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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ABARCA, RAUL VALENCIA, et al.,

Plaintiffs,

v.

MERK & CO., INC., et al.,

Defendants.

1:07-cv-0388 OWW DLB

ORDER GRANTING PLAINTIFFS'
MOTION TO AMEND EIGHT AMENDED
COMPLAINT (DOC. 1371)

I. INTRODUCTION.

Pursuant to the discussions at the hearing on July 11, 2011, Plaintiffs move for leave to amend the current, operative complaint, the Eighth Amended Complaint ("Complaint") to allege specific claims against Defendants Merk & Co., Inc. ("Merk"), Amsted Industries, Inc. ("Amsted") and Baltimore Aircoil Company ("BAC"), based upon their alleged vicarious and direct liability for the actions and activities at the former BAC-Pritchard, Inc. facility (the "Site"). Plaintiffs have identified each change to the existing allegations of the Complaint, as well as the substance of new claims sought to be added to the Complaint.

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1 II. FACTUAL BACKGROUND

2 A. Background.

3 Plaintiffs allege exposure to chemicals and other substances
4 as a result of environmental releases related to wood treating
5 activities at the Site. Plaintiffs have amended their complaint
6 several times for various reasons. The Complaint names Merk,
7 Amsted, BAC, and Track Four as Defendants affiliated with the
8 Site. It is disputed whether, to what extent, and at when
9 Defendants, Merk, Amsted and BAC owned, directed actions,
10 remediated, and/or operated the Site.
11

12 Corporate liability and/or responsibility for causing
13 releases at the Site has been at issue since the inception of
14 this action. Some discovery was conducted on the issue which was
15 largely curbed when Defendants' filed a *Cottel* motion in March of
16 2009 and shifted the focus of discovery to the scientific
17 evidence concerning exposure issues. A discovery stay then went
18 into effect around August of 2009 which discontinued all
19 discovery regarding non-exposure issues.
20

21 B. Plaintiffs Amendments.

22 Plaintiffs have added the following statement to identify
23 Defendants as follows:
24

25 10. Defendant MERCK & CO., INC., ("MERCK") is a New
26 Jersey corporation authorized to and doing business in the
27 State of California, County of Merced. From 1970 to 1985,
28 MERCK owned 100% of the issued outstanding shares of common
stock of defendant Baltimore Aircoil, Inc. ("BAC"). BAC-
Pritchard, Inc. was a wholly-owned subsidiary of BAC from

1 its incorporation in September of 1975 until its dissolution
2 in October of 1993. At all times relevant to this Complaint,
3 MERCK and BAC exercised dominance and control over all the
4 activities of BAC-Pritchard, Inc. Further, BAC-Pritchard,
5 Inc. acted as the agent and/or joint venturer and/or alter
6 ego of MERCK and BAC during all times relevant to this
7 complaint. Further, at all times relevant to this Complaint,
8 MERCK and BAC had knowledge of and ratified the operations,
9 conduct and activities of BAC-Pritchard, Inc. Liability
10 under each claim against this entity as hereinafter alleged,
11 is sought based upon the independent conduct of MERCK, as
12 well as the vicarious liability of MERCK and BAC with regard
13 to the operations, activities and conduct of BAC-Pritchard,
14 Inc."

15 11. Defendant Amsted Industries, Inc. ("AMSTED") is an
16 Illinois corporation authorized to and doing business in the
17 State of California, County of Merced. From 1985 to the
18 present, defendant Baltimore Aircoil, Inc. ("BAC") has been
19 a wholly-owned subsidiary corporation of AMSTED.
20 BAC-Pritchard, Inc. was a wholly-owned subsidiary of BAC
21 from its incorporation in September of 1975 until its
22 dissolution in October of 1993. At all times relevant to
23 this Complaint, AMSTED and BAC exercised dominance and
24 control over all the activities at BAC-Pritchard, Inc.
25 Further, AMSTED acted as the agent and/or joint venture
26 and/or alter ego of MERCK and BAC during all times relevant
27 to this complaint. Further, at all times relevant to this
28 Complaint, AMSTED and BAC had knowledge of and ratified the
operations, conduct and activities of BAC-Pritchard, Inc.
Liability under each claim against this entity as
hereinafter alleged, is sought based upon the independent
conduct of AMSTED, as well as the vicarious liability of
AMSTED and BAC with regard to the operations, activities and
conduct of BAC-Pritchard, Inc."

