UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KAREN MCPETERS, individually, and on Behalf of those individuals, persons and entities who are similarly situated, Plaintiff,	)	
V.	)	CIVIL ACTION NO. 4:10cv1103
THE HONORABLE FREDERICK E. EDWARDS, BARBARA GLADDEN ADAMICK, DISTRICT CLERK; MONTGOMERY COUNTY, TEXAS, and REED ELSEVIER, INC., d/b/a LexisNexis, Defendants.	)	

APPENDIX TO ALL DEFENDANTS' JOINT RESPONSE TO PLAINTIFF KAREN MCPETER'S AUGUST 13, 2010 MOTION TO AMEND COMPLAINT

Tab 1: *Baylor Univ. Med. Ctr. v. Van Enters, Inc.*, CIVIL ACTION NO. 3:03-CV-2392-G, 2005 U.S. Dist. LEXIS 44681 (N.D. Tex. Sept. 1, 2005)

Tab 2: *Dobard v. U.S. Dist. Court*, No. 93-17125, 1994 U.S. App. LEXIS 31282 (9th Cir. Nov. 4, 1994).

Tab 3: *Home Depot U.S.A., Inc. v. Nat'l Fire Ins. Co.*, Civil Action No. 3:06-CV-0073, 2007 U.S. Dist. LEXIS 66696 (N.D.Tex. Sept. 10, 2007)

Tab 4: *Sindoni v. Young*, No. 95-1205, 1995 U.S. App. LEXIS 26755 (4th Cir. Sept. 20, 1995)

Respectfully submitted,

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TAB 1

LEXSEE 2005 US DIST LEXIS 44681

BAYLOR UNIVERSITY MEDICAL CENTER, ET AL., Plaintiffs, VS. EPOCH GROUP, L.C., Defendant, VS. VAN ENTERPRISES, INC. EMPLOYEE BENEFIT TRUST, ET AL., Third-Party Defendants.

CIVIL ACTION NO. 3:03-CV-2392-G

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

2005 U.S. Dist. LEXIS 44681

September 1, 2005, Decided

PRIOR HISTORY: Baylor Univ. Medical Ctr. v. Epoch Group, L.C., 2004 U.S. Dist. LEXIS 21928 (N.D. Tex., Oct. 29, 2004)

COUNSEL: [*1] For Baylor University Medical Center, Our Children's House at Baylor, Baylor All Saints Medical, Baylor Medical Center - Irving, Baylor Medical Center at Grapevine, Plaintiffs: Larry Hallman, LEAD ATTORNEY, Emanuela Prister, Burford & Ryburn - Dallas, Dallas, TX.

For Epoch Group LC, Defendant: Elaine Cribbs Rizza, LEAD ATTORNEY, Angela Marie Rhad, The Rizza Group, Washington, PA.; Lee Foster Christie, LEAD ATTORNEY, Pope Hardwicke Christie Harrell Schell & Kelly, Fort Worth, TX.

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For Van Enterprise, Inc. Employee Benefit Trust, Van Enterprises, Inc., ThirdParty Defendants: Kimberly S Moore, Monica Alvarez, Strasburger & Price - Frisco, Frisco, TX.

JUDGES: A. JOE FISH, CHIEF JUDGE.

OPINION BY: A. JOE FISH

OPINION

MEMORANDUM OPINION AND ORDER

Before the court is the motion of third-party defendants Van Enterprises, Inc. Employee Benefit Trust and Van Enterprises, Inc. (collectively, "Van") to dismiss defendant/third-party plaintiff Epoch Group, [*2] Limited Company ("Epoch")'s claims against them for (1) lack of standing and (2) failure to state a claim on which relief can be granted. Also before the court is Epoch's motion for leave to file an amended third-party complaint against Van. For the reasons discussed below, the motions are granted in part and denied in part.

I. BACKGROUND

On May 5, 2004, the plaintiffs, Baylor University Medical Center, Our Children's House at Baylor, Baylor Medical Center at Grapevine, Baylor Medical Center -- Irving, and Baylor All Saints Medical (collectively, "Baylor"), filed their first amended complaint against Epoch seeking recovery for breach of contract and late payment of claims. *See generally* Plaintiffs' First

Amended Complaint.

On May 24, 2004, Epoch filed a motion for summary judgment under FED. R. Civ. P. 56 arguing that, as a matter of law, (1) Baylor is not entitled to recover for breach of contract or for late payment of claims because Epoch is not a party to any contract with Baylor, and (2) the Employee Retirement Income Security' Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, completely preempts Baylor's [*3] breach of contract claims. *See generally* Defendant's Brief in Support of Third Motion to Dismiss/For Summary Judgment. On August 18, 2004, this court denied that motion and determined, among other things, that Baylor's breach of contract claim was not completely preempted by ERISA. *See generally* August 18, 2004, Memorandum Order. In response to motions by Epoch to reconsider Epoch's motion to dismiss as it relates to ERISA preemption, or in the alternative for leave to file another motion to dismiss reasserting its ERISA preemption argument, this court denied both requests. October 29, 2004, Memorandum Order.

On March 16, 2005, this court issued its scheduling order setting the trial for the court's four-week docket beginning January 3, 2006. Order Establishing Schedule and Certain Pretrial Requirements ("scheduling order") P 2. Among the deadlines included in the court's scheduling order was a requirement that all amended pleadings were to be filed by June 16, 2005. [1] *Id.* P 3.

> 1 The scheduling order has been amended twice since it was issued: first, to extend the deadline for filing motions for summary judgment to September 8, 2005, *see* Order entered August 15, 2005, and, second, to extend the deadline for Epoch and Van to file dispositive motions against each other to October 4, 2005, *see* Order entered August 30, 2005.

[*4] On April 7, 2005, Epoch filed a third-party complaint against Van, Defendant's Original Third Party Complaint ("Third-Party Complaint"), which Van answered on June 20, 2005. Van's Original Answer to Third Party Complaint. On that same date (four days after the amended pleadings were due), Van also filed the instant motion to dismiss Epoch's third-party complaint. Van Enterprises, Inc. Employee Benefit Trust's and Van Enterprises, Inc.'s Motion to Dismiss Pursuant to Rule 12(b)(1) and 12(b)(6) ("Motion to Dismiss"). On July 12, 2005, Epoch filed this motion for leave to file a first amended third-party complaint against Van. Motion for Leave to File First Amended Third-Party Complaint ("Motion for Leave"). Van has not filed a response to this motion, [2] but both parties have argued Van's motion to dismiss. *See generally* Defendant's Response in Opposition to; Third-Party Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1) and Rule 12(b)(6) and Brief in Support of Defendant's Opposition to Third-Party Defendants' Motion ("Response"); Van Enterprises, Inc. Employee Benefit Trust's and Van Enterprises, Inc.'s Reply to Epoch Group L.C.'s Response to Motion to Dismiss Pursuant to [*5] Rule 12(b)(1) and 12(b)(6) ("Reply"); Defendant's Surreply to Third-Party; Defendants' Reply to Defendant's Response in Opposition to Third-Party Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1) and 12(b)(6) and Supporting Brief.

> 2 Although Van did not file a response to Epoch's motion for leave, the motion is opposed. Van did not agree to the motion when it was filed on July 12, 2005. *See* Certificate of Conference, Motion for Leave at 5. In addition, Van argues in its reply to Epoch Group L.C.'s response to motion to dismiss pursuant to Rule 12(b)(1) and 12(b)(6) ("Reply") that Epoch's motion for leave is untimely. Reply P 14.

II. ANALYSIS

The third-party defendants assert two grounds for dismissal: (1) the court lacks subject matter jurisdiction over this case because the third-party plaintiff does not have standing; and (2) the third-party plaintiff has failed to state a claim upon which relief can be granted. Motion to Dismiss at 2-3.

In general, a third-party defendant may raise by motion [*6] any of the defenses enumerated in Rule 12(b), and the principles that govern the disposition of Rule 12(b) motions in other contexts apply under FED. RULE Civ. P. 14 as well. 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE ("WRIGHT & MILLER") § 1455 (2d ed. 1990) at 431-32.

A. Motion for Dismissal under Rule 12(b)(1)

1. *Subject Matter Jurisdiction - Legal Standard*

Federal courts are courts of limited jurisdiction. See *Kokkonen v. Guardian Life Insurance Company of America,* 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed.

2d 391 (1994); *Owen Equipment and Erection Company v. Kroger,* 437 U.S. 365, 374, 98 S. Ct. 2396, 57 L. Ed. 2d 274 (1978). A federal court may exercise jurisdiction over cases only as expressly provided by the Constitution arid laws of the United States. *See* U.S. CONST. art. III §§ 1-2; see also *Kokkonen,* 511 U.S. at 377. Federal law gives the federal district courts original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. A party seeking relief in a federal district court bears the burden of establishing the subject matter [*7] jurisdiction of that court. *United States v. Hays,* 515 U.S. 737, 743, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995); *McNutt v. General Motors Acceptance Corporation of Indiana, Inc.,* 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936); *Langley v. Jackson State University,* 14 F.3d 1070, 1073 (5th Cir.), *cert. denied,* 513 U.S. 811, 115 S. Ct. 61, 130 L. Ed. 2d 19 (1994).

