

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DUARTE NURSERY, INC., a California Corporation; and JOHN DUARTE, an individual,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant.

UNITED STATES OF AMERICA,

Counterclaim-Plaintiff,

v.

DUARTE NURSERY, INC., a California Corporation; and JOHN DUARTE, an individual,

Counterclaim-Defendants.

No. 2:13-cv-02095-KJM-DAD

ORDER

This matter is before the court on the motion for leave to file a second amended complaint by plaintiffs Duarte Nursery, Inc. and John Duarte (collectively, plaintiffs or Duarte). ECF No. 80. Defendant U.S. Army Corps of Engineers (the Corps) and counterclaim-plaintiff the

1 United States oppose the motion, ECF No. 82, and plaintiffs have replied, ECF No. 84. This
2 matter is decided without a hearing. For the following reasons, the court GRANTS plaintiffs'
3 motion.

4 I. BACKGROUND

5 A. Procedural History

6 Plaintiffs commenced this action on October 10, 2013, stating claims against the
7 Corps and seven officers of California's Central Valley Regional Water Quality Control Board
8 (Board). ECF No. 1. Generally, plaintiffs alleged the Corps' cease-and-desist order (CDO) and
9 Notice of Violation (NoV) issued to them violated the Due Process Clause. *See generally id.* The
10 CDO, issued February 25, 2013, alleges that plaintiffs "discharged dredged or fill material into
11 seasonal wetlands, vernal pools, vernal swales, and intermittent and ephemeral drainages, which
12 are waters of the United States, without a . . . permit," and further stated that "[s]ince a DA
13 [Department of Army] permit has not been issued authorizing this discharge, the work is in
14 violation of the Clean Water Act [CWA]." *See* First Am. Compl. (FAC) ¶ 50, ECF No. 40.

15 The state defendants and the Corps separately moved to dismiss the original
16 complaint, ECF Nos. 8 & 9, and the court granted the state defendants' motion and denied the
17 Corps' motion in a single order on April 23, 2014. ECF No. 27. The U.S. Department of Justice,
18 on behalf of the Corps, then filed an answer to the due process claims and, in addition, a
19 counterclaim for injunctive relief and civil penalties under the Clean Water Act. ECF No. 28.
20 Plaintiffs moved to file a first amended complaint¹, which defendant Corps did not oppose, and
21 that complaint was filed on August 6, 2014. *See* FAC. The amended complaint added a sixth
22 claim for retaliatory prosecution in violation of the First Amendment. *Id.* On September 12,
23 2014, defendant Corps moved to dismiss the first, second, fifth, and sixth claims. ECF No. 46.
24 On March 24, 2015, the court granted the motion with leave to amend as to plaintiffs' sixth claim
25 of retaliatory prosecution, and denied the motion in all other respects. ECF No. 63.

26 ////

27 _____
28 ¹ The parties and docket refer to this as a "first supplemental complaint," though the court
will refer to it as a "first amended complaint," for consistency with its previous order.

1 The parties entered into a stipulation on April 3, 2015, setting April 14, 2015 as
2 the deadline for plaintiffs to file an amended complaint. ECF No. 64. If plaintiffs did not timely
3 file an amended complaint, defendant had until April 24, 2015 to file an answer to operative
4 portions of the First Amended Complaint. *Id.* If Duarte timely filed an amended complaint,
5 defendant had until May 5, 2015 to file an answer or other response to that amended complaint.
6 *Id.* Plaintiffs did not file an amended complaint, and defendant answered the first amended
7 complaint on April 22, 2015. ECF No. 68.

8 On July 7, 2015, plaintiffs filed the instant motion, arguing they had recently
9 discovered facts that would cure the retaliatory prosecution claim’s deficiencies, seeking leave to
10 amend the first amended complaint to include those facts and including a proposed second
11 amended complaint. ECF No. 80. The amended allegations appear in the caption, and at page 3,
12 ¶ 10; page 9, ¶¶ 48-49; page 11, ¶ 55b; pages 14-15, ¶¶ 82-95; pages 19-20, ¶¶ 116-121; and page
13 21, ¶ 9 of the Prayer for Relief. Francois Decl., ECF No. 80-2.