12. Defendant Baltimore Aircoil Company, Inc. ("BAC") is an
Illinois corporation authorized to and doing business in the
State of California, County of Merced. From 1970 to 1985,
MERCK owned 100% of the issued outstanding shares of common
stock of defendant Baltimore Aircoil, Inc. ("BAC"). BAC-
Pritchard, Inc. was a wholly-owned subsidiary of BAC from
its incorporation in September of 1975 until its dissolution
in October of 1993. From 1985 to the present, defendant
Baltimore Aircoil, Inc. ("BAC") has been a wholly-owned
subsidiary of AMSTED. At all times relevant to this
Complaint, MERCK, AMSTED and BAC exercised dominance and
control over all the activities at BAC-Pritchard, Inc.

1 Further, AMSTED and MERCK acted as the agent and/or joint
2 venturer and/or alter ego of MERCK and BAC during all times
3 relevant to this complaint. Further, at all times relevant
4 to this Complaint, MERCK, AMSTED and BAC had knowledge of
5 and ratified the operations, conduct and activities of BAC-
6 Pritchard, Inc. Liability under each claim against this
7 entity as hereinafter alleged, is sought based upon the
8 independent conduct of BAC, as well as the vicarious
9 liability of BAC with regard to the operations, activities
10 and conduct of BAC-Pritchard, Inc.

11 In those claims in which Merk, Amsted and BAC have been
12 named, Plaintiffs now identify Defendants as follows:

13 MERCK, individually, and by and through its' wholly-owned
14 subsidiaries, BAC, and BAC's wholly-owned subsidiary BAC-
15 Pritchard, Inc., AMSTED, individually, and by and through
16 its wholly-owned subsidiary BAC and BAC's wholly-owned
17 subsidiary BAC-Pritchard, Inc., and BAC, individually, and
18 by and through its' wholly-owned subsidiary BAC-Pritchard,
19 Inc. and DOES 51 - 100, and each of them, through their
20 employees, agents including their wholly-owned subsidiaries
21 BAC and BAC-Pritchard, Inc.

22 Plaintiffs now identify BAC-Pritchard, Inc., as a member of
23 the alleged conspiracy in Plaintiffs' Sixteenth Claim for Civil
24 Conspiracy. Plaintiffs have added claims for Principal/Agent
25 Liability; Joint Venture Liability and Alter Ego Liability. The
26 facts supporting each of these claims are specifically alleged
27 within the proposed amendments.

28 III. LAW AND ANALYSIS.

A. Standards of Fed. R. Civ. Pro. Rule 15 And 16.

Once a pretrial scheduling order pursuant to Rule 16 has
been entered, the standards of Rule 16 rather than Rule 15 govern
amendment of the pleadings. *See Johnson v. Mammoth Recreations,*

1 *Inc.* 975 F.2d 604, 607-08 (9th Cir. 1992); *Eckert Cold Storage,*
2 *Inc. v. Behl*, 943 F. Supp. 1230, 1232-33 (E.D. Cal. 1996). The
3 good cause requirement of Rule 16 primarily considers the
4 diligence of the party seeking the amendment. The pretrial
5 scheduling order can only be modified "if it cannot reasonably be
6 met despite the diligence of the party seeking the extension."
7 *Mammoth Recreations*, 975 F.2d at 609.

9 After the moving party has demonstrated diligence under Rule
10 16 the standard under Rule 15 is applied to determine whether
11 amendment is proper. *See Mammoth Recreations*, 975 F.2d at 608;
12 *Eckert Cold Storage*, 943 F.Supp. at 1232 n. 3. The Ninth Circuit
13 has instructed that the policy favoring amendments "is to be
14 applied with extreme liberality." *Morongo Band of Mission Indians*
15 *v. Rose*, 893 F.2d 1074, 1079 (9th Cir.1990).

17 A court should consider the following four factors in
18 determining whether to grant leave to amend: (1) undue delay, (2)
19 bad faith, (3) futility of amendment, and (4) prejudice to the
20 opposing party. *United States v. Pend Oreille Public Utility*
21 *Dist. No. 1.*, 926 F.2d 1502, 1511 (9th Cir.1991). Delay alone is
22 not sufficient grounds for denying leave to amend. *Id.* It must be
23 accompanied by one of the other three factors; prejudice to the
24 opposing party is the most important consideration. *Eminence*
25 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.2003)
26 ("Prejudice is the 'touchstone of the inquiry under [R]ule 15(a)'
27
28

1 ") (citing *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238
2 F.3d 363, 368 (5th Cir.2001)). In the absence of prejudice or a
3 strong showing of any of the remaining factors, there is a
4 presumption under Fed R. Civ. P. 15(a) in favor of granting leave
5 to amend. *Id.* "'Where there is a lack of prejudice to the
6 opposing party and the amended complaint is obviously not
7 frivolous, or made as a dilatory maneuver in bad faith, it is an
8 abuse of discretion' to deny leave to amend." *Pend Oreille*, 926
9 F.2d at 1511-1512 (citing *Howey v. United States*, 481 F.2d 1187,
10 1190-1191 (9th Cir.1973)).
11

12 The non-moving party bears the burden of showing why leave
13 to amend should not be granted. *Genetech, Inc. v. Abbott Labs.*,
14 127 F.R.D. 529, 530-31 (N.D.Cal.1989). *Id.*
15

16 1. Rule 16: Good Cause.

