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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Bermuda Road Properties, LLC, a Nevada limited liability company,

Plaintiff

v.

Ecological Steel Systems, Inc., a Delaware corporation, dba Ecosteel,

Defendant

2:12-cv-01579-JAD-VCF

Order Granting Leave to Amend [#107], Vacating the Scheduling Order [#108], and Ordering the Parties to Show Cause Why Case 2:15-cv-783-MMD-VCF Should Not Be Dismissed

11 This is a dispute over who should keep the \$2.1 million down payment that Bermuda Road
12 Properties, LLC made to Ecological Steel Systems, Inc. (Ecosteel), the steel contractor that Bermuda
13 hired to provide design, engineering, fabrication, and steel erection services on a meeting facility.
14 Bermuda terminated Ecosteel's contract in the early stages of its performance because it learned that
15 the contractor was not licensed to work in Nevada. After a series of dispositive rulings, the claims
16 have been distilled to a competing unjust enrichment and quantum meruit claims—one per side.¹
17 Bermuda claims that documents it received from Ecosteel after the amendment deadline passed
18 reveal that Bermuda's architect D3 Design Studios,² who recommended Bermuda hire Ecosteel and
19 failed to mention the contractor's unlicensed status, received a secret kickback from Ecosteel for
20 helping it secure the job.³

21 Bermuda filed a protective action before United States District Court Judge Miranda Du to
22 toll the statutes on its newly proposed claims.⁴ It now moves for leave to amend its complaint to
23 bring in D3 and supplement its claims against Ecosteel in this case. I find good cause and excusable

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25 ¹ See Doc. 81 at 49, l. 1–9.

26 ² D3DS CSD LLC dba D3 Design Studios. See Doc. 107-1 at 3.

27 ³ Docs. 107, 108.

28 ⁴ Case No. 2:15-cv-783-MMD-VCF.

1 neglect to permit the belated amendment with limited exceptions, so I grant the motion. Because the
2 amendment significantly alters the landscape of this case, I grant the motion to amend the scheduling
3 order, vacate the existing scheduling order, and direct the parties to jointly submit a new proposed
4 discovery plan and scheduling order. And because permitting Bermuda to amend its complaint to
5 add these new claims to this case makes the protective action duplicative, I order the parties to show
6 cause why the case before Judge Du should not be dismissed.

7 **Discussion**

8 Rule 15(a)(2) of the Federal Rules of Civil Procedure directs that “[t]he court should freely
9 give leave when justice so requires. The Ninth Circuit Court of Appeals has repeatedly cautioned
10 courts in this circuit to “liberally allow a party to amend its pleading.”⁵ “Courts may decline to grant
11 leave to amend only if there is strong evidence of ‘undue delay, bad faith or dilatory motive on the
12 part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue
13 prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment,
14 etc.’”⁶

15 When leave to amend is sought after the amendment deadline in the court’s scheduling order
16 has expired, the movant must also show good cause to reopen the amendment period and excusable
17 neglect for the delay.⁷ In *Pioneer Investment Services Co. v. Brunswick Associates Limited*
18 *Partnership*,⁸ the United States Supreme Court established a four-part balancing test for determining
19 whether there has been excusable neglect. The court considers: (1) the danger of prejudice to the
20 non-moving party; (2) the length of the delay and its potential impact on judicial proceedings, (3) the
21 reason for the delay, including whether it was within the reasonable control of the movant, and (4)

24 ⁵ *Sonoma Cnty. Ass’n of Ret. Emps. v. Sonoma Cnty.*, 708 F.3d 1109, 1117 (9th Cir. 2013).

25 ⁶ *Id.* at 1117 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

26 ⁷ See Fed. R. Civ. P. 6(b)(1)(B) (stating “the court may, for good cause, extend the time on motion
27 made after the time has expired if the party failed to act because of excusable neglect.”).

28 ⁸ *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395 (1993).

