

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOSEPHINE HOUSE, by her guardian
ad litem PUBLIC GUARDIAN OF
STANISLAUS COUNTY,

Plaintiff,

v.

CAL STATE MORTGAGE CO., INC., a
California Corporation; CAL STATE
HOME LOANS INC., a California
corporation; ALEXANDER GOMEZ;
BENJAMIN CAPITAL INC., a California
Corporation; MURPHY SABATINO; LARRY
MENTON; and JOAN HOUSE, a necessary
party,

Defendants.

08-CV-01880-OWW-GSA

MEMORANDUM DECISION AND
ORDER RE: PLAINTIFF'S
MOTION TO AMEND (Docs. 64 &
67)

I. INTRODUCTION

Before the court is Plaintiff's motion for leave to file a
Third Amended Complaint. Plaintiff seeks to add four new
defendants, and to add and clarify alleged facts. Plaintiff does
not seek to allege any new claims or theories of liability.

Defendants Cal State Mortgage Co., Inc. ("Cal State
Mortgage"), Cal State Home Loans Inc. ("Cal State Home Loans"), and
Alexander Gomez (collectively, the "Cal State Defendants") oppose
the motion. Defendant Murphy Sabatino, represented by separate
counsel, has "no general objection" to Plaintiff's motion. If
leave to amend is granted, all Defendants request a modification of
the Scheduling Order to extend the discovery deadlines, the pre-
trial motion deadlines, the pre-trial conference and trial date.
Plaintiff agrees that such an extension would be appropriate. The
following background facts are taken from the parties' submissions

1 in connection with the motion and other documents on file in this
2 case.

3
4 II. BACKGROUND

5 A. Procedural History

6 This is a mortgage fraud case in which Plaintiff, a disabled
7 individual, claims to be the victim of two predatory and
8 discriminatory loans secured by her residence in Turlock,
9 California. On December 5, 2008, Plaintiff filed her initial
10 complaint against those allegedly involved in the illicit lending,
11 including Cal State Mortgage, Cal State Home Loans, Alexander
12 Gomez, Benjamin Capital, Inc. ("Benjamin Capital"), and Murphy
13 Sabatino. (Doc. 1.) Gomez is the president, owner, operator, and
14 designated broker of Cal State Home Loans and Cal State Mortgage.
15 Murphy Sabatino is a licensed broker and officer of Benjamin
16 Capital.

17 On February 9, 2009, Plaintiff filed a First Amended Complaint
18 ("FAC") as a matter of right under Rule 15. (Doc. 12.) The FAC
19 retained all five original defendants and added two more: Larry
20 Menton and Joan House. Menton allegedly participated in arranging
21 the predatory loans at issue. Joan¹ is Plaintiff's sister who co-
22 owns, with Plaintiff, the Turlock residence. Allegedly Joan is a
23 dependent adult with mental limitations. Plaintiff added Joan as
24 a necessary party against whom no relief is sought.

25 On February 16, 2009, the Cal State Defendants filed a motion
26

27 ¹ For sake of clarity, Joan House is referred to by her first
28 name.

1 to dismiss (Docs. 24 and 26) all claims in the FAC. On July 9,
2 2009, the motion was denied in part and granted in part with leave
3 to amend. (Doc. 49.) The Memorandum Decision and Order on the
4 motion to dismiss specified that "Plaintiff shall file a Second
5 Amended Complaint . . . within twenty (20) days" of the filing date
6 of the Memorandum Decision and Order. (*Id.* at 49.)

7 A scheduling conference was held following the Memorandum
8 Decision and Order. On July 28, 2009, a Scheduling Order was
9 issued. (Doc. 53.) Under a section of the Scheduling Order
10 entitled "Orders re Amendments To Pleadings" it states that
11 "Plaintiffs plan to file a Second Amended Complaint on or before
12 July 29, 2009." (*Id.* at 3.) Later in the Scheduling Order, under
13 a section entitled "Pre-Trial Motion Schedule," dates were set for
14 the filing of non-dispositive and dispositive pre-trial motions.
15 (*Id.* at 7.)

16 On July 29, 2009, Plaintiff filed her Second Amended
17 Complaint. This pleading retained all the same defendants, and no
18 new defendants were added.

