

1  
2  
3  
4 UNITED STATES DISTRICT COURT  
5 EASTERN DISTRICT OF CALIFORNIA  
6

7 RODNEY SCHULTZ and PATRICIA  
8 SCHULTZ,

1:08-CV-526-OWW-SMS

9 Plaintiffs,

MEMORANDUM DECISION AND ORDER  
RE: DEFENDANT MARGARET  
JAMISON'S MOTION FOR  
ATTORNEY'S FEES (Doc. 189)

10 v.

11  
12 SAKAYE ICHIMOTO, et al.,

13 Defendants.  
14

15  
16 I. INTRODUCTION.

17 Before the Court for decision is Defendant Margaret Jamison's  
18 motion for attorney fees. (Doc. 189.) Plaintiffs Rodney and  
19 Patricia Schultz oppose the motion on grounds that it was untimely  
20 under Federal Rule of Civil Procedure Rule 54(d)(2).  
21

22 II. BACKGROUND.

23 The background of this case is summarized in the Court's  
24 previous Memorandum Decision in this case, filed on September 7,  
25 2010, in brief:<sup>1</sup> On April 16, 2008, Plaintiffs commenced this  
26

27  
28 <sup>1</sup> See, e.g., *Schultz v. Ichimoto*, No. 1:08-CV-526-OWW-SMS,  
2010 WL 3504781 (E.D. Cal. Sep. 7, 2010).

1 action against Defendants Margaret Jamison, Sakaye Ichimoto, and  
2 William and Cinda Jamison to recover costs/damages resulting from  
3 environmental contamination of real property located in Oakhurst,  
4 California.<sup>2</sup> (Doc. 1.) On April 1, 2009, Defendant M.B.L., Inc.,  
5 moved to dismiss Plaintiffs' second cause of action on grounds that  
6 Plaintiffs lacked standing.<sup>3</sup> (Doc. 117.) Defendant Margaret  
7 Jamison joined the motion on September 13, 2009.<sup>4</sup> (Doc. 130.) The  
8 second cause of action was dismissed with prejudice on September  
9 16, 2009. (Doc. 138.)

10 On January 25, 2010, Defendants George and Frances Wolfe filed  
11 a motion for judgment on the pleadings or for summary judgment on  
12 Plaintiffs' first claim for cost recovery under CERCLA § 107,  
13 second claim for declaratory relief under CERCLA § 113, and fourth  
14 claim for relief under California Health and Safety Code §  
15 25363(e).<sup>5</sup> (Doc. 142.) Defendant Margaret Jamison joined the  
16 motion on February 25, 2010. (Doc. 156.) On March 18, 2010, the  
17 motion was granted. (Doc. 166.) Plaintiffs' claims under CERCLA  
18 §§ 107, § 113, and California Health and Safety Code § 25363(e)  
19 were dismissed for lack of subject matter jurisdiction. (Id.) The  
20 state law claims were dismissed pursuant to 28 U.S.C. § 1367(c) (3).  
21

---

22 <sup>2</sup> Plaintiffs also named as Defendants a number of adjacent  
23 property owners, former leaseholders, dry cleaning operators, and  
24 manufacturers of dry cleaning products.

25 <sup>3</sup> Defendant M.B.L., Inc. is not a party to this motion and has  
26 not separately filed a motion for attorney's fees.

27 <sup>4</sup> Defendant Sakaye Ichimoto joined the motion on May 21, 2009.  
28 (Doc. 124.)

<sup>5</sup> Defendants George and Frances Wolfe are not a party to this  
motion and have not separately filed a motion for attorney's fees.

1 (Id.)

2 Final judgment was entered on April 16, 2010. (Doc. 182.)

3 On April 30, 2010, Defendants Sakaye Ichimoto and William and  
4 Cinda Jamison separately moved for attorney fees.<sup>6</sup> (Docs. 183 and  
5 187.) Defendant Margaret Jamison filed her motion for fees on May  
6 14, 2010. (Doc. 189.) She requests \$22,200.25 in fees based on  
7 her "prevailing party" status. (Id.)