Rule 12(b)(1) of the Federal Rules of Civil Procedure authorizes the dismissal of a case for lack of jurisdiction over the subject matter. *See* FED. R. Civ. P. 12(b)(1). A motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction must be considered by the court before any other challenge because "the court must find jurisdiction before determining the validity of a claim." *Moran v. Kingdom of Saudi Arabia,* 27 F.3d 169, 172 (5th Cir. 1994) (internal citation omitted); see also *Ruhrgras AG v. Marathon Oil Company,* 526 U.S. 574, 577, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999) ("The requirement that jurisdiction be established as a threshold matter . . . is inflexible and without exception") (citation and internal quotation marks omitted).

On a [*8] Rule 12(b)(1) motion, which "concerns the court's 'very power to hear the case . . .[,] the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" *MDPhysicians & Associates, Inc. v. State Board of Insurance,* 957 F.2d 178, 181 (5th Cir.) (quoting *Williamson v. Tucker,* 645 F.2d 404, 413 (5th Cir.), *cert. denied,* 454 U.S. 897, 102 S. Ct. 396, 70 L. Ed. 2d 212 (1981)), *cert. denied,* 506 U.S. 861, 113 S. Ct. 179, 121 L. Ed. 2d 125 (1992). In ruling on a motion to dismiss under Rule 12(b)(1), the court may rely on: "1) the complaint alone; 2) the complaint supplemented by undisputed facts; or 3) the complaint supplemented by undisputed facts and the court's resolution of disputed facts." *MCG, Inc. v. Great Western Energy Corporation,* 896 F.2d 170, 176 (5th Cir. 1990) (citing *Williamson,* 645 F.2d at 413). When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits. *Hitt v. City of Pasadena,* 561 F.2d 606, 608 (5th Cir. 1977) (per curiam). This requirement [*9] prevents a court without jurisdiction from prematurely dismissing a case', with prejudice. *Id.*

2. *Epoch's Standing to Bring Third-Party Claims*

Van argues that Epoch's claims against Van should be dismissed under Federal Rule of Civil Procedure 12(b)(1) because this court lacks subject matter jurisdiction over Epoch's claims. Van asserts that although the plaintiff Baylor specifically states that it is not seeking benefits under an ERISA plan, Epoch's sole basis for joining Van in this suit is "pursuant to an ERISA plan." Therefore, Van argues, Epoch -- being neither a participant in, nor beneficiary of, an ERISA plan -- lacks standing under ERISA, and this court lacks subject matter jurisdiction. Motion to Dismiss at 4; Reply at 4. Moreover, Van maintains, Epoch lacks standing since it has; not alleged a dispute between Van and Epoch in its complaint. Reply at 5. Epoch responds that its third-party claims against Van are within this court's supplemental jurisdiction under 28 U.S.C. § 1367. Response at 6.

The policy underlying Rule 14 is to promote judicial economy by eliminating circuity of action. See, *e.* [*10] *g., Powell, Inc. v. Abney,* 83 F.R.D. 482, 485 (S.D. Tex. 1979); *Crude Crew v. McGinnis & Associates, Inc.,* 572 F. Supp. 103, 109 (E.D. Wis. 1983) ("The general purpose of Rule 14 is to avoid circuity of actions and to expedite the resolution of secondary actions arising out of or in consequence of the action originally instituted."). Rule 14 thus permits a defendant to bring into a civil suit any person "not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." FED. R. CIV. P. 14(a). Accordingly, Rule 12(b)(1) challenges to a court's subject matter jurisdiction over third-party claims will generally be unsuccessful since such proceedings have been considered ancillary to the main action and therefore do not require independent subject matter jurisdiction. 6 WRIGHT & MILLER § 1455 at 434.

Section 1367(a) provides that

> in any civil action of which the district

> courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the [*11] action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a). Congress, however, has limited this grant of subject matter jurisdiction. Section 1367(a) does not apply to claims by plaintiffs against parties made part of the action by Rule 14 if the original jurisdiction of the district court is based on 28 U.S.C. § 1332. [3] 28 U.S.C. § 1367(b). The practice commentary emphasizes that the limitation in § 1367(b) applies only to plaintiffs who attempt to assert claims against third-party defendants. [4] Practice Commentary § 1367 ("Subdivision (b) of § 1367 is concerned only with efforts of a plaintiff to smuggle in claims that the plaintiff would not otherwise be able to interpose."). This limitation does not apply to a third-party plaintiff's claims against a third-party defendant; it is well-settled that there need be no independent jurisdictional basis for a, defendant's claim against a third-party defendant if jurisdiction over the original parties exists via diversity of citizenship or presence [*12] of a federal question. 6 WRIGHT & MILLER § 1444 at 321-24 (citing *Fawvor v. Texaco, Inc.*, 387 F. Supp. 626, 629 (E.D. Tex. 1975), *aff'd*, 546 F.2d 636 (5th Cir. 1977)).

> 3 28 U.S.C. § 1332(a) provides that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $ 75,000, exclusive of interest and costs, and is between' [persons of diverse citizenship]." 28 U.S.C. § 1332(a).
>
> 4 The practice commentary states that: "D's impleader claim against X [a nondiverse third-party defendant] gets ancillary jurisdiction, and nothing in subsection (b) of § 1367 changes that." Practice Commentary, 28 U.S.C. § 1367.

The mere fact that a third-party claim arises from the same general facts as the original dispute is not sufficient, however; it will be dismissed if it is an entirely independent claim. *United States v. Joe Grasso and Son, Inc.*, 380 F.2d 749, 751 (5th Cir. 1967). [*13] In other words, third-party practice is proper under Rule 14 only if the third-party defendant is or may be liable to the defendant for all or part of the plaintiff's recovery, or the defendant attempts to pass on to the third party all or part of the liability asserted against the defendant. *Id.* (citing IA BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 426 at 664-69 (1960 ed.); 3 Moore's Federal Practice P 14.07 at 512 (2d ed. 1966)).

Here, there is no question that this court has original jurisdiction; over the dispute between Epoch and Baylor. [5] Epoch has been "haled into court against [its] will," *Owen Equipment and Erection Company*, 437 U.S. at 376, and seeks 'to assert claims, pursuant to Rule 14, which form part of the same case or controversy as the original action. The instant case represents a traditional use of third-party practice: derivative liability. *The Equitable Life Assurance Society of the United States, v. Lafferty*, No. 3:02-CV-2453-D, 2003 U.S. Dist. LEXIS 2031, 2003 WL 22946473, at *2 (N.D. Tex. Feb. 11, 2003) ("Because the liability of the third-party defendant to the defendant on; the impleader claim is derivative of the defendant's underlying [*14] liability to the plaintiff in the underlying case, the impleader claim by definition is concerned with the same transaction or occurrence, or common nucleus of operative fact, as the underlying suit."). Epoch seeks to shield itself from paying Baylor's claims by virtue of an Administration Agreement. [6] Under this Administration Agreement, Van retained Epoch to serve as Claims Supervisor, whereby Epoch processed claims for benefits and Van provided funding to pay for such claims. Response at 2. According to the response, Epoch was responsible for paying Baylor only if the services Baylor provided fell within coverage of the Plan. *Id.* at 3. Van and the Plan were then required to pay for claims processed by Epoch if the claims were covered by the Plan. *Id.* Upon resolution of the original claim, Van may be liable to Epoch for all or part of Baylor's claim against Epoch. Van's derivative liability to Epoch thus falls within the traditional use of third-party practice, precluding dismissal under Rule 12(b)(1).

> 5 The plaintiffs concede that there is diversity jurisdiction, as each of the plaintiffs is a Texas non-profit corporation and Epoch is a foreign corporation, and the amount in controversy exceeds $ 75,000. Plaintiffs' Brief in Support of Response to Epoch's Third Motion to Dismiss/For Summary Judgement at 2; see also Plaintiff's First Amended Complaints PP 1-2.

[*15]

> 6 Although Epoch did not attach the

> Administration Agreement to its original Third-Party Complaint against Van, that agreement was subsequently included in documentation related to the motion to dismiss and will therefore be considered by the court on Van's 12(b)(1) motion. *See* Exhibit B *attached to* Motion for Leave; Exhibit 1 *attached to* Response.