19 B. The Second Amended Complaint

20 The Second Amended Complaint, currently the operative
21 pleading, asserts claims for: (1) violation of the Truth In Lending
22 Act; (2) violation of the Home Ownership and Equity Protection Act;
23 (3) violation of the Real Estate Settlement Procedures Act; (4)
24 violation of the Fair Housing Act; (5) violation of the California
25 Fair Employment and Housing Act; (6) violation of the California
26 Covered Loans Law; (7) breach of fiduciary duty; (8) financial
27 abuse under the California Welfare and Institution Code; (9) fraud;
28 and (10) a violation of California's Unfair Competition Law,

1 California Business & Professions Code § 17200.

2 Plaintiff's claims relate to three mortgage loans, two of
3 which Plaintiff asserts were predatory and tainted with various
4 forms of illegality. As alleged, after inheriting the Turlock
5 Residence, Plaintiff and her sister obtained a \$10,000 mortgage in
6 order to renovate their kitchen. Due to their mental illness, and
7 inability to transact business and take care of their property,
8 Plaintiff and her sister were unable to keep up with the payments.
9 By 2005, they faced foreclosure.

10 Judy Towns, a non-party to this action, learned of Plaintiff's
11 financial predicament and spoke with Menton regarding the
12 foreclosure. Towns believed that Menton, an alleged agent with
13 Benjamin Capital, could assist Plaintiff with refinancing into an
14 affordable loan. Menton allegedly informed Towns that he would
15 take care of everything.

16 Allegedly, Benjamin Capital set up, and the "Cal State
17 Defendants"² issued, a predatory loan to Plaintiff and her sister.
18 This predatory loan closed on July 1, 2005 (the "July loan"). The
19 July loan is a five-year, interest-only loan for \$28,500 with a
20 20.995% APR. Of the loan amount, \$11,182 was deducted to pay off
21 the outstanding \$10,000 mortgage. The Cal State Defendants charged
22 certain fees for the July loan, as did Benjamin Capital, Menton,
23 and Sabatino.

24 Less than six months later, on December 7, 2005, "Defendants"
25 arranged for and extended a larger and more expensive "predatory"

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27 ² The "Cal State Defendants" include Gomez, Cal State Home
28 Loans and Cal State Mortgage.

1 loan to Plaintiff and her sister. This loan closed on December 15,
2 2005 (the "December loan"). Loan documents indicate that Sabatino
3 completed Plaintiff's loan application. The December loan is a
4 five-year, interest-only loan for \$50,000 with an 18.941% APR.
5 Once again, the Cal State Defendants charged certain fees for the
6 December loan, as did Benjamin Capital, Menton, and Sabatino.

7 The Second Amended Complaint alleges that the APR, fees,
8 commissions, charges, and balloon payments for the July and
9 December loans were excessive, unearned, and unaffordable.
10 Allegedly, each loan was arranged by Benjamin Capital, Menton,
11 Sabatino and their agents, and extended by the Cal State Defendants
12 and their agents, in an effort to collect excessive and unlawful
13 fees, charges, commissions and interest.

14 C. Plaintiff's Motion To Amend And Proposed Third Amended
15 Complaint

16 After conducting depositions in September and November 2009,
17 and after receiving responses back to written discovery,³ Plaintiff
18 represents that she identified four additional parties who, along
19 with the currently named defendants, were "involved in the two
20 predatory loans that at are issue in this action." Accordingly, on
21 December 14, 2009, Plaintiff filed this motion for leave to file a
22 Third Amended Complaint. The four defendants Plaintiff seeks to
23 add are: Cal State Growth Fund, a California Corporation, Roxanna
24 Seward, Leonette Belling, and Milton McLaurin.

25 As to how these Defendants were involved in the predatory
26 loans, through private investments by *Leonette Belling, Cal State*

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28 ³ See Wakily Decl. (Doc. 65).

1 *Growth Fund* allegedly provided the funding for the July and
2 December loans. *Seward*, the co-owner and vice president of Cal
3 State Home Loans and Cal State Mortgage, allegedly served as the
4 loan officer for the July and December Loans. *Belling* along with
5 *Seward* (as well as Defendant Gomez) allegedly reviewed and approved
6 of the July and December loans. *McLaurin*, a co-owner of Defendant
7 Benjamin Capital and Defendant Menton's half brother, allegedly
8 participated in extending the predatory loans.

