

United States District Court
For the Northern District of California

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

KFD ENTERPRISES, INC.,
Plaintiff,

No. C 08-4571 MMC

**ORDER DENYING MOTION FOR LEAVE
TO AMEND**

v.

CITY OF EUREKA,
Defendant.

_____/
And Related Counterclaims, Cross-claims,
and Third-Party Claims.
_____ /

Before the Court is defendant City of Eureka's ("City") motion, filed May 10, 2012, for leave to file a Fifth Amended Counter-Claim and Cross-Claim, by which the City seeks to add a claim under the Resource Conservation and Recovery Act ("RCRA"). Plaintiffs KFD Enterprises, Inc. ("KFD") and Kenneth Daer ("Daer") have jointly filed opposition thereto, to which the City has replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.¹

BACKGROUND

The instant action was filed October 1, 2008 and "aris[es] out of environmental

¹ By order filed June 13, 2012, the hearing on the motion was vacated.

1 contamination at 2907 'E' Street, Eureka, in the County of Humboldt, California” (“the
2 Property”). (See City of Eureka’s Fourth Amended Counter-Claim and Cross-Claim ¶ 1.)
3 The City alleges that “KFD Enterprises has owned and operated a dry cleaning business
4 located at the Property” (id. ¶ 18), that “KFD has generated and released various solid and
5 hazardous wastes in its operations on the Property,” including PCE (id. ¶ 19), and that
6 Daer, “through his own actions and omissions” and through a “failure to properly hire, train,
7 supervise, instruct, oversee and direct Norman’s Dry Cleaner employees” caused PCE to
8 be released into the environment (see id. ¶¶ 38-41).

9 The City’s original counterclaim and third-party complaint was filed November 21,
10 2008, naming KFD and Unocal Corporation as defendants and alleging claims under the
11 Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), the
12 Hazardous Substance Account Act, and state law. On July 24, 2009, the City filed its
13 “First-Amended Complaint,” adding claims against Daer and a number of other defendants.
14 The City subsequently filed three additional amended pleadings: a “Second-Amended
15 Complaint” on November 9, 2009, a “Third Amended Counter-Claim and Cross-Claim,” on
16 April 30, 2010, and a “Fourth Amended Counter-Claim and Cross-Claim” on December 10,
17 2010. By the instant motion, the City seeks leave to file its Fifth Amended Counter-Claim
18 and Cross-Claim (“5AC”) which, for the first time, alleges a RCRA claim against KFD and
19 Daer.

20 LEGAL STANDARD

21 Where, as here, the complaint previously has been amended, “a party may amend
22 its pleading only with the opposing party’s written consent or the court’s leave.” See Fed.
23 R. Civ. P. 15(a)(2). The court, however, “should freely give leave when justice so requires.”
24 See id. In determining whether such leave should be granted, the court considers such
25 factors as “undue delay, bad faith or dilatory motive on the part of the movant, repeated
26 failure to cure deficiencies by amendments previously allowed, undue prejudice to the
27 opposing party by virtue of allowance of the amendment, [and] futility of amendment.” See
28 Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (quoting

1 Foman v. Davis, 371 U.S. 178, 182 (1962)). Although delay, as noted, is relevant, “delay
2 alone no matter how lengthy is an insufficient ground for denial of leave to amend.” See
3 United States v. Webb, 655 F.2d 977, 980 (9th Cir. 1981). Among the listed factors, “it is
4 the consideration of prejudice to the opposing party that carries the greatest weight.” See
5 Eminence Capital, LLC, 316 F.3d at 1048.

6 **DISCUSSION**

7 **A. Undue Delay**

8 The City argues there has been no undue delay, despite the lateness of its request
9 to amend its claims for a fifth time, because, according to the City, it was only through its
10 recent deposition of Daer that it became aware of facts supporting a RCRA claim.
11 Relevant to the Court’s evaluation of this factor is “whether the moving party knew or
12 should have known the facts and theories raised by the amendment” at the time of the
13 original pleading. See Jackson v. Bank of Hawaii, 902 F.2d 1385, 1388 (9th Cir. 1990)
14 (holding district court did not abuse discretion by denying leave to amend complaint one
15 year after action commenced; rejecting plaintiff’s argument that facts were not “fully fleshed
16 out” until that time).

