (FAC.)

On January 16, 2017, Defendant filed a cross-complaint and answered the FAC, denying all claims and asserting a number of affirmative defenses. (Dkt. Nos. 16-17.) Defendant's counter-claim also brings four causes of action: (1) equitable indemnity; (2) equitable estoppel; (3) equitable subrogation; and, (4) unjust enrichment. (Dkt. No. 17.) Plaintiff answered Defendant's cross-complaint, denying all claims, on February 13, 2017. (Dkt. No. 23.) The Court held a scheduling conference and issued a Trial Order and a referral to ADR Procedure on April 24, 2017. (Dkt. Nos. 25-27.)

Since then, the Parties have attempted to mediate this case, but have been unsuccessful. (Mot. at 3.) The Parties participated in a full day mediation before JAMS mediator Bruce Friedman on July 21, 2017. (Mot. at 4; Opp'n at 22.) Three days later, on July 24, 2017, Plaintiff filed the instant Motion for Leave to file a Second Amended Complaint. (Dkt. No. 28.) On August 7, 2017, Defendant timely opposed the Motion and filed an associated Request for Judicial Notice and Evidentiary Objections. (Dkt. Nos. 29-31.) Plaintiff then timely replied and responded to Defendant's Evidentiary Objections on August 14, 2017. (Dkt. Nos. 32-33.)

III. LEGAL STANDARD

A. Leave to Amend a Pleading Under Rule 15(a)

***3** Federal Rule of Civil Procedure 15 governs amendments to pleadings. The rule encourages courts to "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). In *Foman v. Davis*, the Supreme Court explained that Rule 15's objective is to give a plaintiff "an opportunity to test his claim on the merits." 371 U.S. 178, 182 (1962). As a result, the Supreme Court held that district courts should consider the following factors in deciding whether to grant leave to amend: (1) undue delay; (2) evidence of the movant's

bad faith or dilatory motive; (3) repeated failures to cure deficiencies by previous amendments; (4) undue prejudice to the opposing party; and (5) futility of amendment. *Id.* District courts need not give all of these factors equal weight. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Prejudice to the opposing party is the touchstone of any Rule 15 inquiry and carries the greatest weight. *Id.* (citing and quoting *Lone Star Ladies Inv. Club v. Schlotzsky's, Inc.*, 238 F.3d. 363, 368 (5th Cir. 2001). The party opposing amendment bears the burden of demonstrating prejudice. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987).

"Absent prejudice, or a strong showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to amend." *Eminence Capital,* 316 F.3d at 1052 (internal citation omitted). All inferences should be in favor of granting the motion. *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 880 (9th Cir. 1999) (citing *DCD Programs, Ltd.*, 833 F.2d at 186). Courts retain discretion to deny leave for amendments, but any denial must include a specific finding of prejudice, bad faith, or futility of amendment. *DCD Programs, Ltd.*, 833 F.2d at 186–87.

B. Modifying the Scheduling Order Under Rule 16(b)

Once the district court enters a pre-trial scheduling order under Federal Rule of Civil Procedure 16, that rule's standard controls motions for leave to amend. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607–08 (9th Cir. 1992). Rule 16(b)(4) provides that a scheduling order may be modified "only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). A court determines good cause by evaluating the diligence of the party seeking the amendment. *Johnson*, 975 F.2d at 609. "Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification. If that party was not diligent, the inquiry should end." *Id.* (internal citations omitted).

IV. DISCUSSION

In the instant Motion, Plaintiff seeks leave to amend the FAC in order to withdraw two causes of action, for declaratory relief and equitable indemnification, and add a claim for breach of the implied covenant of good faith and fair dealing. (Mot. at 1.) The new implied covenant claim arises out Defendant's post-settlement conduct, namely that its continued refusal to pay the $1,000,000 Plaintiff alleges is owed amounts to bad faith. (Mot. Ex. A.) Plaintiff also seeks to add attorneys' fees associated with this Action to its damages demand and revise the factual allegations, with the effect, in part, of removing its contention that the Tunas were covered under Defendant's umbrella policy. (Mot. Exs. A, B; Opp'n at 5.)

Defendant opposes the Motion on multiple grounds. Defendant first argues that the Court should strike or deny the Motion because Plaintiff failed to comply with Local Rule 7-3. (Opp'n at 1.) Second, Defendant contends that the Motion should be denied on the merits because: (1) leave to file a SAC would unduly prejudice Defendant; (2) Plaintiff unduly delayed in filing the Motion; (3) Plaintiff acts in bad faith; and (4) Plaintiff's amendment is futile. (Opp'n at 2-3.) In addition to striking the Motion, Defendant requests that the Court issue monetary sanctions against Plaintiff for its non-compliance with Local Rule 7-3 and pursuant to 28 U.S.C. Section 1927. (Opp'n at 23-25.) Finally, Defendant entreats that if the Court grants Plaintiff's Motion, the Court modify the Scheduling Order to extend all deadlines at least an additional ninety days. (Opp'n at 25.) Each of these arguments and requests are addressed in turn below.

A. Plaintiff's Compliance with Local Rule 7-3

***4** In the Opposition, Defendant argues Plaintiff failed to comply with Local Rule 7-3, and consequently Plaintiff's Motion should be struck and Plaintiff's counsel sanctioned. [3] (Opp'n at 1-2, 19-20.) A court's local rules have the force and effect of law, so long as they are not inconsistent with statute or the Federal Rules. *See Atchison, Topeka & Santa Fe R.R. v. Hercules Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998). A court should not depart from the local rules unless the effect on the substantial rights of the parties would be "so slight and unimportant that the sensible treatment is to overlook [it]." *Prof'l Programs Grp. v. Dep't of Commerce*, 29 F.3d 1349, 1353 (9th Cir. 1994) (internal quotation marks omitted). However, "Local Rules are promulgated by District Courts primarily to promote the efficiency of the Court, and... the Court has a large measure of discretion in interpreting and applying them." *Lance, Inc. v. Dewco Servs., Inc.*, 422 F.2d 778, 784 (9th Cir. 1970).

3 Defendant's request for sanctions is addressed in Section IV.B(4).

Central District of California Local Rule 7-3 requires that "counsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, preferably in

person, the substance of the contemplated motion and any potential resolution." C.D. Cal. L.R. 7-3. Furthermore, this "conference shall take place at least seven (7) days prior to the filing of the motion." *Id.* If a movant violates Local Rule 7-3, a district court has discretion to refuse to consider a motion. *Kingdom of Sweden v. Melius*, CV 14-04492 RSWL(Ex), 2015 WL 7574463, at *3 (C.D. Cal. 2015, Nov. 25, 2015) (citing *Reed v. Sandstone Properties, L.P.*, No. CV 12-05021 MMM (VBKx), 2013 WL 1344912, at *6 (C.D. Cal. Apr. 2, 2013)).

Plaintiff filed this motion on July 24, 2017. Accordingly, Local Rule 7-3 required Plaintiff's counsel to confer with Defendant's counsel by July 17, 2017. [4] Plaintiff's Motion states that the Parties' respective counsel met and conferred regarding Plaintiff's proposed amendment on July 21, 2017, following the Parties' unsuccessful mediation. (Mot. at 4; Dkt. No. 28-2 (hereinafter, "Tittmann Decl.") ¶ 6.) The Parties then exchanged emails on July 23-24, 2017, in which Plaintiff sent Defendant a draft of the SAC and requested Defendant either: (1) stipulate to the amended complaint; (2) stipulate to a continuation of the deadline to file amended pleadings pending further meet and confer efforts; or, (3) continue to meet and confer during the pendency of the Motion. (Tittman Decl. ¶¶ 6-7; Mot. Ex. C.) [5] Defendant responded by denying that the meet and confer took place as well as advancing a similar argument to Defendant's position in the Opposition discussed here. (Mot. Ex. C.)

4 Plaintiff repeatedly and strenuously asserts that the Local Rules require a meet and confer *five* days before the filing of a motion. (Dkt. No. 32 (hereinafter, "Reply") at 1, 6.) This is plainly wrong; Local Rule 7-3 clearly requires that parties meet and confer at least seven days prior to the filing of a motion. C.D. Cal. L.R. 7-3. The Court admonishes Plaintiff to both read and comply with all Local Rules.

5 In the July 23, 2017 email, Plaintiff's counsel also wrote that he would "stipulate that Hanover does not need to answer and the prior answer is deemed a sufficient response to this complaint, and any claims are deemed denied to the extent unclear." (Mot. Ex. C.) Defendant characterizes this statement as Plaintiff seeking to "deprive[ ] [Defendant] of the right to file responsive pleadings" and an example of Plaintiff's "disingenuous game playing which completely undermine[s] Rule 7-3." (Opp'n at 20-21.) The Court does not read Plaintiff's statement as Plaintiff demanding Defendant's stipulation as a pre-requisite to a meet and confer; rather, it appears to the Court that the Plaintiff attempting to streamline the pleadings process and eliminate the need for pleadings motions by offering to so stipulate if Defendant desired. This interpretation is bolstered by the fact that the Parties previously engaged in negotiations that led to the Plaintiff's filing of the First Amended Complaint without subsequent pleadings practice. (*See* Dkt. No. 13.)

***5** Defendant's counsel stridently denies that a meet and confer on July 21, 2017 took place regarding the added implied covenant cause of action and the added damages claim for attorneys' fees. (Opp'n at 20-21; Dkt. No. 29-1 (hereinafter, "Herman Decl.") ¶ 7.) Further, Defendant contends that Plaintiff has failed to engage in a substantive exchange on the topic of the Motion prior to filing. (*Id.*) Finally, Defendant argues that Plaintiff has not "substantively" responded to Defendant's July 25, 2017 letter, which indicates Plaintiff is insincere in its offer to meet and confer. (Opp'n at 19-20; Herman Decl. ¶ 11.) Defendant's July 25 letter demanded that Plaintiff withdraw its Motion and articulated Defendant's position regarding Plaintiff's additional cause of action. (Opp'n Ex. B.)

Defendant also seeks to exclude Plaintiff's statements regarding any conversations that took place between the Parties on July 21, 2017, as well as Plaintiff's submission of evidence supporting these conversations, on the grounds that they fall under the mediation privilege pursuant to California Evidence Code Sections 1115-1128. (Dkt. No. 30 (hereinafter, "Evid. Objections"); Opp'n at 21.) [6] Defendant contends that the only conversations that occurred between Plaintiff and Defendant on July 21, 2017 were in the presence of the mediator and in the course of mediation. (Evid. Objections at 2; Herman Decl. ¶ 5.) Defendant thus asserts that it is inappropriate for this Court to consider any communication between the Parties on that day, and Plaintiff mischaracterizes the conversation between the Parties as a meet and confer. (Opp'n at 1-2, 19-21.)

6 Defendant's Evidentiary Objections to the Motion includes arguments that expand beyond those necessary for the objections, including arguments and citations to case law regarding the enforcement of Local Rule 7-3 that do not appear in Defendant's

> Memorandum of Points and Authorities in Opposition to Plaintiff's Motion. (Evid. Objections at 1.) All such arguments and citations should have been advanced in Defendant's Memorandum of Points and Authorities in Opposition, not shoehorned into supplementary filings. It appears to the Court that Defendant sought to exceed the twenty-five page limit set forth in the Court's Standing Order, as highlighted by the Opposition's Table of Contents' reference to pages twenty-seven and twenty-eight for the Local Rule 7-3 case law cited in the Evidentiary Objections. (Opp'n at iii-iv; *See* Dkt. No. 8 ¶ 5(c).) The Court admonishes Defendant to abide by the page limits in the Court's Standing Order. Failure to abide by the limits in the future may result in the Court striking or disregarding excess pages.

In Plaintiff's Reply and Response to Defendant's Evidentiary Objections, Plaintiff asserts that the mediation privilege does not apply because the Parties' conversation regarding the SAC occurred *after* the completion of the mediation and the only purpose of the discussion was to meet and confer, not communicate regarding the mediation. (Reply at 6-7; Dkt. No. 33 (hereinafter, "Evid. Response") at 1-2.)

The Court takes seriously the protections encompassed in the mediation privilege. However, given the conflicting accounts of when the alleged meet and confer took place, as well as the context in which the discussion of the SAC arose on July 21, 2017, the Court is unable to determine whether the mediation privilege in fact applies here. The Court need not resolve this dispute in order to proceed with its decision on whether or not to consider Plaintiff's Motion. Further, even without considering the portions of Mr. Tittmann's declaration to which Defendant objects, it is clear to the Court that: (1) Plaintiff contacted Defendant regarding its intent to file this Motion and providing Defendant with a copy of the proposed SAC prior to filing; (2) this contact fell significantly short of the minimum seven day requirement; (3) Plaintiff requested that Defendant agree to a continuance of the deadline for this Motion in order to meet and confer; and, (4) Defendant declined Plaintiff's offer.

***6** Based on this record, the Court finds Plaintiff failed to substantially comply with Local Rule 7-3's requirements. The Court could, in its discretion, refuse to consider Plaintiff's motion for this reason. *See Singer v. Live Nation Worldwide, Inc.*, SACV 11-0427 DOC, 2012 WL 123146, at *2 (C.D. Cal. Jan. 13, 2012) (denying defendant's motion for summary judgment for failure to comply with Local Rule 7-3). Nevertheless, the Court exercises its discretion to consider Plaintiff's Motion on the merits because Defendant has suffered no prejudice as a result of Plaintiff's counsel's conduct, as discussed below. *See Reed v. Sandstone Properties, L.P.*, CV 12-05021 MMM VBKX, 2013 WL 1344912, at *6 (C.D. Cal. Apr. 2, 2013) (electing to consider plaintiff's motion because defendant suffered no real prejudice). Further, the Court notes that this is Plaintiff's first violation of the Local Rules or any other procedural rule. But the Court notes the seriousness of this violation and admonishes Plaintiff to comply with all Local Rules as this matter proceeds. Failure to do so may result in sanctions or refusal by the Court to consider noncompliant pleadings.

B. The *Foman* Factors Favor Granting Plaintiff Leave to Amend

The Court next considers the *Foman* factors. There is no dispute that Plaintiff has not previously failed to cure deficiencies through former amendments. (Mot. at 6.) The prior first amendment was filed as a matter of right under Rule 15, and there have been neither previous motions to amend nor motions to dismiss. (*Id.*) This factor thus weighs in favor of granting amendment. Defendant argues that the other four factors weigh against leave for amendment. The Court addresses each of the remaining factors in turn.