With regard to Van's argument that Epoch lacks standing in this third-party action because it did not allege an injury, *see* Motion to Dismiss at 5 and Reply P 10, third-party practice under Rule 14 does not require imminent injury. Third-party actions are proper even though the third-party defendant's liability is contingent. *Travelers Insurance Company v. Busy Electric Company,* 294 F.2d 139, 145 (5th Cir. 1961). In fact, Rule 14's "is or may be liable" language makes it clear that third-party practice is proper even though a third-party defendant's liability is not automatically established upon resolution of the third-party plaintiff's liability to the original plaintiff. 6 WRIGHT & MILLER § 1446 at 373 (citing [*16] *Powell,* 83 F.R.D. at 486; *Travelers Insurance Company,* 294 F.2d at 145). As already stated, Van "May be liable" to Epoch upon resolution of Baylor's original claim against Epoch, so Epoch does not lack standing for failure to allege an injury.

The court concludes that jurisdiction over Epoch's claims against the third-party defendants exists on the basis of section 1367(a). Accordingly, Van's motion to dismiss Epoch's third-party complaint for lack of subject matter jurisdiction is denied.

B. Motion for Dismissal under Rule 12(b)(6)

Failure to State a Claim - Legal Standard

Rule 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." FED. R. Civ. P. 12(b)(6). There are two primary principles that guide the court's determination of whether dismissal under Rule 12(b)(6) should be granted. First, a motion under Rule 12(b)(6) should be granted only if it appears beyond doubt that the nonmovant could prove no set of facts in support of its claims that would entitle it to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Leffall v. Dallas Independent School District,* 28 F.3d 521, 524 (5th Cir. 1994); [*17] see also *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.,* 677 F.2d 1045, 1050 (5th Cir. 1982) (citing 5B WRIGHT & MILLER § 1357; at 598 (1969), for the proposition that "the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted"), *cert. denied,* 459 U.S. 1105, 103 S. Ct. 729, 74 L. Ed. 2d 953 (1983). Second, the court must accept all well-pleaded facts as true and view them in the light most favorable to the nonmovant. See *Capital Parks, Inc. v. Southeastern Advertising and Sales System, Inc.,* 30 F.3d 627, 629 (5th Cir. 1994); *Norman v. Apache Corporation,* 19 F.3d 1017, 1021 (5th Cir. 1994); *Chrissy F. by Medley v. Mississippi Department of Public Welfare,* 925 F.2d 844, 846 (5th Cir. 1991). However, conclusory allegations and unwarranted factual deductions will not suffice to avoid a motion to dismiss. *United States ex rel. Willard v. Humana Health Plan of Texas Inc.,* 336 F.3d 375, 379 (5th Cir. 2003). In addition, a court must not look beyond the pleadings when determining whether a complaint states a claim upon which relief may be granted. *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.,* 690 F.2d 489, 499-500 (5th Cir. 1982), [*18] *cert. denied,* 464 U.S. 932, 104 S. Ct. 335, 78 L. Ed. 2d 305 (1983).

2. *Van's Motion to Dismiss Under Rule 12(b)(6)*

Third-party complaints are subject to the pleading requirements Of Rule 8 and must set forth a short and plain statement of the claim showing that defendant is entitled to relief from the third party. 6 WRIGHT & MILLER § 1453 at 417. Specifically, for complaints filed under Rule 14, the complaint must indicate that the third-party defendant is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the defendant. *Id.* at 417-18 (citing *Joe Grasso and Son, Inc.,* 380 F.2d at 751-52).

Epoch's original third-party complaint addresses Van's liability to Epoch for all or part of Baylor's claims. Specifically, Epoch's complaint alleges:

> 9. If the claims for benefits submitted by Baylor to EPOCH for medical services that Baylor provided as identified under either Count V(A) or V(B) are both covered and payable under the Plan then the Third-Party Defendants would be responsible for paying those claims, not EPOCH.
>
> 10. If EPOCH is found to be liable to

> Baylor with regard to either Count V(A) or Count V(B), as it relates [*19] to participants or beneficiaries in the Plan, then Third-Party Defendants are liable to EPOCH for any sums assessed against EPOCH with respect to Count V(A) and for any sums assessed against EPOCH with respect to Count V(B); relating to participants or beneficiaries in the Plan.

Third-Party Complaint PP 9-10. However, even if Epoch addresses liability sufficiently in order to satisfy Rule 14 requirements, Epoch's third-party complaint may still be dismissed for failure to state a claim in compliance with Rule 8 requirements. 6 WRIGHT & MILLER § 1453 at 417.

Since Epoch claims that its proposed amended complaint is merely clarifying its contractual claims against Van, *see* Response at 6, n.3, the court looks to that document to elucidate those claims. Essentially, Epoch argues that Van (*i.e.*, both Van Enterprises, Inc. Employee Benefit Trust and Van Enterprises, Inc.) breached a written contract (the Administration Agreement), as well as an oral or implied-in-fact contract. *See generally* Defendant's First Amended Third-Party Complaint ("Amended Complaint") at 2-6, *attached to* Motion for Leave as Exhibit 1. [7] However, since the court may not consider proposed [*20] amendments and documents not attached to the original complaint when deciding a motion under Rule 12(b)(6), *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996); *Carpenters Local Union No. 1846,* 690 F.2d at 499-500, the court returns to the original pleadings.

> 7 Although Van argues that Epoch seeks relief from Van solely on ERISA grounds, Reply PP 2, 5-6, Epoch explicitly concedes it lacks standing under ERISA. Response at 4. Therefore, the court will not discuss Van's arguments regarding alleged ERISA claims; instead, only the contractual claims asserted by Epoch will be addressed.

Under Texas law, [8] a breach of contract claim requires: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from the defendant's breach. *Kay v. North Texas Rod & Custom,* 109 S.W.3d 924, 927 (Tex. App.--Dallas 2003, no pet.). A contract [*21] in fact is implied where, despite the absence of any express declaration of intent by the parties, their acts are such as to indicate, according to common understanding and the ordinary courses of dealing between men, a mutual intent to contract. *A/S Hydraulico Works v. Fort Worth & Denver Railway Company,* 483 F. Supp. 518, 521 (S.D. Tex. 1980) (citing 13 Tex. Jur. 2d Contracts § 5). Such a contract can be formed by conduct. See *Live Oak Insurance Agency v. Shoemake,* 115 S.W.3d 215, 219 (Tex. App.--Corpus Christi 2003, no pet.). Although Rule 8 pleading requirements are minimal, a complaint based on breach of contract must describe the alleged terms of the contract in a sufficiently, specific manner to give the defendant notice of the nature of the claim. *American Realty Trust, Inc. v. Travelers Casualty and Surety Company of America,* 362 F. Supp. 2d 744, 753 (N.D. Tex. 2005). For instance, a claim on a written contract must either (1) quote relevant contractual language; (2) include a copy of the contract as an attachment; or (3) summarize the contract's purported legal effect. *Id.* (citing 5 WRIGHT & MILLER § 1235 at 393; FED. R. CIV. P. [*22] Official Form 3). Presumably, there is no reason why a party alleging an oral contract should be excused from providing a corresponding level of detail. *Id.*

> 8 As stated previously in note 5, subject matter jurisdiction for the original action (*Baylor v. Epoch*) is based on diversity of citizenship. Accordingly; these claims are controlled by Texas law. See *Erie Railroad Company v. Tompkins,* 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); *Rogers v. Corrosion Products, Inc.*, 42 F.3d 292, 295 (5th Cir.), *cert. denied,* 515 U.S. 1160, 115 S. Ct. 2614, 132 L. Ed. 2d 857 (1995).

Epoch's causes of action depend upon the existence of a contract or behavior of the parties evincing such a contract. In its pleading, however, Epoch fails to identify or attach any contract or agreement between itself and Van. Although Epoch argues that its complaint sufficiently states a breach of contract claim through the allegation that "Van Enterprises *retained* EPOCH to serve as the Claims Supervisor for the Plan . . .", Response at [*23] 5 (citing Third-Party Complaint P5), Epoch fails to allege the number of writings involved, their dates, the specific subject matter or terms of the contracts, or any other information which would give Van notice of the basis upon which Epoch may be entitled to relief. [9] In addition, Epoch has not alleged

facts regarding the behavior of the parties that would give rise to a possible implied-in-fact contract claim. Therefore, Epoch's petition does not include sufficient operative facts to support its breach of contract claims. See *Askanase v. Fatjo,* 148 F.R.D. 570, 573-74 (S.D. Tex. 1993) ("The cross-claims of the [cross-claimants] merely state in conclusory fashion that they are entitled to indemnity and/or contribution from [cross-defendants]. This falls far short of meeting the fair notice requirement of Rule 8."); cf. *McCann v. Texas City Refining, Inc.,* 984 F.2d 667, 674 (5th Cir. 1993) (plaintiff failed to state claim for tortious interference with employment contract where complaint did not allege existence of employment contract). In short, Epoch has failed to aver a set of facts, which, if proven, would entitle it to relief on its breach [*24] of contract claim. See *Conley,* 355 U.S. at 45-46.

