UNPUBLISHED OPINIONS

- *Applied Materials, Inc. v. Advanced Semiconductor Materials Am., Inc.*
- *Chelsea LLC v. Regal Stone, Ltd*
- *EEOC v. Pan-American World Airways, Inc*
- *Grinenko v. Olympic Panel Prods*
- *In re NVIDIA GPU Litigation*
- *Kuroiwa v. Lingle*
- *Levitte v. Google*
- *Lewis v. City of Fresno*
- *Makah Indian Tribe v. Verity*
- *Narvaes v. EMC Mortgage Corp*
- *O'Diah v. Univ. of California*
- *Oregon Natural Desert Ass'n v. Shuford*
- *Sapiro v. Sunstone Hotel Investors*
- *Wadsworth et al v. KSL Grand Wailea Resort, Inc.*

APPLIED MATERIALS, INC., Plaintiff v. ADVANCED SEMICONDUCTOR MATERIALS AMERICA, INC., EPSILON TECHNOLOGY INC., doing business as ASM EPITAXY, and ADVANCED SEMICONDUCTOR MATERIALS INTERNATIONAL N.V., Defendants

No. C-92-20643 RMW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1994 U.S. Dist. LEXIS 17569; 30 U.S.P.Q.2D (BNA) 1967

April 18, 1994, Decided
April 19, 1994, FILED

JUDGES: [*1] RONALD M. WHYTE, UNITED STATES DISTRICT JUDGE

OPINION BY: RONALD M. WHYTE

OPINION

ORDER GRANTING APPLIED MATERIALS, INC.'S MOTION TO DISMISS INEQUITABLE CONDUCT CLAIM AND MOTION TO STRIKE INEQUITABLE CONDUCT DEFENSE

Applied Material Inc.'s ("Applied") motion to dismiss Advanced Semiconductor Materials America, Inc. et al.'s ("ASM") inequitable conduct claim and motion to strike ASM's inequitable conduct defense was heard on April 15, 1994. The court has read the moving and responding papers and heard the oral argument of counsel. Good cause appearing therefor, the court grants Applied's motions.

I. BACKGROUND

On April 18, 1989 Applied filed the parent application of *U.S. Patent No. 5,194,401* for a pressure-resistant thermal reactor system for semiconductor processing. On November 15, 1989, Applied filed a divisional application. Applied filed a corresponding European patent application. On April 9, 1991 Applied received a European Search Report that made reference to *U.S. Patent No. 3,744,964* ("the Hart patent"). On April 22, 1992 Applied filed a continuation application that disclosed the European Search Report and the Hart Patent in an Information Disclosure Statement. On March 16, 1993, the Examiner **[*2]** issued the continuation application as a patent without change.

On October 1, 1992, Applied filed suit against Advanced Semiconductor Materials et al. ("ASM") alleging that ASM infringed *U.S. Patent No. 4,920,918 ("the '918 patent")*. On July 15, 1993, this court, pursuant to the parties' stipulation, granted leave for Applied to amend its complaint to add *U.S. Patent No. 5,194,401 ("the '401 patent")* issued on March 16, 1993. On January 17, 1994, Applied stipulated to allow ASM to amend its answer and counterclaim to allege that Applied was guilty of inequitable conduct in connection with its alleged withholding of *U.S. Patent No. 3,744,964* ("the Hart patent") from the United States Patent Office ("PTO") until after the original patent application was examined and allowed.

On January 21, 1993, Applied moved to dismiss the ASM defendants' inequitable conduct allegations on the grounds that the allegations are insufficient as a matter of law to support an "inequitable conduct" claim.

II. LEGAL STANDARDS

A. Motion to Dismiss

In ruling on a motion to dismiss, district courts must accept all material allegations of fact alleged in the complaint as true, and resolve all doubts in **[*3]** favor of the plaintiff. *Blake v. Dierdorff, 856 F.2d 1365, 1368 (9th Cir. 1988)*. However, fraud claims must be pleaded with particularity. *Fed. R. Civ. Pro. 9(b)*. A complaint may be dismissed as a matter of law for two reasons: (i) lack of a cognizable legal theory, or (ii) the pleading of insufficient facts under a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984)* (citations omitted.)

B. Motion to Strike

A motion to strike is governed by *Rule 12(f) of the Federal Rules of Civil Procedure*, which states:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

As with a motion to dismiss, when ruling on a motion to strike a court must view the pleadings in the light most favorable to the non-moving party. *California v. United States, 512 F. Supp. 36, 39 (N.D. Cal. 1981)*. **[*4]** This court will review the allegations in the pleadings with these standards in mind.

C. Inequitable Conduct

A patent applicant has a duty of candor to the Patent Office. *LaBounty Mfg., Inc. v. United States Int'l Trade Com., 958 F.2d 1066, 1070 (Fed. Cir. 1992)*. The duty of candor extends through the patent's entire prosecution history. If an applicant withholds material information from the Patent Office with the intent to affect the issuance of a patent, the applicant has engaged in inequitable conduct and the patent may be rendered unenforceable. *FMC Corp. v. Manitowoc Co., 835 F.2d 1411, 1415 (Fed. Cir. 1987)*. The elements of materiality and intent must be established by clear and convincing evidence. *LaBounty Mfg., supra, 958 F.2d at 1070*. "Information is material where there is a substantial likelihood that a reasonable examiner would consider it important in deciding whether to allow the application to issue as a patent." 37 C.F.R. [at] 1.56(a) (1991). To establish inequitable conduct, intent to deceive must be proven. *Tol-O-Matic Inc. v. Proma Produkt-Und Marketing Gesellschaft* **[*5]** *m.b. H., 945 F.2d 1546, 1553-54 (Fed. Cir. 1991)*.

III. ANALYSIS

A. Judicial Notice

[1]

1 ASM did not oppose Applied's Request for Judicial Notice.

On a motion to dismiss, a court may take judicial notice of facts outside the pleadings without converting a *Rule 12(b)(6)* motion to one for summary judgment. *Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (1986)*. In *Mack*, the court stated that a court may take judicial notice of "records and reports of administrative bodies." *Id.* (citation omitted). Therefore, this court will take judicial notice of the United States Patent Office's public records of the proceedings in Patent Application Serial Nos. 436,838 (Request for Judicial Notice, Ex. A) and 873,483 (Request for Judicial Notice, Exh. B) which issued into *U.S. Patent No. 5,194,401*.

C. Inequitable Conduct

Applied argues that, as a matter of law, the failure to disclose a prior art reference in an abandoned application cannot **[*6]** be inequitable conduct when the reference is disclosed in a continuing application from which a patent issued because 1) the delayed submission is not material and 2) the alleged misrepresentations relate to nondisclosure of the prior art and were "cured" with its disclosure. ASM argues that even a cursory examination of the Hart patent reveals its materiality to the *'401 patent* because the Hart patent discloses what Applied claims as its invention: a semiconductor reactor having a quartz reaction chamber with external strengthening ribs and the European Search Report expressly stated that the Hart patent was "relevant." Applied counters that materiality

of the delay, not materiality of the prior art, must be assessed on these facts. Applied argues that, even if the Hart patent were a material reference, the fact that it was not cited in the abandoned application was not material because the Examiner was provided with the Hart reference in the context of a fresh patent application. Therefore, Applied contends, a reasonable examiner simply could not consider the earlier absence of Hart before him or her "important in deciding whether to allow the application to issue as a patent." **[*7]** The court agrees. Because this is not a case of nondisclosure, but a case of delayed disclosure, the materiality of the delay, not the materiality of the reference, must be assessed. Because the Examiner considered the prior art in the context of the continuation application, there could not be "a substantial likelihood that a reasonable examiner would consider [the delayed submission of the Hart patent] important in deciding whether to allow the application to issue as a patent." 37 C.F.R. [at] 1.56(a) (1991).

The court also rejects ASM's argument that, because of the late submission, the Examiner did not actually read the Hart patent. In *Northern Telecom, Inc. v. Datapoint Corp., 908 F.2d 931, 939 (Fed. Cir. 1990) cert. denied 498 U.S. 920, 112 L. Ed. 2d 250, 111 S. Ct. 296 (1990),* the court states that "it is presumed that public officials do their assigned jobs." *Id. at 939* (citations omitted)). Once the Hart patent was before the patent examiner, he was presumed to have considered it.

ASM also argues that while Applied withheld the Hart patent it made material **[*8]** misrepresentations to the PTO which were flatly inconsistent with Applied's own concealed knowledge of the Hart patent. ASM contends that because Applied did not comply with the three-part test set forth by the Federal Circuit in *Rohm & Haas Co. v. Crystal Chemical Co., 722 F.2d 1556, 1572 (Fed. Cir. 1983) cert. denied 469 U.S. 851, 83 L. Ed. 2d 107, 105 S. Ct. 172 (1984),* it did not cure the alleged misrepresentations.

In opposition, Applied claims that ASM's cure argument fails because *Rohm & Haas* involved false test results while, in the case at bar, the alleged misrepresentations relate to the prior art. Applied reasons that the *Rohm & Haas* cure requirements are relevant in the former but not in the latter case because in the case of alleged misrepresentations of prior art the Patent Examiner could independently examine the prior art after it was disclosed. Applied points to the Federal Circuit's refusal to find inequitable conduct in *Northern Telecom, Inc. v. Datapoint Corp., 908 F.2d 931, 938-40 (Fed. Cir. 1990)* where the applicant allegedly mischaracterized **[*9]** the prior art. The court reasoned that "the pertinent information was squarely before the examiner. . . ." *Id. at 938*. Applied attempts to distinguish *Northern Telecom* because the patentee's mischaracterization of an amendment to the patent application was made at a time when the document was before the Examiner rather than at an earlier time. The court disagrees. The distinction is inconsequential because in both cases the Patent Examiner could make an independent examination of the prior art. Once the prior art Hart patent was disclosed, the Patent Examiner was free to reach his own conclusion regarding the disclosure in the reference before him. The court also finds that the *Rohm & Haas* cure procedures are not applicable in the instant case. In *Rohm & Haas* a cure could only be effectuated by supplying the Patent examiner "with accurate facts" concerning the test results and "calling his attention to the untrue or misleading assertions sought to be overcome. . . ." *Rohm & Haas, supra 722 F.2d at 1572*. In the case at bar, disclosure of the prior art "cured" the alleged misrepresentations because the Patent **[*10]** Examiner could independently assess the veracity of the alleged misstatements by examining the prior art.

Therefore, the court finds that ASM's failure to disclose a prior art Hart reference in an abandoned application cannot be inequitable conduct when the reference was disclosed in a continuing application from which the *'401 patent* issued.

IV. ORDER

Accordingly, the court grants Applied's motion to dismiss the inequitable conduct claim and motion to strike the inequitable conduct defense.

DATED: 4/18/94

RONALD M. WHYTE

UNITED STATES DISTRICT JUDGE

ORDER DENYING APPLIED'S MOTION FOR CONSOLIDATION WITHOUT PREJUDICE

The motion to consolidate of Applied Material, Inc. "Applied") was heard on April 8, 1994. In this motion,

Applied seeks to consolidate for trial the two above-captioned cases pending before this court. The court has read the moving and responding papers and heard the oral argument of counsel. Good Cause Appearing therefor, the court denies plaintiff's motion to consolidate pursuant to *Federal Rules of Civil Procedure, Rule 42(a)*.

I. BACKGROUND

On October 1, 1992, Applied filed suit against Advanced Semiconductor Materials et al. ("ASM"). In February 1993, this **[*11]** court held a case management conference and set an August 15, 1994 jury trial date and a May 1, 1994 discovery cut-off. Applied alleges that ASM's Epsilon One reactor infringes two related Applied patents, *U.S. Patent Nos. 4,920,918 ("the '918 Patent")* and *5,194,401 ("the '401 Patent")*. Both of these patents relate to the design of the quartz tube in a semiconductor reactor.

ASM filed *Advanced Semiconductor Materials, America Inc. et al. v. Applied Materials* on January 11, 1993. On September 15, 1993 Judge McNamee of the Arizona District Court granted Applied Materials' motion to transfer the case to this court. The case involves two separate patents, *U.S. Patent No. 4,874,464 ("the '464 patent")* relating to a process for operating an epitaxial reactor and *U.S. Patent No. 4,798*, 165 ("the '165 patent") relating to an apparatus for chemical vapor deposition. The parties have agreed to consolidate the cases for purposes of discovery.

II. LEGAL STANDARDS

Federal Rule of Civil Procedure 42(a) provides:

> **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in **[*12]** issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

"The district court has broad discretion under this rule to consolidate cases pending in the same district." *Investors Research Co. v. U.S. District Court, 877 F.2d 777 (9th Cir. 1989)*. In determining whether or not to consolidate, a court weighs the interest of judicial convenience against the potential for confusion, prejudice, or delay. *See Southwest Marine, Inc. v. Triple A Machine Shop, Inc., 720 F. Supp. 805, 807 (N.D.Cal. 1989)*. This weighing process involves a review of a number of different factors including, but not limited to, whether the causes of action and facts in each action are similar, whether the complexity of the consolidated case will confuse the jury, whether trying the actions separately will involve an unneeded duplication of effort, whether consolidation will delay the trial of one or both of the actions, and whether consolidation would adversely affect the rights of any of the parties. *Id.*

III. ANALYSIS

Applied argues **[*13]** that the two cases involve common questions of law and facts such as 1) extensive testimony about the structure and development of ASM's Epsilon One reactor; 2) specific aspects of epitaxial chemical vapor deposition; 3) testimony of many of the same witnesses and expert witnesses on the technology and operation of each party's products; 4) common legal issues e.g. infringement, patent validity, and defenses of anticipation, obviousness, violation of Section 112 and inequitable conduct; 5) common prior art; 6) the commercial success of the Epsilon One; and 7) the level of "one of ordinary skill in the art". On the basis of these allegedly common questions, Applied argues that consolidation would be efficient and economical in that the parties will not have to educate two judges and two juries on the concededly highly complex and technical subject matter. In opposition, ASM argues that the factual and legal overlap between the two cases is de minimis. Although the court finds that there are some common issues, "the mere existence of common issues. . . does not mandate consolidation." *Cedar-Sinai Medical Center v. Revlon, Inc., 111 F.R.D. 24, 33 (D.Del. 1986)*. **[*14]**

ASM contends that granting Applied's motion to consolidate would require the jury to understand three separate technologies, increase the likelihood of juror confusion, lengthen the trial, and invite juror boredom. The court agrees. A patent case involving a single patent is difficult enough for a jury because patent cases are notoriously complex. In the instant case, consolidation would require the same jury to deal with four patents. Consolidating these two cases would require the jury to hear, digest, and keep separate testimony on twice as

many patents. The court finds that the likelihood of jury confusion outweighs any efficiency that might be achieved through consolidation.

IV. ORDER

Good Cause Appearing, the court denies without prejudice Applied's motion to consolidate the above-captioned cases for trial. Upon appropriate request, the court will revisit the issue of consolidation or partial consolidation as proposed by Applied during oral argument at the pretrial conference or by motion made closer to trial.

DATED: 4/18/94

RONALD M. WHYTE

UNITED STATES DISTRICT JUDGE

CHELSEA, LLC, MARK RUSSO, and ALLEN LORETZ, individually and on behalf of all others similarly situated, Plaintiffs, v. REGAL STONE, LTD., HANJIN SHIPPING, CO., LTD., SYNERGY MARITIME, LTD., FLEET MANAGEMENT, LTD., and JOHN COTA In Personam, M/V COSCO BUSAN, their engines, tackle, equipment, appurtenances, freights, and cargo In Rem, Defendants. AND ALL RELATED CASES

Case No. 07-5800 SCand related cases:07-6045 SC,08-2268 SC,08-2052 SC,08-5098 SC

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2009 U.S. Dist. LEXIS 10770

February 3, 2009, Decided
February 3, 2009, Filed

PRIOR HISTORY: *United States v. M/V Cosco Busan, 2008 U.S. Dist. LEXIS 93456 (N.D. Cal., Nov. 17, 2008)*

COUNSEL: [*1] For Chelsea, LLC, individually and on behalf of all others similarly situated, Plaintiff: Adel A. Nadji, Joshua C. Ezrin, Michael Andrew McShane, William M. Audet, LEAD ATTORNEYS, Audet & Partners, LLP, San Francisco, CA; Anthony M. Urie, Law Office of Anthony M. Urie PLLC, Shoreline, WA.

For Regal Stone, Ltd., Defendant: Anne Maureen Moriarty, Christopher A. Stecher, Gordon Craig Young, John D. Giffin, Joseph Albert Walsh, Julie L. Taylor, Nicole Bussi, Keesal Young and Logan, San Francisco, CA.

For Hanjin Shipping, Co., Ltd., Defendant: Erich Paul Wise, LEAD ATTORNEY, Flynn, Delich & Wise, Long Beach, CA; Aleksandrs Eduards Drumalds, James Barton Nebel, Flynn Delich & Wise LLP, Long Beach, CA; Conte C. Cicala, Flynn, Delich & Wise, San Francisco, CA.

For M/V Cosco Busan, their engines, tackle, equipment appurtenances, freights, and corgo In Rem, Defendant: John D. Giffin, Nicole Bussi, Anne Maureen Moriarty, LEAD ATTORNEYS, Keesal Young & Logan, San Francisco, CA; Christopher A. Stecher, Joseph Albert Walsh, Keesal Young & Logan, San Francisco, CA.

For Fleet Management, Ltd., in personam, Defendant: Nicole Bussi, LEAD ATTORNEY, Anne Maureen Moriarty, Christopher A. Stecher, Gordon Craig **[*2]** Young, John D. Giffin, Joseph Albert Walsh, Keesal Young & Logan, San Francisco, CA.

For John Cota, In Personam, Defendant: Walter Gerard Coppenrath, Jr., LEAD ATTORNEY, Coppenrath & Associates, Long Beach, CA; George M. Jones, Phillip S. Dalton, Coppenrath & Associates, Long Beach, CA.

For Captain John Cota, 3rd party defendant: Walter Gerard Coppenrath, Jr., LEAD ATTORNEY, Coppenrath & Associates, Long Beach, CA; George M. Jones, Phillip S. Dalton, Coppenrath & Associates, Long Beach, CA.

For United States Of America, Interested Party: R. Michael Underhill, LEAD ATTORNEY, U.S. Dept of Justice, San Francisco, CA.

For United States of American/ENRD, Interested Party: R. Michael Underhill, LEAD ATTORNEY, U.S. Dept of

Justice, San Francisco, CA; Bradley Robert O'Brien, U.S. Department of Justice, San Francisco, CA.

For The Continental Insurance Co., Motion to Relate Declaratory Relief, Interested Party: Samuel Harold Ruby, Bullivant Houser Bailey, San Francisco, CA.

JUDGES: Samuel Conti, UNITED STATES DISTRICT JUDGE.

OPINION BY: Samuel Conti

OPINION

ORDER GRANTING MOTION TO CONSOLIDATE RELATED CASES FOR PRE-TRIAL PURPOSES ONLY

I. *INTRODUCTION*

On December 19, 2008, Regal Stone Limited ("Regal Stone") and Fleet Management **[*3]** Ltd. ("Fleet") moved to consolidate this case - referred to hereinafter as "the Chelsea action" - and the four related civil cases before this Court for pre-trial purposes only. Docket No. 156. Regal Stone and Fleet filed the same motion in the related cases. *See United States v. Regal Stone, Ltd.*, Case No. 07-6045, ("the United States action"), Docket No. 130; *California v. Regal Stone, Ltd.*, Case No. 08-2268, ("the California action"), Docket No. 44; *Continental Ins. Co. v. Cota*, Case No. 08-2052, ("the Continental action"), Docket No. 78; *Regal Stone, Ltd. v. Cota*, Case No. 08-5098, ("the Regal Stone action"), Docket No. 16. [1]

1 In the California action, both Regal Stone and Fleet moved to consolidate, but Fleet is not listed as a defendant in the case. *See* Docket No. 44. The Court treats that motion as if it were filed by Regal Stone alone.

In the United States action, the Third-Party Defendant, Dr. Charles Calza ("Dr. Calza"), filed a statement of conditional non-opposition. *See* Docket No. 133 ("Dr. Calza Resp."). The United States responded to the motion, filing what is essentially a statement of non-opposition. *See* Docket No. 134 ("United States Resp.").

In the Continental action, **[*4]** The Continental Insurance Company ("Continental") opposed the motion. *See* Docket No. 79 ("Opp'n"). In the same case, Defendant John Joseph Cota ("Cota") filed a conditional statement of non-opposition. *See* Docket No. 80 ("Cota Resp."). The Third-Party Defendants San Francisco Bar Pilots and The San Francisco Bar Pilots Benevolent and Protective Association (collectively, "the Bar Pilots") also filed a conditional statement of non-opposition. *See* Docket No. 81 ("Bar Pilots Resp."). In the United States action, Regal Stone and Fleet filed a Reply. *See* Docket No. 136. For the reasons stated herein, the motions to consolidate are GRANTED.

II. *BACKGROUND*

A. *The Allision*

On November 7, 2007, the cargo ship M/V COSCO BUSAN hit the Bay Bridge while attempting to sail out of the San Francisco Bay. Regal Stone owns the M/V COSCO BUSAN, and Fleet is the ship's operator. Cota is a member of the Bar Pilots and was allegedly piloting the vessel during its exit from the San Francisco Bay. As a result of the allision, the M/V COSCO BUSAN discharged more than 50,000 gallons of heavy bunker fuel into the bay.

B. *The Lawsuits*

Various lawsuits have since been filed in state and federal court. There are currently **[*5]** five federal civil actions that have been related and are before this Court. [2] In addition, the United States filed a criminal action against both Cota and Fleet. *See United States v. Cota*, Case No. CR 08-0160 ("the criminal action").

2 In *Shogren Living Trust v. Regal Stone, Ltd.*, Case No. 07-5926, the Court entered an order dismissing the case on August 8, 2008. *See* Docket No. 29.

On September 18, 2008, the Court stayed the Continental action pending resolution of the criminal action. *See* Docket No. 62 ("Sept. 18, 2008, Order"). On December 9, 2008, the Court entered a Case Management Order in the California action, staying the case pending completion of the criminal proceedings. *See* Docket No. 39 ("Case Management Order"). On December 19, 2008, Regal Stone and Fleet filed the motions to consolidate at issue here.

C. *Responses to the Motions to Consolidate*

The United States does not oppose consolidation of the cases for pre-trial purposes. United States Resp. at 2. The United States makes some other suggestions that are addressed below.

Dr. Calza does not oppose consolidation of the cases, provided that the Court gives explicit instructions to the parties regarding filing and notice provisions, **[*6]** provided that the Court acknowledge that each separate action retains its separate character as required by Ninth Circuit law, and provided that if the cases are stayed, a party in the position to file a dispositive motion without the need for discovery be allowed to do so. Dr. Calza Resp. at 2-4. Dr. Calza also requests that any stay of the consolidated actions be explicitly tied to all criminal proceedings pending before the Honorable Susan Illston. *Id*. at 2-3. Judge Illston issued an order severing the "False Statements" charges against Cota from the criminal negligencebased claims. *Id.; United States v. Cota*, Case No. CR 08-0160, Docket No. 78. Dr. Calza points out that Cota will not be able to participate in discovery related to interactions between Cota and Dr. Calza until after the criminal action concerning the "False Statements" charges. Dr. Calza Resp. at 3.

Cota and the Bar Pilots do not oppose Regal Stone and Fleet's motion, provided that the Court's order staying the case remains in effect, providing that the other consolidated actions are likewise stayed pending resolution of the criminal matter, and provided that the parties are permitted to seek limited relief from the **[*7]** stay upon a showing of good cause. Cota Resp. at 1; Bar Pilots Resp. at 1.

Only Continental opposes consolidation of the cases. *See* Opp'n. Continental's concerns, as well as those of the other responding parties, are addressed below.

III. *LEGAL STANDARD*

"If actions before the court involve a common question of law or fact, the court may . . . consolidate the actions." *Fed. R. Civ. P. 42(a)(2)*. District courts have broad discretion under this rule to consolidate cases pending in the same district. *Investors Research Co. v. U.S. Dist. Court for Cent. Dist. of Cal., 877 F.2d 777, 777 (9th Cir. 1989)*. District courts may consolidate cases for purposes of discovery and pre-trial proceedings only. *See Firemen's Ins. Co. of Newark, N.J. v. Keating, 753 F. Supp. 1137, 1141 (S.D.N.Y. 1990)*. In deciding whether to consolidate actions under *Rule 42(a),* the court must balance the savings of time and effort consolidation will produce against any inconvenience, delay, or expense that it would cause. *Huene v. U.S., 743 F.2d 703, 704 (9th Cir. 1984)*.

IV. *DISCUSSION*

A. *Continental's Opposition*

Continental contends that there are no common questions of law or fact between its case and the related actions. **[*8]** Opp'n at 6-7. Continental, an insurance company, is the underwriter of one of the Bar Pilots' insurance policies. *Id*. at 4. Continental seeks reimbursement from Regal Stone and Fleet for money that Continental advanced to Cota to defend himself in the civil and criminal cases pending against him. *Id*. at 5. Continental relies on a provision of the California Harbors and Navigations Code, which provides that "[e]very vessel, owner, operator, or demise . . . hiring a pilot with a state license for the Bay[] of San Francisco . . . shall . . . defend, indemnify, and hold harmless pilots." *Cal. Harb. & Nav. Code § 1198(c)*. Continental contends that while the allocation of fault for the allision is central to the other cases, "the dispute over the enforceability of *§ 1198* is the fundamental issue in Continental's action." Opp'n at 6.

However, Continental fails to mention that *section 1198(c)* releases vessels, owners and operators from the obligation to defend, indemnify or hold pilots harmless in "cases of willful misconduct by the pilot." *Cal. Harb. & Nav. Code § 1198(c)(1)(C)*. Resolving what Continental considers to be the "fundamental issue" in its action requires discovery concerning Cota's **[*9]** conduct.

The conduct of Cota is a factual issue common to all of the actions, and discovery concerning Cota's conduct will overlap in all of the actions. In this case, the Chelsea action, it is alleged that Cota was piloting the M/V COSCO BUSAN at the time of the allision, and as a result he has been sued for damages. Docket No. 117 ("Verified Second Am. Class Action Compl."). In the United States action, it is alleged that Cota was piloting the M/V COSCO BUSAN at the time of the allision, and as a result the United States has sued Cota for damages. Docket No. 44 ("Am. Compl.") In the Regal Stone action, plaintiffs allege that Cota's operation of the M/V COSCO BUSAN was negligent. Docket No. 1 ("Compl."). In the Continental action, Regal Stone and Fleet filed a cross-claim against Cota seeking damages for rates and

charges paid for pilotage services, and Regal Stone and Fleet also seek a declaration that they are not obligated to defend Cota. Docket No. 27 ("Countercl., Cross-cl., and Third Party Compl."). Even in the California action, where Cota is not a defendant, Cota's conduct is at issue because Regal Stone and Fleet have entered a counterclaim alleging that the Board of Pilot **[*10]** Commissioners was negligent in issuing a license to Cota. Docket No. 32. Consolidating these actions for pre-trial purposes will save time and effort because it will avoid duplication of depositions and other discovery relating to Cota's conduct.

Continental relies on *Monticello Insurance Co. v. Kendall, 1997 U.S. Dist. LEXIS 13749, at *5-6 (D. Kan. Aug. 29, 1997)* and *Turner v. Transportacion Maritima Mexicana S. A., 44 F.R.D. 412, 415-16 (E.D. Pa. 1968)*. However, the present facts are distinguishable. In those cases, the court denied motions to consolidate trials. *Monticello, 1997 U.S. Dist. LEXIS 13749, at *5-6*; *Turner, 44 F.R.D. at 415-16*. Here, the motion is to consolidate the cases for discovery and pre-trial purposes only.

Finally, Continental cannot complain that consolidating the cases for pre-trial purposes will prejudice Continental, or cause inconvenience, delay, or extra expense because Continental's action has already been stayed pending the outcome of the criminal proceedings against Cota. *See* Sept. 18, 2008, Order. Regal Stone and Fleet's motion to consolidate is GRANTED.

B. *Consolidation and Stay*

None of the other responding parties oppose consolidating the cases for pre-trial **[*11]** purposes only. However, in response to the concerns expressed by the responding parties, the Court takes this opportunity to clarify the nature of its Order. The Court's September 18, 2008 Order staying the Continental action remains in effect, and now all five consolidated civil cases are stayed pending completion of the criminal action, *United States v. Cota*.

As outlined above, Cota's conduct is at issue in all of the civil cases. Cota's *fifth amendment* rights would be implicated if discovery were to proceed in any of the civil actions before completion of the criminal matter. *See Keating v. Office of Thrift Supervision, 45 F.3d 322, 324 (9th Cir. 1995)*(noting that first consideration in deciding whether to stay civil proceedings in face of parallel criminal proceeding is extent to which *fifth amendment* rights are implicated). Notwithstanding the stay, any party in the position to file a dispositive motion without the need for discovery is allowed to do so. [3]

> 3 With regard to Dr Calza's concern that the stay should last until after trial of the severed "False Statements" charges against Cota, the parties and the Court will be in a better position to address this concern in their Joint **[*12]** Case Management Statement and at the Case Management Conference scheduled for May 1, 2009.

These cases are consolidated for discovery and pre-trial purposes only. The separate lawsuits are not merged into a single action, and they retain their separate character. *See Geddes v. United Fin. Group, 559 F.2d 557, 561 (9th Cir. 1977)*(determining that trial court erred in incorporating withdrawal of claims in one action in judgments entered in the other action where the two actions were consolidated for discovery purposes only). "[A]n act of consolidation does not affect any of the substantive rights of the parties." *J.G. Link & Co. v. Continental Cas. Co., 470 F.2d 1133, 1138 (9th Cir. 1972)*.

V. *CONCLUSION*

The Court hereby ORDERS the following:

1. Regal Stone and Fleet's motions to consolidate the five related cases for discovery and pre-trial purposes only are GRANTED.

2. The consolidated cases are STAYED pending completion of the criminal matter, *United States v. Cota*, Case No. CR 08-0160, now before the Honorable Susan Illston.

3. The parties shall appear for a Case Management Conference on May 1, 2009, at 10:00 a.m. in Courtroom 1, on the 17th floor, U.S. Courthouse, 450 Golden Gate Avenue, **[*13]** San Francisco, CA 94102. No later than seven days prior to the Case Management Conference, the parties shall file a Joint Case Management Statement addressing discovery and pre-trial motion practice in the cases that have been consolidated for pre-trial purposes.

IT IS SO ORDERED.

Dated: February 3, 2009

UNITED STATES DISTRICT JUDGE

/s/ Samuel Conti

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiffs, v. PAN AMERICAN WORLD AIRWAYS, INC., et al., Defendants. AND RELATED CROSS AND THIRD PARTY ACTIONS

Nos. C-81-3636 RFP, C-81-4590 RFP Related Actions

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1987 U.S. Dist. LEXIS 15181

December 2, 1987, Decided
December 3, 1987, Filed

JUDGES: [*1] Robert F. Peckham, Chief United States District Judge.

