

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

3  
4 GREGORY HALL, et al.,

5                                    Plaintiffs,

6                                    v.

7 APARTMENT INVESTMENT AND MANAGEMENT  
8 COMPANY; AIMCO CAPITAL, INC.; FORTNEY  
9 & WEYGANDT, INC.; IMR CONTRACTOR  
10 CORPORATION; BAY BUILDING SERVICES;  
11 BAY AREA CONSTRUCTION FRAMERS, INC.;  
12 ALL HALLOWS PRESERVATION, LP; BAYVIEW  
13 PRESERVATION, LP; LA SALLE  
14 PRESERVATION, LP; and SHOREVIEW  
15 PRESERVATION, LP,

16                                    Defendants.  
17 \_\_\_\_\_/

No. C 08-03447 CW

ORDER GRANTING  
PLAINTIFFS'  
MOTION FOR LEAVE  
TO AMEND  
COMPLAINT  
(Docket No. 209)

18                                    Plaintiffs Gregory Hall, Fausto Aguilar, Gonzalo Aguilar,  
19 Charles Chilton, Douglas Givens, Quincy Mouton, Richard Rankin,  
20 Hector Rodriguez, Arnulfo Carranza-Rivas and Terry Mackey<sup>1</sup> move for  
21 leave to amend their complaint to add Moises Avila and Ismael Avila  
22 (collectively, the Avilas) as Defendants. Defendant IMR Contractor  
23 Corporation opposes the motion, even though Plaintiffs' claims  
24 against it are stayed because of its bankruptcy. No other  
25 Defendant joined IMR's opposition. The motion will be decided on  
26 the papers. Having considered the papers submitted by the parties,  
27 the Court GRANTS Plaintiffs' motion.

28 \_\_\_\_\_  
<sup>1</sup> Although twenty-eight Plaintiffs were at one time a part of  
this case, the parties' April 11, 2011 stipulation states that  
these ten individuals are the remaining Plaintiffs asserting  
claims.

BACKGROUND

Because the Court's previous orders amply summarize this case, only the background necessary to resolve this motion is provided below.

This action arises from alleged unlawful labor and employment practices of entities involved in the rehabilitation of four apartment communities in the Bayview-Hunter's Point neighborhood of San Francisco, California. Specifically, Plaintiffs charge IMR, their alleged former employer, with multiple violations of California's wage-and-hour laws and Fair Employment and Housing Act (FEHA).

Plaintiffs seek to amend their complaint to add allegations that support alter ego liability against the Avilas for IMR's conduct. Their proposed amendments include allegations that "IMR was a corporation wholly owned, managed and controlled by MOISES AVILA and ISMAEL AVILA" and that the Avilas "did not maintain adequate corporate records" and treated "IMR's assets as their own." Pls.' Mot. at 2-3. Plaintiffs also intend to allege that "IMR did not hold corporate meetings and did not keep minutes for the corporation" and that "IMR has been undercapitalized, does not own any real property, and has threatened bankruptcy while the AVILAS own several real properties." Id. at 3. Finally, Plaintiffs wish to aver that the failure to pierce the corporate veil would allow "the AVILAS to avoid payment of wages to their employees and to avoid any liability for discriminating against Plaintiffs." Id. at 2.

On May 19, 2011, after briefing on Plaintiffs' motion closed,

1 IMR filed for bankruptcy protection. Thus, as noted above,  
2 Plaintiffs' claims against IMR are stayed.

3 Currently, there are no non-defaulting Defendants against  
4 which Plaintiffs have active claims. On April 26, 2010, default  
5 was entered against Defendant Bay Building Services (BBS). (Docket  
6 No. 80.) On February 18, 2011, the Court granted summary judgment  
7 in favor of Defendant Fortney & Weygandt on the claims brought  
8 against it. (Docket No. 182.) On April 11, 2011, pursuant to  
9 stipulation, Plaintiffs' claims against Defendant Bay Area  
10 Construction Framers were dismissed from this action. (Docket No.  
11 208.) Finally, on May 10, 2011, all remaining claims against  
12 Defendants Apartment Investment and Management Company; AIMCO  
13 Capital, Inc.; All Hallows Preservation, L.P.; Bayview  
14 Preservation, L.P.; La Salle Preservation, L.P.; and Shoreview  
15 Preservation, L.P. (collectively, AIMCO) were settled.<sup>2</sup> (Docket  
16 No. 210.)

17 Under the case management order, the deadline to add claims  
18 and parties was March 16, 2009. (Docket No. 35.)

19 DISCUSSION

20 Because the deadline to add claims and parties has passed,  
21 Plaintiffs must satisfy Federal Rule of Civil Procedure 16(b)(4),  
22 which provides that a scheduling order "may be modified only for  
23 good cause and with the judge's consent." Where a schedule has  
24 been ordered, a party's ability to amend its pleading is governed  
25 by this good cause standard, not the more liberal standard of Rule

26 \_\_\_\_\_  
27 <sup>2</sup> The parties have not yet stipulated to the dismissal of the  
28 remaining claims against AIMCO.

1 15(a)(2). Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 608  
2 (9th Cir. 1992). In order to determine whether good cause exists,  
3 courts primarily consider the diligence of the party seeking the  
4 modification. Id. at 609; see also Coleman v. Quaker Oats Co., 232  
5 F.3d 1271, 1294 (9th Cir. 2000). If good cause is shown, under  
6 Rule 15(a)(2), courts consider five factors in deciding whether to  
7 grant leave to amend: undue delay, bad faith, futility of  
8 amendment, prejudice to the opposing party and whether the  
9 plaintiff has previously amended the complaint. Ahlmeyer v. Nev.  
10 Sys. of Higher Educ., 555 F.3d 1051, 1055 n.3 (9th Cir. 2009).

