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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ROBERT CLARKE,  
Plaintiff,  
v.  
PUBLIC EMPLOYEES UNION LOCAL 1,  
Defendant.

Case No. [16-cv-04954-JSC](#)

**ORDER RE: MOTION FOR  
LEAVE TO FILE THIRD-PARTY  
COMPLAINT**

Re: Dkt. No. 19

Now pending before the Court is Defendant’s motion for leave to file a third-party complaint. (Dkt. No. 19.) After considering the parties’ submissions, the Court concludes that oral argument is unnecessary, *see* Civ. L.R. 7-1(b), and GRANTS Defendant’s motion.

**BACKGROUND**

Plaintiff Robert Clarke brought this action against his former employer, Defendant Public Employees Union Local 1 for breach of contract. (Dkt. No. 1.) Plaintiff alleges that he entered into an employment contract with Defendant on January 20, 2014 for a 36-month term of employment as Chief Financial Officer that was modified by a March 9, 2015 contract that provided for another 36-month term. (*Id.* ¶¶ 7-8; Dkt. No. 19-2 ¶¶ 6-7; Dkt. No. 19-2 at 4-5, 7-8.) The contracts specified that Plaintiff could only be removed for “illegal acts or malfeasance” and that, in the event that he was terminated for any other reason, he would be entitled to a severance package. (Dkt. No. 1 ¶ 11; Dkt. No. 19-2 at 5, 8.) Plaintiff alleges that he did not commit any illegal act or malfeasance and was terminated without cause in February 2016, and that Defendant has refused to pay the severance package owed under the contract. (Dkt. No. 1 ¶¶ 12-14.)

Defendant now seeks leave to file a third-party complaint against proposed Third-Party Defendant Peter Nguyen, Defendant’s General Manager while Plaintiff worked for Defendant, and

1 the individual who entered into the contracts with Plaintiff on Defendant’s behalf. (Dkt. No. 19-2  
2 ¶ 3; Dkt. No. 19-2 at 5, 8.) Defendant alleges that as its General Manager with decision-making  
3 and management authority, Nguyen owed Defendant a fiduciary duty. (Dkt. No. 19-3 ¶ 22.)  
4 Defendant alleges that its practice and policy was to provide at-will employment to all  
5 management employees save the General Manager, including the Chief Financial Officer, and thus  
6 Nguyen was expected to hire the Chief Financial Officer and all other employees on an at-will  
7 basis. (Dkt. No. 19-2 ¶¶ 4-5; *see* Dkt. No. 19-3 (Proposed Third-Party Complaint) ¶¶ 10-11.)  
8 Nevertheless, Nguyen entered into two unapproved employment contracts with Plaintiff with  
9 terms unfavorable to Defendant without seeking approval or disclosing the contracts’ existence to  
10 Defendant; to the contrary, Nguyen “actively concealed the purported contracts’ existence.” (Dkt.  
11 No. 19-2 ¶¶ 6-8; Dkt. No. 19-3 ¶¶ 12-15.) The proposed third-party complaint brings one claim of  
12 breach of fiduciary duty against Nguyen. (Dkt. No. 19-3 ¶¶ 22-26.)

13 This case was filed in August 2016. (Dkt. No. 1.) Defendant was served at the end of  
14 October and answered in mid-November. (Dkt. Nos. 6, 14.) Fact discovery closes in August  
15 2017, and trial is set for January 16, 2018. (Dkt. No. 17 at 1-2.) The Pretrial Order did not  
16 include a deadline to move to amend the pleadings. (*See id.*) To date, the parties have engaged in  
17 only limited discovery in advance of mediation. (*See id.*)

## 18 DISCUSSION

19 Federal Rule of Civil Procedure 14(a)(1) provides that

20 [a] defending party may, as third-party plaintiff, serve a summons  
21 and complaint on a nonparty who is or may be liable to it for all or  
22 part of the claim against it. But the third-party plaintiff must, by  
motion, obtain the court’s leave if it files the third-party complaint  
more than 14 days after serving its original answer.

