

DOCKET NO.: FST-CV-15-5014808-S)	SUPERIOR COURT
)	
WILLIAM A. LOMAS)	JUDICIAL DISTRICT OF
)	STAMFORD/NORWALK
Plaintiff,)	
)	
v.)	AT STAMFORD
)	
PARTNER WEALTH MANAGEMENT, LLC,)	
KEVIN G. BURNS, JAMES PRATT-HEANEY,)	
WILLIAM P. LOFTUS)	
)	JUNE 27, 2016
Defendants.)	

**PLAINTIFF’S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS’ MOTION FOR ORDER OF COMPLIANCE AND REQUEST FOR
ADJUDICATION OF DISCOVERY OR DEPOSITION DISPUTE**

I. INTRODUCTION

Plaintiff, William A. Lomas (“Lomas”) submits this memorandum of law in opposition to Defendants’ Motion for Order of Compliance (the “Motion”) (Dkt. No. 159.00) and Request for Adjudication of Discovery or Deposition Dispute (the “Request”) (Dkt. No. 160.00) seeking to compel discovery in support of the “allegations” in a draft, unsigned and unfiled counterclaim. There is no basis for such discovery and Defendants’ motion should be denied.

II. RELEVANT FACTUAL BACKGROUND

Lomas commenced this action in June 2015, seeking to recover in excess of \$4 Million due to him per the terms of the limited liability company agreement (the “Agreement”) governing his withdrawal from the defendant, Partner Wealth Management, LLC. The gravamen

of Lomas' complaint, as amended, is that the Defendants have intentionally, wrongfully and willfully withheld this money in breach of their contractual and fiduciary obligations.¹

Shortly after Lomas filed his Complaint, the parties proceeded with written discovery. Lomas produced responses and objections to Defendants' interrogatories and requests for production, including production of 223 PDF files comprising over 1100 pages of documents. One of Defendants' interrogatories and two of their production requests were objectionable as beyond the scope of any claim in the case. Interrogatory No. 3 requested as follows:

Identify each and every current or former client listed on Schedule E of the Partner Wealth Management LLC Limited Liability Company Agreement dated January 1, 2015 with whom you have had any communication since January 13, 2015 and for each such person identified set forth the date, time and reason for each communication and identify all documents relating to each of the above-identified communications.

Request for Production No. 14 requested the following:

All personal or business calendars, diaries, time entries or other records that show or reflect your scheduled work activities for the period between January 1, 2014 and January 13, 2015.

Request for Production No. 15 requested the following:

All documents concerning any communications, including, but not limited to, notes, memoranda, emails, phone records and electronic recordings, between you and any present or former client listed on Schedule E of the Partner Wealth Management LLC Limited Liability Company Agreement dated January 1, 2015 from January 13, 2015 through the present.

These discovery requests were not related to any claim or defense in the case at the time they were served, and they remain unrelated to any claim or defense in the case to this day. Defendants were on a "fishing expedition," in search of some counterclaim to assert to gain some leverage in their defense of Lomas' legitimate claims.

¹ Defendants moved to strike certain of the allegations of Lomas' Amended Complaint (Dkt. No. 137.00). The motion has been fully briefed and has been argued to the Court. A ruling is pending.

In mid-December, Defendants' prior counsel sent Lomas' counsel a letter seeking clarification regarding Lomas' objections. Because the parties were engaged in settlement discussions that nearly resolved this matter, counsel for the parties agreed not to incur further expense unless and until it was necessary. Accordingly, Lomas' counsel did not respond to the letter until January 21, 2015. At that time, Lomas committed to produce all responsive documents in his possession, except in response to Interrogatory No. 3 and Request Nos. 14 and 15. *See* Affidavit of Edward D. Altabet supporting the Motion ("Altabet Aff."), Exhibit F. Lomas' counsel stated that the discovery sought was a "fishing expedition targeted at documents that do not relate to any claims in this case...." Lomas' counsel pointed out that "there is nothing in the operating agreement which prevents Plaintiff from communicating with clients and mere communications with clients are not actionable." Defendants did not press this discovery any further at that time, and have never suggested that the disputed discovery related to Lomas' affirmative allegations against them.

On May 27, 2016, prior to filing this motion, Defendants' counsel sent Lomas' counsel a letter stating that the discovery previously withheld was now relevant to the lawsuit and should be produced ahead of Lomas' deposition on June 23, 2016. *See* Altabet Aff., Exhibit I. The basis for Defendants' assertion was a "draft," unsigned and unfiled answer and counterclaim, threatening to "allege" that Lomas failed to perform under the Agreement and breached the non-solicitation covenants therein. *See* Altabet Aff., Exhibit J.

Lomas' counsel responded on June 6, 2016. Counsel stated that Defendants' discovery remained premature because a "draft," unfiled counterclaim provides no basis for discovery under Connecticut law. Defendants then filed a Motion for Order of Compliance seeking to compel responses to the disputed discovery. (Dkt. No. 159.00) Thereafter, on June 15, 2016,

counsel for Lomas called counsel for the Defendants to address the deposition of Lomas and anticipated inquiry into matters related to the “draft.” The undersigned counsel advised that, consistent with his June 6 communication, it would be inappropriate to inquire with respect to “claims” that are not of record and that he would not allow such inquiry. Counsel proposed the following alternate solutions to the problem created by this unique set of circumstances:

- Proceed with the deposition on the understanding that (i) inquiry into matters related solely to the “draft” would not be allowed; (ii) the witness would be instructed not to answer such questions; and (iii) the deposition would continue at a later date on the subject matter of any actual counterclaim of record, if and when filed.
- Adjourn the deposition in its entirety to a later date until an actual, signed counterclaim was of record.
- Plaintiff would move for a protective order.

In response to the foregoing proposals, counsel for the Defendants said that he appreciated that this matter was raised in advance, would take the matter under advisement, and would report back. The next day, counsel for the Defendants advised that Defendants would file a motion for expedited adjudication of a discovery dispute. Defendants’ Request was filed shortly thereafter. (Dkt. No. 160.00)

III. ARGUMENT

A. Applicable Legal Standards

Practice Book § 13-2, which applies both to written discovery and depositions, is clear regarding the scope of discovery:

In any civil action... a party may obtain... discovery of...
information material to the subject matter involved in the

pending action, which are not privileged, whether the **discovery or disclosure relates to the claim or defenses of the party seeking discovery or to the claim or defense of any other party**, and which are within the knowledge, possession or power of the party or person to whom the discovery is addressed. Discovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action...

(emphasis added.) “The granting or denial of a discovery request rests in the sound discretion of the court.” *Standard Tallow Corp. v. Jowdy*, 190 Conn. 48, 57, 457 A.2d 503 (1983). The Connecticut Supreme Court has provided further guidance regarding the limitations placed upon discovery: “Discovery is confined to the facts material to the plaintiff’s cause of action and does not afford an open invitation to delve into the defendant’s affairs... *A plaintiff must be able to demonstrate good faith as well as probable cause that the information sought is both material and necessary to his action...* A plaintiff ... should not be allowed to indulge a hope that a thorough ransacking of any information and material which the defendant may possess would turn up evidence helpful to his case.... What is reasonably necessary and what the terms of the judgment require call for the exercise of the trial court’s discretion.” *Berger v. Cuomo*, 230 Conn. 1, 6-7, 644 A.2d 333 (1994) (emphasis added).

B. Defendants Are Not Entitled To Discovery With Respect To Claims That Are Not Of Record

The case at bar presents a unique circumstance. It is highly unusual for a party in litigation to present a “draft” complaint or counterclaim to its adversary, except, at times, under the protection of confidential settlement discussions. It is unheard of for a party to attach an unsigned draft or counterclaim to some other pleading and to file it with the court.

1. The “draft” affords no right to discovery and such discovery would be unfair

Connecticut law is clear that discovery must relate to information material to the subject matter involved in the pending action. *See Berger v. Cuomo*, 230 Conn. 1, 6–7, 644 A.2d 333

(1994) (“[d]iscovery is confined to facts material to the ... cause of action and does not afford an open invitation to delve into the [opposing party's] affairs”). Subject matter does not become material, and the right to discovery is not triggered, until claims are filed over the signature of a lawyer who, by his or her signature, has certified that the facts have been investigated and that there is a good faith basis for the resulting claims under existing law. Conn. Practice Book § 4-2; *see also Lifeguard Licensing Corp. v. Kozak*, No. 15CIV8459LGSJCF, 2016 WL 3144049 (S.D.N.Y. May 23, 2016) (denying defendant’s request to compel discovery responses related to the unpled defenses because Rule 26(b)(1) stating information must be “relevant to a party’s claim or defense” does not provide for discovery of “likely,” “anticipated,” or “potential” claims or defenses); *McHenry v. Renne*, 84 F.3d 1172, 1177-78 (9th Cir. 1996) (providing that an affirmative pleading must “fully set forth who is being sued, for what relief, and on what theory, with enough detail to guide discovery.”); *United States v. \$17,980.00 in United States Currency*, No. 3:12-CV-01463-MA, 2014 WL 4924866, at *4 (D. Or. Sept. 30, 2014) (stating “a party must be able to rely on its opponent’s pleading in guiding discovery”, “to hold otherwise would force parties to conduct often wasteful discovery on myriad unpled, but arguably factually-plausible claims.”); *Altman v. Ho Sports Co.*, No. 1:09-CV-1000 AWI JLT, 2010 WL 4977761, at *2 (E.D. Cal. Dec. 2, 2010) (explicitly stating federal rules prohibit discovery on unpled claims); *246 Sears Road Realty Corp. v. Exxon Mobile Corp.*, No. 09 CV 889, 2012 WL 4174862, at *8 (E.D.N.Y. Sept. 18, 2012) (noting that court denied discovery of unpled fraud claims.)^{2, 3} *Lifeguard Licensing Corp.* is instructive here. It additionally stated,

There are sound reasons for limiting discovery to claims that have been pled, and those reasons apply with force to defenses as well. First, it would be a waste of

² A copy of all out of state and/or unreported authority is attached at Exhibit A.