9 As alleged in the proposed Third Amended Complaint, each loan
10 was arranged by Benjamin Capital, Menton, Sabatino, McLaurin, and
11 their agents, and extended by the "Cal State Defendants." In the
12 Third Amended Complaint, the "Cal State Defendants" now include the
13 Cal State Growth Fund (as the fund supplier), Belling and Seward.
14 In essence, the proposed Third Amended Complaint adds one more
15 defendant to the Benjamin Capital side of the equation (McLaurin)
16 and three more defendants to the Cal State side of the equation
17 (Cal State Growth Fund, Belling and Seward).

18 Aside from adding four defendants, the proposed Third Amended
19 Complaint also alleges a few additional background facts. For
20 example, the proposed Third Amended Complaint alleges that Sabatino
21 brokered the July and December loans. In addition, the proposed
22 Third Amended Complaint clarifies certain facts pled in the Second
23 Amended Complaint. For example, the proposed Third Amended
24 Complaint removes the allegations in the Second Amended Complaint
25 that the July and December loans were "interest-only" loans.

26 D. Amended Scheduling Conference Order

27 Before Plaintiff filed her motion for leave to amend, the
28 Scheduling Conference Order was modified by court order on December

1 2, 2009. (Doc. 63.) The Scheduling Conference Order, as modified,
2 designates March 19, 2010, as the deadline for filing non-
3 dispositive motions, March 26, 2010, as the deadline for filing
4 dispositive pre-trial motions, and March 12, 2010, as the discovery
5 cutoff. Plaintiff filed her motion for leave to file a Third
6 Amended Complaint on December 14, 2009, well before the motion
7 deadlines and discovery cutoff.⁴

8
9 III. STANDARD OF DECISION

10 When, as here, a party can longer amend its pleading as a
11 matter of right, under Rule 15(a)(2) a party may amend its pleading
12 "only with the opposing party's written consent or the court's
13 leave. The court should freely give leave when justice so
14 requires." Rule 15(a)'s liberal policy in favor of "granting leave
15 to amend is not dependent on whether the amendment will add causes
16 of action or parties." *DCD Programs, Ltd. v. Leighton*, 833 F.2d
17 183, 186 (9th Cir. 1987).

18 Rule 15(a)'s liberality is, however, tempered by consideration
19 of several factors. A "district court need not grant leave to
20 amend where the amendment: (1) prejudices the opposing party; (2)
21 is sought in bad faith; (3) produces an undue delay in litigation;
22 or (4) is futile." *AmerisourceBergen Corp. v. Dialysist West, Inc.*,
23 465 F.3d 946, 951 (9th Cir. 2006); see also *Johnson v. Buckley*, 356
24 F.3d 1067, 1077 (9th Cir. 2005) ("Five factors are taken into
25 account to assess the propriety of a motion for leave to amend: bad
26 faith, undue delay, prejudice to the opposing party, futility of

27
28 ⁴ No summary judgment motion has been filed in this case.

1 amendment, and whether the plaintiff has previously amended the
2 complaint." Under a Rule 15(a) analysis, the "consideration of
3 prejudice to the opposing party . . . carries the greatest weight."
4 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th
5 Cir. 2003). "Amending a complaint to add a party poses an
6 especially acute threat of prejudice to the entering party."
7 *Leighton*, 833 F.2d at 187. Accordingly, "[a]voiding prejudice to
8 the party to be added . . . becomes [a] major objective." *Id.*
9 (internal quotation marks omitted) (first alteration in original).

10 11 IV. DISCUSSION AND ANALYSIS

12 A. Preliminary Matter - The Timeliness of Plaintiff's Motion

13 Preliminarily, the Cal State Defendants argue that Rule 15(a)
14 is not the appropriate rule under which to analyze Plaintiff's
15 motion. Defendants argue that Plaintiff's motion for leave to file
16 a Third Amended Complaint was filed beyond the deadline established
17 by the Scheduling Order. According to Defendants, Plaintiff must
18 first show "good cause" to amend the Scheduling Order under Rule
19 16.