23 Thus, a defendant may assert a third-party claim under Rule 14(a)(1) “only when the third-party’s  
24 liability is in some way dependent on the outcome of the main claim, or when the third-party is  
25 secondarily liable to the defending party.” *Three Rivers Provider Network, Inc. v. Jett Integration*,  
26 No. 14ccv1092 JM (KSC), 2015 WL 859448, at \*6 (S.D. Cal. Feb. 27, 2015) (citing *Stewart v.*  
27 *Am. Int’l Oil & Gas Co.*, 845 F.2d 196, 199-200 (9th Cir. 1988)). Put another way, “[t]he crucial  
28 characteristic of a Rule 14 claim is that [the] defendant is attempting to transfer to the third-party

1 defendant the liability asserted against him by the original plaintiff” and so “[t]he mere fact that  
2 the alleged third-party claim arises from the transaction or set of facts as the original claim is not  
3 enough.” *Stewart*, 845 F.2d at 200 (internal quotation omitted). For example, “[i]mpleader is  
4 commonly used for claims against a third party for indemnification, subrogation, breach of  
5 warranty, contribution among joint tortfeasors.” *Kormylo v. Forever Resorts, LLC*, No. 3:13-cv-  
6 0511-JM (WWG), 2013 WL 5212090, at \*2 (S.D. Cal. Sept. 13, 2013) (citation omitted).  
7 Defendant meets this derivative liability requirement: the substantive basis for Plaintiff’s  
8 complaint is that Defendant breached his employment contract, and the allegations in the third-  
9 party complaint would transfer liability for any such breach onto Nguyen from Defendant on the  
10 grounds that by entering the same contracts Nguyen breached his fiduciary duty to Defendant.

11 Ultimately, “[t]he decision to allow a third-party defendant to be impleaded under [R]ule  
12 14 is entrusted to the sound discretion of the trial court.” *United States v. One 1977 Mercedes*  
13 *Benz*, 708 F.2d 444, 452 (9th Cir. 1983) (citation omitted). The purpose of this rule is “to promote  
14 judicial efficiency by eliminating the necessity for the defendant to bring a separate action against  
15 a third individual who may be secondarily or derivatively liable to the defendant for all or part of  
16 the plaintiff’s original claim.” *Sw. Adm’rs, Inc. v. Rozay’s Transfer*, 791 F.2d 769, 777 (9th Cir.  
17 1986) (citation omitted). “Therefore, courts have construed the rule liberally in favor of allowing  
18 impleader.” *Universal Green Solutions, LLC v. VII Pac Shores Investors LLC*, No. C-12-05613-  
19 RMW, 2013 WL 5272917, at \*2 (N.D. Cal. Sept. 18, 2013) (citation omitted). In exercising its  
20 discretion as to impleader, the court must “balance the desire to avoid a circuitry of actions and to  
21 obtain consistent results against any prejudice that the plaintiff might suffer from complications of  
22 the case.” *Irwin v. Mascott*, 94 F. Supp. 2d 1052, 1056 (N.D. Cal. 2000) (quotation marks and  
23 citation omitted). In determining whether to permit a third-party complaint, courts usually  
24 consider the following factors: (1) prejudice to the original plaintiff; (2) complication of issues at  
25 trial; (3) likelihood of trial delay; and (4) timeliness of the motion to implead. *Id.* (citation  
26 omitted). Defendant satisfies each of these requirements.

27 Permitting the third-party complaint will not prejudice Plaintiff. He argues that it will  
28 prejudice him “because it would be a total waste of time and resources.” (Dkt. No. 24 at 4.)

1 While the filing of meritless claims against Nguyen may be prejudicial to Nguyen, it is not  
2 prejudicial to Plaintiff. Plaintiff does not identify any other prejudice. He does not respond to  
3 Defendant’s argument that the proposed third-party complaint will not complicate the issues at  
4 trial, and he therefore concedes that it will not. *See Ardente v. Shanley*, No. 07-4479 MHP, 2010  
5 WL 546485, at \*6 (N.D. Cal. Feb. 9, 2010) (“Plaintiff fails to respond to this argument and  
6 therefore concedes it through silence.”). The Court would reach the same conclusion even absent  
7 Plaintiff’s concession: Nguyen would already be a witness at trial, and his involvement and  
8 authority to enter the contracts at issue would be litigated regardless of whether Defendant is  
9 permitted to file a third-party complaint. Indeed, in the Pretrial Order the Court directed the  
10 parties to engage in limited discovery in advance of mediation, including allowing each party to  
11 depose Nguyen. (Dkt. No. 17 at 1.) Further, the proposed third-party complaint involves one  
12 third-party defendant and a single cause of action arising out of the same contracts at issue in  
13 Plaintiff’s complaint. Thus, the third-party complaint will not substantially complicate the action.