³ A state court may look to federal law for guidance in the absence of Connecticut law. *See Bristol v. Tilcon Minerals, Inc.*, 284 Conn. 55, 88, 931 A.2d 237 (2007).

resources to devote discovery to issues that may be addressed in the litigation. Second, a party and its attorney must have conducted ‘an inquiry reasonable under the circumstances’ before filing a pleading. Permitting discovery on unpled claims or defenses would dilute this obligation by permitting a party to file one plausible claim and then take discovery on any tangentially related potential claims before deciding whether to actually assert them. Finally, and perhaps most significantly, Rule 26(b)(1) makes no distinction between claims and defenses; to be discoverable, information must be ‘relevant to a party’s claim or defense.’ And the plain language of the Rule does not provide for discovery of ‘likely,’ ‘anticipated,’ or ‘potential’ claims or defenses.

2016 WL 3144049 at *3.

Here, Defendants seek discovery out of turn. They have not triggered any right to discovery on their “draft.” They want advance discovery – if they can get it – in the hope to confirm certain of the allegations they have made, remove any they cannot support, and bolster, to the extent possible, any that are “close calls.” Defendants want this discovery without first having to certify, by the signature of their counsel, that the facts have been investigated and are well-grounded and that the claims are fairly supportable under Connecticut law. This should not be allowed. *See Pottetti v. Clifford*, 146 Conn. 252, 263, 150 A.2d 207 (1959) (party seeking discovery “should not be allowed to indulge a hope that a thorough ransacking of any information and material which the [opposing party] may possess would turn up evidence helpful to [its] case”); *Deutsche Bank National Trust Co. v. Griffin*, No. CV075002285, 2008 WL 1948029, at *2 (Conn. Super. Ct. Apr. 22, 2008) (relying on *Berger* and holding that because the facts material to the cause of action in the case concerned only those matters referenced in the pleadings, the defendant was not entitled to discovery requesting documents that were not the subject of the current litigation.) Discovery in this state does not work that way.

Here, once the hyperbole and argument (both improper for a complaint under Connecticut procedural law) are stripped away, it is clear that the allegations are thin.

For example, Defendants allege that “Confidential Client No. 1 withdrew nearly all of his assets” in May 2015. But the allegations concerning Lomas’ actions -- “Lomas had taken him to dinner and an NCAA basketball game in March 2016 and that Lomas played golf with him in April 2016 (and, apparently gave Confidential Client No. 1 home-made pickles),” did not occur until at least 10 months later. *See* ¶ 107, Altabet Aff., Exhibit J. Even taking these factual allegations as true, there was no cause and effect. Even if true, the alleged “facts” prove nothing.

As a further example, Defendants allege that Confidential Client No. 2 withdrew all of his assets and “the only reasonable inference is that Lomas is attempting to solicit clients – by keeping various relationships warm until his non-compete expires in 2017.” *See* ¶ 108-09, Altabet Aff., Exhibit J. But there are no allegations of fact tying Lomas to the withdrawal of Client No. 2’s assets, and one need not be terribly imaginative to recognize many equally plausible substitute inferences for Client No. 2’s actions than the one posited by Defendants. Again, even if true, the alleged facts prove nothing.

As a final example, Defendants’ “draft” claims that Lomas breached his non-solicitation agreement, but absolutely fails to identify any solicitation of any kind. Moreover, on its face, the non-solicitation agreement does not preclude Lomas from communicating with people who have been friends of his for decades. It prevents solicitation. Defendants’ “draft” makes no such allegation of solicitation.

The “claims” in the “draft” are, at best, tenuous. Accordingly, Defendants, and their counsel, have been advised that Lomas will seek all appropriate remedies if the “draft is filed with the Court and is not supported by probable cause.”

Finally, discovery under these circumstances is fundamentally unfair. Defendants want to advance their “draft” while Lomas would be stalled. He cannot move to dismiss, revise or

strike an unfiled “draft.” While a motion to dismiss is unlikely, the “draft” contains a number of scandalous and impertinent assertions, it is heavy on hyperbole, and it is weak on facts actionable under Connecticut law. It hardly meets the requirements of Conn. Practice Book §10-1: “a plain and concise statement of the material facts on which the pleader relies, but not of the evidence by which they are to be proved, such statement to be divided into paragraphs numbered consecutively, each containing as nearly as may be a separate allegation.” Accordingly, Defendants should not be permitted to trigger the machinery of discovery.

2. Defendants’ analogy to Connecticut’s PJR procedure does not justify any deviation from long-standing and well-accepted discovery practice

It is true that Connecticut’s prejudgment remedy statute allows for a “proposed, unsigned writ, summons and complaint” to be attached to the required documents in support of a prejudgment remedy sought before actual service of a writ of summons and complaint. *See* Conn. Gen. Stat. 52-278c(a). But in that circumstance, the complaint is not stamped “draft,” the accompanying representation is that *the plaintiff* is about to commence a lawsuit and that the “proposed unsigned complaint” will be filed with the court, it must be supported by signed affidavits sufficient to support a prejudgment remedy, and there is no procedure for advance discovery, except upon motion made to the court. *See* Conn. Gen. Stat. § 52-278c(4) (requiring at the time the application is made, a “summons directed to a proper officer commanding him to serve upon the defendant at least four days prior to the date of the hearing...the application, *a true and attested copy of the writ, summons and complaint*, such affidavit and the order and notice of hearing.”)

However, Defendants’ assertion that a pleading is cognizable before it is filed is a misstatement of the law and the PJR provision that Defendants rely upon is misplaced. While Conn. Gen. Stat. § 52-278c(a)(2) allows for consideration of known defenses, counterclaims, or

set-offs, it does so at a time in the case when nothing has been filed because the litigation has not yet commenced. In contrast, once the litigation has begun, Connecticut's PJR statute explicitly states that the defendant may only seek a prejudgment remedy based upon a set-off or counterclaim *after* filing. The statute states,

Any defendant in any civil action, *upon filing a set-off or counterclaim containing a claim for money damages*, may, at any time in the pendency of such action, apply in writing to the court before which such action is pending...for an order for a prejudgment remedy against the estate of the party or parties against whom such claim has been made.

Conn. Gen. Stat. § 52-278i. This distinction is critically important and the reasoning for the difference is obvious – at the time a plaintiff seeks a PJR, the litigation has not yet commenced and defendant cannot file a responsive pleading. Here, however, the litigation has been pending for over one year and, following an adjudication of the Motion to Strike, Defendants will have the opportunity to file a responsive pleading. Thus, where a defendant seeks a PJR related to set-offs or counterclaims, he can do so only *after* filing them with the Court. Accordingly, any reliance upon Conn. Gen. Stat. § 52-278c(a)(2) falls flat.

3. Defendants' case law does not support deviation from long-standing and well-accepted discovery practice

Defendants' reliance on *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, to assert that they are entitled to discovery on any issue that is or may be in the case is misplaced. *Rosado* was different from the facts presented here. First, *Rosado* did not involve discovery based upon a draft pleading. Second, *Rosado* involved plaintiffs' allegations that they were sexually assaulted by a priest employed by the defendant. *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, No. CV 93 302072, 1995 WL 348181, at *1 (Conn. Super. Ct. May 31, 1995) During the defendant priest's deposition, he sought a protective order with respect to questions asked of him relating to the sexual misconduct of other priests on the basis that the inquiry was

immaterial to any issue in the case. *Id.* at *6. The Court permitted inquiry into whether the priest ever observed the presence of children in clergy's apartments because it held such inquiry was "material since those children may have heard or seen things, including sexual assaults, which bear on the claims in the plaintiffs' complaint" and additionally, "bears directly on the plaintiffs' claim... that the Diocese failed to provide or enforce rules prohibiting clergy from having children in the bedrooms... of rectories and premises owned and controlled by it." Thus, the discovery was permitted because it related directly to claims of record. *Rosado* does not support discovery under the unusual circumstance existing here.

4. Responsibility for delay, if any, rests with Defendants.

Finally, Defendants' assertion that Lomas seeks to delay trial is without merit. As articulated in Attorney Altabet's Affidavit attached to Defendants' Request, Lomas' counsel offered alternatives for the deposition, including going forward as planned with the understanding that questions related to the "draft" would be deferred. This option would have allowed discovery to proceed and the case of record to move forward, with a possible brief second day of questioning if Defendants ultimately filed an actual counterclaim. Defendants rejected this reasonable proposal. If any party is responsible for delay, it is not the Plaintiff.

IV. CONCLUSION

For the foregoing reasons, Plaintiff William A. Lomas respectfully requests that Defendants' Motion for Order of Compliance be denied.

THE PLAINTIFF,
WILLIAM A. LOMAS

By: /s/ Thomas J. Rechen
Thomas J. Rechen
Brittany A. Killian
McCarter & English, LLP
City Place I, 185 Asylum Street
Hartford, CT 06103
Tel.: (860) 275-6706
Fax: (860) 218-9680
Email: trechen@mccarter.com
His Attorneys

CERTIFICATE OF SERVICE

This is to certify that on June 27, 2016, a copy of the foregoing was served by e-mail and first class mail, postage prepaid, to all counsel of record as follows:

Richard J. Buturla, Esq.
Mark J. Kovack, Esq.
Berchem, Moses & Devlin, P.C.
75 Broad St.
Milford, CT 06460

Gerald Fox, Esq.
Edward D. Altabet, Esq.
Steven I. Wallach, Esq.
Gerald Fox Law P.C.
12 East 49th Street, Suite 2605
New York, NY 10017

/s/Thomas J. Rechen
Thomas J. Rechen

EXHIBIT A

2012 WL 4174862

Only the Westlaw citation is currently available.

United States District Court,
E.D. New York.

246 SEARS ROAD REALTY
CORPORATION, Plaintiff,

v.