1. Plaintiff's Proposed Amendment Is Not Futile

"A motion for leave to amend may be denied if it appears to be futile or legally insufficient." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). "Leave to amend need not be given if a complaint, as amended, is subject to dismissal." *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989). Thus, the "proper test to be applied when determining the legal sufficiency of a proposed amendment is identical to the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6)." *Miller*, 845 F.2d at 214. Under the current motion to dismiss standard, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007)); *see also Fulton v. Advantage Sales & Marketing, LLC*, No. 11-CV-01050-MO, 2012 WL 5182805, at *2 (D. Or. Oct. 18, 2012) (finding that the standard for futility is the same as the modern *Iqbal-Twombly* standard for a motion to dismiss). On

the other hand, courts have granted leave to amend where a claim's survival on a motion to dismiss was uncertain because the sufficiency of a complaint may be more comprehensively briefed under a Rule 12(b)(6) motion. *Portney v. CIBA Vision Corp.*, NO. 07-CV-854-AG (MLGx), 2008 WL 11340330 (C.D. Cal. May 15, 2008); *Saes Getters S.P.A. v. Aeronex, Inc.*, 219 F. Supp. 2d 1081, 1086 (S.D. Cal. 2002).

Defendant argues that Plaintiff's amendment is futile because: (1) the Settlement Agreement of the underlying lawsuit precludes Plaintiff from bringing the implied covenant cause of action and attorneys' fees claim; and, (2) Plaintiff may only subrogate to the Tunas' rights under the contract, not Artstock's rights. (Opp'n at 3-5, 15-17).[7] Plaintiff counters that its amendment is not futile because: (1) the Settlement Agreement does not bar the Plaintiff's action since the limiting language regarding future actions applies to legal theories, not remedies; (2) the Settlement Agreement does not bar a post-settlement claim of bad faith; and, (3) Plaintiff may properly stand in Artstock's shoes to bring a bad faith claim since Plaintiff paid $1,000,000 on Artstock's behalf to satisfy the settlement. (Reply at 2-5.)

[7] In support of these arguments, Defendant requests that the Court take Judicial Notice of an order denying the defendant's motion for summary judgment in the Underlying Lawsuit. (Dkt. No. 31.) Defendant is not clear on the reason for its request of judicial notice, but it appears to be for the state court's legal conclusions in that action regarding the Tunas ability to transfer liability to Artstock. Under Federal Rule of Evidence 201(b), a judicially noticed fact must be one that is "not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). "Court orders and filings are proper subjects of judicial notice." *Vasserman v. Henry Mayo Newhall Mem'l Hosp.*, 65 F. Supp. 3d 932, 942–43 (C.D. Cal. 2014). The Court therefore **GRANTS** Defendant's Request for Judicial Notice of this order ("RJN 1"). However, the factual findings of the state court are not undisputed facts. *See Taylor v. Charter Med. Corp.* 162 F.3d 827, 830 (5th Cir. 1998) ("[W]ere it permissible for a court to take judicial notice of a fact merely because it had been found to be true in some other action, the doctrine of collateral estoppel would be superfluous."). Thus, while the Court takes judicial notice of the fact the pleadings were filed, but not the truth of the statement contained in them. Further, the Court notes that the legal findings in the Underlying Lawsuit are not binding on this Court or in this Action, and doubts their persuasive impact where, as here, those findings simply indicate unresolved, open questions based on factual allegations.
Defendant also requests judicial notice of the original complaint and FAC in this action. (Dkt No. 31) However, Defendant never references its request for judicial notice for these pleadings in its Opposition, nor does Defendant in fact provide a copy of the documents. Thus, although "[i]t is well established that a court can take judicial notice of its own files and records under Rule 201 of the Federal Rules of Evidence," the Court **DENIES** Defendant's request as to those documents since the request is untethered to Defendant's Opposition. *Gerritsen v. Warner Bros. Entm't Inc.*, 112 F. Supp. 3d 1011, 1034 (C.D. Cal. 2015). Further, the Court advises Defendant "for future reference that [it] need not seek judicial notice of documents filed in the same case. An accurate citation will suffice." *Id.* (internal quotation marks omitted).

***7** The Court finds that Plaintiff's amendment is not futile. In order to find that the amendment is futile as Defendant advocates, the Court would have to wade into the merits of the underlying claim, interpret provisions of the Settlement Agreement, and conduct analysis that would, at best, be appropriate on a motion for summary judgment, not on a motion for leave to amend.[8] At this stage, as in a motion to dismiss, the Court is confined to the four corners of the proposed complaint and determines only whether, taking Plaintiff's factual allegations as true, Plaintiff has adequately stated a cause of action. *See Dorset*, 2010 WL 11509321, at *5 ("The Court is not required [on a motion for leave to amend the complaint] to engage in a detailed fact-finding analysis, or to examine documents other than the pleadings."). The Court is satisfied that Plaintiff has sufficiently proposed factual allegations in its Motion and SAC to state a claim for a breach of the implied covenant of good faith and fair dealing, particularly in light of Rule 15(a)'s liberal amendment policy. The remaining proposed amendments are similarly not futile because the remedies are feasible given the substantive allegations, and the factual changes clarify Plaintiff's legal theories. For the foregoing reasons, the futility factor weighs in favor of granting Plaintiff's leave to amend.

[8] Defendant recognizes that its argument requires the Court to evaluate their argument for futility on a motion of summary judgment standard. (Opp'n at 15.) Defendant cites *California v. Neville Chem* to suggest that this standard is appropriate: "futility 'includes the inevitability of a claim's defeat on summary judgment.' " (Opp'n at 15 (citing *California v. Neville Chem. Co.*, 358 F.3d 661, 673 (9th Cir. 2004).) However, this uncommon articulation of the futility standard has previously and properly been rejected as dicta. *Dorsett v. Sandoz, Inc.*, No. 06-CV-7821-AHM-AJW, 2010 WL 11509321, at *5 n. 6 (C.D. Cal. Dec. 23, 2010). Moreover, in *Neville*, the defendant sought to amend its cross-complaint after the court's ruling on summary judgment motions in an unusual statutory interpretation case; a level of motion practice far beyond that undergone here. *Neville*, 358 F.3d at 665. Additionally, defendant's proposed amendment was to assert claims for due process and equal protection violations under the California Constitution. *Id*. at 673-74. These claims simply do not have the same kind of well-defined elements that a plaintiff must satisfactorily plead to survive a motion to dismiss for most other actions, such as breach of contract or tort. The court thus looked to see whether the plaintiff alleged any material factual allegations that could constitute a constitutional violation, and the court determined it did not. *Id*. The unique procedural posture and claim alleged thus makes *Neville* inapposite here, even if the futility standard articulated was not dicta.

2. Undue Delay

The Court may consider whether Plaintiff unduly delayed in filing the motion for leave to amend. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1388 (9th Cir. 1990) (citing *Parker v. Joe Lujan Enters., Inc.*, 848 F.2d 118, 121 (9th Cir.1988)). Defendant argues that Plaintiff's Motion is untimely because Defendant claims that Plaintiff knew of the facts leading to amendment at the time this Action was initially filed, but Plaintiff did not amend until the deadline for filing an amendment. (Opp'n at 17-18.)

Defendant's argument is unpersuasive. First, Plaintiff's Motion is timely filed under the Court's Scheduling Order. (Dkt. No. 27 at 16.) The fact that the Plaintiff filed on the last day for such amendment does not make the Motion untimely; parties, including both Parties in this case, regularly file motions of the day of the deadline. To hold that such filings are untimely would defeat the meaning of a deadline.

Additionally, Plaintiff avers that Defendant's discovery responses produced three weeks prior to the filing of this Motion resulted in Plaintiff's recognition of additional claims and this request for amendment. (Mot. at 5.) Although Defendant now argues that all facts were known to Plaintiff at the outset of litigation, Defendant has previously informed the Court that extensive discovery was necessary given the differences in the issues between the present litigation and the Underlying Lawsuit, as well as the Ms. Quinto and the Tunas' strategic aversion to "aggressive discovery.". (Dkt. No. 24 at 6.) Plaintiff's assertion is consistent with Defendant's earlier position regarding discovery. Moreover, without a showing of some other basis for denying leave to amend, such as undue prejudice or bad faith, "courts have generally granted leave to litigants even though they should have anticipated 'the facts and theories raised by the amendment' at an earlier stage in the litigation, and cannot otherwise justify their delay in seeking leave to amend." *Dep't of Fair Emp't & Hous. V. Law Sch. Admission Council, Inc.*, No. C-12-1830 EMC, 2013 WL 485830, at *4 (N.D. Cal. Feb. 6, 2013) (quoting *Jackson*, 902 F.2d at 1388); *see also Roberts v. Ariz. Bd. of Regents*, 661 F.2d 796, 798 (9th Cir. 1981) ("Ordinarily, leave to amend pleadings should be granted regardless of the length of time of delay by the moving party absent a showing of bad faith by the moving party or prejudice to the opposing party.").

***8** Finally, the parties are in the early stages of discovery and in this litigation, which is further indicative that Plaintiff did not unduly delay in requesting leave for amendment. The Court therefore weighs this factor in favor of granting Plaintiff leave to amend.

3. Prejudice to Defendants

Prejudice carries the greatest weight of the *Foman* factors. *Eminence Capital*, 316 F.3d at 1052 ("Prejudice is the 'touchstone of the inquiry under rule 15(a).' ") (citations omitted). Undue prejudice exists where the proposed claims "would have greatly altered the nature of the litigation and would have required defendants to have undertaken, at a late

hour, an entirely new course of defense." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990).

Defendant argues that allowing Plaintiff to amend its complaint would prejudice Defendant because the added claim presents a new legal theory requiring a different factual focus. (Opp'n at 14.) Defendant argues that the additional claim would add to the scope of discovery and deprive Defendant of sufficient time to complete discovery. (*Id*.) Defendant simultaneously argues that the fact that there are "no new facts justifying the proposed amendment" is indicative of Plaintiff's purposeful delay in filing this Motion. (*Id*. at 13-15.) Finally, Defendant seeks to cast Plaintiff's leave for amendment as a request arising in a late stage of litigation. (*Id*.)

The Court is not persuaded by Defendant's argument. First, Plaintiff is not seeking to amend its Complaint at a late stage. None of the authority cited by Defendant supports a different conclusion.[9] Plaintiff timely filed its Motion and discovery is in the early stages; discovery is not cut off until December 11, 2017. Further, as this Court has previously recognized, if the very addition of claims were prejudicial, no party could seek leave to amend its complaint to add new causes of action—the additional claims would certainly always require additional time and expense to the detriment of the party opposing amendment. *See AIG Prop. Cas. Co. v. Cosby*, No. 15-CV-04842-BRO (RAOx), 2016 WL 6662730, at *6 (C.D. Cal. Jan. 8, 2016) (citing *Trans Video Elecs., Ltd. v. Sony Elecs., Inc.*, 278 F.R.D. 505, 509 n.2 (N.D. Cal. 2011)).

9 The cases Defendant cites to support its argument present far more extreme situations giving rise to prejudice than the facts presented here. For instance, in *Ascon Properties, Inc. v. Mobil Oil Co.*, 886 F.2d 1149, 1161 (9th Cir. 1989), the court found leave to amend would be prejudicial after the plaintiff sought to amend its complaint for a third time after the two prior complaints had been dismissed on motions to dismiss over a two-plus year period. Likewise, in *Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1395 (9th Cir. 1986), the court found leave to amend would be prejudicial after the case had been ongoing for two years, and the plaintiff sought to amend its complaint between oral argument on a motion for summary judgment and the court's order granting the motion. The facts in these cases are not comparable to the facts presented here.

Defendant's claim that discovery is broadened to the point of prejudice is unconvincing. The new breach of the implied covenant of good faith cause of action and request for attorneys' fees arise from allegations in the FAC. As Defendant explicitly recognizes, most of the facts supporting Plaintiff's additional claims are already alleged. Moreover, Plaintiff eliminates two causes of action in its proposed SAC and refines its factual allegations. Thus, while Plaintiff expands the scope of possible legal theories and discovery on one hand, it narrows it in others.

***9** For the foregoing reasons, the Court finds that Defendant fails to meet his burden of demonstrating prejudice. This *Foman* factor weighs heavily in favor of granting leave to amend. *See DCD Programs*, 833 F.2d at 187.

4. Bad faith

"[C]ourts have understood ['bad faith'] to mean such tactics as, for example, seeking to add a defendant merely to destroy diversity jurisdiction." *Saes Getters S.P.A.*, 219 F. Supp. 2d at 805. Defendant stridently argues that such tactics are present here. (Opp'n at 18-23.) Defendant asserts that Plaintiff brings this Motion "in an effort to 'raise the stakes,' " "make this case more expensive," "multiply litigation based on no new information," and "create extra work in order to coerce capitulation." (Opp'n at 18-19.) Defendant further asserts that Plaintiff's failure to comply with Local Rule 7-3 and alleged breach of the mediation privilege, discussed above, is evidence of bad faith. (*Id*.)

The Ninth Circuit has explained that "amendment should be permitted unless it will not save the complaint or the plaintiff merely is seeking to prolong the litigation by adding new but baseless legal theories." *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 881 (9th Cir. 1999). That is not the case here. Plaintiff's reasons for alleging a breach of implied covenant claim and seeking to recover attorneys' fees may be strategic, but the Court does not find evidence of Plaintiff's bad faith or trickery. As previously mentioned, this case is in its early stages. Plaintiff does not merely seek to prolong the litigation; and, as discussed above, Plaintiff's amendments would not be futile.

The Court addressed Plaintiff's non-compliance with Local Rule 7-3 and the Court's inability to assess whether the

mediation privilege was, in fact, breached above. (*See* discussion *infra* Section IV.A.) Although Plaintiff did not substantially comply with Local Rule 7-3, Plaintiff did take steps to meet and confer with Defendant prior to filing and to reach a stipulation that would have allowed the parties to meet and confer longer. These steps are sufficient to demonstrate to the Court, along with the factors discussed above, that Plaintiff did not act in bad faith. Further, as the Court previously noted, it is not clear to the Court that Plaintiff in fact violated the mediator's privilege. Even if the Plaintiff did so violate, there is no evidence that the violation was willful and in bad faith. [10]

10 For the same reasons, the Court **DENIES** Defendant's request for sanctions against Plaintiff. In addition to striking the Motion, Defendant requests monetary sanctions in the sum of $12,500 in attorneys' fees for costs associated with this Motion; these sanctions are based on Plaintiff's violation of Local Rule 7-3 under 28 U.S.C. Section 1927 and Local Rule 83-7. (Opp'n at 23-25; Herman Decl. ¶ 22.) Under 28 U.S.C. Section 1927, a court may require an attorney "who so multiples the proceedings in any case unreasonably and vexatiously" to personally pay the resulting costs and attorneys' fees. "Sanctions pursuant to Section 1927 must be supported by a finding of subjective bad faith." *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989). The Court does not find that Plaintiff acted in bad faith, and thus sanction pursuant to Section 1927 are inappropriate.
Similarly, Local Rule 83-7 empowers the Court to issue monetary sanctions for a violation of the Local Rules upon a finding that the offending party's conduct "was willful, grossly negligent, or reckless." C.D. Cal. L.R. 83-7(a). The Court may also award costs and attorneys' fees to opposing counsel upon a finding that the offending party acted in bad faith. C.D. Cal. L.R. 83-7(b). Sanctions are awarded in rare and exceptional circumstances. *Primus Automotive Financial Services, Inc. v. Batarse*, 115 F.3d 644, 649-50 (9th Cir. 1997). While the Court requires strict compliance with the Local Rules, Plaintiff's first and only breach, where Defendant suffered no prejudice, does not meet the high threshold required for the imposition of sanctions.