14 B. Case Scheduling

15 The court convened an initial scheduling conference on April 16, 2014, all parties
16 appearing. ECF No. 67. Among other dates, the court set a discovery cut-off of October 2, 2015
17 and a November 6, 2015 dispositive motion deadline. ECF No. 69. After a request for
18 clarification, the court issued an amended pretrial scheduling order, amending deadlines for
19 expert reports, but retaining all other deadlines. ECF No. 73.

20 II. LEGAL STANDARD

21 A party seeking leave to amend pleadings after the deadline specified in the
22 scheduling order must first satisfy Federal Rule of Civil Procedure 16(b)’s “good cause” standard.
23 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608–09 (9th Cir. 1992). Rule 16(b)(4)
24 states that a “schedule may be modified only for good cause and with the judge’s consent.” This
25 good cause evaluation “is not coextensive with an inquiry into the propriety of the amendment
26 under . . . Rule 15.” *Johnson*, 975 F.2d at 609. Distinct from Rule 15(a)’s liberal amendment
27 policy, Rule 16(b)’s good cause standard focuses primarily on the diligence of the moving party,

28 /////

1 *id.*, and that party’s reasons for seeking modification, *C.F. ex rel. Farnan v. Capistrano Unified*
2 *Sch. Dist.*, 654 F.3d 975, 984 (9th Cir. 2011).

3 If good cause exists, the party must next satisfy Rule 15(a). *Cf. Johnson*, 975 F.2d
4 at 608 (citing with approval *Forstmann v. Culp*, 114 F.R.D. 83, 85 (M.D.N.C. 1987), for its
5 explication of this order of operations). Federal Rule of Civil Procedure 15(a)(2) states “[t]he
6 court should freely give leave [to amend its pleading] when justice so requires” and the Ninth
7 Circuit has “stressed Rule 15’s policy of favoring amendments.” *Ascon Props., Inc. v. Mobil Oil*
8 *Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989). “In exercising its discretion [regarding granting or
9 denying leave to amend] ‘a court must be guided by the underlying purpose of Rule 15 — to
10 facilitate decision on the merits rather than on the pleadings or technicalities.’” *DCD Programs,*
11 *Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (quoting *United States v. Webb*, 655 F.2d 977,
12 979 (9th Cir. 1981)). However, “the liberality in granting leave to amend is subject to several
13 limitations. Leave need not be granted where the amendment of the complaint would cause the
14 opposing party (1) undue prejudice, (2) is sought in bad faith, (3) constitutes an exercise in
15 futility, or (4) creates undue delay.” *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*,
16 637 F.3d 1047, 1058 (9th Cir. 2011) (citations omitted).

17 III. DISCUSSION

18 The court first looks to Rule 16(b)’s “good cause” standard. The court finds good
19 cause because plaintiffs have consistently pursued the retaliatory prosecution claim and diligently
20 sought leave to amend upon discovering the additional facts. In May 2015, they received the
21 following documents among others in response to a production request: correspondence
22 surrounding the filing of the counterclaim, correspondence containing a third party’s observation
23 that the counterclaim is retaliatory, and a deposition of Matthew Kelley of the Army Corps staff,
24 who testifies about the unusual circumstances surrounding this litigation. *See Francois Decl.* at 2.
25 A portion of the documents became available to plaintiffs on May 21, 2015, and the deposition
26 transcripts became available on June 5, 2015. *Id.* Plaintiffs filed the instant motion several weeks
27 later, on July 7, 2015. Plaintiffs pursued leave diligently. *See Wynes v. Kaiser Permanente*
28 *Hospitals*, No. 2:10-CV-00702-MCE, 2012 WL 2339245, at *1 (E.D. Cal. June 19, 2012)

1 (finding diligence where documents were produced in March and plaintiff sought leave to amend
2 in light of those documents two months later).

