

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

KFD ENTERPRISES, INC.,

No. C-08-4571 MMC

Plaintiff,

**AMENDED* 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**

v.

CITY OF EUREKA,

Defendant,

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.¹ 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.

*The sole amendment is remove the limitation to CERCLA claims in the Court's description of KFD's argument in opposition to the City's motion. (See infra, at 3:13-15.)

¹Although 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.

DISCUSSION

A. KFD's Motion

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

Leave to amend may be denied if the amendment "constitute[s] an exercise in futility." See DCD Programs, Inc. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987). A proposed amendment is futile, however, "only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988).

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

With respect to KFD's proposed Fourteenth Claim for Relief and its request for

²Section 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.³

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 claims against Daer and has failed to provide "evidentiary support" for such
15 claims. (See Opp'n at 6:16.) As noted, however, a proposed amendment is futile "only if
16 no set of facts can be proved under the amendment to the pleadings that would constitute
17 a valid and sufficient claim or defense." See Miller, 845 F.2d at 214. Here, KFD has failed
18 to show the City can plead no set of facts under which Daer would be liable to the City.

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

20 **CONCLUSION**

21 For the reasons stated above:

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

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

26 //

27 ³In light of such ruling, the Court does not reach Unocal's Request for Judicial
28 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.

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

3 **IT IS SO ORDERED.**

4
5 Dated: July 20, 2009


MAXINE M. CHESNEY
United States District Judge