20 In support of their argument, the Cal State Defendants point
21 to the initial Scheduling Order dated July 28, 2009, where it
22 states that "Plaintiffs plan to file a Second Amended Complaint on
23 or before July 29, 2009." (*Id.* at 3.) Based on this quoted
24 language, Defendants contend that Plaintiff was required to file
25 her Second Amended Complaint and her *Third Amended Complaint* by
26 July 29, 2009. This argument is patently absurd. On its face, the
27 initial Scheduling Order mentioned only the "Second Amended
28 Complaint" and did not establish, or in any way even suggest, a

1 July 29, 2009, deadline for filing a *Third Amended Complaint*.

2 *The Memorandum Decision and Order* on the motion to dismiss
3 (not the Scheduling Order) granted Plaintiff leave to amend her FAC
4 and established the deadline for filing the *Second Amended*
5 *Complaint*, i.e., within twenty (20) days of filing of the
6 *Memorandum Decision and Order*. Plaintiff complied with this
7 deadline. She filed her *Second Amended Complaint* on July 29, 2009.
8 After filing her *Second Amended Complaint*, the only way Plaintiff
9 could amend her complaint yet again was through a motion requesting
10 leave to amend.

11 As to the motion deadline, the Scheduling Order, as amended,
12 designates March 19, 2010, as the deadline for non-dispositive
13 motions and March 26, 2010, as the deadline for dispositive pre-
14 trial motions. Plaintiff filed her motion for leave to amend on
15 December 14, 2009. Her motion was timely under the Scheduling
16 Order and Rule 16 does not apply. Plaintiff's motion for leave to
17 amend is governed by *Rule 15*, not *Rule 16*. See *AmerisourceBergen*
18 *Corp.*, 465 F.3d at 952 (concluding that because the plaintiff
19 "filed its motion for leave to amend within the deadline set by the
20 district court" *Rule 15*, not *Rule 16*, applied).

21 **B. Rule 15(a) Factors**

22 Certain *Rule 15(a)* factors are not at issue in this motion.
23 No party suggests that the proposed amendment is sought in bad
24 faith, that Plaintiff unreasonably delayed in bringing this motion,
25 or that granting the proposed amendment would cause undue delay in
26 the proceedings.

27 As for prejudice, the most important factor, only Defendant
28 Sabatino explicitly raises an argument about prejudice. Sabatino

1 contends that Plaintiff's amendment would cause prejudice if the
2 discovery deadlines, the motion deadlines, the pretrial conference
3 and the trial date are not extended.

4 1. Prejudice

5 Prejudice can arise when a proposed amendment contains new
6 allegations that would require additional discovery and cause delay
7 in the proceedings. See, e.g., *Coleman v. Quaker Oats Co.*, 232 F.3d
8 1271, 1295 (9th Cir. 2000) (finding prejudice where "granting the
9 request to amend the complaint would likely have required reopening
10 discovery so that [defendant] could develop its evidence to prepare
11 its defenses to this [additional] theory"); *Zivkovic v. S. Cal.*
12 *Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (finding prejudice
13 where the amendment sought "would have required further discovery"
14 late in the litigation); *Lockheed Martin Corp. v. Network*
15 *Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) ("A need to
16 reopen discovery and therefore delay the proceedings supports a
17 district court's finding of prejudice from a delayed motion to
18 amend the complaint.").

19 Here, no party disputes that the addition of four new
20 defendants would require additional discovery concerning their
21 involvement in this case and would also cause some delay in the
22 proceedings. Plaintiff agrees with Defendants that if the motion
23 for leave were granted, the Scheduling Order "should be re-opened
24 to allow parties sufficient time to prepare for trial."

25 Normally, when a proposed pleading amendment would require
26 additional discovery and cause delay in the proceedings, a finding
27 of prejudice is warranted. Here, however, Defendants do not argue
28 that the need for additional discovery and delay in the proceedings

1 would cause them any prejudice. Instead, Defendant Sabatino argues
2 that the amendment *would* cause prejudice *if* the current discovery
3 deadlines, the deadlines on pre-trial motions, and the pre-trial
4 conference and trial date were not extended. Likewise, the Cal
5 State Defendants suggest that if the motion to amend is granted,
6 these deadlines and dates should be extended "to avoid any
7 prejudice." This is a rare case in which the defendants, when
8 faced with a motion to amend the complaint, are actually
9 *requesting*, but not objecting to, additional discovery and trial
10 preparation time. On the facts of this case, the pleading
11 amendment would not cause prejudice to Defendants. Any prejudice
12 to the four new defendants can be obviated by modifying the current
13 Scheduling Order's deadlines and dates.