3 Finding Rule 16 satisfied, the court moves to the Rule 15 factors: prejudice, bad
4 faith, futility, and undue delay. Defendants address only futility in their opposition. *See* Opp'n at
5 5-9. There is no argument that plaintiffs move in bad faith or with undue delay, or that the new
6 allegations prejudice defendants. The court notes "it is the consideration of prejudice to the
7 opposing party that carries the greatest weight." *See DCD Programs*, 833 F.2d at 185. Here, the
8 allegations are an attempt to cure a previously dismissed claim initially pled by stipulation in
9 August 2014, plaintiffs were granted leave to amend that claim, which arises from documents in
10 defendants' possession, discovery remains open, and the deadline for dispositive motions is in
11 November 2015. Leave to amend would not unfairly prejudice defendants.

12 Defendants argue the allegations as pleaded in the second amended complaint do
13 not cure the deficiencies of the first amended complaint and are therefore futile. "A district court
14 does not err in denying leave to amend where the amendment would be futile . . . or would be
15 subject to dismissal." *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) (citations omitted).
16 "However, a proposed amendment is futile only if no set of facts can be proved under the
17 amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller*,
18 845 F.2d at 214²; *Foman v. Davis*, 371 U.S. 178, 182 (1962) (stating that "[i]f the underlying
19 facts or circumstances relied upon by a [movant] may be a proper subject of relief, he ought to be
20 afforded an opportunity to test his claim on the merits").

21
22 ² The test for determining the sufficiency of a pleading was augmented by *Bell Atlantic*
23 *Corporation v. Twombly*, 550 U.S. 544, 561–63 (2007). The Court abrogated the standard set
24 forth in *Conley v. Gibson*, which held that a "complaint should not be dismissed for failure to
25 state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support
26 of his claim which would entitle him to relief." 355 U.S. 41, 45–46 (1957). Now, under
27 *Twombly*, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter,
28 accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*,
556 U.S. 662, 678, (2009) (quoting *Twombly*, 550 U.S. at 570). The leading case on futility in the
Ninth Circuit, *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988), echoed the "no set
of facts" test and is cited with regularity in this circuit. Because the standard for futility was
designed to echo the 12(b)(6) pleading standard, this court assumes the pleading standard of
Twombly now applies.

1 In the court's order dismissing the retaliatory prosecution claim, it found the
2 complaint includes no facts supporting an inference the
3 government's counterclaim was motivated by plaintiffs' speech.
4 Plaintiffs have not satisfied their duty of pleading a link between
5 their speech and the government's counterclaim, which seeks
6 enforcement against the same activity alleged in the previously
7 issued CDO and NoV. Even if they did plead such a link, plaintiffs
8 have not pleaded any injury caused by the alleged retaliatory
9 conduct.

10 Order March 24, 2015 at 8, ECF No. 63. In the proposed new complaint, plaintiffs plead at least
11 some facts supporting an inference of retaliatory motive: evidence that plaintiffs sought media
12 attention for the alleged lack of due process in the Corps' issuance of the CDO before the
13 government filed its counterclaim, ECF No. 80-4; a recommendation that plaintiffs' alleged
14 unlawful activity be referred to the EPA for enforcement, ECF No. 80-5; testimony that the
15 litigation action was unusual in terms of timing and action taken, ECF No. 80-7; and statements
16 from Caleb Unruh, whom the government sought to depose, that the government pursued the
17 claim in order to intimidate or with some improper motive, ECF No. 80-8. Plaintiffs' allegations
18 support some inference that defendants filed the counterclaim in retaliation, and that the
19 counterclaim's enforcement action would not have been filed without plaintiffs having first
20 brought their initial claim. Plaintiffs plead injury of a violation of their rights to free speech. The
21 claim is therefore legally sufficient and amendment would not be futile.

22 Because defendants only address futility in their opposition and the court finds
23 leave to amend would not be futile, defendants have not met their burden. *See DCD Programs,*
24 *Ltd.*, 833 F.2d at 187.

25 IV. CONCLUSION

26 Plaintiffs' motion for leave to amend, ECF No. 80, is granted. The Clerk of the
27 Court is directed to file the second amended complaint, attached to plaintiffs' motion, on the
28 docket.

IT IS SO ORDERED.

DATED: September 2, 2015.

6 
UNITED STATES DISTRICT JUDGE