OPINION BY: PECKHAM

OPINION

MEMORANDUM AND ORDER DENYING PLAINTIFF RUSSELL'S MOTION TO CONSOLIDATE ABOVE TWO ACTIONS

Raymond L. Russell, plaintiff in Russell v. Pan American World Airways, Inc., et al., C-81-4590 RFP (N.D. Cal), renews his motion to consolidate his action for all purposes with EEOC v. Pan American World Airways, Inc., et al., C-81-3636 RFP (N.D. Cal.).

BACKGROUND

The Equal Employment Opportunity Commission ("EEOC") in EEOC v. Pan American World Airways, Inc., et al., C-81-3636 RFP (N.D. Cal.) (the "EEOC action"), filed an action on behalf of 81 former Pan American World Airways, Inc. ("Pan Am") captains and first officers (Russell among them), seeking relief under the Age Discrimination in Employment Act ("ADEA"), *29 U.S.C. § 626(b)*. Russell subsequently sued Pan Am in a separate action, Russell v. Pan Am, et al., C-81-4590 RFP (N.D. Cal.) (the "Russell action"), alleging breach of the collective bargaining agreement between Pan Am and the pilots' union Airline Pilots Association International ("ALPA"), breach of ALPA's duty of fair representation, and violation of California law prohibiting age discrimination. *Cal. Gov't Code §* **[*2]** *12941 et seq.*

On August 15, 1983, Judge Ingram of this court denied without prejudice Russell's prior motion to consolidate the EEOC and Russell actions. At that time, the court was considering the fairness of the first proposed consent decree in the EEOC action. The court in April 1984 ultimately rejected the proposed decree as insufficiently favorable to the plaintiffs. Another proposed settlement was rejected on the same grounds in October 1985. *EEOC v. Pan American World Airways, Inc., 622 F. Supp. 633 (N.D. Cal. 1985)*. Pan Am's appeal of this ruling was dismissed for want of jurisdiction. *EEOC v. Pan American World Airways, Inc., 796 F.2d 314 (9th Cir. 1986)*, cert. denied, *107 S. Ct. 874 (1987)*.

Russell now renews his motion to consolidate these cases pursuant to *Rule 42 of the Federal Rules of Civil Procedure*. Pan Am opposes the motion; the EEOC has stated that it does not oppose consolidation.

DISCUSSION

Rule 42(a) of the Federal Rules of Civil Procedure provides:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; **[*3]** and it may make such orders concerning proceedings therein as may tend to avoid unnecessary cost or delay.

Rule 42 seeks to provide the trial court with "broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties." 9 Wright & Miller, Federal Practice and Procedure, § 2381 at 253; see also *Huene v. United States, 743 F.2d 703, 704 (9th Cir. 1984)*. The party urging consolidation must convince the court that, in "balancing the time that might be saved against the possible delay or prejudice involved," the cases ought to be consolidated. *Transeastern Shipping Corp. v. India Supply Mission, 53 F.R.D. 204, 206 (S.D.N.Y. 1971)*. The outcome of such a balancing process necessarily turns on facts peculiar to each set of circumstances. In re Paris Air Crash of March 3, 1974, *60 F.R.D. 310, 319 (C.D. Cal. 1975)*.

Here, both actions arise out of essentially the same nucleus of operative fact: Pan Am's alleged discrimination against its pilots on the basis of age. Moreover, the primary defendants (Pan Am and ALPA) are the same in both actions, and Russell is a plaintiff **[*4]** in each. Finally, the plaintiffs in each action seek much the same legal and equitable relief, including back pay and other lost benefits plus injuncitive relief.

In addition, Russell argues that the EEOC has twice agreed to proposed consent decrees later rejected by the court as insufficiently favorable to plaintiffs. Both proposed decrees would have extinguished Russell's state and federal claims against Pan Am. Russell contends that the court ought to consolidate these cases to ensure that he has ample opportunity to protect his rights. Memorandum in Support of Renewed Motion to Consolidate at 5.

The court declines to consolidate these actions, however. In spite of considerable factual overlap, these two cases are completely dissimilar in law: Russell raises no ADEA claim, while EEOC raises no claim of breach of the collective bargaining agreement, breach of the duty of fair representation, or California age discrimination claim. Introducing evidence pertaining to Russell's claims and elucidating the law applicable therein would inject substantial intricacy into an already complex trial. Although the court is mindful of Russell's concerns regarding past EEOC representation, that **[*5]** history also demonstrates that the pilots' interests can be amply protected by other means.

For the foregoing reasons, the court denies Russell's motion to consolidate the Russell and EEOC actions.

IT IS SO ORDERED.

December 2, 1987.

Not Reported in F.Supp.2d, 2008 WL 1805673 (W.D.Wash.)
(Cite as: 2008 WL 1805673 (W.D.Wash.))

H

Only the Westlaw citation is currently available.

United States District Court, W.D. Washington, at Tacoma.
Sarah GRINENKO, Plaintiff,
v.
OLYMPIC PANEL PRODUCTS, LLC, a Washington State limited liability company; International Association of Machinists, Woodworkers Local Lodge W-38; Ray Doyle; Sean Scupine; Shane Scupine; Randy Ward; Jane Doe Ward; Dwight Midles; Mel Matson; Brandon Thompson; Robert Pierson, Defendants.
No. C07-5402BHS.

April 21, 2008.

John R. Bonin, Shelton, WA, for Plaintiff.

Lewis Lynn Ellsworth, Elizabeth Pike Martin, Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, Tacoma, WA, Don S. Willner, Trout Lake, WA, William Michael Hanbey, Wm. MichaelHanbey PS, Clifford F. Cordes, III, Cordes Brandt, Olympia, WA, for Defendants.

Brandon Thompson, Lacey, WA, pro se.

ORDER DENYING PLAINTIFF'S MOTION TO AMEND COMPLAINT/CONSOLIDATE CASE WITH C07-5436 AND TO BIFURCATE INDIVIDUAL DEFENDANTS CASES

BENJAMIN H. SETTLE, District Judge.

***1** This matter comes before the Court on Plaintiff's Motion to Amend Complaint/Consolidate Case with C07-5436 and to Bifurcate Individual Defendants Cases (Dkt.65). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby denies the motion for the reasons stated herein.

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts, according to the amended complaint, are as follows:

Ms. Grinenko was employed by Olympic Panel Products, Inc. ("Olympic") from October of 2006 until May 18, 2007. Dkt. 17 at 3. Ms. Grinenko was the victim of a sexual assault that caused her serious injury. *Id.* Ms. Grinenko requested time off from work. *Id.* at 4. Ms. Grinenko was ultimately granted leave only after being required to furnish a copy of the police report and undergo lengthy questioning about the subject matter of the report. *Id.* When Ms. Grinenko returned to work after her leave of absence, she discovered that the matter of the sexual assault had been disclosed. *Id.* at 5. According to Ms. Grinenko, this disclosure created "a previously non-existent interest in her by male coworkers" and male coworkers began to treat her with "overwhelming hostility." *Id.* at 5, 9. Ms. Grinenko contends that responses to her complaints about the working environment were inadequate. *Id.* at 11. Ms. Grinenko then tendered her oral resignation, effective June 1, 2007. *Id.* Ms. Grinenko brings suit for the following claims: invasion of privacy, hostile work environment, retaliation, discrimination, termination in violation of public policy, assault, infliction of emotional distress, outrage, breach of contract and fiduciary duty, gender discrimination by Plaintiff's union, and defamation. Dkt. 17 at 17-26.

Plaintiff previously moved for entry of a consolidated discovery schedule to govern this case and *Spurgeon v. Olympic Panel Products*, No. 07-5436BHS. Dkt. 50. The Court denied that motion, holding that the cases are insufficiently similar to warrant a consolidated discovery schedule.

Plaintiff now moves to consolidate this matter with the Spurgeon matter, seeks leave to file a second amended complaint, asks the Court to bifurcate and

remand individual defendants' claims, and to certify a class. Dkt. 65.

II. DISCUSSION

A. MOTION TO STRIKE

As a threshold matter, Olympic moves to strike several portions of Ms. Grinenko's reply, the Declaration of John Bonin and all exhibits attached thereto, the Declaration of Alma Davis, the Declaration of Christine Hoyt and attachments thereto, the Second Declaration of Christine Hoyt, the Third Declaration of Christine Hoyt and attachments thereto, the Declaration of Kecia Johnson, the Declaration of Rosemary Kudia, and the Second Declaration of Rosemary Kudia and attachments thereto. Dkt. 87 at 1-2. Defendant Olympic Panel Products' Request to Strike Portions of Plaintiff's Reply (Dkt.87) is granted in part and denied in part for the reasons below.

1. Reply Arguments

***2** Olympic moves to strike several portions of the reply as irrelevant or beyond the scope of the motion and responses. Dkt. 87 at 1.

First, Olympic moves to strike language on page three of the reply referencing the legal experience of counsel for Olympic and Local Lodge. *See* Dkt. 74 at 3. This portion of the reply bears no relevance to the legal issues presented by the motion and is therefore stricken.

Second, Olympic moves to strike page four in its entirety, including footnote one. Page four references the existence of previously- and newly-filed declarations and should not be stricken. *See id.* at 4. Footnote one addresses the parties' attempts to draft an agreed protective order, an issue that was the subject of a previous order and is beyond the scope of the instant motion. Footnote one is therefore stricken.

Third, Olympic moves to strike portions of page five that allege a practice of advising employees that the only basis for grievances is failure to provide union representation. *See id.* at 5. This portion of the reply is beyond the scope of the motion and is therefore stricken.

Fourth, Olympic moves to strike the first paragraph on page six of the reply, which addresses the second amended complaint filed in the Spurgeon matter. This portion of the reply is beyond the scope of the motion and is therefore stricken as irrelevant.

2. Declaration of John Bonin and Exhibits Thereto

Olympic moves to strike the Declaration of John Bonin and all attachments thereto. Dkt. 87 at 2. Mr. Bonin's declaration serves primarily to identify exhibits offered in support of the reply. To the extent that Mr. Bonin's declaration asserts facts that are beyond the scope of the motion, the declaration is stricken. Exhibit A is a psychological evaluation of Plaintiff and is stricken as irrelevant and beyond the scope of a proper reply. Exhibit B is not an exhibit but instead contains argument in support of Plaintiff's request for class certification or consolidation. Exhibit B is stricken. Exhibit C, part of a proposed third amended complaint in the event that this case is certified as a class action, is stricken as beyond the scope of the motion and response. Exhibits D-P are stricken as irrelevant, beyond the scope of a proper reply, or both.

3. Other Declarations in Support of Reply

Olympic moves to strike documents attached in support of the reply as irrelevant and beyond the scope of the motion and responses. Dkt. 87 at 2. While Plaintiff's counsel contends that some of these declarations were previously provided, the motion does not address any of the declarations. Defendants have therefore been deprived of the opportunity to address the factual basis for Plaintiff's

motion because the factual underpinnings were not revealed until the reply was filed. The declarations of Alma Davis (Dkt.75), Christine Hoyt (Dkts.76, 77, 78), Kecia Johnson (Dkt.79), and Rosemary Kudia (Dkts.80, 81) are therefore stricken.

B. PLAINTIFF'S MOTION TO AMEND COMPLAINT/CONSOLIDATE CASE WITH C-07-5436 AND TO BIFURCATE

***3** Over the course of just four pages of briefing, Plaintiff asks the Court to consolidate the Grinenko and Spurgeon matters, to grant Plaintiff leave to file a second amended complaint, to sever individual Defendants from this case, to remand claims against individual Defendants to state court, and to certify this case as a class action. Dkt. 65. The motion fails to offer any legal authority to support these requests; is not supported by affidavits, declarations, or exhibits; and makes no citation to the factual record in this case. Frankly, the motion leaves one wondering whether Plaintiff's counsel's requests are sincere or made in jest. The reply, on the other hand, is supported by approximately 150 pages of exhibits and declarations. Offering such a naked motion only to flood the electronic file with documentation in support of a reply brief is inappropriate and threatens due process. While many of the requests contained in the motion should be denied outright for failure to state the legal bases for the requests, the Court will address each request in the interest of fairness to Ms. Grinenko.

1. Consolidation

Consolidation of cases is governed by Federal Rule of Civil Procedure 42(a), which provides as follows:

> (a) Consolidation. If actions before the court involve a common question of law or fact, the court may:
>
> (1) join for hearing or trial any or all matters at issue in the actions;
>
> (2) consolidate the actions; or
>
> (3) issue any other orders to avoid unnecessary cost or delay.

Fed.R.Civ.P. 42(a). This rule affords courts "broad discretion" to consolidate cases pending in the same district, either upon motion by a party or sua sponte. *In re Adams Apple, Inc.*, 829 F.2d 1484, 1487 (9th Cir.1987).

The legal term "consolidation" is employed in three different contexts: "(1) when several actions are stayed while one is tried, and the judgment in the case tried will be conclusive as to the others; (2) when several actions are combined and lose their separate identities, becoming a single action with a single judgment entered; and (3) when several actions are tried together, but each suit retains its separate character, with separate judgments entered." *Schnabel v. Lui*, 302 F.3d 1023, 1035 (9th Cir.2002) (citing 9 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2382 (2d ed.1995)). The traditional rule, in place before Federal Rule of Civil Procedure 42(a) was adopted, provided that "consolidation ... does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97, 53 S.Ct. 721, 77 L.Ed. 1331 (1933). While the language of Federal Rule of Procedure 42(a) apparently permits consolidation either to merge the cases or to retain the separate character of the cases, the majority of courts subscribe to the traditional rule. *Schnabel*, 302 F.3d at 1035; *see also Geddes v. United Financial Group*, 559 F.2d 557, 561 (9th Cir.1977 (citing *Johnson*, 289 U.S. at 496-97); *but see Huene v. U.S.*, 743 F.2d 703, 705 (9th Cir.1984) (treating consolidated cases as one for purposes of permitting appeal).

***4** In this case, Defendants oppose consolidation. Dkt. 66 at 5; Dkt. 67 at 5; Dkt. 68 at 2; Dkt. 72 at 1. As the Court indicated with respect to Plaintiff's motion for a consolidated discovery schedule, the Grienenko and Spurgeon matters are insufficiently

similar to warrant consolidation.

First, while some parties appear in both matters, there are several parties in the Grinenko matter who are not parties to the Spurgeon matter.

Second, the Grinenko matter is set for a jury trial on February 17, 2009, and the Spurgeon matter is set for a bench trial on December 8, 2008. The cases are therefore in a different posture and could not easily accommodate consolidation.

Third, while some of the claims overlap, there are some claims unique to each case: invasion of privacy, assault, infliction of emotional distress, outrage, defamation, fraud/misrepresentation, breach of contract under the Washington Law Against Discrimination, and violation of Washington law regarding viewing of employment records. In light of these substantial differences, the Court declines to consolidate the Grinenko and Spurgeon matters.

2. Amendment

Plaintiff seeks leave to file an second amended complaint to correct scrivener errors in the spelling of names, to reflect Ms. Grinenko's married name, and to make unspecified "minor clarifications." Dkt. 65 at 1. Defendants Ray Doyle, Sean Scupine, Shane Scupine, and Robert Pierson do not oppose amendment of the complaint to reflect Ms. Grinenko's married name "upon verification of the change of her marital status" but oppose amendment for purposes of consolidation or class certification. Dkt. 66 at 3-4. Olympic similarly does not oppose amendment to reflect Plaintiff's married name but requests that Plaintiff specify which scrivener errors would be corrected and why such corrections could not have been made earlier. Dkt. 67 at 2. Local Lodge contends that amendment is unnecessary to correct misspellings or to reflect Ms. Grinenko's married status. Dkt. 68 at 2. Defendants Randy and Jane Doe Ward also oppose amendment of the complaint. Dkt. 72 at 1.

Because Plaintiff does not address the scrivener's errors sought to be corrected, the Court cannot evaluate the merits of Plaintiff's request. The Court is particularly concerned that the proposed second amended complaint includes "minor clarifications" that have not been brought to the attention of the Court or of Defendants. Therefore, while the Court appreciates Plaintiff's desire to present a complaint that is free of error, Plaintiff's motion to amend is denied. Plaintiff is encouraged to cooperate with Defendants to craft a stipulated amended complaint that would not overly burden Defendants and, if possible, would not require Defendants to draft entirely new answers.

3. Bifurcation and Remand

Plaintiff seeks bifurcation on the grounds that "[t]he individual defendants ... would best be addressed by bifurcation of the individual matters and remanding these individual claims back to state court." Dkt. 65 at 3. Defendants Ray Doyle, Sean Scupine, Shane Scupine, Robert Pierson, and Randy and Jane Doe Ward do not oppose remand of Plaintiff's claims against them because claims against these individual defendants do not invoke the Court's federal question jurisdiction. Dkt. 66 at 2; Dkt. 72 at 2. Olympic opposes bifurcation on the grounds that bifurcation would lead to the existence of two lawsuits with overlapping claims and evidence, thereby wasting judicial resources. Dkt. 67 at 13-14. Local Lodge apparently opposes bifurcation and remand only as to Defendants Eric Dobson and his wife. *See* Dkt. 68 at 2 ("Local Lodge respects the preference of the individual defendants, other than the Dobsons, on the issue of whether their cases should be remanded to State Court."). The precise contours of Plaintiff's request for bifurcation are unclear, although it appears that Plaintiff may be asking the Court to sever certain claims. The Court will not speculate as to the relief sought by Plaintiff or as to whether severance would be proper upon a properly-supported motion. In this respect, Plaintiff's motion is denied.

4. Class Certification

***5** Though not captioned as a motion for class certification, Plaintiff's motion appears to seek to certify a class of plaintiffs. *See* Dkt. 65 at 2 ("The information provided to date in discovery would indicate that this multi-plaintiff litigation may be suited for class certification.").

Certification of a class action is appropriate only if the prerequisites of Federal Rule of Civil Procedure 23(a) are satisfied:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). Generally speaking, the suit must be maintainable as a class action under Rule 23(b) because (1) the prosecution of separate actions would risk adjudications that are inconsistent or would be dispositive of interests of nonparties, (2) the defendants acted on grounds that apply generally to the class such that injunctive or declaratory relief is appropriate to the class as a whole, or (3) common questions of law or fact predominate over individual issues. Fed.R.Civ.P. 23(b).

The party moving for class certification bears the burden of proving that the proposed class satisfies the requirements of Federal Rule of Civil Procedure 23. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992). The Court must engage in a rigorous analysis to determine whether the prerequisites of Federal Rule 23(a) are satisfied. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). The movant need not make an extensive evidentiary showing so long as the Court is provided enough information to form a reasonable judgment on each certification requirement. *See Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir.1975). The Court may not conditionally certify a class on the basis of speculation that certification requirements may later be met. *Id.*

Where there is insufficient information to make a reasonable judgment on all requirements, Local Rule CR 23 provides that the Court may postpone final determination of the issue until more information is available:

> The court may certify the class, may disallow and strike the class allegations, or may order postponement of the determination pending discovery or such other preliminary procedures as appear appropriate and necessary in the circumstances. Whenever possible, where the determination is postponed, a date will be fixed by the court for renewal of the motion.

Local Rule CR 23(f)(3).

Several features of this case militate against class certification. First, it does not appear that the proposed class is so numerous that joinder would be impractical. Assuming that all current Olympic employees have claims similar to Plaintiff's, joinder of 29 plaintiffs is feasible and does not necessitate certification of a class.

***6** Second, from the evidence now before the Court, it does not appear that the subject matter of this case presents common issues of law or fact. While the commonality prong is construed permissively and a common course of conduct against all class members may satisfy the commonality requirement, this case would appear to present diverging facts and diverging legal issues such that the cases could not, or should not, be maintained as a class action. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir.1998) (commonality prong construed permissively); *Blackie*, 524 F.2d at 902 (common course of conduct); *Hanlon*, 524 F.2d at 902 (Commonality is satisfied even if there are

common legal issues and diverging facts or a common core of facts and differing claims to relief.).

Finally, the Court notes that the typicality prong may also present obstacles to certifying this matter as a class action. The typicality prong is permissive and requires that the class representative's claims be reasonably co-extensive with, not substantially identical to, those of absent class members. *Hanlon,* 150 F.3d at 1020. It does not appear that Plaintiff, who is a former employee of Olympic, is in a sufficiently similar posture to current employees such that her claims could be deemed sufficiently typical.

Plaintiff's cursory presentation of the class certification issue does not provide the Court with sufficient information to form a reasonable judgment on each certification requirement and is insufficient to meet her burden of proving that the proposed class satisfies the requirements of Federal Rule of Civil Procedure 23. To the extent that Plaintiff moves for certification of a class, the motion is denied.

III. ORDER

Therefore, it is hereby

ORDERED that Plaintiff's Motion to Amend Complaint/Consolidate Case with C07-5436 and to Bifurcate Individual Defendants Cases (Dkt.65) is **DENIED,** and Defendant Olympic Panel Products' Request to Strike Portions of Plaintiff's Reply (Dkt.87) is **GRANTED in part** and **DENIED in part** as provided herein.

W.D.Wash.,2008.
Grinenko v. Olympic Panel Products, LLC
Not Reported in F.Supp.2d, 2008 WL 1805673 (W.D.Wash.)

END OF DOCUMENT

1 of 1 DOCUMENT

The NVIDIA GPU Litigation.

NO. C 08-04312 JW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

2009 U.S. Dist. LEXIS 30606

April 9, 2009, Decided
April 10, 2009, Filed

COUNSEL: [*1] For Katherine E Decker, individually and on behalf of all others similarly situated, Plaintiff: James C. Sturdevant, Monique Olivier, Whitney Huston, LEAD ATTORNEYS, The Sturdevant Law Firm, A Professional Corporation, San Francisco, CA; John Crongeyer, LEAD ATTORNEY, Crongeyer Law Firm, P.C., Atlanta, GA.

For Hewlett Packard Company, Defendant: Meredith Ann Galto, Morgan Lewis & Bockius LLP, Philadelphia, PA.

JUDGES: JAMES WARE, United States District Judge.

OPINION BY: JAMES WARE

OPINION

ORDER GRANTING PLAINTIFF DECKER'S MOTION FOR LEAVE; GRANTING IN PART AND DENYING IN PART PLAINTIFF DECKER'S MOTION FOR RECONSIDERATION

Presently before the Court is Plaintiff Decker's Administrative Motion for Leave to File Motion for Reconsideration of Order Denying Request to Find *Decker* Action Unrelated. (hereafter, "Motion," Docket Item No. 92.) Plaintiff Decker seeks to have the Court reconsider her previously filed motion to have *Decker v. Hewlett Packard*, No. C 09-00295 PVT, unrelated and unconsolidated to a series of cases that have been consolidated into this action. [1] Defendant Hewlett Packard ("HP") filed an opposition on the ground that Plaintiff Decker's Motion seeks to relate her case to a separate pending action, *Nygren* **[*2]** *v. Hewlett Packard*, No. C 07-05793 JW. [2] The Proposed Interim Class Counsel [3] filed a motion in support of Plaintiff Decker's Motion. [4]

1 Plaintiff Decker attached her proposed Motion for Reconsideration as Exhibit A to her Motion for Leave. (Motion, Ex. A.)

2 (Defendant Hewlett-Packard Company's Response in Opposition to Plaintiff Decker's Motion to Consider Whether Cases Should be Related, Docket Item No. 93.)

3 The various Plaintiffs in this consolidated action have filed a joint motion for appointment of interim class counsel. (*See* Docket Item No. 75.) The Court will address that motion in a separate Order.

4 (Proposed Interim Class Counsel's Response to Plaintiff Decker's Motion for Reconsideration of Order Denying Request to Find Decker Action Unrelated, hereafter, "Proposed Class Counsel Response," Docket Item No. 98.)

On February 25, 2009, the Court ordered the *Decker* action related and consolidated with ten other cases concerning defective Graphics Processing Units ("GPU") manufactured by Defendant NVIDIA and incorporated into Defendant HP computers. (February 25, 2009 Order at 2, Docket Item No. 63.) On March 10, 2009, the Court

denied a motion by Plaintiff Decker to have her case **[*3]** unrelated and unconsolidated. (March 10, 2009 Order, Docket Item No. 80.)

Before a party may file a motion for reconsideration, the party must first obtain leave of the court. Civ. L.R. 7-9(a). In doing so, the moving party must specifically show the following:

> (1) At the time of the filing the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought. The party also must show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order; or
>
> (2) The emergence of new material facts or a change of law occurring after the time of such order; or
>
> (3) A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order.

Civ. L.R. 7-9(b). A motion for leave to file a motion for reconsideration may not repeat any oral or written argument previously made with respect to the interlocutory order that the party now seeks to have reconsidered. Civ. L.R. 7-9(c). "A party who violates this restriction shall **[*4]** be subject to appropriate sanctions." *Id.*

Based on the parties' submissions, the Court finds it appropriate to grant Plaintiff Decker's leave to file a motion for reconsideration. Since Plaintiff Decker provides her proposed motion for reconsideration along with her motion for leave, and Defendant HP and the other Plaintiffs have had an opportunity to respond to the grounds for Plaintiff Decker's motion for reconsideration, the Court reconsiders whether the *Decker* action should be unrelated and unconsolidated with this action.

The Court denied Plaintiff Decker's motion to unrelate and unconsolidate on the grounds that her putative class is almost entirely subsumed by one of the consolidated cases. (March 10, 2009 Order at 2.) However, after the Court denied Plaintiff Decker's motion to unrelate and unconsolidate, counsel for the other Plaintiffs represented that, although a significant number of the consolidated actions contained allegations concerning non-functioning wireless communication cards, the anticipated Amended Consolidated Complaint "will allege only claims arising from NVIDIA's design, manufacture and sale of defective NVIDIA GPUs." (Proposed Class Counsel Response at 2.) **[*5]** Since Plaintiff Decker's Complaint focuses only on defective wireless cards/devices, and the consolidated action will focus only on issues regarding defective NVIDIA GPUs, the Court now finds that the *Decker* action should be unconsolidated. However, in light of the allegations brought by several Plaintiffs that defective NVIDIA GPUs may have caused HP wireless cards not to function and that HP breached certain warranties, the Court finds the *Decker* action should remain related to this consolidated action.

With respect to Plaintiff Decker's additional request that the Court consider whether the *Decker* action and *Nygren v. Hewlett Packard* are related, the Court finds that they are not related pursuant to Civ. L.R. 3-12(a). The *Nygren* action is at a different stage of litigation than *Decker* and it is unlikely there will be an unduly burdensome duplication of labor and expense or conflicting results.

Accordingly, the Court GRANTS Plaintiff Decker's Motion for Leave to File a Motion for Reconsideration. The Court GRANTS in part and DENIES in part Plaintiff Decker's Motion for Reconsideration. The *Decker* action will no longer be consolidated with this consolidated action. All future filings **[*6]** concerning the *Decker* action shall be filed under *Decker v. Hewlett Packard*, 09-00295 JW. However, the *Decker* action will remain related to this case.

The *Decker* parties shall appear for a Case Management Conference on **May 18, 2009 at 10 a.m.** On or before **May 8, 2009,** the parties shall meet and confer and file Joint Case Management Statement. The Statement shall include a good faith discovery plan with a proposed date for the close of all discovery.

Dated: April 9, 2009

/s/ James Ware

JAMES WARE United States District Judge

JAMES I. KUROIWA, JR., et al., Plaintiffs, vs. LINDA LINGLE, et al., Defendants. VIRGIL E. DAY, et al., Plaintiffs, vs. HAUNANI APOLIONA, et al., Defendants, and STATE OF HAWAII, Intervener-Defendant.

CIVIL NO. 08-00153 JMS/KSC, CIVIL NO. 05-00649 SOM/BMK

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

2008 U.S. Dist. LEXIS 43036

May 30, 2008, Decided
May 30, 2008, Filed

PRIOR HISTORY: *Day v. Apoliona, 496 F.3d 1027, 2007 U.S. App. LEXIS 18664 (9th Cir. Haw., 2007)*

COUNSEL: [*1] For Virgil E. Day, Mel Hoomanawanui, Josiah L. Hoohuli, Patrick L. Kahawaiolaa, Samuel L. Kealoha, Jr., Plaintiffs: Walter R. Schoettle, LEAD ATTORNEY, Honolulu, HI.

For Haunani Apoliona, individually and in her official capacity as Chairperson and Trustee of the Office of Hawaiian Affairs, unknown Office of Hawaiian Affairs, Rowena Akana, A Trustee of the Office of Hawaiian Affairs of the State of Hawaii, sued in her official capacity for declaratory and prospective injunctive relief; sued in individual capacity for damages, unknown Office of Hawaiian Affairs, Dante Carpenter, A Trustee of the Office of Hawaiian Affairs of the State of Hawaii, sued in his official capacity for declaratory and prospective injunctive relief; sued in individual capacity for damages, unknown Office of Hawaiian Affairs, Donald Cataluna, A Trustee of the Office of Hawaiian Affairs of the State of Hawaii, sued in his official capacity for declaratory and prospective injunctive relief; sued in individual capacity for damages, unknown Office of Hawaiian Affairs, Linda Keawe'ehu Dela Cruz, A Trustee of the Office of Hawaiian Affairs of the State of Hawaii, sued in her official capacity for declaratory and prospective **[*2]** injunctive relief; sued in individual capacity for damages, unknown Office of Hawaiian Affairs, Colette Y. Pi'ipi& Machado, A Trustee of the Office of Hawaiian Affairs of the State of Hawaii, sued in her official capacity for declaratory and prospective injunctive relief; sued in individual capacity for damages, unknown Office of Hawaiian Affairs, Boyd P. Mossman, A Trustee of the Office of Hawaiian Affairs of the State of Hawaii, sued in his official capacity for declaratory and prospective injunctive relief; sued in individual capacity for damages, unknown Office of Hawaiian Affairs, Oswald K. Stender, A Trustee of the Office of Hawaiian Affairs of the State of Hawaii, sued in his official capacity for declaratory and prospective injunctive relief; sued in individual capacity for damages, unknown Office of Hawaiian Affairs, John D. Waihee, IV, A Trustee of the Office of Hawaiian Affairs of the State of Hawaii, sued in his official capacity for declaratory and prospective injunctive relief; sued in individual capacity for damages, unknown Office of Hawaiian Affairs, Defendants: Lisa W. Cataldo, Lisa Marie Ezra, Robert G. Klein, LEAD ATTORNEYS, Nadine Y. Ando, McCorriston Miller Mukai **[*3]** MacKinnon LLP, Honolulu, HI.

For Clayton Hee, Former Trustee of the Office of Hawaiian Affairs of the State of Hawaii, sued in his individual capacity for damages, Charles Ota, Former Trustee of the Office of Hawaiian Affairs of the State of Hawaii, sued in his individual capacity for damages, Defendants: Charleen M. Aina, LEAD ATTORNEY, Office of the Attorney General-Hawaii, Honolulu, HI.

