UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BEL AIR MART, et al.,

Plaintiffs,

v.

ARNOLD CLEANERS, INC. et al.,

Defendants.

No. 2:10-cv-02392-MCE-EFB

MEMORANDUM AND ORDER

In September 2010, Plaintiffs Bel Air Mart ("Bel Air") and Wong Family Investors, L.P. ("WFI") (collectively, "Plaintiffs"), filed this environmental cleanup action against numerous Defendants. Plaintiffs seek recovery for property damage and cleanup costs caused by contamination from a dry cleaning facility ("the Facility") formerly operated on the real property located at the southeast corner of Arden Way and Eastern Avenue in Sacramento, California (the "Property"). Defendants in this case include parties who allegedly owned and/or operated the Facility, or owned and/or operated the Property, for various periods of time from an uncertain date before the 1970s through about 2007. Plaintiffs' claims against the Defendants include claims for Cost Recovery pursuant to section 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"); contribution pursuant to California Health and Safety Code

section 25300; Declaratory Relief pursuant to CERCLA section 113(g), 42 U.S.C. § 9613(g); Declaratory Relief pursuant to 28 U.S.C. § 2201; Equitable Indemnification; Declaratory Relief for Equitable Indemnification; Contribution under state common law; Negligence; Negligence Per Se; Private Nuisance pursuant to California Civil Code section 3479; Nuisance Per Se; Trespass; and Breach of Contract. See First Amended Complaint, Dec. 9, 2010, ECF No. 7. As discussed below, three motions by various Defendants are currently pending before this Court, ECF Nos. 205, 214 and 215.[1]

BACKGROUND

On January 31, 2011, Defendant and counterclaimants R. Gern Nagler, as Trustee of the John W. Burns Testamentary Trust, and Robert Gern Nagler (collectively, "Nagler") filed a Counterclaim against Plaintiffs and the former owners/operators of the facility who are named defendants in the underlying action. See ECF No. 38. On February 2, 2011, Nagler filed a First Amended Counterclaim. Nagler alleges claims for Negligence, Declaratory Relief, Equitable Indemnity and Contribution. See ECF No. 41.

Nagler now seeks leave to file a Second Amended Counterclaim to include a breach of contract claim against Bel Air Mart and two statutory claims against the other parties for, in essence, indemnity/contribution. Mot., Nov. 3, 2013, ECF No. 214. By way of a separate Motion, Nagler also seeks leave to file an additional Third-Party Complaint against the Wong family members, individually and in their capacities as trustees for their respective trusts, for breach of guaranty and/or liability as general partners of WFI, under section 15643 of the California Corporations Code. Mot., Nov. 3, 2013, ECF No. 215.

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[1] Because oral argument would not be of material assistance, the Court ordered this matter submitted on the briefs. E.D. Cal. Local R. 230(g). See Minute Order, Jan. 7, 2014, ECF No. 244.

On July 20, 2012, Defendant and Counter and Cross-Claimant Century Indemnity Company ("Century Indemnity")[2] filed a Counter and Cross-Claim against Plaintiffs and the former owners/operators of the Facility who are named defendants in the underlying action, alleging claims for relief for Contribution, Declaratory Relief, Negligence, Hazardous Substance Statutory Indemnity and Equitable Indemnity. See ECF No. 149.

Century Indemnity now moves for sanctions against Bel Air on the basis of spoliation of evidence. Mot., Oct. 8, 2013, ECF No. 205. Specifically, Century Indemnity asks that the Court dismiss Plaintiff's entire action as a spoliation sanction, or, in the alternative, for evidentiary and monetary sanctions. See id. Several of Century Indemnity's co-Defendants joined its Motion. See ECF Nos. 208-213.

For the following reasons, Century Indemnity's Motion to dismiss, or, in the alternative, for evidentiary and monetary sanctions, ECF No. 205, is denied without prejudice. Further, Nagler's motion for leave to file a Second Amended Counterclaim, ECF No. 214, is granted in part and denied in part, and Nagler's motion for leave to file a Third Party Complaint, ECF No. 215, is denied, all without prejudice.

ANALYSIS

A. Century Indemnity's Motion for Sanctions (ECF No. 205)

In 2007, Bel Air retained environmental consultant Klenfelder, who conducted a preliminary investigation which showed possible PCE and TECE contamination at the Property. In 2008, Bel Air nonetheless destroyed the Facility, purportedly in the normal course of business, as part of a long planned expansion of its Arden Way facility. In 2010, Plaintiffs brought this environmental cleanup action against the various owners and operators of the Facility.[3]

[2] Century Indemnity is successor to CCI Insurance Company, which in turn is successor to Insurance Company of North America, the alleged insurer of The Estate of Ronald G. Armstrong, Deceased, pursuant to California Probate Code section 550.