***10** Because all of the applicable *Foman* factors weigh in favor of granting Plaintiff leave to amend, the Court **GRANTS** Plaintiff's Motion for Leave to File its Second Amended Complaint.

C. Defendant Has Not Demonstrated Good Cause to Modify the Scheduling Order

Defendant requests in the alternative that the Court extends the trial date and all pre-trial deadlines by a minimum of ninety days. (Opp'n at 25.) In support of this request, Defendant simply refers the Court to its Opposition, particularly the section on prejudice and futility. The Court does not find good cause in these sections for a modification to the scheduling order. As the Court discussed above, the Court does not find that Defendant will suffer prejudice as result of this amendment. (*See* discussion *infra* Section IV.B(3).) Moreover, as the Court previously recognized, the amendments in this Action derive largely from the same facts previously alleged in the FAC. There is also more than three months of the discovery period remaining. Finally, Defendant has not articulated how despite its diligence, it requires a scheduling modification in order to be able to meet the deadlines. The Court therefore **DENIES** Defendant's request to modify the Scheduling Order.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiff's Motion for Leave to file its Second Amended Complaint, and **DENIES** Defendant's request to modify the Scheduling Order.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 10434402

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2020 WL 9073068
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Silas Braxton
v.
SEJ Assessment Management
& Investment Company

Case No.: CV 19-04005-AB (ASx)
|
Filed 10/22/2020

Attorneys and Law Firms

Carla Badirian, Deputy Clerk, Attorney(s) Present for Plaintiff(s): None Appearing

N/A, Court Reporter, Attorney(s) Present for Defendant(s): None Appearing

Proceedings: [In Chambers] ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT AND DENYING AS MOOT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Honorable ANDRÉ BIROTTE JR., United States District Judge

***1** Pending before the Court is Plaintiff's Motion for Leave to File a First Amended Complaint (ECF 42) and Defendant's Motion for Summary Judgment (ECF 43). The Court has determined that this matter can be decided without oral arguments and accordingly **VACATES** the October 23, 2020 hearing. Having reviewed all the papers submitted pertaining to these Motions, the Court **GRANTS** Plaintiff's Motion and **DENIES AS MOOT** Defendant's Motion.

I. BACKGROUND

On May 7, 2019, Plaintiff Silas Braxton filed a Complaint against Defendant SEJ Assessment Management & Investment Company alleging violations of the Americans with Disabilities Act and the California Unruh Act. (ECF 1.) On October 18, 2019, Plaintiff noticed a land inspection and set the inspection date for November 22, 2019. That same day, Plaintiff sent courtesy copies of all discovery served and requested that Defendant "confer with [Plaintiff] regarding the best date to conduct the land inspection at your earliest convenience." (ECF 42, Exh. B.) Defendant states it did not oppose the proposed inspection date, but Plaintiff states that Defendant never contacted Plaintiff to formally set an inspection date. (*Compare* ECF 44, Declaration of Michael Orr ("Orr Decl.") at ¶ 2 *with* ECF 45, Exh. A at 31.)

On November 20, 2019, the parties filed a joint report in which Plaintiff noted that he would "conduct a site inspection to determine what other unlawful barriers exist, and may amend the complaint to allege these additional barriers, if any." (ECF 30 at 7.) The Court ordered the parties to submit an amended joint report to include a scheduling worksheet, and on February 27, 2020, the parties submitted the following proposed deadlines—all of which were granted by the Court:

- Last Date to Hear Motion to Amend Pleadings/Add Parties: December 20, 2020
- Non-Expert Discovery Cut-Off: September 25, 2020
- Expert Disclosure (Initial): October 25, 2020
- Expert Disclosure (Rebuttal): November 30, 2020
- Expert Discovery Cut-Off: October 30, 2020

(*See* ECFs 32, 34.)

On July 29, 2020, Plaintiff met and conferred regarding Defendant's discovery responses, and noted that Defendant "has failed to meet and confer with Plaintiff regarding a mutually agreeable time and date for Plaintiff and Plaintiff's certified access specialist to inspect the subject premises." (ECF 45, Exh. A at 31.) On July 30, 2020, Plaintiff was deposed. (Orr Decl. at ¶ 3.) On July 31, 2020, Plaintiff requested that Defendant provide three dates for a land inspection. (ECF 45, Exh. B.) On August 3, 2020, Plaintiff followed up with Defendant to again request inspection dates, and the parties were able to agree upon and complete the inspection on August 6, 2020. (*Id.*)

On September 3, 2020, the parties met and conferred regarding discovery responses and amending the Complaint. Plaintiff requested that the parties stipulate to amend so he could add a new party and the additional barriers that were discovered during the August 6, 2020 site inspection; during this conversation, Defendant agreed to stipulate to add a new party but refused to stipulate to the addition of new barriers. (ECF 42, Exh. C.) On September 4, 2020, Plaintiff sent Defendant a proposed First Amended Complaint

against asking Defendant to stipulate for leave to amend. (*Id.*) That same day, Defendant met and conferred with Plaintiff regarding its intention to file a motion for summary judgment. (Orr Decl. ¶ 7.) [1]

[1] Defendant's Opposition to Plaintiff's Motion states that the meet and confer regarding summary judgment took place on September 4, 2020 (Orr Decl. at ¶ 7), which would make Defendant's September 10, 2020 Motion for Summary Judgment untimely pursuant to Local Rule 7-3 ("The conference shall take place at least seven (7) days prior to the filing of the motion."). The Court will afford Defendant the benefit of the doubt, however, given that its Motion for Summary Judgment states that the meet and confer took place on September 3, 2020. (ECF 43 at 2.)

***2** On September 9, 2020, Plaintiff filed the instant motion (ECF 42), and on September 10, 2020, Defendant filed its Motion for Summary Judgment (ECF 43.)

II. LEGAL STANDARD

Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that "[t]he court should freely give leave [to amend a pleading] when justice so requires." Fed. R. Civ. Proc. 15(a)(2). " 'This policy is to be applied with extreme liberality,' " but "leave to amend is not automatic." *Kaneka Corp. v. SKC Kolon PI, Inc.*, No. CV1103397, 2013 WL 11237203, at *2 (C.D. Cal. May 6, 2013) (quoting *Eminence Capital, L.L.C. v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003)).

Courts typically apply five factors in deciding whether to grant leave to amend: "bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *Id.* (citing *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004)). "The party opposing amendment bears the burden of showing prejudice," (*DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987)), and "it is the consideration of prejudice to the opposing party that carries the greatest weight." *Eminence Capital*, 316 F.3d at 1052.

III. ANALYSIS

The Court finds that given the liberality with which leave to amend should be granted, and in analyzing the requisite factors, leave to amend is warranted in this case.

A. Prejudice

"[I]t is the consideration of prejudice to the opposing party that carries the greatest weight" under Rule 15. *Eminence Capital*, 316 F.3d at 1052 (citation omitted). "A need to reopen discovery, a delay in the proceedings, or the addition of complaints or parties are indicators of prejudice." *Lanier v. Fresno Unified Sch. Dist.*, No. 1:09-cv-01779-AWI-BAM, 2013 WL 1896183, at *3 (collecting cases).

Defendant has not shown how Plaintiff's proposed amendments would "require[ ] additional discovery on a wide range of new issues." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 809 (9th Cir. 1988). Any new alleged violations would involve the same site—these amendments would not require discovery involving new witnesses, new locations, or new encounters, let alone any other "wide range of new issues."

Defendant also argues prejudice exists because it remedied barriers based upon Plaintiff's July 30, 2020 testimony. (ECF 44 at 5.) The Court does not find this argument persuasive for several reasons: First, Plaintiff is not, nor does he claim to be, an ADA expert such that his testimony would provide an ironclad assessment of all possible ADA violations on the premises. Defendant took a calculated risk in premising the scope of its repairs on Plaintiff's non-expert testimony.

Second, one day after Plaintiff's deposition, Plaintiff contacted Defendant about a site inspection. (ECF 45, Exh. B.) The site inspection occurred on August 6, 2020, approximately one week after Plaintiff's deposition. Assuming Defendant scheduled repairs the same day it deposed Plaintiff (July 30, 2020), it knew the following day that an official site inspection was imminent and chose to proceed with repairs based upon Plaintiff's testimony. Defendant could have delayed repairs for a short period to review the findings of Plaintiff's inspection or it could have conducted its own inspection to determine the existence of violations. The decision otherwise does not provide the basis for a showing of prejudice.

***3** In short, any minimal prejudice that Defendant has alleged is insufficient to justify denying leave to amend.

B. Undue Delay

While courts also consider whether there was undue delay in seeking to amend, "[u]ndue delay by itself ... is insufficient to justify denying a motion to amend." *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999) (citation omitted). First,

the Court notes that Plaintiff brought this motion before the December 20, 2020 deadline for the last day to hear motions to amend pleadings. (ECF 34.) While this fact alone does not show Plaintiff moved without undue delay, it does highlight that both parties assumed the risk that such a motion could be brought up until their mutually agreed upon deadline.

Second, Defendant does not counter Plaintiff's assertion that it never responded to the initial request for a site inspection with proposed dates. The Court notes, however, that Plaintiff did not follow up regarding his request for inspection from October 2019 to July 2020, approximately nine months. But Plaintiff notified the Court and Defendant in the November 2019 status report that he still intended to conduct a site inspection. (ECF 30 at 7.) The short delay of nine months does not amount to undue delay.

Finally, the August 6, 2020 site inspection took place almost two months prior to the close of non-expert discovery (September 25, 2020) and three months prior to the close of initial expert disclosure (October 25, 2020). (*See* ECF 34.) Less than a month after the inspection, Plaintiff met and conferred with Defendant about amending his Complaint based upon new information learned from the inspection. "Relevant to evaluating the delay issue is whether the moving party knew or should have known the facts and theories raised by amendment in the original pleading." *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1388 (9th Cir. 1990). Here, Plaintiff did not know of the need to amend the Complaint until the site inspection; subsequently, Plaintiff moved to amend quickly upon learning of potential additional barriers.

Other than the initial request to inspect the land—which Defendant seemingly never acknowledged—there is no evidence of undue delay by Plaintiff in bringing this motion. [2]

[2] While neither party addresses this, the Court is cognizant of the potential difficulties that the COVID-19 pandemic has created in scheduling in-person site inspections.

C. Futility of Amendment

"[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient ... defense." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988) (citing *Baker v. Pac. Far East Lines, Inc.*, 451 F. Supp. 84, 89 (N.D. Cal. 1978); 3 J. Moore, Moore's Federal Practice ¶ 15.08[4] (2d ed. 1974)). "Courts ordinarily do not consider the validity of a proposed amended pleading in deciding whether to grant leave to amend ...." *Kaseberg v. Conaco, LLC*, No. 15-CV-1637 JLS (RNB), 2018 WL 1782914, at *3 (S.D. Cal. Apr. 13, 2018). Rather, "[a]rguments concerning the sufficiency of the proposed pleadings, even if meritorious, are better left for briefing on a motion to dismiss." *Id.* (citing *Lillis v. Apria Healthcare*, No. 12-cv-52-IEG (KSC), 2012 WL 4760908, at *1 (S.D. Cal. Oct. 5, 2012)).

***4** In arguing that amendment would be futile, Defendant claims that "Plaintiff's federal claim is moot and Plaintiff's amendment does not establish standing." (ECF 44 at 6.) Defendant then expounds upon this argument, which mirrors the merits of its Motion for Summary Judgment. In short, Defendant asks the Court to decide its standing argument prior to deciding whether it should grant leave to amend. The Court declines to do so and finds that Defendant has not shown that amendment would be futile at this point in litigation.

D. Bad Faith

Finally, Defendant conclusorily states that Plaintiff sought leave to amend in order to "prejudice" its Motion for Summary Judgment. (ECF 44 at 2.) First, the timeline of this case suggests otherwise—Plaintiff sought leave to amend within one month of learning of new potential violations. Second, the parties met and conferred at almost the same time to discuss their respective motions. It appears that Defendant may have even conferred with Plaintiff about its intent to file a Motion for Summary Judgment *after* Plaintiff discussed his desire to file an amended complaint. (See Orr Decl. at ¶ 7.) Defendant has made no showing of bad faith beyond mere speculation.

IV. CONCLUSION

Based upon the foregoing, the Court finds that Plaintiff has not unduly delayed in seeking amendment, that amendment would not be futile, there has been no showing of bad faith, and that, most importantly, Defendant will not be unduly prejudiced. Accordingly, the Court **GRANTS** Plaintiff's Motion for Leave to file a First Amended Complaint. Plaintiff must file the FAC within ten (10) days of the issuance of this order.

Because leave to amend has been granted, the Court **DENIES AS MOOT** Defendant's Motion for Summary Judgment without prejudice to its later renewal.

IT IS SO ORDERED.

Initials of Deputy Clerk CB

All Citations

Slip Copy, 2020 WL 9073068

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2010 WL 11509228
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

SPELLBOUND DEVELOPMENT GROUP, INC.
v.
PACIFIC HANDY CUTTER, INC. et al.

Case No. SACV 09–951 DOC (ANx)
|
Filed 08/31/2010

Attorneys and Law Firms

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PROCEEDING (IN CHAMBERS): ORDER GRANTING MOTION FOR LEAVE TO AMEND [50]

DAVID O. CARTER, JUDGE

***1** Before the Court is Plaintiff Spellbound Development Group, Inc. ("Spellbound")'s Motion for Leave to Amend (the "Motion"). The Court finds the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; Local R. 7–15. After considering the moving, opposing, and replying papers, the Court GRANTS the Motion.

I. Background

This lawsuit arises out of Defendant Pacific Handy Cutter, Inc. ("PHC")'s alleged infringement of three patents owned by Spellbound. The patents concern cutting devices with certain safety features, including blade guards and locking mechanisms for blades that protect against unintended blade displacement. Spellbound represents that it is engaged in the sale of such safety cutters, as well as other safety-related products. *See* Ex. A to Lauson Decl. at 1.

The three patents are U.S. Patent Nos. 7,365,928, 7,726,029, and 6,178,640. Spellbound's initial complaint, filed on August 17, 2009, only alleged infringement of the '928 patent. On October 20, 2009, Spellbound filed a first amended complaint that added allegations of infringement as to the '640 patent, following its purchase of that patent. Most recently, on June 4, 2010, Spellbound filed a second amended complaint that added allegations that PHC infringed the '029 Patent, which issued on June 1, 2010. The gravamen of Spellbound's infringement claims is that a single product sold by PHC—the PHC–432 safety knife—infringes Spellbound's patents.