1 whether the moving party's conduct was in good faith.⁹ The weight assigned to these factors is left
2 to the court's discretion.¹⁰ Bermuda has satisfied each of these burdens.

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4 **A. Bermuda has demonstrated the good cause and excusable neglect necessary to
reopen the amendment period under the scheduling order.**

5 The deadline for amending the pleadings was December 31, 2012.¹¹ Bermuda represents
6 that Ecosteel produced the documents in which it discovered this secret kickback deal on March 19,
7 2013—three months after that deadline passed.¹² Because Bermuda was not yet aware of this basis
8 for new claims until after the amendment deadline passed, Bermuda could not have filed a timely
9 motion to enlarge the deadline before it expired. I find that Bermuda has satisfied the *Pioneer*
10 factors and demonstrated the good cause and excusable neglect necessary to reopen the amendment
11 period for this purpose.

12 I thus grant the motion to amend the scheduling order (Doc. 108) to allow Bermuda to
13 request leave to amend its complaint. Because I am granting leave to amend as well, I am also
14 granting the motion to amend the scheduling order to reopen discovery and other deadlines in part.
15 Bermuda asks the court to simply reset all deadlines in the scheduling order and give the parties 90
16 days to complete discovery. I prefer to give the parties the opportunity to work out a mutually
17 desirable schedule. Accordingly, the current scheduling order (Doc. 32) is vacated. The parties are
18 directed to meet and confer in good faith to work out a new schedule for discovery and other
19 deadlines. They must file a joint motion for approval of the amended discovery plan and scheduling
20 order (with the proposed amended scheduling order attached) by August 31, 2015, or show good
21 cause why they could not do so.

22 **B. Leave to amend is warranted.**

23 Bermuda has also demonstrated that it should be permitted to amend its complaint to plead

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25 ⁹ *Id.*

26 ¹⁰ *Pincay v. Andrews*, 389 F.3d 853, 860 (9th Cir. 2004).

27 ¹¹ Doc. 32 at 1.

28 ¹² Doc. 108 at 3.

1 claims arising from this alleged secret kickback agreement. This is Bermuda's first request to add
2 these claims; it has no track record of attempting in vain to cure deficiencies.¹³ I also do not find that
3 the timing of Bermuda's motion to amend shows undue delay, bad faith, or dilatory motive on
4 Bermuda's part. Bermuda offers a reasonable explanation for ignoring the documents for two years.
5 In April 2013, two weeks after Bermuda received those documents, the court entered summary
6 judgment on all of Bermuda's claims; EcoSteel quickly filed a notice of dismissal of its
7 counterclaim.¹⁴ Despite a flurry of motions, the case was presumptively over until April 2014, when
8 the summary-judgment order was reversed and EcoSteel's notice of voluntary dismissal was
9 stricken.¹⁵ Although those rulings revived the parties' competing equitable claims, Bermuda then
10 moved for summary judgment on them.¹⁶ That motion was denied in February 2015.¹⁷ Two months
11 later, Bermuda moved to amend its complaint and reopen the scheduling order.¹⁸

12 I also do not find that EcoSteel would be unduly prejudiced by permitting amendment. The
13 burden to show prejudice rests with EcoSteel,¹⁹ and EcoSteel has not met this burden. EcoSteel
14 suggests that the case is simply too old and too near trial to "send it right back to square one."²⁰ But
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17 ¹³ EcoSteel tangentially notes that Bermuda filed a motion to amend its complaint on April 12, 2013,
18 and made no mention of this kickback theory then. Doc. 109 at 14. But that motion was filed just
19 three weeks after EcoSteel produced the alleged smoking gun in a 12,000+ "document dump." Doc.
20 108 at 3. That proposed amended complaint was not intended to address this theory, so it is not part
21 of any repeated failure to cure deficiencies by amendment that might otherwise merit denial of leave
22 to amend.