EXXON MOBIL CORPORATION, Defendant.

No. 09-CV-889 (NGG)(JMA).

|
Sept. 18, 2012.

Synopsis

Background: Lessor of gasoline service station filed suit against lessee alleging breach of lease and breach of contract allowing lessee access to the property for purposes of environmental remediation. Plaintiff moved to amend complaint to add fraud claims.

Holdings: The District Court, Azrack, United States Magistrate Judge, held that:

[1] lessor failed to demonstrate good cause for nine-month delay in moving to amend complaint;

[2] there was no indication that lessor had relied to its detriment on lessor's alleged fraud;

[3] fiduciary relationship did not exist between the parties following expiration of the lease;

[4] information allegedly concealed was matter of public record; and

[5] claim for fraudulent concealment was duplicative of breach of contract claim.

Motion denied.

West Headnotes (17)

[1] Federal Civil Procedure

Time for amendment in general

Federal Civil Procedure

Pretrial Order

A party can establish good cause to amend pleadings after deadline set in scheduling order by showing that the deadline at issue cannot reasonably be met despite diligence of party seeking the extension. Fed.Rules Civ.Proc.Rule 16(b), 28 U.S.C.A.

8 Cases that cite this headnote

[2] Federal Civil Procedure

Time for amendment in general

Federal Civil Procedure

Pretrial Order

Despite federal rule's liberal standard for amendment of pleadings, district court may, in its discretion, deny leave to amend pleadings after deadline set in scheduling order where moving party has failed to establish good cause. Fed.Rules Civ.Proc.Rules 15(a), 16(b), 28 U.S.C.A.

6 Cases that cite this headnote

[3] Federal Civil Procedure

Time for amendment in general

Federal Civil Procedure

Pretrial Order

Even where the prejudice to non-moving party may well be minimal, a failure to show good cause can warrant denial of a motion to amend pleadings after deadline set forth in scheduling order. Fed.Rules Civ.Proc.Rules 15(a), 16(b), 28 U.S.C.A.

4 Cases that cite this headnote

[4] Federal Civil Procedure

Time for amendment

Federal Civil Procedure

Pretrial Order

Lessor of gasoline service station would not be allowed to amend complaint alleging breach of lease and breach of contract against lessee in order to add claim for fraud, since motion

had been made after deadline for amendments set forth in court's scheduling order and lessor failed to demonstrate good cause for its delay; lessor knew or should have known of lessee's alleged fraudulent conduct relating to environmental remediation of the property more than seven weeks prior to deadline, in that it had received correspondence outlining remediation agreement from New York State Department of Environmental Conservation (DEC) and a Freedom of Information Act (FOIA) disclosure concerning the premises, yet it had delayed bringing motion for more than nine months after the deadline. Fed.Rules Civ.Proc.Rules 15(a), 16(b), 28 U.S.C.A.

1 Cases that cite this headnote

[5] Federal Civil Procedure

↳ Form and sufficiency of amendment; futility

A proposed amendment to a pleading is considered futile if it could not withstand a motion to dismiss for failure to state a claim. Fed.Rules Civ.Proc.Rules 12(b)(6), 15(a), 28 U.S.C.A.

Cases that cite this headnote

[6] Federal Civil Procedure

↳ Hearing, determination, order; matters considered

Court may consider documents attached to complaint when making futility determinations in the context of a motion to amend pleadings. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

Cases that cite this headnote

[7] Fraud

↳ Elements of Actual Fraud

Fraud

↳ Statements recklessly made; negligent misrepresentation

Under New York law, fraud requires that defendant knowingly or recklessly

misrepresented a material fact, intending to induce plaintiff's reliance, and that plaintiff relied on misrepresentation and suffered damages as a result.

Cases that cite this headnote

[8] Fraud

↳ Duty to disclose facts

Under New York law, when plaintiff seeks to show fraud by omission, it must also prove that defendant had a duty to disclose the concealed fact.

Cases that cite this headnote

[9] Fraud

↳ Reliance on Representations and Inducement to Act

Fraud

↳ Injury and causation

Gasoline service station lessor's complaint failed to state claim against lessee for fraudulent inducement to enter contract for environmental remediation of leased site, under New York law, since there were no allegations that lessor had relied to its detriment on lessor's alleged fraud.

Cases that cite this headnote

[10] Fraud

↳ Fiduciary or confidential relations

There was no evidence of an ongoing relationship of trust and confidence between lessor of gasoline service station and its lessee, as required under New York law to create a fiduciary relationship between the parties following expiration of their lease.

Cases that cite this headnote

[11] Fraud

↳ Duty to disclose facts

Under New York law, a duty to disclose may arise where one party possesses superior knowledge, not readily available to the other,

and knows that the other is acting on the basis of mistaken knowledge.

2 Cases that cite this headnote

[12] **Fraud**

☞ Duty to Investigate

Lessor of gasoline service station could not have justifiably relied on lessee's alleged fraud regarding environmental remediation to be completed on the leased property, as required to demonstrate fraudulent inducement under New York law to enter into an access contract, since remediation required by New York State Department of Environmental Conservation (DEC) was a matter of public record and plan presumably would have been available to lessor upon request.

Cases that cite this headnote

[13] **Fraud**

☞ Duty to disclose facts

Fraud

☞ Duty to Investigate

Under New York law, a plaintiff cannot establish justifiable reliance or a duty to disclose, for purposes of fraud claim, where the information at issue is a matter of public record that could have been discovered through the exercise of ordinary diligence.

3 Cases that cite this headnote

[14] **Fraud**

☞ Effect of existence of remedy by action on contract

Under New York law, parallel fraud and contract claims may be brought if plaintiff: (1) demonstrates a legal duty separate from the duty to perform under the contract; (2) points to a fraudulent misrepresentation that is collateral or extraneous to the contract; or (3) seeks special damages that are unrecoverable as contract damages.

1 Cases that cite this headnote

[15] **Fraud**

☞ Effect of existence of remedy by action on contract

Under New York law, when a defendant is alleged to have misrepresented or failed to disclose present facts that induced plaintiff to enter into a contract, such misrepresentations or omissions give rise to a non-duplicative fraud claim.

1 Cases that cite this headnote

[16] **Fraud**

☞ Effect of existence of remedy by action on contract

Under New York law, when a defendant fails to disclose that it never intended to perform its obligations under a contract, that failure to disclose its intention to breach is not actionable as a fraudulent concealment.

Cases that cite this headnote

[17] **Fraud**

☞ Effect of existence of remedy by action on contract

Under New York law, gasoline station lessee's alleged failure to disclose, to lessor, prior to entering into contract, its intention to breach access contract by removing all of the underground storage tanks (UST) on the property as part of environmental remediation, was not actionable as separate claim for fraudulent concealment, since it was duplicative of lessor's breach of contract claim.

Cases that cite this headnote

Attorneys and Law Firms

Richard W. Young, Patrick F. Young, Young & Young, LLP, Central Islip, N.Y., for Plaintiff.

Beth L. Kaufman, Deirdre J. Sheridan, Schoeman, Updike & Kaufman, LLP New York, NY, for Defendant.

MEMORANDUM AND ORDER

AZRACK, United States Magistrate Judge:

*1 This case concerns a dispute between plaintiff 246 Sears Road Realty Corp. (“plaintiff”) and defendant Exxon Mobil Corp. (“Exxon”) stemming from Exxon’s lease of a gasoline service station from plaintiff and Exxon’s subsequent remediation of a fuel spill on the property. After Exxon’s lease ended in May 2004, the parties entered into extensive negotiations regarding an agreement that would permit Exxon to access the property in order to conduct the remediation. That agreement (the “Access Agreement”) was signed on December 1, 2005, and Exxon completed its remediation efforts in December 2008. In March 2009, plaintiff filed suit against Exxon alleging that Exxon, through its acts and omissions during its tenancy and the subsequent remediation, breached its obligations under the lease and Access Agreement.

Presently before the Court is plaintiff’s motion to amend its complaint to add fraud claims based on Exxon’s failure to disclose information both before and after the execution of the Access Agreement. The Honorable Nicholas G. Garaufis referred this motion to me for decision. ECF No. 79.

Plaintiff’s proposed fraud claims focus on a provision in the Access Agreement that called for plaintiff to purchase certain underground storage tanks from Exxon. Plaintiff alleges that Exxon failed to disclose information about those tanks and the remediation in an attempt to shift the costs of the remediation to plaintiff.

As explained below, plaintiff’s motion to amend its complaint is denied. For the majority of plaintiff’s proposed fraud allegations, plaintiff cannot show good cause for raising these claims seven months after a court—ordered deadline for amending the pleadings. Moreover, not only is plaintiff’s proposed complaint futile, but undisputed evidence offered by Exxon also indicates that plaintiff’s proposed claims are meritless.

I. FACTUAL BACKGROUND**A. The Spill and Remediation**

The following facts are taken from plaintiff’s proposed amended complaint (“PAC”) and the attached exhibits. Decl. of Richard W. Young in Supp. of Pl.’s Mot. to Amend (“Young Decl.”), ECF Nos. 72–75.

1. Events Leading up to Execution of the Access Agreement

Plaintiff is owned by Natale (“Nat”) and Anthony Castagna. PAC ¶ 9. In 1984, Exxon leased a parcel of land in Brooklyn (“the premises”) from plaintiff for use as a gasoline service station. *Id.* ¶ 4. The premises had been operating as a gasoline service station since the 1940s. *Id.* ¶ 6.

A variance from the City of New York allowed plaintiff to operate a gasoline and service station on the premises. *Id.* ¶ 7. However, the variance would be lost if a gasoline station was not operated at the premises for a continuous period of two years. *Id.* ¶ 8.