14 Third, Plaintiff concedes that the third-party complaint will not delay trial. (Dkt. No. 24 at  
15 4.) This case is still early in the discovery phase: there are seven months left before the close of  
16 fact discovery, and trial is nearly a year away. Similarly, Plaintiff concedes that Defendant’s  
17 motion is timely. (*See id.*) Defendant filed the instant motion for leave to file a third-party  
18 complaint only three months after being served with the complaint and only two months after  
19 filing its answer; other courts have found even longer lapses timely. *See, e.g., Universal Green*  
20 *Solutions, LLC*, 2013 WL 5272917, at \*4 (motion was timely when filed three months after  
21 answer); *Kormylo*, 2013 WL 5212090, at \*2 (motion was timely when filed six months after case  
22 was filed).

23 The gravamen of Plaintiff’s opposition is that Defendants “fail to make even a threshold  
24 showing that Peter Nguyen was its fiduciary” and therefore leave to file the proposed third-party  
25 complaint should be denied and stricken as futile. (Dkt. No. 24 at 2-3.) Put simply, Plaintiff  
26 contends that the proposed third-party complaint and motion fail to support the existence of a  
27 fiduciary relationship. (*Id.* at 3.) Plaintiff does not cite any case holding that courts may deny  
28 leave to file a third-party complaint based on futility. To the contrary, courts have rejected that

1 argument, noting that “Rule 14(a) expressly permits impleader where the proposed third-party  
2 defendant ‘may be liable’ to the original defendant” and the proposed third-party complaint  
3 “asserts at least a colorable claim for relief[,]” as “[a]ny Rule 12 defenses . . . are properly raised  
4 by [the] third-party defendant in its answer to the third-party complaint, not by . . . the original  
5 plaintiff in opposition to a motion for leave to file.” *Clark Cnty. v. Jacobs Facilities, Inc.*, No.  
6 2:10-CV-00194-LRH-PAL, 2011 WL 44587797, at \*1 (D. Nev. Sept. 23, 2011) (citation omitted);  
7 *see also Villegas v. Hackett*, No. 03 CV 2133, 2007 WL 4277509, at \*3 (S.D. Cal. Dec. 5, 2007)  
8 (declining to address the parties’ arguments about “the issue of viability” of the complaint on a  
9 Rule 14 motion for leave to file a third-party complaint because “that issue is not now before the  
10 court”).

11 In short, construing Rule 14(a)(1) liberally in favor of impleader, *see Universal Green*  
12 *Solutions, LLC*, 2013 WL 5272917, at \*2, to the extent Defendant has an actionable claim that  
13 belongs in this forum against Nguyen—an issue better left for Nguyen to challenge once he is  
14 served—resolving all disputes arising from Plaintiff’s employment contracts in one litigation  
15 would “avoid a circuitry of actions” and inconsistent results. *Irwin*, 94 F. Supp. 2d at 1056. The  
16 judicial economy of allowing Defendant to implead Nguyen outweighs any prejudice to Plaintiff.

17 **CONCLUSION**

18 For the reasons described above, the Court GRANTS Defendant’s motion for leave to file  
19 a third-party complaint against Nguyen.

20 This Order disposes of Docket No. 19.

21 **IT IS SO ORDERED.**

22 Dated: February 10, 2017

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JACQUELINE SCOTT CORLEY  
United States Magistrate Judge

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA

3 ROBERT CLARKE,  
4 Plaintiff,

5 v.

6 PUBLIC EMPLOYEES UNION LOCAL 1,  
7 Defendant.

Case No. [16-cv-04954-JSC](#)

**CERTIFICATE OF SERVICE**

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S.  
10 District Court, Northern District of California.

11 That on February 10, 2017, I SERVED a true and correct copy(ies) of the attached, by  
12 placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by  
13 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery  
14 receptacle located in the Clerk's office.

15  
16 Robert Clarke  
17 5905 W. Charleston Blvd, Apt 318  
18 Las Vegas, NV 89146

19 Mark LeHocky  
20 Judicate West  
21 100 Pine St.  
22 Suite 1950  
23 San Francisco, CA 94111

24 Dated: February 10, 2017

25 Susan Y. Soong  
26 Clerk, United States District Court

27 By:   
28 LISA R. CLARK, Deputy Clerk to the  
Honorable JACQUELINE SCOTT CORLEY

United States District Court  
Northern District of California