[3] With respect to Plaintiffs' first ex parte application, ECF No. 233, on December 12, 2013, on the Court's own motion, the Court granted, in part, Plaintiff's request to file a Sur-Reply to Century Indemnity's Reply re Motion for Sanctions (ECF No. 229). ECF No. 241. The Court also permitted a response to that

The crux of Defendants' argument for spoliation sanctions is that by destroying the Facility, Bel Air destroyed the most critical evidence in this case with full knowledge and acquiescence of its attorneys. Defendants allege that Bel Air made no attempt to preserve any evidence relating to the contamination and contend they will therefore have difficulty proving what or where the source of the contamination was or whether Bel Air or other parties are responsible for the cleanup and other resulting costs. According to Defendants, Bel Air's destruction of evidence has rendered meeting this burden extremely difficult, if not impossible. More specifically, Defendants contend that the only way to conclusively determine the effect of the demolition on the spread of contamination is to compare the soil and soil gas results before the demolition to the results after the demolition. As a result of the Facility's removal, this comparison is no longer possible.

Defendants thus move for dismissal of this action as a spoliation sanction, or in the alternative, for evidentiary sanctions and monetary sanctions. Specifically, Defendants argue that as of September 13, 2007, Bel Air had knowledge of potential environmental problems related to the Facility, and had a duty to preserve evidence, because: (1) its in-house and outside counsel were involved with the contamination issues at the Property since the initial site investigation; (2) it specifically carved out future environmental claims against one of the operators of Arnold Cleaners, Han Joo; (3) discussions between Bel Air's counsel and its environmental consultant regarding "pursuing the matter" had already taken place; (4) there was extensive correspondence to and from both Bel Air's in-house and outside counsel related to the "legal representation of Bel Air Mart" well before the demolition took place; and (5) Bel Air's use of the attorney work product privilege for activities that took place before the demolition evidences Bel Air's specific contemplation of this CERCLA action.

Sur-Reply by Defendants. Id. Thereafter, Plaintiffs and Century Indemnity filed supplemental briefing. See ECF Nos. 242, 243. The Court did not permit any further filings by the parties prior to the scheduled oral argument. See ECF No. 241. Because all of the parties were allowed to submit supplemental briefing, the Court declines to strike any portion of Century Indemnity's Reply (ECF No. 229). Thus, Plaintiffs' first ex parte application, ECF No. 233, is denied as moot.

In opposition, Bel Air asserts that, at the time of demolition in 2008, it did not know of the extent and potential cost of the contamination and therefore did not view litigation as likely. Furthermore, Bel Air states that the notion that it knew or should have known that litigation was imminent because it had knowledge of potential environmental problems is "nonsense," and numerous environmental problems are resolved without litigation such that the facts known to Bel Air at that time did not trigger a duty to preserve the Facility.[4]

"Spoliation of evidence is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence, in pending or future litigation." Kearney v. Foley & Lardner, LLP, 590 F.3d 638, 649 (9th Cir. 2009). "The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation." World Courier v. Barone, C 06-3072 TEH, 2007 WL 1119196 (N.D. Cal. Apr. 16, 2007) (citing Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998)). "This is an objective standard, asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation." Micron Tech., Inc. v. Rambus Inc., 645 F.3d 1311, 1320 (Fed. Cir. 2011).

"Although the Ninth Circuit has not precisely defined when the duty to preserve is triggered, trial courts in this Circuit generally agree that, '[a]s soon as a potential claim is identified, a litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.'" Apple Inc. v. Samsung Electronics Co., Ltd., 888 F. Supp. 2d 976, 991 (N.D. Cal. 2012) (citing In re Napster, Inc. Copyright Litig.,

[4] Bel Air objects to Century Indemnity's evidence on several grounds. Those objections, ECF No. 221-1, are overruled without prejudice because it was unnecessary for the Court to rely on that evidence to resolve this dispute. The Court similarly denies Century Indemnity's Motion to Strike Bel Air's opposition (ECF No. 231), which the Court considers timely under Local Rule 230. The Court is also not persuaded that Bel Air's admitted error in exceeding the page limits warrants striking the Opposition either, which Defendant does not indicate resulted in any prejudice. Century Indemnity's Motion to Strike, ECF No. 231, is thus denied. However, all parties are admonished to scrupulously follow the terms of this Court's Scheduling Order going forward.