During Exxon’s lease, the premises contained eleven underground storage tanks (“USTs”). *Id.* ¶ 11. There were three 3,000–gallon USTs and eight 550–gallon USTs (collectively the “Small Tanks”) as well as five 4,000–gallon USTs (the “Large Tanks”). *Id.* ¶¶ 11–12. During its tenancy, Exxon used the Large Tanks, which were registered to Exxon. *Id.* ¶¶ 12, 82. The Small Tanks, which had been de-registered, were never used by Exxon. *Id.* ¶¶ 11, 82. The premises also contained lines and piping associated with USTs, as well as two underground oil tanks that stored used motor oil and fuel oil to heat the building on the premises. *Id.* ¶ 13. Exxon operated a gas station on the premises until May 14, 2004, when its lease expired. *Id.* ¶ 21. According to the lease, when Exxon surrendered the premises, the premises had to be “in as good condition as” when the lease began. *Id.* ¶ 14.

*2 At some point during Exxon’s tenancy, the premises became contaminated by motor vehicle fuel. *Id.* ¶¶ 17, 19. In March 1990, New York State Department of Environmental Conservation (“DEC”) assigned the premises a “SPILL REPORT,” which would remain open until December 2008. *Id.* ¶¶ 18, 113; Dep. of John Durnin¹ (“Durnin Dep.”) 164, Young Decl., Ex. F. Plaintiff alleges that Exxon was obligated to remediate this contamination. PAC ¶ 19.

In April 2003, DEC conducted an on-site inspection of the premises, which identified several violations concerning the USTs and accompanying lines. *Id.* ¶¶ 22–25; Sept. 3, 2003 Ltr. from DEC to Exxon (“Sept. 3, 2003, Ltr.”), Young Decl., Ex. E; Notice of Violation, Young Decl., Ex. E. In June 2003, DEC inspectors were scheduled to inspect the premises again. PAC ¶ 30. In September 2003, DEC issued Exxon a Notice of Violation directing Exxon to correct the above violations. *Id.* ¶ 30; Notice of Violation; Sept. 3, 2003, Ltr.

Around the same time as DEC's April 2003 inspection, on-site monitoring wells, which had been installed on the property, revealed contaminants, and Exxon was finding an increase in “gasoline constituents” in the groundwater. PAC ¶¶ 26–27. In November 2003, Exxon issued a status report update for the premises, indicating that 1,131 gallons of contaminated water had been removed and that Exxon would continue quarterly groundwater sampling. *Id.* ¶ 31.

In January 2004, DEC approved Exxon's work plan for the premises, which provided for, *inter alia*, the installation of off-site monitoring wells to determine the extent of the contamination. *Id.*; Jan. 15, 2004, Ltr. from John Durnin to Melissa Winsor,² Young Decl., Ex. G. That same month, Exxon compared the costs of bringing the USTs into compliance versus removing them, and decided to proceed with a remediation plan that involved removing the USTs and other equipment on the premises. PAC ¶ 37. Exxon was aware that if the USTs were removed, plaintiff would no longer be able to operate the Premises as a gasoline station and that Exxon “could lose its Certificate of Occupancy.”³ *Id.* ¶ 39. Exxon allegedly failed to disclose to plaintiff its plan to remove all of the USTs. *Id.* ¶ 40.

In February 2004, Exxon notified plaintiff that it would not renew the lease and instead proposed that plaintiff and Exxon enter into an access agreement that would enable Exxon to remain on the premises to perform remediation operations. *Id.* ¶ 20.

On March 26, 2004, Nat Castagna contacted Geological Services Corporation (“GSC”), Exxon's consultant in charge of the remediation project, in an attempt to obtain information about the premises. *Id.* ¶ 34. At the time, Nat Castagna was not aware that there was an active environmental case at the site. *Id.* ¶ 44.

On March 30, 2004, an employee at GSC advised Maria Kobe, an Exxon employee, that he was making copies of environmental reports and asked whether he should send copies to Nat Castagna. *Id.* ¶ 46. Although Kobe responded that Castagna's requests should be directed to her and that she would forward the reports to Castagna, neither she nor Winsor, Exxon's Remediation Territory Manager, ever forwarded the reports or any other documents filed with DEC to Castagna. *Id.* ¶¶ 28, 47–48.

*3 Beginning in May 2004, the parties engaged in “extensive negotiations,” which would culminate in the signing of the Access Agreement on December 1, 2005. *Id.* ¶¶ 71–72.

In a letter dated August 30, 2004, Durnin informed Winsor that although the concentrations of groundwater contamination on the premises had decreased over the past twelve years, contamination was still present. *Id.* ¶ 50; Aug. 30, 2004, Ltr. from Durnin to Winsor (“Aug. 30, 2004, Ltr.”) Young Decl., Ex. K. The letter goes on to state that “[t]here is a potential that some or all” of the USTs on the premises “could be contributing to the groundwater contamination” and that “[t]he source of this contamination must be identified and removed.” Aug. 30, 2004 Ltr. Exxon was directed to prepare a Corrective Action Plan (“CAP”), which would have to be approved by DEC and would lead to “the closure of the site.”⁴ *Id.* Although Exxon had previously proposed continuing groundwater monitoring and sampling, Durnin informed Winsor that monitoring alone would not be sufficient. *Id.*

Between September 2004 and March 2005, DEC and Exxon exchanged a series of letters. In September 2004, GSC submitted a proposed CAP to DEC that provided for closure and removal of all USTs and piping on the premises “as approved by the property owner.” PAC ¶ 53. On November 4, 2004, Durnin advised Winsor that Exxon was required to submit an Underground Storage Tank Divestiture Plan (“USTDP”) for removal of the USTs. *Id.* ¶ 54. On December 10, 2004, GSC submitted the USTDP, which called for removal of all the USTs and accompanying lines. *Id.* ¶ 56. The USTDP provided that removal of all tanks was subject to approval of the “property owner.” *Id.* ¶ 57. On March 14, 2005, GSC submitted a remediation schedule for the CAP that incorporated certain modifications that DEC had

requested. *Id.* ¶ 59. On March 29, 2005, Durnin advised Exxon that DEC had approved the CAP and USTDP. *Id.* ¶ 60; Mar. 29, 2005 Ltr. from Durnin to Winsor, Young Decl., Ex. L.

In an internal Exxon email dated April 21, 2005, Joanne Wallach, an Exxon employee, wrote:

Recommend waiting for the [DEC] attorney (Lou Oliva) to contact [plaintiff's] attorney regarding access, before placing a dealer under agreement to re-open. The [DEC] is only going to discuss granting [Exxon] access to the site, not requiring the tanks to be removed. We should hear back in a week. Ultimately, it is a business decision to re-open or pull tanks. If the [DEC] places pressure on the [plaintiff] for access, maybe the [plaintiff] will want to have the tanks removed.

PAC ¶ 64.

Between April and June 2005, Exxon compared the costs of two different remediation plans. *Id.* ¶¶ 65, 68. One plan, estimated to cost \$800,000 to \$850,000, did not involve the removal of any of the USTs. *Id.* ¶ 65; May 11, 2011, Email, Young Decl., Ex. M; May 12, 2011, Email, Young Decl., Ex. M. Instead, under that plan, a remediation system would be installed that would require Exxon to monitor the premises over a period of eight to ten years (“remediation system plan”). PAC ¶ 65; May 11, 2011, Email. This plan would have allowed the premises to remain operating as a gas station. PAC ¶ 65. The other plan, which would last six months and cost \$350,000, involved removal of all the USTs and excavation of the soil (“UST removal plan”). *Id.* ¶ 66. Plaintiff alleges that this plan would have rendered the premises vacant and no longer operational as a gasoline service station. *Id.* Plaintiff further alleges that, although Exxon was aware of this fact, “Exxon chose” the UST removal plan as it was less costly for Exxon. *Id.* ¶ 67.

2. Omissions

*4 Plaintiff alleges that, prior to the execution of the Access Agreement in December 2005, Exxon failed

to disclose to plaintiff numerous pieces of information discussed above. PAC ¶¶ 51, 62, 63, 68, 135. Specifically, plaintiff claims that prior to the execution of the Access Agreement, Exxon should have disclosed: (1) the extent of the contamination on the premises (“Omission # 1”)⁵; (2) that DEC had approved the CAP and USTDP submitted by Exxon (“Omission # 2”); (3) that the lines were faulty and the subject of a Notice of Violation issued by DEC (“Omission # 3”); (4) that plaintiff's permission was necessary pursuant to the approved CAP and USTDP before any remediation could begin (“Omission # 4”); (5) information about the two alternative remediation options that Exxon compared between April and June 2005 (“Omission # 5”), *id.* ¶¶ 65–66; and (6) that Exxon had chosen the remediation plan that involved removal of all of the USTs and that would render the premises vacant and no longer operational as a gasoline service station (“Omission # 6”). Plaintiff also alleges that Exxon failed to disclose information contained in a July 14, 2006, letter from Durnin to Winsor (“Omission # 7”), which is discussed more fully *infra*. *Id.* ¶¶ 95, 97. In sum, the PAC alleges that Exxon's failure to disclose the information above constitutes fraud.

3. Access Agreement Signed in December 2005

On December 1, 2005, plaintiff and Exxon finally signed the Access Agreement that they had been negotiating since May 2004. *Id.* ¶¶ 71–72. Plaintiff was represented by an attorney, Leonard Kramer. *See id.* ¶¶ 64, 73, 98.

The Access Agreement granted Exxon access to the premises for the purpose of conducting environmental testing and/or remediation operations. Access Agreement at 1. In return, Exxon was required to pay plaintiff \$13,750 per month, including retroactive monthly payments going back to May 15, 2004. *Id.* ¶ 3(a). Exxon was required to make this monthly payment until Exxon reasonably determined that it no longer needed access to the entire premises and that plaintiff could lease the premises for use as a service station. *Id.* ¶ 3(d). Once Exxon no longer needed to access to the entire premises, it was only required to pay a portion of the rent attributable to the percentage of the premises that Exxon would use. *Id.* ¶ 3(d).