The May 3, 2010 Scheduling Order sets a discovery cut off date of January 7, 2011, a Motion Cut off Date of February 14, 2011, and a trial date of April 5, 2011. The Scheduling Order further set a July 2, 2010 deadline for any motions for leave to file an amended pleadings. [1] The instant motion was filed within that deadline, on June 28, 2010.

1 The Order specified that

II. Legal Standard

Rule 15 provides for the liberal amendment of pleadings. Though, subject to certain inapplicable exceptions, "a party may amend its pleading only with the opposing party's written consent or the court's leave[,] [t]he court should grant leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). The Court must consider the following factors when determining whether to permit amendment: (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of amendment; and (5) whether the plaintiff has previously amended his complaint. *Nunes v. Ashcroft*, 348 F.3d 815, 818 (9th Cir. 2003). Prejudice is the "touchstone of the inquiry under rule 15(a)" and therefore "carries the greatest weight." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

Motions for leave to amend that seek to join new parties as plaintiffs or defendants must also be evaluated under Rule 20. *See Desert Empire Bank v. Ins. Co. of North Am.*, 623 F.2d 1371, 1374 (9th Cir. 1980). Like Rule 15, Rule 20 allows for the liberal joinder of new parties. Persons may be joined as defendants if (1) "any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences"; and (2) "any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a)(2). In evaluating a request to join parties, the court must analyze the factors set forth in Rule 20 and,

in addition, consider "other relevant factors ... in order to determine whether the permissive joinder of a party will comport with the principles of fundamental fairness." *See Desert Empire Bank*, 623 F.2d at 1375. These factors include (1) prejudice to existing parties; (2) the moving party's delay in seeking joinder; (3) the moving party's motive in amending its pleadings; (4) the closeness of the relationship between the new and old parties; (5) the effect of amendment on the court's jurisdiction; and (6) the new party's notice of the pending action. *Id.* Notwithstanding its consideration of these factors, the court must be cognizant of the "strong liberality" with which leave to join parties must be given. *See id.* at 1376.

III. Discussion

***2** Spellbound's proposed third amended complaint doesn't add new claims or even new allegations. Instead, Spellbound seeks to join as defendant Stanley Black & Decker, Inc. ("Stanley"), who Spellbound claims is an active participant in the infringement of its patents. The claims against Stanley arise out of its alleged distribution of the PHC–432 safety knife.

A. Leave to Amend

The facts weigh in favor of amendment. The burden lies with PHC to demonstrate the impropriety of amendment, given Rule 15's liberal standard. *See DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). Notwithstanding this burden, PHC failed to submit any substantive opposition to Spellbound's motion. Instead, PHC merely incorporated by reference arguments made in its since-denied *ex parte* Application for an order enjoining Spellbound from adding Stanley as a defendant. That *ex parte* didn't even discuss Rule 15, let alone the factors set forth in *Nunes*. The application consisted of an argument that Spellbound's claims against Stanley were asserted in bad faith and with the intent to harass. Since PHC's argument only addresses the second *Foman* factor, the Court analyzes the remaining factors on its own initiative and out of an abundance of caution.

First, there has been no undue delay in the filing of Spellbound's request: Spellbound requested leave to amend within the deadline imposed by the Scheduling Order. Moreover, even PHC's *ex parte* Application implicitly concedes that Spellbound couldn't have asserted its claims against Stanley earlier, since "PHC is only now beginning to foster a solid business relationship with Stanley." *See* Dkt. 53 at 1. A party should not be penalized for "wait[ing] until [it] had sufficient evidence of conduct upon which [it] could base claims of wrongful conduct." *Leighton*, 833 F.2d at 186. Even if the facts were otherwise, and Spellbound had delayed in adding Stanley as a defendant, "delay, by itself, is insufficient to justify denial of leave to amend." *Leighton*, 833 F.2d at 186.

Second, PHC suffers no prejudice as a result of Spellbound's proposed amendment. This lawsuit remains in the preliminary stages and the discovery cut off and trial dates are months away. Furthermore, the proposed amendment asserts no new claims, let alone new allegations, as to PHC. The work already performed by PHC is preparing its defense to the first amended complaint remains unaffected by the proposed amendment.

Third, contrary to PHC, the evidence does not show "bad faith" on Spellbound's part. The basis for PHC's claim of bad faith is a letter sent by Spellbound to Stanley prior to the filing of the motion. In that letter, Spellbound informed Stanley that a knife sold by Stanley and likely supplied by PHC infringed the patents-at-issue. *See* Ex. A to Marinovich Decl. Spellbound's letter purported to "put [Stanley] on actual notice of [Spellbound's] patent rights" but offered Stanley a business alternative to suit: "Alternatively, a limited license under the patents may be available to your company, or the superior but comparable patented product can be purchased from its inventor, Spellbound." *Id.* According to PHC, Stanley was subject to suit because it refused to do business with Spellbound.

But the letter doesn't give rise to the inference advanced by PHC. Spellbound's attempt to achieve a pre-suit resolution of its potential claims against Stanley represents shrewd business, not bad faith. Indeed, Spellbound's letter exhibits a genuine conviction in the viability of its potential claims against Stanley. *See id.*

***3** PHC also argues that Spellbound's proposed claims against Stanley represent an illegitimate attempt to interfere with PHC's growing relationship with Stanley. However, Spellbound's letter to Stanley doesn't evidence this improper motive. Nor does Spellbound's proposed pleading suggest that the claim against Stanley is baseless. And this Court is aware of no authority (nor has PHC cited any authority) for the proposition that a plaintiff should be barred from bringing a viable claim for the sole reason that the filing of that claim may affect another party's business relationships.

Fourth, the amendment isn't futile, nor does PHC contend that it's futile. "Where the underlying facts or circumstances

of a case 'may be a proper subject of relief, [a plaintiff] ought to be afforded an opportunity to test his claim on the merits." *Leighton*, 833 F.2d at 188 (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227 (1962)). Here, Spellbound alleges that Stanley's liability arises out of its sale of products supplied by PHC that infringe Spellbound's patents. Such distribution of an infringing product can give rise to a claim for patent infringement. *See Metro–Goldwyn–Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 125 S.Ct. 2764 (2005).

Finally, Spellbound has already amended its pleading twice, but the new amendment doesn't add factual allegations that Spellbound was aware of at the time its prior amendments were filed. Though this factor may, as a formal matter, weigh against permitting leave to amend, the Court finds that the facts otherwise weigh heavily in favor of amendment.

The Court finds that Rule 15's requirements have been satisfied.

B. Leave to Join Stanley

Rule 20's requirements are likewise satisfied. The claims against Stanley arise out of the same transaction, occurrence or series of transactions. Stanley's alleged infringement relates directly to the sale of the 432 model knife, which was supplied to Stanley by PHC. Furthermore, questions of law or fact bind the claims against PHC with the proposed claims against Stanley. Specifically, the claims against both defendants will require the Court to construe and apply the patents-at-issue.

The remaining Rule 20 factors align closely with the Rule 15 factors discussed above and the Court therefore incorporates its prior analysis. While the Court must additionally consider prejudice to Stanley caused by the proposed amendment, that prejudice is minimal. When a case is still in the "discovery stage" and the trial and pretrial dates are months away, the prejudice to the party being joined is minimal and insufficient to defeat joinder. *See Leighton*, 833 F.2d at 188. Although *Leighton* is distinguishable because no pretrial and trial dates had been scheduled, the Court is more than willing to require accelerated discovery from Spellbound on the scope of its proposed claims against Stanley, which have already been subject to extensive discovery thus far (since those proposed claims mirror the pending claims against PHC).

Finally, Stanley's joinder doesn't affect the Court's jurisdiction, which arises under 28 U.S.C. § 1331 and 1338(a). This is a case arising under the patent laws of the United States, 35 U.S.C. § 1, *et. seq.*, over which this Court exercises original jurisdiction.

The Court finds that Rule 20's requirements have been satisfied.

IV. Disposition

The Motion is GRANTED. The Scheduling Order is modified for the limited purpose of extending the deadline for the filing of amended pleadings to September 6, 2010. Spellbound shall have leave to file its revised proposed third amended complaint (Attachment 1 to Docket 59) on or before September 6, 2010.

***4** The Clerk shall serve this minute order on all parties to the action.

All Citations

Not Reported in Fed. Supp., 2010 WL 11509228

End of Document

2016 WL 10570247
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

TOWNSEND FARMS, et al.
v.
GOKNUR GIDA MADDELERI ENERJI IMALAT ITHALAT IHRACAT TICARET VE SANAYI A.S., et al.

Case No. SA CV 15–0837–DOC (JCGx)
|
Filed 06/02/2016

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PROCEEDINGS (IN CHAMBERS): ORDER GRANTING MOTION TO FILE AMENDED CONSOLIDATED COMPLAINT [54]

DAVID O. CARTER, UNITED STATES DISTRICT JUDGE

***1** Before the Court is Plaintiff Purely Pomegrante, Inc. ("PPI"), Valley Forge Insurance Company ("Valley Forge"), and Townsend Farms, Inc.'s ("TFI" or "Townsend Farms") (collectively, "Plaintiffs") Motion to File Amended Consolidated Complaint ("Motion") (Dkt. 54). The Court finds this matter appropriate for resolution without oral argument. Fed. R. Civ. P. 78; L.R. 7–15. After reviewing the moving papers and considering the parties' arguments, the Court hereby GRANTS the Motion.

I. Background

This consolidated case is one of several that arise from a 2013 Hepatitis A outbreak. Numerous individuals in the United States allegedly contracted Hepatitis A after consuming or being exposed to pomegranate arils sold by Goknur Gida Maddeleri Enerji Imalat Ithalat Ticaret ve Sanayi Anomim Sirketi ("Goknur") and United Juice Corp ("United Juice") (collectively, "Defendants"). Plaintiffs allege Defendants were responsible for manufacturing and selling the contaminated pomegranate arils respectively.

The Court briefly notes the following facts from the operative complaints in the respective cases: the First Amended Complaint in the action brought by Townsend Farms ("Townsend FAC") (Case No. 15–0837, Dkt. 27), and the First Amended Complaint in the action brought by Valley Forge and PPI ("PPI FAC") (Case No. 15–0840, Dkt. 18).

Defendants Goknur and United Juice are in the business of manufacturing, exporting, distributing, and selling pomegranate arils. PPI FAC ¶ 15. Defendant Goknur is a business entity organized under the laws of Turkey and has its principle place of business in Turkey. *Id.* ¶ 5. Defendant United Juice is incorporated in and has its principal place of business in New Jersey. *Id.* ¶ 6.

Between September 24, 2013 and December 17, 2013, Defendants sold pomegranate arils identified as Lot Code 12–15–13–2–1–0 to Plaintiff PPI. *Id.* Relying on Defendants' representations and warranties that the products were fit for human consumption, PPI distributed these pomegranate arils to Plaintiff TFI and Scenic Fruit Company ("Scenic"). *Id.* ¶ 17. The pomegranate arils were subsequently incorporated into these companies' products: Townsend Farms Organic Antioxidant Blend ("Townsend berry mix"), which was sold at Costco in various states, and Scenic's Woodstock Organic Pomegranate Kernels ("Scenic Pomegranate Kernels"). *Id.* Several individuals allegedly contracted Hepatitis A after exposure to these two products. *Id.* ¶ 18.

As a result of the outbreak, PPI, Townsend Farms, and Scenic all recalled the products that contained the pomegranate arils. *Id.* ¶ 19. Beginning on or around July 2013, various lawsuits related to the Hepatitis A outbreak were filed against PPI ("underlying claims"). *Id.* ¶ 20. These underlying claims included those brought by individuals who alleged damages and injuries due to exposure to the contaminated pomegranate arils as well as claims brought by Townsend Farms, Costco, and Scenic against PPI. *Id.* In total, Valley Forge and PPI

were aware of 51 underlying lawsuits when they filed the FAC. *See* PPI FAC Ex. D (Dkt. 18–4). Plaintiffs deny liability in connection with those underlying lawsuits, and contend Defendants should be held responsible for any damage awards. *See* PPI FAC ¶ 31; Townsend FAC ¶ 24.

II. Procedural History

***2** Plaintiffs Valley Forge and PPI filed an action against Defendants on May 28, 2015 (Case No. 15–0840, Dkt. 1). Plaintiff TFI filed a separate action against Defendants on the same date (Case No. 15–0837, Dkt. 1). On January 20, 2016, the Court consolidated the two actions because both cases involved companies in the distribution chain suing other companies in the distribution chain. *See generally* Order, January 20, 2016 ("January 20, 2016 Order") (Case No. 15–0837, Dkt. 39). Specifically, in the January 20, 2016 Order, the Court ordered as follows:

> (1) All remaining claims in the two cases shall be tried in one trial;
>
> (2) A new consolidated complaint shall be filed in the low-case number, *Townsend Farms*, 15–0837; and
>
> (3) Going forward, all documents in both cases shall be filed only under the low-number case, *Townsend Farms*, 15–0837.

January 20, 2016 Order at 2.

Plaintiffs filed the instant Motion on April 18, 2016. Defendants opposed on April 25, 2016 (Dkt. 56). Plaintiffs replied on May 2, 2016 (Dkt. 59).

III. Legal Standard

Generally, leave to amend a pleading "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The decision whether to permit amendments lies within the sound discretion of the trial court, which "must be guided by the underlying purpose of Rule 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities." *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). Thus, Rule 15's policy of favoring amendments to pleadings should be applied with "extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990); *Lopez v. Smith,* 203 F.3d 1122, 1127 (9th Cir. 2000) (holding that dismissal with leave to amend should be granted even if no request to amend was made).

The Supreme Court has identified four factors relevant to whether a motion for leave to amend should be denied: undue delay, bad faith or dilatory motive, futility of amendment, and undue prejudice to the opposing party. *Foman v. Davis*, 371 U.S. 178, 182, (1962). The Ninth Circuit holds that these factors are not of equal weight; specifically, "delay alone no matter how lengthy is an insufficient ground for denial of leave to amend." *Webb*, 655 F.2d at 980; *accord Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999). The most important factor is whether amendment would prejudice the opposing party. *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973). Futility of amendment can, by itself, justify denial of a motion for leave to amend. *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). However, a proposed amended pleading is futile "only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff–Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

IV. Discussion

Plaintiffs contend they have recently learned through investigations that Defendant "Goknur has a history of processing adulterated foods under non-sanitary conditions and shipping them to the U.S." Mot. at 1. Based on this new information, Plaintiffs seek to add a claim for intentional misrepresentation and a request for punitive damages. *Id.* at 2. In response, Defendants argue they will be prejudiced by the addition of punitive damages, and that Plaintiffs' proposed consolidated complaint is unduly delayed. Opp'n at 5–9. [1]

[1] As an initial matter, Defendants contend Plaintiffs' proposed consolidated complaint violates the January 20, 2016 Order. Opp'n at 4. Specifically, Defendants complain Plaintiffs should have simply filed a consolidated complaint with the remaining claims in the two cases, rather than filing the instant Motion. *Id.* The Court does not view Plaintiffs' request as problematic, however. It would have been a problem if Plaintiffs had filed a consolidated complaint with new claims without obtaining leave of the Court. In this case, however, Plaintiffs filed a noticed motion and specifically seek the Court's permission to amend. Under these circumstances, the Court sees no issue in evaluating the merits of Plaintiffs' Motion, and the Court finds no evidence of bad faith on Plaintiffs' part, as Defendants suggest.