17 Neither party addresses the good cause standard of Rule 16.
18 The relevant facts are as follows: The Phase 1 Final Pretrial
19 Order pertains only to Phase 1 of this multi-phase action. The
20 Phase 1 Pretrial Order focused on general causation, i.e.,
21 contaminates of concern "reach[ing] any location where plaintiffs
22 could have been exposed to them, and if so, when such
23 contaminants arrived, how such contaminants arrived at the
24 location, how long they were present, and at what levels they
25 were present." (Doc. 540 at 1.) Discovery in Phase 1 was
26 limited to "the issues relevant to exposure" including:
27
28

1 (b) BAC Site operations and history relevant to
2 identification of the presence, amount and concentration of
3 contaminants at the BAC Site and in the environment.

4 (Phase 1 Pretrial Order at 2:14-16).

5 Significant confusion arose regarding the exact evidence to
6 be presented at trial. The parties and the Court were not in
7 unison about whether evidence of corporate liability - e.g.,
8 theories of vicarious liability, principal/agency, piercing the
9 corporate veil, and the like - would be tried in Phase 1 or
10 corporate responsibility for exposure - e.g., a basic jury
11 decision regarding who owned and/or operated the Site during the
12 relevant time period.

13 Defendants argue they understood that the Phase 1 jury would
14 be asked to identify the entities that caused the release of
15 contaminants at the BAC Site and assign legal responsibility.
16 Defendants filed a trial brief, which they believe was "clearly
17 framed . . . in accordance with the [Order]," that "contain[s] a
18 detailed discussion of the relationships among Merk, Amsted,
19 Baltimore Aircoil, and the various facility owners and operators
20 [and] discusse[s] controlling California case law."

21
22 The Court understood, as Defendants point out, that Phase 1
23 would not "assign legal responsibility," but would include "who
24 owned, who operated [the Site], what was done through the period
25 that the lawsuit encompasses." (Lewis Decl., Ex. 1, Feb. 1, 2011
26 Rough Transcript at 42:5-9.)
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1 Plaintiffs acknowledge that corporate liability and/or
2 exposure responsibility was an issue for one of the phases at
3 trial and at certain times Plaintiffs represented that they would
4 be able to present sufficient evidence on the subject during
5 Phase 1. Yet once Phase 1 began, Plaintiffs had not completed
6 discovery on the issue and did not present a case. (Doc. 1371-1,
7 MTA at 5:26-27.) Plaintiffs argue that discovery was not complete
8 because Defendants filed their *Cottel* motion on March 23, 2009
9 which wholly shifted the focus of discovery to the complex and
10 consuming medical and scientific evidence. The *Cottel* motion was
11 followed by a stay of discovery in or around August of 2009 which
12 discontinued discovery on corporate liability issues.
13

14
15 During discussion on jury instructions after Phase 1
16 evidence closed, the Court determined that, due to confusion
17 about the specifics of corporate liability/responsibility
18 evidence to be presented in combination with the discovery stay
19 and *Cottel* motion, insufficient evidence was presented for a jury
20 determination on the subject at that time. *U.S. v. Dang*, 488 F.3d
21 1135, 1143 (9th Cir. 2007) ("the district court is given broad
22 discretion in supervising the pretrial phase of litigation.");
23 *and see* Fed. R. Civ. Pro. 42(b). In light of the above,
24 Plaintiffs were diligent in complying with the Phase 1 Pretrial
25 Order.
26

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28 B. Rule 15: Undue Delay And Prejudice.

1 Once the requisite showing is made under Rule 16, the
2 inquiry turns to Rule 15. Defendants argue that (1) Plaintiffs
3 have unduly delayed in requesting leave to amend to add their
4 corporate liability claims and (2) allowing Plaintiffs to amend
5 will cause undue delay of trial, both of which amount to
6 prejudice to Defendants.
7

8 1. Undue Delay in Amending.