For State of Hawaii, Movant, Amicus: William J. Wynhoff, LEAD ATTORNEY, Office of the Attorney

General-State of Hawaii, Honolulu, HI.

JUDGES: J. Michael Seabright, United States District Judge. Susan Oki Mollway, United States District Judge.

OPINION BY: J. Michael Seabright; Susan Oki Mollway

OPINION

ORDER DENYING MOTION TO CONSOLIDATE AND EX PARTE MOTION TO SHORTEN TIME FOR HEARING ON MOTION TO CONSOLIDATE

On May 29, 2008, Plaintiffs in *Kuroiwa v. Lingle*, Civ. No. 08-00153 JMS/KSC, filed a motion to consolidate an upcoming hearing in that case with a hearing scheduled in *Day v. Apoliona*, Civ. No. 05-00649 SOM/BMK. Both of these cases involve a trust created when Hawaii was admitted as a state. This "public trust" is to be used for one or more of the following:

> [1] for the support of the public schools and other public educational **[*4]** institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible[,][4] for the making of public improvements, and [5] for the provision of lands for public use.

P.L. 86-3 (March 18, 1959), *reprinted in* 73 Stat. 4, 6.

In 1978, the Office of Hawaiian Affairs ("OHA") was established by a state constitutional amendment. *See Haw. Const. art. XII, §§ 5*-6. The purposes of OHA include 1) bettering the condition of Hawaiians and native Hawaiians; [1] 2) serving as the principal state agency responsible for the performance, development, and coordination of programs and activities relating to Hawaiians and native Hawaiians; 3) assessing the policies and practices of other agencies affecting Hawaiians and native Hawaiians; 4) applying for, receiving, and disbursing grants and donations from all sources for Hawaiian and native Hawaiian programs and services; and 5) serving as a receptacle for reparations. *Haw. Rev. Stat. § 10-3*. OHA was charged with the responsibility of administering and managing some of the public trust proceeds. *See* **[*5]** *Price v. Akaka, 3 F.3d 1220, 1222 (9th Cir. 1993)*.

> 1 As used in the chapter governing OHA, "Hawaiian" means "any descendent of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Haw. Rev. Stat. § 10-2*. "Native Hawaiian" means "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." *Id.*

In *Kuroiwa v. Lingle*, Civ. No. 08-00153 JMS/KSC, Plaintiffs allege that, although they are not ethnically Hawaiian, they are beneficiaries of the public trust because they are citizens of the State of Hawaii. They contend that distributions from this public trust benefitting persons of Hawaiian ancestry--as opposed to all citizens of the State of Hawaii--violate the *Fifth* and *Fourteenth Amendments*. Plaintiffs **[*6]** in *Kuroiwa* seek to dismantle OHA and to prevent the public trust from being used in a manner that benefits only Hawaiians and native Hawaiians. *See* Six Non-Ethnic Hawaiians' Complaint for Breach of Trust and Deprivation of Civil Rights and to Dismantle Office of Hawaiian Affairs, Civ. No. 08-00153 JMS/KSC (Apr. 3, 2008).

In *Day v. Apoliona*, Civ. No. 05-00649 SOM/BMK, on the other hand, Plaintiffs claim to be "native Hawaiians," meaning descendants of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended. Plaintiffs in *Day* contend that the use of public trust funds to benefit Hawaiians in general violates trust law. Plaintiffs in *Day* do not seek to dismantle OHA or to have the trust funds used for the public generally. Instead, they seek to limit the use of trust funds for purposes that benefit "native Hawaiians" only. They also seek to have trust funds that have been expended to benefit Hawaiians in general restored to the trust. *See* First Amended Complaint

(March 10, 2006).

On May 9, 2008, OHA-related Defendants filed a Motion for Judgment on the Pleadings in the *Kuroiwa* case. They **[*7]** argue that Plaintiffs in that case lack trust beneficiary standing to assert that trust funds are being improperly spent and that their claims are foreclosed by the Ninth Circuit's decision in *Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007)*. They also argue that the complaint fails to allege a viable public trust violation. Finally, OHA-related Defendants in *Kuroiwa* contend that they are not "persons" for purposes of the *42 U.S.C. § 1985* claim asserted in the complaint and that the *§ 1985* claim was not properly pled. *See* OHA Defendants' Motion for Judgment on the Pleadings, Civ. No. 08-00153 JMS/KSC (May 9, 2008).

On March 27, 2008, Defendants in the *Day* case filed a motion for summary judgment. This motion argues that they acted in accordance with their common law trust duties, that they have qualified immunity with respect to the claims asserted in the *Day* complaint, and that some of the claims asserted are not ripe. *See* Second Motion for Summary Judgment, Civ. No. 05-00649 SOM/BMK (Mar. 27, 2008).

Plaintiffs in *Kuroiwa* now seek to consolidate the upcoming hearing on the Motion for Judgment on the Pleadings in *Kuroiwa* with the hearing on the Second Motion for Summary Judgment in *Day*. **[*8]** They argue that, because both cases question whether public trust funds are being properly expended on lobbying for a federal bill recognizing Hawaiians, the hearings should be consolidated. This court declines to consolidate the hearings.

A district court has broad discretion under *Rule 42(a) of the Federal Rules of Civil Procedure* to consolidate matters pending in the same district. *See Investors Research Co. v. United States Dist. Court, 877 F.2d 777, 777 (9th Cir. 1989)*; *see also* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2383 (3d ed. 2008). *Rule 42(a)(1)* provides for consolidation of a hearing or a trial when "actions before the court involve a common question of law or fact." *Local Rule 40.2* similarly provides that consolidation is appropriate when cases "involve the same or substantially identical transactions, happenings, or events, or the same or substantially the same parties or property or subject matter, or the same or substantially identical questions of law, or for any other reason said cases could be more expeditiously handled if they were all heard by the same district judge."

Although some of the claims in the *Kuroiwa* and the *Day* cases **[*9]** involve the same factual bases--the expenditure of ceratin trust funds, different remedies are sought in the cases. In *Kuroiwa*, Plaintiffs seek to prevent the expenditure of funds that benefit Hawaiians and native Hawaiians. In *Day*, Plaintiffs seek to limit the expenditure of the funds to matters that benefit only native Hawaiians. Although both cases have a similar factual foundation, the upcoming motions involve completely different issues. Under these circumstances, consolidation of the hearings would not result in a more expeditious handling of the matters. To the contrary, wholly irrelevant issues would be inserted into each case. This court declines to consolidate the hearings. This ruling renders moot the *ex parte* motion to shorten time to have a hearing on the consolidation motion.

The court notes that, in future proceedings before this court, Plaintiffs in *Kuroiwa* should take care to comply with all applicable Local Rules. The motion to consolidate violated the font-size requirement in *Local Rule 10.2*. Future violations of Local Rules may result in sanctions, including fines and/or the striking of filings.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 30, 2008.

/s/ J. Michael **[*10]** Seabright

J. Michael Seabright

United States District Judge

/s/ Susan Oki Mollway

Susan Oki Mollway

United States District Judge

Hal K. Levitte, RK West, Inc., Pulaski & Middleman, LLC, JIT Packing, Inc., Plaintiffs, v. Google, Inc., Defendant.

NO. C 08-03369 JW,NO. C 08-03452 JW,NO. C 08-03888 JW,NO. C 08-04701 JW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

2009 U.S. Dist. LEXIS 18198

February 25, 2009, Decided
February 25, 2009, Filed

PRIOR HISTORY: *Levitte v. Google, Inc., 2008 U.S. Dist. LEXIS 82802 (N.D. Cal., Sept. 19, 2008)*

COUNSEL: [*1] For Hal K. Levitte, individually and on behalf of all others similarly situated, Plaintiff: Kimberly Ann Kralowec, Willem F. Jonckheer, LEAD ATTORNEYS, Dustin Lamm Schubert, Schubert Jonckheer Kolbe & Kralowec LLP, San Francisco, CA.

For Pulaski & Middleman, LLC, Plaintiff: Guido Saveri, LEAD ATTORNEY, Saveri & Saveri, Inc., San Francisco, CA; Dustin Lamm Schubert, Schubert Jonckheer Kolbe & Kralowec LLP, San Francisco, CA.

For Google Inc., a Delaware corporation, Defendant: Michael Graham Rhodes, LEAD ATTORNEY, Cooley Godward Kronish LLP, San Diego, CA; Leo Patrick Norton, San Diego, CA; Peter Joel Willsey, PRO HAC VICE, Cooley Godward Kronish LLP, Washington, DC.

JUDGES: JAMES WARE, United States District Judge.

OPINION BY: JAMES WARE

OPINION

ORDER GRANTING MOTION TO CONSOLIDATE; APPOINTING INTERIM CLASS COUNSEL

I. INTRODUCTION

Presently before the Court is Plaintiffs' Motion to Consolidate Related Cases, Appoint Interim Class Counsel, and Schedule the Filing of Plaintiffs' Consolidated Complaint. [1] Plaintiffs seek to consolidate four related class actions ("Related Class Actions") against Google Inc.'s ("Defendant") and to appoint interim co-lead counsel. [2] To date, Defendant has not filed an opposition. [3] The Court **[*2]** found it appropriate to take the matter under submission without oral argument. *See* Civ. L.R. 7-1(b). Based on the papers submitted to date, the Court ORDERS the cases consolidated and appoints Schubert Jonckheer Kolbe & Kralowec LLP as interim class counsel.

1 (Plaintiffs' Motion to Consolidate Related Cases Pursuant to *Fed. R. Civ. P. 42(a)*; Appoint Interim Class Counsel Pursuant to *Fed. R. Civ. P. 23(g)(2)*; and Schedule the Filing of Plaintiffs' Consolidated Complaint, hereafter, "Motion," Docket Item No. 34.)

2 The Related Class Actions are *Levitte v. Google, Inc.*, No. C 08-3369 JW (filed Jul. 11, 2008), *RK West, Inc. v. Google, Inc.*, No. C 08-03452 JW (filed Jul. 14, 2008), *Pulaski & Middleman, LLC v. Google, Inc.*, No. C 08-03888 JW (filed Aug. 14, 2008), *JIT Packing, Inc. v. Google, Inc.*, No. C 08-04701 (filed Oct. 10, 2008).

3 Plaintiffs represent that Defendant agrees that

the cases should be consolidated, but that it neither endorses nor opposes Plaintiffs' proposed leadership structure.

II. BACKGROUND

The Related Class Actions were filed against Defendant on behalf of internet advertisers who used Defendant's AdWords program to display advertisements online. Plaintiffs allege that **[*3]** Google unlawfully displayed advertisements on "parked domains," websites with a registered domain name that typically lack content, and "error page websites," websites with an unregistered domain name or that simply display the results of a malformed search query. Plaintiffs allege that, although parked domains and error page websites are low-quality websites from an advertiser's perspective, Defendant charged them for displaying advertisements on these sites without revealing to Plaintiffs that they were parked domain and error page websites.

The first of the Related Class Actions, *Levitte v. Google, Inc.*, was filed in the Northern District of California on July 11, 2008 and assigned to this Court. On November 3, 2008, the Court related three additional later-filed cases. (*See* November 3, 2008 Order Granting Motion to Relate Cases, Docket Item No. 30.)

III. DISCUSSION

A. *Consolidation of the Related Class Actions*

A district court has broad discretion to consolidate actions involving "common issues of law or fact." *Fed. R. Civ. P. 42(a)*; *Investors Research Co. v. U.S. Dist. Ct. for Cent. Dist. of Cal., 877 F.2d 777, 777 (9th Cir. 1989)*. In exercising its broad discretion to order consolidation, **[*4]** a district court "weighs the saving of time and effort consolidation would produce against any inconvenience, delay, or expense that it would cause." *Huene v. U.S., 743 F.2d 703, 704 (9th Cir. 1984)*.

Here, in reviewing the Complaints filed in the Related Class Actions, the Court finds that each case presents virtually identical factual and legal issues. Google, Inc. is the sole Defendant in each case. The core issue of each case is whether Defendant unlawfully charged internet advertisers for advertisements displayed on parked domain and error page websites. Further, as each case is a putative class actions, the issues concerning class certification will be substantially duplicative. Given these similarities and the lack of any apparent inconvenience, delay, or expense that would result from bringing the cases together, the Court finds that consolidation of the related cases is appropriate. Accordingly, the Court GRANTS Plaintiffs' request to consolidate the Relate Class Actions.

B. *Appointment of Interim Class Counsel*

Plaintiffs contend that appointing interim class counsel is necessary to protect the interests of the putative class. (Motion at 5.) Plaintiffs seek to have four law firms--Schubert **[*5]** Jonckheer Kolbe & Kralowec LLP, Saveri & Saveri, Inc., Kabateck Brown Kellner LLP, and Foote, Meyers, Mielke, and Flowers, LLP--appointed as co-interim class counsel. (*Id.*) Plaintiffs further seek to have Schubert Jonckheer Kolbe & Kralowec LLP appointed as liaison counsel to provide Defendant with a single firm to contact. (*Id.* at 12.)

Under *Fed. R. Civ. P. 23(g)(3)*, a court "may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action." Although *Rule 23(g)(3)* does not provide any guidance for selecting interim class counsel, a court may consider the factors enumerated in *Rule 23(g)(1)*. Under *Rule 23(g)(1)*, a court considers "(I) the work counsel has done in identifying or investing potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." [4]

4 The Court may also consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." *Fed. R. Civ. P. 23(g)(1)(B)*.

Here, **[*6]** although Plaintiffs contend that the scope of the proposed consolidated action favors a multi-firm structure, the Court finds that the putative class will benefit from having a single firm conduct the pre-class certification aspects of the litigation. Thus, upon review of the law firm resumes submitted by Plaintiffs and consideration of the factors enumerated above, the Court appoints Schubert Jonckheer Kolbe & Kralowec LLP as interim class counsel.

IV. CONCLUSION

The Court GRANTS Plaintiffs' Motion to Consolidate the Related Actions and orders as follows:

> (1) The related putative class actions--C 08-3369 JW, C 08-03452 JW, C 08-03888 JW and C 08-04701 JW--are consolidated into one action. The Clerk of Court shall consolidate these actions such that the earlier filed action, C 08-3369 JW, is the lead case. All future filings shall be in C 08-3369 JW and bear the caption: "*In re Google AdWords Litigation.*" In addition, the Clerk shall administratively close C 08-03452 JW, C 08-03888 JW and C 08-04701.
>
> (2) Schubert Jonckheer Kolbe & Kralowec LLP is appointed interim class counsel.
>
> (3) Plaintiffs shall file an Amended Consolidated Complaint on or before **April 6, 2009.**

In light of this Order, **[*7]** the Court VACATES the hearing on the Motion set for March 2, 2009.

Dated: February 25, 2009

/s/ James Ware

JAMES WARE

United States District Judge

2 of 2 DOCUMENTS

JAMES LEWIS, Plaintiff, vs. CITY OF FRESNO, et al., Defendants.

No. CV-F-08-1062 OWW/GSA,No. CV-F-09-304 LJO/SMS

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2009 U.S. Dist. LEXIS 57083

July 6, 2009, Decided
July 6, 2009, Filed

SUBSEQUENT HISTORY: Motion granted by, in part, Motion denied by, in part, Dismissed by, in part *Lewis v. City of Fresno, 2009 U.S. Dist. LEXIS 80556 (E.D. Cal., Sept. 3, 2009)*

PRIOR HISTORY: *Lewis v. City of Fresno, 2008 U.S. Dist. LEXIS 104374 (E.D. Cal., Dec. 15, 2008)*

COUNSEL: [*1] For James Lewis (1:08-cv-01062-OWW-GSA), Plaintiff: Rayma Church, LEAD ATTORNEY, Emerson, Corey, Sorensen, Church and Yohman, Fresno, CA.

For City Of Fresno (1:08-cv-01062-OWW-GSA), Defendant: James B. Betts, Joseph D. Rubin, LEAD ATTORNEYS, Betts & Wright, Fresno, Ca.

For Jerry Dyer, Anthony Martinez, Greg Garner, John Romo, Robert Nevarez (1:08-cv-01062-OWW-GSA), Defendants: James B. Betts, LEAD ATTORNEY, Betts & Wright, Fresno, Ca.

For Gerald Miller, Jonathan Pierro, Ron Manning (1:09-cv-00304-LJO-SMS), Plaintiffs: Rayma Church, LEAD ATTORNEY, Emerson, Corey, Sorensen, Church and Yohman, Fresno, CA.

For City Of Fresno, Brett Vestal, Stuart Riba, Brian Phelps, Jason Jones, Anthony Bustos, Kirk Pool, Mindy Medina, Eric Eide, John Chandler, Greg Garner, Joyce Vasquez, Robert Nevarez, Patrick Farmer, Roger Enmark, Jerry Dyer (1:09-cv-00304-LJO-SMS), Defendants: James B. Betts, Joseph D. Rubin, LEAD ATTORNEYS, Betts & Wright, Fresno, Ca.

JUDGES: Oliver W. Wanger, UNITED STATES DISTRICT JUDGE.

OPINION BY: Oliver W. Wanger

OPINION

MEMORANDUM DECISION GRANTING IN PART PLAINTIFF'S MOTION TO CONSOLIDATE ACTIONS (Docs. 29 & 22)

Plaintiff moves to consolidate the *Miller, et al. v. City of Fresno, et al.*, No. CV-F-09-304 LJO/SMS **[*2]** with this action pursuant to *Rule 42(a), Federal Rules of Civil Procedure*.

The motion to consolidate is opposed by Defendants.

A. Governing Standards.

Rule 42 provides:

> (a) Consolidation. If actions before the court involve a common question of law or fact, the court may:
>
> (1) join for hearing or trial any or all matters at issue in the actions;
>
> (2) consolidate the actions; or

> (3) issue any other orders to avoid unnecessary cost or delay.
>
> (b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

Once a common question has been established, "consolidation is within the broad discretion of the district court." *Paxonet Communs., Inc. v. Transwitch Corp., 303 F.Supp.2d 1027, 1028-1029 (N.D.Cal.2003)*. But "even where cases involve some common issues of law or fact, consolidation may be inappropriate where individual issues predominate." *See In re Consol. Parlodel Litig., 182 F.R.D. 441, 447 (D.N.J.1998)*. To determine whether to consolidate, the interest **[*3]** of judicial convenience is weighed against the potential for delay, confusion, and prejudice caused by consolidation. *Id.* Factors such as differing trial dates or stages of discovery usually weigh against consolidation. Wright & Miller, Federal Practice and Procedure § 2383 (2006). As explained in *Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2nd Cir.), cert. denied, 498 U.S. 920, 111 S. Ct. 297, 112 L. Ed. 2d 250 (1990)*:

> Considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial . . . When exercising its discretion, the court must consider:
>
> > [W]hether the specific risks of prejudice and possible confusion [are] overcome by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses, and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense of all concerned of the single-trial, multiple-trial alternatives.
>
> . . . When considering consolidation, a court should also note that the risks of prejudice and confusion may be reduced by the use of cautionary instructions to the jury and verdict sheets outlining the claims of each **[*4]** plaintiff.

The moving party bears the burden of showing consolidation is appropriate. *In re Consol. Parlodel Litig., 182 F.R.D. at 447*.

B. Merits of Motion.

Plaintiffs assert that all of them have alleged, "in one way or another," a hostile work environment in that each has been subjected to and heard insensitive remarks, stereotypical comments and disparate treatment on the basis of race and/or color, that Defendant Dyer was aware of the racial motivations of the individual defendants and the resulting disparate impact upon Plaintiffs, but failed and refused to correct such conduct, thereby ratifying it:

> The thread that runs throughout the claims of the four Plaintiffs is that of racial discrimination and retaliation. This is true not only of the legal theories pled but the factual contentions. Each Plaintiff has put forth facts evincing circumstances in which he personally was involved and a victim of such discrimination. Additionally, each Plaintiff is contending that the practices of the Police Department under the reign of Chief Dyer and the work place environment is racially hostile to African Americans.
>
> Further, it has been alleged that under Chief Dyer, opportunities for hiring, **[*5]** training, retention and promotion for African Americans are less advantageous and that disciplinary actions are likewise more onerous or likely to result in discipline or more severe discipline than other similarly situated officers who are not African-American.

Defendants argue that Plaintiff has not demonstrated a common question of law or fact. Although conceding that all of the Plaintiffs allege racial discrimination in employment, Plaintiff Lewis's claim of discrimination is also based on his sex, marital status and union activity. Defendants further contend that none of the individual claims have any factual overlap and that not all Defendants are sued in connection with each of the claims (other than Defendant Dyer). To the contrary, all claims concern the alleged racial discrimination, hostile work environment, and adverse employment actions taken against all Plaintiffs, who are African-American police officers.

Defendants cite *Coughlin v. Rogers, 130 F.3d 1348 (9th Cir.1997)*, a case involving joinder under *Rule 20, Federal Rules of Civil Procedure*, in which an action was brought for a writ of mandamus to compel INS officials to adjudicate 49 pending petitions or applications. **[*6]** In affirming the District Court's conclusion that the plaintiffs failed to meet the requirements for joinder, the Ninth Circuit stated in pertinent part:

> [A]lthough Plaintiffs' claims are all brought under the Constitution and the Administrative Procedure Act, the mere fact that all Plaintiffs' claims arise under the same general law does not necessarily establish a common question of law or fact. Clearly, each Plaintiff's claim is discrete, and involves different legal issues, standards, and procedures. Indeed, even if Plaintiffs' claims were not severed, the Court would still have to give each claim individualized attention. Therefore, the claims do not involve common questions of law or fact.

130 F.3d at 1351.

Defendants further argue that, even if Plaintiffs establish a common question of law or fact, consolidation should be denied. Defendants concede that consolidation does not create a risk of delaying the trial because both actions are at a similar procedural stage, i.e., no scheduling conference has taken place in either case. However, Defendants argue, the risk of prejudice to Defendants and confusion of the jury weigh against consolidation:

> The joining together of disparate claims **[*7]** of discrimination in the Lewis case with the claims of racial discrimination in the Miller Action will require the City to defend four factually distinct claims together before the same jury. In that event, even if one or more of the individual Plaintiffs were unable to meet their burden of proof in support of their individual claims, a jury could be influenced by the mere numerosity of the claims presented at trial. In such circumstances, although the jury would be instructed to examine each claim individually, it would be difficult, if not impossible, to separate each claim from Plaintiffs' repetitive exhortions that the City and individual defendants practice and/or condone racial discrimination. In a similar sense, a finding of liability in one case could be unfairly extrapolated into adverse findings in all cases. Such a result would be extremely prejudicial to the City, as well as to the seventeen . . . individually named Defendants, each of whom face personal exposure and punitive damages.

Defendants argue that denial of consolidation will not expose the parties in the two actions to inconsistent adjudications:

> Each of the four . . . cases is fact specific, and will succeed or **[*8]** fail upon the strengths or weakness of the divergent facts presented in each specific case.

Defendants further argue that the burden on the parties, witnesses and available judicial resources weigh against consolidation:

> At best, Plaintiffs' diverse claims present a common allegation of racial discrimination. However, the claims arise in completely distinct factual situations, involve uniquely different groups of alleged conspirators, and completely different percipient witnesses. With the exception of Chief Dyer, the only overlap between the sixteen . . . remaining

> individual defendants involve the naming of Deputy Chief Robert Nevarez and Captain Greg Garner in two . . . of the four claims.

Defendants contend that consolidation will involve the seventeen individual defendants to attend a protracted trial involving four separate claims in which the majority of defendants play only a small role in a single claim. Any suggestion that each individual defendant need not attend the entire trial is, Defendants contend, "untenable in a case which asserts that the individual defendants engaged in morally reprehensible conduct and which seeks to impose punitive damages against the individual." **[*9]** Defendants argue that, except for the time saved in picking a jury, consolidation of the two actions will not enhance court efficiency and will substantially complicate and expand the trial.

Plaintiff's motion to consolidate is GRANTED IN PART. The actions involve essentially common questions of law and, to some extent, common questions of fact regarding operation and command of the Fresno Police Department, its policies and practices, and how African-American officers are treated in the workforce. Judicial economy and conservation of the parties' resources weigh heavily in favor of consolidation for purposes of discovery in both cases, for case management, and non-dispositive and dispositive motions. No prejudice to Defendants results from this partial consolidation. Any privacy concerns relative to internal affairs investigations of individual parties may be addressed by appropriate protective orders. A decision whether and/or to what extent these cases will be consolidated for trial is deferred. All parties to these consolidated actions shall appear at the Scheduling Conference set for September 4, 2009 at 8:15 a.m. in Courtroom 3.

These cases are ordered partially consolidated for **[*10]** the purposes described above, including dispositive motions. At that juncture the parties and the Court will be able to ascertain and evaluate the merits of advantages and disadvantages of discovery.

IT IS SO ORDERED.

Dated: July 6, 2009

/s/ Oliver W. Wanger

UNITED STATES DISTRICT JUDGE

1 of 1 DOCUMENT

MAKAH INDIAN TRIBE, Plaintiff, v. C. WILLAIM VERITY, et al., Defendants

No. C87-747 RC

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SEATTLE DIVISION

1988 U.S. Dist. LEXIS 15340

May 10, 1988, Decided; May 12, 1988, Filed

COUNSEL: [*1] Alvin J. Ziontz, ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM, Seattle, WA, Attorney for Plaintiff

Thomas F. Carr, Office of the Attorney General, Daniel Wyckoff, Olympia, WA, Susan Barnes, Assistant United States Attorney, Seattle, WA, Charles H. Shockey, U.S. DEPT. OF JUSTICE, Washington, D.C., Douglas Ancona, NOAA, Seattle, WA, George Dysart, Portland, OR, Quinault Tribe, Amicus Curiae, Richard Reich, Taholah, WA, Attorneys for Defendants

OPINION BY: COYLE

OPINION

DECISION AND ORDER RE FEDERAL DEFENDANTS' MOTION TO DISMISS

ROBERT E. COYLE, UNITED STATES DISTRICT JUDGE

On December 14, 1987, the court heard the Federal Defendants' Motion to Dismiss. Upon due consideration of the written and oral arguments of the parties and the record herein, he court denies the motion to the extent it is based on mootness but grants the motion to the extent it is based on the failure to join indispensable parties.

On May 28, 1987, the Makah Indian Tribe (hereinafter referred to as Makah) filed a Complaint for Declaratory Judgment, Mandatory Injunction, and Review of Administrative Action. Named as defendants are C. William Verity, Secretary, United States Department of Commerce; and the United States of America; Curtis **[*2]** *Mack, Administrator, Oceanic and Atmospheric Administration; William E. Evans, Assistant Administrator for Fisheries, National Marine Fisheries Service/National Oceanic and Atmospheric Administration; Rolland A. Schmitten, Northwest Regional Director, National Marine Fisheries Service/National Oceanic and Atmospheric Administration; Joseph Blum, Director, Washington Department of Fisheries; and the State of Washington. In the complaint Makah seeks a declaratory judgment and permanent injunction as follows:*

1.3.1 The 1987 fishery management measures under the Framework Management Plan and its amendments (hereafter, 1987 regulations) which allocate a total of 15,800 chinook salmon to seven ocean treaty troll tribes is inviolation of the Magnuson Fisheries Conservation and Management Act (hereafter, FCMA), is arbitrary and capricious and is based on unlawful grounds.

1.3.2 That denial of a proposed tribal quota of 24,000 chinook to the ocean treaty troll fisheries is a violation of the FCMA, is arbitrary and capricious and is based on unlawful grounds.

1.3.3 That the promulgation of the 1987 regulations effective May 1, 1987, but not published in the Federal Register **[*3]** until May 6, 1987, and setting a comment deadline of May 15, 1987, is in violation of law and denies these plaintiffs due process of law by making a

sham of the requirement that there be a comment period. The setting of a nine-day comment period reveals that there will be no meaningful consideration of any comment by the Secretary.

1.3.4 The 1978 Fisheries Management Plan and 1985 Final Framework Amendment for managing the ocean salmon fisheries off the coast of Washington, Oregon and California are violative of the FCMA.

1.3.5 Implementation of the 1987 Regulations by the federal defendants and the defendant Director of the Washington Department of Fisheries will result in deprivation of plaintiff's protected rights and interests under its treaty with the United States and its right to protection and enforcement of those rights under Article VI of the United States Constitution and its right to due process of law under *Article V of the United States Constitution* as applied to the States under Article XIV of the United States Constitution.

1.4 Plaintiff seeks a permanent injunction against defendants restraining them from enforcing the proposed ocean treaty troll **[*4]** chinook quota of 15,800 chinook and mandating them to adjust said quota upwards to 24,000 chinook.

Federal Defendants move for dismissal of this action on the following grounds:

1. the case is moot and, therefore, does not present a case or controversy as required for this court's jurisdiction under Article III, section 2 of the Constitution;

2. the plaintiff has failed to join as necessary parties other Indian tribes who have interests that will be affected by the outcome of this case. Those tribes, while necessary parties, are immune from suit, and their absence renders them indispensable parties to this litigation under *Fed. R. Civ. P. 19*; and

3. the case, if not dismissed, will interfere with and frustrate the mediation that this court recently ordered in a related case, *United States* v. *Washington*, Civil No. 9213 Phase I (sub nos. 83-9, 86-5) (W.D.Wash.), on September 21, 1987, with regard to inter-tribal salmon allocation issues. [1]

1 In the concluding portion of Federal Defendants' Motion or Summary Judgment, Federal Defendants move to dismiss pursuant to Rule 12(b)(6) or for judgment of the pleadings pursuant to Rules 12(c) and 56 of those causes of action not explicitly included in the Makah's Motion for Partial Summary Judgment. There are Counts 4, 8, 9 and 10. Federal Defendants have no standing to dismiss Count 10, it alleging a violation of *42 U.S.C. § 1983* against the state defendants. In any event, the court agrees with the Makah that the request for dismissal on these grounds has not been properly presented to the court.

[*5] A. *Mootness.*

Federal Defendants argue that Makah's action is moot because the 1987 ocean salmon fishing season has ended and the relevant portions of the Commerce Department regulations and management measures governing the 1987 season no longer have any practical or legal effect. The regulations only authorized treaty Indian ocean salmon fishing through September 30, 1987 and will be superseded by regulations implemented for the 1988 season. *See* 50 C.F.R. Part 661, Subpart B & App., Pts. II, III; 50 C.F.R. 661.23(d)(2); *52 Fed. Reg. 17264* (May 6, 1987). Consequently, it is argued that Makah has not presented a live "case or controversy" within the jurisdictional requirements of Article III, Section 2 of the Constitution.

Makah responds that this action is not moot: "Although the Secretary's regulations are effective for only five months or less out of the year, they are renewed in one form or another each and every year.