11 IMR opposes Plaintiffs' motion on multiple grounds. IMR  
12 contends that Plaintiffs have not established good cause to amend  
13 their complaint and that they unduly delayed seeking leave to  
14 amend. However, Plaintiffs' proposed amendments stem from their  
15 desire to collect any judgment against IMR, which constitutes good  
16 cause. Further, under the Federal Rules of Civil Procedure and  
17 California law, a plaintiff may move to amend a complaint -- even  
18 after judgment -- to add a defendant for the purpose of executing a  
19 judgment. See Katzir's Floor & Home Design, Inc. v. M-MLS.com, 394  
20 F.3d 1143, 1148 (9th Cir. 2004) (stating that Rule 69(a), in  
21 conjunction with California Code of Civil Procedure § 187, grants  
22 courts authority to "amend a judgment to add additional judgment  
23 debtors"); NEC Elecs., Inc. v. Hurt, 208 Cal. App. 3d 772, 778-81  
24 (1989). Because Plaintiffs could have sought to add the Avilas  
25 even after the entry of judgment, any delay in naming them as  
26 Defendants does not warrant denying their motion for leave to  
27 amend.

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1           IMR also contends that it will suffer prejudice because it  
2 will be required to expend additional resources if the Avilas are  
3 added to this action. This argument is unavailing. Plaintiffs'  
4 claims against IMR are currently stayed pending resolution of its  
5 bankruptcy petition.

6           Finally, IMR argues that amendment would be futile. First, it  
7 contends that the relevant statutes of limitations bar any recovery  
8 against the Avilas. However, a

9           claim against a defendant, based on the alter ego theory,  
10 is not itself a claim for substantive relief, e.g.,  
11 breach of contract or to set aside a fraudulent  
12 conveyance, but rather, procedural, i.e., to disregard  
13 the corporate entity as a distinct defendant and to hold  
14 the alter ego individuals liable on the obligations of  
15 the corporation where the corporate form is being used by  
16 the individuals to escape personal liability, sanction a  
17 fraud, or promote injustice.

18           Shaoxing Cnty. Huayue Import & Export v. Bhaumik, 191 Cal. App. 4th  
19 1189, 1199 (2011) (citation and internal quotation marks omitted).  
20 Plaintiffs are not seeking to add new substantive claims for relief  
21 against the Avilas for conduct that occurred outside the  
22 limitations period. Instead, Plaintiffs are seeking to impose  
23 alter ego liability against the Avilas for the claims brought  
24 against IMR, which IMR does not contend are time-barred.

25           IMR also argues that amendment would be futile because  
26 Plaintiffs' allegations are not sufficient to support alter ego  
27 liability against the Avilas.<sup>3</sup> For alter ego liability to be

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28           <sup>3</sup> IMR also points to evidence that it contends contradicts or  
undercuts Plaintiffs' allegations. However, whether Plaintiffs  
have sufficient evidence to support their claims against the Avilas  
is not at issue on this motion. The futility analysis tests the  
legal sufficiency of Plaintiffs' pleadings. See Kendall v. Visa  
U.S.A., Inc., 518 F.3d 1042, 1051-52 (9th Cir. 2008).

1 imposed, two requirements must be met: (1) "there must be such a  
2 unity of interest and ownership between the corporation and its  
3 equitable owner that the separate personalities of the corporation  
4 and the shareholder do not in reality exist" and (2) "there must be  
5 an inequitable result if the acts in question are treated as those  
6 of the corporation alone." Sonora Diamond Corp. v. Superior Court,  
7 83 Cal. App. 4th 523, 538 (2000). Factors a court may consider  
8 include the commingling of funds and assets, "inadequate  
9 capitalization," and the "disregard of corporate formalities." Id.  
10 at 538-39. Plaintiffs intend to plead that IMR was  
11 undercapitalized and did not observe corporate formalities or  
12 maintain adequate corporate records. Plaintiffs also contend that  
13 the failure to pierce the corporate veil would permit the Avilas to  
14 escape liability for their alleged failure to comply with state  
15 wage-and-hour laws and the FEHA. These proposed amendments satisfy  
16 both requirements for alter ego liability.

17 Because their proposed amendments are supported by good cause  
18 and would not be futile, Plaintiffs will be permitted to amend  
19 their complaint to add the Avilas as Defendants and assert claims  
20 against them based on an alter ego theory of liability.

21 CONCLUSION

22 For the foregoing reasons, Plaintiffs' motion for leave to  
23 amend their complaint is GRANTED. (Docket No. 209.) Within three  
24 days of the date of this Order, Plaintiffs shall file an amended  
25 complaint that reflects the amendments proposed in their motion.  
26 Plaintiffs' amended pleading shall be served on the Avilas within  
27 seven days of the date it is filed. Within twenty-one days of the

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1 date it is served on them, the Avilas shall respond. If the Avilas  
2 intend to file any dispositive motion, such as a motion to dismiss,  
3 motion for judgment on the pleadings or a motion for summary  
4 judgment, it must be filed at that time. If a dispositive motion  
5 is filed, Plaintiffs' opposition shall be due fourteen days  
6 thereafter. The Avilas' reply shall be due seven days after that.  
7 Any dispositive motion will be taken under submission on the  
8 papers, unless the Court indicates otherwise.

9 A final pretrial conference will be held on August 9, 2011 at  
10 2:00 p.m. A jury trial is expected to begin on August 22, 2011 at  
11 8:30 a.m.

12 IT IS SO ORDERED.

13 Dated: 5/24/2011

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15 CLAUDIA WILKEN  
16 United States District Judge  
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