462 F. Supp. 2d 1060, 1067 (N.D. Cal. 2006)); see AmeriPride Servs., Inc. v. Valley Indus. Serv., Inc., S-00-113 LKK/JFM, 2006 WL 2308442, at *4 (E.D. Cal. Aug. 9, 2006) (anticipated litigation date is when a potential claim is identified); see also Hynix Semiconductor Inc. v. Rambus Inc., 645 F.3d 1336, 1346-47 (Fed. Cir. 2011) (litigation need only be reasonably foreseeable, not immediate or certain). The duty to preserve evidence also attaches when "a party should have known that the evidence may be relevant to future litigation." In re Napster, Inc. Copyright Litig., 462 F.Supp.2d 1060, 1068 (N.D. Cal. 2006) (citing Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)). However, "[a] general concern over litigation does not trigger a duty to preserve evidence." Realnetworks, Inc. v. DVD Copy Control Ass'n, Inc., 264 F.R.D. 517, 526 (N.D. Cal. 2009).

> When litigation is "reasonably foreseeable" is a flexible fact-specific standard that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry. This standard does not trigger the duty to preserve documents from the mere existence of a potential claim or the distant possibility of litigation.
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> However, it is not so inflexible as to require that litigation be "imminent, or probable without significant contingencies."

Micron Tech., 645 F.3d at 1320.

"The moving party has the burden of demonstrating sanctionable conduct and prejudice. The weight of that burden depends on the [specific] circumstances." Rev 973 LLC v. Mouren-Laurens, CV 98-10690 AHM (EX), 2009 WL 273205 at *1 (C.D. Cal. Feb. 2, 2009). To decide which specific spoliation sanction to impose, courts generally consider three factors: "(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party." Apple, Inc. v. Samsung Electronics Co., Ltd., 888 F. Supp. 2d 976, 992 (N.D. Cal. 2012). "While a district court has broad discretion in choosing an appropriate sanction for spoliation, the applicable sanction should be molded to serve the prophylactic, punitive,

and remedial rationales underlying the spoliation doctrine." Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001). "In addition, a court must find some degree of fault to impose sanctions. . . . But dismissal should be avoided if a lesser sanction will perform the necessary function." Id.

"The exercise of a court's inherent powers must be applied with restraint and discretion and only to the degree necessary to redress the abuse." Reinsdorf v. Skechers U.S.A., Inc., 86 Fed. R. Serv. 3d 377 (C.D. Cal. 2013) (citing Chambers v. NASCO, Inc., 501 U.S. 32, 45 (1991)). Accordingly, the determination of an appropriate sanction for spoliation is "confined to the sound discretion of the trial judge, and is assessed on a case-by-case basis." Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001) (internal citations omitted). "A party's destruction of evidence need not be in 'bad faith' to warrant a court's imposition of sanctions." Rev 973 LLC v. Mouren-Laurens, CV 98-10690 AHM (EX), 2009 WL 273205 at *1 (C.D. Cal. Feb. 2, 2009).

"Dismissal under a court's inherent powers is justified in extreme circumstances. In the Ninth Circuit, extraordinary circumstances exist where there is a pattern of disregard for Court orders and deceptive litigation tactics that threaten to interfere with the rightful decision of a case." In re Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060, 1071 (N.D. Cal. 2006) (internal citations omitted).

> Dismissal is an available sanction when a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings because courts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice. Before imposing the 'harsh sanction' of dismissal, however, the district court should consider the following factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.

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Leon v. IDX Sys. Corp., 464 F.3d 951, 958 (9th Cir. 2006). "While the district court need not make explicit findings regarding each of these factors, a finding of 'willfulness, fault, or bad faith' is required for dismissal to be proper. Additionally, the district court must consider 'less severe alternatives' than outright dismissal." Id. (internal citations omitted).