23 ¹⁴ Docs. 39, 41.

24 ¹⁵ Docs. 80, 81.

25 ¹⁶ Doc. 83.

26 ¹⁷ Doc. 101.

27 ¹⁸ Docs. 107, 108.

28 ¹⁹ See *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987).

²⁰ Doc. 109 at 8.

1 the passage of time is not reason enough to preclude amendment.²¹ And Bermuda has sufficiently
2 demonstrated that the delay was not the result of bad faith but rather the natural consequence of the
3 unusual course of this litigation.

4 Ecosteel's futility arguments are unpersuasive. It contends that evidence produced in this
5 litigation disproves Bermuda's theory.²² But futility is not determined from an analysis of the
6 evidence, it's based on the sufficiency of the allegations. "A proposed amendment is futile only if no
7 set of facts can be proved under the amendment to the pleadings that would constitute a valid and
8 sufficient claim or defense."²³ Ecosteel has not shown that Bermuda has failed to state plausible
9 claims, just that it expects Bermuda cannot ultimately prove them. Whether Bermuda can ultimately
10 prove its claims is a question for another day and another motion.

11 The motion for leave to amend is granted.²⁴ Bermuda must file its First Amended Complaint
12 in the format proposed at Document 107-1 by August 10, 2015, and promptly serve it.

13 **C. The parties must show cause why the protective action should not be dismissed.**

14 Finally, because the inclusion of these kickback-scheme claims in this action renders
15 Bermuda's protective action before Judge Du in 2:15-cv-783-MDD-VCF duplicative, Bermuda has
16 until August 10, 2015, to show cause why that case should not be dismissed. Ecosteel will then have
17 until August 17, 2015, to file any response to that brief. No reply brief will be permitted. Bermuda's
18 response to this show-cause order and any responsive brief from Ecosteel should be filed both in this
19 action **and** in the protective action.

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22 ²¹ See, e.g., *Roberts v. Arizona Bd. of Regents*, 661 F.2d 796, 798 (9th Cir. 1981) ("Ordinarily, leave
23 to amend pleadings should be granted regardless of the length of time of delay by the moving party
absent a showing of bad faith by the moving party or prejudice to the opposing party.").

24 ²² Doc. 109 at 10-12.

25 ²³ *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988) (citing 3 J. Moore, Moore's
26 Federal Practice ¶ 15.08[4] (2d ed. 1974) and noting that the "proper test to be applied when
27 determining the legal sufficiency of a proposed amendment is identical to the one used when
considering the sufficiency of a pleading challenged under Rule 12(b)(6)").

28 ²⁴ Doc. 107.

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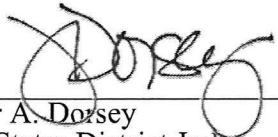
Conclusion

Accordingly, and with good cause appearing, IT IS HEREBY ORDERED that Bermuda Road Properties, LLC's Motion for Leave to Amend Complaint [Doc. 107] is GRANTED. **Bermuda Road must file its First Amended Complaint in the format attached as Document 107-1 by August 10, 2015.**

IT IS FURTHER ORDERED that Bermuda's Motion to Amend Scheduling Order [Doc. 108] is GRANTED in part. The current scheduling order [Doc. 32] is vacated. The parties must meet and confer in good faith to work out a new schedule for discovery and other deadlines and file a joint motion for approval of amended discovery plan and scheduling order (with the proposed amended scheduling order attached) by August 31, 2015, or show good cause why they could not do so.

Finally, Bermuda has until August 10, 2015, to show cause why 2:15-cv-783-MDD-VCF should not be dismissed. Ecosteel will then have until August 17, 2015, to file any response to Bermuda's brief. No reply brief will be permitted. Bermuda's response to this show-cause order and any responsive brief from Ecosteel must be filed both in this action **and** in the protective action.

Dated this 30th day of July, 2015.



Jennifer A. Dorsey
United States District Judge