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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

G.P. MUGGIE & SONS, LLC,
Plaintiff,
v.
HAMMON PLATING CORPORATION, et
al.,
Defendants.

Case No. 16-CV-05908-LHK
**ORDER GRANTING MOTION FOR
LEAVE TO FILE SECOND AMENDED
COMPLAINT**
Re: Dkt. No. 56

Plaintiff G.P. Muggie & Sons, LLC (“Plaintiff”) sues Defendants Hammon Plating Corporation (“Hammon Plating”), and Galen Wooten, personal representative of the estate of Thomas Wooten (“Wooten”), for causes of action arising out of Defendants’ release of certain contaminants at Plaintiff’s property. Before the Court is Plaintiff’s motion for leave to file a Second Amended Complaint. ECF No. 56. Having considered the parties’ submissions, the record in this case, and the relevant law, the Court GRANTS Plaintiff’s motion for leave to file a Second Amended Complaint.

I. BACKGROUND
A. Factual Background

Hammon Plating is a “California Corporation” that operates a metal plating business in

1 Santa Clara County, California. ECF No. 33 (“FAC”) ¶ 3. Specifically, Hammon Plating operates
2 its business at three adjacent properties in Palo Alto: 855 Commercial Street, 882 Commercial
3 Street, and 890 Commercial Street. *Id.* Until February 2015, Wooten was Hammon Plating’s sole
4 shareholder. *Id.* ¶ 2. Wooten died on July 27, 2015. *Id.*

5 Although Hammon Plating and Wooten were the “former owners” of the properties at 855
6 and 882 Commercial Street and Hammon Plating recently sold those properties, “Plaintiff is the
7 owner and lessor” of 890 Commercial Street. *Id.* ¶¶ 9–10, 21. In 1983, Hammon Plating and
8 Wooten entered into a lease (the “1983 Lease”) with Plaintiff’s predecessors-in-interest, the
9 Munsey Family Trust, to lease 890 Commercial Street. *Id.* ¶ 11. The 1983 Lease was extended
10 multiple times, including by a written lease extension dated January 13, 2003 (the “2003 Lease”).
11 *Id.* Then, on October 1, 2011, Plaintiff entered into a new lease with Hammon Plating and
12 Wooten (the “2011 Lease”) that provided for an expiration date of September 30, 2014. *Id.*
13 Currently, Hammon Plating is “occupying the 890 Property on a month to month basis.” *Id.* ¶ 14.

14 Plaintiff alleges that under the 2003 Lease and the 2011 Lease, Hammon Plating and
15 Wooten “are contractually obligated . . . to be solely responsible for the investigation and
16 remediation of any and all Hazardous Substances at the 890 Property,” and to complete any
17 removal of these substances by September 30, 2014, the date on which the 2011 Lease expired.
18 *Id.* ¶ 33. Plaintiff also alleges that (1) “during the time that Hammon [Plating] and Wooten leased
19 and operated the 890 Property, they possessed, used, stored, pumped and transported Hazardous
20 Substances including, but not limited to,” tetrachlorethene (“PCE”), trichloroethylene (“TCE”),
21 and cis-1, 2-dichlorethane (“DCE”) at 890 Commercial Street; (2) Hammon Plating “released
22 these Hazardous Substances by way of sudden and accidental leaks, spills and pumping, as well as
23 improperly storing and disposing of the Hazardous Substances in connection with Hammon’s
24 manufacturing processes”; and (3) “[t]he Hazardous Substances, including TCE, PCE and DCE
25 have been recently discovered in the soil, soil gas, indoor air and groundwater beneath the 890
26 Property” and the properties at 855 and 882 Commercial Street. *Id.* ¶ 12.