As noted above, Defendants point to five events which they claim circumstantially demonstrate that Bel Air spoliated evidence, some of which are more compelling than others. Bel Air strongly contests each of these contentions. However, even if all of Defendants' contentions are true, their accusations do not rise to the level of a "pattern of deception and discovery abuse" that would make "it impossible for the district court to conduct a trial with any reasonable assurance that the truth would be available." Valley Engineers Inc., 158 F.3d at 1057. Defendants present no evidence that Bel Air "willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice." Id. Public policy favors disposition of cases on their merits, and even if the rest of Defendant's allegations are true, it will nonetheless be possible for this Court to conduct a fair and adequate trial. This is particularly true given the variety of less drastic sanctions at the Court's disposal which can be narrowly tailored to address any potential prejudice suffered by Defendants. See Advantacare Health Partners, LP v. Access IV, No. C 03-04496 JF, 2004 WL 1837997 at *5 (N.D. Cal. Aug.17, 2004) (citing Halaco Eng'g Co. v. Costle, 843 F.2d 376, 381 (9th Cir. 1988)) (noting that dismissal is appropriate in extraordinary circumstances such as where there is a pattern of disregard for Court orders and deceptive litigation tactics that threaten to interfere with the rightful decision of a case). Therefore, the Court denies without prejudice Century Indemnity's motion for dismissal.

Nor will the Court impose any other sanctions at this time. Defendant's Motion requires this Court to make, at least in part, a credibility determination. However, as set forth in Century Indemnification's motion, supporting evidence, and subsequent reply and supplemental briefing, it is not clear that Bel Air knew or reasonably should have

known that the destroyed evidence might be relevant to future litigation at the time it removed the building in question.

That being said, the Court cannot predict how a reasonable jury might resolve the spoliation question. Therefore, the Court does not reach the issue of whether spoliation occurred in this matter. See Kronisch v. United States, 150 F.3d 112, 127 (2d Cir. 1998) (noting that where a district court could not rule out the possibility that a reasonable jury would find that spoliation occurred, the veracity of a party's reasons for destroying the evidence "is an issue of credibility best left for trial") (quoting the district court in that matter). Cf. Josendis v. Wall to Wall Residence Repairs, Inc., 662 F.3d 1292, 1322 (11th Cir. 2011) (Korman, J., dissenting) (noting that "[a] factual finding of spoliation is necessary only where the district judge seeks to impose a particular sanction beyond submitting the issue to the jury"). Instead, it will be up to the jury to determine whether Bel Air had an obligation to preserve evidence and, if the jury makes such a finding, it will then be entitled to draw an adverse inference against that party. Kronisch, 150 F.3d at 130.

Accordingly, Century Indemnity may renew the issue of spoliation in a pre-trial motion and present the issue to the jury for adjudication. See, e.g., Glover v. BIC Corp., 6 F.3d 1318, 1332 (9th Cir. 1993) (noting that the district court properly submitted all the evidence to the jury concerning the alleged spoliation of evidence). Cf. Josendis, 662 F.3d at 1322 (Korman, J., dissenting) (observing that where there is sufficient probative evidence for a jury to find an act of spoliation, a court may deny a motion for summary judgment and the issue should therefore reach the jury).[5]

[5] Moreover, even if the Court were to find that Bel Air engaged in spoliation when it destroyed the Facility, spoliation sanctions must be narrowly tailored to remedy the prejudice to Defendants. Because discovery has not closed, the Court would be unable to determine the extent of any potential prejudice created by Bel Air's alleged failure to preserve evidence. See Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc., 621 F. Supp. 2d 1173, 1195 (D. Utah 2009) (noting that "[p]rejudice by loss of evidence must be measured in light of other evidence available. . . . Therefore the degree of prejudice and the appropriate sanction cannot be determined until the close of discovery"); In re Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060, 1077 (N.D. Cal. 2006) (noting that "[a]t this stage of the proceedings, when the full evidentiary record has not yet been considered by the court, . . . the court cannot determine the extent of prejudice created" by a party's failure to preserve evidence).

Based on the record before it, the Court denies Century Indemnity's Motion for spoliation sanctions, ECF No. 205, without prejudice.

B. Nagler's Motion for Leave to File an Amended Counterclaim

Nagler had an ownership interest in the real Property that is the subject of this litigation from December 1980 to April 1988. In October 1984, Nagler and Bel Air entered into a written lease for the property. Plaintiffs named Nagler as a one of the Defendants in its action for damages and cleanup costs resulting from the contamination. Nagler subsequently filed counterclaims on January 31, 2011, against several parties, including Plaintiffs, asserting causes of action for: (1) Negligence, (2) Declaratory Relief, (3) Equitable Indemnity, and (4) Contribution. See ECF 38. Nagler filed a First Amended Counter Claim on February 2, 2011, that contained the same four claims. See ECF No. 41. On November 4, 2013, Nagler filed a motion for leave to file a Second Amended Counterclaim. See ECF No. 214.

