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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RODNEY SCHULTZ and PATRICIA
SCHULTZ,

Plaintiffs,

v.

SAKAYE ICHIMOTO, et al.,

Defendants.

1:08-CV-526-OWW-SMS

ORDER RE: REQUEST FOR
SUPPLEMENTAL BRIEFING

AND RELATED ACTIONS

I. INTRODUCTION.

The present dispute involves several motions for attorneys' fees filed by Defendants Margaret Jamison, Sakaye Ichimoto, and William and Cinda Jamison. The request for supplemental briefing is limited to Defendant Margaret Jamison's motion for attorneys' fees, filed on May 14, 2010.

On April 16, 2008, Plaintiffs commenced this action against Defendants Margaret Jamison, Sakaye Ichimoto, and William and Cinda Jamison to recover costs/damages resulting from environmental

1 contamination of real property located in Oakhurst, California.

2 On March 1, 2009, Defendant M.B.L., Inc., moved to dismiss
3 Plaintiffs' second cause of action on grounds that they lacked
4 standing.¹ The second cause of action was dismissed with prejudice
5 on September 16, 2009. On January 25, 2010, Defendants George and
6 Frances Wolfe² filed a motion for judgment on the pleadings or for
7 summary judgment on Plaintiffs' first claim for cost recovery under
8 CERCLA § 107, second claim for declaratory relief under CERCLA §
9 113, and fourth claim for relief under California Health and Safety
10 Code § 25363(e).³ On March 18, 2010, the motion was granted.⁴

11 On April 30, 2010, Defendants Sakaye Ichimoto and William and
12 Cinda Jamison separately moved for attorney fees based on
13 "prevailing party" status. Defendant Margaret Jamison filed her
14 motion for fees on May 14, 2010.

15 Plaintiffs filed a single opposition to the motions on June
16 28, 2010. As to Defendant Margaret Jamison's motion for fees,
17 Plaintiffs argued her motion was untimely under Rule
18 54(d)(2)(b)(I). In particular, Plaintiffs asserted that because

20 ¹ Defendant M.B.L., Inc. is not a party to the current
21 dispute.

22 ² Defendants George and Frances Wolfe are not parties to the
23 current dispute.

24 ³ Defendants Margaret Jamison, Sakaye Ichimoto, and William
25 and Cinda Jamison joined the motion in February 2010. Plaintiffs
26 Rodney and Patricia Schultz filed a statement of non-opposition to
27 the motion on March 8, 2010.

28 ⁴ Plaintiffs' claims under CERCLA §§ 107, § 113, and
California Health and Safety Code § 25363(e) were dismissed for
lack of subject matter jurisdiction. The state law claims were
dismissed pursuant to 28 U.S.C. § 1367(c)(3).

1 Defendant Margaret Jamison filed her motion more than 14 days after
2 the entry of final judgment, the relevant time-frame under Rule
3 54(d)(2)(b)(I), her motion was untimely.⁵ It is undisputed that
4 Margaret Jamison's motion for fees was not filed until May 14,
5 2010, twenty-eight days after judgment was entered in this case.

6 Defendant Margaret Jamison did not respond to Plaintiffs'
7 timeliness arguments via written reply. However, at oral argument,
8 counsel for Ms. Jamison argued that her client was "the prevailing
9 party under CERCLA based on Federal Rule of Civil Procedure 54(d)."

10 Counsel further stated:

11 The motion for attorney's fees is brought under
12 California Code of Civil Procedure Section 1033.5. And
13 that's based on contract. And the time frame for filing
14 should be brought under California law, 30 days, hence
15 Margaret Jamison's motion is timely.

16 (Reporter's Transcript, July 14, 2010, 23:2-23:7.)

17 Normally, arguments raised for the first time in a reply brief
18 or at the hearing on a motion are disregarded. See *United States*
19 *v. Bohn*, 956 F.2d 208, 209 (9th Cir. 1992); *United States v.*
20 *Boyce*, 148 F. Supp. 2d 1069, 1085 (S.D. Cal. 2001). However, a
21 review of the record reveals that Ms. Jamison cited both Rule 54
22 and § 1033.5 in her motion, without identifying which provision
23 controls the timeliness of her motion and why. Critically, Ms.
24 Jamison's motion addressed only her entitlement to attorneys' fees
25 based on "prevailing party" status, disregarding the timeliness
26 issue (and the relevant legal analysis). Additionally, Ms. Jamison
27 elected not to file a written reply despite the fact that

1 Plaintiffs specifically objected to her motion on timeliness
2 grounds. At oral argument, she argued for the first time that §
3 1033.5 controlled the procedural events in this case, not Rule
4 54(d)(2)(b)(I). As such, Plaintiffs were deprived of an
5 opportunity to support their arguments, which were properly raised
6 via written opposition.

7 Here, if Federal Rule 54 applies, as Plaintiffs claim, then
8 Ms. Jamison's motion is untimely and is denied for that reason. On
9 the other hand, if § 1033.5 provides the applicable time period,
10 her motion is timely and Plaintiffs' objections fail. Without
11 additional briefing on whether federal or state law provides the
12 relevant time-frame, Ms. Jamison's motion for attorneys' fees
13 cannot be decided. Supplemental briefing, not to exceed five (5)
14 pages, is requested on the following issues:⁶

15
16 1) Why does California Code of Civil Procedure § 1033.5
17 control the timeliness analysis in this case? Specifically, given
18 that the only claim dismissed with prejudice was purely federal
19 (CERCLA), why would state procedural law provide the limitations
20 period? Please address the impact of: (1) that the state law
21 claims were dismissed without prejudice; and (2) that the
22 underlying basis of the lawsuit was environmental contamination,
23 not breach of contract.

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26 _____
27 ⁶ The delineated questions are not exhaustive. The parties
28 are free to address any line of argument that supports their
positions.

1 Defendant Margaret Jamison may before 5:00 p.m. on August 18,
2 2010, submit supplemental briefing on these questions. Any written
3 opposition is due August 25, 2010. Supplemental briefing shall not
4 exceed five (5) pages per side.

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6 IT IS SO ORDERED.

7 **Dated: August 10, 2010**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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