The Access Agreement provides that “[i]f [Exxon] undertakes any remediation,” it will continue such remediation until the applicable governmental agencies

indicate that no further remediation is required and issue a “closure letter” indicating that the “Spill Number” has been removed. *Id.* ¶ 1(b). Exxon was required to provide plaintiff with copies of all environmental test results “which Exxon Mobil files” with any governmental agency. *Id.* ¶ 1(c).

Exxon retained the sole right to negotiate with any governmental agency concerning a remediation plan for the premises provided that “the execution of said plan does not diminish the value of the Premises.” *Id.* ¶ 1(e).

*5 Paragraph five of the Access Agreement, which discusses the USTs, states:

In addition to the parties' rights under the Lease, in order to perform remediation required by any Governmental Authority, [Exxon] may use, move, remove, or alter any building, structure, curbing, pavement, driveway, improvement, machinery, or other equipment located on the Premises without incurring any liability to [plaintiff] therefor provided it restores any building, machinery, equipment and other facilities necessary for the preservation of the use of the Premises as a gas service station in accordance with the requirements of the Board of Standard Appeals or other applicable governmental authority. Those items which [Exxon] does not remove belong to [plaintiff]. *The tanks and lines shall remain on the Premises and be purchased by [plaintiff] for the nominal consideration of \$10.00 subject to the terms of a bill of sale provided by Exxon Mobil to Owner, provided, however, that the [Small Tanks] located adjacent to the [Large Tanks system] shall be removed, if feasible, as part of the remediation undertaken by [Exxon] in accordance with the requirements of the [DEC]. With regard to the determination of whether it is feasible to remove the [Small Tanks],*

feasibility shall be based upon structural concerns, minimizing damage to the improvements on the Premises, and similar matters rather than the cost of removal. If such removal is not feasible, then [Exxon] and [plaintiff] agree that [Exxon] may abandon such tanks in place in accordance with the requirements of, and with the approval of, the [DEC]....

Id. ¶ 5 (emphasis added).

4. Exxon's Attempted Sale of the USTs

Shortly after the Access Agreement was signed, but before any remediation work had begun or Exxon had signed the consent order, Exxon attempted to sell the Large Tanks to plaintiff. PAC ¶¶ 86, 90. The proposed bill of sale offered by Exxon included a provision that required plaintiff to “agree[] that any leak or overfill discharge discovered at any time after the effective date of [the] bill of sale shall be [plaintiff's] responsibility and shall be deemed to have occurred after ownership of [Exxon's] interest in the tanks and lines passed to [plaintiff].”⁶ *Id.* ¶ 87. Plaintiff alleges that Exxon sought to sell plaintiff the Large Tanks pursuant to the above bill of sale because that would have enabled Exxon to shift the cost of the remediation to plaintiff. *Id.* ¶¶ 89, 91, 102.

Plaintiff declined Exxon's repeated attempts to sell the Large Tanks. *See id.* ¶¶ 98–99. Exxon began remediation work in the Spring of 2007. *Id.* ¶ 90.

5. Remediation and Removal of the USTs

On January 6, 2006, a GSC employee informed Durnin, via email, that the Access Agreement had been finalized and that pursuant to the agreement, the USTs were to remain on the premises. *Id.* ¶ 93. Durnin responded that leaving the USTs in the ground would “change the approved CAP and [USTDP].” *Id.*

*6 On July 14, 2006, Durnin wrote to Winsor about the results of a survey conducted in May 2006. *Id.* ¶¶ 94–95. In this letter, “[Durnin] noted that years of monitoring data had shown contaminants on the site and [that] removal of all USTs was required.” *Id.* The letter, however, also indicates that Durnin would permit any UST to remain if

Exxon could show that it had not contaminated the soil adjacent to or below it.⁷ *Id.*

Exxon never attempted to demonstrate to DEC that the Large Tanks were not contaminating the soil. *Id.* ¶ 96. In addition, Exxon never presented DEC with any alternative remediation plan that provided for preserving the Large Tanks and never asked to alter or modify the CAP to allow those tanks to remain. *Id.* ¶ 69.

In April 2007, Exxon solicited bids from three vendors who all responded that it was not technically feasible to remove the Small Tanks without damaging the Large Tanks. *Id.* ¶ 106.

Between May and August 2007, Exxon removed all of the USTs, three hydraulic lifts, and 1,326 tons of soil. *Id.* ¶¶ 110–11. In May 2008, Exxon determined that it no longer needed exclusive access to the premises and, therefore, ceased paying \$13,750 per month to plaintiff. *Id.* ¶ 118. Exxon then began tendering \$83.50 per month for limited access, presumably related to equipment for continued monitoring. *Id.*

In December 2008, DEC officially closed its spill inquiry for the premises. ¶ 113.

B. Procedural History

1. The Parties' Breach of Contract Claims

Plaintiff's original complaint, which was filed on March 9, 2009, asserts three claims for breach of contract. These claims are largely similar to the three breach of contract claims raised in the PAC.

First, plaintiff alleges that Exxon breached the Access Agreement when it ceased tendering full rental payments in May 2008 because the Access Agreement required full rental payments until plaintiff was able to use the premises as a gasoline service station. Compl. ¶ 18; PAC ¶ 118. According to plaintiff, the premises cannot be used as a gasoline service station due to Exxon's removal of the buildings, machinery, and equipment, and subsequent refusal to repair and restore those items. Compl. ¶¶ 15–20; PAC ¶¶ 115–20. As part of this claim, plaintiff alleges that its damages will continue to accrue monthly until the premises can be used as a gasoline service station. Compl. ¶ 20; PAC ¶ 120.

Second, plaintiff alleges that Exxon breached the Lease and the Access Agreement by damaging and removing buildings, machinery, and equipment, and refusing to repair and restore those items.⁸ Compl. ¶¶ 21–25; PAC ¶¶ 121–27.

Third, plaintiff alleges, in sum and substance, that Exxon's delay in restoring the premises breached the Lease, and that, because of the delay, the premises can no longer be lawfully used as gasoline service station. Compl. ¶¶ 26–28; PAC ¶¶ 128–130.

*7 On June 1, 2009, Exxon filed counterclaims, alleging that plaintiff breached the Access Agreement by refusing to purchase the Large Tanks when Exxon tendered the bill of sale in December 2005. Def.'s Am. Answer ¶¶ 49–50, ECF No. 7. According to Exxon's counterclaim, on July 14, 2006, DEC “required Exxon to remove all [USTs] on the Premises.” *Id.* ¶ 53. Thus, Exxon maintains that if plaintiff had fulfilled its obligations under the Access Agreement and purchased the Large Tanks when Exxon tendered the bill of sale: (1) Exxon would have removed the Small Tanks and completed its remediation efforts by May 14, 2006; and (2) plaintiff, rather than Exxon, would have shouldered the \$260,000 cost of removing the Large Tanks. *Id.* ¶¶ 61, 65.

2. Subsequent Events during Litigation

On July 14, 2009, I approved the parties' joint discovery plan, pursuant to which, “[t]he parties agree[d] that any motion to ... amend their respective pleadings shall be made by August 15, 2009.” ECF Nos. 9–10.

In a letter dated June 25, 2009, Durnin provided Nat Castagna with a chronology of events regarding DEC's involvement with the premises. June 25, 2009, Ltr., Decl. of Beth L. Kaufman in Opp. to Pl.'s Mot. for Leave to Amend the Compl. (“Kaufman Decl.”), Ex. 7, ECF Nos. 76. The letter recounted that in December 2004, GSC had submitted a USTDP to DEC that “proposed divestiture activities for the closure and removal of the gasoline USTs, filling and dispensing systems,” and that DEC had approved the USTDP and Exxon's proposed CAP in March 2005. *Id.* Thus, by June 25, 2009, plaintiff was aware that Exxon had submitted, and that DEC had approved, a USTDP that proposed removing all of the USTs from the premises. The June 25, 2009, letter

also explicitly states that DEC's August 30, 2004 letter requested a CAP. *Id.*

In or around February 2010, plaintiff's counsel retained another firm, Young & Young, LLP, on an "of counsel" basis to assist in the review of approximately 5,000 pages of documents that Exxon had produced on January 25, 2010. ECF Nos. 14, 16. In an April 13, 2010, letter seeking an extension of the discovery deadline, plaintiff's counsel informed the Court that plaintiff had recently completed reviewing Exxon's document production and would seek to file an amended complaint raising a fraud claim because some of those documents indicated that, prior to the execution of the Access Agreement, Exxon had already agreed with DEC to remove all of the USTs. ECF No. 16. Plaintiff's counsel, however, intended to refrain from seeking leave to amend until a privilege dispute between the parties was resolved. *Id.* After the parties conferred and narrowed the privilege dispute, ECF No. 22, the Court resolved the remaining privilege issues in an order dated September 22, 2010, ECF No. 27.

While the privilege dispute was ongoing, plaintiff raised a number of issues concerning Exxon's document production, which culminated in plaintiff making a motion to compel in December 2010. ECF Nos. 25, 28, 29. Plaintiff's motion to compel argued, *inter alia*, that Exxon failed to produce certain emails and attachments and that, in Exxon's production, there was a five-month gap in emails between August and December 2003. Pl.'s Mem. of Law in Supp. of Mot. to Compel ("Mot. to Compel") at 9–11, ECF No. 29.

*8 Exxon opposed the motion to compel and filed its own motion to strike plaintiff's expert report, which was submitted in support of the motion to compel. Exxon's Notice of Mot. to Strike Opinion of Yalkin Demirkaya, ECF No. 36. In an order dated April 1, 2011 ("April 1, 2011, Order"), I denied plaintiff's motion, granted Exxon's motion, and awarded Exxon its attorney's fees and costs for the motions. ECF No. 44. In denying plaintiff's motion, the April 1, 2011, Order concluded, *inter alia*, that the primary purpose of plaintiff's motion was to obtain discovery regarding plaintiff's unpleaded fraud claim and that plaintiff was not entitled to documents predating May 2004.⁹ Exxon was awarded fees and costs because plaintiff's motion to compel was "essentially duplicative of the Court and the parties' efforts to resolve this same dispute months ago." *Id.* at 14. During conferences held

in August and October 2010, I had explained to plaintiff that it was not entitled to discovery on an unpleaded fraud claim. Kaufman Decl. ¶ 10.