The amended counterclaim seeks to add additional theories of recovery under (1) breach of contract, (2) contribution pursuant to CERCLA § 113(f), and (3) Hazardous Substance Statutory Indemnity. See ECF 214-4. Nagler contends that that the breach of contract claim arises from its allegation that Bel Air breached the parties' lease by letting the property to a polluter—a fact Nagler contends he was unaware of until Plaintiffs filed the Complaint.[6]

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[6] In opposing Nagler's two motions, Plaintiffs requested that this Court take judicial notice of an "Individual Gift Deed" recorded by the Sacramento County Clerk-Recorder on October 20, 1982. See ECF Nos. 218, 220. The Court did not consider that document and thus Plaintiffs' requests for judicial notice, ECF Nos. 218, 220, are denied as moot.

This case was stayed on multiple occasions, notably from October 6, 2011, to January 31, 2012, from June 4, 2012 to October 31, 2012, and from June 5, 2013, until October 31, 2013. See, e.g., ECF No. 198. Nagler filed his motion on November 4, 2013, shortly after the third stay was lifted. Discovery in this case is ongoing and does not close until July 25, 2014. See PTSO, ECF No. 202.[7]

1. Amendment under Rule 16(b)

Generally, the Court is required to enter a pretrial scheduling order within 120 days of the filing of the complaint. Fed. R. Civ. P. 16(b). The scheduling order "controls the subsequent course of the action" unless modified by the Court. Fed. R. Civ. P. 16(e). Orders entered before the final pretrial conference may be modified upon a showing of "good cause," Fed. R. Civ. P. 16(b), but orders "following a final pretrial conference shall be modified only to prevent manifest injustice." Fed. R. Civ. P. 16(e); see also Johnson v. Mammoth Recreations, 975 F.2d 604, 608 (9th Cir. 1992).

Rule 16(b)'s "good cause" standard primarily considers the diligence of the party seeking the amendment. Johnson, 975 F.2d at 609. The district court may modify the pretrial schedule "if it cannot reasonably be met despite the diligence of the party seeking the extension." Fed. R. Civ. P. 16 advisory committee's notes (1983 amendment); id. Moreover, carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief. Johnson, 975 F.2d at 609. Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification.

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[7] Plaintiffs objected to Nagler's Reply, ECF No. 227, on the grounds that he included new arguments and new evidence that was not included in his Motion (ECF Nos. 214). See ECF Nos. 234. Plaintiffs asked that the Court strike the new arguments and evidence, or in the alternative, grant leave for Plaintiffs to file a Sur-Reply. Id. On December 12, 2013, on the Court's own motion, the Court denied Plaintiff's request to file a Sur-Reply. See Minute Order, ECF No. 241. The Court declines to strike any portion of Nagler's Reply Brief. Because the Court does not consider the contested new argument in Nagler's Reply brief (ECF Nos. 227) and the accompanying contested evidence in this Order, the Court declines to address the merits of Plaintiffs' motions to strike. Thus, Plaintiffs' second ex parte application, ECF No. 234, is denied as moot.

Id. (citing Gestetner Corp. v. Case Equip. Co., 108 F.R.D. 138, 141 (D. Me. 1985)). If the moving party was not diligent, the Court's inquiry should end. Id.

This Court's July 25, 2013 Amended Pretrial Scheduling Order requires that a party seek leave of the Court to amend its pleadings and that good cause be shown before amendments to pleadings are permitted. See ECF No. 202. Therefore, Nagler must meet the Rule 16 standard of good cause and the Rule 15 standard for amendment of pleadings.

The focus of the Court's Rule 16 inquiry is the moving party's reasons for seeking modification. Here, Nagler purports to have delayed in bringing his motion because of the three stays halting the proceedings in this case, delays from mediation proceedings in this case held in October 2012 and October 2013 and the facts required for his amendments came through discovery. Plaintiffs object on the grounds that Nagler has been aware of the facts and theories supporting amendment since the inception of the action. Plaintiffs also contend that the issue of the stay is a red herring because Nagler could have amended his Complaint before and in between the stays.

In light of the unique circumstances of this case, specifically the three stays imposed by this Court and the fact that Nagler brought his amended motion to amend days after the third stay was lifted on October 31, 2013, the Court finds that Nagler acted with reasonable diligence in amending his existing Counterclaims for the purposes of Rule 16 and the general strictures of Rule 15 thus apply.