17 The factual allegations necessary to support a claim under RCRA are: “(1) that the
18 defendant has generated solid or hazardous waste, (2) that the defendant is contributing to
19 or has contributed to the handling of this waste, and (3) that this waste may present an
20 imminent and substantial danger to health or the environment.” Albany Bank & Trust Co. v.
21 Exxon Mobil Corp., 310 F.3d 969, 972 (7th Cir. 2002).

22 The City points to the following facts learned through the deposition of Daer as the
23 basis for its RCRA claim: (1) “Norman’s Dry Cleaner . . . suffered numerous spills and boil
24 overs;” (2) “Daer’s lateral on the property had not been maintained and had been broken in
25 several places and not repaired;” (3) “pure PCE was disposed down floor drains on a
26 regular basis;” (4) “PCE-laden filters were discarded into the dumpster in the [adjacent]
27 alley;” (5) “KFD ‘misted’ PCE wastewater out the back wall of the boiler room;” and (6)
28 “Daer was the main operator of the dry cleaner equipment when all of these practices were

1 occurring in the 1980s.” (See Memorandum of Points and Authorities at 1:7-15, 2:17-21.)

2 Contrary to the City’s argument, facts sufficient to support a RCRA claim have been
3 known to the City for years. Specifically, the City has known, and indeed has previously
4 alleged, facts supporting an inference that KFD and Daer used and stored PCE, that KFD
5 and Daer handled PCE and caused it to be released into the environment, and that such
6 release of PCE could present an imminent and substantial danger to health or the
7 environment. For example, in its original counter-claim against KFD, filed November 21,
8 2008, the City alleged that “KFD used, handled, [and] stored various hazardous
9 substances, including but not limited to . . . PCE related to its activities and operations at
10 the Property,” that “KFD has generated and released various solid and hazardous wastes,
11 in its operations on the Property since at least 1980,” and that “PCE has in the past
12 contaminated and continues presently to contaminate Eureka’s groundwater and soil from
13 KFD’s acts and omissions.” (See Defendant City of Eureka’s Answer to Complaint of KFD
14 Enterprises, Inc. and Counterclaim and Third-Party Complaint ¶¶ 8-11.) Thereafter, in its
15 First Amended Complaint, filed July 24, 2009, the City added similar allegations as to Daer.
16 (See, e.g., Counter-Claimant and Third-Party Plaintiff City of Eureka’s First Amended
17 Complaint ¶ 29 (“Eureka is informed and believes the improper handling and disposal of the
18 dry cleaning chemical, perchloroethylene, under the supervision and management of
19 Kenneth Daer, owner and operator of the dry cleaner, thereby causing [sic] contamination
20 at or around the soil and groundwater underlying the Property, and the surrounding soils
21 and groundwater.”).)

22 The City fails to explain why such allegations would not have supported a RCRA
23 claim years ago. Consequently, the City fails to show good cause for delay.

24 **B. Bad Faith**

25 KFD and Daer argue the instant motion is brought in bad faith because, according to
26 KFD and Daer, the City has long been aware of the very facts it now claims were
27 discovered through Daer’s deposition. “To oppose a motion for leave to amend on grounds
28 of bad faith, a party must show ‘sharp practice’ tactics such as, for example, seeking to add

1 a defendant merely to destroy diversity jurisdiction.” SAES Getters S.p.A. v. Aeronex, Inc.,
2 219 F. Supp. 2d 1081, 1095 (S.D. Cal. 2002) (citing Sorosky v. Burroughs Corp., 826 F.2d
3 794, 805 (9th Cir. 1987)). Although, as discussed above, the City has, for some time, been
4 aware of a number of facts that could have served as a basis for a RCRA claim, the record
5 before the Court does not support a finding of bad faith.

6 **C. Futility**

7 KFD and Daer argue the proposed amendment would be futile because, according
8 to KFD and Daer, any injunction awarded under RCRA would require them to clean up
9 environmental contamination on the Property, which they are obliged to do in any event by
10 order of the Regional Water Board, and because CERCLA prohibits judicial interference in
11 an ongoing removal of environmental contamination. See, e.g., Razore v. Tulalip Tribes of
12 Washington, 66 F.3d 236, 239-40 (9th Cir. 1995) (dismissing RCRA claim where injunction
13 could interfere with cleanup plan adopted under CERCLA); SPPI-Somersville, Inc. v. TRC
14 Companies, Inc., Nos. C 04-2648 SI, 07-5824 SI, 2009 WL 2612227 (N.D. Cal. Aug. 21,
15 2009) (holding RCRA claim failed where consent order “already require[d] [defendants] to
16 clean up the groundwater contamination, and . . . remediation ha[d] been underway for
17 years”). The City argues the proposed amendment would not be futile because the
18 Regional Water Board has not issued a final Consent Order or approved a final Remedial
19 Action Plan and removal efforts have not begun.