***3** Defendants first argue the Court should not grant leave to amend because "Plaintiffs' allegations and claims for punitive damages are fatally flawed." Opp'n at 5. Defendants specifically argue that because Plaintiffs did not name a single individual who had authority to speak on behalf of Goknur, Plaintiffs have not "come close to the pleading requirements for punitive damages." Opp'n at 6. The Court disagrees. Indeed, in a recent case, this Court specifically rejected this argument, holding, "a plaintiff must make allegations concerning an officer, director, and/or managing agent of the corporation, without having to specifically include the name of any individuals at the pleading stage." Order, April 7, 2016, *Kenneth A. Waddell v. Trek Bicycle Corporation, et al.*, Case No. SA CV 15–2082 (Dkt. 41), at *5 n.1. Plaintiffs have done that here. *See* Proposed Consolidated Complaint (Dkt. 54) ¶ 38.

Indeed, the Court is of the view that in "federal court, a plaintiff may include a short and plain prayer for punitive damages that relies entirely on unsupported and conclusory averments of malice or fraudulent intent." *Alejandro v. ST Micro Elecs., Inc.*, Case No. 15–CV–01385–LHK, 2015 WL 5262102, at *11 (N.D. Cal. Sept. 9, 2015) (internal citations and quotation marks omitted). Additionally, the Court is mindful a proposed pleading is futile "only if *no set of facts* can be proved under the amendment." *Miller*, 845 F.2d at 214 (emphasis added). Defendants simply have not met this demanding standard here.

Defendants next argue punitive damages are not appropriate for most of the claims for which Plaintiffs seek punitive damages. Opp'n at 6. Defendants argue "[p]unitive damages are not allowed for Plaintiffs' indemnity or negligence-based causes of action." Opp'n at 6 (citation omitted). This argument, however, does not provide a sound basis for denying Plaintiffs leave to amend. Even accepting that Plaintiffs may not recover punitive damages under some of the claims they assert,[2] the Court recognizes punitive damages may be appropriate for some of the other claims, such as intentional misrepresentation. *See Petrus v. New York Life Ins. Co.*, Case No. 14–cv–2268–BAS–JMA, 2016 WL 1255812, at *6 (S.D. Cal. Mar. 31, 2016) ("Punitive damages would be recoverable on the intentional misrepresentation claim.") (citation omitted). Given that at least some of Plaintiffs' claims support recovery for punitive damages, the Court sees no reason to deny Plaintiffs leave to amend to add a punitive damages request. In fact, Defendants have provided the Court with no cases where courts have denied leave to amend under similar circumstances. *See* Opp'n at 6–7.[3]

2 The Court first notes, without adopting the position, that at least some courts appear to have found negligent conduct may support an award of punitive damages. *See, e.g., Estate of McNeil v. Freestylemx.com, Inc.*, Case No. 13cv2703 NLS (KSC), 2016 WL 1394262, at *12 (S.D. Cal. Apr. 8, 2016) ("Where, as here, a plaintiff seeks to impose liability based on negligent conduct, such plaintiff can establish malice, for purposes of punitive damages, by submitting evidence that the defendant acted with a conscious disregard of the safety of others.") (internal citation and quotation marks omitted).

3 Indeed, the existing case law suggests the opposite result. In *Hernandez v. Beaumont*, the court denied defendants' motion to strike plaintiffs' request for punitive damages, even though plaintiffs requested those punitive damages in connection with negligence-based claims. *See Hernandez v. Beaumont*, No. EDCV 13–00967 DDP (DTBx), 2013 WL 6633076, at *8. Specifically, the *Hernandez* court noted found that Plaintiffs had alleged "substantial underlying facts that make plausible their allegation that the acts were committed willfully and with malice." *Id.* at *8. The court did note that "[i]n order to ultimately recover punitive damages, Plaintiffs will have to prove that Defendants acted with more than negligence, but instead acted willfully or recklessly." *Id.* n.4. Given that the *Hernandez* court refused to strike plaintiffs' request for punitive damages even though they were requested for negligence-based claims, the Court does not find Plaintiffs' request for punitive damages for negligence-based claims provides a sufficient basis for denying Plaintiffs leave to amend.

***4** Defendants' remaining two arguments are unavailing. First, Defendants contend Plaintiffs' proposed consolidated complaint is unduly delayed. Opp'n at 8. In particular, Defendants note Plaintiffs started the meet and confer process on February 22, 2016, more than two months ago. *Id.* The Court does not find this constitutes undue delay, especially because the case is just getting underway. Further, Defendants have not presented convincing evidence Plaintiffs knew of the underlying facts for a significant period of time. And the Court recognizes that "[u]ndue delay by itself ... is insufficient

to justify denying a motion to amend." *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999).

Second, Defendants broadly assert they will be prejudiced. Opp'n at 5.[4] However, as Plaintiffs point out, "Defendants simply state they will be unduly prejudicial without identifying the prejudice they will allegedly suffer." Reply at 1–2. This is plainly insufficient.

[4] While Defendants label a section of their Opposition with the term "prejudice," *see* Opp'n at 5, it appears that section actually contains arguments more properly addressed under the futility prong.

"Prejudice typically arises where the opposing party is surprised with new allegations which require more discovery or will otherwise delay resolution of the case." *Wehlage v. EmpRes Healthcare Inc.*, No. C 10–5839 CW, 2012 WL 3803 64, at *2 (N.D. Cal. Feb.6, 2012) (citing *Acri v. Int'l Assoc. of Machinists & Aerospaces Workers*, 781 F.2d at 1398–99). " 'Undue prejudice' means substantial prejudice or substantial negative effect; the Ninth Circuit has found such substantial prejudice where the claims sought to be added 'would have greatly altered the nature of the litigation and would have required defendants to have undertaken, at a late hour, an entirely new course of defense.' " *SAES Getters S.p.A. v. Aeronex, Inc.*, 219 F. Supp. 2d 1081, 1086 (S.D. Cal. 2002) (quoting *Morongo Band of Mission Indians*, 893 F.2d at 1079). The burden of showing prejudice is on the party opposing an amendment to the complaint. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987); *Beeck v. Aquaslide 'N' Dive Corp.*, 562 F.2d 537, 540 (9th Cir. 1977). Further, under Rule 15(a), there is a presumption in favor of granting leave to amend where prejudice is not shown. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

The Court finds Defendants have not shown "any serious prejudice to mitigate [Rule 15's] otherwise liberal stance toward granting motions to amend." *Hynix Semiconductor Inc. v. Toshiba Corp.*, No. C–04–4708 VRW, 2006 WL 3093812, at *2 (N.D. Cal. Oct. 31, 2006). Although Defendants may have to conduct discovery regarding the intentional misrepresentation claim, the Court concludes allowing Plaintiff to add the intentional misrepresentation claim and request for punitive damages will not "greatly alter[ ] the nature of the litigation." *See Morongo Band of Mission Indians*, 893 F.2d at 1079. Indeed, as Plaintiffs explain, the intentional misrepresentation claim arises from the same factual situation as the other claims. Mot. at 6. And, as noted above, the litigation is still in its very early stages.

Finally, with respect to bad faith, Defendants contend the "timing of Plaintiffs' motion filing, just two weeks prior to the Scheduling Conference, demonstrates bad faith on their part." Opp'n at 1. This argument is unpersuasive for the reasons discussed above. The litigation is just beginning, and the Court fails to see how requesting amendment at this early stage is evidence of bad faith.

V. Disposition

For the reasons stated above, the Court GRANTS Plaintiffs' Motion.

***5** Plaintiffs shall file their Proposed Consolidated Complaint **on or before June 10, 2016.**

The Clerk shall serve this minute order on the parties.

All Citations

Not Reported in Fed. Supp., 2016 WL 10570247

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674 Fed.Appx. 645
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

ULTRASYSTEMS ENVIRONMENTAL,
INC., Plaintiff-Appellant,
v.
STV, INC., Defendant-Appellee.

No. 15-55215
|
Argued and Submitted December
8, 2016 Pasadena, California
|
Filed January 03, 2017

Synopsis

Background: Subcontractor on consulting contract with California High Speed Rail Authority brought action against prime contractor alleging prime contractor breached their agreement by failing to promptly pay undisputed invoices. The United States District Court for the Central District of California, Dean D. Pregerson, J., 2015 WL 224712, dismissed action and denied subcontractor's motion to amend its complaint. Subcontractor appealed.

Holdings: The Court of Appeals held that:

[1] striking subcontractor's argument that prime contractor was paid prompt payment penalties by Authority on account of subcontractor was not warranted;

[2] as predicted by Court of Appeals, California Prompt Payment Act does not impose upon private contractors the obligation to pay subcontractors late payment penalties; and

[3] subcontractor's request for leave to amend its complaint to add breach of implied duty of good faith and fair dealing was futile.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (3)

[1] **Federal Courts** Defects, objections, and amendments; striking brief

Subcontractor's argument on appeal of dismissal of its breach of contract claim against prime contractor, that prime contractor on consulting contract with California High Speed Rail Authority was paid prompt payment penalties by authority on account of subcontractor, was not new, and thus striking such argument from subcontractor's reply brief on appeal was not warranted, where subcontractor had argued in its opposition to prime contractor's motion to dismiss that if the authority paid prime contractor late payment penalties, prime contractor was required to share them pro rata with subcontractor.

[2] **Antitrust and Trade Regulation** Construction, renovation, improvement, and repair

Public Contracts Proceedings for enforcement

States Rights and remedies of subcontractors, laborers, and materialmen

As predicted by Court of Appeals, California Prompt Payment Act, which requires state agencies to pay properly submitted, undisputed invoices within 45 days of receipt or notification thereof, does not impose upon private contractors the obligation to pay subcontractors late payment penalties. Cal. Gov't Code § 927.

[3] **Antitrust and Trade Regulation** Construction, renovation, improvement, and repair

Contracts Acts or Omissions Constituting Breach in General

Public Contracts Proceedings for enforcement

States Rights and remedies of subcontractors, laborers, and materialmen

California's implied duty of good faith and fair dealing did not require prime contractor under consulting contract with state agency to pay late payment penalties to subcontractor, although the prime contract made the agency's payment obligations subject to the California Prompt Pay Act and the subcontract incorporated the prime contract, where the subcontract did not obligate the prime contractor to seek late payment penalties from the agency. Cal. Gov't Code § 927.

Attorneys and Law Firms

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Robert Gary Campbell, Esquire, Trial Attorney, Trevor Brian Potter, Esquire, Counsel, Cox, Castle & Nicholson, LLP, Irvine, CA, for Defendant-Appellee

Appeal from the United States District Court for the Central District of California, Dean D. Pregerson, District Judge, Presiding. D.C. No. 2:13-cv-08787 (DDP)

Before: REINHARDT and PAEZ, Circuit Judges, and FRIEDMAN, * District Judge.

* The Honorable Paul L. Friedman, United States District Judge for the District of Columbia, sitting by designation.

MEMORANDUM **

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Plaintiff-Appellant Ultrasystems Environmental, Inc. ("UEI") appeals the district court's decision dismissing its complaint against Defendant-Appellee STV, Inc. ("STV") in its entirety. We have jurisdiction under 28 U.S.C. § 1291. On appeal, we affirm the dismissal of UEI's complaint.

As the parties are familiar with the facts, we recount them only briefly here. In January of 2007, the California High Speed Rail Authority ("CHSRA") entered into a consulting contract (the "prime contract") with STV for STV to perform "preliminary engineering and project-specific environmental work" for the Los Angeles segment of the proposed rail project. The prime contract makes CHSRA's payment obligations subject to the California Prompt Payment Act, which, inter alia, requires "state agencies" to "pay properly submitted, undisputed invoices ... within 45 days of receipt or notification thereof, or automatically calculate and pay the appropriate late payment penalties." CAL. GOV'T CODE § 927(b) ("Section 927").

In February of 2007, STV formally entered into a subcontract with UEI for UEI to prepare environmental impact statements for the rail project in the Los Angeles area. The subcontract states that "[a] copy of the Prime Agreement, including [UEI's] responsibilities and timing of services hereunder, is incorporated by reference into this Agreement as Exhibit A." The subcontract required STV to pay UEI "within fifteen (15) business days following receipt of payment from [CHSRA] of STV's invoice that includes the invoice from [UEI]." From 2007 until November 2009, UEI performed approximately $4.5 ***647** million worth of work under the subcontract.

In its First Amended Complaint, UEI alleged that "STV breached its Agreement [ ] by failing to promptly pay undisputed UEI invoices within 45 days of STV's receipt of payment from CHSRA for work performed by UEI," and "STV is therefore obligated to pay [UEI] penalties for said late payments to the same extent and in the same manner that late payments would be calculated pursuant to" Section 927. STV moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing that the plain language of Section 927 makes it applicable only to "state agencies" and not contractors like itself. In UEI's opposition to the motion to dismiss, it argued that it "should be given leave to file a Second Amended Complaint to assert" a claim that STV had "an implied duty of good faith and fair dealing ... to collect prompt payment penalties [from CHSRA] and pay [UEI a] pro rata share" of those penalties.

The district court agreed with STV that the plain meaning of Section 927 imposes no obligations on STV, dismissed UEI's complaint in its entirety with prejudice, and denied UEI the opportunity to amend its complaint because it concluded it would be futile to permit amendment to add a claim of breach of an implied warranty of good faith and fair dealing.

On appeal, UEI contends that the district court erred in dismissing its contract claims and denying it leave to amend its complaint.

We review de novo the grant of a motion to dismiss. Schueneman v. Arena Pharm., Inc., 840 F.3d 698, 704 n.5 (9th Cir. 2016). We review the denial of leave to amend for an abuse of discretion, United States v. ex rel. Lee v. Corinthian Colls., 655 F.3d 984, 995 (9th Cir. 2011), but review the question of futility of amendment de novo, Carvalho v. Equifax Info. Servs., LLC, 629 F.3d 876, 893 (9th Cir. 2010). In other words, "[d]ismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment." Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1061 (9th Cir. 2004).

[1] 1. Following full briefing in this Court, STV filed an "objection and motion to strike" the portion of UEI's reply brief that raised the "false and new claim that STV was paid prompt payment penalties on account of UEI." STV's motion to strike lacks merit. It is not clear what STV is referring to when it discusses "prompt payment penalties on account of UEI" because neither party alleges that UEI caused CHSRA to pay late payment penalties to STV. Nonetheless, UEI's argument is not new. UEI argued in its opposition to STV's motion to dismiss in the district court that if CHSRA paid STV late payment penalties, STV must "share [them] pro rata" with UEI based on "equitabl[e]" principles and the "implied duty of good faith and fair dealing." We therefore deny STV's motion to strike.