Shortly after I issued the April 1, 2011, Order, plaintiff filed an objection to the order and filed a pre-motion conference letter before Judge Garaufis seeking leave to amend the complaint to add a fraud claim. ECF Nos. 47, 48. On May 19, 2011, Judge Garaufis granted plaintiff permission to file a motion for leave to amend, which was ultimately filed on September 23, 2011. Minute Entry dated May 19, 2011; ECF Nos. 71–77. On November 17, 2011, Judge Garaufis referred the motion to me "for decision pursuant to 28 U.S.C. § 636(b)(1)(A) and Federal Rule of Civil Procedure 72(a)." ECF No. 79.

While the objection and motion for leave to amend were being briefed, the parties completed, with a single exception, all depositions. Kaufman Decl. ¶¶ 7, 12. The lone remaining deposition was presumably completed before the end of 2011.

3. Plaintiff's Motion for Leave to Amend

Plaintiff's proposed fraud claim, which is based on numerous new factual allegations, asserts that Exxon had a duty to disclose the Omissions because: (1) Exxon had a fiduciary duty to plaintiff; and (2) Exxon had superior knowledge, which was not readily available to plaintiff, of the Omissions and knew that plaintiff was acting on the basis of mistaken knowledge. PAC ¶¶ 132–34.

According to plaintiff, "[a]s a result of Exxon's fraudulent concealment, Plaintiff was fraudulently induced to enter into the Access Agreement and delay in renewing its Certificate of Occupancy for the Premises." *Id.* ¶ 137. Plaintiff also alleges that Exxon's failure to disclose information concerning the remediation "has directly damaged Plaintiff in that the Certificate of Occupancy lapsed resulting in the Premises no longer able to be lawfully maintained as a gasoline service station." *Id.* ¶ 138.

According to plaintiff, "the crux of [its] proposed fraud claim" is "that despite the fact that Exxon knew that the Large Tanks were required to be removed pursuant to plans filed with the [DEC] as possibly contributing to contamination, Exxon intentionally failed to disclose this information to Plaintiff[and] [i]nstead Exxon fraudulently attempted to sell the Large Tanks to Plaintiff

pursuant to a bill of sale in an attempt to shift the entire cost of the remediation to Plaintiff.” Pl’s Reply Mem. in Further Supp. of Mot. for Leave to File Am. Compl. (“Pl.’s Reply Mem.”) at 1, ECF No. 77; *see also* Pl.’s Mem. at 1 (“Exxon intentionally withheld material information concerning the remediation in an effort to fraudulently induce Plaintiff to ‘purchase’ the remediation and get stuck with all remediation costs.”).

*9 Exxon argues that plaintiff’s motion should be denied because plaintiff’s proposed amendment was unduly delayed and brought in bad faith, and is also futile. In support of these arguments, Exxon relies on documents and deposition testimony that are not attached to the PAC.

II. DISCUSSION

A. Standard for Motion to Amend

In order to amend its complaint, plaintiff requires the court’s leave, which should be granted “freely ... where justice so requires.” Fed.R.Civ.P. 15(a)(2). However, “[a] district court has discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party.” *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir.2007) (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)).

B. Undue Delay under Rule 15(a) and Good Cause under Rule 16(b)

The Second Circuit has “held repeatedly that ‘mere delay’ is not, of itself, sufficient to justify denial of a Rule 15(a) motion.” *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir.2000) (citation omitted); *see also Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 333 (2d Cir.2000) (“Parties are generally allowed to amend their pleadings absent bad faith or prejudice.” (citing *State Teachers Ret. Bd. v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir.1981))). However, where the court has issued a scheduling order under Federal Rule of Civil Procedure 16(b), Rule 16(b) must also be considered in analyzing a motion to amend.

Rule 16(b) directs district courts to issue a scheduling order at the outset of a case limiting “the time to join other parties, amend the pleadings, complete discovery,

and file motions.” Fed.R.Civ.P. 16(b). This schedule “may be modified only for good cause and with the judge’s consent.” Fed.R.Civ.P. 16(b)(4). “Rule 16(b) serves an important function in ensuring fairness, certainty, and expedition of litigation.” *Sokol Holdings, Inc. v. BMB Munai, Inc.*, No. 05 Civ. 3749, 2009 WL 3467756, at *6 (S.D.N.Y. Oct. 28, 2009) (citing *Parker*, 204 F.3d at 340).

[1] A party can establish good cause under Rule 16(b) by showing that the deadline at issue “‘cannot reasonably be met despite the diligence of the party seeking the extension.’” *Parker*, 204 F.3d at 340 (quoting Fed.R.Civ.P. 16 advisory committee’s note (1983 amendment, discussion of subsection (b))). “[T]he good cause standard is not satisfied when the proposed amendment rests on information ‘that the party knew, or should have known, in advance of the deadline.’” *Lamothe v. Town of Oyster Bay*, No. 08 Civ.2078, 2011 WL 4974804, at *6 (E.D.N.Y. Oct. 19, 2011) (quoting *Sokol Holdings, Inc. v. BMD Munai, Inc.*, No. 05 Civ. 3749, 2009 WL 2524611, at *7 (S.D.N.Y. Aug. 14, 2009) (Freeman, Mag. J.), *aff’d*, 2009 WL 3467756 (S.D.N.Y. Oct. 28, 2009)).

[2] [3] Despite the liberal standard for amendment under Rule 15(a), a district court may, in its discretion, deny “leave to amend the pleadings after the deadline set in the scheduling order where the moving party has failed to establish good cause.” *Parker*, 204 F.3d at 340. When both Rule 15(a) and Rule 16(b) are implicated, the Second Circuit has directed that “the primary consideration is whether the moving party can demonstrate diligence.” *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 244 (2d Cir.2007) (addressing application of Rule 16(b) to situation where Rule 15(a) would otherwise permit amendment as of right). In exercising its discretion under Rule 16(b), a district court “may [also] consider other relevant factors including, in particular, whether allowing the amendment of the pleading at this stage of the litigation will prejudice defendants.” *Id.*; *see also Holmes v. Grubman*, 568 F.3d 329, 334–35 (2d Cir.2009) (affirming denial of motion to amend where plaintiff failed to establish good cause and stating that the lenient standard under Rule 15(a) “must be balanced against” Rule 16(b)’s good cause requirement) (quoting *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir.2003)). Even where the prejudice to the non-moving party “may well be minimal,” a failure to show good cause can warrant denial of a motion to amend. *Oppenheimer & Co. Inc. v. Metal Mgmt.*,

Inc., No. 08 Civ. 3697, 2009 WL 2432729, at *4 (S.D.N.Y. July 31, 2009) (Maas, Mag. J.), *aff'd*, 2010 WL 743793 (S.D.N.Y. Mar. 2, 2010).

***10 [4]** Plaintiff cannot establish good cause for failing to raise its claims based on Omissions # 1, 2, 3, 4, and 7 prior to the August 15, 2009, deadline for amending the pleading. Those claims essentially concern information contained in formal written correspondence between DEC and Exxon,¹⁰ and plaintiff either knew, or should have known, of the relevant information before the August 15, 2009 deadline. Critically, Durnin's June 25, 2009, letter to Nat Castagna revealed the factual basis for the "crux" of plaintiff's fraud claim. Therefore, plaintiff's motion to amend is denied as to these claims.

Plaintiff argues that it has established good cause because it first learned of the facts forming the basis of its fraud claim in discovery. Pl.'s Reply Mem. at 3 n. 1. According to plaintiff, "it was not until Plaintiff pieced together Exxon's incomplete document production that Plaintiff first learned that Exxon had an approved CAP and USTDP with [DEC] which required removal of all USTs, including the Large Tanks it was trying to sell to Plaintiff, some eight months prior to Exxon's execution of the Access Agreement." *Id.* at 4.

Plaintiff, however, simply ignores Durnin's June 25, 2009, letter, which indicates that, in March 2005, DEC had approved Exxon's USTDP, which proposed "removal of the gasoline USTs, [and] filling and dispensing systems." Thus, plaintiff was aware of the factual basis for the "crux" of its fraud claim seven weeks prior to the August 15, 2009, deadline for filing motions to amend the pleadings, and over nine months before plaintiff's April 13, 2010, letter that first raised the prospect of a fraud claim.¹¹ Given the June 25, 2009, letter, plaintiff cannot show good cause as to Omission # 2—the lynchpin of its fraud claim.¹² See *Oppenheimer*, 2009 WL 2432729, at *3 (denying motion to amend answer and finding no good cause where, even though recently produced documents "may further have underscored the potential viability of [plaintiff's] waiver argument, the [waiver] issue was not new").

Plaintiff has also failed to show good cause as to Omissions # 1, 3, 4, and 7. Plaintiff appears to have obtained DEC's July 14, 2006, letter—the basis for

Omission # 7—before the August 15, 2009 deadline. In a letter from Kramer to Durnin dated October 5, 2006, Kramer requested a copy of the July 14, 2006, letter through the Freedom of Information Act ("FOIA"), see Oct. 5, 2006, Ltr., Kaufman Decl., Ex. 9, and Durnin's deposition testimony suggests that Kramer's request was granted, see Durnin Dep. 140, Reply Decl., Ex. C (stating that he faxed this letter to Kramer).¹³ Plaintiff offers no contrary evidence concerning either Kramer's October 5, 2006, letter or Durnin's apparent response. In addition, there is no evidence in the record that, either before filing the original complaint or after receiving the June 25, 2009, letter, plaintiff acted diligently to obtain, through either a FOIA request or other means available to it as owner of the premises, relevant documents concerning the premises from DEC. Presumably, such requests would have yielded the documentation underlying Omissions # 1, 3, and 4, such as DEC's August 30, 2004, letter, and the Notice of Violation concerning the lines.¹⁴

***11** It should also be noted that, even after plaintiff reviewed Exxon's January 2010 production (and, according to plaintiff, first learned of the Omissions), plaintiff further delayed filing a motion to amend its complaint and instead sought to compel discovery on its unpleaded fraud claim despite being informed by the Court that such discovery was impermissible. This strategy contributed to an unnecessary delay of these proceedings for at least six months and further supports denial of plaintiff's motion to amend.