8  
9 III. DISCUSSION

10 A. Supplemental Briefing

11 In their opposition to this motion, filed on June 28, 2010,  
12 Plaintiffs argued that because Ms. Jamison filed her motion more  
13 than 14 days after the entry of final judgment, her motion was  
14 untimely. Defendant Margaret Jamison did not respond to  
15 Plaintiffs' timeliness arguments via written reply. At oral  
16 argument, however, Ms. Jamison's counsel argued that her client was  
17 "the prevailing party under CERCLA based on Federal Rule of Civil  
18 Procedure 54(d)." Counsel further stated:

19 The motion for attorney's fees is brought under  
20 California Code of Civil Procedure Section 1033.5. And  
21 that's based on contract. And the time frame for filing  
22 should be brought under California law, 30 days, hence  
23 Margaret Jamison's motion is timely.

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

25 On August 10, 2010, the Court requested additional briefing on  
26 the issue of timeliness:

---

27 <sup>6</sup> Defendants Sakaye Ichimoto and William and Cinda Jamison's  
28 motions for attorney's fees were resolved by separate memorandum  
decision. (Doc. 209.)

1 Normally, arguments raised for the first time in a  
2 reply brief or at the hearing on a motion are  
3 disregarded. See *United States v. Bohn*, 956 F.2d 208,  
4 209 (9th Cir. 1992); *United States v. Boyce*, 148  
5 F.Supp.2d 1069, 1085 (S.D. Cal. 2001). However, a  
6 review of the record reveals that Ms. Jamison cited  
7 both Rule 54 and § 1033.5 in her motion, without  
8 identifying which provision controls the timeliness of  
9 her motion and why. Critically, Ms. Jamison's motion  
10 addressed only her entitlement to attorneys' fees based  
11 on "prevailing party" status, disregarding the  
12 timeliness issue (and the relevant legal analysis).  
13 Additionally, Ms. Jamison elected not to file a written  
14 reply despite the fact that Plaintiffs specifically  
15 objected to her motion on timeliness grounds. At oral  
16 argument, she argued for the first time that § 1033.5  
17 controlled the procedural events in this case, not Rule  
18 54(d)(2)(b)(I). As such, Plaintiffs were deprived of  
19 an opportunity to support their arguments, which were  
20 properly raised via written opposition.

21  
22  
23 *Schultz v. Ichimoto*, No. 1:08-CV-526-OWW-SMS, 2010 WL 3210764 (E.D.  
24 Cal. Aug. 10, 2010).

25 The parties filed their supplemental briefs on September 18  
26 and 25, 2010. (Docs. 206 and 208.)

27  
28  
29 B. Merits

30 Plaintiffs argue that Ms. Jamison's motion for attorneys' fees  
31 should be denied as untimely, i.e., the motion was filed after the  
32 time required under Federal Rule of Civil Procedure 54.

33 Under Rule 54 of the Federal Rules of Civil Procedure, a  
34 motion for attorney's fees must be filed "no later than 14 days  
35 after entry of judgment." Fed. R. Civ. P. 54(d)(2)(B)(I). In this  
36 case, final judgment was entered on April 16, 2010. (Doc. 182.)  
37 Defendant Margaret Jamison's motion for attorney's fees was not  
38 filed until May 14, 2010, twenty-eight (28) days after judgment was  
39 entered. Accordingly, Defendant's May 14, 2010 motion for fees was

1 untimely filed.

2 A district court may, however, "for good cause, extend the  
3 time [...] on motion made after the time has expired if the party  
4 failed to act because of excusable neglect." Fed. R. Civ. P.  
5 6(b)(1)(B). In determining whether a party's neglect is excusable,  
6 Courts consider: 1) the danger of prejudice to the opposing party,  
7 2) the length of delay caused by the neglect and its impact on  
8 judicial proceedings, 3) the reason for delay, and whether it was  
9 in the reasonable control of the moving party, and 4) the existence  
10 of good faith on the part of the moving party. See, e.g., *United*  
11 *States v. Torres*, 372 F.3d 1159, 1162 (10th Cir. 2004). Here, Ms.  
12 Jamison does not provide a single reason for failing to comply with  
13 54(d)(2) in this case. More problematic is that she did not  
14 request an extension of the deadline despite three other parties  
15 timely moving for fees and costs; she also filed the motion  
16 without seeking leave of Court. Ms. Jamison does not provide a  
17 sufficient basis on which the Court may permit a late filing.

18 In her supplemental briefing, Ms. Jamison argues Rule 54 is  
19 not applicable here. Citing *Erie R. Co. v. Tompkins*, 304 U.S. 64,  
20 78-80 (1938), Ms. Jamison suggests that state procedural rules  
21 apply in this case because her motion for fees is "substantively  
22 and procedurally based on California law."<sup>7</sup> According to her, the  
23 fee motion was timely because "state procedural rules that are  
24 intimately bound with substantive law may apply in federal actions  
25 where they in fact serve substantive state policies and more  
26

---

27 <sup>7</sup> Specifically, Ms. Jamison contends that the motion is timely  
28 because it was filed within § 1033.5's thirty-day timeframe.

