

1 Lee also moved to alter or amend the "Judgment Pursuant to Rule
2 54(b), Federal Rules of Civil Procedure" entered on August 5,
3 2009 (hereafter August 5, 2009 Judgment). These motions are
4 opposed by USF&G, American Specialty, and Aon ("Opposing
5 Parties").

6 A. Motion to Amend and/or Make Additional Findings of Fact
7 and Conclusions of Law.

8 Lee moves to amend the "Findings of Fact and Conclusions of
9 Law Re Court Trial Held on April 4-6, 2007," (Doc. 893).

10 Rule 52(b), Federal Rules of Civil Procedure, provides:

11 On a party's motion filed no later than 10
12 days after the entry of judgment, the court
13 may amend its findings - or make additional
findings - and may amend the judgment
accordingly.

14 Motions under Rule 52(b) are primarily designed to correct
15 findings of fact which are central of the ultimate decision; the
16 Rule is not intended to serve as a vehicle for rehearing. *Davis*
17 *v. Mathews*, 450 F.Supp. 308, 318 (E.D.Cal.1978). "The primary
18 purpose of Rule 52(b) is to enable the appellate court to obtain
19 a correct understanding of the factual issues determined by the
20 trial court as a basis for the conclusions of law and the
21 judgment entered thereon."

22 Rule 60(a), Federal Rules of Civil Procedure, provides:

23 The court may correct a clerical mistake or a
24 mistake arising from oversight or omission
25 whenever one is found in a judgment, order,
26 or other part of the record. The court may
do so on motion or on its own, with or
without notice. But after an appeal has been
docketed in the appellate court and while it

1 is pending, such a mistake may be corrected
2 only with the appellate court's leave.

3 Lee filed a Notice of Appeal from the August 5, 2009
4 Judgment on September 4, 2009.

5 Lee moves to amend the Findings of Fact and Conclusions of
6 Law at page 4 to reflect the amendments to the Partial Judgment
7 on Jury's Verdict made by the "Order Granting in Part and Denying
8 in Part Motion of Lee Investments LLC to Vacate Partial Judgment
9 on Jury Verdict Upon Multiple Claims Involving Multiple Parties
10 or To Alter or Amend Partial Judgment Pursuant to Federal Rules
11 of Civil Procedure 59(e), 60(a) and 60(b)," filed on November 21,
12 2008, (Doc. 862). The September 21, 2008 Order states:

13 12. Lee's motion to amend the Partial
14 Judgment to reflect that Lee did not
15 stipulate to the inclusion of an alter ego
16 claim against Richard Ehrlich, et al., but to
17 instead reflect that USF&G was allowed to
18 amend its Complaint to add alter ego
19 allegations against Richard Ehrlich, which
20 claims were severed for trial by Order filed
21 on July 18, 2006 (Document 256, pp. 12-16),
22 is GRANTED *nunc pro tunc*.

23 13. Lee's motion to amend the Partial
24 Judgment to reflect that Lee did not
25 stipulate to any determination of claims as
26 to Diana Conley is GRANTED *nunc pro tunc*.

...

15. Lee's motion to clarify that the issue
of whether USF&G breached a duty to defend in
the WCAB proceedings and in this action is
not among the issues disposed of by the
Partial Judgment and is reserved for
resolution in a future proceeding is GRANTED.

Opposing Parties contend that the motion should be denied
because Lee is not prejudiced:

1 Lee and the Rexford Parties complain that the
2 Partial Judgment lumps the alter ego claims,
3 which were severed by this Court's order,
4 with the damage and interest claims and other
5 matters, which were severed for a separate
6 bench trial, by stipulation and order. The
7 clarifying language sought by Lee does not
8 demonstrate clear error or manifest
9 injustice.

10 The recitation of the procedural background in this action
11 set forth in the Findings of Fact and Conclusions of Law was for
12 informational purposes and does not constitute a Finding of Fact
13 *per se*. Nonetheless, for purposes of clarity and accuracy in
14 this complex action, Lee's motion to amend is GRANTED. The
15 Findings of Fact and Conclusions of Law are amended *nunc pro tunc*
16 to reflect the November 21, 2008 Order.

17 Lee moves to amend USF&G Finding of Fact No. 8, page 8, line
18 2 to delete "February, 1998" as the date when Diana Conley was
19 first injured and substitute "February, 1999." Lee also moves to
20 amend USF&G Finding of Fact No. 15, page 9, line 25, to delete
21 "April 16, 1999" as the date USF&G filed its complaint for
22 rescission in this action and substitute "April 26, 1999."

23 These two amendments to the Findings of Fact and Conclusions
24 of Law pertain to clerical/typographical errors under Rule 60(a).
25 Because Lee filed a Notice of Appeal after filing the motion to
26 amend the Findings of Fact and Conclusions of Law, the Court is
precluded by the Rule from correcting these clearly typographical
errors without prior leave of the Ninth Circuit. However, in
Catz v. Chalker, 566 F.3d 839 (9th Cir.2009) the Ninth Circuit
held that a motion under Rule 60(a) tolls the time for filing a

1 notice of appeal until the Rule 60(a) motion is disposed of. In
2 any event, the Ninth Circuit has treated clerical errors,
3 oversights and omissions as if they had been corrected and have
4 not required the formality of a correction by the district court.
5 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2nd
6 § 2856, p. 252; Huey v. Teledyne, Inc., 608 F.2d 1234, 1237 (9th
7 Cir.1979). In Morris v. Morgan Stanley & Co., 942 F.2d 648, 654-
8 655 (9th Cir.1991), the Ninth Circuit ruled:

9 [Appellants] correctly argue as a general
10 rule, a district court is divested of
11 jurisdiction once a notice of appeal has been
12 filed ... We have held, however, when a
13 district court attempts to correct a
14 'clerical error' under Federal Rule of Civil
15 Procedure 60(a) after a notice of appeal has
16 been filed, and the correction does not
represent a change of position, but rather
simply clarifies the court's intended action,
'a remand to effectuate that intent is matter
of "mere form."' ... Courts should not employ
the rule to defeat this purpose by 'inducing
needless paper shuffling.'

17 Here, the clerical error correction of these two Findings of Fact
18 to reflect the correct dates simply accurately clarifies the
19 Court's originally intended action. Lee's motion to amend the
20 Findings of Fact and Conclusions of Law is GRANTED.

21 A. Motion to Alter or Amend Judgment.

22 With regard to a motion to alter or amend judgment pursuant
23 to Rule 59(e), Federal Rules of Civil Procedure, Wright, Miller &
24 Kane, *supra*, § 2810.1, explains:¹

25 ¹The District Court retains jurisdiction over motions to alter
26 or amend the judgment filed after notice of appeal is given.
Wright, Miller & Kane, *supra*, § 2821.

1 Since specific grounds for a motion to amend
2 or alter are not listed in the rule, the
3 district court enjoys considerable discretion
4 in granting or denying the motion. However,
5 reconsideration of a judgment after its entry
6 is an extraordinary remedy which should be
7 used sparingly. There are four basic grounds
8 upon which a Rule 59(e) motion may be
9 granted. First, the movant may demonstrate
10 that the motion is necessary to correct
11 manifest errors of law or fact upon which the
12 judgment is based. Second, the motion may be
13 granted so that the movant may present newly
14 discovered or previously unavailable
15 evidence. Third, the motion will be granted
16 if necessary to prevent manifest injustice.
17 Serious misconduct of counsel may justify
18 relief under this theory. Fourth, a Rule
19 59(e) motion may be justified by an
20 intervening change in controlling law.

21 The Rule 59(e) motion may not be used to
22 relitigate old matters, or to raise arguments
23 or present evidence that could have been
24 raised prior to the entry of judgment. Also,
25 amendment of the judgment will be denied if
26 it would serve no useful purpose. [Footnotes
omitted]

Lee asserts that the Court committed clear error in the
August 5, 2009 Judgment and that its decision is manifestly
unjust.

The August 5, 2009 Judgment states at page 2, lines 1-11:

The parties have reserved, by written
stipulation and order: USF&G's alter ego
claims against Richard K. Ehrlich, an
individual, et al., the determination of the
amount of attorneys' fees and interest
claimed by USF&G; and the claim of Aon Risk
Services Inc. of Central California ('Aon')
for relief based on the tort of another. All
other claims of the parties were adjudicated
by the jury, including USF&G's claim for
rescission based on fraud; all claims of Lee
Investments LLC, dba The Island, a California
limited liability company. Any claims as to
Diana Conley have been determined by the

1 parties' stipulation.

2 Referring to the November 21, 2008 Order, Lee argues that
3 August 5, 2009 Judgment should be amended to reflect the rulings
4 in Paragraphs 12, 13 and 15 of the November 21, 2008 Order.

5 USF&G, American Specialty and Aon ("Opposing Parties")
6 oppose Lee's motion on the ground that the requested amendment is
7 merely technical and does not demonstrate clear error or manifest
8 injustice.

9 Lee replies that a failure to include the *nunc pro tunc*
10 amendments to the Partial Judgment on Jury Verdict is potentially
11 prejudicial because Lee and the alter ego defendants opposed
12 making the alter ego defendants parties to this action. Lee
13 argues that, without amendment of the August 5, 2009 Judgment,
14 Lee could be precluded from raising on appeal the granting of the
15 motion to add the alter ego defendants.

16 Lee's motion to alter or amend the August 5, 2009 Judgment
17 to reflect these rulings is GRANTED. The August 5, 2009 Judgment
18 will be revised *nunc pro tunc* to include the November 21, 2008
19 Order corrections.

20 Lee moves to alter or amend the August 5, 2009 Judgment to
21 the extent that it states: "Any claims as to Diana Conley have
22 been determined by the parties' stipulation." Lee was not a
23 party to the "Stipulation Dismissing Diana Conley From Action
24 Without Prejudice and Order Thereon," filed on January 24, 2001
25 (Doc. 73).

26 Opposing Parties again contend that Lee's motion is merely

1 technical and does not demonstrate clear error or manifest
2 injustice. Lee was not a party to the stipulation because Lee
3 had no claims against Diana Conley in this action nor did Diana
4 Conley have any claims against Lee in this action.

5 Lee responds that it will be potentially prejudiced if the
6 amendment to the August 5, 2009 Judgment is not granted. Lee
7 asserts that Diana Conley filed a civil action against Lee in the
8 Fresno County Superior Court on January 29, 2009, alleging that
9 Lee was uninsured for workers' compensation and that she is
10 entitled to sue Lee under California Labor Code § 3706. Lee has
11 filed a motion for summary judgment on the ground, among others,
12 that Ms. Conley's action is barred by the statute of limitations.
13 Asserting that Ms. Conley must establish equitable tolling to
14 withstand summary judgment and that two of the elements of
15 equitable tolling are reasonable and good faith conduct in her
16 delay in filing the suit and lack of prejudice to Lee, Lee
17 contends:

18 Among other contentions, Lee contends that it
19 was not in good faith and not reasonable for
20 Ms. Conley to wait eight years after she
21 stipulated with USF&G to accept the federal
22 court's ultimate determination the [sic]
23 policy was rescinded before she brought her
24 civil lawsuit against Lee and Lee has been
25 plainly prejudiced by this delay. So that
26 Lee's contention in this regard in the
California courts is not potentially subject
to some claim by Conley of waiver by
acceptance of the stipulation and is not
otherwise inadvertently compromised by this
court erroneously stating that Lee agreed to
Conley's stipulation with USF&G in 2001, this
court should amend the Rule 54(b) Judgment
....

1 Lee's motion to amend the August 5, 2009 Judgment is
2 GRANTED. The August 5, 2009 Judgment will be revised *nunc pro*
3 *tunc* as to the "Stipulation Dismissing Diana Conley From Action
4 Without Prejudice and Order Thereon" filed on January 24, 2001.

5 Lee moves to alter or amend the August 5, 2009 Judgment on
6 the ground that it erroneously finds in favor of USF&G, American
7 Specialty and Aon on all of their affirmative defenses to Lee's
8 claims. Lee refers to Question 38A on the "Special Verdict of
9 Trial Jury Re Aon's Claims Against Lee," filed on February 27,
10 2007, (Doc. 685), where the jury answered "no" to USF&G's,
11 American Specialty's, and Aon's affirmative defense: "Did Lee
12 unreasonably delay in asserting the claims against any party?"

13 Lee's motion to amend the August 5, 2009 Judgment is
14 GRANTED. The August 5, 2009 Judgment will be amended *nunc pro*
15 *tunc* at page 3, line 11 and line 22 and page 4 to delete the
16 statements that the jury found against Lee on the affirmative
17 defense of unreasonable delay.

18 For the reasons stated:

19 1. Lee's motion to amend and/or make additional findings of
20 fact and conclusions of law to the "Findings of Fact and
21 Conclusions of Law re Court Trial Held on April 4-6, 2007" is
22 GRANTED;

23 2. Lee's motion to alter or amend the "Judgment Pursuant to
24 Rule 54(b), Federal Rules of Civil Procedure" entered on August
25 5, 2009 is GRANTED.

26 3. Counsel for Lee shall prepare and lodge a form of order

1 consistent with this Memorandum Decision within five (5) court
2 days of service of this Memorandum Decision.

3 IT IS SO ORDERED.

4 Dated: September 29, 2009

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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