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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

FAIR HOUSING COUNCIL	)	1:10cv02073 LJO DLB
OF CENTRAL CALIFORNIA, INC., et al.,	)	
	)	ORDER DENYING PLAINTIFFS' MOTION
	)	TO COMPEL DEFENDANT HENRY NUNEZ
	)	TO COMPLY WITH DISCOVERY ORDER AS
	)	MOOT (Document 49)
Plaintiffs,	)	
	)	ORDER GRANTING PLAINTIFFS' MOTION
v.	)	FOR LEAVE TO FILE FIRST AMENDED
	)	COMPLAINT (Document 46)
	)	
	)	ORDER DENYING PLAINTIFFS' MOTION
HENRY D. NUNEZ, et al.,	)	TO MODIFY SCHEDULING ORDER AS
	)	MOOT (Document 51)
	)	
	)	ORDER VACATING SCHEDULING ORDER
	)	AND SETTING STATUS CONFERENCE
Defendants.	)	

Plaintiffs Fair Housing Council of Central California, Inc., Nelida Mendiola, Martha Lemos and Maria Nava ("Plaintiffs") filed the present motions (1) to compel Defendant Henry Nunez to comply with the Court's November 3, 2011 discovery order, (2) for leave to file a first amended complaint, and (3) to modify the scheduling order. The matters were heard on January 13, 2012, before the Honorable Dennis L. Beck, United States Magistrate Judge. Elizabeth Brancart appeared telephonically on behalf of Plaintiffs. Daniel Harralson appeared on behalf of Defendant Henry Nunez. Henry Nunez appeared as counsel on behalf of Defendant Minnie Avila.

**INTRODUCTION**

Plaintiffs Nelida Mendiola, Martha Lemos and Maria Nava are current or former tenants

1 of the Cypress Estates apartment complex (“Cypress Estates”), each of whom resided there with  
2 minor children. Defendant Henry Nunez controls the management of Cypress Estates.  
3 Complaint, ¶¶ 8-9. Cypress Estates claims to be a housing complex for older persons under the  
4 Housing for Older Persons Act (“HOPA”), [42 U.S.C. § 3607\(b\)\(2\)](#).

5 Plaintiffs and other residents complained of discrimination at Cypress Estates to the Fair  
6 Housing Council of Central California, a nonprofit corporation ensuring compliance with fair  
7 housing laws throughout the Central Valley. Complaint, ¶¶ 4-7. Plaintiffs allege that Defendants  
8 enforced unreasonable and discriminatory rules against them and their children, served them with  
9 eviction notices because of their protected familial status, and made derogatory statements about  
10 their national origin that interfered with the enjoyment of their tenancy. Complaint, ¶¶ 12-22.

11 Plaintiffs assert violations of the Fair Housing Act ([42 U.S.C. §§ 3601, et seq.](#)), the  
12 California Fair Employment and Housing Act (Government Code §§ 12955, et seq.), the  
13 [California Civil Code §§ 1714, 1927, 1940.2, 44-46](#), and the [California Code of Civil Procedure](#)  
14 [§§ 1159 and 1160](#). Plaintiffs seek monetary damages, including punitive damages, along with  
15 declaratory and injunctive relief.

16 **I. MOTION TO COMPEL DEFENDANT HENRY NUNEZ TO COMPLY WITH**  
17 **DISCOVERY ORDER**

18 On January 10, 2012, Plaintiffs filed a reply stating the motion to compel is now moot.  
19 Doc. 71. At the hearing, the parties confirmed that the motion to compel was resolved.  
20 Accordingly, Plaintiffs’ motion to compel Defendant Henry Nunez to comply with discovery  
21 order is DENIED AS MOOT.

22 **II. MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT**

23 A. Introduction

24 On November 10, 2011, Plaintiffs filed a motion for leave to file a first amended  
25 complaint. Plaintiffs seek to add two new defendants, Joy Nunez and Cypress Estates, Inc., and  
26 seek to add factual allegations (1) that defendant Henry Nunez holds a partial ownership interest  
27 in the Cypress Estates apartments, (2) that his use of the corporate form should be disregarded  
28 and (3) that defendants Henry Nunez, Joy Nunez and Cypress Estates, Inc. knew or should have

1 known that Minnie Avila was an unfit manager and their continued employment of Ms. Avila as  
2 their agent was in reckless disregard of the rights of plaintiffs and other tenants of the Cypress  
3 Estates to live in an environment free of housing discrimination.