2. Amendment under Rule 15

The court should freely give leave when justice so requires. Fed. R. Civ. P. 15(a)(2). Generally, the five factors of bad faith, undue delay, prejudice to opposing party, futility of amendment and whether plaintiff has previously amended complaint are considered when assessing the propriety of a motion to amend. Ahlmeyer v. Nevada Sys. of Higher Educ., 555 F.3d 1051, 1055 (9th Cir. 2009). Here, Plaintiffs argue that: (1) Nagler unduly delayed in seeking leave to amend, (2) Nagler's proposed counterclaim for breach of contract would be futile, and (3) Nagler's proposed

amendment to add the additional indemnity and contribution claims at this late date would prejudice Plaintiffs.

Plaintiffs contend that Nagler delayed in bringing his Motion despite the fact that he knew or should have known of the facts supporting his claim at the very latest when he first appeared in the action. In addition, Plaintiffs assert that Nagler should have sought to amend his counterclaim in the eight months before enactment of the first stay or between the various stays. In his Reply, Nagler admits that "[he] may have known about the facts required for an amended [C]omplaint." ECF No. 227 at 8. Because Plaintiff admits that he may have known about the relevant facts, this factor weighs against allowing Nagler to amend his Counterclaims. See AmerisourceBergen Corp. v. Dialysist W., Inc., 465 F.3d 946, 953 (9th Cir. 2006).

Next, Plaintiffs contend that leave to amend should be denied because Nagler's proposed counterclaim for breach of contract would be futile because the statute of limitations for contract claims is four years. ECF No. 219 at 11. In addition, Plaintiffs assert that the statute of limitations began to run on the alleged breach for allowing a dry cleaner to operate at the leased remises when the breach first occurred. Id. Both parties agree that the statute of limitations for a breach of written contract is four years. See Cal. Code Civ. Proc. § 337.

Nagler argues that the breach of Contract claim is not premised on Plaintiffs merely allowing a dry cleaner to operate on the premises, but is instead predicated on the fact that PCE, HVOC, or VOC were released at the site. Nagler therefore contends that the breach was not the mere letting of the property, but the letting of the property to an alleged polluter. Thus, Nagler asserts that because he was not aware of the contamination until the filing of Plaintiffs' Complaint, the four-year statute of limitations has not run. See ECF No. 227 at 9. As for Nagler's claim that Plaintiffs breached the contract for failing to insure Nagler, Nagler similarly argues that no breach was known or discoverable until Nagler was sued. Id.

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Although Nagler cites no authority to support his claim that the statute of limitations did not accrue until Plaintiffs' Complaint was filed, it appears that Nagler may be relying on California's "Discovery Rule." See April Enterprises, Inc. v. KTTV, 147 Cal. App. 3d 805, 826-27 (1983) (explaining that "a cause of action under the discovery rule accrues when the plaintiff discovers or should have discovered all facts essential to his cause of action . . . this has been interpreted under the discovery rule to be when plaintiff either (1) actually discovered his injury and its negligent cause or (2) could have discovered injury and cause through the exercise of reasonable diligence"); see also William L. Lyon & Assocs., Inc. v. Superior Court, 204 Cal. App. 4th 1294, 1310 (2012), as modified on denial of reh'g (May 11, 2012), review denied (July 25, 2012) (applying the discovery rule to a breach of contract claim).

"The discovery rule itself contains procedural safeguards protecting against lengthy litigation on the issue of accrual. It presumes that a plaintiff has knowledge of injury on the date of injury. In order to rebut the presumption, a plaintiff must plead facts sufficient to convince the trial judge that delayed discovery was justified. And when the case is tried on the merits the plaintiff bears the burden of proof on the discovery issue." William L. Lyon & Assocs., Inc., 204 Cal. App. 4th at 1310 (emphasis added). Here, Nagler's proposed breach of contract claim does not plead facts sufficient to convince the Court that delayed discovery was justified. In fact, Nagler's proposed fifth cause of action for Breach of Contract, ECF No. 214-4 at 11, contains no facts relating to discovery of the breach of contract claim.

"[F]utility is analyzed under the same standard of legal sufficiency as a motion to dismiss under Fed. R. Civ. P. 12(b)(6)." SmithKline Beecham Corp. v. Geneva Pharm., Inc., 287 F. Supp. 2d 576, 581 (E.D. Pa. 2002). Thus, "[f]actual allegations must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004) (stating that the pleading must contain something more than "a statement of facts that merely creates a suspicion [of] a legally

cognizable right of action.")). Under the pleading standards of Rule 12(b)(6), Nagler's breach of contract claim fails because it does not state a claim upon which relief can be granted.