Although the potential prejudice to defendant may be minimal, plaintiff's motion to amend its complaint to add fraud claims concerning Omissions # 1, 2, 3, 4, and 7 is denied. See *Oppenheimer*, 2009 WL 2432729, at *4 (denying motion to amend, which was filed seven months after amendment deadline, based on failure show good cause even though discovery in case was not complete and prejudice to non-moving party "may well be minimal"). Additionally, as explained below, plaintiff's claims concerning all of the Omissions are also futile.

C. Futility

1. Standard

[5] A proposed amendment to a pleading is considered futile if it "could not withstand a motion to dismiss pursuant to Rule 12(b)(6)." *Dougherty v. Town of North*

Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 87 (2d Cir.2002) (citing *Ricciuti v. N. Y. C. Transit Auth.*, 941 F.2d 119, 123 (2d Cir.1991)).

In analyzing a motion to dismiss under Rule 12(b)(6), the court is required to accept as true “all well-pleaded factual allegations in the complaint and draw all reasonable inferences in the plaintiff’s favor.” *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 270–71 (2d Cir.2011).

Under *Ashcroft v. Iqbal*:

[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.

556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citations and internal marks omitted).

Iqbal sets out a two-pronged approach to reviewing a motion to dismiss. First, a court is not required to accept as true a complaint’s legal conclusions. *Id.* “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* (citation omitted). Second, a court must be satisfied that the complaint “state[s] a plausible claim for relief.” *Id.* at 679, 129 S.Ct. 1937 (citation omitted). “Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* (citation omitted). “Plausibility thus depends on a host of considerations: the full factual picture presented by the complaint, the particular cause of action and its elements, and the existence of alternative explanations so obvious that they render plaintiff’s inferences unreasonable.” *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 430 (2d Cir.2011).

2. *Consideration of Matters Extraneous to the Complaint*
 *12 [6] The general rule is that “[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.” Fed.R.Civ.P. 12(d). A court, however, may consider documents attached to the complaint without converting the motion. *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir.2010) (citation omitted). The above principles are generally applicable when a court is tasked with making futility determinations in the context of a motion to amend. *See Contractual Obligation Prods., LLC v. AMC Networks, Inc.*, No. 04 Civ. 2867, 2006 WL 6217754, at *3 (S.D.N.Y. Mar. 31, 2006).

In arguing that plaintiff’s proposed fraud claims are futile, Exxon relies on documents and deposition testimony submitted in its opposition papers that would ordinarily not be considered. Therefore, the futility analysis below is based on the facts set out in the PAC and the exhibits attached thereto. Based on those facts, the amended complaint is futile.

3. Elements of a Fraud Claim

[7] [8] Under New York law, fraud requires that “the defendant knowingly or recklessly misrepresented a material fact, intending to induce the plaintiff’s reliance, and that the plaintiff relied on the misrepresentation and suffered damages as a result.” *Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.*, 500 F.3d 171, 181 (2d Cir.2007) (citations omitted). Where a plaintiff seeks to show fraud by omission, it must also prove that the defendant had a duty to disclose the concealed fact. *Id.* (citation omitted).

Plaintiff has failed to allege any detrimental reliance linked to Omission # 7 or Exxon’s failure to disclose the other Omissions after the execution of the Access Agreement. With regard to Omissions # 1, 2, 3, and 4, plaintiff has failed to plausibly allege reasonable reliance or a duty disclose. Plaintiff’s claim based on Omission # 6 fails because it is duplicative of plaintiff’s breach of contract claims. Finally, plaintiff’s claim concerning Omission # 5 is futile on a number of different grounds.

4. Detrimental Reliance

“An essential element of any fraud ... claim is that there must be reasonable reliance, to a party’s detriment, upon

the representations made.” *Water Street Leasehold LLC v. Deloitte & Touche LLP*, 19 A.D.3d 183, 185, 796 N.Y.S.2d 598 (N.Y.App. Div. 1st Dep’t 2005) (citation omitted). “ [P]laintiff must show both that defendant’s misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation).” *Id.* (quoting *Laub v. Faessel*, 297 A.D.2d 28, 31, 745 N.Y.S.2d 534 (N.Y.App.Div. 1st Dep’t 2002)).

[9] Plaintiff alleges that Exxon’s failure to disclose the Omissions fraudulently induced it to “delay in renewing its Certificate of Occupancy.” PAC ¶ 137. Exxon, however, argues that plaintiff has failed to plead any detriment linked to that delay because plaintiff has neither alleged that it applied to renew its Certificate of Occupancy nor that any such application was denied. Def.’s Mem. in Opp. to Pl.’s Mot. for Leave to Amend the Compl. (“Def.’s Mem.”) at 20–21. Plaintiff responds that it has alleged a detriment, namely, that the premises’ Certificate of Occupancy and variance lapsed because the premises were not used as a gasoline service station for a continuous period of two years. Pl.’s Reply Mem. at 6.

*13 The flaw in plaintiff’s argument is that, although the variance and Certificate of Occupancy lapsed, the PAC does not plausibly suggest that this occurred because of plaintiff’s delay in renewing the Certificate of Occupancy. Nothing in the PAC or plaintiff’s papers indicates that, if plaintiff had sought to renew the Certificate of Occupancy sooner, that action could have prevented the CO and variance from lapsing or could have otherwise remedied the lapse.

The PAC alleges that Exxon’s removal of all of the USTs could cause the loss of the premises’ Certificate of Occupancy, PAC ¶ 39; however, nothing in the PAC suggests that plaintiff’s delay in renewing its Certificate of Occupancy was a cause of that loss. In its reply brief, plaintiff raises a different argument, contending that Exxon’s failure to disclose induced plaintiff into executing the Access Agreement, and that the variance and Certificate of Occupancy lapsed because the Access Agreement “result[ed]” in the premises not being used as a gasoline service station for more than two years. Pl.’s Reply Mem. at 6. However, plaintiff’s delay in renewing its Certificate of Occupancy is completely absent from this theory of detrimental reliance, and none of the additional

evidence that plaintiff submitted concerning the variance and Certificate of Occupancy, *see supra* n. 3, fills this gap.

Because plaintiff has failed to allege any link between its delay in renewing the Certificate of Occupancy and the lapse of the Certificate of Occupancy and variance, plaintiff’s only potentially viable claims concern the Omissions that allegedly induced plaintiff into executing the Access Agreement. Any claim involving Exxon’s failure to disclose information *after* the execution of the Access Agreement must be dismissed. This includes plaintiff’s claim concerning Omission # 7, which is premised on Exxon’s failure to disclose DEC’s July 14, 2006, letter—a letter that was not sent until six months *after* the Access Agreement was signed.

5. Duty to Disclose / Reasonable Reliance

For claims of fraudulent concealment,

New York recognizes a duty by a party to a business transaction to speak ... when the parties stand in a fiduciary or confidential relationship with each other; and ... where one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge.

Brass v. Am. Film Techns., Inc., 987 F.2d 142, 150 (2d Cir.1993).

a. Fiduciary Duty

“A fiduciary duty arises when one has reposed trust or confidence in the integrity or fidelity of another who thereby gains a resulting superiority of influence over the first, or when one assumes control and responsibility over another.” *Sotheby’s, Inc. v. Minor*, No. 08 Civ. 7694, 2009 WL 3444887, at *9 (S.D.N.Y. Oct. 26, 2009) (citations and internal marks omitted).

[10] In its opening brief, plaintiff notes that a contract may create a fiduciary relationship if the contract “establishes a relationship of trust and confidence between the parties.” Pl.’s Mem. at 14 (quoting *St. John’s Univ. v. Bolton*, 757 F.Supp.2d 144, 166 (E.D.N.Y.2010)).

However, outside of this single sentence, plaintiff does not address this issue further and never even identifies which of the contracts at issue (the lease or the Access Agreement) gave rise to the alleged fiduciary relationship. That alone suffices to reject this argument. Moreover, even if plaintiff had pursued this issue, nothing in the lease suggests a relationship of trust and confidence that extended past the expiration of the lease and into the period in which the parties negotiated the Access Agreement. See Lease dated Mar. 7, 1984, Young Decl., Ex. C. As such, plaintiff has failed to plead a fiduciary relationship for the purposes of its claim that the Omissions induced it to execute the Access Agreement. It is unnecessary to determine whether the Access Agreement gave rise to a fiduciary relationship because, as explained earlier, plaintiff has failed to allege that it was induced into any detrimental acts or omissions after the execution of the Access Agreement.

b. Superior Knowledge and Reasonable Reliance

*14 [11] Under New York law, a duty to disclose may arise where one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge. *Brass*, 987 F.2d at 150. According to *Brass*, although “[i]n general” information is considered “readily available” in cases “where a buyer has an opportunity equal to that of a seller to obtain information,” “in an increasing number of situations, a buyer is not required to conduct investigations to unearth facts and defects that are present, but not manifest” and “may safely rely on the seller to make full disclosure.” *Id.* at 151.