14 2. Futility

15 The Cal State Defendants argue that Plaintiff's proposed
16 addition of Belling and Seward as defendants is "futile" because
17 the entities for whom these individuals allegedly work, Cal State
18 Mortgage and/or Cal State Home Loans, are already named defendants.
19 In turn, these named entity defendants potentially face respondeat
20 superior liability for Belling and Seward's actions. According to
21 the Cal State Defendants, nothing in the proposed Third Amended
22 Complaint suggests that Belling and Seward were acting in their
23 "individual capacities," i.e., in some capacity other than as an
24 employee within the scope of their employment with Cal State
25 Mortgage and/or Cal State Home Loan. The Cal State Defendants
26 argue that "there is nothing that Plaintiff can recover from
27 Belling and Seward that she cannot already recover from the
28

1 [currently named] Cal State Defendants."⁵

2 This argument is not persuasive. Even assuming the currently
3 named Cal State entity defendants face liability, as employers, for
4 Belling and Seward's conduct, the Cal State Defendants fail to
5 explain why it is improper for Plaintiff to sue Belling and Seward
6 individually for their alleged illegal conduct. For example, there
7 is no argument that the federal and state statutes purportedly
8 violated in this case do not give rise to individual liability.

9 Nor could it be argued that Belling and Seward cannot be held
10 individually liable for fraud. Common law fraud is a tort, and "an
11 agent or employee is always liable for his own torts, whether his
12 employer is liable or not." *Shafer v. Berger, Kahn, Shafton,*
13 *Figler, Simon & Gladstone*, 107 Cal. App. 4th 54, 68 (2003)
14 (internal quotation marks omitted). Belling and Seward face
15 individual liability for any fraud they committed, even if, at the
16 time of the fraud, they were acting within the course and scope of
17 their employment with any currently named defendant. Plaintiff is
18 entitled to seek recourse against each potentially responsible
19 individual party.

20 The Cal State Defendants further argue that Plaintiff's
21 proposed addition of "Cal State Growth Fund" as a separate
22 defendant is "futile." According to the Cal State Defendants,
23 "Plaintiff fails to explain why or how" Cal State Growth Fund's
24 purported funding of the predatory loans creates any "additional
25 liability" in this case. The Cal State Defendants overlook
26 additional allegations in the proposed Third Amended Complaint that

27 ⁵ The Cal State Defendants make the same argument with respect
28 to McLaurin who allegedly worked for Benjamin Capital.

1 link Cal State Growth Fund to the claimed illegality. For example,
2 the Third Amendment Complaint explains that each loan was "extended
3 by the Cal State Defendants," including Cal State Growth Fund, as
4 part of an effort to "collect excessive and unlawful fees, charges,
5 commission, and interest." (Doc. 64-2 at 12 & n.1.) Elsewhere in
6 the Third Amended Complaint, Plaintiff alleges that "[e]ach
7 defendant charged excessive fees, interest, charges and
8 commissions" (Doc. 64-2 at 25 (emphasis added)) and that "Cal State
9 Growth Fund," among other defendants, committed fraud by
10 "misrepresenting . . . that the loans were open lines of credit"
11 (Doc. 64-2 at 26). In others words, Plaintiff has alleged facts
12 implicating Cal State Growth Fund in the purported illegality. It
13 is the *Cal State Defendants* (not Plaintiff) who have failed to
14 explain why or how Cal State Growth Fund cannot be held liable for
15 its participation in the asserted illegality.

16 In light of the record and arguments presented, a
17 consideration of the relevant factors does not overcome Rule
18 15(a)'s liberal policy in favor of permitting amendment to include
19 any potentially responsible party. Leave to amend is appropriate.

20
21 V. CONCLUSION

22 For the reasons stated, Plaintiff's motion for leave to file
23 a Third Amended Complaint is GRANTED.

24 Within five (5) days following electronic service of this
25 decision, the parties shall contact the courtroom deputy to set a
26 scheduling conference.

27 IT IS SO ORDERED.

28 Dated: February 26, 2010

/s/ Oliver W. Wanger

UNITED STATES DISTRICT JUDGE

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