Nagler's motion for leave to amend with respect to his contract claim is thus denied without prejudice. Nagler is granted one final opportunity to seek leave to amend the Counterclaim in order to state a legally cognizable cause of action for breach of contract. He may (but is not required to) renew his Motion not later than twenty (20) days following the date this Order is electronically filed. If Nagler does not timely renew his Motion, no further leave to amend this Counterclaim will be permitted.

3. Prejudice Suffered by Amendment to Add Indemnity and Contribution Claims

Finally, Plaintiffs contend that because Nagler already asserted indemnity and contribution counterclaims under state law, his HSAA indemnity and contribution under CERCLA claims cause unnecessary complication and delay. See ECF No 219 at 13. Nagler responds that his proposed new claims for HSAA indemnity and contribution under CERCLA do not prejudice Plaintiffs because co-Defendants Century Indemnity and Arrowood Indemnity have already pled these same claims in this action. See ECF No. 227 at 10.

In their Opposition, Plaintiffs admit that Nagler has "already asserted indemnity and contribution counterclaims under state law." ECF No. 219 at 13. Therefore, it appears that the amendment will not involve a great deal of additional discovery. Because discovery relating to these similar state claims is ongoing, Plaintiffs are not prejudiced by the inclusion of these federal claims. Cf. Bleiler v. Cristwood Contracting Co., Inc., 868 F. Supp. 461, 463 (D. Conn. 1994) aff'd in part, rev'd in part on different grounds sub nom. Bleiler v. Cristwood Const., Inc., 72 F.3d 13 (2d Cir. 1995) ("Permitting a proposed amendment also may be prejudicial if discovery already has been completed, but this concern may be alleviated if the new claim arises from a similar set of operative facts and a similar time as the existing claims."); Citizens & S. Sec.

Corp. v. Braten, 733 F. Supp. 655, 660 (S.D.N.Y. 1990) ("Prejudice has been found when proposed amendment contained an unexpected allegation or defense. Prejudice may also occur when the proposed amended pleading is interposed after the completion of discovery, or is based upon a new set of operative facts.") (internal citations omitted).

Thus, the Court grants Nagler leave to amend his Counterclaim with new claims for HSAA indemnity and Contribution under CERCLA, but denies without prejudice his Counterclaim with a breach of contract claim.

C. Nagler's Motion for Leave to File a Third Party Claim

Nagler also seeks leave of this Court to file a third party complaint against eight individuals, the "Wong Individuals," in their capacity as the general partners of Plaintiff WFI. Nagler seeks to assert six claims that he included in his proposed second amended counterclaim against Plaintiffs: negligence, declaratory relief, equitable indemnity, contribution, hazardous substance statutory indemnity and contribution pursuant to CERCLA, as well as a new claim for breach of guaranty.[8]

As outlined above, this Court's July 25, 2013, Amended Pretrial Scheduling Order requires a party seek leave of Court and that good cause be shown before amendments to pleadings are permitted. See ECF No. 202. Therefore, Nagler must meet the Rule 16 standard of good cause and the Rule 14(a) standard for impleader.

Unlike with his above claims, the Court concludes that Nagler was not diligent in bringing his current complaint against these new individuals. While Nagler claims that he was unaware of the facts necessary for these claims, in 2011 Nagler brought several of the same claims based on the same facts against Plaintiffs. Thus, Nagler was not reasonably diligent in delaying for two years in naming eight new parties to the matter.

[8] Plaintiffs also objected to Nagler's Reply, ECF No. 228, on the grounds that he included new arguments and new evidence that was not included in his Motion (ECF Nos. 215). See ECF Nos. 235. Plaintiffs asked that the Court strike the new arguments and evidence, or in the alternative, grant leave for Plaintiffs to file a Sur-Reply. Id. On December 12, 2013, on the Court's own motion, the Court denied Plaintiff's request to file a Sur-Reply. See Minute Order, ECF No. 241. The Court declines to strike any portion of Nagler's Reply Brief. Because the Court does not consider the contested new argument in Nagler's Reply brief (ECF Nos. 228) and the accompanying contested evidence in this Order, the Court declines to address the merits of Plaintiffs' motions to strike. Thus, Plaintiffs' third ex parte application, ECF Nos. 235, is denied as moot.

Nagler could have, at the very least, brought the negligence, declaratory relief, equitable indemnity and contribution claims against these eight third-party defendants when he brought his initial and amended Counterclaims, yet he neglected to do so and fails to adequately explain why he could not do so. "Late amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action." Royal Ins. Co. of Am. v. Sw. Marine, 194 F.3d 1009, 1016-17 (9th Cir. 1999) (internal citations omitted); see In re W. States Wholesale Natural Gas Antitrust Litig., 715 F.3d 716, 737 (9th Cir. 2013) (upholding a district court's finding that a party was not diligent in seeking to amend their complaint because "[t]he good cause standard typically will not be met where the party seeking to modify the scheduling order has been aware of the facts and theories supporting amendment since the inception of the action") (emphasis added). The Court therefore denies Nagler's motion for leave to file a third-party claim, ECF No. 215.