[2] 2. Section 927 states that "[i]t is the intent of the Legislature that state agencies pay properly submitted, undisputed invoices, refunds, or other undisputed payments due to individuals within 45 days of receipt or notification thereof, or automatically calculate and pay the appropriate late payment penalties as specified in this chapter." CAL. GOV'T CODE § 927(b) (emphasis added). The statute further specifies that, "[n]otwithstanding any other provision of law, this chapter shall apply to all state agencies...." Id. at § 927(c) (emphasis added). The district court correctly interpreted Section 927 to not impose obligations on entities other than "state agencies," and thus correctly concluded that UEI failed to plead that STV violated the subcontract.

***648** The district court in this case was the first state or federal court ever to interpret Section 927. "When a state's highest court has not yet ruled on an issue, we must reasonably determine the result that the highest state court would reach if it were deciding the case." Gonzales v. CarMax Auto Superstores, LLC, 840 F.3d 644, 649 (9th Cir. 2016). "When addressing questions of statutory interpretation under California law, we '[must] ascertain the intent of the Legislature so as to effectuate the purpose of the law.' " Id. (quoting People v. Coronado, 12 Cal.4th 145, 48 Cal.Rptr.2d 77, 906 P.2d 1232, 1234 (1995)). "The California Supreme Court first looks to the language of the statute, giving effect to the words' plain meaning; '[i]f the language is unambiguous, the plain meaning controls.' " Id. (quoting Voices of the Wetlands v. State Water Res. Control Bd., 52 Cal.4th 499, 128 Cal.Rptr.3d 658, 257 P.3d 81, 93 (2011)).

Section 927 requires "state agencies" to "pay properly submitted, undisputed invoices ... within 45 days of receipt or notification thereof, or automatically calculate and pay the appropriate late payment penalties[.]" CAL. GOV'T CODE § 927(b). Section 927 does not define the term "state agencies," see CAL. GOV'T CODE § 927.2, but "[t]he Legislature [ ] is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof. Where a statute is framed in language of an earlier enactment on the same or an analogous subject, and that enactment has been judicially construed, the Legislature is presumed to have adopted that construction." People v. Harrison, 48 Cal.3d 321, 256 Cal.Rptr. 401, 768 P.2d 1078, 1081–82 (1989) (internal citations omitted); see also Los Angeles Cty. Dependency Attorneys, Inc. v. Dep't of Gen. Servs., 161 Cal.App.4th 230, 73 Cal.Rptr.3d 817, 822–23 (2008) (analyzing statute that uses but does not define the term "state agency" and finding that the legislature used the term with an "aware[ness]" of other statutes defining the term).

California has myriad statutes relating to contracting with "state agencies," see generally CAL. PUB. CONT. CODE §§ 10100-10285 (provisions of the "State Contract Act"), and its legislature has consistently defined the term "state agency" as "every state office, officer, department, division, bureau, board, and commission," or a variation thereof. CAL. GOV'T CODE § 11000 (providing for the organization of the California state government); CAL. GOV'T CODE § 6252(f)(1) (same definition under the California Public Records Act); see also CAL. GOV'T CODE § 65934 (" 'State agency' means any agency, board, or commission of state government."); CAL. GOV'T CODE § 8869.82(a)(10) (" 'State agency' means the state and all state entities[.]").

Against this extensive background, we presume that the California legislature was aware of the plain meaning of the term "state agencies" when it enacted Section 927 and intended that meaning to control. The unambiguous plain meaning of the term "state agencies" does not include entirely private companies such as STV that contract with "state agencies," and the statute therefore does not impose upon private contractors the obligation to pay subcontractors late payment penalties.

The text of Section 927.10 of the California Prompt Payment Act confirms this plain language interpretation. That subsection states that "[s]tate agencies shall encourage claimants to promptly pay their subcontractors and suppliers...." CAL. GOV'T CODE § 927.10 (emphasis added). The legislature's decision in this provision to distinguish "[s]tate agencies" from claimants (contractors) and subcontractors suggests that the legislature never intended ***649** the term "state agencies" to include private contractors or subcontractors. It is also telling that Section 927.10 empowers "[s]tate agencies" to merely "encourage" state contractors "to promptly pay their subcontractors and suppliers"; it does not mandate them to do so. Cf. Am. Acad. of Pediatrics v. Lungren, 16 Cal.4th 307, 66 Cal.Rptr.2d 210, 940 P.2d 797, 884–85 (1997) ("Assembly Bill 2274 encourages but does not mandate that an unemancipated minor consult her parents prior to obtaining an abortion."). Section 927.10 therefore compels the conclusion that Section 927's substantive timing and late payment penalty provisions do not impose obligations on contractors like STV. The district court properly dismissed UEI's contract claims.

Because Section 927's plain language makes it inapplicable to the subcontract, we need not consider appellant's argument that the statute can "fill in" for portions of the subcontract that UEI alleges are ambiguous or unenforceable. Nor do we consider the legislative history of Section 927 because, "[i]f the statute's text evinces an unmistakable plain meaning, we need go no further." Pac. Palisades Bowl Mobile Estates, LLC v. City of Los Angeles, 55 Cal.4th 783, 149 Cal.Rptr.3d 383, 288 P.3d 717, 727 (2012) (internal quotation marks omitted). Finally, we decline UEI's invitation to certify the question of Section 927's application here to the California Supreme Court because it is one of straightforward plain language interpretation.

[3] 3. The district court correctly denied as futile UEI's request for leave to amend the complaint to add a claim of breach of the implied duty of good faith and fair dealing. Under Rule 15(a) of the Federal Rules of Civil Procedure, "leave to amend shall be freely given when justice so requires," at least "in the absence of ... undue delay, bad faith[,] dilatory motive on the part of the movant, ... undue prejudice to the opposing party ..., futility of amendment, etc." Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (internal quotation marks omitted). "Absent prejudice, or a strong showing of any of the remaining Foman factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend." Sharkey v. O'Neal, 778 F.3d 767, 774 (9th Cir. 2015) (emphasis and internal quotation marks omitted). An amendment is futile when "no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988).

Under California contract law, "[t]he covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. The covenant thus cannot be endowed with an existence independent of its contractual underpinnings. It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." Guz v. Bechtel Nat'l, Inc., 24 Cal.4th 317, 100 Cal.Rptr.2d 352, 8 P.3d 1089, 1110 (2000) (internal citations and quotation marks omitted). Here, the subcontract lacks any language concerning late payment penalties. While it incorporates the prime contract and thereby Section 927, the timing and late payment penalty provisions therein do not apply to STV. UEI's failure to negotiate for terms obligating STV to seek late payment penalties from CHSRA is fatal to its proposed covenant of good faith and fair dealing claim.

In its reply brief on appeal, UEI suggests for the first time that the district court erred in finding amendment futile ***650** because it could also assert: (1) a statutory unfair competition claim under California law, see CAL. BUS. & PROF. CODE § 17200, and (2) a common law claim under California law for money had and received. "This argument was not adequately raised before the district court and is therefore waived." Morris v. Ernst & Young, LLP, 834 F.3d 975, 984 n.6 (9th Cir. 2016). We therefore affirm the district court's denial of leave for UEI to amend its complaint because the proposed amendment is futile.

AFFIRMED.

All Citations

674 Fed.Appx. 645

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808 Fed.Appx. 414
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Ethan VOLUNGIS; Farooq Abdulla; Nighat Abdulla, Plaintiffs-Appellants,
v.
LIBERTY MUTUAL FIRE INSURANCE COMPANY, Defendant-Appellee.

No. 18-16600
|
Submitted March 26, 2020 * Las Vegas, Nevada
|
FILED April 2, 2020

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Accordingly, Liberty Mutual's motion for oral argument (Dkt. No. 23) is denied.

Synopsis

Background: Injured motorist, as assignee, brought action against automobile liability insurer, alleging breach of contract, breach of implied covenant of good faith and fair dealing, and violations of Nevada's Unfair Claims Practices Act. Following removal, the United States District Court for the District of Nevada, James C. Mahan, J., 2018 WL 3543030, dismissed. Motorist appealed.

Holdings: The Court of Appeals held that:

[1] motorist could not state claim for breach of contract based on insurer's failure to settle claim;

[2] motorist did not state claim for breach of implied covenant of good faith and fair dealing based on insurer's failure to settle claim;

[3] motorist did not state claim for breach of implied covenant of good faith and fair dealing based on insurer's failure to communicate his settlement offer to insured;

[4] motorist did not state claim for violations of Nevada's Unfair Claims Practices Act; but

[5] district court abused its discretion by dismissing claims with prejudice.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim.

West Headnotes (5)

[1] **Action** Nature of Action
Insurance Insurer's settlement duties in general

Under Nevada law, injured motorist could not state claim for breach of contract based on automobile liability insurer's failure to settle motorist's claim against insured; claim sounded in tort, not contract, as there was no independent unwritten contractual duty to settle.

[2] **Insurance** Insurer's settlement duties in general

Under Nevada law, injured motorist failed to allege any unreasonable or arbitrary conduct on part of automobile liability insurer and, thus, did not state claim for breach of implied covenant of good faith and fair dealing based on insurer's failure to settle motorist's claim against insured, where motorist failed to allege that insurer countered his settlement offer in bad faith or without reasonable basis.

[3] **Insurance** Communications and explanations

Under Nevada law, injured motorist failed to state claim for breach of implied covenant of good faith and fair dealing based on automobile

liability insurer's failure to communicate his settlement offer to insured, where motorist failed to allege that insurer failed to communicate initial settlement offer to insured.

[4] **Insurance** Actions

Injured motorist did not state claim against automobile liability insurer for violations of Nevada's Unfair Claims Practices Act, where motorist offered no supporting facts outside of reciting language of several subsections without citation. Nev. Rev. St. § 686A.310.

[5] **Federal Civil Procedure** Effect

District court abused its discretion by dismissing injured motorist's claims against automobile liability insurer for breach of implied covenant of good faith and fair dealing and violation of Nevada's Unfair Claims Practices Act with prejudice without any discussion about whether amendment should have been permitted, where claims could have been cured through amendment. Nev. Rev. St. § 686A.310; Fed. R. Civ. P. 15(a)(2).

Attorneys and Law Firms

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Appeal from the United States District Court for the District of Nevada, James C. Mahan, District Judge, Presiding, D.C. No. 2:17-cv-02247-JCM-VCF

Before: W. FLETCHER, BYBEE, and WATFORD, Circuit Judges.

MEMORANDUM **

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

After Appellant Ethan Volungis was injured in a car accident caused by Farooq Abdulla, he contacted Abdulla's insurer, Appellee Liberty Mutual Fire Insurance Company, offering not to pursue civil action against Abdulla in exchange for payment of the full limit of Abdulla's policy and several other conditions. Liberty Mutual responded by offering to pay the full policy limit, but did not meet Volungis's other conditions. Volungis then sued Abdulla in Nevada state court, ultimately receiving a jury verdict of over $6 million. Abdulla eventually assigned to Volungis all of his rights against Liberty Mutual arising out of its handling of Volungis's claim. In exchange, Volungis agreed not to execute on Abdulla's assets to satisfy the judgment.

Volungis then sued Liberty Mutual, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and violations of Nevada's Unfair Claims Practices Act. The district court dismissed Volungis's complaint with prejudice without considering whether Volungis could have cured the deficiencies in his complaint by amending it. While dismissal was proper, Volungis should have been given an opportunity to amend. We therefore affirm dismissal, but reverse to the extent that dismissal was with prejudice, and remand to allow Volungis the chance to amend.

[1] 1. Volungis's claim for breach of contract arises out of Liberty Mutual's failure to settle his claim against Abdulla. But under Nevada law, the duties that arise under the implied covenant of good faith and fair dealing—like the duty to settle—are imposed by law and not the terms of the insurance contract. *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 212 P.3d 318, 330 (2009) (en banc). There is no independent unwritten contractual duty to settle. Therefore, claims for failure to settle sound in tort, not contract, and this claim fails as a matter of law.

2. Under Nevada law, the implied covenant of good faith and fair dealing arises out of every contractual relationship and "prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other." *Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420, 427 (2007). An insurer breaches this duty when

it refuses to compensate covered losses even though it has "an actual or implied awareness of the absence of a reasonable basis for denying benefits of the policy." *Am. Excess Ins. Co. v. MGM Grand Hotels, Inc.*, 102 Nev. 601, 729 P.2d 1352, 1354–35 (1986) (per curiam).

***417** **[2]** Volungis alleges that Liberty Mutual breached the implied covenant in two ways: (1) failing to settle his claim against Abdulla, and (2) failing to communicate his settlement offer to Abdulla. Volungis's first theory fails because he has failed to allege any unreasonable or arbitrary conduct on Liberty Mutual's part. *See Miller*, 212 P.3d at 324, 326. He does not allege that Liberty Mutual countered his settlement offer in bad faith or without a reasonable basis. Volungis raises several arguments before this court about whether Liberty Mutual could have easily obtained the information he requested with his settlement offer and Liberty Mutual's understanding of Volungis's need to obtain that information, but none of those allegations appear in the complaint.

[3] Volungis's second theory fails because he does not allege that Liberty Mutual failed to communicate his initial settlement offer to Abdulla. To the extent that Volungis argues that this theory is premised on Liberty Mutual's failure to communicate a second settlement offer to Abdulla, that contention is not clear from the face of the complaint.

[4] 3. Volungis's claim for violations of Nevada's Unfair Claims Practices Act offers no supporting facts outside of reciting the language of several subsections without citation. That alone is sufficient grounds for dismissal. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (holding that mere recitation of the elements of a cause of action is insufficient to state a claim).

4. Federal Rule of Civil Procedure 15(a)(2) requires district courts to "freely give leave [to amend] when justice so requires." This policy is "to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (per curiam) (quotation omitted). "[A] district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation marks omitted). Amendment is futile only if no set of facts can be proven under the amendment that would constitute a valid and sufficient claim. *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

[5] The district court dismissed Volungis's complaint with prejudice without any discussion about whether amendment should be permitted. While his breach-of-contract claim fails as a matter of law, his other claims could be cured through amendment. It was an abuse of discretion to dismiss these claims with prejudice and no justification for doing so. *See Doe v. United States (In re Doe)*, 58 F.3d 494, 497 (9th Cir. 1995).

We therefore affirm dismissal of the breach-of-contract claim with prejudice, but reverse the dismissal of Volungis's other claims to the extent that they were dismissed with prejudice, and remand to allow Volungis an opportunity to file an amended complaint.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

All Citations

808 Fed.Appx. 414

End of Document

2021 WL 230035
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Sarah WEEKS
v.
LA QUINTA HOLDINGS INC., et al.

Case No. EDCV 19-1646 JGB (KKx)
|
Filed 01/22/2021

Attorneys and Law Firms

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Proceedings: Oder (1) DENYING Plaintiff's Motion for Leave to Amend Complaint and to Remand (Dkt. No. 26); and (2) VACATING the January 25, 2021 Hearing (IN CHAMBERS)

The Honorable JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

***1** Before the Court is a motion for leave to amend complaint and to remand filed by Plaintiff Sarah Weeks. ("Motion," Dkt. No. 26.) The Court finds this matter appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After considering the papers filed in support of and in opposition to the Motion, the Court DENIES the Motion. The hearing scheduled for January 25, 2021 is VACATED.

I. BACKGROUND

On April 10, 2019, Plaintiff filed her Complaint against Defendants La Quinta Holdings, Inc, LQ Management, L.L.C, and Does 1-25 in the Superior Court of the State of California for the County of San Bernardino. ("Complaint," Dkt. No. 1-1.) The Complaint alleges one cause of action for negligence. (Id. ¶¶ 12-19.) On August 28, 2019, Defendant LQ Management, LLC ("LQ") removed the action to federal court on the basis of diversity jurisdiction. ("Notice of Removal," Dkt. No. 1.)

Plaintiff filed the Motion on November 9, 2020, along with the Declaration of Anthony Werbin ("Werbin Declaration," Dkt. No. 26-2). Defendant opposed the Motion on December 8, 2020. ("Opposition," Dkt. No. 29.) Plaintiff replied on December 22, 2020. ("Reply," Dkt. No. 30.)

II. FACTUAL ALLEGATIONS

Plaintiff alleges the following facts. Defendants LQ Management, LLC ("LQM") and Does 1-25 own, manage, supervise, inspect, and maintain La Quinta Hotel, located at 3555 Inland Empire Blvd., Ontario, California, 91764. (Compl. ¶ 6.) On April 8, 2018, Plaintiff was a paying guest at the Hotel, when she fell on a slick and wet floor in her hotel room. (Id. ¶ 5.) The fall required emergency transportation by ambulance to a hospital and surgery, and caused serious injuries, including seven fractures to Plaintiff's patella. (Id.) While Defendants were on notice of the dangerous condition of the floor and shower area, there were no signs alerting Plaintiff that the floor was wet and slick, or other safeguards to ensure that the water did not leak from the shower into the bathroom area. (Id. ¶ 7.)

The proposed Defendant, H. Alexander Oh, is a manager of the Hotel. (Werbin Decl. ¶ 10.) Plaintiff asserts that Oh failed to ensure that Plaintiff's room was free from dangerous conditions. (Mot.; Werbin Decl. ¶ 11.) Plaintiff argues that, as evidenced in a September 6, 2012 e-mail from Oh, he was aware of the issue of water leaking onto the bathroom floors, but did not fix the issue. (Id. ¶ 12.)

III. LEGAL STANDARD

After removal, if a plaintiff "seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to State court." 28 U.S.C. § 1447(e). Federal Rule of Civil Procedure 15 provides that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Ninth Circuit holds " '[t]his policy is to be applied with extreme liberality.' " Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003) (quoting Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001)). The Ninth Circuit considers five

factors when considering a motion for leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) the futility of amendment, and (5) whether the plaintiff has previously amended his or her complaint. Nunes v. Ashcroft, 375 F.3d 805, 808 (9th Cir. 2004). "The party opposing amendment bears the burden of showing prejudice, unfair delay, bad faith, or futility of amendment." United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co., 2009 WL 650730, at *2 (C.D. Cal. Mar. 12, 2009) (citing Eminence Capital, 316 F.3d at 1052; DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186-87 (9th Cir. 1987)).

***2** However, some courts in this circuit have found that "the permissive amendment under Rule 15(a) does not apply when a plaintiff amends her complaint after removal to add a diversity destroying defendant." Chan v. Bucephalus Alternative Energy Group, LLC, 2009 WL 1108744, at *3 (N.D. Cal. 2009) (citing Bakshi v. Bayer Healthcare, LLC, 2007 WL 1232049, at *2 (N.D. Cal. 2007)). These courts consider the following six factors: "(1) whether the party sought to be joined is needed for just adjudication and would be joined under Federal Rule of Civil Procedure 19(a); (2) whether the statute of limitations would preclude an original action against the new defendants in state court; (3) whether there has been unexplained delay in requesting joinder; (4) whether joinder is intended solely to defeat federal jurisdiction; (5) whether the claims against the new defendant appear valid; and (6) whether denial of joinder will prejudice the plaintiff." See IBC Aviation Servs., Inc. v. Compania Mexicana de Aviacion, S.A. de C.V., 125 F. Supp. 2d 1008, 1011 (N.D. Cal. 2000); Boon v. Allstate Ins. Co., 299 F. Supp. 2d 1016, 1020 (C.D. Cal. 2002).

IV. DISCUSSION

Plaintiff moves to amend the Complaint to name H. Alexander Oh, a manager of the Hotel, as a Defendant. Because Oh is a California resident, Plaintiff also moves to remand the action to state court, arguing that the Court would no longer have subject matter jurisdiction. After considering the following six factors, the Court DENIES Plaintiff's Motion.

A. Necessary Parties Under Rule 19(a)

The Court finds that H. Alexander Oh is not a necessary party under Rule 19(a). A "necessary party" under Rule 19 is one "having an interest in the controversy, and who ought to be made [a] part[y], in order that the court may act on that rule which requires it to decide and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it." See CP Nat'l Corp. v. Bonneville Power Admin., 928 F.2d 805, 912 (9th Cir. 1991) (citation omitted). The Ninth Circuit explains such a rule requires joinder for a party when "complete relief" cannot be accorded without such joinder or that disposing of the action without the joined party may (i) impede that person's ability to protect their interest or (ii) leave an existing party at risk of incurring multiple or inconsistent obligations. See Fed. R. Civ. P. 19(a); Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1043 (9th Cir. 1983).

Here, no such circumstances exist. Plaintiff seeks money damages, and Defendant LQM may be held liable for damages caused by its employees, even if Oh is not joined in this action. See Perez v. City of Huntington Park, 7 Cal. App. 4th 817, 820 (1992) (citing Golceff v. Sugarman, 36 Cal. 2d 152, 154 (1950)). Plaintiff would be able to obtain complete relief in Oh's absence. This factor weighs against amendment.

B. Statute of Limitations

The statute of limitations in California for personal injury claims is two years. Cal. Code Civ. Proc. § 335.1. The alleged incident occurred on April 8, 2018. (Compl. ¶ 5.) However, the statute of limitations was tolled from April 6, 2020 until October 1, 2020 in light of the COVID-19 pandemic. California Rules of Court, Emergency Rule 9. While the statute of limitations may have expired in October 2020, Defendant points out that Plaintiff informed Defendant of her intention to file a motion to amend and remand before this date. (Opp'n at 7; Choi Decl. ¶ 10.) However, Plaintiff did not seek to enter into a tolling agreement or file an action against Oh to preserve her right. (Id.) Plaintiff does not address this argument in her Reply. Although an expired statute of limitations generally favors allowing amendment, given these circumstances, the Court finds that this factor is neutral.

C. Unexplained Delay

***3** "When determining whether to allow amendment to add a nondiverse party, courts consider whether the amendment was attempted in a timely fashion." Clinco v. Roberts, 41 F. Supp. 2d 1080, 1083 (C.D. Cal. 1999) (finding amendment less than six weeks after complaint to be timely). Here, Plaintiff seeks to amend her Complaint more than one year after

removal, and three months before the trial date. Moreover, Defendant argues that Plaintiff knew of Oh's identity in October 2019 and acquired the e-mail at issue in December 2019. (Opp'n at 10.) Yet, Plaintiff only undertook to amend the pleadings in November 2020, long after the deadline to amend the pleadings or add new parties, and after the statute of limitations on any claim against Oh had run. (Id.) Plaintiff responds that while the email that led Plaintiff to investigate Oh's liability was provided in December 2019, moving counsel did not become aware of the document until June 22, 2020, when he took over the case and received the case file. (Reply at 2.) Still, Defendant does not explain prior counsel's delay or the months-long gap between the date of this alleged discovery and Plaintiff's motion. The Court finds that this delay was unreasonable. AmerisourceBergen Corp. v. Dialysist West, Inc., 465 F.3d 946, 953 (9th Cir. 2006) (noting that an "eight month delay between the time of obtaining a relevant fact and seeking a leave to amend is unreasonable"). This factor therefore weighs heavily against amendment.

D. Purpose of Joinder

"[T]he motive of a plaintiff in seeking the joinder of an additional defendant is relevant to a trial court's decision to grant the plaintiff leave to amend his original complaint." Desert Empire Bank v. Ins. Co. of N. America, 623 F.2d 1371, 1376 (9th Cir. 1980). Defendant argues that Plaintiff's motive for adding Oh as a party appears to be solely to defeat jurisdiction. (Opp'n at 7.) However, suspicion of amendment for the purpose of destroying diversity is not an important factor in this analysis, as Section 1447(e) gives courts flexibility in determining how to handle addition of diversity-destroying defendants. See IBC Aviation, 125 F. Supp. 2d at 1012 (citing Trotman, 1996 WL 428333, at *1 ("The legislative history to § 1447(e) ... suggests that it was intended to undermine the doctrine employed by some courts that amendments which destroyed diversity were to be viewed with suspicion.")). Although Defendant convincingly argues that Defendant seeks to add Oh for the purposes of defeating diversity, Plaintiffs' underlying allegations are not so threadbare as to support a conclusion of bad faith. The Court therefore finds that this factor is neutral.

E. Validity of the Claims Against the New Defendant

Plaintiff's claims appear to be viable. To state a facially viable claim for purposes of joinder under section 1447(e), a plaintiff need not allege a claim with particularity or even plausibility. Instead, "under section 1447(e), the Court need only determine whether the claim 'seems' valid." Freeman v. Cardinal Health Pharmacy Servs., LLC, 2015 WL 2006183, at *3 (E.D. Cal. May 1, 2015) (quoting Hardin v. Wal-Mart Stores, Inc., 813 F. Supp. 2d 1167, 1174 (E.D. Cal. 2011)); see also Sabag, 2016 WL 6581154, at *6 ("In considering the validity of plaintiff's claims, the [c]ourt need only determine whether the claim seems valid which is not the same as the standard in either a motion to dismiss or a motion for summary judgment.") (internal quotations omitted).

Here, Plaintiff seeks to assert one cause of action of negligence against Oh. (Proposed First Amended Complaint, Mot. Ex. 3.) To state a claim for negligence, a plaintiff must establish: (1) the defendant had a duty to use due care, (2) the defendant breached that duty, and (3) that breach was the proximate or legal cause of the resulting injury. Hayes v. City of San Diego, 57 Cal. 4th 622, 629 (2013) (citations omitted).

Plaintiff argues that as the Hotel manager, Oh had a duty to ensure that the premises were safe and free of danger. (Reply at 5.) Plaintiff alleges that he had knowledge of a dangerous condition, as evidenced by the 2012 e-mail, and that this dangerous condition was present on the date of the incident and caused Plaintiff's injury. (Id.) Defendant argues that Plaintiff's theory of liability fails because: (1) the issue described in the e-mail was remedied long before the accident and (2) did not cause the spill Plaintiff allegedly slipped on; (3) Plaintiff cannot prove that Oh had notice of the specific condition alleged in her complaint; and (4) there is evidence that Plaintiff slipped on a banana peel, and not water. (Opp'n at 8-9.) However, these are all questions of fact, which do not foreclose Plaintiff's claims as a matter of law. The Court finds that Plaintiff's negligence claim against Oh "seems valid." Freeman, 2015 WL 2006183, at *3. This factor favors amendment.

F. Prejudice to Plaintiff

***4** The Court finds that Plaintiff would not be prejudiced by denial of leave to amend because Plaintiff may subpoena Oh to testify at trial to, for example, establish La Quinta's actual or constructive knowledge of the dangerous condition at issue. Newcombe v. Adolf Coors Co., 157 F.3d 686, 691 (9th Cir. 1998). In turn, Defendant would be prejudiced if the case were to be remanded on the eve of trial, having expended significant resources to prepare the case. (Opp'n at 9; Choi Decl. ¶ 12.) This factor therefore weighs against amendment.

Considering the above factors as a whole, the Court finds amendment is not warranted. While the claims against Oh

seem to be facially valid, the proposed Defendant is not a necessary party, the significant delay in seeking amendment is Plaintiff's own doing, and Plaintiff would not be prejudiced by a denial of leave to amend. Accordingly, the Court DENIES the Motion to amend. Having determined that leave to amend is not warranted, the Court further DENIES the Motion to remand, because Plaintiff does not argue another ground for remand.

V. CONCLUSION

For the reasons above, the Court DENIES Plaintiff's Motion. The hearing set for January 25, 2021 is VACATED.

IT IS SO ORDERED.

All Citations

Slip Copy, 2021 WL 230035

2020 WL 5983256
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Kathleen WILLIAMS, et al. Plaintiffs,
v.
CITY OF LONG BEACH, et al. Defendants.

Case No. 2:18–cv–01069–AB (JCx)
|
Signed 07/21/2020

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ORDER DENYING IN PART AND GRANTING IN PART PLAINTIFFS' MOTION TO AMEND COMPLAINT

HONORABLE ANDRÉ BIROTTE JR., UNITED STATES DISTRICT COURT JUDGE

***1** Before the Court is Plaintiffs Kathleen Williams and Michael Hill's ("Plaintiffs") Motion to Modify the Scheduling Order and for Leave to Amend Complaint for the fourth time. (Dkt. No. 142 ("Mot.").) Defendants City of Long Beach ("City") and Los Angeles County Metropolitan Transit Authority ("MTA") each filed an opposition. Plaintiffs replied. The Court heard oral argument on June 19, 2020. The Court **DENIES** the Motion as to proposed Defendant Philip A. Washington and **GRANTS** the Motion as to proposed Defendant Robert Luna.

I. BACKGROUND

The Court previously set forth the factual and procedural background of this action in its Order denying in part and granting in part MTA's Motion to Dismiss Plaintiffs' Second Amended Complaint. (Dkt. No. 72.) Plaintiffs' basic theory is that MTA's no-turnstile honor system is a ruse used to intentionally target low-income communities of color with pretextual and unconstitutional searches and seizures. In the instant motion, Plaintiffs seek to: (1) replace two fictitiously-named defendants with MTA CEO Philip A. Washington ("Washington") and Long Beach Police Department ("LBPD") Chief Robert Luna ("Luna"); and (2) add Washington and Luna to their request for recovery of punitive damages under Plaintiffs' sixth cause of action for violation of 42 U.S.C. § 1981. (Mot. at 4.)

On September 20, 2018, this Court issued the Scheduling Order and set November 30, 2018 as the last date to hear motions to amend pleadings and add parties. (Dkt. No. 69.) The Court amended the Scheduling Order three times per stipulation of the parties, but in no stipulation did the parties seek to extend the deadline to move to amend the pleadings. (Dkt. No. 119.) Plaintiffs filed this Motion on May 22, 2020.