Article III, Section 2 of the Constitution imposes on federal courts the duty to dismiss a suit that does not satisfy the "case or controversy" requirement. *U.S. Parole Commission v. Geraghty, 445 U.S. 388, 395 (1980)*. A case is moot and, therefore, **[*6]** does not satisfy this requirement if the issues are no longer live and if the parties lack a legally cognizable interest in the outcome. *Id. at 396. Powell v. McCormack, 395 U.S. 486, 496 (1969)*. A major purpose served by the mootness doctrine is the avoidance of advisory opinions or abstract propositions of law. *Naylor v. Superior Court of State of Arizona, 558 F.2d 1363, 1366 (9th Cir. 1977), cert. denied, 435 US. 946 (1978)*; *Church of Scientology of Hawaii v. United States, 485 F.2d 313, 314 (9th Cir. 1973)*. It is not enough to survive a mootness challenge

for there to have been an actual dispute at the time the complaint was filed; there must remain a "live" controversy throughout all stages of the court's review. *Burke v. Barnes, U.S. , 93 L.Ed.2d 732 (1987)*; *Preiser v. Hewkirk, 422 U.S. 395, 401 (1975)*. Where the circumstances have changed and only a conjectural or hypothetical threat of injury to the parties exists, the case is moot and must be dismissed for lack of jurisdiction. *Sosna v. Iowa, 419 U.S. 393, 403 (1975)*; *North Carolina v. Rice, 404 U.S. 244, 246 (1971)*; *Golden v. Zwickler, 394 U.S. 103, 108 (1969)*. In addition **[*7]** to the constitutional requirement of Article III, section 2, the Court may withhold injunctive relief on the basis of mootness, even if a constituional case or controversy did exist. *United States Steel Corp. v. Industrial Welfare Comm'n, 473 F.Supp. 537, 539 (N.D.Cal. 1979)*. The objective of both constitutional and "prudential" imitations on the court is the entry of specific orders which "will have some effect in the real world." *Id.* A case is moot if the reviewing court can no longer grant effective relief. *United States v. Oregon, 718 F.2d 299, 302 (9th Cir. 1983)*.

An important factor in this Court's analysis of the issue of mootness is whether there is a "reasonable expectation that the wrong will be repeated." *United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)*, citing *United States v. Aluminum Co. of America, 148 F.2d 416, 448 (2nd Cir. 1945)*. Plaintiff must show that a case, otherwise moot, should be adjudicated because "there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *Id.* This test is frequently stated as whether the action taken by the government makes **[*8]** the issues presented in plaintiff's complaint "capable of repetition, yet evading review." *Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122 (1973)*, citing *Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)*. The federal courts invoke the "capable of repetition, yet evading review" exception to the mootness doctrine only in unusual circumstances. *Enrico's Inc. v. Rice, 730 F.2d 1250, 1254 (9th Cir. 1984)*. The exception applies, for example, only where the challenged action is too brief ever to be fully litigated prior to its cessation *and* there is a reasonable expectation that the same complaining party will be subjected to the same action again. *Weinstein v. Bradford, 423 U.S. 147, 149 (1975)* (per curiam) (parole); *Sosna v. Iowa, 419 U.S. 393 (1975)* (duration residency requirements); *Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974)* (labor strike); *Roe v. Wade, 410 U.S. 113 (1973)* (pregnancy); *Wiggins v. Rushen, 760 F.2d 1009, 1011 (9th Cir. 1985)*. "The likelihood of the injury recurring must be calculable and if there is no basis for predicting that any future repetition would affect the present plaintiffs, there is **[*9]** no case or controversy." *Sample v. Johnson, 771 F.2d 1335, 1340 (9th Cir. 1985)*. The burden for showing a likelihood of recurrence is on the plaintiff. *Sample v. Johnson, id. at 1342*.

There are a number of decisions involving fisheries and the question of mootness, cases which are cited and either relied upon or distinguished by the parties. The court considers these decisions to be the most helpful in resolving the issue before it.

In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 691 (1979)*, the Supreme Court held:

We also agree with the United States that the conflict between the District Court's order and IPSFC does not present us with a justiciable issue. The initial conflict occasioned by the regulations for the 1975 season has been mooted by the passage of time, and there is little prospect that a similar conflict will revive and yet evade review. . . . Since 1975, the United States, in order to protect the Indian rights, has exercised its power under Art VI of the Convention and refused to give the necessary approval to those portions of the IPSFC regulations that affected Indian fishing rights. Those regulations have **[*10]** accordingly not gone into effect in the United States. The Indians' fishing rights and responsibilities have instead been the subject of separate regulations promulgated by the Interior Department, under its general Indian powers, . . . and enforced by the National Marine Fisheries Service directly, rather than by delegation to the State. The District Court's order is fully consistent with those regulations.

In *Sohappy v. Smith, 529 F.2d 570, 572-573 (9th Cir. 1974)*, the Ninth Circuit held that an appeal by the State of Washington from an order denying its motion for preliminary injunctive relief to restrain various Indian tribes from fishing commercially on the Columbia River during the 1974 spring Chinook run was subject to being dismissed as moot inasmuch as the 1974 Chinook run was over and closure orders issued by the State of Washington in respect to commercial fishing on the Columbia River had also expired by their own terms.

As part of the continuing litigation to implement and enforce the decrees affirmed in *United States v. Washington, 384 F. Supp. 312 (W.D.Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976)* (the Boldt decision), **[*11]** the district court issued certain injunctions against the State of Washington to enforce an allocation of fishing rights between treaty Indians and other fishermen during the 1975 salmon fishing season. In *United States v. State of Washington Department of Fisheries, 573 F.2d 1118, 1120-1121 (9th Cir. 1978)*, the Ninth Circuit dismissed as moot the State of Washington's appeal, holding:

The first injunctive order in question directed the State of Washington and its Department of Fisheries to adopt certain regulations to implement and enforce directives of the 1975 International Pacific Salmon Fisheries Commission pertaining to sockeye and pink salmon fishing in United States waters. Since the Commission promulgates fishing regulations on a yearly basis, the 1975 Commission directives are now fully superseded by other Commission orders. If there were a likelihood that the district court would require the state to implement Commission regulations for subsequent seasons, the legal questions presented here might be ones 'capable of repetition, yet evading review,' and thus amenable to adjudication notwithstanding their moot character in this case. . . . That, however, is not the **[*12]** position here.

After the 1975 season, it became unnecessary to utilize state regulations to accommodate the Commission directives and the court decree. The United States has taken steps to remove treaty Indians from the jurisdiction of the Commission and regulates treaty Indian fishing solely through the Bureau of Indian Affairs. The commission regulations are enforced against nontreaty fishermen by the National Oceanic and Atmospheric Administration through its subagency the National Marine Fisheries Service and by the United States Coast Guard. The 1975 injunction which required the state to adopt regulations is not, therefore, likely to be reissued for later years.

Appellant argues that, even if repetition of this injunction is unlikely, two of the legal premises relied on by the district court are of continuing importance in this litigation and should be addressed here. These questions are whether or not the Washington Department of Fisheries is required to adopt and enforce fishing regulations in a manner designed to give treaty Indians the opportunity to catch fifty percent of the available fish, and whether this court's holding in *United States v. Washington, supra,* **[*13]** dictates that any fifty percent allocation must apply to waters under the jurisdiction of the IPSFC. Questions regarding the nature and extent of the rights of treaty Indians to an allocation of the pink and sockeye salmon in IPSFC waters should not be discussed in a hypothetical context. Furthermore, the question of a percentage allocation is presented in *United States v. Washington, 573 F.2d 1123 (9th Cir. 1978)* (nos. 77-3654 & 77-3655, filed April 24, 1978). These are not issues that threaten to elude review. Therefore we follow the rule that 'federal courts are without power to decide quesitons that cannot affect the rights of litigants in the case before them.' . . .

The district court issued a second injunction directed to the Superior Court of the State of Washington in and for the County of Thurston. The federal injunction ordered a stay of state court orders requiring the Washington Department of Fisheries to suspend fishing regulations then in effect for the 1975 season. The 1975 season has now passed and neither the order of the United States district court nor that of the state court has current force. Moreover, the situation that gave rise to the federal injunction **[*14]** is unlikely to recur since, as noted above, state agencies are no longer relied upon to allocate fishing rights in the fisheries controlled by the IPSFC as between treaty Indians and others. The issues presented by the order enjoining the state proceedings are now moot.

Thirdly, the district court issued a preliminary injunction to prevent the state from enforcing state regulations which restricted certain types of net fishing by the Swinomish tribe. The purpose of the state regulation was to give effect to IPSFC directives. This injunction has no practical consequence for the parties now. It is not likely to be reissued. The responsibility for enforcement of IPSFC regulations has now been assumed solely by federal authorities, and we think the appeal from this order is also moot.

The district court in *Northwest Environmental Defense Center v. Gordon,* Civil No. 86-725 LE (D.Ore. Dec. 4, 1986), *appeal docketed,* No. 87-3606 (9th Cir. 1987) dismissed a challenge to the 1987 fishing management measures following the end of the season's Coho salmon harvest, on the ground of mootness and on the ground that the annual fishery management measures

are not of such short duration as **[*15]** to elude judicial review. This order states:

The federal and state defendants contend that NEDC's challenge to the 1986 salmon management measures is moot because the 1986 season for coho salmon is now over. The coho quota was reached and closure notices were made effective on July 24 and August 20, 1986.

. . .

In this action, no decree by the court granting injunctive or declaratory relief can undo the harvesting of coho salmon that took place during the 1986 season. Thus, the court can provide NEDC with no relief and the action is moot.

This is also not one of those unusual circumstances where the action taken by the government makes the issues presented 'capable of repetition, yet evading review.' *Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)*. The annual fishery management measures are not of such short duration as to elude judicial review. An exception to the mootness need not be made in this action.

In *Washington Trollers Ass'n v. Kreps, 466 F.Supp. 309, 312-313 (W.D.Wash. 1979)*, *rev'd on other grounds, 645 F.2d 684 (9th Cir. 1981)*, the district court held that the issue of the validity of regulations promulgated to implement the 1978 Pacific **[*16]** Salmon Fishery Management Plan was not moot:

At the threshold, however, the Court is faced with the issue of mootness. The 1978 ocean salmon fishing season is over and the 1978 regulations have expired. New and somewhat more restrictive regulations are being prepared for adoption by the Secretary within the next two months. While those regulations will rest on an administrative record somewhat different from that before the Secretary in 1978, and while the Council is expected to amend the present Plan to include additional management options, it appears to the Court that the 1979 regulatory scheme will be basically similar to the 1978 scheme. The regulations, although somewhat different, will implement a plan similar to the 1978 Plan. Counsel for both sides indicated at oral argument that a ruling on the 1978 regulations would be relevant to action taken on the 1979 regulations.

It thus appears that the 1978 regulations are a part of a regulatory scheme having a continuing effect on the parties sufficient to preclude the action from being moot. [2] In addition, the action seems to fall within the exception for 'short term orders, capable of repetition yet evading review,' which **[*17]** can be considered by a court even if the issue were otherwise moot. . . . The exception requires both that there be more than a remote chance of repetition of the challenged conduct and that 'the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration.' . . . The impending adoption of regulations for the 1979 season, and the short duration of that season, qualify this case under the exception.

2 In this connection, the preamble to the 1978 Plan states in part:

The 1978 FMP is the second step in development of a comprehensive plan for the management of salmon stocks. The initial step was the FMP developed and implemented during 1977. The success of this 1978 FMP is dependent upon cooperation by adjacent states, with regard to enforcement and salmon management. A comprehensive plan is currently being developed by the Council. . . . 43 Fed.Reg. 29791 (July 11, 1978).

In *United States v. Oregon, 718 F.2d 299, 302-303 (9th Cir. 1983)*, the States of Oregon and Washington appealed from a preliminary injunction which had expired before the appeal was completed. The district court issued the injunction to allocate Chinook salmon among **[*18]** treaty and nontreaty fishermen for the fall 1982 salmon run on the Columbia River. The Ninth Circuit held that the appeal was not moot:

A case is moot if the reviewing court can no longer grant effective relief. . . . This customary description of mootness has reduced significance to litigation such as this which is but part of extensive ongoing judicial oversight of a continuous activity. What is decided in one proceeding in such litigation will impact on future, and perhaps even on past, proceedings. Even a failure to decide may cause significant reverberations. Moreover, even when the termination of litigation can be foreseen to be reasonably proximate to its commencement, it is said an exception to the mootness doctrine applies when the claim for relief is 'capable of repetition, yet evading review' and the complaining party is likely to be subject to the same harm. . . .

Without regard to whether the staying hand of

mootness should be relaxed in 'oversight litigation,' the exception certainly applies to this case. Because the difficulty of forecasting the run of fish forces the district court to issue its orders as close as possible to the start of the fishing season, and **[*19]** because this conflict is certain to continue, the dispute over the allocation of fish can easily recur, yet evade review, between the same complaining parties. . . . The calculation of the deficit in the treaty fishermen's share also does not present a moot issue, because the deficit will be carried over into future allocations. And there is no evidence in the record that these issues have been mooted by a new Plan. . . .

In *United States v. Washington, 761 F.2d 1404, 1407 (9th Cir. 1985), later proceeding, United States v. Washington, 774 F.2d 1470 (9th Cir. 1985), cert. denied sub nom., Quinault Indian National v. Washington, 474 U.S. 1100 (1986)*, the Ninth Circuit held not moot an appeal from the district court's adoption of the FAB "probing plan" for determining the escapement levels necessary to sustain optimum yield in connection with the appropriate number of fall Chinook that should be allowed to escape the in-river fisheries and spawn. The Ninth Circuit held:

The United States argues that because the factual record is rooted in 1983, this appeal is moot. The district court's decision, however, not only adopted the factual findings relevant to 1983, it implemented **[*20]** an interim plan which would allow the tribal catch to exceed 50% of the available fish if the non-treaty fishers were unable to harvest their full share. This aspect of the plan will apply throughout its five-year life, and does not depend on annual data. To decline review on this basis would create a situation guaranteed to repeat yet evade review. *See United States v. Oregon, 718 F.2d 299, 302 (9th Cir. 1983)*.

In *Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts v. United States, 832 F.2d 1127, 1129-1130 (9th Cir. 1987)*, the Ninth Circuit held as not moot an appeal in an action brought by the Joint Board of Control against the Bureau of Indian Affairs seeking to enjoin the BIA from continuing to implement its 1986 operating strategy for the Flathead Irrigation Project:

This case involves a continuing dispute surrounding the operating strategy by which the BIA provides water supplies controlled by the Flathead Irrigation Project to serve the competing demands of tribal fisheries and irrigated agriculture. The first litigation was commenced by the Tribe. In 1985, the Tribes determined that drought conditions--a combined effect of diminished **[*21]** precipitation and high summer temperatures--would diminish flows and decrease water levels in the Reservation's rivers and reservoirs. They brought an action to enjoin the BIA from distributing waters to the irrigation districts in such a manner as to deplete the streams and reservoirs and cause what the Tribes viewed as irreparable damage to the tribal fisheries. The Joint Board intervened. According to the Tribes, the BIA's efforts to meet the demands of irrigated agriculture at the expense of tribal fisheries violated the Tribe's fishing rights secured by the Treaty of Hell Gate, . . . and the Tribe's impiled reserved water rights. . . . The district court issued a temporary restraining order. The parties then entered a stipulation that established minimum stream flows and reservoir water levels for the 1985 irrigation season and set forth procedures for establishing future minimum flows and water levels. The District Court consequently dismissed the action as moot. . . .

By the summer of 1986, the BIA had established an interim operating strategy that provided greater protection for tribal fisheries by ensuring minimum stream flows and minimum reservoir levels. In some instances, **[*22]** implementation of these flow requirements diminished the availability of irrigation water. On August 4, 1986, the Joint Board brought this suit for injunctive relief against the United States, claiming that the BIA had abused its discretion in establishing the 1986 Interim Instream Flow and Pool Level Agreement. The Tribes intervened. According to the Joint Board, the BIA had abused its discretion by failing to give consideration to the rights and interests of the irrigators in determining a water distribution strategy, and by inequitably distributing the water supplies of the Flathead Irrigation Project.

The District Court issued a temporary restraining order and then held a hearing on whether to issue a preliminary injunction. Subsequent to the hearing, the district court found that the Joint Board had 'shown substantial likelihood of success on the merits and a possibility of irreparable injury' and granted the preliminary injunction.

In addition to enjoining the BIA from continuing to implement the 1986 Interim Instream Flow and Pool

Level Agreement, the District Court set forth legal principles for allocating the scarce water supplies of the Project. The District Court viewed **[*23]** the different positions taken by the BIA in in 1985 and in 1986 as extreme, polar positions--first protecting the irrigators at the expense of the Tribes and, second, protecting the Tribes at the expense of the irrigators. The District Court counseled that the BIA must be guided by the principle of 'just and equal distribution' of *'all* waters of the Reservation.' . . .

. . . This exception to the mootness doctrine is applicable to cases where: '(1) the challenged action is of limited duration, too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again.' . . . This controversy clearly meets the first requirement. Operating strategy for each irrigation season has such a short life that it cannot effectively be subjected to appellate reivew. The second requirement is also satisfied; the challenged activity is likely to recur. The same parties were before the district court as a result of the BIAs operating strategy in 1985 and 1986. Subsequent to the filing of the action challenging the 1986 Interim Agreement, the parties were again before the district **[*24]** court challenging the 1987 operating strategy. This controversy has recurred and will continue to recur.

Moreover there is a continuing public interest in determining the appropriate legal principles by which the BIA should distribute water, which transcends the particular distribution strategy selected in any given year. . . . We conclude that this case is not moot.

Federal Defendants argue from these cases that the court should carefully examine the nature of the present dispute and conclude from several factors that the complaint is moot and does not meet the narrow criteria for carving out an exception to the mootness doctrine. Relying primarily upon *Sohappy, Washington Department of Fisheries,* and *Washington State Commercial Passenger Fishing Vessel Ass'n,* Federal Defendants contend:

First, the 1987 season and the pertinent Commerce Department regulations governing the inter-tribal allocation of ocean salmon have been completed. Second, the mere prospect of new regulations for the 1988 season does not render this case one of those inherently 'short-term' cases that necessarily terminate before judicial review can be completed. Rather, the Makah's unexplained refusal **[*25]** to take a single step to prosecute this May 1987 complaint until September 22, 1987, is the principal reason why judicial review is no longer available.

Third, this case is unlike the situation in *United States v. Washington, 761 F.2d 1404*. There, the court found that the fisheries plan would remain in effect for five years. Here, the 1987 regulatory scheme expired and will be superseded. . . . Thus, the issues raised by the complaint are not of an 'enduring' nature, as in *United States v. Oregon, 657 F.2d 1009.*

Finally, and most importantly, the Makah and the other treaty Indian tribes engaged in ocean salmon fishing are subject to this Court's continuing order in *United States v. Washington,* No. 9213 - Phase I (W.D.Wash.), to negotiate under the auspices of court-appointed mediator in an effort to reach mutually satisfactory catch figures, *before* returning to the federal courts to resolve this long-standing controversy. If the mediation ultimately proves unfruitful, the Makah and all other tribes and interested parties have an available judicial forum. Any party to that litigation can institute a separate sub-proceeding in connection with this Court's ongoing **[*26]** jurisdiction. The Makah, however, should not be permitted to initiate novel lawsuits by filing separate complaints in this or any other court. We submit that this complaint is a thinly-veiled effort to circumvent this Court's directive to and [sic] negotiate and mediate first, then, if unsuccessful, to seek judicial review under the auspices of the ongoing plenary salmon litigation. The existence of a readily accessible forum guarantees that the Makah's pleas will not escape judicial review.

Makah responds that Federal Defendants' reliance upon *Sohappy, Washington Department of Fisheries,* and *Washington State Commercial Passenger Fishing Vessel Ass'n* is misplaced because tone of these cases involved a regulatory scheme which will be implemented on an annual basis. Makah contends that the court's conclusion should be controlled by *Kreps, Oregon* and *Washington:*

Here, . . . through the actions of the State of Washington and PFMC, the Secretary has, since 1984, . . . imposed arbitrary quotas upon ocean fishing tribes in the name of 'equitable sharing of the conservation burden' . . . and 'weak stock management' . . . and has given priority to terminal area fisheries, **[*27]** ignoring the

needs and abilities of ocean fishing tribes and their status as co-managers of the fisheries. . . . These affidavits also establish that, in prior years, defendants have entered into agreements with groups of tribes in river or terminal areas, as they did in 1987 with the Columbia River tribes, and have used the vehicle of federal ocean regulation to implement such agreements.

The Spring Creek Hatchery on the Columbia River has presented a continuing constraint on plaintiff's fishing rights for the past three years . . . and will probably present such a constraint again in 1988. . . . The practice of using previous year's quotas as the basis for the following year's quotas is also well established by these affidavits, as is the practice of trading away the ocean treaty fishing opportunity in order to deliver fish to Columbia River treaty and non-treaty fishing groups.

Makah further contends that the complexity of this case as well as their lack of financial resources prevented the full litigation of this action before the end of the 1987 season. [2]

> 2 Makah also argues that the issues in this action have led to prior litigation, thereby lending credence to their claim that the legal wrongs complained of herein are 'capable of repetition.' However, while some of the issues involved in *Makah v. Schmitten*, Civil No. 86-665, are similar to those raised herein, the court notes that the Makah has made no effort to prosecute *Makah* v. *Schmitten* subsequent to the filing of the complaint. In *United States v. Washington*, No. 9213 - Phase I, subproceeding No. 86-4, no challenge was made to the legality of the Secretary's regulations and administrative process. Consequently, the court finds Makah's reliance upon these prior legal actions less than persuasive.

[*28] In their reply brief, Federal Defendants argue that the *Oregon* case actually supports the Secretary's position and not that of the Makah. Referring to the statement in *Oregon* that the "customary description of mootness has reduced significance to litigation such as this which is but part of the extensive ongoing judicial oversight of a continuous activity," *718 F.2d at 302*, Federal Defendants contend that the *Oregon* case represents a proper forum for presenting and resolving continuing disputes over Indian treaty fishing rights, including intertribal allocation matters, a conflict the Ninth Circuit in *Oregon* noted was certain to continue, but which is not the case here:

History has shown that, in a given year, any of a number of different runs of chinook or coho salmon can be the 'weak runs' which will serve as the focal point of ocean salmon management for that year. Any allegation that the Spring Creek Hatchery (SCH) chinook will form the basis for ocean management in 1988-or, if it does, that the Makah will be aggrieved by regulations to protect that run--is pure speculation. To the contrary, the Department of the Interior representative on the Council announced **[*29]** at the September 1987 Pacific Fishery Management Council (Council) meeting that the United States Fish and Wildlife Service (FWS) no longer intends to recommend that SCH stocks be the constraining chinook stock in the management of the ocean salmon fishery. See Minutes of September 16-17, 1987, Council meeting at 21, attached as Fed. Def. Ex. 1.

Further, the SCH chinook has been among the weakest stocks for the last three years, but the Makah did not challenge the annual regulations previously, except for 1986, when the tribe expressed concern only with regard to the coho salmon stocks, not the SCH chinook run. The Makah also did not object until 1987 to the policies or procedures of the Council and Secretary, so the policies to which the plaintiff now objects so strenuously do not appear to have been a cause for concern in prior years. Accordingly, defendants urge this court to dismiss the Complaint as moot and require the Makah to pursue any future objections to the annual regulations in the context of the 'extensive ongoing judicial oversight' pending before this court in *United States v. Washington.*

. . .

The 1987 regulations differed from the 1986 regulations in terms **[*30]** of the 'weak stocks' of concern. Similarly, the 1988 regulations are very likely to depend on different stocks of salmon that affect any ocean treaty troll quotas than the SCH chinook run and Skagit River coho. This phenomenon of yearly biological variations requires different annual regulations and flexible in-season management measures. The need for individual review of the relevant facts each year establishes a *prima facie* showing that the plaintiff's claims, which they did not press for nearly five months until the end of the 1987 season, are moot. . . .

The important point, for purposes of considering the

mootness of plaintiff's cliams, is that the Council and Secretary will not automatically apply the same analytical methods or reach the same results in 1988 as in 1987 or prior years. The decision will be made based on the facts that emerge in preparation for the 1988 season. If the Makah, alone among all affected treaty Indian tribes, continue to believe that litigation is necessary to pursue their objectives, they can challenge the 1988 regulations in a new subproceeding within *United States v. Washington*, where all tribes are parties, having waived their sovereign **[*31]** immunity. To avoid mootness, the Makah can move promptly for relief, rather than permitting the season to expire as they have done the past two years.

Makah argues at length that there is no alternative forum to litigate the claims presented here, contrary to the assertion made by Federal Defendants.

Section 9 of the Order Approving Mediation and Appointing Mediator filed September 23, 1987 in Subproceedings 83-9 and 86-5 provides in pertinent part that "[n]othing in this order or the tribal submissions described in paragraph 1 shall be deemed to give any mediator, mediation technical advisor or technical committee any jurisdiction or authority over any nonparty to this mediation, or to recommend allocations for such nonparties except as any such nonparty may specifically request them to recommend such allocations . . . ." Moreover, Makah refers to strenuous efforts by the United States to prevent the mediation process in *United States v. Washington* from affecting any allocation of fish between tribes party to *United States v. Washington* and tribes party to *United States v. Oregon:*

There is no other forum which can review the issues raised by plaintiff. The jurisdictional **[*32]** limitations of the federal court in *U.S. v. Washington* have been repeatedly invoked by the government to bar any attempt to use that forum to address questions of allocation between *U.S. v. Washington* case area tribes and Columbia River tribes. Presumably, the District Court's jurisdictional limitations in *U.S. v. Oregon* would have the same limitations.

It is submitted that this *is* the proper forum for addressing these issues. It is precisely the Secretary, in his functions as ocean regulator, who must account to the judicial system for his allocations affecting treaty rights of these two jurisdictionally separate groups of treaty fishers. The issues raised by plaintiff *will* elude review if this court cannot review them.

In their reply brief, Federal Defendants pull away from their previous position that the Makahs could have brought this action as part of Subproceedings Nos. 83-9 and 86-5. Rather, they now contend that the Makah should bring this challenge to, the Magnuson Act regulations as a separate subproceeding in *United States v. Washington* because the claims raised and the relief sought necessarily will affect a number of other tribes and user groups **[*33]** that fish for Pacific salmon:

This court . . . has exercised jurisdiction over the Secretary's ocean troll regulations issued under the Magnuson Act in response to challenges from the Quinault Treaty Area Tribes. *Hoh Indian Tribe v. Baldridge, 522 F.Supp. 683 (W.D.Wash. 1981)*. The Hoh opinion held that the Magnuson Act did not supersede the treaty rights adjudicated in *United States v. Washington.* The *Hoh* case currently is being considered along with the overall Indian fisheries litigation before this court in *United States v. Washington. . . .*

Plaintiff's reference to prior United States pleadings in sub-proceeding 86-5 . . . misconstrues the Federal Government's position. The United States argued that, in light of the jurisdiction of another federal district court over Columbia River salmon runs in *United States v. Oregon*, this court should not assert concurrent jurisdiction over those same runs in *United States v. Washington.* The dispute at issue in this case, however, does not involve jurisdiction over the fisheries in the Columbia River. . . . The Secretary's regulations being challenged govern only the ocean troll catch, which clearly is subject **[*34]** to the Secretary's Magnuson Act authority. . . .

Of course, as all parties concede, there is a very close relationship between the ocean and the inside fisheries. Congress recognized that biological fact in adopting the multi-party Council process set forth in the Magnuson Act. The Council and Secretary understand that actions taken with respect to ocean and in-river salmon fisheries affect one another closely.

There simply is no logical conflict in asserting (a) that this court should not adjudicate claims over Columbia River runs in the absence of necessary parties, as the Federal Government has done in sub-proceeding 86-5, *see* Fed. Def. Ex. 9 at 4-5, attached, and, at the same time, (b) that this court should dismiss the Makah's

efforts in a proceeding against the Secretary of Commerce to increase its ocean troll quota. To the contrary, the government's positions are consistent. A single principle guides our position in both cases, i.e., that this court should not adjudicate the merits of intertribal fishing disputes that affect non-party tribes. This court properly can exercise jurisdiction over all matters relating to the magnitude of the Makah's treaty fishing entitlement, **[*35]** which is the subject of this case, but should do so through the ongoing *United States v. Washington* framework, where other affected tribes are parties, not in a separate lawsuit involving only one of the tribal interests.

. . .

Clearly, whether or not the Makah's action is moot presents a difficult and close question. The court concludes, however, that the action is not moot. While the court is of the opinion that the Makah could and should have litigated this matter more expeditiously, it is nonetheless highly unlikely that the matter could have been fully resolved during the relevant period. Moreover, while certain of the factual issues appear unlikely to reoccur, the procedural issues will. Finally, the availability of an alternative forum is, in the court's opinion, germane to the issue of indispensable parties, but does not alleviate the difficulty of resolving challenges under the Magnuson Act in a timely fashion. Accordingly, this portion of the motion to dismiss is denied.

2. *Failure to Join Indispensable Parties.*

As noted, Federal Defendants further move for dismissal of this action on the ground that the Columbia River tribes, the Puget Sound Tribes, the Quinault **[*36]** Indian Nation, the Jamestown, Port Gamble and Lower Elwha Klallam tribes, and the Hoh, Quileute, Yakima, Warm Springs, Umatilla and Nez Perce tribes are necessary parties under *Rule 19(a), Federal Rules of Civil Procedure*, whose joinder cannot be compelled in the absence of each tribe's waiver of sovereign immunity, thereby requiring dismissal for failure to join indispensable parties pursuant to *Rule 19(b)*. [3]

> 3 *Rule 19, Federal Rules of Civil Procedure* governs the joinder of additional parties to on-going litigation. *Rule 19* provides in pertinent part:
>
> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest
>
> . . . .
>
> (b) Determination by Court Whenever Joinder not Feasible. If a person . . . cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the Court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

[*37] a. *Public Interest Exception.*

Makah, invoking the "public interest exception" first articulated in *National Licorice Co. v. NLRB, 309 U.S. 350 (1940)*, argues that this complaint involves public rights rendering unnecessary the joinder of all affected parties.

In *Sierra Club v. Watt, 608 F.Supp. 305, 324-325 (E.D.Cal. 1985)*, the district court explained the "public interest exception":

In *National Licorice,* the Supreme Court held that an NLRB enforcement action barring an employer from enforcing contracts with employees which violate the

National Labor Relations Act was proper despite a failure of the Board to join the employees who were signatories to the contract at issue. The Court first noted that it was not within any court's power to make a binding adjudication of the rights of those parties not brought before it. . . . Nonetheless, the Court recognized that the litigation would have a practical effect upon the rights and obligations of the absent employees under the contract; despite this conclusion the Court nevertheless held that joinder was not required. The High Court observed that '[i]n a proceeding so narrowly restricted to the protection and enforcement **[*38]** of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights.' . . . Although first announced in the context of public agency action, the doctrine has evolved to include the assertion of public rights by private parties. . . . *National Licorice* was, of course, decided prior to the adoption of the present form of *rule 19*, and thus its failure to analyze the question in terms of the rule is unremarkable. Unfortunately, subsequent cases have also failed to apply the rule to public interest exception cases. Such textual support for the doctrine, howver, is readily at hand.