> 9 As mentioned above, an unsigned "Administration Agreement" was attached to Epoch's response, see Exhibit 1*attached to* Response, and motion for leave, see Exhibit B *attached to* Motion for Leave, but not to its original third-party complaint. Consequently, the Administration Agreement cannot be considered on a motion to dismiss under Rule 12(b)(6). *Lovelace v. Software Spectrum Inc.,* 78 F.3d at 1017; *Carpenters Local Union No.* 1846, 690 F.2d at 499-500.

Accordingly, since Epoch has failed to give Van notice of the nature of its claim, Epoch's original third-party complaint is dismissed under Rule 12(b)(6).

C. Epoch's Motion for Leave to Amend Third-Party Complaint

If it appears that a more carefully drafted pleading might state a claim upon which relief could be granted, the court should give the claimant an opportunity to amend its claim rather than dismiss it. *Friedlander v. Nims,* 755 F.2d 810, 813 (11th Cir. 1985); [*25] *Taylor v. Dallas County Hospital District,* 976 F. Supp. 437, 438 (N.D. Tex. 1996). Epoch therefore argues, in support of its motion for leave, that granting leave to amend will "preserve its claims against Third-Party Defendants." Motion for Leave at 2. Epoch cites Rule 15(a) of the Federal Rules of Civil Procedure for the proposition that leave should be "freely given when justice so requires." *Id.* (citing FED. R. Civ. P. 15(a)). While this is a correct statement of the general rule regarding amendment of pleadings, "Rule 16(b) governs amendment of pleadings after a [district court's] scheduling order deadline has expired." *S&W Enterprises, L.L.C. v. South Trust Bank of Alabama, NA,* 315 F.3d 533, 536 (5th Cir. 2003). "Rule 16(b) provides that a scheduling order 'shall not be modified except upon a showing of good cause and by leave of the district judge.'" *Id.* at 535 (citing FED. R. Civ. P. 16(b)). "The good cause standard requires the 'party seeking relief to show that the deadlines cannot reasonably be met [*26] despite the diligence of the party needing the extension.'" *Id.* (citing 6A WRIGHT & MILLER § 1522.1 at 231). "Only upon the movant's demonstration of good cause to modify the scheduling order will the more liberal standard of Rule 15(a) apply to the district court's decision to grant or deny leave." [10] *Id.* at 536. The Fifth Circuit established a test in *S&W Enterprises* for determining whether an untimely motion to amend should be allowed, despite the existence of a scheduling order: "(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice." *Id.* at 536 (internal quotations and brackets excluded). As discussed below, three of the four factors weigh against granting Epoch leave to amend its original third-party complaint.

> 10 Federal Rule of Civil Procedure 15(a) provides that leave to amend should be "freely given when justice so requires." The Fifth Circuit has repeatedly held that Rule 15(a) evinces a liberal amendment policy. See, *e.g., Lowrey v. Texas A & M University System,* 117 F.3d 242, 245 (5th Cir. 1997); *Nance v. Gulf Oil Corporation,* 817 F.2d 1176, 1180 (5th Cir. 1987); *Youmans v. Simon,* 791 F.2d 341, 348 (5th Cir. 1986). A motion to amend under Rule 15(a), therefore, should not be denied unless there is a substantial reason to do so. *Jacobsen v. Osborne,* 133 F.3d 315, 318 (5th Cir. 1998) (citing *Leffall v. Dallas Independent School District,* 28 F.3d 521, 524 (5th Cir. 1994)).

[*27] 1. *Explanation for Failure to Timely Move for Leave to Amend*

The first factor weighs against Epoch because it has offered no adequate basis for its failure to amend prior to the court-ordered deadline. Epoch bears the burden of showing that, despite its due diligence, the deadlines of the scheduling order could not be met. However, in its

motion for leave, Epoch merely addresses the requirements under Rule 15(a). *See generally* Motion for Leave at 2-4. According to Epoch, the motion was untimely because Epoch had no reason to believe its third-party complaint needed amendment until Van filed its motion to dismiss after the scheduling order deadline expired. *Id.* at 3.

The motion to amend in this case was made more than three years after the events in question had occurred. It was made almost two years after the filing of Baylor's original complaint, and almost four weeks after the scheduling order's deadline for amended pleadings. *See generally* Docket Sheet; Scheduling Order. Despite such delay, the proposed amendment appears to rely on an agreement known to Epoch from the time of its original pleading, but not included therein. *See* "Administration Agreement," [*28] *attached to* Epoch's Motion for Leave as Exhibit B. Epoch therefore could have clarified its theory at that time or, at the very least, within the two months remaining before the scheduling order deadline. Consequently, Epoch's only explanation for the delay -- notice that its third-party complaint may need amendment upon Van's motion to dismiss -- "is tantamount to no explanation at all." *S & W Enterprises,* 315 F.3d at 536. Nor does the bare assertion that "the proposed amendment will not cause undue prejudice to Third-Party Defendants," Motion for Leave at 3, offer an explanation for its failure to timely move for leave to amend. *STMicroelectronics, Inc. v. Motorola, Inc.*, 307 F. Supp. 2d 845, 850-51 (E.D. Tex. 2004). The amended claims are not the result of new information discovered in investigations, recent breach of agreements between the parties, or disclosure of facts previously hidden by nonmovants; instead, Epoch seeks to amend its complaint to avoid dismissal under Rule 12(b)(6). Motion for Leave at 2. However, the facts on which Epoch's breach of contract claim is based were fully known to Epoch from the outset of the lawsuit and, indeed, [*29] were relied on by Epoch, though under a different theory, in its original third-party complaint. It was not until that theory was challenged by Van in its motion to dismiss that the amendment was tendered. Therefore, this factor weighs against Epoch.

2. *Importance of the Amendment*

While it is important for a court to allow amendment of claims so that cases may be heard on their merits, Epoch's failure to timely amend its claims undercuts the importance of the amended complaint. Accordingly, the court does not weigh this factor in favor of granting or denying leave. However, should this court grant Van's motion to dismiss without prejudice, Epoch is free to file an independent claim for relief against Van in this forum or another, particularly if new facts come to light or Epoch is able to recast its claim in compliance with Rule 8 standards. [11] Therefore, all is not lost for Epoch.

> 11 Dismissal with prejudice for failure to state a claim is a decision on the merits and essentially ends the plaintiff's lawsuit. *Hitt v. City of Pasadena,* 561 F.2d 606, 608 (5th Cir. 1977); *see also* Rule 41. However, Rule 41(b) expressly provides that the district court may specify that a dismissal is without prejudice; in such circumstances, a second suit is not barred. 9 WRIGHT & MILLER § 2373 at 401. "The cardinal principle is that the second action is precluded unless the new allegations supply a material deficiency of the complaint in the first action." *Estevez v. Nabers,* 219 F.2d 321, 323 (5th Cir. 1955). It appears to the court that the present circumstances merit a dismissal without prejudice.

[*30] 3. *Potential Prejudice in Allowing the Amendment*

The third factor also weighs against Epoch. Van may suffer prejudice if a cause of action based on additional documents is added approximately four months prior to trial (January 2006) and within approximately two months of the close of discovery (October 31, 2005). *See* Scheduling Order PP 2, 6. While the court could extend the discovery period in order to cure this prejudice, such an extension would cause undue delay and possibly require the court to reset the current trial date and/or extend other pretrial deadlines. [12]

> 12 The court notes that since Van has not engaged in any discovery to date, Motion for Leave at 3, Van could effectively conform any future discovery to Epoch's first amended complaint. However, the potential for delay -- given that Van is beginning discovery within such a compressed time frame -- leads the court to be concerned that the trial date would nonetheless be affected.

4. *Availability of a Continuance to Cure Such Prejudice*

[*31] In light of Epoch's failure to present any adequate explanation for its untimely motion, such disruption to the court's docket is unwarranted. See *Reliance Insurance Company v. Louisiana Land and Exploration Company,* 110 F.3d 253, 258 (5th Cir. 1997) ("District judges have the power to control their dockets by refusing to give ineffective litigants a second chance to develop their case"); *Guillory v. Domtar Industries Inc.,* 95 F.3d 1320, 1332 (5th Cir. 1996) ("It is well established that the district court is entitled the [sic] manage its court room and docket"); *Freeman v. Continental Gin Company,* 381 F.2d 459, 469 (5th Cir. 1967) ("A busy district court need not allow itself to be imposed upon by the presentation of theories seriatim"). The fourth factor, therefore, also weighs against granting Epoch leave to amend.

Epoch has not shown that it was diligent in its attempt to file for leave to amend its third-party complaint by the deadline established by the court's original scheduling order. Epoch has failed to show good cause, pursuant to FED. R. Civ. P. 16(b), to modify the scheduling [*32] order, and its motion for leave to amend is accordingly denied. [13]

13 Because Epoch has failed to meet the good cause standard of Rule 16(b), the court need not address whether Epoch's motion satisfies the requirements of Rule 15(a). See *S & W Enterprises,* 315 F.3d at 536.