4 On December 30, 2011, Defendant Henry Nunez filed an opposition to Plaintiffs' motion  
5 to amend. Doc. 61.

6 On June 6, 2011, Defendant Herminia (Minnie) Avila filed an untimely opposition to the  
7 motion to amend. Doc. 66.

8 On January 6, 2012, Plaintiffs filed a reply to Defendant Nunez. Doc. 65. On January  
9 10, 2012, Plaintiffs filed a reply to Defendant Avila. Doc. 69. With leave of court, Plaintiffs  
10 also filed a supplemental reply to Defendant Nunez on January 11, 2012. Doc. 73.

11 On January 12, 2012, Defendants Henry Nunez and Herminia Avila filed an opposition to  
12 Plaintiffs' reply brief, a supporting memorandum and a request for judicial notice in support of  
13 their opposition. Docs. 74, 75 and 76.

#### 14 B. SUMMARY OF PROPOSED AMENDMENT

15 As noted, Plaintiffs seek to add two new defendants to this action: (1) Joy Nunez,  
16 Defendant Henry Nunez's wife, who holds an ownership interest in Cypress Estates; and (2)  
17 Cypress Estates, Inc., a corporation wholly owned by Defendant Henry Nunez, which also holds  
18 an ownership interest in Cypress Estates. The proposed amended complaint also adds the  
19 following:

20 (1) allegations based on public records that some of the parcels on which the relevant  
21 apartments are located have been owned, in part, by defendant Henry Nunez, Joy Nunez and  
22 Cypress Estates, Inc. Plaintiffs note that Cypress Estates, Inc. filed a bankruptcy petition on  
23 March 9, 2010, but Plaintiffs were not listed as creditors. On July 7, 2011, the bankruptcy court  
24 issued its final decree and the automatic stay is now lifted;

25 (2) allegations seeking injunctive relief against Cypress Estates, Inc. to stop the  
26 discriminatory housing practices at the apartments. Plaintiffs seek to establish a right to collect  
27 damages from the liability policy maintained by Cypress Estates, Inc.;

28 (3) allegations that defendant Minnie Avila, acting as agent of the other defendants,

1 repeatedly made derogatory statements to the occupants at the Cypress Estates apartments  
2 concerning families with children and persons of Mexican ancestry;

3 (4) acknowledgment that Ms. Avila filed a Chapter 13 bankruptcy petition and Plaintiffs  
4 are the primary unsecured creditors. Plaintiffs note the automatic stay imposed by the bankruptcy  
5 filing and represent that they have added no new claims or allegations against Ms. Avila;

6 (5) allegations concerning Defendants' prior history of alleged Fair Housing Act violations  
7 and their reckless disregard in retaining Defendant Minnie Avila. The allegations include  
8 instances of multiple lawsuits/discrimination complaints beginning in 2006 and continuing  
9 through 2010 involving Minnie Avila and the Cypress Estates apartments. Defendants Henry  
10 Nunez and Minnie Avila repeatedly agreed to attend fair housing training. Plaintiffs allege that  
11 Ms. Avila did not attend fair housing training as part of a conciliation agreement in 2010; and

12 (6) allegations that Defendant Henry Nunez manipulated the corporate form. He is the  
13 sole shareholder and president of Cypress Estates, Inc., he shares an address with the corporation  
14 and he is the only person at Cypress Estates with authority to issue notices or sign leases. Per  
15 public records, by a series of conveyances Defendant Henry Nunez transferred ownership of the  
16 parcels making up the Cypress Estates apartments to himself and to his wife, Joy Nunez, as joint  
17 tenants and they leased the property back to Cypress Estates, Inc. Between 2005 and 2007, Henry  
18 and Joy Nunez secured mortgages on the parcels. In July 2009, Henry Nunez executed a grant  
19 deed to Cypress Estates, Inc. conveying his interest in certain parcels, but didn't record it at that  
20 time. In November and December 2009, the trustees holding the deeds of trust executed by Henry  
21 and Joy Nunez recorded notices of default. On February 18, 2010, Defendant Henry Nunez had  
22 the July 2009 grant deed recorded. On March 9, 2010, Cypress Estates, Inc. filed Chapter 11  
23 bankruptcy. The United States Trustee filed a motion to dismiss or convert the bankruptcy for  
24 lack of counsel. Facts showed that the corporation's counsel, Tomas D. Nunez, had the same  
25 address, telephone number, fax number, email address and ECF filing account as Henry Nunez.  
26 The trustee withdrew the motion after new counsel was substituted.

27 C. Legal Standard

28 [Federal Rule of Civil Procedure Rule 15\(a\)](#) provides that the court should "freely give

1 leave [to amend] when justice so requires.” The United States Supreme Court has stated:

2 [i]n the absence of any apparent or declared reason – such as undue delay, bad faith or  
3 dilatory motive on the part of the movant, repeated failure to cure deficiencies by  
4 amendments previously allowed, undue prejudice to the opposing party by virtue of  
allowance of the amendment, futility of amendment, etc. – the leave sought should, as the  
rules require, be “freely given.”