In public rights cases, what is at stake by definition are constitutional, national statutory, or national administrative issues. Almost by the nature of the issues tendered by such litigation, the number of persons who will be affected as a practical matter is very large, and almost certainly a substantial number of those persons cannot be served in one district. To hold that such persons nevertheless must be joined or the case dismissed 'would effectively preclude such litigation against the government.' . . . *Rule 19* provides **[*39]** as a factor in considering the court's response to a joinder motion the issue of 'whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder,' . . . . Clearly, the 'public interest exception' is the effectuation of this provision.

Yet another source, however, justifies the exception. The rules themselves provide that '[t]hey shall be construed to secure the just, speedy and inexpensive determination of every action.' *Fed.R.Civ.P. 1*. Surely justice cannot be done if public interest litigation is precluded by virtue of the requirements of joinder. Inevitably, the joinder of the large number of persons who could potentially be affected by public interest litigation, even if possible, is not feasible and certainly is not inexpensive. In sum, then, the public interest exception is supported by both *rule 19* itself and *rule 1*, and just makes good sense.

The instant case is a fair example of the doctrine. It is brought by six public interest organizations who seek vindication of the provisions of FLPMA by a declaration that a ruling, adopted by the Secretary of Interior and affecting nationally held land in eleven western states, violates the law. On **[*40]** the other side of the issue is the United States government and intervenors, including a public interest group with a viewpoint different from the plaintiffs. Whatever the outer boundaries of the public interest exception, the instant case falls within the heart of it.

The public interest exception has been applied in the following cases: *Northern Alaska Environmental Center v. Hodel, 803 F.2d 466 (9th Cir. 1986)* (joinder of individual miners not necessary in suit to enjoin mining in national parks based on violations of NEPA); *Jeffries v. Georgia Residential Finance Authority, 678 F.2d 919* (11th Cir.), *cert. denied, 459 U.S. 971 (1982)* (joinder of affected landlords not necessary to tenants suit to enjoin use of termination and eviction procedures in a class of residential leases allegedly violating the *Fourteenth Amendment*); *Kirkland v. New York State Department of Correctional Services, 520 F.2d 420 (2d Cir. 1975), cert. denied, 429 U.S. 823 (1976)* (joinder of civil service employees granted promotions not necessary in a suit to enjoin civil service promotions on the ground that the qualifying exam violated civil rights statutes); *Swomley v. Watt, 526 F.Supp.* **[*41]** *1271 (D.D.C. 1981)* (joinder of permit holder not necessary in a suit to compel revocation of use permit held by a religious organization in violation of the *Establishment Clause*); *Natural Resources Defense Counsel v. Berklund, 458 F.Supp. 925* D.D.C. 1978, aff'd, *609 F.2d 553 (D.C.Cir. 1979)* (joinder of ease applicants not necessary in action to enjoin issuance of preference right coal leases without first preparing an EIS and thereafter exercising discretion to reject lease applications where appropriate); *Sansome Committee v. Lynn, 366 F.Supp. 1271 (E.D.Pa. 1973)* (joinder of affected landowner not necessary in a suit to enjoin a federally authorized construction project on the ground that it was approved in violation of NEPA and the National Housing Act); *National Resources Defense Council v. TVA, 340 F.Supp. 400 (S.D.N.Y. 1971), rev'd on other grounds, 459 F.2d 255 (2d Cir. 1972)* (joinder of coal suppliers not necessary in suit to enjoin performance of coal supply

contracts on ground that TVA entered into them without complying with NEPA).

Makah argues that the public interest exception applies to this action: "The Makah Tribe seeks to correct procedural improprieties **[*42]** in the administrative process, and to enforce the Secretary's statutory obligations to assure that fishery management are consistent with Indian treaty rights and avoid waste and inefficiency. Like the procedural and substantive claims made in prior Magnuson Act cases, these claims raise public issues which warrant judicial review, notwithstanding the absence of potentially affected parties." In addition, Makah argues that even though *16 U.S.C. § 1855(d)* and *5 U.S.C. § 702* which govern review of Magnuson Act regulations do not affect other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground, if review of regulations promulgated by the Magnuson Act was based in every case in which such regulations affected a party who was not or could not be joined, the congressional provision for judicial review would be largely vitiated.

In support of its position, Makah cites several decisions conducting judicial review pursuant to *Sections 1855(d)* and *702*. Makah argues that these actions were decided on the merits even though all affected parties were not before the court. However, in none of these **[*43]** cases was joinder or the public interest exception an issue. *See Maine v. Kreps, 563 F.2d 1043 (2d Cir. 1977)*; *Pacific Coast Fed'n of Fishermen's Ass'n v. Secretary of Commerce, 494 F.Supp. 626 (N.D.Cal. 1980)*; *Washington Trollers Ass'n v. Kreps, 466 F.Supp. 309 (W.D.Wash. 1979), rev'd on other grounds, 645 F.2d 684 (9th Cir. 1981)*; *Hoh v. Baldridge, 522 F.Supp. 683 (W.D.Wash 1981), aff'd, 676 F.2d 710* (9th Cir.), *cert. denied, 459 U.S. 864 (1982)*; *Washington State Charterboat Ass'n v. Baldridge, 702 F.2d 820 (9th Cir. 1983)*.

Moreover, Federal Defendants contend that the cases relied upon by Makah involve different types of rights than those that the Makah advance. Those cases involving NEPA advance NEPA's principal purpose of informing the public of a federal agency's considerations concerning potential impacts of proposed federal actions, *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983)*. The other cases cited by Makah involve generally recognized public interests such as tenants' rights, federal civil rights, and religious freedom. As Federal Defendants further contend that *Sierra Club v. Watt* involved **[*44]** a situation totally different from that of the present case where the absent parties are limited in number, easily identified, and already parties to *United States v. Washington.* Finally, Federal Defendants assert:

The Makah, alone among all treaty Indian tribes, attempt to overturn the 1987 regulations. The other tribes, while perhaps not fully satisfied with the results of the shared conservation burden, have decided to work within the system that Congress designed. All participants in the Council process believe that the regulations must be fair and equitable, from both a procedural and substantive perspective. Defendants submit that Makah's pursuit of additional fish is a purely private, not public, concern.

The Quinault Indian Nation's amicus brief expresses a similar private, rather than public, interest on the part of the Makah:

The Makah Tribe's complaint, in essence, is that the Secretary limited the treaty Indian ocean troll fishery below the levels desired by the ocean fishing tribes to provide sufficient Spring Creek Chinook returns to the Columbia River to allow for the anticipated Columbia River treaty fishery above Bonneville Dam and to assure minimal hatchery **[*45]** escapements. Assuming that assurance of a minimal escapement of 3,100 fish to the Spring Creek hatchery is a justifiable conservation measure, the real issue in this case is whether or not the Secretary should have allowed a greater treaty Indian ocean chinook fishery at the expense of the Yakima, Warm Springs, Umatilla, and Nez Perce tribal fisheries in the Columbia River.

Finally, Federal Defendants reply that Makah have misconstrued the point of their argument: "The Secretary has never claimed to be exempt from litigation under the Magnuson Act, nor claimed that all litigation over Pacific salmon fisheries regulation must join every potentially affected party or else face dismissal under *Rule 19*." Federal Defendants contend that joinder must occur, however, where challenges to particular aspects of regulations present questions of allocation of limited resources among multiple users.

The court concludes that Makah's reliance upon the public interest exception is misplaced under the circumstances of this litigation. In the court's opinion,

Makah is litigating in this action a matter of private, rather than public, concern.

Thus, the court turns to the issues raised by Federal **[*46]** Defendants' invocation of *Rule 19*. Joinder under *Rule 19* entails a two-step inquiry. First, the court must determine whether an absent party should be joined as a "necessary party" under subsection (a). Second, if the court concludes that the non-party is necessary and cannot be joined for practical or jurisdictional reasons, the court must then determine under subsection (b) whether in "equity and good conscience" the action should be dismissed because the non-party is "indispensable." *Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1042 (9th Cir. 1983)*.

b. *Necessary Parties.*

There is no precise formula for determining whether a particular non-party should be joined under *Rule 19(a)*, the determination being heavily influenced by the facts and circumstances of each case. *Bakia v. County of Los Angeles, 687 F.2d 299, 301 (9th Cir. 1982)*. However, to fit within *Rule 19(a)(1)*, it must appear that complete relief cannot be accorded among the present parties absent the joinder of the non-parties. "This factor is concerned with consummate rather than partial or hollow relief as to those already parties, and with precluding multiple lawsuits on the same cause of action. **[*47]** *Northrop Corp., supra at 1043*. With regard to *Rule 19(a)(2)*, 3A *Moore's Federal Practice § 19.07* explains:

The 'interest relating to the subject matter of the action,' that makes an absent party a party needed for just adjudication, must be a legally protected interest, and not merely a financial interest or interest of convenience.

. . .

[With respect to *Rule 19(a)(2)(i)*, i]t is not necessary that an absent person would be bound by the judgment in the technical sense. It is enough that as a practical matter his rights will be affected.

. . .

Clause (2)(i) . . . protects the absent person. Conversely, clause (2)(ii) protects those presently before the court.

Federal Defendants have the burden of persuasion of the *Rule 19(a)(2)* elements. *Sierra Club v. Watt, supra at 319-321*. In arguing that other tribes are necessary parties, Federal Defendants refer the court to an order dismissing an action brought by the Tulalips in *Tulalip Tribes of Washington v. Neff*, Civil No. C86-426R (W.D.Wash. July 16, 1987), wherein the district court held:

The Tribe has not shown proof that notice of this action was served on the other tribes, nor that non-party tribes are **[*48]** willing to be bound by the result in this litigation. As a result, the State has no assurance that a favorable result in this suit will protect it from subsequent suits brought by other tribes on the same legal basis. For this reason alone, the non-party treaty tribes are indispensable to this litigation.

Even if the court were to accept plaintiff's assertion that it is generally considered the representative of all affected tribes in litigation relating to the Snohomish River stocks, the nature of the declaratory relief sought by the Tribe in this matter goes far beyond the Snohomish River. A ruling on the merits, for or against the Tribe, would substantially effect the rights and remedies of non-party treaty tribes regarding fish resources throughout Western Washington. These tribes are therefore necessary parties to this litigation. . . . Because the Tribe has made no showing that the non-party tribes will not or cannot be joined, the Tribe's suit against the State must be dismissed. . . .

Relying upon the authority cited above, Federal Defendants contend that the tribes are necessary parties within the meaning of both categories of *Rule 19(a)*:

The Makah Complaint seeks a **[*49]** declaration that the quotas establishied for the 1987 season are contrary to the Magnuson Act, their asserted treaty rights, and due process of law. If the court were to address the merits of that allegation and rule favorably for plaintiff, then the other tribes would, at a minimum, have their 1987 catch, as well as their rights in future years, placed in jeopardy from a legal standpoint. Those tribes also could face claims by the Makah for restitution or damages. Because the quota assigns a maximum catch level to all tribes, any judicial decree altering the regulatory scheme as it applies to all tribes necessarily affects the catch available to other tribes. Thus, the Court could not grant complete relief as to the Makah's complaint without adjudicating the rights of the non-party Indian tribes. This result satisfies the first criterion in

Rule 19(a)(1).

In addition, each non-party tribe has claimed an ongoing interest in the annual salmon catch to satisfy *Rule 19(a)(2)*. This interest is expressly evident by their participation in in [sic] 1986 litigation in *United States v. Washington* (sub-proceeding 86-4), concerning the injunction this court entered against the Makah. Columbia **[*50]** River, Puget Sound, and Washington coastal tribes all participated in opposing the Makah's unilateral attempt to allocate a harvest quota for itself in 1986. Accordingly, under *Northrop,* the Court should examine the two additional factors under *Rule 19(a)*. First, disposition of the Makah complaint will impair and impede the rights of those other tribes to protect their own interests, not only as a practical, but also as a legal, matter. The other tribal interests are not the smae as those of the Makah in this case. Thus, no party to the lawsuit as presently structured can adequately represent the interests of those tribes.

Second, both the federal and state government defendants would face the risk of multiple and inconsistent obligations if the 1987 regulations were declared invalid, in whole or in part. For example, the Department of Commerce could be compelled to provide a specified allocation quota to the Makah that could be incompatible with the treaty entitlement of other tribes to portions of the 50% share of the same salmon which are involved here.

In arguing that *Rule 19(a)(1)* is inapplicable, Makah contends: "In this action for judicial review of regulations promulgated **[*51]** under the Magnuson Act, there is no reason the court cannot assess the validity of the regulations, and thus provide complete relief as between the parties now before the court, without joining additional parties. Indeed, because of the 30-day limit in . . . *§ 1855(d)*, no other party can challenge the regulations at issue here. The mere possibility that an absent party might challenge subsequently issued regulations does not preclude the court from rendering complete relief to the parties now before it."

As support for the latter sentence, Makah cites *Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1253 (9th Cir. 1983), cert. denied sub nom. Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe, 465 U.S. 1049 (1984)*, a case the court finds unhelpful to resolution of the issue in this case. There, the Ninth Circuit held that joinder of the State of Washington in an action in ejectment between the tribe and the Port to settle title between the adverse claimant and the party in possession was not required under *Rule 19(a)(i)* because the district court could provide complete relief to the parties to the action without joining other parties who might also claim an **[*52]** interest in the same land and even though the State might in the future challenge the title of the Tribe to the Port.

Makah argues that *Rule 19(a)(2)* has not been satisfied because Federal Defendants fail to show that any such tribe has the requisite interest to be a necessary party:

[T]he ocean treaty allocation sought by the Makahs in 1987 would have had little, if any, impact on 'inside' treaty fisheries. The following alternatives were presented, each of which would have accommodated an ocean treaty harvest of 24,000 chinook:

(1) *no* reduction in returns to the hatchery, and *no* reduction in 'inside' fisheries, by allocating more chinook to the treaty troll out of the non-treaty troll; or

(2) *no* reduction in the non-treaty troll, by reducing the hatchery return by 40 fish out of 3,100 (approximately 1%), reducing the in-river non-Indian fishery by 1,000 chinook out of 239,000 (less than 1/2 of 1%) and reducing the in-river treaty fishery by 200 fish out of 125,700 (less than 2/1Oths of 1%).

The first alternative would have had no impact on the 'in-river' treaty fisheries, and the impact from the second alternative -- less than 2/10ths of 1% of that fishery -- **[*53]** would have been *de minimus.*

. . .

The only legally protected interest the absent tribes might claim is an interest in proper application of treaty-rights principles in the formulation of the Secretary's regulations. Those principles, however, are well-established, and defendants make no showing that a vindication of the Makah's claims would impair them. For example, a holding that the Secretary's application of 'weak-stock management principle,' utilization of prior year's quotas, aggregation of Indian treaty fishing opportunities, or subservience to hatchery management policies, were in derogation of the Makah Tribe's treaty rights, will not impair the treaty rights of any other tribe.

Federal Defendants respond that Makah's efforts to downplay the clear evidence in the record that other tribes will suffer concrete injury to their treaty fishing rights is unavailing:

By seeking to amend their Complaint to obtain an 'equitable adjustment,' the Makah make clear that they demand more fish in 1988, to remedy the alleged violations in 1987, than they would otherwise be entitled to receive. The Puget Sound and Columbia River Tribes adamantly opposed that attempt throughout the **[*54]** 1987 administrative process. Those tribes seek to preserve not only the procedural integrity of a fair regulatory process, as the Makah claims, but also to preserve their own 'legally protected interest' in a fair and equitable share of SCH chinook in 1987, consistent with their own adjudicated treaty rights. ... Any adjustment to benefit one tribe, the Makah, must come from the remaining portion available to other treaty tribes, i.e., the Columbia River Tribes and Puget Sound Tribes. . . . Any additional slice carved out for the Makah must come from the other tribes. This is the essence of an intertribal allocation dispute. The adverse affect on the legally protected interests of those non-party tribes could hardly be more clear. They qualify without question as necessary parties under *rule 19(a)(2)*.

The court is persuaded by Federal Defendants' arguments and holds that the absent tribes are necessary parties.

c. *Indispensable Parties.*

The court having concluded that the absent tribes are necessary within the meaning of *Rule 19(a)*, the question becomes whether they are indispensable within the meaning of *Rule 19(b)*.

In ruling on this portion of the motion, Federal Defendants **[*55]** urge the court to be guided by *Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 774-778 (D.C.Cir. 1986)*.

In *Wichita*, the First Indian tribe filed an action for review of a decision by the Interior Board of Indian Appeals and scheme of the Department of Interior to distribute income derived from land restored to an Indian tribe that no longer existed in its original form but which had been succeeded by three separate tribes. The Second and Third Indian tribes intervened as party defendants, with Second Tribe filing a cross claim against the Department. The District of Columbia Circuit held that the First and Third Tribes were indispensable parties in whose absence Second Tribe's cross claim for retroactive redistributions of income from land could not proceed. In so holding, the Circuit Court noted that the four factors set forth in *Rule 19(b)* are not rigid, technical tests, but rather 'guides to the overarching "equity and good conscience" determination.'" *Id. at 774*. Given the importance of *Wichita* to the resolution of this issue, the Court quotes from it at some length. Looking to the four factors, the Circuit Court held:

1. *Extent of Prejudice*

[*56]

Conflicting claims by beneficiaries to a common trust present a textbook example of a case where one party may be severely prejudiced by a decision in his absence.

. . .

In some cases the prejudice created by the relevant party's absence is mitigated, or even eliminated, by the presence of a party who will represent the absent party's interest. In Heckman v. *United States*, . . . for example, the Supreme Court held that Indian grantors of land were not indispensable parties in a suit brought by the United States to cancel those conveyances and to restore the land to the Indian grantors. The Court explained that '[t]here can be no more complete representation than that on the part of the United States in acting on behalf of these dependents. . . . When the United States instituted this suit, it undertook to represent the Indian grantors whose conveyances it sought to cancel.' . . . In this case, by contrast, the United States is apparently willing to concede a large portion of the Caddos' claim for retroactive relief. Moreover, whatever allegiance the government owes to the tribes as tarustee, is necessarily split among the three competing tribes involved in the case. **[*57]** This case, therefore, falls squarely under the rule that when 'there is a conflict between the interests of the United States and the interests of Indians, representation of the Indians by the United States is not adequate.' . . .

Because of the Wichitas' intimate participation in the litigation surrounding their original claim they have, of course, had ample opportunity to make known their interests and legal theories about the cross-claim to both

the District Court and this court. Nonetheless, we decline to hold that the *de facto* opportunity to file position papers with the court on a cross-claim is sufficient to mitigate the prejudice of non-joinder. If the opportunity to brief an issue as a non-party were enough to eliminate prejudice, non-joinder would never be a problem since the court could always allow the non-joinable party to file amicus briefs. Being party to a suit carries with it significant advantages beyond the amicus opportunities, not the least of which is the ability to appeal an adverse judgment. . . .

Furthermore, the Wichitas' filings with regard to the cross-claim all occurred *after* the Wichitas asked the District Court to dismiss the case for lack **[*58]** of jurisdiction due to tribal immunity. The District Court never ruled on this issue. It would be manifestly unjust to punish the Wichitas for hedging their bets thereafter by seeking input into the cross-claim litigation. . . .

Finally, we reject the notion that the Wichitas' ability to intervene as defendants in the cross-claim, as the Caddos and Delawares did vis-a-vis the original claim, mitigated the prejudice of proceeding in their absence. To intervene, the Wichitas would have had to waive their tribal immunity. It is wholly at odds with the policy of tribal immunity to put the tribe to this Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it.

2. *Ability to Shape Remedy to Avoid Prejudice*

This is not a case where we can shape the relief so as to avoid the prejudice to the absent parties. Unlike a case where the problem is simply the potential depletion of a fund, . . . and the court can thus protect the absent party by shielding an adequate portion of the fund until all third parties have an opportunity to bring claims, any relief that the Caddos obtain in this case will have an inevitable effect on the Wichitas and **[*59]** *Delawares. Simply because a number of parties harbor an interest in obtaining a specified quantity* of pie, does not necessarily mean that their claims are conflicting. There *may* be more than enough pie to satisfy all of the claims, and the interests are therefore *not always* mutually exclusive. . . . But when, as in this case, the parties' interest is in a specified *percentage* of the pie, and the combined requests of the parties exceed 100% of the pie, the court cannot afford one relief without affecting the rights of the others. In that instance, the claims are mutually exclusive, and the problem of indispensability of an absent party is accentuated.

Of course, were we to accept the Caddos' argument that the IBIA erred in finding that the Caddos had consented to the pre-1982 distribution scheme, we could limit our remedy to a remand to the IBIA for renewed consideration. On remand, the Wichitas would undoubtedly have an opportunity to participate in the proceedings. But while a remand might be a bit less prejudicial than a judgment ordering immediate redistributions, there would still be substantial prejudice to the Wichitas. Unlike a case where the remand is for **[*60]** reevaluation in light of a procedural defect, a remand in this case would be premised on a holding that the agency made a substantive mistake in finding that the Caddos had agreed to the distribution scheme through 1982. Our holding to that effect would be binding on the agency, and it becomes quickly obvious that even if we were to agree with the substantive premise of the remand solution, it would not in fact mitigate the prejudice to the Wichitas.

Nor does it suffice to say that the court could stay future disposition of the funds until the absent party-tribes have an opportunity to file a separate suit challenging any distribution plan that the court endorses. It would elevate form over substance to allow tribal immunity to be avoided by proceeding against an absent, indispensable, tribe becasue the tribe has the opportunity to file a later suit attacking the plan. This is tantamount to saying that there is no prejudice because the tribe has the right to intervene, a conclusion we have already rejected. . . . Either approach dismisses substantially the policy of tribal immunity, which, after all, accords to tribal sovereighty and autonomy a place in the hierarchy of values over **[*61]** society's interest in making tribes amenable to suit.

3. *Adequacy* of *Judgment*

The third factor, 'whether a judgment rendered in the person's absence will be adequate,' tends to point in favor of finding that the tribes were not indispensable parties. Inasmuch as the federal defendant has control of the trust, and the relief that the Caddos seek in reallocation of future distributions to compensate for past withholdings is not dependent on compliance by the other two tribes, a judgment rendered in their absence would be effective. This factor, however, cannot be given dispositive weight when the efficacy of the judgment would be at the cost of the absent parties' rights to

participate in litigation that critically affect their interests.

4. Alternative Adequate Remedy

The final factor that Rule 19(b) mentions is 'whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.' While a court should be extra cautious in dismissing a case for nonjoinder where the plaintiff "will not have an adequate remedy elsewhere,'. . . it is also important to realize that '[t]his does not mean that an action should proceed solely because the plaintiff **[*62]** *otherwise would not have an adequate remedy, as this would be a misconstruction of the rule and would contravene the established doctrine of indispensability.' . . .*

Although we are sensitive to the problem of dismissing an action where there is no alternative forum, we think the result is less troublesome in this case than in some others. The dismissal of this suit is mandated by the policy of tribal immunity. This is not a case where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.

. . .

Relying on the above-quoted analysis in Wichita, Federal Defendants argue that the absent tribes are equally indispensable:

The present case involves a dispute among several Indian tribes, only one of which is a party to the case. A decision in Makah's favor would be detrimental to the other ocean fishing tribes, who are entitled to salmon under the 1987 and future Commerce Department regulations. . . . Secondly, no relief could be shaped that would avoid prejudice to the non-party tribes in this litigation. Any **[*63]** lesser relief to the Makah would be deemed inadequate by the plaintiff; any more relief would be prejudicial to the non-party tribes. . . .

As to the fourth factor, the Makah have an adequate alternate forum in *United States v. Washington.* This factor, we submit, should be given great weight in the Court's consideration, as the question of salmon allocation rights has been the subject of that litigation. Indeed, the United States, the State of Washington, and other tribes who are parties to that litigation specifically protested to the Court the filing of the Makah's separate complaint in their 1986 lawsuit.

Makah responds that an evaluation of the four factors compels a conclusion that the absent tribes are not indispensable for purposes of *Rule 19(b).* The court, however, finds Makah's arguments unpersuasive. Thus, Mile Makah argues that it has no available alternative forum to litigate its claims presented in this action, the court has previously indicated that the claims raised in this action can be asserted as a separate sub-proceeding in *United States v. Washington.* Makah's statement that defendants can avoid multiple litigation or inconsistent relief by "moving to consolidate **[*64]** any relevant future challenges to ocean fishing regulations with this case" is, in the court's opinion, in unrealistic and unreasonable approach. Makah further asserts that the interests of the absent tribes can be adequately protected by the Federal Defendants because the Secretary is opposing the Makah's claims, thereby reducing, if not eliminating, any prejudice to the tribes. Makah argues, moreover, that protective provisions in the judgment, the shaping of relief, or other measures can lessen or reduce the prejudice to the absent tribes:

The court's judgment regarding the Makah's procedural claims can easily avoid prejudice to them by affirming that the process must be fair to all parties. And, in ruling on the Makah's substantive claims, the court can avoid prejudice to the absent tribes by affirming that the Secretary's ocean regulations must be consistent with the treaty rights of *all* tribes -- thereby protecting the only legal interest those tribes have in this proceeding. Further, as noted above, the Makahs' claim that the ocean treaty quota was unlawfully low can be remedied with *no,* or at most a *de minimis* impact on the absent tribes.

However, Makah's proposals **[*65]** with regard to the substantive claims essentially require Federal Defendants to determine and fairly represent all potentially conflicting intratribal treaty claims relevant to this litigation, a task the court believes Federal Defendants cannot do fairly and impartially. Finally, while Makah contends that complete relief can be accorded it in the absence of the other tribes, the persuasiveness of Makah's argument is substantially undercut by Makah's amendment to the complaint.

Accordingly, the court finds that the absent tribes are indispensable parties within the meaning of *Rule 19(b)* and that, consequently, this action must be dismissed.

IT IS THEREFORE ORDERED that the Motion to Dismiss is granted. IT IS FURTHER ORDERED that this action is dismissed.

JUDGMENT TO BE ENTERED.

DATED: May 10, 1988.

ORDER RE MOTION TO CONSOLIDATE - May 12, 1988, Filed

On December 14, 1987, the court heard the Motion to Consolidate filed by the Makah Indian Tribe (hereinafter referred to as Makah). Upon due consideration of the written and oral arguments of the parties, the court denies the motion for the reasons set forth herein.

By this motion, Makah moves the court to consolidate *Makah Indian* **[*66]** *Tribe v. Schmitten*, No. C86-665 RC, with the above-captioned case pursuant to *Rule 42(a), Federal Rules of Civil Procedure*. *Rule 42(a)* provides in pertinent part:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all-the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

In its motion, the Makah attach a copy of the Complaint for Declaratory Judgment, Mandatory Injunction and Review of Administrative Action filed in *Makah Indian Tribe v. Schmitten.* Makah asserts:

As can be seen from perusal of the document, that action is based upon common questions of law and fact with Case No. C87-747(R)C. No trial date has been set for either action, but a Motion for Partial Summary Judgment and Motion for Dismissal is pending in Case No. C87-747(R)C. The plaintiff's Motion for Partial Summary Judgment takes up the identical issues presented in Case No. C86-665(R)C and, presumably defendants' Motion to Dismiss is equally applicable to this action.

Thus, it is submitted **[*67]** that it is in the interest of judicial economy that these two actions be consolidated.

Federal Defendants oppose this motion to consolidate. They argue that the motion is premature and, in any event, lacks merit:

While no trial date has been set, dispositive motions are pending in the 1987 case that, if granted, will obviate the need for trial. . . .

Until the court rules on those motions, there is no reason to consolidate the two cases, because consolidation would serve only to delay, not expedite, resolution of both. If the court should deny all three pending dispositive motions, presumably on the basis that material facts are genuinely in dispute, then consolidation might be appropriate. Even so, defendants would anticipate filing separate dispositive motions for the 1986 case that may or may not raise similar grounds to the arguments presented in the 1987 case. Only if the court also were to deny any such dispositve motions would consolidation for purposes of trial be appropriate.

Federal Defendants further argue that there are a number of material differences between the 1986 case and the 1987 case that should preclude consolidation at this time:

[T]he court's docket **[*68]** and the interests of the parties would be better served by resolving the 1987 case first, on the basis of dispositive motions, if possible. If the court determines that trial on some or all issues is warranted for the 1987 case, then plaintiff can renew its motion to consolidate. Defendants pledge cooperation in bringing about the most expeditious and fair resolution in both cases.

The court concludes that consolidation is not appropriate. The common denominator of the two complaints is the Makah's position that the Magnuson Act may not be used to denigrate the Makah's treaty rights. In the 1986 case, the Makah are complaining that the Quinault were allocated an excessive share of ocean Coho troll in violation of Makah's treaty rights. In the 1987 case, the Makah are complaining that an excessive number of Chinook were allocated to the Columbia River tribes in violation of the Makah's treaty rights. There are also allegations in both complaints that agreements were used to determined allocations rather than reliance upon treaties. Even though these issues will be somewhat similar, the court is persuaded that the two cases should be kept separate for the reasons stated by the government.

[*69] ACCORDINGLY, IT IS ORDERED that the Motion to Consolidate is denied. [1]

DATED: May 10, 1988.

1 The Quinault Nation has filed an Amicus Quinault Nation's Memorandum in Response to Makah Motion to Consolidate. In that brief, the Quinault Nation states that it takes no position with respect to the Makah's Motion to Consolidate, but argues that *Makah v. Schmitten* must be dismissed for failure to join an indispensable party, i.e., the Quinault Indian Nation, and on the ground of mootness. The court expresses no opinion with regard to this argument, no motion being before the court.

ORDER RE MOTION FOR LEAVE TO AMEND - May 12, 1988, Filed and Entered

On December 14, 1987, the court heard the Motion for Leave to Amend Complaint filed by the Makah Indian Tribe (hereinafter referred to as Makah). Upon due consideration of the written and oral arguments of the parties and the record herein, the court grants the motion for the reasons set forth herein.

Makah moves pursuant to *Rule 15(a), Federal Rules of Civil Procedure*, for leave to amend the complaint to add the following prayer for relief:

6. That the court remand this matter to the Secretary of Commerce to determine whether **[*70]** an equitable adjustment should be made and, if so, in what form, to compensate plaintiff and other similarly situated tribes, i.e., Washington treaty trolling tribes, for the lost fishing opportunity in the 1987 season.

Makah contends that leave to amend should be granted because it was not possible to adjudicate their claim during the 1987 fishing season so as to achieve relief in the form of additional fish during that season. Referring to the concept of "equitable adjustment" provided in *United States v. Washington, 384 F.Supp. 312, 344 (W.D.Wash. 1974), United States v. Washington, 459 F.Supp. 1020, 1070 (W.D.Wash. 1978),* and *United States v. Washington, 626 F.Supp. 1405, 1484 (W.D.Wash. 1985),* Makah asserts that "equitable adjustment" is triggered here since its case rests upon its contentions that fish have been allocated by the Secretary of Commerce to others which by law should have been subject to Makah's opportunity by virtue of its treaty rights. Makah argues:

The equitable adjustment sought by the Makah Tribe flows from the same facts and theories of law set forth in the original Complaint. It is also consistent with the plaintiff's Motion for Partial Summary **[*71]** Judgment and the factual material set forth in the affidavits supporting that motion. The supporting affidavits assert that the illegality complained of is a product of a process which has been going on for the past several years and which promises to continue indefinitely.