Moreover, even if Nagler had established good cause to modify the pretrial scheduling order for leave to file a third-party claim, Nagler's Motion would still fail, because he has not shown that his amendment meets the requirements of Rule 14. Rule 14 permits parties to bring a lawsuit against, or "implead," a third party who is not already a party to the lawsuit in order to transfer liability being asserted against it in the underlying lawsuit. Specifically, Rule 14 provides that "at any time after commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." Fed. R. Civ. P. 14(a). Rule 14 is to be construed liberally in favor of allowing impleader. Lehman v. Revolution Portfolio L.L.C., 166 F.3d 389, 393 (1st Cir. 1999). However, the District Court has broad discretion in determining the propriety of a third-party claim under Rule 14. See Sw. Admin., Inc. v. Rozay's Transfer, 791 F.2d 769, 777 (9th Cir. 1986). The Court is to consider all relevant factors of each individual case including whether the delay in seeking leave was excusable and whether the delay would

prejudice a party. In addition, the Court does not abuse its discretion by denying an application that will disadvantage an existing action. Id.

Here, Nagler's third-party complaint would unnecessarily complicate and delay discovery in this matter. Plaintiffs contend that "Nagler's proposed third-party complaint expands the issues in the current litigation by, among other things, raising partnership issues, potentially complicated breach of contract and guaranty issues, and issues relating to the viability of claims against additional deceased individuals, all of which are not currently part of the litigation." ECF No. 217 at 10. Plaintiffs concerns are well taken.

"If bringing in the third party will introduce unrelated issues and unduly complicate the original suit, impleader may be denied. Moreover, a lack of similarity between the issues and evidence required to prove the main and third-party claims may be sufficient to warrant the dismissal of an impleaded party." Dishong v. Peabody Corp., 219 F.R.D. 382, 385 (E.D. Va. 2003) (internal citations omitted); see United States Fid. & Guar. Co. v. Perkins, 388 F.2d 771, 773 (10th Cir.1968) ("If impleading a third party defendant would require the trial of issues not involved in the controversy between the original parties without serving any convenience, there is no good reason to permit the third-party complaint to be filed."). Although most of Nagler's claims against the third-party defendants, the general partners of Plaintiff WFI, are similar to those alleged against Plaintiffs in Nagler's amended Counterclaim, Nagler's third-party complaint raises several new issues and adds eight new individual parties to this matter. Nagler now asserts that the Third Party Defendants are liable as either general partners or as guarantors. By raising new partnership issues, guaranty issues and claims against deceased individuals, Nagler seeks to broaden this litigation and unnecessarily complicate the trial and discovery. Unlike Nagler's motion for leave to amend his existing Counterclaims—where discovery has been ongoing on the same and substantially similar issues with the existing parties—Nagler here seeks to bring in new parties and new issues. Further, no discovery has been conducted on these new issues

with respect to these new parties. Although Rule 14 is to be construed liberally in favor of allowing impleader, Nagler fails to satisfy this standard. See Sw. Admin., Inc., 791 F.2d at 777.

Thus, the Court denies Nagler's Motion for Leave to File a Third-Party Claim (ECF No. 215) without prejudice. Again, Nagler will be permitted twenty (20) days from the date this Order is electronically filed in which to renew his Motion. Should he fail to do so, no further leave to add these parties will be permitted.

CONCLUSION

For the reasons set forth above, IT IS HEREBY ORDERED THAT:

1. Century Indemnity's Motion for Sanctions, ECF No. 205, is DENIED in its entirety without prejudice.
2. Nagler's Motion for Leave to File a Second Amended Counterclaim, ECF No. 214, is GRANTED in part and DENIED in part without prejudice as explained in this Order.
3. Nagler's Motion for Leave to File Third-Party Complaint, ECF No. 215, is DENIED without prejudice.
4. Century Indemnity's Motion to Strike Plaintiff Bel Air Mart's Opposition, ECF No. 231, is DENIED.

IT IS SO ORDERED.

Dated: February 21, 2014

MORRISON C. ENGLAND, JR, CHIEF JUDGE
UNITED STATES DISTRICT COURT