9 Defendants argue that Plaintiffs have unduly delayed in
10 filing for leave to amend. They contend that the stay on
11 discovery does not excuse a failure to amend the Complaint to
12 allege the proper claims. Defendants pointed out at the August
13 1, 2011 hearing that in their answer to the second amended
14 complaint in October of 2007, they alleged that they were not
15 successors in any of the entities Plaintiffs had named. In April
16 of 2008, Defendants stated, Plaintiffs' counsel took a number of
17 depositions to lay the ground work that Merck and Amsted were
18 directly responsible for the claims regarding the Site. In June
19 of 2008, Plaintiffs' counsel learned that BAC-Prichard was a
20 dissolved corporation. Defendants contend that despite beginning
21 the discovery process and amending the Complaint several times
22 for other reasons, Plaintiffs only now request leave to add their
23 corporate liability claims.
24
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26 Plaintiffs agree that some discovery has been conducted on
27 this issue. They rejoin, however, that they were in the process
28

1 of discovering facts related to the ownership and operation of
2 the Site when the *Cottel* motion was filed and shifted the focus
3 of discovery and Plaintiffs' resources to the scientific evidence
4 of the case. This was followed by the stay on discovery,
5 including discovery on corporate liability, which resulted in a
6 loss of focus on the liability issues and caused delay in
7 requesting leave to amend.
8

9 The nature of Plaintiffs' assertions and counter-assertions
10 were made as far back as October of 2007 and Plaintiffs have had
11 many opportunities to amend the Complaint. Plaintiffs' delay is
12 acknowledged. However, the fact that Plaintiff could have moved
13 to amend at an earlier time does not by itself constitute an
14 adequate basis for denying leave to amend. *Owens v. Kaiser*
15 *Foundation Health Plan, Inc.*, 244 F.3d 708, 712-13 (9th Cir.
16 2001).
17

18 2. Undue Delay of Trial.
19

20 Defendants' assert that allowing amendment would delay trial
21 and require additional discovery which is unduly prejudicial to
22 Defendants, citing *M/V American Queen v. San Diego Marine Const.*
23 *Corp.*, 708 F.2d 1483, 1492 (9th Cir. 1983); *Acri v. International*
24 *Ass'n of Machinists & Aerospace Workers*, 781 F.d 1393, 1398 (9th
25 Cir. 1986); and *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir.
26 1994).
27

28 Defendants' cited cases are distinguishable. *Acri* found no

1 abuse of discretion in denying leave to amend where the
2 plaintiffs' attorney admitted that plaintiffs' delay in bringing
3 the new cause of action was a tactical choice in that he felt the
4 causes of action already stated were sufficient, and the new
5 claim would necessitate further discovery. 781 F.d at 1398. No
6 such admission was given in this case.
7

8 *Kaplan* upheld denial of leave to amend where the parties had
9 "engaged in voluminous discovery. . . trial was only two months
10 away, and discovery was *completed*." 49 F.3d at 1370 (emphasis
11 added). Here, while much discovery has been conducted, it is not
12 complete on the issue of corporate liability due to the discovery
13 stay on non-exposure issues.
14

15 *M/V American Queen* found that the trial court properly
16 exercised its discretion in refusing to allow amendment of the
17 complaint where there was delay in moving to amend of one and a
18 half years after the case was filed; new allegations would
19 totally alter the basis of the action, in that they covered
20 different acts, employees and time periods necessitating
21 additional discovery; and motion for summary judgment was pending
22 for possible disposition of case.
23

24 The only similar fact here is delay in requesting leave to
25 amend. The new allegations will not "totally alter" the basis of
26 the action. The corporate liability issues came into focus
27 around October of 2007 when Defendants filed an answer to
28

1 Plaintiffs' second amended complaint. Plaintiffs and Defendants
2 have already begun discovery on the issue and all parties
3 acknowledge that corporate liability is an issue for trial.
4 Defendants state that they prepared for Phase 1 with corporate
5 liability in mind. (See Doc. 1406 at 4:15-17.) Defendants
6 cannot assert that adding these claims totally alters the action.
7 Finally, while completion of discovery is needed, any prejudice
8 can be avoided through a limited and focused discovery plan that
9 is not duplicative.
10

11 Plaintiffs' motion for leave to amend the Complaint is
12 GRANTED.

13
14
15 IV. CONCLUSION.

16 For the reasons stated:

- 17 1. Plaintiffs' motion for leave to amend is GRANTED.
18 2. Discovery shall be re-opened to allow Plaintiffs' to conduct
19 discovery on the issue of corporate liability. Re-opening of
20 discovery on this issue is reciprocal for all parties.
21 Plaintiffs shall submit an order in conformity with this
22 decision within five (5) calendar days following electronic
23 service of this order.
24

25 SO ORDERED.

26 DATED: August 10, 2011.

27 /s/ Oliver W. Wanger
28 Oliver W. Wanger
United States District Judge