. . . It was deemed that the declaratory judgment concerning the effect of the illegality of the Secretary's action in and of itself would guide the Secretary in promulgating 1988 fishing regulations. However, that will not remedy the harm done to the plaintiff here. Since the Secretary must commence preparation for planning allocations and regulations for upcoming seasons, it is important that the Secretary be directed to take into account the effect of his illegality and to afford plaintiff the form of relief provided for in *U.S. v. Washington* as a means of compensating plaintiff and similarly situated tribes for denial of treaty right fishing opportunities.

As explained by the Supreme Court in *Foman v. Davis, 371 U.S. 178, 182 (1962),* the following general standard is to be employed by the district courts under *Rule 15(a)*:

If the underlying facts or circumstances relied upon by a plaintiff may be **[*72]** a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rule requires, be 'freely given.'

[I]f the proposed change clearly is frivolous or advances a claim or defense that is legally insufficient on its face, the court nay deny leave to amend." Wright and Miller, 6 Federal Practice and Procedure, § 1487, pp. 432-433 (1971).

Federal Defendants oppose this motion. They first take issue with Makah's claim that it requests the amendment at this time because the 1987 season has ended:

The season was ending when plaintiff filed its partial

summary judgment motion on September 22, 1987. It was clear at that time that the Makah would not have this case litigated before the season did end, yet plaintiff made no effort to amend its Complaint at that time. Only after federal defendants moved to dismiss the case **[*73]** as moot on October 13, 1987, did the Makah file this motion, in a thinly-veiled attempt to skirt the mootness problem that confronts them.

More importantly, Federal Defendants argue that equitable adjustment is not a proper basis for relief in this case. Noting that the equitable adjustment referred to in *384 F.Supp. at 344* concerned adjustments between treaty fishermen and non-treaty fishermen, Federal Defendants assert that such a situation is not present here:

Because treaty right fishermen would catch at least 58.5 percent of the Spring Creek Hathery run at issue, any additional chinook to be made available to the Makah would come from other treaty fishermen, not from non-treaty fishermen, who would receive only 41.5 percent of SCH. . . .

That precedent also could not benefit the plaintiff here because that case *[United States v. Washington]* involved litigation between the treaty tribes as plaintiffs, with the United States acting as trustee, and the State of Washington as the defendant. The court never has indicated that similar adjustments could be made with respect to regulations issued by the Secretary of Commerce under his Magnuson Act authority. The concept of equitable **[*74]** adjustment, where it does apply, was meant to provide relief for fish caught in the same season, but in different fisheries. No legal basis exists that would permit adjustment from one season to the next.

In addition, Federal Defendants argue that even if the court were to ultimately find that the Secretary acted arbitrarily and capriciously or otherwise not in accordance with law, the sole remedy available to the Makah would be a remand to the Secretary of Commerce to permit the Secretary to fashion what he determines is the appropriate relief, which decision would be subject to judicial review under *Section 1855(d)* of the Magnuson Act. In arguing that the court cannot dictate the outcome of the agency's reconsideration by requiring an equitable adjustment, Federal Defendants refer the court to orders by the Ninth Circuit and the Supreme Court:

In *Confederated Tribes v. Kreps*, No. 79-541 (D.Ore. July 23, 1979), the district court directed the Secretary to adopt emergency regulations for the 1979 ocean salmon fishing season that would bar all ocean troll fishing as of September 1, 1979. The Ninth Circuit, however, stayed the district court's order 'insofar as it orders the **[*75]** Secretary of Commerce to adopt emergency regulations.' *Id., stay granted*, No. 79-4509 (9th Cir. Aug. 30, 1979). Circuit Justice Rehnquist, reviewing that order, stated that the federal courts under the Magnuson Act cannot usurp the Secretary's discretion to determine what remedial action is appropriate:

The order entered by the Court of Appeals on August 30th leaves the exercise of discretion as to whether the salmon trolling season shall close on September 1st or on September 8th squarely in the hands of the Secretary of Commerce, whee in my view the [Magnuson Act] FCMA intended to place it. She is free to retain the regulations now in effect but if she does so it will be because she has chosen in the exercise of her discretion to do so, and not because of any compulsion of the order of the United States District Court for the District of Oregon. She is likewise free to adopt other regulations consistent with the FCMA and other obligations imposed upon her by law.

All Coast Fisherman's Marketing ASs'n v. *Conferderated Tribes*, No. A-157 (U.S. Aug. 31, 1979) (Rehnquist, Circuit Justice).

However, while the Federal Defendants are correct in their contention that the **[*76]** district court cannot tell the Secretary what to do on remand, a careful reading of the proposed amendment does not purport to do that. It would only require the Secretary to determine whether an equitable adjustment should be made. Moreover, the court is not impressed with Federal Defendants' argument that the concept of equitable adjustment provided in *United States v. Washington* cannot apply to inter-tribal allocations. The problem with its application is, of course, inter-ference with the treaty rights of other tribes, a matter of which Makah complains in this action relative to its treaty rights. Nonetheless, the court concludes that this concern does not suffice to prevent the filing of the proposed amendment under the *Foman* standards.

ACCORDINGLY, IT IS ORDERED that Makah's Motion for Leave to Amend Complaint is granted. [1]

1 In so ruling, the court recognizes that Makah

has won a hollow victory given the court's dismissal of the action by separate order. Nonetheless, the court's ruling preserves the issue for appeal, if any.

DATED: May *10,* 1988.

BENJAMIN M. NARVAES and ELENA V. NARVAES, Plaintiffs, vs. EMC MORTGAGE CORPORATION and FREMONT INVESTMENT AND LOAN, Defendants, and FREMONT INVESTMENT AND LOAN, Third-Party Plaintiff, vs. 808 HOME MORTGAGE INC., FIDELITY NATIONAL TITLE INSURANCE, Third-Party Defendants.

CIVIL NO. 07-00621 HG-LEK

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

2009 U.S. Dist. LEXIS 38084

April 30, 2009, Decided
May 1, 2009, Filed

SUBSEQUENT HISTORY: Magistrate's recommendation at *Narvaes v. EMC Mortg. Corp., 2009 U.S. Dist. LEXIS 38411 (D. Haw., May 5, 2009)*

COUNSEL: [*1] For Benjamin M. Narvaes, Elena V. Narvaes, Plaintiffs: Christian P. Porter, LEAD ATTORNEY, Brooks Tom Porter & Quitiquit, Honolulu, HI; John Harris Paer, LEAD ATTORNEY, Honolulu, HI.

For EMC Mortgage Corporation, Fremont Investment and Loan, Defendants: Daniel D. Povich, Jade L. Ching, Laura P. Couch, LEAD ATTORNEYS, Alston Hunt Floyd & Ing, Honolulu, HI.

For 808 Home Mortgage Inc., ThirdParty Defendant, Counter Claimant: Harvey E. Henderson , Jr., LEAD ATTORNEY, Henderson Gallagher & Kane, Honolulu, HI.

For Fremont Investment and Loan, ThirdParty Plaintiff, Counter Defendant: Daniel D. Povich, Jade L. Ching, Laura P. Couch, LEAD ATTORNEYS, Alston Hunt Floyd & Ing, Honolulu, HI.

JUDGES: Leslie E. Kobayashi, United States Magistrate Judge.

OPINION BY: Leslie E. Kobayashi

OPINION

ORDER DENYING PLAINTIFFS' MOTION TO CONSOLIDATE ACTIONS

On February 20, 2009, Plaintiffs Benjamin M. Narvaes and Elena V. Narvaes (collectively "Plaintiffs") filed a Motion to Consolidate Actions ("Motion") in each of the following cases: Narvaes v. EMC Mortgage Corp. et al., CV 07-00621 HG-LEK ("Narvaes v. EMC"); and Narvaes v. Wells Fargo Bank, N.A., et al., CV 08-00584 DAE-KSC ("Narvaes v. Wells Fargo"). EMC Mortgage Corporation ("EMC") and **[*2]** Fremont Investment and Loan ("Fremont") [1] filed a memorandum in opposition to the Motion on April 9, 2009. Wells Fargo Bank, N.A. ("Wells Fargo") [2] filed a memorandum in opposition on April 10, 2009. 808 Home Mortgage Inc. ("808 Mortgage") [3] filed a statement of no opposition on March 4, 2009. [4] Plaintiffs filed their reply on April 17, 2009.

1 EMC and Fremont are only parties in Narvaes v. EMC.

2 Wells Fargo is only a party in Narvaes v. Wells Fargo.

3 808 Mortgage is a party in both Narvaes v. EMC and Narvaes v. Wells Fargo.

4 The Court notes that at the hearing on the Motion, 808 Mortgage changed its position and

stated that it supported consolidation.

This matter came on for hearing on April 29, 2009. Appearing on behalf of Plaintiffs was John Harris Paer, Esq. Appearing on behalf of EMC and Fremont were Jade Ching, Esq., and Laura Couch, Esq. Appearing on behalf of 808 Mortgage and Blake Sato was Harvey Henderson, Jr., Esq. Appearing on behalf of Wells Fargo was Melissa Lambert, Esq. Finally, appearing on behalf of Ivonne Machado [5] was James Stanton, Esq. After careful consideration of the Motion, supporting and opposing memoranda, and the arguments of counsel, Plaintiffs' Motion is HEREBY **[*3]** DENIED for the reasons set forth below.

5 Mr. Sato and Ms. Machado are parties only in Narvaes v. Wells Fargo.

BACKGROUND

The instant case arises from a home mortgage loan that Plaintiffs obtained from Fremont in November 2006. According to Plaintiffs, Nichole K. Buendia, [6] the purported mortgage broker and the alleged agent of 808 Mortgage, Fremont and EMC, promised an initial rate of 8.8% for six months, and a subsequent refinance of the $ 650,000.00 mortgage to a thirty-year fixed-rate mortgage with a rate between 5.5% and 5.875%. Ms. Buendia conducted the signing of the loan documents in Plaintiffs' home, without the presence of a notary, and without explaining or providing the loan documents to Plaintiffs. In the six months after the closing, Plaintiffs attempted to contact Buendia about the refinancing she promised, but she did not return their calls.

6 Ms. Buendia is a party in only Narvaes v. Wells Fargo.

Upon receiving selected loan documents some eight months later, Plaintiffs learned of various fees and penalties that were not disclosed to them. Plaintiffs later contacted Fremont and EMC, which Plaintiffs believed was the current owner and holder of the loan, and attempted to rescind **[*4]** the loan. Both Fremont and EMC refused rescission, and EMC threatened to immediately foreclose on Plaintiffs' home. On December 26, 2007, Plaintiffs filed their Complaint for Damages and Injunctive Relief in Narvaes v. EMC ("EMC Complaint"). The EMC Complaint alleges the following claims: violation of the Truth in Lending Act ("TILA"); and unfair and deceptive acts or practices in violation of *Haw. Rev. Stat. Chapter 480*. On November 15, 2008, Fremont filed its Answer, along with a Third Party Complaint against, *inter alia*, 808 Mortgage. In its June 13, 2008 Answer, 808 Mortgage included a Counterclaim against Fremont. Trial in Narvaes v. EMC is set for August 4, 2009. The dispositive motions deadline was March 4, 2009, and the discovery deadline is June 5, 2009.

In the course of Narvaes v. EMC, Plaintiffs learned that Wells Fargo was the current owner and holder of the loan. On December 29, 2008, Plaintiffs filed their Complaint for Damages and Injunctive Relief in Narvaes v. Wells Fargo ("Wells Fargo Complaint"). The other defendants in Narvaes v. Wells Fargo are 808 Mortgage, Ms. Buendia, Mr. Sato, and Ms. Machado. [7] Narvaes v. Wells Fargo is based upon the same set of facts as Narvaes **[*5]** v. EMC, except that Wells Fargo is now identified as the owner and holder of the loan. Wells Fargo's February 6, 2009 Answer included a crossclaim against the other defendants in Narvaes v. Wells Fargo. The Wells Fargo Complaint alleges the same claims as the EMC Complaint. 808 Mortgage's March 19, 2009 Answer included a crossclaim against Wells Fargo, Ms. Buendia, and Ms. Machado. Mr. Sato's April 28, 2009 Answer included a crossclaim against Wells Fargo, Ms. Buendia, and Ms. Machado. Trial in Narvaes v. Wells Fargo is set for April 10, 2010. The dispositive motions deadline is November 18, 2009, and the discovery deadline is February 19, 2010.

7 Mr. Sato was allegedly the principal broker of 808 Mortgage and was Ms. Buendia's and Ms. Machado's supervisor. Ms. Machado was the notary who signed Plaintiffs' loan documents.

DISCUSSION

A court may order consolidation if the actions "involve a common question of law or fact[.]" *Fed. R. Civ. P. 42(a)*. Under *Rule 42(a)*, a court has broad discretion to consolidate cases pending in that district. See *Investors Research Co. v. United States Dist. Court for Cent. Dis. of Cal., 877 F.2d 777 (9th Cir. 1989)*. Such discretion, however, is not unfettered. **[*6]** See *Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990)*. The court should weigh the time and effort that consolidation would save against any inconvenience, delay, or expense it would cause. See *Huene v. United States, 743 F.2d 703, 704 (9th Cir. 1984)*. In particular, the court should consider:

> [W]hether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses, and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.

Johnson, 899 F.2d at 1285 (alterations in original) (citations omitted).

Insofar as the two cases arise from the same facts and allege the same causes of action, this Court finds that there are common questions of law and fact. Thus, consolidation would be within the Court's discretion. This Court, however, finds that consolidation is not appropriate in these cases.

Of primary concern to this Court is the advanced litigation stage of Narvaes v. EMC. Trial is set in a little **[*7]** more than three months, the dispositive motions deadline has passed, and the discovery deadline is approximately one month away. In contrast, trial in Narvaes v. Wells Fargo is approximately one year from now. The dispositive motions deadline is November 18, 2009, and the discovery deadline is February 19, 2010. If the cases were consolidated, applying the schedule in Narvaes v. EMC would be unduly prejudicial to the parties in Narvaes v. Wells Fargo, and applying the schedule in Narvaes v. Wells Fargo would unduly delay the resolution of Narvaes v. EMC.

The Court acknowledges that some of the parties and witnesses will be involved in both trials and the multiple trials will be more expensive and more time consuming for them. However, after consultation with the district judge, see In the Matter of Motions to Consolidate, Order, filed June 8, 2006, this Court finds that consolidation is not appropriate.

CONCLUSION

On the basis of the foregoing, Plaintiffs' Motion to Consolidate Actions, filed February 20, 2009, is HEREBY DENIED.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, April 30, 2009.

/S/ Leslie E. Kobayashi

Leslie E. Kobayashi

United States Magistrate Judge

1 of 1 DOCUMENT

AROR ARK O'DIAH, Plaintiff, v. UNIVERSITY OF CALIFORNIA, et al., Defendants

No. C-90-0915 RFP

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1991 U.S. Dist. LEXIS 13468

September 19, 1991, Decided
September 19, 1991, Filed

JUDGES: [*1] Robert F. Peckham, United States District Judge.

OPINION BY: PECKHAM

OPINION

ORDER

I. *INTRODUCTION*

We are presented with a motion to dismiss by defendant Kaiser Foundation Hospitals ("Kaiser"). Defendants the Regents of the University of California ("Regents") and Applied Risk Management ("Applied Risk") joins Kaiser's motion to dismiss, independently assert that plaintiff's complaint fails to state a claim upon which relief may be granted, and demand that plaintiff provide a more definite statement. Defendant Carl Gak, M.D., ("Gak") presents a motion to dismiss for insufficiency of service and for failure to state a claim upon which relief may be granted.

Pro se plaintiff, Aror Ark O'Diah brings suit alleging: 1) violation of civil rights under *§ 1983*; 2) racial discrimination and harassment; 3) wrongful denial of medical claims and benefits; and 4) discrimination on the basis of nationality. In addition, plaintiff brings claims for negligence, exposure to occupational hazardous conditions, breach of fiduciary duty, and breach of contract under a health insurance plan. Plaintiff seeks $ 5,000,000 in damages to compensate for past and future medical costs, past and future wage loss, emotional **[*2]** distress, pain and suffering, loss of benefits such as life, health, car and disability insurance, and court costs. The court has construed these claims and alleged harms from a repetitive first amended complaint.

II. *BACKGROUND*

Plaintiff, a black male from Nigeria, was employed as a laboratory maintenance assistant at the Department of Hydraulic and Civil Engineering at the University of California at Berkeley from 1986 to 1988. Plaintiff claims that he suffers rashes, dizziness, and loss of feeling in the right side of his body resulting from the inhalation of toxic reagents and chemicals while performing his assigned tasks. Plaintiff also alleges that he sustained a head injury resulting from a fall off of a ladder in March, 1988, while painting a laboratory.

Plaintiff alleges that the physicians at Cowell Memorial Hospital recommended that he be placed on "job duty restriction" to limit his exposure to unsafe chemicals. Plaintiff alleges that the University claimed that it could not afford to provide him with his physician's recommended work environment, although white employees were able to receive such consideration, and threatened to fire him. The University then terminated **[*3]** his employment. Plaintiff also alleges

that he was discouraged by University officials from filing a discrimination suit.

Plaintiff has sued the other defendants on the allegation that they have conspired with the University to deny him compensation benefits and to prevent him from filing his civil rights action.

The complaint alleges civil rights violations under *42 U.S.C. § 1985*. His complaint also asserts jurisdiction under the wholly inapplicable *42 U.S.C. § 1997d*, which governs state institutions such as mental hospitals and pretrial detention facilities; *42 U.S.C. § 2000a-2*, segregation and discrimination in places of public accommodation. He has not alleged violations of these latter two sections.

III. *DISCUSSION*

The motions to dismiss filed by Kaiser, the Regents, Applied Risk, and Dr. Gak should all be granted with prejudice.

A. *Kaiser Foundation Hospital*

Kaiser moves to dismiss the complaint under *Rule 12(b)(6)*, failure to state a claim upon which relief can be granted.

Plaintiff's conclusory allegations of conspiracy unsupported by facts are insufficient to satisfy the pleading requirements of *42 U.S.C. § 1985*. *Friedman v. Younger, 282 F.Supp. 710 (C.D.Cal. 1968)*. **[*4]** Plaintiff's complaint offers no factual allegations supporting his conclusory claim that Kaiser participated in a conspiracy with the other defendants. Since plaintiff has already had one opportunity to amend his complaint, this claim is dismissed with prejudice.

B. *The Regents of the University of California*

The Regents move to dismiss the complaint under *Rule 12(b)(6)*, failure to state a claim upon which relief can be granted.

State agencies are not "persons" within the meaning of the Civil Rights Act. *Whitner v. Davis, 410 F.2d 24, 29 (9th Cir. 1969)*. *See Coffin v. South Carolina Dep't of Social Serv., 562 F.Supp. 579, 586 (D.S.C. 1983)* (recognizing immunity in suit under *42 U.S.C. § 1985*). Furthermore, civil rights claims against the Regents are barred by the *Eleventh Amendment to the United States Constitution*. *Vaughn v. Regents of University of California, 504 F.Supp. 1349, 1351-52 (E.D.Cal. 1981)*. Therefore, all claims against the University and the Regents must be dismissed.

C. *Allied Risk Management*

Allied Risk moves to dismiss the complaint under *Rule 12(b)(6)*, failure to state a claim upon which relief **[*5]** can be granted.

Plaintiff's conclusory allegations of conspiracy unsupported by facts are insufficient to satisfy the pleading requirements of *42 U.S.C. § 1985*. *Friedman v. Younger, 282 F.Supp. 710 (C.D.Cal. 1968)*. Plaintiff's complaint offers no factual allegations supporting his conclusory claim that Allied Risk participated in a conspiracy with the other defendants. Since plaintiff has already had one opportunity to amend his complaint, this claim is dismissed with prejudice.

D. *Carl Gak, M.D.*

Dr. Gak has moved for dismissal of the complaint for insufficiency of process and failure to state a claim under which relief can be granted.

Valid service of the summons and complaint must be made in accordance with *Rule 4(c)*. A defendant may be served under either the laws of the state in which the district court is held, *Rule 4(c)(2)(C)(i)*, or by mail under *Rule 4(c)(2)(C)(ii)*. For service by mail, both federal and California law require the inclusion of a notice and acknowledgement of service of the summons and complaint and a return self-addressed stamped envelope. *Fed. R. Civ. P. 4(c)(2)(C)(ii), Cal. Civ. Proc. Code § 415(30)(a)*.

Plaintiff failed to include **[*6]** the requisite notice, acknowledgement forms, and the self-addressed stamped envelope. Therefore, the motion to quash is granted.

Also, plaintiff's conclusory allegations of conspiracy unsupported by facts are insufficient to satisfy the pleading requirements of *42 U.S.C. § 1985*. *Friedman v. Younger, 282 F.Supp. 710 (C.D.Cal. 1968)*. Plaintiff's complaint offers no factual allegations supporting his conclusory claim that Dr. Gak participated in a conspiracy with the other defendants. Therefore, since plaintiff has already had one opportunity to amend his complaint, this claim is dismissed with prejudice.

IT IS SO ORDERED.

ORDER - September 19, 1991, Filed

INTRODUCTION

Plaintiff Aror Ark O'Diah has brought this civil action against the University of California at Berkeley, Regents of the University of California (the "Regents"), Applied Risk Management ("Applied Risk"), Alameda County, Kaiser Foundation Hospital ("Kaiser"), Allstate Insurance Company, Judges of Alameda County Superior Court (the "Judges"), and Carl Gak, M.D. ("Gak"). The Regents, Applied Risk, Kaiser, and Dr. Gak have been granted motions to dismiss with prejudice.

Now defendants Alameda County **[*7]** and the Judges have filed motions to strike certain pleadings and receive judgment on the pleadings. Plaintiff has not filed a response to this motion.

DISCUSSION

I. *Judgment on the Pleadings*

The motion is granted because the Judges and Alameda County are immune from liability and plaintiff has not filed a response opposing the motion. A motion for judgment on the pleadings may only be brought "after the pleadings are closed and within such time as to not delay the trial." *Fed. R. Civ. P. 12(c)*. Since the pleadings are closed and the motion will not delay the trial, it is proper.

A. *Pleadings Closed*

The pleadings are closed only after all required or permitted pleadings are served or filed. Alameda County and the Judges filed their answer to plaintiff's first amended complaint on July 22, 1991. Although the other defendants have yet to file an answer to plaintiff's first amended complaint -- most have filed motions to dismiss -- a defendant who has filed all required pleadings is not barred from a *Rule 12(c)* motion.

B. *No Delay of Trial*

Whether a delay of trial will result from a *Rule 12(c)* motion is committed to the sound discretion of the court. There would be **[*8]** no such delay here.

C. *Immunity*

Defendants' memorandum of points and authorities correctly states that the Judges are immune from prosecution here and that Alameda County is also immune because plaintiff only allegation is based on respondeat superior. It also appears that Alameda County is immune from any civil rights claims because it is not a "person" according to the applicable statutes.

1. *Judges' Immunity*

The United States Supreme Court has long recognized immunity for judges despite allegations of malice or corruption. *Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872)*. Immunity is recognized despite allegations of civil rights violations under *42 U.S.C. §§ 1983* and *1985*. *Stump v. Sparkman, 43 U.S. 349 (1977)*. Immunity from allegations of conspiracy are also recognized by the Ninth Circuit. *Ashelman v. Pope, 793 F.2d 1072 (9th Cir. 1986)*. The necessary inquiry to determine immunity is whether the judge had jurisdiction over the subject matter before him. *Id. at 356*. Courts construe a judge's jurisdiction broadly. A judge will be subject to liability only when he has acted in the "clear absence of all jurisdiction." **[*9]** *Bradley, 80 U.S. at 351*. A judge is immune if the action is one normally performed by a judge and the plaintiff dealt with the judge in his judicial capacity. *Stump, 43 U.S. at 362*. Here, since plaintiff had file suit in the Alameda County Superior Court and all of the Judge's actions related to that proceeding, the judge had the necessary jurisdiction required for immunity.

2. *Alameda County Immunity Based on Respondeat Superior*

Since the judges are immune from liability here, Alameda County cannot be held liable for injury resulting from the actions of the Judges. *Cal. Gov't. Code § 815.2(b)* (West 1980). Plaintiff's allegations against defendant Alameda County are only based on respondeat superior.

3. *Alameda County Immunity From Federal Civil Rights Claims*

A federal civil rights cause of action does not lie against Alameda County because the county is not a "person" subject to liability under *42 U.S.C. § 1983*. *Moor v. County of Alameda, 36 L.Ed. 596, 602 (1973)*.

Based on the preceding discussion, defendants

Alameda County and the Judges' motion for judgment on the pleadings is granted.

II. *Motion to Strike* **[*10]** *Certain Pleadings*

Since defendants' Alameda County and the Judges answer does not contain a counterclaim or cross-complaint, the "Plaintiff Reply Brief to the Defendants Judges of Alameda County Superior Court Answers to First *[sic]* Plaintiff First Amended Complaint" ("Plaintiff's Reply") is not proper without an order of the court. *Beckstrom v. Coastwise Line, 13 F.R.D. 480, 482 (1953)*. Since the court granted no such order, the motion to strike Plaintiff's Reply is granted.

IT IS SO ORDERED.

ORDER - September 19, 1991, Filed

INTRODUCTION

Plaintiff Aror Ark O'Diah has brought this civil action against the University of California at Berkeley, Regents of the University of California (the "Regents"), Applied Risk Management ("Applied Risk"), Alameda County, Kaiser Foundation Hospital ("Kaiser"), Allstate Insurance Company, Judges of Alameda County Superior Court (the "Judges"), and Carl Gak, M.D. ("Gak"). Defendants Regents, Applied Risk, Kaiser and Dr. Gak have filed motions to dismiss with prejudice. Defendants Alameda County and the Judges have filed motions to strike certain pleadings and judgment on the pleadings.

On August 30, 1991, seventeen **[*11]** days before the hearing on defendants Alameda County and the Judges' motion, plaintiff filed a "cross-motion" moving: 1) to consolidate his cases; 2) disqualify Judge Peckham; 3) to compel answers from certain defendants; and 4) to obtain a preliminary injunction to prevent harassment by certain defendants. Although plaintiff entitles this filing a "cross-motion", it does not respond to the defendants' motions in any way.

Defendants Regents and Applied Risk have objected to plaintiff's cross-motion because it violates Local Rules of Practice 220-2. Rule 220-2 requires plaintiff to give the defendants 28 days notice before a motion is heard. Defendants Alameda County and the Judges have objected to plaintiff's cross-motion because it violates Local Rules of Practice 220-6. Rule 220-6 allows such a cross-motion only if it is "related to the subject matter" of the original motion. Plaintiff's cross-motion is not related to defendants' motion to strike certain pleadings and judgment on the pleadings.

Although these objections are applicable, the motion to disqualify is denied due to its untimely filing and its failure to sufficiently state a claim. The remaining motions are denied on their **[*12]** merits.

DISCUSSION

I. *Consolidation of this Action With Another Case*

Plaintiff moves to consolidate this case with Case No. C-91-1884-SBA. If common questions of law or fact exist, *Rule 42(a)* allows parties to move for consolidation of cases to enhance trial efficiency and avoid the substantial danger of inconsistent adjudication. *Fed. R. Civ. P. 42(a)*. The district court has broad discretion whether consolidation of cases is appropriate. *Johnson v. Celotex Corp., 899 F.2d 1281, 1284 (2nd Cir. 1990)*.

In *Johnson*, the court consolidated the two cases only after carefully reviewing the common questions of fact and law. *Id. at 1285*. Here, plaintiff's motion merely alleges that the two cases are "related." While a review of plaintiff's complaint in Case No. C-91-1884-SBA reveals that the two cases share a common defendant, the Judges of the Superior Court of Alameda County, and two causes of action, *42 U.S.C. §§ 1983* and *1985*, the remaining questions of fact and law are not sufficiently common to warrant consolidation. The basis of C-91-1884-SBA are allegations of negligence against two defendants. First, plaintiff claims injury to **[*13]** his wife and his automobile resulting from a train collision caused by the negligent operation of equipment owned and operated by defendant Southern Pacific Transportation Company. Second, plaintiff claims injury to himself and another automobile resulting from an accident caused by defendant Rose Marie Sanchez's negligent operation of her automobile. Plaintiff further alleges conspiracies of racial harassment and extortion of medical claims against the aforementioned defendants, California State Automobile Association Inter-Insurance Bureau, Ford Motor Credit Company, and a variety of other defendants. While plaintiff's complaint refers to the case before Judge Peckham, he has not alleged that the conspiracies in these two cases are interrelated.

Consolidation of these cases would not enhance trial efficiency. Furthermore, there does not appear to be a

substantial danger that these cases will result in inconsistent adjudications. Therefore, using the court's broad discretion, plaintiff's motion to consolidate is denied.

II. *Disqualification of the Honorable Robert F. Peckham*

Although plaintiff cites no statutory authority or specific facts, he moves to disqualify the Honorable **[*14]** Robert F. Peckham and demands the appointment of a three judge panel to hear his case. Per *28 U.S.C. § 144*, a party may move to disqualify a district court judge for "personal bias or prejudice" provided he "files a timely and sufficient affidavit." *28 U.S.C.A. § 144 (West 1968)*. Per the Ninth Circuit, a disqualification must be referred to another judge for a determination of the merits only if the affidavit is timely and legally sufficient. *United States v. Sibla, 624 F.2d 864, 867 (9th Cir. 1980)*. Here, it appears that plaintiff's affidavit is neither timely nor legally sufficient.