5 [Foman v. Davis, 371 U.S. 178, 182 \(1962\)](#). The Ninth Circuit has summarized these factors to  
6 include the following: (1) undue delay; (2) bad faith; (3) prejudice to the opponent; and (4) futility  
7 of amendment. [Loehr v. Ventura County Cmty. Coll. Dist., 743 F.2d 1310, 1319 \(9th Cir. 1984\)](#).  
8 Granting or denial of leave to amend rests in the sound discretion of the trial court. [Swanson v.](#)  
9 [United States Forest Serv., 87 F.3d 339, 343 \(9th Cir. 1996\)](#). Despite the policy favoring  
10 amendment under [Rule 15](#), leave to amend may be denied if the proposed amendment is futile or  
11 would be subject to dismissal. [Saul v. United States, 928 F.2d 829, 843 \(9th Cir. 1991\)](#).

12 D. Analysis

13 As a preliminary matter, the Court addresses the pleadings filed by Defendants Henry  
14 Nunez and Minnie Avila on January 12, 2012. Defendants Nunez and Avila filed an untimely  
15 opposition to Plaintiffs’ reply brief, along with a supporting memorandum and request for judicial  
16 notice. Docs. 74, 75 and 76. At the hearing, Defendant Henry Nunez, who also serves as counsel  
17 for Defendant Avila, indicated that the documents should not have been filed. Accordingly, the  
18 Court HEREBY ORDERS these documents STRICKEN FROM THE RECORD.

19 The Court now turns to the merits of the underlying motion.

20 1. Undue Delay

21 Plaintiffs argue that the proposed amendment is timely because the scheduling order sets  
22 no deadline to amend the pleadings and the claims asserted against the proposed defendants are  
23 within the statutory time limits.

24 Defendant Nunez counters that there was no reason why Plaintiffs could not have included  
25 the proposed amendments when they originally filed the complaint because they knew that he was  
26 an officer for Cypress Estates, Inc. However, Plaintiffs explain that they first became aware of the  
27 need to amend their complaint in response to the motion to dismiss filed by Defendant Henry  
28 Nunez in October 2011. In the motion to dismiss, Mr. Nunez claimed he could not be held liable

1 as an officer of Cypress Estates, Inc. and that Cypress Estates, Inc. had not been named in the  
2 complaint. Doc. 38. When Mr. Nunez claimed he could not be liable, Plaintiffs' counsel  
3 reviewed public records identifying the transactions between Henry and Joy Nunez and Cypress  
4 Estates, Inc. in an effort to determine ownership interests in the Cypress Estates apartments.

5 To the extent defense counsel attempted to demonstrate that Plaintiffs' were aware of the  
6 proposed amendments prior to the outset of this action, they were unsuccessful. The Court finds  
7 no undue delay by Plaintiffs.

## 8 2. Bad Faith

9 Defendant Henry Nunez argues that the proposed amendment is brought in bad faith to  
10 annoy him and Joy Nunez. Defendant argues that there is no conceivable reason, other than a  
11 failure to investigate, for not suing Henry Nunez in his individual capacity at the outset of this  
12 case. Defendant also asserts that Plaintiffs' counsel knew of a lease identifying both Henry and  
13 Joy Nunez as co-owners of the Cypress Estates properties since 2007 based on a prior case.

14 Plaintiffs counter that Defendant Nunez already was named in his individual capacity in  
15 the original complaint as an owner of Cypress Estates apartments. As to Defendant's claim that  
16 Plaintiffs knew of a lease identifying both Joy and Henry Nunez as co-owners of the properties,  
17 Plaintiffs' counsel indicated that they had never seen a copy of any lease because there was no  
18 discovery in the prior litigation.

19 Defendant Minnie Avila also claims bad faith on the part of Plaintiffs by including her in  
20 the proposed amendments. On June 6, 2011, Defendant Avila filed an untimely opposition to the  
21 motion for leave to file a first amended complaint. Doc. 66. In her motion, she explains that she  
22 filed for Chapter 13 bankruptcy on July 8, 2011, and there is an automatic stay against any action  
23 being taken against her without prior approval from the bankruptcy court. She contends that  
24 Plaintiffs failed to file a proof of claim with the bankruptcy court and therefore they cannot take  
25 any action against her in this case. Ms. Avila wants to reinstate the motion to dismiss the original  
26 complaint.