III. CONCLUSION

For the reasons stated above, Van's motion to dismiss under 12(b)(1) is **DENIED,** Van's motion to dismiss under 12(b)(6) is **GRANTED,** and Epoch's motion for leave to amend its third-party complaint is **DENIED.** Under the circumstances of this case, Epoch's claims against Van are **DISMISSED** without prejudice.

SO ORDERED.

September 1, 2005.

A. JOE FISH

CHIEF JUDGE

TAB 2

LEXSEE 1994 U.S. APP LEXIS 31282

RAY DOBARD, Plaintiff-Appellant, v. THE UNITED STATES DISTRICT COURT FOR NORTHERN CALIFORNIA, et al., Defendant-Appellee.

No. 93-17125

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1994 U.S. App. LEXIS 31282

November 1, 1994, ** Submitted

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, Dobard's request for oral argument is denied. Because we deny Dobard' request for oral argument, we also deny his request for a computer-aided transcription system.

November 4, 1994, Filed

NOTICE: [*1] THIS DISPOSITION IS NOT APPROPRIATE FOR PUBLICATION AND MAY NOT BE CITED TO OR BY THE COURTS OF THIS CIRCUIT EXCEPT AS PROVIDED BY THE 9TH CIR. R. 36-3.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 43 F.3d 1478, 1994 U.S. App. LEXIS 39896.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of California. D.C. No. CV-93-00669-SBA. Saundra B. Armstrong, District Judge, Presiding

DISPOSITION: AFFIRMED.

JUDGES: Before: WALLACE, Chief Judge, GOODWIN and NORRIS, Circuit Judges.

OPINION

MEMORANDUM *

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Raymond Dobard appeals pro se the district court's dismissal of his action against the United States District Court for the Northern District of California, two district court judges, the clerk of the court, and several deputy clerks. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Dobard brought this action pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* [1] 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971), [*2] alleging that his equal protection rights were violated because he was denied equal access to the courts based on two pre-filing review orders regarding Dobard and his treatment as a deaf litigant.

1 Although Dobard designated his action as brought under 42 U.S.C. § 1983, because the defendants all allegedly were acting under color of federal law, Dobard's action is more properly characterized as a *Bivens* action. *See Mullis v. United States Bankruptcy Court,* 828 F.2d 1385,

1387 (9th Cir. 1987) (citing *Bivens,* 403 U.S. at 388), *cert. denied,* 486 U.S. 1040, 100 L. Ed. 2d 616, 108 S. Ct. 2031 (1988).

We review de novo the district court's dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). *Tanner v. Heise,* 879 F.2d 572, 576 (9th Cir. 1989). In determining whether a complaint [*3] states a claim, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Love v. United States,* 915 F.2d 1242, 1245 (9th Cir. 1989).

I

Judicial Immunity

Dobard contends that the district court erred by dismissing his claims against Judges Schwarzer and Patel on the ground that the claims were barred by judicial immunity. This contention lacks merit.

Judges are absolutely immune from section 1983 liability for damages for their judicial acts, "even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Stump v. Sparkman,* 435 U.S. 349, 356, 55 L. Ed. 2d 331, 98 S. Ct. 1099 (1978); *Ashelman v. Pope,* 793 F.2d 1072, 1075 (9th Cir. 1986). An act is "judicial" when it is a function normally performed by a judge and the parties dealt with the judge in his or her judicial capacity. *Sparkman,* 435 U.S. at 362; *Crooks v. Maynard,* 913 F.2d 699, 700 (9th Cir. 1990). Although [*4] judicial immunity does not bar actions seeking prospective injunctive relief, *Pulliam v. Allen,* 466 U.S. 522, 541-42, 80 L. Ed. 2d 565, 104 S. Ct. 1970 (1984), this rule does not apply to constitutional tort actions brought pursuant to *Bivens. Mullis,* 828 F.2d at 1394.

Here, Dobard alleged that Judge Schwarzer and Judge Patel violated his constitutional rights by issuing pre-filing review orders against Dobard. Dobard also alleged that Judge Schwarzer violated his constitutional rights by conducting a status conference without a computer-assisted transcription system. Dobard sought damages, declaratory, and injunctive relief.

Because the allegations in Dobard's complaint concern actions taken by the judges in their judicial capacity, Dobard's claims are barred by judicial immunity. *See Stump,* 435 U.S. at 356-57 (claims for damages); *Mullis,* 828 F.2d at 1394 (claims for declaratory and injunctive relief). Accordingly, the district court properly dismissed Dobard's claims against Judges Schwarzer and Patel [*5] as barred by judicial immunity. *See Tanner,* 879 F.2d at 576.

II

Quasi-Judicial Immunity

Dobard also contends that the district court erred by dismissing his claims against the clerk of the court and several deputy clerks on the ground that the claims are barred by quasi-judicial immunity. This contention lacks merit.

"Court clerks have absolute quasi-judicial immunity from damages for civil rights violations when they perform tasks that are an integral part of the judicial process." *Mullis,* 828 F.2d at 1390. "When judicial immunity is extended to officials other than judges, it is because their judgments are functionally comparable to those of judges--that is, because they, too, exercise a discretionary judgment as part of their function." *Antoine v. Byers & Anderson, Inc.,* 124 L. Ed. 2d 391, 113 S. Ct. 2167, 2171-72 (1993) (quotation omitted). Where a clerk files or refuses to file a document with the court, he is entitled to quasi-judicial immunity for his actions, provided the acts complained of are within the clerk's jurisdiction. *Mullis,* 828 F.2d at 1390. [*6] The filing of a complaint or petition is an integral part of the judicial process, and court clerks are the officials through whom such filing is done. *Id.*

Here, Dobard alleged that the clerk of the court and two deputy clerks violated his constitutional rights when they failed to file his complaints pursuant to the pre-filing review orders. All of the acts Dobard alleged the clerks committed were integral parts of the judicial process. *See id.* Moreover, Dobard did not allege actions on the part of the clerks "done in the clear absence of all jurisdiction." *See id.* Thus, the clerks were entitled to quasi-judicial immunity from civil liability for their actions. *See id.* Accordingly, the district court properly dismissed Dobard's claims against the clerks. *See Tanner,* 879 F.2d at 576.

III

Other Claims

A. Leave to Amend

Dobard contends that the district court erred by denying him leave to amend his complaint to add the Cities of Oakland and Berkeley and Alameda County as defendants. This contention lacks merit.

The denial of leave to amend is within the district court's discretion. *Allen v. City of Beverly Hills,* 911 F.2d 367, 373 (9th Cir. 1990). [*7] Pro se plaintiffs should be given an opportunity to amend their complaint to overcome any deficiencies unless it clearly appears that the deficiencies cannot be overcome by amendment. Here, the proposed amendments would have been futile. *See id.* at 374. Accordingly, the district court did not abuse its discretion by denying Dobard leave to amend his complaint. *See id.* at 373-74.

B. Extension of Time

Dobard contends that the district court erred by denying his motion for an enlargement of time to oppose defendants' motion to dismiss. This contention lacks merit.

Fed. R. Civ. P. 6(b)(2) permits enlargement of any period of time prescribed by local rules "where the failure to act was the result of excusable neglect." We must therefore determine whether the district court erred by concluding that Dobard failed to set forth facts that demonstrate excusable neglect. *Rutledge v. Electric Hose & Rubber Co.,* 511 F.2d 668, 675 (9th Cir. 1975). The "determination of excusable neglect is left to the sound discretion of the district court." *Rodgers v. Watt,* 722 F.2d 456, 460 (9th Cir. 1983) [*8] (en banc) (discussing the excusable neglect standard in the context of Rule 60(b)(1)). Under the abuse of discretion standard, we must affirm unless we are "left with the definite and firm conviction that the court committed a clear error of judgment in reaching its conclusion after weighing the relevant factors." *United States v. BNS, Inc.,* 858 F.2d 456, 464 (9th Cir. 1988).

Here, Dobard requested an extension of time due to a critical illness he alleges was caused during a hearing before Judge Legge of the Northern District on September 15, 1993. The district court denied Dobard's motion, noting that his opposition was due September 9, 1993, nearly one week prior to Dobard's alleged illness. Furthermore, the district court found that Dobard had failed to show excusable neglect because he failed to substantiate his recent illness and was well enough to file two lengthy motions between September 14, 1993 and October 5, 1993. Based on these circumstances, the district court did not abuse its discretion by denying Dobard's motion. *See id.*

C. Recusal

Dobard contends that Judge Armstrong abused her discretion by failing to recuse herself under 28 U.S.C. § 455. [*9] Section 455 requires recusal only if the judge's alleged bias of prejudice "stems from an extrajudicial source and not from conduct or rulings made during the course of the proceedings." *Toth v. Trans World Airlines, Inc.,* 862 F.2d 1381, 1388 (9th Cir. 1988).