A. *Timely Filing of the Motion for Disqualification*

A motion to disqualify a judge must be made at the first opportunity after discovering the facts allegedly requiring disqualification. *Duplan Corporation v. Deering Milliken, Inc., 400 F.Supp. 497, 509 (D.S.C. 1975)*. This situation is complicated when the motion is made after an adverse ruling is entered. *Id.* In *Duplan*, the delay between the date of discovery of the disqualifying facts and the date of the properly submitted affidavit was 145 days. *Id. at 510*. This fact alone was **[*15]** sufficient for denial of the motion to disqualify. *Id.*

Here, the alleged disqualifying facts appear to be as follows: 1) Judge Peckham's dismissal of plaintiff's complaint without leave to amend; 2) Judge Peckham's participation in a "systematic racially motivated discriminatory conspiracy" to deny plaintiff's right to file an amended complaint; and 3) an unidentified racial remark made by Judge Peckham. Plaintiff's original complaint was dismissed almost one year ago, October 1, 1990. The eleven months between that dismissal date and the filing of the motion is excessive per *Duplan.*

B. *Legal Sufficiency of Affidavit Alleging Personal Bias or Prejudice*

An affidavit filed pursuant to *§ 144* is not legally sufficient unless it specifically alleges facts that fairly support the contention that the judge exhibits bias or prejudice directed toward a party that extends from an extrajudicial source. *United States v. Sibla, 624 F.2d 864 (9th Cir. 1980)*. Plaintiff's affidavit is not legally sufficient because the alleged bias or prejudice is not supported by specific facts and there is no allegation that such bias or prejudice stems from an extrajudicial source. **[*16]**

1. *Specific Allegations of Bias or Prejudice*

A party moving for disqualification must allege specific facts to fairly support the contention that the judge is bias or prejudice. An allegation that the judge "hated me without cause" is too vague to sufficiently raise a reasonable question as to the judge's impartiality. *United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986)*. Here, plaintiff merely asserts without factual support that Judge Peckham is biased, has joined a "racially motivated discriminatory conspiracy," and "made some remark which [plaintiff] perceived as racial[]." These vague allegations are not sufficient for recusal. Specific facts must be alleged. Regarding plaintiff's subjective perception of racial remarks, he has used an incorrect standard. In *Studley*, the Ninth Circuit made it clear that the standard for recusal is "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Id.* quoting *United States v. Nelson, 718 F.2d 315, 321 (9th Cir. 1983)*. Plaintiff has failed to allege specific facts to meet this standard.

2. *Bias or* **[*17]** *Prejudice Stems From Extrajudicial Source*

A district court judge's bias or prejudice must stem from an extrajudicial source. *Sibla, 624 F.2d at 869*. A judge's rulings against a party in the present case are not cause for recusal. *Toth v. Trans World Airlines, Inc., 862 F.2d 1381, 1387-88 (9th Cir. 1988)*. Here, plaintiff's allegations of bias and prejudice appear to stem solely from the judicial proceedings. Plaintiff's affidavit notes that Judge Peckham dismissed his complaint without leave to amend. His affidavit also states that "the defendants[’] . . . records have influenced the court and made the court . . . racially insensitive to the plaintiff['s] physical and mental incapacitation." This statement implies that Judge Peckham's alleged bias or prejudice resulted directly from the judicial proceedings.

Since the motion is untimely and fails to state a sufficient claim, plaintiff's motion for disqualification is

denied.

III. *Order Compelling Answers by Certain Defendants*

Plaintiff moves for an order to compel defendants University of California at Berkeley and Allstate Insurance Company to file an answer to the first amended complaint. **[*18]** There is no authority to compel a party to file an answer to a complaint. *Rule 12(a)* states that an answer is due within 20 days after service of the summons and complaint unless the time is extended by stipulation or court order. *Fed. R. Civ. P. 12(a).* Therefore, plaintiff's motion is denied.

IV. *Injunctive Relief Against All Defendants*

Plaintiff moves for injunctive relief restraining all of the defendants from "harassing the plaintiff from university to university, form hospital to hospital, from state to state and from place of dwelling to place of dwelling." The purpose of granting a preliminary injunction is to protect the plaintiff from irreparable injury by preserving the status quo. *Pharmaceutical Manufacturers Ass'n v. Weinberger, 401 F.Supp. 444, 449 (D.C.D.C. 1975)*. Plaintiff has not alleged any irreparable harm caused by the defendants' alleged harassment. The delay in requesting such re1ief indicates that no irreparable harm would result from the denial of this motion. Based on this discussion, the plaintiff's motion for preliminary injunction is denied.

IT IS SO ORDERED.

JUDGMENT - September 19, 1991, Filed

The court having ruled in its order **[*19]** dated September 19, 1991, that the motion to dismiss with prejudice by defendants Kaiser Foundation Hospitals, Carl Gak, M.D., Regents of the University of California and Applied Risk Management be granted; and the court having ruled in its order dated September 19, 1991, that the motion for judgment on the pleadings by defendants Judges of Alameda County Superior Court and County of Alameda be granted,

IT IS HEREBY ORDERED that judgment be entered accordingly.

2 of 2 DOCUMENTS

OREGON NATURAL DESERT ASSOCIATION, Plaintiff, vs. DANA R. SHUFORD, Burns District Manager, BLM, KARLA BIRD, Andrews Resource Area Field Manager, JOAN M. SUTHER, Three Rivers Resource Area Field Manager, ELAINE M. BRONG, State Director, Oregon/Washington BLM, GALE A. NORTON, Secretary, United States Department of the Interior, U.S. BUREAU OF LAND MANAGEMENT, and U.S. DEPARTMENT OF THE INTERIOR, Defendants.

Civil No. 06-242-AA

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

2006 U.S. Dist. LEXIS 64452

September 8, 2006, Decided
September 8, 2006, Filed

SUBSEQUENT HISTORY: Partial summary judgment granted by, Summary judgment denied by, Summary judgment granted, in part, summary judgment denied, in part by *Or. Natural Desert Ass'n v. Shuford, 2007 U.S. Dist. LEXIS 42614 (D. Or., June 8, 2007)*

COUNSEL: [*1] For Oregon Natural Desert Association, Plaintiff: Kristin F. Ruether, Peter Macnamara Lacy, Oregon Natural Desert Association, Portland, OR; Stephanie M. Parent, Pacific Environmental Advocacy Center, Portland, OR.

For Dana R Shuford, Burns District Manager, BLM, Karla Bird, Andrews Resource Area Field Manager, Joan M. Suther, Three Rivers Resource Area Field Manager, Elaine M. Brong, State Director, Oregon/Washington BLM, Gale A. Norton, Secretary, United States Department of the Interior, U.S. Bureau of Land Management, U.S. Department of the Interior, Defendants: Bradley Grenham, US Department of the Interior, Office of the Regional Solicitor, Portland, OR; Stephen J. Odell, United States Attorney's Office, Portland, OR.

For Harney County, a political subdivision of the State of Oregon, Intervenor Defendant: Ronald S. Yockim, Ronald S. Yockim, Attorney at Law, Roseburg, OR.

For Center for Tribal Water Advocacy, Intervenor: Harold S. Shepherd, Center for Tribal Water, Pendleton, OR.

For Steens Mountain Landowner Group, Inc., Intervenor: Elizabeth E. Howard, **[*2]** Dunn Carney Allen Higgins & Tongue LLP, Portland, OR.

JUDGES: Ann Aiken, United States District Judge.

OPINION BY: Ann Aiken

OPINION

OPINION AND ORDER

AIKEN, Judge:

The parties filed six motions for this court's consideration. Oral argument on held on September 7, 2006. The motions are decided as follows:

(1) Harney County's Motion to Intervene - GRANTED IN PART (denied as to liability phase, but allowed intervention in remedial phase, also allow participation in liability phase as amicus curiae).

(2) Steens Mountain Landowner Group's Motion to Intervene - GRANTED IN PART (denied as to liability phase, but allowed intervention in remedial phase, also allow participation in liability phase as amicus curiae).

(3) Tribal Water Advocacy's Motion to Intervene - GRANTED.

(4) Government's Motion to Stay - GRANTED.

(5) Plaintiff's Motion for Partial Summary Judgment - STAYED.

(6) Plaintiff's Motion to Consolidate - DENIED.

FACTUAL BACKGROUND

In 2000, Congress enacted the Steens Mountain Cooperative Management and Protection Act of 2000 ("Steens Act), *16 U.S.C. §§ 460nnn-122*, to provide for conservation and management of Steens Mountain. Steens Mountain is a nearly 10,000 foot elevation mountain in the northern Great Basin in southeast **[*3]** Oregon. The Act created the 170,000 acre Steens Mountain Wilderness; added 29 miles to the federal Wild and Scenic River System; withdrew 1.1 million acres from mining and geothermal development; established a Wildlands Juniper Management Area for experimentation, education, interpretation and demonstration of juniper management and restoration of native vegetation of the Steen; and designated the nation's first Redband Trout Reserve. *Id.*

The Act also established the Cooperative Management and Protection Area (CMPA or "the Area"), a 496,000 acre area managed by the BLM on the Steens. *Id.* The purpose of the CMPA "is to conserve, protect, and manage the long-term ecological integrity of Steens Mountain for future and present generations." *16 U.S.C. § 460nnn-122(a)*.

On February 22, 2006, plaintiff Oregon Natural Desert Association (ONDA) filed the lawsuit at bar alleging that defendants Dana Shuford et al. ("BLM") violated federal environmental laws in a number of respects, in their adaption of the Andrews-Steens Resource Management Plan ("Andrews-Steens RMP"). *See* Complaint, PP 1-2. A resource management plan is a land use plan that establishes, **[*4]** for a particular area of public lands, allowable uses, land designations, goals for future condition of the land, program constraints and management practices, implementation requirements, intervals and standards for monitoring and evaluation of the plan, and specific next steps in management. *See 43 C.F.R. § 1601.0-5(k)*; *43 U.S.C. § 1712*.

Plaintiff alleges that the BLM violated its duties under the National Environmental Policy Act (NEPA), *42 U.S.C. §§ 4321-4361*, the Federal Land Policy and Management Act (FLPMA), *43 U.S.C. §§ 1701-1784*, the Public Rangelands Improvement Act (PRIA), *43 U.S.C. §§ 1901-08*, the Taylor Grazing Act of 1934, *43 U.S.C. §§ 315-315r*, and the Steens Act, each actionable under the Administrative Procedure Act (APA), *5 U.S.C. §§ 701-706*. Plaintiff's allegations specifically allege the BLM's failure to: (1) consider the environmental consequences of the proposed action on the wilderness resource; (2) engage **[*5]** in a proper multiple use balancing process as to the wilderness resource, relying upon up-to-date and accurate inventory information, and ensuring the proposed action will not cause "unnecessary or undue degradation" to the public lands; (3) analyze a reasonable range of alternatives with respect to lands allocated to, and authorized levels of, domestic livestock grazing, as well as lands designated as "closed" to off-highway vehicle use; (4) assess or determine the suitability of the public lands for grazing; (5) adopt a Transportation Plan within the time required by Congress in the Steens Act; and (6) complete the Transportation Plan as an integral part of the Andrews-Steens RMP. Complaint, PP 1-3.

Plaintiff challenges the BLM's grazing allocation and off-highway vehicle designation decisions as follows, the BLM failed to: (1) satisfy NEPA's range of alternatives and "hard look" requirements with respect to lands allocated to, and authorized levels of, livestock grazing, as well as lands designated "closed" to off-highway vehicle use; (2) assess or determine the suitability of the public lands for grazing, as required by FLPMA, the Public Rangelands Improvement Act, and the Taylor **[*6]** Grazing Act; and (3) properly balance competing uses of the public lands and their resources in a way that satisfied FLPMA's multiple-use requirements.

DISCUSSION

MOTIONS TO INTERVENE

Standards Pursuant to Fed. R. Civ. P. 24(a), (b)

Intervention of right pursuant to *Rule 24(a)* requires

the satisfaction of a four-part test: (1) the applicant's motion must be timely; (2) the applicant must assert an interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that without intervention the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest is not adequately represented by the other parties. *United States v. State of Oregon, 839 F.2d 635, 637 (9th Cir. 1988)*; and *Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 836 (9th Cir. 1996)*f. The burden is on the intervener to establish that the requirements for intervention are satisfied. *Petrol Stops Northwest v. Continental Oil Co., 647 F.2d 1005, 1010 n.5 (9th Cir. 1981)*. **[*7]**

Permissive intervention pursuant to *Rule 24(b)(2)* requires that an applicant show the following: (1) its motion is timely; (2) it shares a common question of law or fact with the main action; and (3) the court has an independent basis for jurisdiction over the applicant's claims. *Donnelly v. Glickman, 159 F.3d 405, 412 (9th Cir. 1998)* (internal citations omitted). The court has broad discretion in granting or denying permissive intervention. *Id.*

(1) *Harney County's Motion to Intervene*

Harney County is a political subdivision of the State of Oregon. Pursuant to *Fed. R. Civ. P. 24(a), (b)*, Harney County requests leave to intervene as a defendant-intervenor in this action because it has "a significant interest in the wise and proper implementation of the [Steens Act]" in lands within Harney County.

Defendant does not object to Harney County's intervention. Plaintiff objects to Harney County's intervention and requests that this court allow the County leave to intervene only as to the remedial phase of this litigation. I agree.

(1) *Timeliness*

Applying the test outlined above, I find that Harney County's motion **[*8]** is timely. Under *Rule 24(a)*, a court must consider: (1) the stage of the proceeding at the time intervention is sought; (2) the possible prejudice to the other parties from any delay in seeking intervention; and (3) the reasons for the length of any delay. *County of Orange v. Air California, 799 F.2d 535, 537 (9th Cir. 1986), cert. denied, 480 U.S. 946, 107 S. Ct. 1605, 94 L. Ed. 2d 791 (1987)*. This case was filed on February 21, 2006. Harney County promptly held a public meeting under the Oregon Public Meetings Law wherein it debated whether to intervene, and subsequently drafted the motion to intervene. Further, the court notes Harney County's ability to comply with the court's discovery and pretrial scheduling order including motions, hearings and trial. Finally, I note that plaintiff does not contest the timeliness of Harney County's motion.

(2) *Interest in Subject Matter*

A party may intervene as a matter of right if it is able to assert an interest in the property or transaction that is the subject of the action. Here, Harney County asserts an interest in the property within its boundaries, including the management of federal and private lands within the Andrews Management **[*9]** Unit and the Steens Mountain Cooperative Management and Protection Area.

Specifically, Harney County asserts that it has participated in the land management planning for these lands and has coordinated its own land use planning with these various plans at issue. Further the Steens Mountain Cooperative Management and Protection Area Plan is premised, in part, upon the County providing search and rescue, road management, and sheriff services on the lands within or abutting the Area. Finally, pursuant to the Oregon system of land use planning, the County is responsible for coordinating its local plans with the federal plans and to protect water quality, scenic features, wildlife, fisheries and wild and scenic rivers on lands within the county.

I find that the County fails to establish a "significant protectable interest" which would allow intervention in this lawsuit. The rule in the Ninth Circuit regarding intervention is clear: when, as here, the claims in an environmental case go only to the government's compliance or non-compliance with its legal duties, the federal government is the only proper defendant in the liability phase of the case. *See Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094 (9th Cir. 2002)*. **[*10]** There, the court considered whether the defendant-intervenors allowed by the district court were an appropriate party to defend an action by plaintiff against the federal government. The court held: "[a]s a general rule, the federal government is the only proper defendant in an action to compel compliance with NEPA." *Id. at 1107-08*. The rule is "based on the premise that private parties do not have a 'significantly protectable interest' in

NEPA compliance actions." *Id. at 1108*. The court reasoned that NEPA and other environmental laws required action only by the government, and therefore only the government can be liable under those laws. *Id.* (internal quotation omitted).

Moreover, that rule has been applied by the Ninth Circuit to state, county and city governments seeking intervention. In *Forest Conservation Council v. U.S. Forest Service, 66 F.3d 1489 (9th Cir. 1995)*, the court reaffirmed that the state and county could not "claim any interest that relates to the issue of the Forest Service's liability under NEPA and NFMA." *Id. at 1495, 1499 n.11*. Similarly, in *Churchill County v. Babbitt, 150 F.3d 1072 (9th Cir. 1998)*, **[*11]** the court again applied the rule to city and county governments, reasoning that "because NEPA requires action only by the [federal] government, only the government can be liable under NEPA" and the city and county "cannot comply" with NEPA, therefore [they] cannot be defendants in a NEPA compliance action." *Id. at 1082*. As here, the proposed Intervener in *Churchhill County* also argued at length that it had a "significantly protectable" interest in the underlying action. Despite those arguments, the court firmly held that the Intervener "does not have a 'significantly protectable' interest in federal government compliance or noncompliance with NEPA." *Id.*

The court accepts the County's assertions that it has responsibilities under state law to protect water quality, fish and wildlife, and other nature resources, however, that fact is irrelevant to whether the BLM complied with NEPA and other federal laws when it adopted the Andrews-Steens RMP. Here, the statutory provisions that form the basis of plaintiff's claims - NEPA, FLMPA, PRIA, the Taylor Grazing Act, and the Steens Act - regulate only the actions of the federal government. The Acts listed above **[*12]** do not impose any duties, rights or obligations on private parties, including the County, nor do plaintiff's claims implicate state or private lands.

(3),(4) *Adequate Representation of County's Interest*

The Ninth Circuit has held that in determining the adequacy of representation, the following factors should be considered: (1) whether the current party's interest is such that it will undoubtedly make all of the intervenor's arguments; (2) whether the current party is capable and willing to make such arguments; and (3) whether the Intervener would offer any necessary elements to the proceeds that other parties would neglect. *People of the State of California v. Tahoe Regional Planning Agency, 792 F.2d 775, 778 (9th Cir. 1986)*.

The County argues that where the government is the representative, "the requirement of inadequacy of representation is satisfied if the applicant shows that representation of its interests 'may be' inadequate and . . . the burden of making that showing is minimal." *United States v. Stringfellow, 783 F.2d 821, 827 (9th Cir. 1986), vacated and remanded on other grounds, 480 U.S. 370, 107 S. Ct. 1177, 94 L. Ed. 2d 389 (1987)*.

Here, the **[*13]** County asserts that the government cannot adequately represent its interests as its interests are broader than those of the federal defendants and cover the private lands as well as the federal lands within the external boundaries of the Area. Further, the federal defendants do not share in the County's dependency upon federal grazing receipts nor in the County's obligations to provide transportation, land use planning, search and rescue, or sheriff patrols in and abutting the areas covered by the various land management plans.

The County specifically refers to its duties and powers under the State of Oregon's comprehensive land use planning. These duties and powers are not shared by the BLM and are unique to the County. In managing the Area, the County argues that it is necessary to inquire into the manner in which the State of Oregon, and the County, regulate the private lands within the external boundaries of these Areas, a matter left exclusively to the states. These areas cannot be effectively managed by the BLM alone and requires cooperation between the BLM, private landowners and the County. Regulation of private lands with the Areas external boundaries is one of the responsibilities **[*14]** delegated to the County under the Oregon system of comprehensive planning. *See* Affidavit of Steven R. Grasty (duty and power to conserve and protect the natural resources of the County, improve and protect the quality of Oregon's air, water and land resources).

The court has no quarrel with the County's assertions outlined above, however, I find that the BLM will adequately represent the County's interests during the liability phase of this case. During the liability phase, the County has the same interest as the BLM and any other member of the public: an interest in assuring that the federal defendants have complied with all applicable federal laws. There is generally a presumption of adequate representation when the representative is a

governmental body or officer charged by law with representing the interests of the public. *Forest Cons. Council, 66 F.3d at 1499*.

Moreover, I note that in its Proposed Answer, Harney County has not asserted any affirmative or other defenses, or cross-claims. The County's statement that its "interests are broader than those of the federal Defendants and cover private lands as well as federal lands[,] does not support a finding **[*15]** that the County's interests are not adequately protected. Harney County's Brief, p. 11. I agree, however, that during the remedial phase of this litigation there is a possibility that the interests of the BLM and the County may diverge.

Finally, I find that the County is not entitled to permissive intervention pursuant to *Rule 24(b) (2)*. I find no independent basis for jurisdiction over the County's claims, nor has the County argued that the court has an independent basis for jurisdiction over its claims. *Donnelly, 159 F.3d at 412* (internal citation omitted).

Regarding the requirement that there be a common question of law or fact, again, the only issue in the liability phase of this ligation is whether the BLM has complied with NEPA, FLPMA and other federal statutes. There is no dispute that only the BLM can be held liable under these federal laws, and only the BLM can be ordered to comply with the statutory provisions at issue. Harney County fails to demonstrate that any legal position it might advance concerning plaintiff's claims is any different than the position advanced by the BLM. *See Kootenai Tribe, 313 F.3d at 1111* (if "the would be **[*16]** intervenor's claim or defense contains no question of law or fact that is raised also by the main action, intervention under *Rule 24(b)(2)* must be denied.").

In conclusion, given the clear law of the Ninth Circuit on this issue, Harney County's motion to intervene is granted in part. Harney County is granted intervention of right in the remedial phase of this lawsuit, and denied intervention in the liability phase of this lawsuit. Harney County's alternative Motion for permissive intervention is denied. Further, Harney County may file briefs and attend oral argument as amicus curiae during the liability phase of the lawsuit.

(2) *Steens Mountain Landowner Group's Motion to Intervene*

Steens Mountain Landowner Group (SMLG) is a non-profit association formed under the laws of the State of Oregon, on behalf of private landowners within the Steens Mountain Cooperative Management and Protective Area. SMLG seeks to intervene in this lawsuit as a defendant - intervenor pursuant to *Fed. R. Civ. P. 24* as a matter of right, and alternatively, move for permissive intervention. Defendants do not oppose this motion.

SMLG is comprised of 23 property **[*17]** owners with land located inside or adjacent to the Area. Because their lands are intertwined with the Area lands, SMLG members access their private lands through the public lands in the Area. Members also utilize the lands in the Area in conjunction with their private lands in order to support commercial livestock and commercial recreational businesses. "SMLG members were key players in the cooperative process undertaken by Congressman Walden that led to the enactment of the Steens Act." SMLG's Memo in Support, p. 3. "For example, a number of privately-held ranches exchanged land with the BLM in order to effectuate its enactment. These compromises by private landowners are specifically recognized in the Act itself." *Id.* (internal citations omitted). "Since the enactment of the Steens Act, SMLG and its members have participated in, commented on and reviewed BLM's actions with respect to the Steens Act and the [Area]." *Id.*

SMLG argues that it must be granted full party status "not only to protect its economic interests but also to ensure that Plaintiff and BLM do not compromise the intent and goals of the Steens Act." *Id.* at p. 4.

The court refers to and relies on the **[*18]** standards section outlined above to determine whether to allow intervention. Plaintiff does not contest the timeliness of SMLG's motion and the court finds that it was timely filed.

Regarding SMLG's "significantly protectable" interests related to the subject matter of this litigation, SMLG asserts that its members' livestock grazing and commercial recreation businesses rely on access to privately held property across public lands. Further, SMLG argues that if that access is diminished, the value of SMLG members' property will be substantially diminished. SMLG's Memo, p. 10. Specifically, SMLG argues that if plaintiff prevails on its claims, "the practical outcome is that access to private land, grazing, and recreational uses would be restricted and constrained.

Therefore, the resolution of these claims directly implicates SMLG's members' economic and real property interests, which were specifically protected by the Steens Act." SMLG's Memo, p. 13. Finally, the SMLG asserts that "any reduction in grazing rights, commercial recreational use, or access to private lands will have a negative impact on SMLG's members. A ruling dismissing Plaintiff's claims will allow SMLG's members to **[*19]** continue the current level of use of public lands for these purposes. Any concessions by the BLM to resolve this dispute will impact SMLG's members to the extent it lessens their use of public lands. Therefore, as a practical matter, SMLG's members will be substantially affected by the outcome in this case and are entitled to intervene." SMLG's Memo, p. 14.

SMLG fails to adequately discuss or distinguish any of the many Ninth Circuit cases that mandate this court's ruling when dealing with a private party requesting intervention in a NEPA or FLMPA lawsuit against the government. Instead, SMLG relies on a case brought under the *Clean Water Act (CWA), Sierra Club v. U.S. Environmental Protection Agency, 995 F.2d 1478 (9th Cir. 1993)*. There, the CWA established a scheme explicitly designed to permit and thereby regulate the discharge of sewage sludge into navigable waters of the United States. *Id. at 1485*. This scheme protects the interests of persons who discharge sewage sludge pursuant to such permits. The proposed-intervenor (City of Phoenix) had such a permit, and therefore the court found the City had a "protectable interest" and allowed intervention. **[*20]** *Id.* SMLG asserts that the statutes at issue here also authorize permits for use of public lands, SMLG members hold or own such permits, and therefore SMLG has a "protectable interest" sufficient to obtain intervention of right.

I disagree. *Sierra Club* specifically distinguished their facts precisely because the case was brought pursuant to the CWA. "The Clean Water Act does not principally regulate the EPA. It regulates private parties and state and local governments, such as the City of Phoenix." *Id. at 1485*. The court went on to note that it is "one thing to hold that only the government can be a defendant in a NEPA suit, where the statute regulates only government action, but quite another to exclude permit-holding property owners from a Clean Water Act suit, where the statute directly regulates their conduct." *Id.* Therefore, while the Ninth Circuit has allowed such intervention pursuant to the CWA, it has not allowed intervention pursuant to NEPA, FLMPA, and other similar federal Acts. As stated earlier, in challenges such as this which allege that the federal government has failed to comply with non-discretionary duties under federal statutes like **[*21]** NEPA and FLPMA, the Ninth Circuit has established a rule limiting intervention of right to "none but a federal defendant." *Kootenai Tribe, 313 F.3d at 1108. See also, Wetlands Action Network v. U.S. Army Corps of Engineers, 222 F.3d 1105, 1114 (9th Cir. 2000)* ("Because a private party cannot violate NEPA, it cannot be a defendant in a NEPA compliance action.").

Further, I note that SMLG's economic interests based on its members' businesses and an interest in access to private property do not qualify as "significant protectable interests" under Ninth Circuit law. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dept. of Agric., 143 Fed. Appx. 751, 753 (9th Cir. 2005)* ("pure economic expectancy is not a legally protected interest for purposes of intervention")(internal citations omitted). Specifically, because the decision to issue grazing permits is discretionary by the BLM, and because those federally-issued permits convey no "right, title, or interest, or estate in or to the public lands," SMLG's members' economic interests based on federally issued grazing permits are not a "significant protectable **[*22]** interest." *43 U.S.C. § 315b*. This also applies to individuals holding various "special recreation permits" which allow them to conduct private commercial operations on public lands. This court has previously found that status as special use permit holders, operating tours and other commercial activities conducted in a wild and scenic river corridor did not establish a protectable interest in a NEPA action. *Riverhawks v. Zapeda*, CV 01-3035-AA (D. Or. Aug. 23, 2001) (citing *Wetlands Action Network, 222 F.3d at 1114*). Therefore, the SMLG's economic interest in ensuring its members' commercial operations relying on federally-permitted use of the public lands remains unchanged and that interest is not at issue unless and until this action reaches the remedial phase.

Finally, I find no basis for SMLG's contentions that if plaintiff prevails on its claims, "the practical outcome is that access to private land, grazing, and recreational uses would be restricted and constrained." None of the statutory provisions at issue in plaintiff's lawsuit or the relief requested by plaintiff affect the rights of private individuals to access their private lands. **[*23]**

Complaint, PP 44-78.

Alternatively, SMLG argues that it is entitled to permissive intervention pursuant to *Rule 24(b)(2)*. Again, I disagree. As explained above, this court finds no independent basis for jurisdiction over SMLG's claims, with respect to the liability phase of the litigation. Moreover, SMLG has not attempted to argue that the court has an independent basis for jurisdiction over its claims. Further, regarding the necessity for a common question of law or fact, the only issue in the liability phase of this litigation is whether the BLM has complied with NEPA, FLPMA and other federal statutes. Only the BLM can be held liable under these federal laws, and only the BLM can be ordered to comply with the statutory provisions at issue. Therefore, I find that SMLG fails to demonstrate that any legal position it might advance concerning plaintiff's claims is any different than that of the BLM's. Therefore, SMLG's alternative motion for permissive intervention is denied.

In conclusion, based on the case law cited at length above, SMLG's motion to intervene as a matter of right is denied as to the liability phase, however, it is granted as to the remedial phase. Further, SMLG may **[*24]** also participate in the liability phase of this lawsuit as amicus curiae by submitting briefs and attending oral argument.

(3) *Center for Tribal Water Advocacy Motion to Intervene*

The Center for Tribal Water Advocacy (CTWA) moves to intervene as a plaintiff in this lawsuit. Plaintiff ONDA does not object to the motion. Defendants object to CTWA's intervention in this lawsuit.

CTWA is a non-profit Oregon public interest entity whose members use the Area and the lands covered by the Andrews RMP area for cultural, traditional, recreational, fishing, hunting and aesthetic pursuits. CTWA Motion to Intervene, p. 3. CTWA's approximately 100 members include Indian Tribe members located throughout the Pacific Northwest. CTWA is headquartered in Pendleton, Oregon. CTWA's mission is to "protect, defend, and restore forever, water right and water quality interests of Federally recognized Indian Tribes and their members." CTWA's Memo in Support, p. 9. CTWA asserts that "for the most part," its members are not members of plaintiff ONDA and "retain legal interest separate from the general public that are not representative of the ONDA membership." CTWA's Reply, p. 4.

CTWA's motion to intervene **[*25]** was timely filed. Defendants do not contend otherwise.

CTWA filed a 24-page proposed complaint in intervention. Defendants object to CTWA's intervention "on the present record," arguing first that CTWA "has offered absolutely no arguments or rationales upon which it can even arguably demonstrate that it satisfies the criteria in [*Rule 24*]. . . . CTWA simply recites the test of the rule, but nowhere, in its motion or otherwise, does it articulate any reasons that ostensibly serve to establish that it has met the rule's standards." Defendants' Response, p. 2.

> Second, defendants object to CTWA's motion because virtually the only factual evidence that CTWA offers in support of its motion is a four-paragraph affidavit of its own counsel . . .. [Moreover,] [t]he allegations that CTWA sets forth in its proposed complaint are not significantly or sufficiently specific or satisfactory in this regard. . . . Even taken collectively, the largely conclusory and overly vague averments and allegations that CTWA proffers in its moving papers fall well short of establishing a sound factual predicate for the necessary findings that, among other things, litigation of the claims without **[*26]** its participation stands to impair its ability to protect one or more legally protectable interests and that the original plaintiff, [ONDA], cannot adequately represent any such interests.

Defendants' Response, p. 2-3.

CTWA replies that in compliance with *Rule 24*, it attached to and filed with its motion to intervene its Complaint in Intervention which fully and thoroughly describes the basis for CTWA's standing, rights in intervention and sets forth its claims for which intervention is sought. I agree that CTWA's proposed 24-page complaint in intervention adequately sets out each of the claims brought by CTWA against the defendant. CTWA's motion to intervene as a plaintiff in this action is granted.

(4), (5) *Defendant's Motion to Stay and Plaintiff's*

Motion for Partial Summary Judgment

Defendants move for a stay of plaintiff's motion for partial summary judgment on plaintiff's sixth claim for relief and request that plaintiff's motion be considered under the same dispositive motion briefing schedule as previously set by this court.

This court retains "inherent power to control the disposition of the causes on its docket in a matter which will promote economy of time **[*27]** and effort for itself, for counsel, and for litigants. *CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962)*. This discretion includes postponing summary judgment on plaintiff's sixth claim until all of the claims can be considered together.

As already stated on the record during the hearing on these motions, defendants' motion to stay consideration of plaintiff's motion for partial summary judgment is granted. Plaintiff's motion for partial summary judgment is stayed. Plaintiff's motion for partial summary judgment will be considered along with the other summary judgment motions due October 20, 2006, and subject to the briefing schedule set by the court.

