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United States District Court  
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KFD ENTERPRISES, INC.,  
Plaintiff,  
v.  
CITY OF EUREKA,  
Defendant,

No. C-08-4571 MMC

**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR LEAVE TO AMEND; GRANTING CITY OF EUREKA'S MOTION FOR LEAVE TO AMEND**

\_\_\_\_\_  
AND RELATED COUNTERCLAIMS AND CROSSCLAIMS.  
\_\_\_\_\_

Before the Court are plaintiff KFD Enterprises, Inc.'s ("KFD") motion, filed June 12, 2009, for leave to file a an amended complaint, and defendant/counterclaimant/third-party plaintiff City of Eureka's ("City") motion, likewise filed June 12, 2009, for leave to file an amended counterclaim and third-party complaint.<sup>1</sup> Having read and considered the papers filed in support of and in opposition to the motions, the Court deems the matters appropriate for decision thereon, hereby VACATES the hearings scheduled for July 24, 2009, and rules as follows.

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<sup>1</sup>Although the City has titled its proposed pleading a "First-Amended Complaint" (see Bolcom Decl. Ex. 1), such pleading is in fact an amended counterclaim and third-party complaint.

1 **DISCUSSION**

2 **A. KFD’s Motion**

3 By its motion, KFD seeks leave file a First Amended Complaint (“FAC”) that adds  
4 claims against ten new parties, as well as claims for “continuing trespass, strict liability,  
5 negligence, and waste,” and deletes a claim for “Porter-Cologne Statutory Contribution.”  
6 (See Mot. at 3:3-18.) In opposition to such motion, third-party defendant Unocal  
7 Corporation (“Unocal”), whom KFD seeks to add as a defendant, argues that KFD’s  
8 proposed First Claim for Relief (“Cost Recovery Pursuant to CERCLA § 107(a)”<sup>2</sup>) is barred  
9 to the extent it seeks to impose joint and several liability on defendants, that KFD’s  
10 proposed Fourteenth Claim for Relief (“Waste”) is barred by the applicable statute of  
11 limitations, and that KFD’s proposed request for attorney’s fees (see Mot. Ex. A (Proposed  
12 FAC) Prayer for Relief ¶ 7) is futile, as KFD has failed to plead any claim for relief under  
13 which such fees are available.

14 Leave to amend may be denied if the amendment “constitute[s] an exercise in  
15 futility.” See DCD Programs, Inc. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987). A  
16 proposed amendment is futile, however, “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.”  
18 Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988).

19 Here, with respect to KFD’s proposed First Claim for Relief, Unocal argues that KFD  
20 is a “potentially responsible party (‘PRP’)” under § 107(a) of CERCLA and that,  
21 consequently, KFD’s “remedy under CERCLA, if any, is limited to several liability only.”  
22 (See Opp’n at 3:5-6, 3:25.) Such argument, however, is premature at this stage of the  
23 proceedings, as it does not address the question of whether KFD’s First Claim for Relief  
24 may be asserted against Unocal, but, rather, the nature of the relief available under such  
25 Claim for Relief.

26 With respect to KFD’s proposed Fourteenth Claim for Relief and its request for  
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28 <sup>2</sup>Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) is codified at 42 U.S.C. § 9607(a).

1 attorney's fees, KFD states it "agrees to dismiss without prejudice" both the claim and the  
2 request. (See Reply at 5:10-13.)

3 Accordingly, to the extent KFD seeks leave to amend to add new parties and to add  
4 claims for continuing trespass, strict liability, and negligence, KFD's motion will be granted,  
5 and to the extent KFD seeks leave to amend to assert its proposed Fourteenth Claim for  
6 Relief and its proposed request for attorney's fees, KFD's motion will be denied.<sup>3</sup>

7 **B. The City's Motion**

8 By its motion, the City seeks leave to file an amended counterclaim and third-party  
9 complaint that adds claims against nine new parties, seven of which are also named in  
10 KFD's proposed First Amended Complaint. In opposition to such motion, KFD argues that  
11 the City's proposed claims against Kenneth Daer ("Daer"), the "owner and operator" of KFD  
12 (see Bolcom Decl. Ex. 1 (proposed amended counterclaim and third-party complaint) ¶¶ 5,  
13 15), would be futile. In particular, KFD argues, the City has failed to plead sufficient facts in  
14 support of its CERCLA claims against Daer and has failed to provide "evidentiary support"  
15 for such claims. (See Opp'n at 6:16.) As noted, however, a proposed amendment is futile  
16 "only if no set of facts can be proved under the amendment to the pleadings that would  
17 constitute a valid and sufficient claim or defense." See Miller, 845 F.2d at 214. Here, KFD  
18 has failed to show the City can plead no set of facts under which Daer would be liable to  
19 the City.

20 Accordingly, the City's motion for leave to amend will be granted.

21 **CONCLUSION**

22 For the reasons stated above:

23 1. To the extent KFD seeks leave to amend to add new parties and to add claims  
24 for continuing trespass, strict liability, and negligence, KFD's motion is hereby GRANTED;  
25 KFD's First Amended Complaint shall be filed no later than July 31, 2009.

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28 <sup>3</sup>In light of such ruling, the Court does not reach Unocal's Request for Judicial  
Notice, as such request is directed only at the issues of whether KFD is a PRP under  
CERCLA and whether KFD's proposed Fourteenth Claim for Relief is time-barred.

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2. In all other respects, KFD's motion is hereby DENIED.

3. The City's motion for leave to amend is hereby GRANTED; the City's amended counterclaim and third-party complaint shall be filed no later than July 31, 2009.

**IT IS SO ORDERED.**

Dated: July 17, 2009

  
MAXINE M. CHESNEY  
United States District Judge