27 Specifically, Plaintiff states that in December 2013, Hammon Plating retained a consulting

1 company to test the soil and groundwater at 855, 882, and 890 Commercial Street properties. *Id.* ¶
2 17. Further, in 2013, Hammon Plating submitted a “Request for Agency Oversight Application”
3 to the California Department of Toxic Substances Control (“DTSC”) “to oversee remediation” of
4 the properties, and reported to the DTSC that after some testing, Hammon Plating had found PCE,
5 DCE, TCE, copper, and other “Hazardous Substances” in the soil, groundwater, and soil vapors at
6 the properties. *Id.* Then, in November 2014, Hammon Plating “entered into an Agreement for
7 Facility-Initiated Corrective Action with the DTSC for the DTSC oversight of remedial action to be
8 conducted by Hammon” at the Commercial Street properties. *Id.* ¶ 19. However, Plaintiff states
9 that “[a]lthough some investigation [into the Hazardous Substances] commenced before the Lease
10 Expiration Date [of September 30, 2014], Hammon [Plating] and Wooten failed to complete the
11 investigation or commence any of the substantial remediation work before the Lease Expiration
12 Date as required by the 2011 Lease or thereafter.” *Id.*

13 Plaintiff alleges that on February 18, 2015, Wooten sold all of his shares in Hammon
14 Plating to an entity called “AMC” for approximately \$9,339,000. *Id.* ¶ 20. Plaintiff further
15 alleges that Hammon Plating continues to operate its metal plating business out of the properties at
16 855, 882, and 890 Commercial Street, and that Hammon Plating “has placed \$1,100,000 in an
17 escrow account for the purpose of remediation of” the properties at 855 and 882 Commercial
18 Street. *Id.* However, Plaintiff states that “Hammon [Plating] has expended no funds for
19 remediation . . . [of] the 890 Property and that it does not intend to commence remediation based
20 upon an erroneous claim that the structure at [890 Commercial Street] will be demolished.” *Id.*

21 Thus, Plaintiff alleges that Hammon Plating and Wooten “continue to breach their lease
22 obligations by failing to commence or to complete the remediation of the Hazardous Substances
23 that they released at the 890 Property.” *Id.* ¶ 21. As a result, “[t]he 890 Property continues to be
24 impacted by Hammon’s operations at the 890 Property . . . , including the ongoing presence of
25 TCE, PCE, and other Hazardous Substances that are closely regulated by the State of California
26 and the federal government.” *Id.* ¶ 23. Plaintiff states that Hammon Plating and Wooten “have
27 made ongoing promises and representations to Plaintiff that they would remediate the 890

1 Property,” and have “asked Plaintiff to grant them a license for their environmental consultant to
2 enter the 890 Property to investigate the nature and scope of Hazardous Substances that [Hammon
3 Plating and Wooten] released at the 890 Property,” but that “the investigation is inadequate and
4 remediation activities are not proceeding.” *Id.* ¶ 26.

5 **B. Procedural History**

6 On July 18, 2016, Plaintiff filed its original complaint against Defendants in Santa Clara
7 County Superior Court. ECF No. 1-1 at 2. The original complaint asserted eight causes of action,
8 including: (1) breach of contract; (2) equitable indemnity/contribution; (3) violation of the
9 Hazardous Substance Account Act (“HSAA”), Cal. Health & Safety Code § 25323.5(a); (4)
10 violation of HSAA’s notice requirement in Cal. Health & Safety Code § 25359.7; (5) declaratory
11 relief; (6) trespass; (7) negligence; and (8) waste. *Id.* at 8–15. On October 12, 2016, Hammon
12 Plating removed the case to this Court. ECF No. 1. That same day, Hammon Plating filed a
13 cross-claim against Galen Wooten for contractual indemnity, equitable indemnity, comparative
14 indemnity, equitable apportionment of fault, and declaratory relief. ECF No. 3. On November 2,
15 2016, Galen Wooten answered Hammon Plating’s cross-claim and asserted a third-party complaint
16 for contractual indemnity against AMC Acquisition Corporation (“AMC”), who had purchased all
17 outstanding shares of Hammon Plating from Wooten in February 2015. ECF No. 13. Then, on
18 December 19, 2016, Hammon Plating answered Plaintiff’s original complaint. ECF No. 16.

19 On February 3, 2017, Plaintiff amended its complaint to include two more causes of
20 action: a ninth claim for violation of the Comprehensive Environmental Response, Compensation
21 and Liability Act (“CERCLA”), 42 U.S.C. § 9607, and a tenth claim for violation of the Resource
22 Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6972(A)(1)(A)–(B). *See* FAC. On
23 February 17, 2017, Galen Wooten answered Plaintiff’s First Amended Complaint and asserted a
24 cross-claim against Hammon Plating and a First Amended Third-Party Complaint against AMC.
25 ECF No. 35. On April 3, 2017, AMC answered Galen Wooten’s First Amended Third-Party
26 Complaint. ECF No. 36. That same day, Hammon Plating answered Plaintiff’s First Amended
27 Complaint and Galen Wooten’s cross-claim. ECF Nos. 37, 39.

1 On August 21, 2017, Plaintiff and Hammon Plating filed a stipulation stating that Hammon
2 Plating is liable to Plaintiff on the first, third, fourth, ninth, and tenth causes of action in Plaintiff's
3 First Amended Complaint (for breach of contract, violation of the HSAA, violation of the HSAA's
4 notice requirement, violation of CERCLA, and violation of RCRA). ECF No. 51. Pursuant to this
5 stipulation, the Court entered an order finding Hammon Plating liable on these causes of action on
6 August 22, 2017. ECF No. 52. Then, on September 26, 2017, Plaintiff and Galen Wooten filed a
7 stipulation stating that Galen Wooten is liable to Plaintiff on the same causes of action. ECF No.
8 61. Pursuant to this stipulation, the Court entered an order finding Galen Wooten liable on these
9 causes of action on September 28, 2017. ECF No. 63.

10 On September 15, 2017, Plaintiff filed the instant motion for leave to file a second
11 amended complaint. ECF No. 56. Hammon Plating opposed Plaintiff's motion on September 29,
12 2017, ECF No. 64, and Plaintiff replied on October 6, 2017. ECF No. 66.

13 **II. LEGAL STANDARD**

14 Under Rule 15(a) of the Federal Rules of Civil Procedure, "[t]he court should freely give
15 leave [to amend] when justice so requires," bearing in mind "the underlying purpose of Rule 15
16 ...[is] to facilitate decision on the merits, rather than on the pleadings or technicalities." *Lopez v.*
17 *Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc). Nonetheless, a district court may deny
18 leave to amend a complaint due to "undue delay, bad faith or dilatory motive on the part of the
19 movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice
20 to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *See*
21 *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Leadsinger, Inc. v. BMG Music Publ'g*, 512
22 F.3d 522, 532 (9th Cir. 2008). Of these considerations, "it is the consideration of prejudice to the
23 opposing party that carries the greatest weight." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d
24 1048, 1052 (9th Cir. 2003) (per curiam). "Absent prejudice, or a strong showing of any of the
25 remaining *Foman* factors, there exists a presumption under Rule 15(a) in favor of granting leave to
26 amend." *Id.* (emphasis in original). Nevertheless, a proposed amendment may be denied as futile
27 "if no set of facts can be proved under the amendment to the pleadings that would constitute a

1 valid and sufficient claim or defense.” *See Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th
2 Cir. 1988). Ordinarily, however, “courts will defer consideration of challenges to the merits of a
3 proposed amended pleading until after leave to amend is granted and the amended pleading is
4 filed.” *Netbula, LLC v. Distinct Corp.*, 212 F.R.D. 534, 539 (N.D. Cal. 2003). The non-moving
5 party bears the burden of showing why leave to amend should not be granted. *Genentech, Inc. v.*
6 *Abbott Labs.*, 127 F.R.D. 529, 530–31 (N.D.Cal.1989).

7 **III. DISCUSSION**

8 In the instant motion, Plaintiff seeks to add Stephen Sorenson (“Sorenson”) as a defendant
9 on the theory that Sorenson is an alter ego of Hammon Plating. ECF No. 56 at 2. Sorenson owns
10 and controls AMC, which purchased all shares of Hammon Plating from Wooten in February
11 2015. Plaintiff explains that the instant motion is based in part on information disclosed by
12 Hammon Plating’s designated corporate witness, Wade Smith, during an August 7, 2017
13 deposition regarding Hammon Plating’s financial information and sale of the 855 and 882
14 Commercial Street properties. *Id.* at 6, 10. Specifically, Plaintiff points to deposition testimony
15 indicating that (1) Sorenson is “the principal or the owner of Hammon plating,” ECF No. 56-1 at
16 7; (2) Sorenson directs certain payments from Hammon Plating’s accounts, *see id.* at 9, as well as
17 “large transactions,” *see id.* at 13; (3) after AMC purchased all shares of Hammon Plating from
18 Wooten, Sorenson caused Hammon Plating to sell the properties at 855 and 882 Commercial
19 Street in August of 2015 for \$3,850,000, *see id.* at 10–11; (4) although the “Seller’s Estimated
20 Settlement Statement” associated with that sale shows that \$1,784,336.43 was to go to Hammon
21 Plating as a result of the sale, an audit document with a “period ending December 2015” did not
22 indicate that \$1,784,336.43 “came into” Hammon Plating, *see id.* at 38; (5) Smith did not know
23 whether the \$1,784,336.43 was “used to help the profitability of Hammon Plating,” and had never
24 seen that money “applied to the Hammon Plating accounts” or in Hammon Plating’s “cash or cash
25 equivalents,” *id.* at 13; and (6) Hammon Plating is planning to move its operations to “another
26 facility in Santa Clara” owned by Sorenson. *See id.* at 40–41.

27 Based on this deposition testimony, Plaintiff seeks to allege in a Second Amended

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1 Complaint that “during the time that Hammon [Plating] has known of the contamination of
2 Plaintiff’s 890 Property by Hammon [Plating], [Sorenson has] diverted substantial funds from
3 Hammon [Plating] to himself on a regular basis such that Hammon [Plating’s] assets are treated as
4 [Sorenson’s] personal property and its separate existence should be disregarded as to Plaintiff.”
5 ECF No. 56 at 14. Further, Plaintiff seeks to allege that Sorenson diverted at least \$1.7 million of
6 the proceeds of Hammon Plating’s sale of the 855 and 882 Commercial Street properties to
7 himself, which in turn has made Hammon Plating “unable to answer for its obligations” for the
8 “substantial costs to clean up its contamination.” *Id.* Thus, Plaintiff wishes to add Sorenson as an
9 alter ego defendant because “[i]t would be inequitable for Sorenson to not be held accountable”
10 for Hammon Plating’s environmental cleanup obligations. *Id.*

11 Hammon Plating argues that Plaintiff’s motion for leave to file a Second Amended
12 Complaint should be denied because (1) Plaintiff “has unduly delayed pursuing its alter ego claim
13 and bringing its motion to amend”; (2) Plaintiff’s proposed amendment is futile; and (3) Plaintiff’s
14 amendment “has already caused prejudice to Hammon Plating.” ECF No. 64 at 3, 4, 7. The Court
15 addresses each argument in turn.

16 **A. Undue Delay**

17 Hammon Plating points out that “all parties have known of Mr. Sorenson and his
18 connection to Hammon Plating all along.” *Id.* at 3. Further, Plaintiff states that “initial
19 disclosures were exchanged on February 1, 2017,” and that “[f]ollowing Wade Smith’s deposition
20 [on August 7, 2017], Plaintiff waited until September 15, 2017” to file the instant motion to add
21 Sorenson as a defendant. *Id.* Thus, Hammon Plating argues that “[t]hese delays are inexcusable
22 and reason enough to deny leave to amend.” *Id.*