II. LEGAL STANDARDS

A party moving to amend its pleading after the deadline set forth in the scheduling order "must first show 'good cause' for amendment under [Federal Rule of Civil Procedure ("Rule")] 16(b), then, if 'good cause' be shown, the party must demonstrate that amendment was proper under Rule 15." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992) (citing *Forstmann v. Culp*, 114 F.R.D. 83, 85 (M.D.N.C.1987)).

Rule 16(b)'s good cause standard "primarily considers the diligence of the party seeking the amendment." *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000) (quoting *Mammoth*, 975 F.2d at 609). "Carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Mammoth*, 975 F.2d at 609.

Rule 15 directs courts to "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a). Rule 15 should be applied with "extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003); *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir.2001). The Ninth Circuit considers five factors to determine whether to grant leave to amend under Rule 15(a): "(1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of amendment; and (5) whether the plaintiff has previously amended his complaint." *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004). Each factor is not given equal weight. *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir.

1995). "It is the consideration of prejudice to the opposing party that carries the greatest weight." *Eminence Capital, L.L.C. v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). Moreover, "The party opposing amendment bears the burden of showing prejudice," *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987).

III. DISCUSSION

***2** The Court will address the motion as to each proposed additional defendant in turn.

A. Leave to Amend to Add Washington is DENIED

Plaintiffs seek to replace fictitiously-named DOE 2 with MTA CEO Philip Washington on the theory that Washington authorized the alleged discriminatory MTA policies and practices, directed them, and/or knew of or should have known of them and failed to prevent them. (Mot. at 22.) In the proposed Fourth Amended Complaint ("4AC," Holder Decl. (Dkt. No. 142-1), Ex. 1), Plaintiffs add Washington to eight causes of action.

1. Plaintiffs Have Not Met Their Burden Under Rule 16(b) of Showing Good Cause to Modify the Scheduling Order to Add Washington

Plaintiffs have not demonstrated diligence and therefore do not show good cause to modify the Scheduling Order to add Washington at this late date. Under Rule 16, "the focus of the inquiry is upon the moving party's reasons for seeking modification [citation omitted]. If that party was not diligent, the inquiry should end." *Mammoth*, 975 F.2d at 609. Here, Plaintiffs' argument hinges on the fact that it took "approximately one year of continuous effort to digest, review and analyze this voluminous discovery in order to fully ascertain ... Mr. Washington's culpability and liability." (Mot. at 15-16.) Although Plaintiffs admit they were aware that Washington was in charge of the MTA, they claim they "did not initially possess facts which would support pleading causes of action against [him]." (Mot. at 16.) Plaintiffs assert it was only after diligently going through the 1.7-million-page "document dump" they received from the MTA on February 7, 2019—more than 15 months before they filed this Motion—that they recently discovered evidence to support naming Washington as a defendant. (Mot. at 13-14.) Plaintiffs' claimed diligence is not convincing.

In the proposed 4AC, Plaintiffs offer no new facts learned from discovery that pertain specifically to Washington. None of the submitted exhibits—which the Court identifies below in connection with Luna—relate to Washington. None of the allegations of the 4AC offer anything other than conclusory allegations regarding Washington. These allegations amount to nothing more than adding Washington's name wherever allegations were made against defendant MTA. Accordingly, given that Plaintiffs rely on nothing new, the Court concludes that to the extent they have any claim against Washington, they knew or should have known such theories early on and, acting with diligence, could have added Washington in any of the three prior amended complaints. They did not. Therefore, Plaintiffs have neither demonstrated diligence nor good cause under Rule 16 to modify the Scheduling Order to add Washington.

Without a showing of good cause, the court need not address the Rule 15 factors with respect to Washington and the "inquiry should end." *Mammoth*, 975 F.2d at 609.

B. Leave to Amend to Add Luna is GRANTED

Plaintiffs seek to replace fictitiously-named DOE 1 with LBPD Chief Robert Luna on the theory that Luna authorized the alleged discriminatory LBPD policies and practices, directed them, and/or knew of or should have known of them and failed to prevent them. (Mot. at 22.) In the proposed 4AC, Plaintiffs add Luna to eight causes of action.

1. Plaintiffs Have Met Their Burden Under Rule 16(b) of Showing Good Cause to Modify the Scheduling Order to Add Luna

***3** Plaintiffs have demonstrated diligence and therefore show good cause to modify the Scheduling Order to replace DOE 1 with Luna. Plaintiffs offer the same argument with respect to adding Luna as they do for Washington—namely, that Plaintiffs did not initially possess the facts to support pleading causes of action against Luna and gained such facts after combing through the 1.7-million-page "document dump. " This argument is inapt as to Luna because those 1.7 million documents were produced by the MTA, not the LBPD, and none of the documents Plaintiffs point to as supporting new claims against Luna were part of that document dump. Notwithstanding this misdirected argument,

the Court finds that the distinguishing factor as to Luna's addition is Plaintiffs' pointing to several documents recently produced by the LBPD that do establish potentially plausible claims against Luna. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation[ ]"); *McCartin v. Norton*, 674 F.2d 1317, 1321 (9th Cir. 1982) ("[a]mendment is to be liberally granted where from the underlying facts or circumstances, the plaintiff may be able to state a claim[ ]").

The four documents Plaintiffs highlight include LBPD Internal Affairs histories of select officers produced in November 2019 (Mot. at 16); TAP card instructions allegedly instructing LBPD officers patrolling the Blue Line to use fare evasion as probable cause for stops or arrests produced in November 2019 (Mot. at 17); memoranda to Chief Luna regarding LBPD Blue Line enforcement produced in November 2019 (Mot. at 18); and LBPD stop data produced in April 2020 (Mot. at 18). These documents—the most recent of which produced in April 2020—not only provide basic evidence to support plausible claims against Luna but also indicate that Plaintiffs, with respect to Luna, acted diligently because they only received this evidence recently and have shown good cause to modify the Scheduling Order to amend the complaint.

2. Plaintiffs Have Satisfied Rule 15(a) as to Luna

Having found that Plaintiffs demonstrated good cause under Rule 16 to modify the Scheduling Order, Plaintiffs must now satisfy the Rule 15(a) factors. *Mammoth*, 975 F.2d at 608. Here, each of the five factors weigh in favor of the Plaintiffs or are neutral. The Court will address each factor in turn.

a. Bad Faith

The Court finds that there is no evidence to indicate that Plaintiffs acted in bad faith. In order for the Court to find that a party filed a leave to amend in bad faith, "the opposing party must offer evidence that shows 'wrongful motive' on the part of the moving party." *Castro v. Swift Transportation Co.*, No. CV 16-03232-AB (EX), 2016 WL 11002145, at *2 (C.D. Cal. Oct. 27, 2016) (citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987)). Here, City only briefly touches on the subject of bad faith. City argues that Plaintiffs "cannot in good faith claim that they acted diligently in seeking modification of the scheduling order." (Dkt. No. 143 ("City Opp'n") at 9.) Further, City asks how Plaintiffs in good faith "can claim that Chief Luna's 'potential liability' was only recently discovered when many of the allegations contained in the proposed Fourth Amended Complaint mirror those contained in Plaintiffs' original complaint and [first amended complaint]?" While the Court is sensitive to these issues posed by City, they offer little evidence to show wrongful motive on the part of the moving party. Accordingly, the Court does not find that Plaintiffs acted in bad faith.

b. Undue Delay

In evaluating undue delay, this Court inquires as to "whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading." *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 953 (9th Cir. 2006) (citing *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1388 (9th Cir. 1990)). City points out that Plaintiffs initially named Luna as a defendant, but voluntarily dropped him when they filed the Second Amended Complaint on August 16, 2018, and that Plaintiffs did not timely seek any discovery pertaining to Luna earlier in the case. Plaintiffs argue that while they were aware Robert Luna was the LBPD Chief of Police, and they initially named him, they realized they did not initially possess facts which would support pleading causes of action against him, and accordingly dismissed him in good faith. (Mot. at 16.) It was only after going through the 1.7-million-page "document dump" that Plaintiffs recently discovered evidence to support re-naming Luna as a defendant. (Mot. at 13-14).

***4** As stated above, this 1.7 million page "document dump" argument is inapt as to Luna because none of the new facts brought forth by Plaintiffs to support the 4AC derive from MTA's document dump. Nevertheless, Plaintiffs still provide new facts sufficient for the allegations against Luna from as recent as April 2020. This motion was filed on May 22, 2020. While the Ninth Circuit has held that "an eight month delay between the time of obtaining a relevant fact and seeking a leave to amend is unreasonable," here, one month is not unreasonable. *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 953 (9th Cir. 2006).

Furthermore, although the Court is sympathetic to the defense argument that Plaintiffs dropped Luna as a defendant early on without conducting discovery as to him, Plaintiffs' decisions

appeared to be in good faith and the fact remains that they did only recently secure documents from the City allegedly implicating Luna. Accordingly, the Court finds that Plaintiffs did not *unduly* delay in seeking to add Luna.

c. Prejudice to the Opposing Party

Defendants have not met their burden of showing prejudice. "The Ninth Circuit has found a sufficient showing of prejudice where the claims sought to be added 'would have greatly altered the nature of the litigation and would have required defendants to have undertaken, at a late hour, an entirely new course of defense.' " *Castro v. Swift Transportation Co.*, No. CV 16-03232-AB (EX), 2016 WL 11002145, at *3 (C.D. Cal. Oct. 27, 2016) (quoting *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990)). Moreover, where a "case is still at the discovery stage with no trial date pending, nor has a pretrial conference been scheduled, there is no evidence that [the defendant] would be prejudiced by the timing of the proposed amendment." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 188 (9th Cir. 1987); *see also Lockheed Martin Corp. v. Network Sols., Inc.*, 194 F.3d 980,986 (9th Cir. 1999) (finding that reopening discovery is a large factor in determining prejudice).

Here, although pretrial and trial dates are set, Defendants are not prejudiced in their discovery timeline because the parties recently submitted a stipulation to continue all discovery, motion, and trial dates. (Dkt. No. 119.) Discovery is currently open until September 4, 2020 and the pre-trial conference is scheduled for January 8, 2021 (Dkt. No. 119), which provides adequate time for the Defendants to "absorb the amendments" without prejudice. (Mot. at 21.) Accordingly, adding Luna as a defendant would not prejudice Defendants.

d. Futility of Amendment

"Although there is a general rule that parties are allowed to amend their pleadings, it does not extend to cases in which any amendment would be an exercise in futility, [citation omitted], or where the amended complaint would also be subject to dismissal." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998). "Under California law, if a defendant is added to an amended complaint as a new defendant, and not as a Doe defendant, the amendment does not relate back to the time of the original complaint." *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 683 (9th Cir. 1980). "Relation back provisions of state law, rather than Rule 15(c), govern a federal cause of action pursuant to 42 U.S.C. § 1983." *Merritt v. Cty. of Los Angeles*, 875 F.2d 765, 768 (9th Cir. 1989).

***5** In the proposed 4AC, Plaintiffs seek to substitute Luna for the fictitious DOE 1 wherever it appears in the complaint. (Mot. at Ex. 2, ¶¶ 10-11.) If Luna is added as a DOE, his claims would relate back to the incidents that took place on February 14, 2017 and would no longer be subject to dismissal under the statute of limitations. The claims, therefore, would not be futile. The issue, then, is whether Luna qualifies as a DOE defendant under California law. Section 474 of the California Code of Civil Procedure states:

> When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly[.]

Cal. Civ. Proc. Code § 474 (West).

"[I]t is now well established that even though the plaintiff knows of the existence of the defendant sued by a fictitious name, and even though the plaintiff knows the defendant's actual identity (that is, his name), the plaintiff is 'ignorant' within the meaning of the statute if he lacks knowledge of that person's connection with the case or with his injuries." *Gen. Motors Corp. v. Superior Court*, 48 Cal. App. 4th 580, 593–94 (1996), *as modified on denial of reh'g* (Sept. 5, 1996). *See also Fuller v. Tucker*, 84 Cal. App. 4th 1163, 1165 (2000) ("The phrase 'ignorant of the name of a defendant' is broadly interpreted to mean not only ignorance of the defendant's identity, but also ignorance of the facts giving rise to a cause of action against that defendant.").

In the instant case, Defendants contend that Plaintiffs were not ignorant of Chief Luna's name as required for DOE pleading and therefore Plaintiffs cannot now substitute Luna for a DOE defendant in their proposed 4AC. (City Opp'n at 17). Plaintiffs argue that their knowledge of Luna's identity does not prevent them from naming Luna as a DOE defendant because they were "not aware of the facts which supported liability until

recently." (Dkt. No. 145.) Because Plaintiffs bring forth their 4AC with recently attained facts to allege plausible claims against Luna, the Court finds that Luna qualifies as DOE 1.

Therefore, the amended complaint with Luna named as DOE 1 relates back to the time of the original complaint. Hence, there is no statute of limitations issue with respect to Luna's addition and no grounds to deny Luna's addition based on futility of amendment.

e. Whether the Plaintiff has Previously Amended Complaint

"[A] district court has broad discretion to grant or deny leave to amend, particularly where the court has already given a plaintiff one or more opportunities to amend his complaint to allege federal claims." *Mir v. Fosburg*, 646 F.2d 342, 347 (9th Cir. 1980). As part of the broad discretion, this Court looks to the "prejudicial burden" on the defendant of granting an additional amendment. *See Fid. Fin. Corp. v. Fed. Home Loan Bank of San Francisco*, 792 F.2d 1432, 1438 (9th Cir. 1986) (affirming that the new claims in a fourth amended complaint would impose a prejudicial burden on the defendant). Here, while this is the fourth time Plaintiffs seek to amend their complaint, the Court does not find that in light of the extended discovery, motions, and trial dates, Defendants will not be prejudiced by the amendment to add Luna. The Court is sensitive to the fact that Luna was initially a defendant and was later dropped, but it is not apparent that adding him will cause legal prejudice. As such, this factor does not weigh against the granting of Plaintiffs' motion as to Luna.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** the Motion as to proposed Defendant Philip A. Washington and **GRANTS** the Motion as to proposed Defendant Robert Luna.

Plaintiffs are **ORDERED** to file their Fourth Amended Complaint adding Robert Luna as a DOE Defendant within seven (7) days of the issuance of this Order.

***6 IT IS SO ORDERED.**

All Citations

Slip Copy, 2020 WL 5983256

End of Document

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

DLA Piper LLP (US)
2000 Avenue of the Stars, Suite 400 North Tower
Los Angeles, CA 90067-4704

A true and correct copy of (I) the entitled *Trustee's Notice of Motion and Motion for Leave to Amend Adversary Complaint* will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing documents were served by the court via NEF and hyperlink to the document. On April 28, 2021, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☐ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:
On April 28, 2021, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on April 28, 2021, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

VIA HAND DELIVERY

VIA ELECTRONIC MAIL

(Party, who is being served if different, and email address for each)

☒ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

April 28, 2021	William L. Countryman, Jr.	*/s/ William L. Countryman, Jr.*
Date	*Printed Name*	*Signature*

Counsel via Electronic Mail	
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