Here, Dobard failed to link any alleged bias on the part of Judge Armstrong to any extrajudicial source. Rather, Dobard's declaration accompanying the recusal motion draws an inference of bias from the judge's orders (1) denying him leave to file his complaint pursuant to a pre-filing review order, (2) imposing sanctions against him, and (3) denying his request for an extension of time. Because the alleged incidents involved the judge's performance while presiding over Dobard's case rather than any extrajudicial source, the motion was properly denied. *See id.*

AFFIRMED. [2]

2 Appellees request that we issue a pre-filing review order requiring Dobard to seek approval from the court before filing any documents other than one opening and one reply brief per appeal. We decline to do so here due to the extreme nature of such orders. *See De Long v. Hennessey,* 912 F.2d 1144, 1147-48 (9th Cir.), *cert. denied,* 111 S. Ct. 562 (1991).

[*10]

TAB 3

LEXSEE 2007 US DIST LEXIS 66696

HOME DEPOT U.S.A., INC., Plaintiff, VS. NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, Defendant-Third-Party Plaintiff VS. EXPRESS SITE PREPARATION, INC. and AMERICAN EQUITY INSURANCE COMPANY, Third-Party Defendants.

Civil Action No. 3:06-CV-0073-D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

2007 U.S. Dist. LEXIS 66696

September 10, 2007, Decided
September 10, 2007, Filed

PRIOR HISTORY: Home Depot U.S.A., Inc. v. Nat'l Fire Ins. Co., 2007 U.S. Dist. LEXIS 46922 (N.D. Tex., June 27, 2007)

COUNSEL: [*1] For Home Depot USA Inc., Plaintiff: Arthur K Smith, LEAD ATTORNEY, Law Offices of Arthur K Smith, Allen, TX; Kevan I Benkowitz, Law Offices of Kevan I Benkowitz PC, Plano, TX.

For National Fire Insurance Company of Hartford, Defendant: Greta A Matzen, LEAD ATTORNEY, Claudia K Frey, Colliau Elenius Murphy Carluccio Keener & Morrow, Dallas, TX.

For National Fire Insurance Company of Hartford, ThirdParty Plaintiff: Greta A Matzen, LEAD ATTORNEY, Claudia K Frey, Colliau Elenius Murphy Carluccio Keener & Morrow, Dallas, TX.

For American Equity Insurance Company, ThirdParty Defendant: Ellen G Tagtmeier, LEAD ATTORNEY, Robert C Tarics, Gordon & Rees - Houston, Houston, TX; Matthew D Murphey, Tracy Graves Wolf, Gordon & Rees, Dallas, TX.

For National Fire Insurance Company of Hartford, Counter Defendant: Greta A Matzen, LEAD ATTORNEY, Claudia K Frey, Colliau Elenius Murphy Carluccio Keener & Morrow, Dallas, TX.

JUDGES: SIDNEY A. FITZWATER, UNITED STATES DISTRICT JUDGE.

OPINION BY: SIDNEY A. FITZWATER

OPINION

MEMORANDUM OPINION AND ORDER

The court revisits this case in response to plaintiff's second motion for summary judgment, which addresses a limited issue left unresolved by the court's prior summary judgment ruling, and to [*2] decide whether defendant should be granted leave to amend its answer. For the reasons that follow, the court grants plaintiff's second motion for summary judgment and denies defendant's motion for leave to amend.

I

Plaintiff Home Depot U.S.A., Inc. ("Home Depot") sues defendant National Fire Insurance Company of Hartford ("National Fire"), contending that National Fire

failed to comply with a contractual duty to defend Home Depot against claims asserted in a Texas state court lawsuit, *Boxcars Properties, Ltd. v. W. Hills Joint Venture,* No. 22433 (278th Dist. Ct., Walker County, Tex.) (the *"Boxcars Litigation"*). In a prior opinion in this case, *Home Depot U.S.A., Inc. v. National Fire Ins. Co.,* 2007 U.S. Dist. LEXIS 20032, 2007 WL 846525 (N.D. Tex. Mar. 21, 2007) (Fitzwater, J.) (*"Home Depot I"*), the court granted Home Depot's motion for summary judgment on its breach of contract claim against National Fire "to the extent of holding that National Fire breached its duty to defend Home Depot in the *Boxcars Litigation."* 2007 U.S. Dist. LEXIS 20032*[WL]* at *9. The court "limit[ed] its grant of summary judgment to liability alone." 2007 U.S. Dist. LEXIS 20032*[WL]* at *8. It declined to award all the relief that Home Depot sought in its motion, explaining:

> Home Depot maintains [*3] that it is entitled to recover $ 128,708.47 for the attorney's fees and costs it incurred in defending its interests in the *Boxcars Litigation.* This figure, however, appears to include not only expenses that Home Depot incurred in defending itself in the *Boxcars Litigation* but some of the attorney's fees and costs it has incurred in prosecuting the instant case. This potentially blends two different decisions, one to be made by the trier of fact and the other to be made by the court. Attorney's fees and costs incurred in the *Boxcars Litigation* defense are determined by the trier of fact as part of Home Depot's breach of contract claim. Those expended in prosecuting the present lawsuit are awarded by the court under the procedures specified in Fed. R. Civ. P. 54(d) and N.D. Tex. Civ. R. 54.1. The court is therefore unable to grant summary judgment awarding Home Depot specific relief on its breach of contract claim without the possibility of awarding duplicative attorney's fees and costs. It will therefore limit its grant of summary judgment to liability alone.

Id.

Home Depot later obtained leave of court under N.D. Tex. Civ. R. 56.2(b) to file a second motion for summary judgment on the [*4] remaining issue of attorney's fees and expenses. *See Home Depot U.S.A., Inc. v. Nat'l Fire Ins. Co. of Hartford,* 2007 U.S. Dist. LEXIS 46922, 2007 WL 1969752, at *2 (N.D. Tex. June 27, 2007) (Fitzwater, J.). Home Depot then filed its second motion for summary judgment. Nine days after Home Depot obtained leave to file the motion, National Fire sought leave to file a first amended original answer, affirmative defenses, and original counterclaim. [1]

> 1 Although it does not affect the disposition of this motion, the court notes that use of the term "original" is a misnomer in federal practice. The term "original" probably emanates from Texas state procedure. *See* Tex. R. Civ. P. 46 (referring to "original answer"); *but cf.* Tex. R. Civ. P. 97(a) and (b) (referring to "a counterclaim"). Federal procedure, however, does not use the term "original" when referring to an answer or a counterclaim. *See* Fed. R. Civ. P. 7(a) ("There shall be . . . an answer . . . ."); 13(a) and (b) (referring to "a counterclaim").

The original deadline established by the court's Fed. R. Civ. P. 16(b) scheduling order for filing motions for leave to amend pleadings was April 1, 2007, but the court extended the deadline to August 15, 2007 in response [*5] to National Fire's unopposed motion. National Fire sought this relief on the ground that it needed time to develop its third-party claims. Among the amendments that National Fire seeks to make is one asserting a new counterclaim against Home Depot. National Fire relies on this proposed counterclaim to oppose summary judgment. [2] Therefore, the court must first address National Fire's motion for leave to amend before considering Home Depot's second motion for summary judgment.

> 2 National Fire also seeks leave to assert new affirmative defenses. In considering National Fire's motion for leave, however, the court will focus on the counterclaim, because it is alone sufficient to warrant denying the motion.

II

A

National Fire alleges in its proposed counterclaim that its duty to defend Home Depot in the *Boxcars Litigation* gives rise to a contractual subrogation

right--that is, a right to step into Home Depot's shoes--regarding any of Home Depot's claims against other insurers arising out of the *Boxcars Litigation.* One of the insurers against whom Home Depot allegedly has a claim is American Equity Insurance Company ("American Equity"), who was joined as a third-party defendant in November 2006. [*6] National Fire maintains that Home Depot impaired its subrogation rights by failing to give American Equity timely notice of the *Boxcars Litigation.* The *Boxcars Litigation* commenced on or about February 17, 2004, but Home Depot did not notify American Equity of the lawsuit until August 8, 2005. National Fire asserts that this effectively precludes any recovery for litigation costs incurred before August 8, 2005. Accordingly, it seeks to offset its liability on the insurance contract by the amount of defense costs it will be unable to recover due to the delayed notice.

B

"It is settled that the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court." *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 330, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971). [3] Leave to amend pleadings "shall be freely given when justice so requires." Rule 15(a). Granting leave to amend, however, "is by no means automatic." *Wimm v. Jack Eckerd Corp.,* 3 F.3d 137, 139 (5th Cir. 1993) (quoting *Addington v. Farmer's Elevator Mut. Ins. Co.,* 650 F.2d 663, 666 (5th Cir. Unit A July 1981)). The district court may consider factors such as undue delay, bad faith or dilatory motive on the part of the [*7] movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment. *Id.* (citing *Foman v. Davis,* 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)).

