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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LARRY O. CROTHER, INC.,
a California Company,
d.b.a. ABC INSULATION
& SUPPLY CO.,

No. 2:11-cv-00138-MCE-GGH

Plaintiff,

v.

ORDER

LEXINGTON INSURANCE
COMPANY, a Delaware
corporation, and DOES
1 through 25, inclusive,

Defendants.

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Through the present action, Plaintiff Larry O. Crother, Inc.
d.b.a. ABC Insulation & Supply Co. ("Plaintiff") seeks to recoup
certain insurance premiums it paid its comprehensive general
liability carrier, Defendant Lexington Insurance Company
("Lexington"). Plaintiff's initial complaint was filed on
December 13, 2010 in the Superior Court of the State of
California in and for the County of Sacramento. Lexington was
served with the Summons and Complaint on December 16, 2010.

1 Because Lexington was the only named Defendant, and because
2 Lexington claims to be a corporation incorporated under the laws
3 of the State of Delaware with a principal place of business in
4 the State of Massachusetts, Lexington timely removed Plaintiff's
5 action to this Court on January 14, 2011, citing diversity of
6 citizenship pursuant to 28 U.S.C. § 1441. Thereafter, on
7 January 28, 2010, Plaintiff filed a First Amended Complaint
8 purporting to add new, and non-diverse, Defendants; namely,
9 Plaintiff's insurance broker and agent. Plaintiff filed that
10 amended pleading without seeking either a stipulation from
11 Lexington or a court order authorizing it to do so.

12 On the basis of the purported new parties, which conceivably
13 destroy diversity, Plaintiff filed a Motion to Remand (ECF No. 8)
14 seeking to send the matter back to state court where it
15 originated. Lexington filed both a Motion to Dismiss attacking
16 the purported First Amended Complaint on its merits (ECF No. 10)
17 as well as a Motion to Strike under Federal Rule of Civil
18 Procedure 15(a)(1)¹ and 28 U.S.C. § 1447(e) (ECF No. 9).

19 Rule 15(a)(1) provides as follows:

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28 ¹ All further references to "Rule" or "Rules" are to the
Federal Rules of Civil Procedure unless otherwise noted.

1 **(a) Amendments Before Trial.**

2 (1) Amending as a Matter of Course. A party may
3 amend its pleadings once as a matter of course
4 within:

5 (A) 21 days after serving it, or

6 (B) if the pleading is one to which a
7 responsive pleading is required, 21 days
8 after service of a responsive pleading or 21
9 days after service of a motion under rule
10 12(b), (e), or (f), whichever is earlier.

11 (2) **Other Amendments.** In all other cases, a party
12 may amend its pleading only with the opposing
13 party's written consent or the Court's leave. The
14 court should freely give leave when justice so
15 requires.

16 It follows that under the express provisions of Rule 15(a),
17 Plaintiff had 21 days after the date it effectuated service on
18 Lexington (December 16, 2010) within which to amend its complaint
19 as a matter of course without obtaining either leave of court or
20 the consent of other parties. That 21-day period expired on
21 January 6, 2011. Plaintiff did not in fact file its First
22 Amended Complaint in this matter until January 28, 2011, more
23 than three weeks after the deadline for doing so as a matter of
24 course expired. It is undisputed that neither leave of court nor
25 the consent of Lexington was obtained before Plaintiff's amended
26 pleading was filed.

27 It follows that under the unequivocal terms of Rule 15(a) as
28 set forth above Plaintiff's purported First Amended Complaint was
29 untimely filed and should be stricken as such. As Alan Wright
30 notes in his treatise on Federal Practice and Procedure:

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1 "In general, if an amendment that cannot be made as of
2 right is served without obtaining the court's leave or
3 the opposing party's consent, it is without legal
4 effect and any new matter it contains will not be
5 considered unless the amendment is resubmitted for the
6 court's approval."

7 Alan Wright, 6 Federal Practice & Procedure: Civil 3d, § 1484, p.
8 685 (West 2010) (emphasis added). Because such an amendment is of
9 no legal effect, and since the purpose of a motion to strike
10 under Rule 12(f) generally is to remove impertinent and/or
11 immaterial matter from a party's pleadings, courts within this
12 Circuit have properly stricken amended pleadings not filed in
13 conformance with Rule 15(a)(1). See, e.g., Sutton v. Holz, 2007
14 WL 3027345 at * 2-3 (N.D. Cal. 2007); Fagorala v. Nationstar
15 Mortgage, LLC, 2010 WL 2278722 at * 1 (N.D. Cal. 2010).


16 Significantly, even Plaintiff does not dispute its failure
17 to comply with the applicable deadline for amending as a matter
18 of right under Rule 15(a). Plaintiff nonetheless argues that
19 because it filed a "Resubmitted" First Amended Complaint on
20 February 24, 2011, after Lexington's Motion to Dismiss was filed
21 on February 10, 2011, that "resubmitted" pleading should be
22 considered timely since following either a Motion to Dismiss or a
23 Motion to Strike under Rule 12 an amended pleading can be timely
24 filed within 21 days.

25 Plaintiff's contention in this regard borders on the
26 frivolous. Under Plaintiff's logic, an untimely amended pleading
27 can be rendered timely as long as the otherwise untimely
28 amendment is resubmitted after being challenged as untimely.
That argument is both circular and nonsensical in the view of
this Court.

1 Lexington's Motion to Strike (ECF No. 9) is GRANTED.²
2 Because Plaintiff's First Amended Complaint consequently has no
3 legal effect, Lexington's Motion to Dismiss the First Amended
4 Complaint on substantive grounds (ECF No. 10) is DENIED as moot.
5 In addition, because Plaintiff's Motion to Remand depends on
6 allegedly diverse defendants that are not properly before the
7 Court at this time, the Motion to Remand (ECF No. 8) is also
8 DENIED as moot. Plaintiff's recourse is to file a Motion for
9 Leave to File an Amended Pleading should it choose to do so.

10 IT IS SO ORDERED.

11 Dated: March 18, 2011

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14 MORRISON C. ENGLAND, JR.
15 UNITED STATES DISTRICT JUDGE
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27 ² Because oral argument was not of material assistance, the
28 Court ordered this matter submitted on the briefs. E.D. Cal.
Local Rule 230(g).