20 Denial of leave to amend on grounds of futility “is rare and courts generally defer
21 consideration of challenges to the merits of a proposed amended pleading until after leave
22 to amend is granted and the amended pleading is filed.” See Clarke v. Upton, 703 F. Supp.
23 2d 1037, 1043 (E.D. Cal. 2010). Here, a finding that the City’s RCRA claim will fail would
24 require additional discovery as to the proceedings before the Regional Water Board, as
25 well as additional motion practice. Under such circumstances, KFD and Daer fail to show
26 the proposed amendment would be futile.

27 **D. Prejudice**

28 KFD and Daer argue they will be prejudiced if the proposed amendment is allowed,

1 because additional motion practice will be required, additional discovery will be necessary,
2 and the discovery deadline is approaching. See Lockheed Martin Corp. v. Network
3 Solutions, Inc., 194 F.3d 980, 986 (9th Cir. 1999) (holding “[a] need to reopen discovery
4 and therefore delay the proceedings supports a district court’s finding of prejudice from a
5 delayed motion to amend the complaint”); Jackson, 902 F.2d at 1387-88 (holding prejudice
6 shown where “additional discovery would have to be undertaken on [the] new claims”). The
7 discovery cut-off date, as set forth in the Court’s Pretrial Order, is July 30, 2012.
8 (See Minutes of Case Management Conference, filed January 20, 2012; Pretrial
9 Preparation Order, filed January 24, 2012.) A motion to dismiss the RCRA claim would be
10 briefed and heard, at the earliest, close to the discovery cut-off date, and, if the claim
11 survived, that deadline would need to be extended; as a consequence, the entire action
12 would be delayed.²

13 The City argues no additional discovery is needed, because its claim is based on
14 Daer’s deposition. Contrary to the City’s argument, the addition of a RCRA claim will, in all
15 probability, necessitate additional discovery, including depositions of third parties (see, e.g.,
16 Declaration of Charles Bolcom Ex. 62 at 419:6-25 (Daer Depo.) (describing inspection
17 performed by maintenance company employee who determined lateral needed repair))
18 and, as discussed above, discovery with respect to the ongoing proceedings before the
19 Regional Water Board.

20 In short, “[t]o put [KFD and Daer] through the time and expense of continued
21 litigation on a new theory, with the possibility of additional discovery, would cause undue
22 prejudice.” Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989)
23 (internal quotation and citation omitted).

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25
26 ² In light of the above findings with respect to delay, the Court does not address
27 herein KFD and Daer’s additional argument that the City fails to show “good cause” to
28 extend the discovery deadline under Rule 16. See Fed. R. Civ. P. 16(b)(4) (providing
“scheduling order” issued by court “may be modified only for good cause and with the
judge’s consent”).

1 **E. Prior Amendments**


2 The instant action has been pending for close to four years. Over that period of
3 time, the City has had ample opportunity to amend its pleadings, conduct discovery and
4 investigate its claims against KFD and Daer. "The district court's discretion to deny leave
5 to amend is particularly broad where [the] plaintiff has previously amended the complaint."
6 Ascon Properties, Inc., 866 F.2d at 1160 (denying leave to amend RCRA claim a second
7 time). If allowed to amend again, the City would be filing its sixth pleading. As the Court
8 has observed, there are numerous parties to the action and numerous motions have been
9 made, opposed and heard with respect to the pleadings alone. (See Order Denying
10 Plaintiff's Motion for Leave to File Fifth Amended Complaint, filed April 22, 2011, at 4:18.)
11 The case is, at last, moving forward toward trial. To return to the pleading stage at this
12 point in the litigation would do a disservice to all parties involved.

13 **CONCLUSION**

14 The Court, having considered and weighed the above-referenced relevant factors,
15 the City's motion is hereby DENIED.

16 **IT IS SO ORDERED.**

17 Dated: June 14, 2012

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19 MAXINE M. CHESNEY
20 United States District Judge
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