27 In the proposed amended complaint, Plaintiffs have not added any new allegations or  
28 claims against Ms. Avila. Further, Plaintiffs acknowledged that their claims against Ms. Avila are

1 subject to the automatic stay. Proposed First Amended Complaint, Doc. 47-1. At the hearing,  
2 Ms. Avila’s counsel admitted that the allegations against Ms. Avila have not changed. Instead,  
3 the proposed complaint contains allegations regarding the interactions of defendants with Ms.  
4 Avila.

5 The Court does not find that Plaintiffs are seeking to amend for an improper purpose.

6 3. Prejudice to Defendant

7 Plaintiffs assert that the proposed amendment adds no new claims against the current  
8 defendants and the new defendants will not be prejudiced because (1) they are so closely related to  
9 Defendant Henry Nunez; and (2) the insurance company providing liability insurance for the  
10 Cypress Estates complex is defending the action. Declaration of Elizabeth Brancart (“Brancart  
11 Dec.”) ¶ 3.

12 Defendant Henry Nunez counters that he will be unduly prejudiced because these new  
13 allegations will increase litigation costs by adding Joy Nunez and by seeking to pierce the  
14 corporate veil. However, litigation costs alone are not grounds for denial of leave to amend. See  
15 Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001).

16 4. Futility

17 Defendant Nunez argues that the proposed amendments are futile. “Futility of amendment  
18 can, by itself, justify the denial of a motion for leave to amend.” Bonin v. Calderon, 59 F.3d 815,  
19 845 (9th Cir.1995). However, denial of leave to amend due to futility is rare. Ordinarily, courts  
20 will defer consideration of challenges to the merits of a proposed amended pleading until after  
21 leave to amend is granted and the amended pleading is filed. Netbula v. Distinct Corp., 212  
22 F.R.D. 534, 539 (N.D.Cal.2003); Britz Fertilizers v. Nationwide Agribusiness Ins. Co., 2011 WL  
23 5118521 (E.D. Cal. Oct. 27, 2011).

24 Here, the Court defers ruling on the merits of the proposed amended complaint.  
25 Notwithstanding, the Court notes that certain of defendants’ arguments regarding futility are  
26 unsupported or inaccurate. For example, Defendant Nunez argues that the amendments are futile  
27 because Plaintiffs failed to exhaust their administrative remedies under the California Fair  
28 Employment and Housing Act (“FEHA”), Cal. Gov. Code §§ 12955 et seq. However, FEHA

1 does not require exhaustion of administrative remedies for housing claims. [See Cal. Gov. Code §](#)  
2 [12989.1; House v. Cal. State Mortg. Co., 2009 WL 2031775, \\*18 \(E.D. Cal. 2009\)](#) (denying  
3 motion to dismiss FEHA housing cause of action on exhaustion grounds).

4 As an additional example, Defendant Nunez argues that the proposed amendments are  
5 futile because Plaintiff Fair Housing Council of Central California, Inc. has no standing to bring  
6 the seventh claim for relief pursuant to the Unruh Civil Rights Act. However, the proposed  
7 amended complaint clearly states that the seventh cause of action for violation of the Unruh Act is  
8 brought only by Plaintiffs Mendiola, Nava and Lemos. Proposed First Amended Complaint p. 15,  
9 Doc. 47-1.

10 Following consideration of the relevant Eitel factors, Plaintiffs' motion for leave to file a  
11 first amended complaint is GRANTED. To accommodate service of the amended complaint,  
12 along with the possible retention of counsel and tender of defense to the insurance carrier for  
13 Cypress Estates, Inc., the Court HEREBY VACATES the Scheduling Order dated March 21,  
14 2011. Doc. 16.

15 A status conference is SCHEDULED for February 7, 2012, at 9:00 a.m.

### 16 **III. MOTION TO MODIFY SCHEDULING ORDER**

17 On November 15, 2011, Plaintiffs filed a motion to modify the Scheduling Order pursuant  
18 to [Rule 16\(b\)\(4\) of the Federal Rules of Civil Procedure](#). (Doc. 51.) As the existing scheduling  
19 order has been vacated, Plaintiffs' motion to modify the scheduling order is DENIED AS MOOT.

### 20 **CONCLUSION**

21 For the reasons stated above, the Court HEREBY ORDERS as follows:

- 22 1. Plaintiffs' motion to compel Defendant Henry Nunez to Comply with Discovery  
23 Order is DENIED AS MOOT;
- 24 2. The opposition to Plaintiffs' reply brief, supporting memorandum and request for  
25 judicial notice filed by Defendants Henry Nunez and Minnie Avila on January 12,  
26 2012 (Documents 74, 75 and 76) are STRICKEN FROM THE RECORD;
- 27 3. Plaintiffs' motion for leave to file a first amended complaint is GRANTED;
- 28 4. Plaintiffs' claims, as set forth in the original complaint filed November 8, 2010,