> 3 Because National Fire filed its motion for leave to amend before the court-ordered deadline, the motion is analyzed under Rule 15(a).

"Perhaps the most important factor listed by the Court [in *Foman*] and the most frequent reason for denying leave to amend is that the opposing party will be prejudiced if the movant is permitted to alter his pleading." 6 Charles Alan Wright et al., *Federal Practice and Procedure* § 1487, at 613 (2d ed. 1990). For example, a change may be deemed prejudicial "if the amendment substantially changes the theory on which the case has been proceeding and is proposed late enough so that the opponent would be required to engage in significant new preparation." *Id.* at 623. Leave may also be denied "if the court determines that the proposed amendment would result in defendant being put to added expense and the burden of a more complicated and lengthy trial." *Id.* at 626. "As a general rule, the risk of substantial prejudice increases with the passage of time." *Id.* § 1488, [*8] at 670.

Additionally, "[t]his court will 'carefully scrutinize a party's attempt to raise new theories of recovery by amendment when the opposing party has filed a motion for summary judgment.'" *Barrow v. Greenville Indep. Sch. Dist.,* 2001 U.S. Dist. LEXIS 20120, at *3 (N.D. Tex. Dec. 4, 2001) (Fitzwater, J.) (quoting *Parish v. Frazier,* 195 F.3d 761, 764 (5th Cir. 1999) (per curiam)). This principle applies with equal force to a new counterclaim that could defeat a summary judgment motion. The court has frequently found prejudice when a party seeks leave to amend after the opposing party has filed a summary judgment motion. *See, e.g., AMS Staff Leasing, NA, Ltd. v. Associated Contract Truckmen, Inc.,* 2005 U.S. Dist. LEXIS 28919, 2005 WL 3148284, at *11 (N.D. Tex. Nov. 21, 2005) (Fitzwater, J.) (denying motion for leave to amend after summary judgment motion filed); *see also Overseas Inns S.A. P.A. v. United States,* 911 F.2d 1146, 1151 (5th Cir. 1990) (holding that "'[t]o grant . . . leave to amend is potentially to undermine [a party's] right to prevail on a motion that necessarily was prepared without reference to an unanticipated amended complaint . . . . A party should not, without adequate grounds, be permitted [*9] to avoid summary judgment by the expedient of amending its complaint.'") (quoting this court's opinion below). *A fortiori,* prejudice can easily be found where, as here, leave is first sought after the court has granted summary judgment.

C

Home Depot filed this lawsuit on January 15, 2006. Only after Home Depot moved for and obtained summary judgment in *Home Depot I,* obtained leave to file a second summary judgment motion on June 27, 2007, and over 18 months had elapsed since suit was filed, did National Fire move for leave to amend. Following the court's decision in *Home Depot I,* the only issue that remains between Home Depot and National Fire is the amount of attorney's fees and costs that Home Depot is entitled to recover from National Fire for defending its

interests in the *Boxcars Litigation* and for prosecuting the instant breach of contract claim. *Home Depot I,* 2007 U.S. Dist. LEXIS 20032, 2007 WL 846525, at *8. Granting National Fire leave to assert a new counterclaim *after* Home Depot has obtained summary judgment and *after* Home Depot has filed a second summary judgment motion that, if granted, will result in a final judgment in its favor, would be patently prejudicial.

National Fire maintains that its dilatory [*10] conduct is justified because it could not have raised the counterclaim earlier. It posits that, until the court decided in *Home Depot I* that it was contractually liable to Home Depot, National Fire had no subrogation rights to assert and could not have sued Home Depot for impairing these rights. The court disagrees.

First, the premise that National Fire's subrogation rights arose only after the court found it liable on the insurance contract is mistaken. The court's ruling in *Home Depot I* did not create National Fire's duty to defend Home Depot in the *Boxcars Litigation;* rather, the duty was created by the parties' contract, which was already in existence at the time of the *Boxcars Litigation. See Home Depot I,* 2007 U.S. Dist. LEXIS 20032, 2007 WL 846525, at *9 (holding that National Fire had duty to defend Home Depot in *Boxcars Litigation*). Consequently, any subrogation rights corresponding with that duty would also have existed at the time of the *Boxcars Litigation.* National Fire could have asserted these rights at any time. Apparently, it opted not to do so because this would have required that it acknowledge the underlying duty.

Second, it was unnecessary for the court to determine contractual liability before [*11] National Fire became aware of, or raised, a claim based on its alleged subrogation rights. This is demonstrated by National Fire's third-party complaint filed against American Equity in November 2006, in which it asserted a contingent right of subrogation in the event it was held liable on the insurance contract. National Fire could similarly have brought a counterclaim against Home Depot based on the impairment of that right, which was in fact required under Rule 13(a) (with inapplicable exceptions, making compulsory any counterclaim arising out of same transaction or occurrence as opposing party's claim).

Furthermore, in evaluating the potential prejudice to Home Depot arising from granting leave to amend, the court also considers the circumstances and effect of granting National Fire's March 30, 2007 motion to extend pretrial deadlines. Had the motion been denied, National Fire's present motion for leave to amend would have been filed after the court-ordered deadline for filing such motions. To obtain the relief that National Fire now seeks, it would have been required first to satisfy the Rule 16(b) good-cause standard for amending the scheduling order and then to have met the Rule 15(a) [*12] standard for obtaining leave to amend. *See, e.g., S&W Enters., L.L.C. v. SouthTrust Bank of Ala., N.A.,* 315 F.3d 533, 536 (5th Cir. 2003) ("Only when the movant's demonstration of good cause to modify the scheduling order will the more liberal standard of Rule 15(a) apply to the district court's decision to grant or deny leave."). National Fire's motion for an extension was not opposed, however, and the court granted it. Home Depot maintains that it did not oppose the motion because National Fire had agreed to stipulate to its claimed attorney's fees and costs. National Fire denies the existence of such an agreement.

Regardless whether there was such an agreement, Home Depot will plainly suffer prejudice due to National Fire's reliance on an erroneous (or at least incomplete) basis to justify extending the deadline for filing motions for leave to amend. National Fire represented only that it needed more time to pursue its third-party claims, and it neither suggested nor disclosed that it intended to file a new counterclaim against Home Depot. It is inconceivable to conclude that, had Home Depot known its own interests were at risk, it would not have opposed the motion.

Accordingly, for [*13] the reasons explained, the court holds that National Fire's motion for leave to amend should be denied based on the clear prejudice that Home Depot will suffer if National Fire is allowed at this late date to assert a new counterclaim. [4]

> 4 If National Fire desires to revise its proposed amended pleading to address claims against other parties who remain in the case, it may move for leave to amend within 14 days of the date this memorandum opinion and order is filed. If, as to parties other than Home Depot, the revised pleading is substantially the same as the one the court is now denying, the court will treat it as if it was filed before the August 15, 2007 deadline, meaning that National Fire need only satisfy the

Rule 15(a), not the Rule 16(b), standard.

III

The court now turns to Home Depot's motion for summary judgment on the issue of attorney's fees and expenses incurred in the *Boxcars Litigation.*

As the party bearing the burden of proof on damages, Home Depot must establish the amount of its fees and expenses "'beyond peradventure.'" *Bank One, Tex., N.A. v. Prudential Ins. Co. of Am.*, 878 F. Supp. 943, 962 (N.D. Tex. 1995) (Fitzwater, J.) (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986)).

Home [*14] Depot seeks $ 109,482.39 in consequential damages from defending itself in the *Boxcars Litigation,* composed of $ 93,097.00 in attorney's fees and $ 16,385.39 in litigation expenses. It also seeks its attorney's fees, court costs, and expenses incurred in litigating the present case. National Fire does not dispute the amount of damages that Home Depot seeks for defending itself in the *Boxcars Litigation.* Rather, as discussed above, it relies on a proposed new counterclaim to defeat summary judgment, for which leave to file the pleading has been denied. Considering the evidence on which Home Depot relies, and in the absence of a genuine issue of material fact, the court holds that Home Depot is entitled to summary judgment awarding it $ 109,482.39 in damages from National Fire. The court also holds that Home Depot is entitled to recover its attorney's fees, taxable costs, and recoverable litigation expenses for prosecuting the instant breach of contract action against National Fire. Those fees, costs, and expenses will be awarded in response to timely motions filed under Rule 54(d)(2) and N.D. Tex. Civ. R. 54.1.

* * *

For the reasons set out, Home Depot's July 9, 2007 second motion for [*15] summary judgment is granted, and National Fire's July 6, 2007 motion for leave to file first amended original answer, affirmative defenses, and original counterclaim is denied. A Rule 54(b) final judgment in favor of Home Depot against National Fire will be filed today. Home Depot may seek its attorney's fees, costs, and expenses incurred in prosecuting the instant action by filing timely motions under Rule 54(d)(2) and N.D. Tex. Civ. R. 54.1.

