

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, JUDGE**

Civil Case No. 08-cv-00855-LTB

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LA PLATA,
COLORADO,

Plaintiff,

v.

BROWN GROUP RETAIL, INC.,
PLUMMER PRECISION OPTICS CO.,
BLUE JAUNTE COMPANY, INC., and
PLUMMER PRECISION OPTICS WESTERN DIVISION, INC.,

Defendants.

ORDER

This environmental contamination case is before me on Plaintiff's Motion for Leave to File Third Amended Complaint [**Docket # 103**]; Defendant, Brown Group Retail, Inc.'s ("Brown Group"), Response [**Docket # 106**]; and Plaintiff's Reply [**Docket # 108**]. This Court has previously dismissed multiple claims and counterclaims of both parties. Plaintiff now seeks to amend the Second Amended Complaint [**Docket # 49**] so as to assert three additional claims: (1) a CERCLA section 113(f) contribution counterclaim in response to Brown Group's CECRLA section 107 recovery claim ("Sixth Claim for Relief"); (2) removal and recovery reimbursement under COLO. REV. STAT. § 29-22-104 ("Seventh Claim for Relief"); and (3) hazardous waste abandonment mitigation costs under COLO. REV. STAT. § 25-15-313 ("Eighth Claim for Relief").

FED. R. CIV. P. 15(a) provides that where—as here—a responsive pleading has been served, “a party may amend the party’s pleading only by leave of court or by written consent of

the adverse party.” However, “leave shall be freely given when justice so requires.” *Id.* The United States Supreme Court teaches that:

this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be 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 rules require, be “freely given.”

Foman v. Davis, 371 U.S. 178, 182 (1962). As Plaintiff filed its motion before expiration of the May 22, 2009, deadline to amend pleadings—and as the discovery deadline does not expire until December 15, 2009—any contention that the motion is untimely or the result of undue delay is without merit.

Plaintiff avers that the purpose of this requested amendment is to assert claims that were either unavailable or unknown at the time the Second Amended Complaint was filed. To the extent Plaintiff asserts a CERCLA section 113(f) contribution counterclaim, it is not disputed that such a claim was unavailable prior to Brown Group asserting its own CERCLA section 107 recovery claim. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 165–68 (2004). Accordingly, leave to amend should be granted as to this claim.

Turning to the two state law claims, Plaintiff avers it was unaware that the relevant statutes existed prior to filing the present motion. Although anemic, such a justification does not show the amendment is offered in bad faith or with dilatory motive. *See Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993). Likewise, Brown Group does not show that inclusion of the state law claims will alter the focus of this case, nor that allowing the amendment will in any way impair its ability to adequately prepare for trial. *See Orr v. City of Albuquerque*, 417

F.3d 1144, 1153 (10th Cir. 2005). Finally, although Brown Group argues the state law claims would be subject to dismissal for lack of jurisdiction—and, accordingly, that leave to amend should be denied on futility grounds—Brown Group provides no case law or other authority supporting this position. *See Jefferson County Sch. Dist. v. Moody's Investor's Servs.*, 175 F.3d 848, 859 (10th Cir. 1999).

Accordingly, Plaintiff's Motion for Leave to File Third Amended Complaint [**Docket # 103**] is GRANTED. Plaintiff's Third Amended Complaint [**Docket # 103-2**] is DEEMED FILED.

Dated: June 16, 2009.

BY THE COURT:

s/Lewis T. Babcock
Lewis T. Babcock, Judge