(6) *Plaintiff's Motion to Consolidate*

Plaintiff requests that the action at bar (*SHUFORD*) be consolidated with another pending action, *Oregon Natural Desert Association v. Gammon*, CV 06-523-HO (D. Or. filed April 21, 2006). Plaintiff-intervenor, CTWA, filed a "Reply in Support of Motion to Consolidate" joining in plaintiff's motion and brief.

In *Gammon*, both the Answer and Administrative Record have been filed, and dispositive motions are due November 7, 2006. Specifically, plaintiff requests that **[*28]** the court maintain separate schedules for briefing dispositive motions, but order that oral argument on cross-dispositive motions in both cases be consolidated into a single hearing.

As stated earlier, *Shuford* involves plaintiff ONDA's assertion that BLM violated federal environmental laws in their adoption of the Andrews-Steens Resource Management Plan. The *Gammon* lawsuit, filed by ONDA along with co-plaintiffs Oregon Natural Resources Council Fund and Northwest Environmental Defense Center, alleges similar violations concerning the BLM's adoption of the Lakeview Resource Management Plan and the Beaty Butte Allotment Management Plan.

STANDARDS

Fed. R. Civ. P. 42 provides:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Id.

District courts have broad discretion in deciding whether to consolidate cases within the same district. *Investors Research Co. v. U.S. Dist. Court, 877 F.2d 777 (9th Cir. 1989)*. **[*29]** *Local Rule 42* provides that "[u]nless otherwise directed by the court consolidation and case Management of complex or related cases will usually be governed by the principals set forth in The Manual for Complex Litigation, Third." L.R. 42.1. The Manual states that actions "involving common questions of law or fact may be consolidated . . . if it will avoid unnecessary cost or delay." Manual § 21.631.

DISCUSSION

Consolidation is only appropriate if there are common questions of law or fact. Plaintiff argues that each of these two actions allege that the BLM violated a number of federal environmental laws in adopting resource management plans (RMP) for neighboring several million-acre areas of public lands in southeast Oregon. A RMP is a land use plan that establishes, for a particular area of the public lands, allowable uses, land designations, goals for future condition of the land, program constraints and management practices, implementation requirements, intervals and standards for monitoring and evaluation of the plan, and specific next steps in management. *See 43 C.F.R. §§ 1601.0-5(k), 1712*. The *Gammon* case also includes three claims **[*30]** directed at BLM's decision adopting the Beaty Butte allotment management plan (AMP). FLPMA provides that the BLM may prepare AMPs which are activity-level plans that "prescribe[] the manner in, and extent to which livestock operations will be conducted in order to meet multiple-use, sustained yield, economic and other needs and objectives. *43 U.S.C. § 1702(k)*. AMPs are "tailored to the specific range condition of the area: and are

intended to "improv[e] the range condition of [those] lands." *43 U.S.C. § 1752(d)*.

In both cases, plaintiff argues that it "targets several core issues of concern," primarily under NEPA and FLPMA. Plaintiff's Memo in Support, p. 4. Plaintiff's primary complaint about the RMPs concern BLM's alleged violation of its statutory duties concerning management of public lands containing outstanding wilderness values. This concern gives rise to claims under two independent and district statutory duties: NEPA requires the BLM to take a "hard look" at the direct, indirect, and cumulative impacts of its decision on the wilderness resource; FLMPA establishes the BLM's duty to affirmatively balance the wilderness resource **[*31]** against the other valid "multiple uses" of the public lands to ensure its selected course of action will not cause "unnecessary or undue degradation," and to achieve that purpose by collecting and maintaining accurate, up-to-date inventory information on wilderness and other resources. *42 U.S.C. § 4332(2) ©*); *43 U.S.C. §§ 1711(a), 1712©*), *1732(a), (b)*. Plaintiff acknowledges that the underlying facts are different in both cases - the public lands at issue versus the timing of wilderness inventories conducted - however, plaintiff argues that both actions raise the same legal questions.

Plaintiff also asserts that both actions raise identical legal questions concerning the BLM's grazing allocation and off-highway vehicle designation decisions. Specifically, plaintiff's claims allege that the BLM: (1) failed to satisfy NEPA's range of alternatives and "hard look" requirements with respect to lands allocated to, and authorized levels of, livestock grazing, as well as lands designated "closed to off-highway vehicle use;" (2) did not assess or determine the suitability of the public lands for grazing, as required by **[*32]** FLPMA, the Public Rangelands Improvement Act, and the Taylor Grazing Act; and (3) did not properly balance competing uses of the public lands and their resources in a way that satisfied FLPMA's multiple-use requirements.

Plaintiff acknowledges that both actions contain claims that are distinct from the other. *Shuford* contains two claims (six and seven) under the Transportation Plan provision under the Steens Mountain Act. In the *Gammon* case, there are three claims related to the BLM's decision adopting the Beaty Butte AMP.

The Manual for Complex Litigation states: "[w]hether consolidation is permissible or desirable will depend in large part on the extent to which the evidence in the cases is common." Manual at § 21.631. Unless common evidence predominates, consolidation may lead to confusion while failing to improve efficiency. *Id.* Plaintiff acknowledges that the challenged agency decisions in these two actions will rely upon separate administrative records, therefore, "common evidence does not predominate." Plaintiff's Memo in Support, p. 6. Plaintiff then states the lack of common evidence between the two cases is the "main reason" why plaintiff recommends separate **[*33]** briefing schedules "with the possibility of a consolidated hearing following completion of briefing in both cases." *Id.* at 6-7. Finally, plaintiff notes that consolidating lodging of the administrative record and/or briefing on the merits in these two actions "would *not* be efficient due to the sheer magnitude of the record (estimated to be on the order of 20,000 pages in each action) and the briefing." *Id.* at p. 8, n.2 (emphasis in original).

Defendants object to consolidation, with the SMLG filing a separate brief in opposition. Defendants point to *Oregon Natural Desert Ass'n v. USFS, 2004 U.S. Dist. LEXIS 11043, 2004 WL 1293909 (D. Or. June 10, 2004)*, where the Forest Service filed a motion to consolidate a related case pending in the District of Oregon. Plaintiff ONDA opposed the motion. The court denied defendant Forest Service's motion to consolidate in part because ONDA's claims under the National Wild and Scenic Rivers Act (WSRA) in the first case were not present in the second case. Further, ONDA's claims under the National Forest Management Act in the second case were not present in the first case. Although both cases contained similar claims under NEPA and the Rescissions **[*34]** Act, the court nonetheless determined that the plaintiff's allegations under the WSRA were central to the action, and denied the motion to consolidate. Defendants argue that is the situation at bar. Defendants assert that *Shuford* presents distinct legal issues under the Steens Act, other claims are highly fact-dependent, and the pure legal issue has already been litigated. Specifically, defendants argue that plaintiff's claims under the Steens Act are central to the *Shuford* case. The Steens Act is unique to the area at issue. These claims are not present in the *Gammon* case. Similarly, the *Gammon* case involves claims regarding the Beaty Butte AMP that are legally distinct from the claims in our case. In fact, plaintiff does not challenge any allotment management plans in *Shuford.* Like the WSRA claim in *ONDA v. USFS*, the Steens Act claims are central to

Shuford, and the specific legal duties imposed by the WSRA in *ONDA v. USFS* are similar to the specific duties imposed on the BLM in the Steens Act with respect to the Steens Mountain Area. Therefore, defendants assert that because the Steens Act is unique to the area at issue in *Shuford* and that claim **[*35]** is central to the case, consolidation is not appropriate.

While defendants acknowledge that plaintiff's NEPA and FLMPA claims in both cases are similar, defendants point out that resolution of those claims is highly fact dependent and will turn on specific facts contained in different Administrative Records.

Defendants also assert that consolidation is inappropriate because the legal question at issue in both cases has already been litigated and decided by Judge Jelderks. Plaintiff's fourth claim for relief in *Shuford* and fifth claim for relief in *Gammon* both assert that the BLM has violated the Taylor Grazing Act by failing to determine whether the public lands at issue are "chiefly valuable" for grazing. Judge Jelderks found that claim was nonjusticiable. *ONDA v. BLM*, CV 03-1017-JE, 2005 WL 711663 (D. Or. March 29, 2005)(determining that plaintiffs' claims under FLMPA and the Taylor Grazing Act were not justiciable).

As noted above, the Manual counsels whether consolidation is permissible or desirable depends "in large part on the extent to which the evidence in the cases is common." Here, there is little common evidence between the two cases. The cases **[*36]** refer to completely different RMPs, different areas of land, and the areas are located in different BLM districts. Further, the administrative record in each of the cases is distinct because many of the determinations, such as the effects of grazing or off-highway vehicle use, are highly site-specific. Finally, relying on the precedent in *ONDA v. USFS*, cited above, evidence of BLM's compliance with Steens Act duties will not be relevant to the allegations made in *Gammon.*

Finally, consolidation will likely cause unnecessary cost and delay because the administrative record in each case is indisputably voluminous. The administrative record in our case, according to defendants, consists of "upwards of thirty thousand pages." Even plaintiff recognizes that the two cases are so distinct that separate administrative record filings, and separate briefing schedules on cross-motions for summary judgment would be necessary. The only portion that plaintiff believes should be consolidated is "possibly" the hearing on dispositive motions. Given the fact-dependent nature of the NEPA and FLMPA claims, it is unlikely that consolidation will lead to increased efficiency in reviewing the records.

[*37] Plaintiff's motion to consolidate is denied.

CONCLUSION

The motions at bar are ruled on as follows:

Harney County's and SMLG's motions to intervene (docs. 28,33) are denied as to the liability phase, but granted as to the remedial phase. These parties are also allowed to participate in the liability phase as amicus curiae.

The Center for Tribal Water Advocacy's motion to intervene (doc. 67) is granted.

The government's motion to stay (doc. 77) is granted. Plaintiff's motion for partial summary judgment (doc. 17) is stayed and will be considered with other dispositive motions filed pursuant to the briefing schedule set by this court.

Finally, plaintiff's motion to consolidate (doc. 51) is denied.

IT IS SO ORDERED.

Dated this 8 day of September 2006.

Ann Aiken

United States District Judge

1 of 1 DOCUMENT

Marvin Sapiro and Gloria Sapiro, his wife, Plaintiffs, vs. Sunstone Hotel Investors, L.L.C., Sunstone Hotel Investors, L.P., Defendants. Gilbert Sudbeck and Lynn Sudbeck, husband and wife, Plaintiffs, vs. Sunstone Hotel Properties, Inc.; Sunstone Hotels Investors, LLC; Sunstone Hotel Investors, L.P.; SMP II Limited Partnership; Jeffery Hammermeister, and Jone Doe Hammermeister, husband and wife; Diversified Engineering, Inc.; John and Jane Doe I-X, husbands and wives; Black Corporations, I-X; White Partnerships, I-X, Defendants.

No. CV-03-1555-PHX-SRB, No. CV-04-1535-PHX-JWS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

2006 U.S. Dist. LEXIS 21234

April 4, 2006, Decided

NOTICE: [*1] NOT FOR PUBLICATION

SUBSEQUENT HISTORY: Related proceeding at *Sudbeck v. Sunstone Hotel Props., Inc., 2006 U.S. Dist. LEXIS 51639 (D. Ariz., July 26, 2006)*

COUNSEL: For Marvin Sapiro, Gloria Sapiro, wife, Plaintiffs: Ann M Galvani, Chloe Andrews, Boies Schiller & Flexner LLP, Armonk, NY; David W Shapiro, Boies Schiller & Flexner LLP, Oakland, CA; Jorge Schmidt, Steven W Davis, Boies Schiller & Flexner LLP, Miami, FL.

For Sunstone Hotels Investors, LLC, Sunstone Hotel Investors LP, Defendants: Matthew David Kleifield, Scott Ian Gruber, Chad Christopher Baker, Julie R Barton, Kunz Plitt Hyland Demlong Kleifield PC, Phoenix, AZ.

JUDGES: Susan R. Bolton, United States District Judge.

OPINION BY: Susan R. Bolton

OPINION

ORDER

Pending before the Court is Plaintiffs' Marvin and Gloria Sapiro's Motion to Consolidate *Sapiro v. Sunstone, L.L.C.*, No. CV-03-1555-PHX-SRB *and Sudbeck v. Sunstone Hotel Properties, Inc.*, No. CV-04-1535-PHX-JWS (Doc. 122, 123) [1]. The Court now rules on the motion.

1 Doc. 123 is a duplicate of Doc. 122 and was docketed in error.

I. BACKGROUND

Marvin Sapiro and Gilbert Sudbeck allege that they contracted Legionnaires' **[*2]** Disease after staying at the Sheraton San Marcos Gold Resort ("resort") in Chandler, Arizona. Sudbeck stayed at the resort from June 24-27, 2002, and Sapiro stayed at the resort from February 6-11, 2003. Both were diagnosed with Legionnaires' Disease after they returned to their respective homes in South Dakota and Florida. Sudbeck and Sapiro filed separate lawsuits claiming in each that Defendants negligently maintained the resort, which allowed the pathogen associated with Legionnaries' Disease to propagate and infect them during their respective stays at the resort.

Plaintiffs filed the instant motion to consolidate *Sapiro v. Sunstone Hotel Investors, L.L.C., and Sunstone*

Hotel Investors, L.P., CV-03-1555-PHX-SRB *and Sudbeck v. Sunstone Hotel Properties, Inc.*, CV-04-1535-PHX-JWS. Defendants oppose the motion.

II. LEGAL STANDARDS AND ANALYSIS

Federal Rule of Civil Procedure 42(a) provides:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated; and it **[*3]** may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Rule 42 permits consolidation of separate actions presenting a common issue of law or fact as a matter of convenience and economy in judicial administration. *See, e.g., Devlin v. Transportation Communs. Int'l Union, 175 F.3d 121, 130 (2d Cir. 1999)*; *Enter. Bank v. Saettele, 21 F.3d 233, 235 (8th Cir. 1994)*. However, the fact that a common question is present does not guarantee consolidation. *In re Consol. Parlodel Litig., 182 F.R.D. 441, 444 (D.N.J. 1998)*. The district court has broad discretion to decide whether consolidation is desirable. *See, e.g., Enter. Bank, 21 F.3d at 235*; *In re Consol. Parlodel Litig., 182 F.R.D. at 444*. In determining whether consolidation is appropriate, a court "must balance the interest of judicial convenience against the potential for delay, confusion and prejudice that may result from such consolidation." *Bank of Montreal v. Eagle Assoc., 117 F.R.D. 530, 532 (S.D.N.Y. 1987)* (citing *Katz v. Realty Equities Corp., 521 F.2d 1354, 1362 (2d Cir. 1975)*). **[*4]** Factors such as differing trial dates or stages of discovery usually weigh against consolidation. Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2383 (1995). Furthermore, "the trial judge should be most cautious not to abuse his judicial discretion and to make sure that the rights of the parties are not prejudiced by the order of consolidation under the facts and circumstances of the particular case." *Dupont v. S. Pac. Co., 366 F.2d 193, 196 (5th Cir. 1966)*. Conversely, "the risk of inconsistent adjudications of common factual and legal issues" generally weighs in favor of consolidation. *Malcolm v. Nat'l Gypsum Co., 995 F.2d 346, 350 (2d Cir. 1993)* (citations omitted). However, "considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial." *Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990)* (citation omitted).

The moving party bears the burden of proof on a motion for consolidation. *See, e.g., In Re Repetitive Stress Injury Litig., 11 F.3d 368, 373 (2d Cir. 1993)*; *In re Consol. Parlodel Litig., 182 F.R.D. at 444*. Here, **[*5]** Plaintiffs argue that consolidation is appropriate because "both actions arise out of the same circumstances: Mr. Sudbeck and Mr. Sapiro were guests of the same hotel, within approximately eight months of each other, and both fell ill with Legionnaires' Disease shortly following their stays." (Pls.' Mot. to Consol. at 2.) Plaintiffs argue that the resources saved by consolidating these cases outweighs any confusion, delay, expense, inconvenience or prejudicial effect caused by granting Plaintiffs' motion. The Sudbecks support this motion to consolidate and argue that it is appropriate to consolidate the two cases because Sudbeck and Sapiro "allege they sustained bodily injuries as a result of contracting Legionnaires' Disease while guests at the hotel property in question." (Pls.' Mot. to Consol. at 1; Shannon Aff. P 3.)

Defendants argue that consolidation would prejudice them because factual confusion will occur. In particular, Defendants argue that "consolidation of these two isolated cases would only permit the improper inference that because two people suffered a similar injury at the same location, the property was negligent in its operations." (Defs.' Resp. in Opp'n to Pls. **[*6]** ' Mot. to Consolidate at 5.) The Court agrees that consolidation could lead to improper inferences in this case. If Sudbeck and Sapiro had stayed at the hotel at the same time or even within a few weeks of each other, then consolidation would be more appropriate. In this case, however, the passage of eight months leaves too much time for the possibility that separate, intervening events led to Sapiro and Sudbeck contracting Legionnaires' Disease.

Plaintiffs argue that Defendants "make much of the eight months that separate the onset of Messrs. Sapiro and Sudbeck's infections, as if this passage of time sufficed to destroy all common questions of fact." (Pls.' Reply in Supp. of Mot. to Consolidate at 2.) For support, Plaintiffs cite to a Second Circuit opinion that affirmed the consolidation of two asbestos injury cases in which the plaintiffs were allegedly exposed to asbestos at the

same worksite but during different time periods; one plaintiff was exposed between 1942-1945 and the other was exposed from 1946-1966. *See Johnson, 899 F.2d at 1285*. In *Johnson*, the court permitted consolidation because the two cases shared numerous characteristics including a "common **[*7]** worksite" and a "similar occupation to the extent that both workers were exposed to asbestos in a bystander capacity (they worked in trades that did not involve direct handling of asbestos products)." *Id.* Thus, each plaintiff was exposed to asbestos at the same worksite over a period of at least three years, albeit at different time periods.

In this case, Sudbeck was at Defendants' resort for three days in June 2002 and Sapiro stayed at the resort during five days in February 2003. The only factual commonalities here are that Sapiro and Sudbeck each stayed at the resort and, shortly after they returned to their homes in Florida and South Dakota, were diagnosed with Legionnaires' Disease. The case before this Court does not involve workers at the same worksite exposed to the same substance over a period of years. Thus, the Court chooses to exercise its discretion and deny Plaintiffs' Motion to Consolidate. [2]

> 2 While consolidating these actions could prevent some duplication of efforts, these savings would be minimal since most of the discovery has already been completed. Furthermore, having one trial rather than two would not necessarily save judicial resources in this case because the resulting joint trial could be longer, more complicated and potentially more confusing to jurors. On balance, the resources saved by granting this consolidation do not justify the resulting prejudice and potential for confusion.

[*8] In addition, the concern about inconsistent verdicts is not significant here. This situation is different from an airplane crash where all passengers suffered a harm at the same time and through the same mechanism. *See, e.g., In re Air Crash Disaster at Detroit Metro. Airport on Aug. 16, 1987, 737 F. Supp. 391, 392 (E.D. Mich. 1989)* (consolidating all pending cases arising out of the crash of Northwest Flight 255 on August 16, 1987). Because Sudbeck's and Sapiro's stays at Defendants' resort occurred eight months apart, the Court cannot say that each man was harmed in the same way. Unlike a single airplane crash in which multiple passengers were injured at the same time, it is more difficult to determine how someone contracted a disease. Therefore, it is not possible to say at this stage of litigation that both Sapiro and Sudbeck contracted Legionnaires' Disease during their separate stays at Defendants' resort.

The concern about inconsistent verdicts is also alleviated by the fact that different verdicts might be warranted. If Sapiro can only recover on the basis that Defendants had knowledge of the dangerous condition, it is possible that Sapiro could prevail in **[*9]** his lawsuit but not Sudbeck, if the hotel only learned of the dangerous condition in the time between their two respective stays.

Therefore, the Court denies the motion to consolidate because the judicial resources potentially saved by consolidating the cases at this stage do not outweigh the prejudice and confusion that could be created.

IT IS ORDERED denying Plaintiffs' Motion to Consolidate (Doc. 122, 123.)

DATED this 4th day of April, 2006.

Susan R. Bolton

United States District Judge

6 of 15 DOCUMENTS

NAN WADSWORTH, ET AL., Plaintiffs, vs. KSL GRAND WAILEA RESORT, INC., DBA GRAND WAILEA RESORT HOTEL & SPA, Defendant.

CIVIL NO. 08-00527 ACK-LEK

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

2009 U.S. Dist. LEXIS 22282

March 19, 2009, Decided
March 19, 2009, Filed

SUBSEQUENT HISTORY: Adopted by *Wadsworth v. KSL Grand Wailea Resort, Inc., 2009 U.S. Dist. LEXIS 29715 (D. Haw., Apr. 8, 2009)*

COUNSEL: [*1] For Nan Wadsworth, on behalf of themselves and all others similarly situated, Mark Apana, on behalf of themselves and all others similarly situated, Elizabeth Valdez Kyne, on behalf of themselves and all others similarly situated, Bert Villon, on behalf of themselves and all others similarly situated, Stephen West, on behalf of themselves and all others similarly situated, Plaintiffs: Ashley K Ikeda, Lori K. Aquino, LEAD ATTORNEYS, Weinberg Roger & Rosenfeld, Honolulu, HI; David A. Rosenfeld, LEAD ATTORNEY, Weinberg Roger & Rosenfeld, Alameda, CA; Harold L. Lichten, Hillary Schwab, Shannon Liss-Riordan, LEAD ATTORNEYS, Pyle, Rome, Lichten, Ehrenberg & Liss-Riordan, P.C., Boston, MA.

For Hilton Hotels Corporation, Waldorf=Astoria Management LLC, Defendants: Barry W. Marr, Melanie M. May, Richard M. Rand, LEAD ATTORNEYS, Marr Jones & Wang LLLP, Honolulu, HI.

For BRE/Wailea LLC, doing business as Grand Wailea Resort Hotel & Spa, Defendant: Duane R. Miyashiro, Erika L. Lewis, LEAD ATTORNEYS, Carlsmith Ball, Honolulu, HI.

JUDGES: Leslie E. Kobayashi, United States Magistrate Judge.

OPINION BY: Leslie E. Kobayashi

OPINION

ORDER DENYING PLAINTIFFS' MOTIONS TO CONSOLIDATE ACTIONS; AND FINDINGS AND RECOMMENDATION TO DENY ALTERNATIVE [*2] REQUESTS FOR ASSIGNMENT PURSUANT TO *L.R. 40.2*

On January 21, 2009, the plaintiffs in each of the following seven cases (collectively "Plaintiffs") filed a Motion to Consolidate Actions or Alternatively for Assignment Pursuant to *L.R. 40.2* ("Motions"): [1]

. Davis, et al. v. Four Seasons Hotel Ltd., et al., CV 08-00525 HG-LEK;

. Wadsworth, et al. v. KSL Grand Wailea Resort, Inc., et al., CV 08-00527 ACK-LEK;

. Apana, et al. v. Fairmont Hotels & Resorts (U.S.) Inc., CV 08-00528 JMS-LEK;

. Villon, et al. v. Marriott Hotel Servs., Inc., CV 08-00529 SPK-LEK;

. Kyne v. Ritz-Carlton Hotel Co., LLC, CV 08-00530 ACK-BMK;

. Lara, et al. v. Renaissance Hotel Operating Co., CV 08-00560 SOM-BMK; and

. Rodriguez, et al. v. Starwood Hotels & Resorts Worldwide, Inc., CV 09-00016 DAE-BMK.

Plaintiffs seek to have the seven cases consolidated for all pretrial purposes. In the alternative, Plaintiffs seek to have all seven cases reassigned to the same district judge and magistrate judge. Defendant Four Seasons Hotel Limited ("Four Seasons"), Defendant Fairmont Hotels & Resorts (U.S.) Inc., doing business as Fairmont Kea Lani Hotel & Resort ("Fairmont"), Defendant Marriott Hotel Services, Inc., doing business as **[*3]** Wailea Marriott Resort ("Marriott"), Defendant the Ritz Carlton Hotel Company, LLC, doing business as the Ritz-Carlton Kapalua ("Ritz-Carlton"), Defendant Renaissance Hotel Operating Company, doing business as Renaissance Wailea Beach Resort ("Renaissance"), and Defendant Starwood Hotels & Resorts Worldwide, Inc., doing business as Westin Maui Resort & Spa ("Westin"), each filed a memorandum in opposition. [2] Plaintiffs filed an identical reply in each case. The Court finds these matters suitable for disposition without a hearing pursuant to Rule *LR7.2(d)* of the Local Rules of Practice of the United States District Court for the District of Hawaii ("Local Rules"). The hearing on the Motions, currently set for Monday, March 23, 2009, is THEREFORE VACATED.

1 Insofar as Plaintiffs are represented by the same counsel and the Motions are identical, the Court will refer to them collectively.

2 Some of the defendants have not yet made an appearance in their case, and some have appeared but did not respond to the motion to consolidate in their case.

After careful consideration of the Motions, supporting and opposing memoranda, and the relevant legal authority, and for the reasons set forth below, **[*4]** the Court HEREBY DENIES Plaintiffs' Motions as to the request for consolidation, and HEREBY FINDS AND RECOMMENDS that Plaintiffs' Motions be DENIED as to the alternative request for reassignment.

DISCUSSION

Plaintiffs have all worked as food and beverage servers for hotels and/or resorts owned and/or operated by the defendants ("the Establishments"). The Establishments each impose a service charge on the sale of food and beverages at its banquets and other events. Plaintiffs allege that the Establishments do not distribute the total proceeds of these service charges to their employees as tip income. Plaintiffs argue that this is a violation of *Hawaii Revised Statutes § 481B-14*, and is actionable under *§§ 481B-4*, *480-2*, and *480-13*, as well as under Hawaii's wage statutes, *Hawaii Revised Statutes §§ 388-6*, *388-10*, and *388-11*, and Hawaii common law.

I. Consolidation

A court may order consolidation if the actions "involve a common question of law or fact[.]" *Fed. R. Civ. P. 42(a)*. Under *Rule 42(a)*, a court has broad discretion to consolidate cases pending in that district. See *Investors Research Co. v. United States Dist. Court for Cent. Dis. of Cal., 877 F.2d 777 (9th Cir. 1989)*. Such discretion, **[*5]** however, is not unfettered. See *Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990)*. The court should weigh the time and effort that consolidation would save against any inconvenience, delay, or expense it would cause. See *Huene v. United States, 743 F.2d 703, 704 (9th Cir. 1984)*. In particular, the court should consider:

> [W]hether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses, and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.

Johnson, 899 F.2d at 1285 (alterations in original) (citations omitted).

Insofar as all seven cases share the same basic fact pattern, allege the same causes of action, and are focused upon the interpretation and application of *Haw. Rev. Stat. § 481B-14*, this Court finds that there are common questions of law and fact. Thus, consolidation would be within the Court's discretion. This Court, however, finds that consolidation is not appropriate **[*6]** in these cases.

Beyond the basic fact pattern, there are several factual differences between the cases which may also render the legal issues in each case distinguishable. For example, three of the plaintiffs in CV 08-00525 signed employment contracts with mandatory arbitration clauses, and Four Seasons has filed a motion to compel arbitration. None of the other cases present a similar issue. Some of the Establishments' food and beverage servers are unionized and some are not. Some of the Establishments allege that their retention of a portion of the service charges does not violate Hawaii law because they provide the requisite disclosure to the customers. Other Establishments apparently have no disclosure procedures. Further, in light of the fact that discovery has not begun in any of these cases, additional differences between the cases may come to light.

Plaintiffs argue that they will save considerable time and resources if the cases are consolidated because they all have the same counsel and several of the cases have common plaintiffs. [3] Consolidation, however, will likely be more inefficient and more expensive for the defendants because they will be unwilling aligned with other **[*7]** defendants with differing factual and legal issues and who are their competitors in the hotel industry. Further, it is not clear that consolidation would be more efficient for the district court. Many of the seven cases have already taken different procedural postures and each case is purportedly a class action. Class certification would be unduly complicated if the cases are consolidated. Finally, although Plaintiffs argue that the danger of inconsistent rulings favors consolidation, the Court finds that this factor is neutral. Different rulings may be the result of the different facts in each case, rather than the result of review by different judges.

> 3 Daryl Dean Davis is apparently a plaintiff in CV 08-525, CV 08-528 (as Daryl Dean), and CV 08-560 (as Dean Davis). Apana is a plaintiff in CV 08-525, CV 08-527, CV 08-528, and CV 08-529. Valdez Kyne is a plaintiff in CV 08-525, CV 08-527, and CV 08-530. Villon is a plaintiff in CV 08-527 and CV 08-529. No plaintiff is a party to all seven cases and CV 09-00016 does not have any common plaintiffs with the other cases.

This Court finds that the majority of the relevant factors weigh against consolidation. Plaintiffs' Motions are therefore **[*8]** DENIED as to their requests to consolidate the seven cases for all pre-trial purposes.

II. Reassignment

The Local Rules provide that the Chief Judge may reassign cases to the same district judge if they

> involve the same or substantially identical transactions, happenings, or events, or the same or substantially the same parties or property or subject matter, or the same or substantially identical questions of law, or for any other reason said cases could be more expeditiously handled if they were all heard by the same district judge[.]

Local Rule *LR40.2*. After consultation with the district judge, see In the Matter of Motions to Consolidate, Order, filed June 8, 2006, and for reasons set forth *supra*, this Court FINDS that reassignment to the same district judge is not warranted in these cases. The Court, however, finds that reassigning all cases to the same magistrate judge will allow for more efficient case management. This Court therefore RECOMMENDS that Plaintiffs' alternative request for reassignment be GRANTED IN PART AND DENIED IN PART.

CONCLUSION

On the basis of the foregoing, Plaintiffs' Motions to Consolidate Actions or Alternatively for Assignment Pursuant to *L.R. 40.2*, filed on **[*9]** January 21, 2009 in CV 08-00525 HG-LEK, CV 08-00527 ACK-LEK, CV 08-00528 JMS-LEK, CV 08-529 SPK-LEK, CV 08-00530 ACK-BMK, CV 08-00560 SOM-BMK, and CV 09-00016 DAE-BMK, are HEREBY DENIED as to Plaintiffs' request for consolidation.

IT IS SO ORDERED.

RECOMMENDATION

This Court HEREBY FINDS AND RECOMMENDS that Plaintiffs' Motions be GRANTED IN PART AND DENIED IN PART as to Plaintiffs' alternative request for reassignment. The Court recommends that Plaintiffs' request to have the cases reassigned to the same district judge be DENIED. The Court, however, recommends that the cases be reassigned to the same magistrate judge.

IT IS SO FOUND AND RECOMMENDED.

Leslie E. Kobayashi

DATED AT HONOLULU, HAWAII, March 19, 2009.

United States Magistrate Judge

/s/ Leslie E. Kobayashi