SO ORDERED.

September 10, 2007.

SIDNEY A. FITZWATER

UNITED STATES DISTRICT JUDGE

TAB 4

LEXSEE 1995 U.S. APP LEXIS 26755

JOHN SINDONI; SEASIDE GROWERS, LIMITED, A California Limited Partnership; BISCAYNE BAY GROWERS, INCORPORATED, A Florida Corporation,Plaintiffs-Appellants, v. FREDERICK R. YOUNG, Defendant-Appellee.

No. 95-1205

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1995 U.S. App. LEXIS 26755

August 31, 1995, Submitted
September 20, 1995, Decided

NOTICE: [*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 66 F.3d 317, 1995 U.S. App. LEXIS 33611.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, Chief District Judge. (CA-94-1287).

DISPOSITION: AFFIRMED

COUNSEL: William J. Moran, BENICE & ASSOCIATES, Irvine, California, for Appellants.

Helen F. Fahey, United States Attorney, Richard Parker, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

JUDGES: Before LUTTIG, WILLIAMS, and MOTZ, Circuit Judges.

OPINION

OPINION

PER CURIAM:

John Sindoni, Seaside Growers, Ltd., and Biscayne Bay Growers, Inc. ("Appellants") appeal from the district court's order dismissing this civil action for failure to state a claim upon which relief might be granted. Fed. R. Civ. P. 12(b)(6). They contend that the district court erred in granting the motion to dismiss on grounds not raised in the motion, that the district court erred in not affording them an opportunity to amend the complaint, and that the district court did not address two of their claims. We affirm the district court's dismissal of this [*2] action.

John Sindoni, a California resident, was a general partner in Seaside Growers, Ltd. ("Seaside"), a California limited partnership whose business was to cultivate, grow, and sell palm trees. In 1992, Sindoni moved a substantial portion of this palm tree business to Florida, where he conducted business through Biscayne Bay Growers, Inc. ("Biscayne").

In 1993, Hurricane Andrew devastated Biscayne's business, and, when federal disaster funds became available for Florida residents, Biscayne sought an emergency loan from Farmers Home Administration ("FmHA"). The FmHA Dade County Committee denied Biscayne's application for an emergency loan, stating that

the corporation did not suffer a qualifying loss, the company failed to meet the test for credit, the principals' credit histories were unacceptable, and there existed inaccuracies in the financial statements of one of the principals.

Biscayne appealed this decision to a FmHA Hearing Officer, who sustained the Committee's decision to deny the loan. Biscayne then appealed to the Department of Agriculture National Appeals Staff. Frederick R. Young, the Director of the National Appeals Staff, per sonally adjudicated the appeal. In [*3] his decision, Young made findings of fact and agreed with the Committee on all points except that he concluded that Biscayne did in fact exist in Florida at the time of the natural disaster.

Appellants, rather than seeking further review of this decision, instituted a civil action against Young alleging that his decision to deny their loan request was "intentional, arbitrary, capricious, intentional (sic) and discriminatory, and in violation of plaintiff's right to due process under the Fifth Amendment to the United States Constitution." Appellants further alleged that Young denied the loan because a former partner was in default on a loan from FmHA and because Sindoni is a California resident doing business in Florida.

Young moved to dismiss the complaint, contending that he was entitled to absolute judicial immunity for his actions in upholding the decision of the FmHA Hearing Officer. Young did not present any other basis for dismissal of this action. In opposition to the motion to dismiss, Appellants asserted that Young would not be entitled to absolute immunity, but only qualified immunity.

During a hearing on the motion, the district court granted Young's motion to dismiss, [*4] reasoning that Young was entitled to qualified immunity for his actions in upholding the denial of the FmHA loan to Appellants. The district court also determined that Appellants failed to allege the existence of a property right in the receipt of a FmHA emergency loan and therefore, failed to state a claim for a deprivation of property without due process of law.

Appellants first argue that the district court erred in granting the motion to dismiss based upon qualified immunity when the motion argued only that Young was entitled to absolute immunity. Appellants contend that the district court erred in not affording them notice and an opportunity to be heard on this issue. Contrary to their claims, Appellants had notice of the motion to dismiss, attended the hearing on the motion, and had notice that qualified immunity might be considered as a basis for dismissing the action. In fact, Appellants themselves raised the issue of qualified immunity in response to Young's motion to dismiss. We find no error by the district court in dismissing this action on the basis of qualified immunity. *See Anderson v. Creighton*, 483 U.S. 635, 646 n.6, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987); *Torchinsky v. Siwinski*, 942 F.2d [*5] 257, 261 (4th Cir. 1991).

Appellants contend that Young's denial of FmHA loan proceeds violated their due process rights, their right to travel, and their right to free association. Because no private right of action against federal officials exists based upon the statutes authorizing FmHA loans, *Martin v. Marriner*, 904 F.2d 120, 120-21 (1st Cir. 1990), *cert. denied*, 498 U.S. 1034 (1991); *Childress v. Small Business Admin.*, 825 F.2d 1550, 1553 n.3 (11th Cir. 1987), and Appellants did not assert any claims under the Federal Tort Claims Act, the district court properly construed the complaint as alleging a *Bivens* action based upon a denial of due process. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971); *Childress*, 825 F.2d at 1552.

To state a claim for the denial of the FmHA loan under *Bivens*, Appellants must allege that they "'possess a constitutionally protected property interest in the benefits offered by the various FmHA loan programs.'" *Martin*, 904 F.2d at 121 (quoting *DeJournett v. Block*, 799 F.2d 430, 431 (8th Cir. 1986)). The filing of a request for an emergency loan under the FmHA does not "confer [*6] a property interest protected by the due process clause of the Fifth Amendment." *Martin*, 904 F.2d at 121; *see Lyng v. Payne*, 476 U.S. 926, 942, 90 L. Ed. 2d 921, 106 S. Ct. 2333 (1986). Applicants have no entitlement to such loan proceeds; thus no property interest. Moreover, Appellants have not alleged that they were denied notice or an opportunity to be heard. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 94 L. Ed. 865, 70 S. Ct. 652 (1950). Therefore, a *Bivens* action does not lie for a violation of due process based upon the denial of a FmHA loan.

Appellants' complaint asserted that Young denied the loan because a former minority partner was in default on a prior FmHA loan and because Sindoni was a California resident doing business in Florida. They now contend that this conclusory allegation stated a claim against Young for interference with Appellants' right of free association and right to travel. However, in opposition to Young's motion to dismiss and during the hearing on the motion, Appellants asserted only that Young violated their Fifth Amendment due process rights. Because Appellants failed to advance these issues in the district [*7] court, the district court did not plainly err in failing to address them. *See United States v. Maxton*, 940 F.2d 103, 105 (4th Cir.), *cert. denied*, 502 U.S. 949 (1991).

Moreover, Appellants' broad, generalized statement referring to a constitutional protection fails to identify a "clearly established" right which Young allegedly violated. Thus, Appellants have failed to overcome Young's entitlement to qualified immunity. *See Anderson*, 483 U.S. at 639-40; *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992). Appellants failed to allege or present any facts to support their generalized statement that Young's decision interfered with the right to travel or the right of free association. Rather, the record shows that Young's review of the case focused upon the denial of a loan application of Biscayne, a Florida corporation, and did not focus upon the facts that Sindoni is a resident of California or that Seaside was a California corporation. Regarding the vague claim of an interference with the right of free association, the only factual allegation related to this right is that Sindoni's partner, Mr. Wood, had previously borrowed FmHA funds and was in default. We find [*8] that Young's decision upholding the denial of the emergency loan based upon an unacceptable credit history does not implicate the right of free association.

Appellants additionally argue that the district court erred in dismissing this civil action without affording them the opportunity to amend their complaint. Although leave to amend the complaint "shall be freely given when justice so requires," Fed. R. Civ. P. 15(a), Appellants gave no indication--prior to filing their brief in this court --that they wished to amend their complaint. *See Mayes v. Leipziger*, 729 F.2d 605, 608 (9th Cir. 1984). Moreover, Appellants have not stated the manner in which they wish to amend the complaint. Further, we find that given the opportunity to amend the complaint, Appellants would not be able to overcome Young's qualified immunity to state a claim arising from his alleged denial of Appellants' right to travel and to free association. *See Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991). Therefore, we find that the district court did not abuse its discretion by dismissing the complaint without granting leave to amend.

In conclusion, we affirm the district court's order granting Young's [*9] motion to dismiss and dismissing this civil action. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

Certificate Of Service

I hereby certify that on Monday, August 30, 2010, a true and correct copy of the Appendix to All Defendants' Joint Response to Plaintiff Karen McPeter's August 13, 2010 Motion to Amend Complaint was forwarded via electronic delivery pursuant to local rules, *to-wit*:

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