1 properly rules of substantive law within the meaning of Erie."  
2 (Doc. 206 at 3:12-3:16.)

3 Erie and its progeny, however, do not support Ms. Jamison's  
4 arguments in this case. Pursuant to the Erie principles, "federal  
5 courts sitting in diversity apply state substantive law and federal  
6 procedural law." *In re Larry's Apartment, L.L.C.*, 249 F.3d 832,  
7 837 (9th Cir. 2001). The Ninth Circuit has made clear that "Rule  
8 54 establishes the procedure to obtain attorney's fees, and a party  
9 seeking attorney's fees must provide another source for the award  
10 of fees such as a rule, statute, or contract." *Drake v. Lowe's*  
11 *Cos., Inc.*, No. 04-0142-FCD-JFM, 2005 WL 2562653, at \*2 (E.D. Cal.  
12 Oct. 11, 2005) citing *MRO Commc'ns, Inc. v. AT & T Co.*, 197 F.3d  
13 1276, 1282 (9th Cir. 1999) (emphasis added)). The California  
14 statutes cited by Ms. Jamison provide the "source" or "substance"  
15 to recover fees, they do not, however, provide the procedural  
16 mechanism to perfect that alleged right in this case, which falls  
17 within the exclusive ambit of Rule 54(d)(2). See *Reudy v. Clear*  
18 *Channel Outdoors, Inc.*, 693 F. Supp. 2d 1091, 1098-99 (applying  
19 Rule 54(d)(2)'s 14-day timing requirement to award attorney fees  
20 under fee provision in parties' agreement, California Civil Code §  
21 1717 and Code of Civil Procedure §§ 1021 & 1033.5.).

22 Ms. Jamison cites no authority for the proposition that a  
23 state statute providing for recovery of attorney's fees as "costs"  
24 preempts or otherwise supplants Rule 54(d)(2)'s procedural  
25 requirements. This is especially true given that Ms. Jamison seeks  
26  
27  
28

1 fees based on her "prevailing party" status.<sup>8</sup> Compare *Bianco v.*  
2 *Erkins*, 341 F. App'x 329, 331-32 (9th Cir. 2009) (motion for an  
3 award of attorneys' fees was not time-barred under Rule 54(d)(2)  
4 because Plaintiff "sought an award for postjudgment attorneys' fees  
5 and costs incurred in attempting to collect on a judgment, not an  
6 award of fees as a prevailing party that would be subject to the  
7 federal or local rules requiring that requests be made within  
8 fourteen days.") with *Kearney v. Foley and Lardner*, 553 F. Supp. 2d  
9 1178, 1182 (S.D. Cal. 2008) (determining that Rule 54(d)(2)'s 14-  
10 day timing requirement applied to the prevailing party's motion for  
11 fees).<sup>9</sup>

12 Since Plaintiff did not file her motion for fees by May 1,  
13 2010, the relevant time-frame under Rule 54(d)(2), her motion is  
14 untimely and is DENIED. Because the motion is resolved on the  
15 basis of federal procedural law, it is unnecessary to resolve  
16 whether Ms. Jamison can pursue a claim for legal fees in state  
17 court.

18 //

19 //

---

21 <sup>8</sup> As explained in the September 7, 2010 Memorandum Decision,  
22 Ms. Jamison was a "prevailing party" as to the federal CERCLA  
23 claims only. See *Schultz v. Ichimoto*, No. 1:08-CV-526-OWW-SMS,  
24 2010 WL 3504781, at \*2-3. The state law claims were dismissed  
without prejudice. *Id.*

25 <sup>9</sup> In *Kearney v. Foley and Lardner*, the Court determined "that  
26 Rule 54 was applicable and therefore, the filing of defendants'  
27 motion for attorneys' fees was late." *Id.* at 1182. However, the  
28 Court held that the "that defendants had demonstrated excusable  
neglect under Federal Rule of Civil Procedure 6(b)(2), and  
plaintiff would suffer no prejudice if an extension of time was  
granted." *Id.* There was no such showing in this case.

V. CONCLUSION.

For the above reasons:

1. Defendant Margaret Jamison's motion for attorney's fees is DENIED.

IT IS SO ORDERED.

Dated: November 8, 2010

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE