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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CHRIS KOHLER,
Plaintiff,
v.
PACIFIC SOLANA BEACH
HOLDINGS, *et al.*,
Defendants.

Civil No. 09CV2837-L(JMA)
**ORDER GRANTING DEFENDANT
BIG 5 CORP.'S MOTION FOR
LEAVE TO FILE A THIRD-PARTY
COMPLAINT**

In this action for disability discrimination in access to and enjoyment of public facilities, Defendant Big 5 Corp. dba Big 5 Sporting Goods #223 ("Big 5") filed a motion for leave to file a third-party complaint against former Defendant and Big 5's landlord Pacific Solana Beach Holdings, LP ("Pacific). Pacific opposed the motion and Big 5 replied. For the reasons which follow, Big 5's motion is **GRANTED**.

This action was brought against four Defendants, Pacific, Big 5, The Vons Companies, Inc. dba Vons #2327 ("Vons"), and Ross Dress for Less, Inc. dba Ross Dress for Less #263 ("Ross"). Big 5, Vons and Ross were served first and all of them answered the complaint. On March 12, 2010 Plaintiff served Pacific and filed a notice of settlement of his claims against Big 5, Vons and Ross. On April 15, 2010 the claims against Vons and Ross were dismissed pursuant to a joint motion to dismiss. Pacific settled Plaintiff's claims against it, and on April 28, 2010 those claims were dismissed pursuant to a joint motion. It appears that Plaintiff's settlement with Big 5 fell through, because on May 18, 2010 Plaintiff withdrew his notice of settlement of

1 claims against it. Big 5 is the only remaining Defendant in this case. It filed a motion pursuant
2 to Federal Rule of Civil Procedure 14(a) to file a third-party complaint against Pacific.

3 Rule 14(a) provides that “[a] defending party may, as third-party plaintiff, serve a
4 summons and complaint on a nonparty who is or may be liable to it for all or part of the claim
5 against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the
6 third-party complaint more than 14 days after serving its original answer.” Because Big 5 did
7 not file its third-party complaint within 14 days after answering the complaint, leave of court is
8 required.

9 The purpose of Rule 14(a) is “to promote judicial efficiency by eliminating the necessity
10 for the defendant to bring a separate action against a third individual . . .” *Sw. Adm’rs, Inc. v.*
11 *Rozay’s Transfer*, 791 F.2d 769, 777 (9th Cir. 1986). However, a “third-party claim may be
12 asserted only when the third party’s liability is in some way dependent on the outcome of the
13 main claim and the third party’s liability is secondary or derivative. . . . It is not sufficient that
14 the third-party claim is a related claim; the claim must be derivatively based on the original
15 plaintiff’s claim.” *United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 452 (9th Cir. 1983).

16 Big 5 wants to file a complaint alleging that based its lease with Pacific, Pacific must
17 indemnify Big 5 if Plaintiff prevails. Big 5 intends to assert indemnity claims against Pacific
18 which are dependent on the outcome of Plaintiff’s claim against Big 5 and wholly derivative of
19 its liability. Accordingly, Big 5's proposed third-party complaint meets the secondary or
20 derivative requirement.

21 Pacific argues that Big 5 should not be granted leave because the proposed third-party
22 complaint will add undue complexity to this case. “It is not an abuse of discretion to deny an
23 application for impleader where it will disadvantage the existing action.” *Rozay’s Transfer*, 791
24 F.2d at 777. Big 5's proposed complaint will introduce the necessity to interpret the lease
25 between Big 5 and Pacific to determine whether Big 5 is entitled to indemnity from Pacific
26 should Plaintiff prevail against Big 5, and if so, to what extent. This kind of complexity is
27 anticipated and subsumed in the standard governing Rule 14(a) impleaders. Leave may be
28 granted where liability is derivative and secondary. Accordingly, the determination whether the

1 derivative or secondary liability claim against the third-party defendant has merit, by itself,
2 should not preclude leave to file a third-party complaint.

3 Next, Pacific contends that it would be unduly prejudiced if Big 5 is granted leave to file
4 a third-party complaint. Pacific argues that it would be required to litigate the underlying
5 liability to Plaintiff and re-expose itself to the risk of statutory attorney's fees after having settled
6 with Plaintiff. However, Big 5's complaint against Pacific does not present the underlying
7 liability issues as between Pacific and Plaintiff or Big 5 and Plaintiff. It presents Big 5's claims
8 against Pacific. The proposed third-party complaint is based entirely on Big 5's alleged right to
9 indemnity from Pacific. It is an alternative to Big 5's separate indemnity action against Pacific.
10 *See Rozay's Transfer*, 791 F.2d at 777. Pacific has failed to show how the prejudice it would
11 suffer from defending a separate action would be any less than the prejudice it would suffer from
12 having to defend a third-party complaint in this action.

13 Further, Pacific argues that Big 5 unduly delayed filing this motion because it answered
14 the complaint and did not file a cross-claim against Pacific or demand that it cure pursuant to the
15 lease the alleged access barriers, before Pacific settled its claims with Plaintiff. Big 5 counters
16 that it did not do so because it thought it was going to settle with Plaintiff as well, as indicated
17 on the notice of settlement. Even if the court were to accept Pacific's position that Big 5 was
18 remiss for not filing a cross-claim or making a demand on Pacific before Pacific's settlement,
19 Pacific has not shown that it has been prejudiced by the delay.


20 Last, Pacific argues that Big 5's proposed alleged indemnity claims lack merit because
21 they are not supported by the express terms of the lease. Assuming *arguendo* that Pacific is
22 correct, this does not by itself dispose of all the proposed claims. The proposed third-party
23 complaint is not based only on the express terms of the lease, but includes an implied indemnity
24 claim, which Pacific did not directly address. In addition, the merits arguments presented by
25 Pacific are more appropriate to a motion to dismiss or motion for summary judgment, where they
26 can be appropriately briefed. Accordingly, the court declines to consider Pacific's lease
27 interpretation arguments at this time.

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1 Based on the foregoing, Big 5's motion for leave to file a third-party complaint is
2 **GRANTED**. No later than **December 22, 2010**, Big 5 shall file the third-party complaint
3 attached to the Declaration of Judy Y. Chiang, if any. Pacific's response to the third-party
4 complaint, if any, shall be filed no later than 21 days after being served with the summons and
5 the third-party complaint.

6 **IT IS SO ORDERED.**

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8 DATED: December 14, 2010

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11 M. James Lorenz
12 United States District Court Judge

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HON. JAN M. ADLER
UNITED STATES MAGISTRATE JUDGE

ALL PARTIES/COUNSEL