23 However, even though all parties have known about Sorenson’s connection to Hammon
24 Plating all along, the instant motion is based on more specific details about the extent of
25 Sorenson’s control over Hammon Plating and the sale of the 855 and 882 Commercial Street
26 properties—details that Plaintiff says it learned from Wade Smith’s August 7, 2017 deposition.
27 *See* ECF No. 56 at 10. Hammon Plating does not contend that these details were previously-

1 known facts. Moreover, Plaintiff asked Hammon Plating to stipulate to the addition of Sorenson
 2 as a defendant, but Hammon Plating declined to so stipulate. ECF No. 56-1 ¶ 5. Although
 3 Plaintiff filed the instant motion a little over a month after Wade Smith’s deposition, the Court
 4 does not find that this constitutes “a *substantial* delay in seeking leave to amend.” *See Naranjo v.*
 5 *Bank of America, N.A.*, 2015 WL 913031, at *8 (N.D. Cal. Feb. 27, 2015) (emphasis added).

6 **B. Futility**

7 Under California law, to “satisfy the alter ego exception to the general rule that a
 8 subsidiary and the parent are separate entities, the plaintiff must establish a prima facie case (1)
 9 that there is such unity of interest and ownership that the separate personalities [of the two entities]
 10 no longer exist; and (2) that failure to disregard [their separate identities] would result in fraud or
 11 injustice.” *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir.2001) (internal quotation marks
 12 omitted) (alterations in original). Hammon Plating argues that allowing Plaintiff to file a Second
 13 Amended Complaint would be futile because Plaintiff’s proposed Second Amended Complaint
 14 “does not plead facts sufficient to meet either requirement of the alter ego doctrine.” ECF No. 64
 15 at 5.

16 However, Plaintiff’s proposed Second Amended Complaint alleges that (1) Sorenson has
 17 diverted funds from Hammon Plating on a regular basis “such that Hammon assets are treated as
 18 Sorenson’s personal property”; and (2) Sorenson diverted over \$1.7 million of the proceeds from
 19 Hammon Plating’s sale of the 855 and 882 Commercial Street Properties “at a time when
 20 Hammon [Plating] [was] under an obligation to remediate its contamination of Plaintiff’s”
 21 property at 890 Commercial Street, which in turn made Hammon Plating “unable to answer for its
 22 obligations” for the “substantial costs to clean up its contamination.” *Id.* at 14. Because
 23 Plaintiff’s proposed Second Amended Complaint appears to address both requirements of the alter
 24 ego exception, and because courts usually “defer consideration of challenges to the merits of a
 25 proposed amended pleading until after leave to amend is granted and the amended pleading is
 26 filed,” *see Netbula*, 212 F.R.D. at 539, the Court finds that Plaintiff’s amendment would not be
 27 futile.

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C. Prejudice

Hammon Plating appears to briefly argue that it has *already* been prejudiced because “the Court has already granted an extension of discovery . . . and reset all other dates in the case” pursuant to the Court’s September 20, 2017 Case Management Order. ECF No. 64 at 7; *see* ECF No. 57. Hammon Plating asserts without further explanation that “[s]uch delay clearly constitutes prejudice.” ECF No. 64 at 7.

Hammon Plating’s conclusory objection to an extension that the Court has already ordered is not well-taken. Further, Plaintiff seeks only to add Sorenson as an alter ego defendant, and therefore does not seek to add or substantially change any causes of action. Thus, Plaintiff does not request any further changes to the case schedule. As a result, the Court finds that Hammon Plating has not met its burden of showing that prejudice would result from granting Plaintiff’s motion for leave to file its Second Amended Complaint. *See Serpa v. SBC Telecomms., Inc.*, 318 F. Supp. 2d 865, 870 (N.D. Cal. 2004) (“The party opposing leave to amend bears the burden of showing prejudice.”).

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiff’s motion for leave to file a Second Amended Complaint to name Sorenson as an alter ego defendant. Plaintiff shall file a second amended complaint consistent with this order within three days.

IT IS SO ORDERED.

Dated: November 14, 2017



LUCY H. KOH
United States District Judge