[12] Exxon argues that plaintiff’s conclusory allegation that the undisclosed information at issue was not readily available is insufficient to establish a duty to disclose in light of the allegations in the PAC and Exxon’s additional evidence. Again, the additional evidence submitted by Exxon is beyond the scope of the PAC and will not be considered. Nevertheless, plaintiff has still failed to plausibly plead a duty to disclose or reasonable reliance as to Omissions # 1, 2, 3, and 4. Although Exxon does not raise this argument, I find that the instant suit is analogous to cases where the critical information at issue was available in public records. The PAC and the documents attached thereto indicate that all of the important information underlying the omissions at

issue was contained in correspondence between DEC and Exxon—records that were presumably available to plaintiff upon request. Although the question of “[w]hether or not reliance on alleged misrepresentations is reasonable in the context of a particular case is intensely fact-specific and generally considered inappropriate for determination on a motion to dismiss,” *Doehla v. Wathne Ltd., Inc.*, No. 98 Civ. 6087, 1999 WL 566311, at *10 (S.D.N.Y. Aug. 3, 1999), plaintiff’s claim must still be plausible.

[13] A plaintiff cannot establish justifiable reliance or a duty to disclose where the information at issue was a matter of public record that could have been discovered through the exercise of ordinary diligence. See *Barrett v. Freifeld*, 77 A.D.3d 600, 601, 908 N.Y.S.2d 736 (N.Y.App. Div.2d Dep’t 2010) (affirming grant of summary judgment and finding no duty to disclose where arrest of seller of business “was a matter of public record which could have been discovered through the exercise of ordinary diligence and, thus, the plaintiff did not justifiably rely on [accountant] to disclose that information”); *Urstadt Biddle Props., Inc. v. Excelsior Realty Corp.*, 65 A.D.3d 1135, 1137, 885 N.Y.S.2d 510 (N.Y.App. Div.2d Dep’t 2009) (affirming grant of summary judgment on misrepresentation claim where zoning status of property and tax assessment were matters of public record); *Alpha GmbH & Co. Schiffsbesitz KG v. BIP Indus. Co.*, 25 A.D.3d 344, 345, 807 N.Y.S.2d 73 (N.Y.App. Div. 1st Dep’t 2006) (affirming grant of summary judgment on fraudulent concealment claim where “[t]he parties, businesses on opposite sides of a transaction, and each represented by counsel, were not in a confidential or fiduciary relationship, and the allegedly concealed information, plaintiff’s insolvency and dissolution, were matters of public record that defendant could have discovered by the exercise of ordinary diligence”); but see *Todd v. Pearl Woods, Inc.*, 20 A.D.2d 911, 248 N.Y.S.2d 975 (N.Y.App. Div.2d Dep’t 1964) (affirming denial of summary judgment where defendant made misrepresentations regarding sewer system for homes in housing development and concluding that because “the facts [at issue] were peculiarly within the knowledge of the defendants and were willfully misrepresented, the failure of the plaintiffs to ascertain the truth by inspecting the public records is not fatal to their action”), *aff’d*, 15 N.Y.2d 817, 257 N.Y.S.2d 937, 205 N.E.2d 861 (1965).

*15 Moreover, even without the benefit of *Iqbal*, courts have granted motions to dismiss where the information at issue was available in public records. *See Wildenstein v. SH & Co., Inc.*, 97 A.D.3d 488, 950 N.Y.S.2d 3, 6 (N.Y.App. Div. 1st Dep't 2012) (reversing denial of motion to dismiss where defendant's misrepresentations concerning architect and home improvement contractor licenses could have been verified through public records); *Clearmont Prop., LLC v. Eisner*, 58 A.D.3d 1052, 1056, 872 N.Y.S.2d 725 (App.Div.3d Dep't 2009) (affirming grant of motion to dismiss where seller represented that he owned property and contract noted that the property was tax exempt, raising a question as to the reason for the property's tax exempt status, but buyer failed to investigate public records regarding ownership); *Gen. Motors Corp. v. Villa Marin Chevrolet, Inc.*, Nos. 98-CV-5206, 98-CV-5208, 98-CV-6167, 99-CV-3750, 2000 WL 271965, at *28-32 (E.D.N.Y. Mar. 7, 2000) (dismissing misrepresentation claims where the information at issue—a certificate of occupancy and a municipal denial of a request to subdivide a tax lot—were contained in publicly available documents and the parties were counseled and sophisticated); *Villa Marin Chevrolet, Inc. v. Gen. Motors Corp.*, 98-CV-6167, 1999 WL 1052494, at *6-7 (E.D.N.Y. Nov. 18, 1999) (dismissing related fraud claims based on failure to establish reasonable reliance or a duty to disclose); but *see Brass*, 987 F.2d at 152 (reversing grant of motion to dismiss where, although investor, who was apparently uncounseled, could have learned about restraint on alienation of securities from the SEC, defendant's "conduct taken as a whole ... strongly implied that the stock ... could be freely traded.").

Omissions # 1, 2, 3, and 4 were essentially all contained in written correspondence between DEC and Exxon. If plaintiff had undertaken the minimal effort of requesting records concerning the premises from DEC—records that plaintiff was presumably entitled to obtain—it would have discovered the information above. Plaintiff was the owner of the premises throughout the relevant time period and it (and likely any interested member of the public) was presumably entitled to obtain copies of that documentation from DEC. Thus, plaintiff's conclusory assertion that this information was not readily available is insufficient to plausibly plead a viable fraud claim.

Only one factual allegation raised by plaintiff is potentially relevant to this issue. Plaintiff argues that an internal Exxon email, dated April 21, 2005, "explicitly

noted that [DEC] would only discuss with Plaintiff granting [Exxon] access to the site and not the requirement that the tanks be removed."¹⁵ Pl.'s Reply Mem. at 8 n. 3.¹⁶ However, plaintiff's interpretation of this email—that DEC had already imposed a requirement that the USTs be removed and was not going to disclose that requirement to plaintiff—is implausible in light of later statements in that same email as well as subsequent internal Exxon emails. The April 21, 2005, email goes on to state that "it is a business decision to re-open or pull tanks." PAC ¶ 64. Similarly, in May and June 2005, Exxon employees compared the costs of two remediation plans—one of which involved preserving all of the USTs. Obviously, these alternatives would not have been considered if DEC had already mandated that the USTs be removed. More importantly, even accepting plaintiff's interpretation of the April 21, 2005, email, that still would not plausibly suggest that the written documentation on file with DEC was not accessible to plaintiff upon request.

*16 Finally, the facts alleged by plaintiff do not plausibly suggest that this is a situation where plaintiff might be excused from engaging in the minimal diligence of requesting written records about the spill investigation from DEC. Although plaintiff was presumably not a sophisticated party with repeat experience in this type of transaction, plaintiff had counsel, and—in light of its knowledge that there was a DEC investigation into potential contamination and the fact that the Access Agreement contemplated it purchasing the Large Tanks at an unspecified time pursuant to a bill of sale with unspecified terms—was on notice that it could potentially be exposed to environmental liabilities associated with the Large Tanks.¹⁷

Plaintiff's claims based on Omissions # 1, 2, 3, and 4 are futile because plaintiff has not plausibly pled that the information underlying those omissions was not readily available.

6. *Viability of Plaintiff's Parallel Fraud and Contract Claims*

[14] "[U]nder New York law, parallel fraud and contract claims may be brought if the plaintiff (1) demonstrates a legal duty separate from the duty to perform under the contract; (2) points to a fraudulent misrepresentation that is collateral or extraneous to the contract; or (3) seeks special damages that are unrecoverable as

contract damages.” *Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.*, 500 F.3d 171, 183–84 (2d Cir.2007) (citing *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 20 (2d Cir.1996)).

[15] [16] Where a defendant is alleged to have misrepresented or failed to disclose present facts that induced the plaintiff to enter into a contract, such misrepresentations or omissions give rise to a non-duplicative fraud claim. *Merrill Lynch*, 500 F.3d at 183 (holding that fraudulent inducement claim based on representations and omissions related to contractual warranties was not duplicative and drawing analogy to case where a “seller misrepresented facts as to the present condition of his property, even though these facts were warranted in the parties' contract”). However, the Second Circuit has also held that where a defendant fails to disclose that it “never intended to perform its obligations” under a contract, that failure to disclose its “intention to breach is not actionable as a fraudulent concealment.” *TVT Records v. Island Def Jam Music Group*, 412 F.3d 82, 90 (2d Cir.2005).

According to Exxon, *TVT* bars plaintiff's claims that it was induced into signing the Access Agreement by Exxon's pre-Access Agreement failure to disclose its state of mind concerning whether and how it intended to perform under the Access Agreement.

a. Omission # 6

[17] According to Omission # 6, Exxon “chose” the remediation option that involved removal of all of the USTs even though Exxon was aware that this approach would render the premises vacant and no longer operational as a gasoline station. In essence, plaintiff is alleging that, prior to entering into the Access Agreement, Exxon had already decided on a course of action that would violate the Access Agreement and that Exxon should have disclosed this to plaintiff.¹⁸

*17 Under *TVT*, plaintiff's fraud claim based on Omission # 6 is duplicative of plaintiff's breach of contract claims, and is, therefore, futile. *See also Marriott Int'l, Inc. v. Downtown Athletic Club of New York City, Inc.*, No. 02 Civ. 3906, 2003 WL 21314056, at *5–7 (S.D.N.Y. June 9, 2003) (dismissing fraudulent inducement claim where complaint alleged that defendant's promise was false at

the time it was made because defendant did not intend to honor the contract).

b. Omission # 5

Omission # 5 concerns the two alternative remediation options that Exxon considered between April and June 2005. The fact that Exxon considered these two plans is intertwined with plaintiff's allegation that Exxon ultimately “chose” the UST removal plan (Omission # 6). Because a claim based on Exxon's intent to breach the Access Agreement is not viable, Omission # 5 is irrelevant to the extent that it sheds light on that intent.

Moreover, plaintiff has failed to plausibly plead any other potential claim based on the information about the remediation system plan that Exxon did not disclose to plaintiff. Although the remediation system plan was not discussed in the DEC records that were presumably available to plaintiff, given the information in the DEC records and the fact that plaintiff had access to the premises, plaintiff could and should have determined, on its own, whether a plan such as the remediation system plan was potentially a viable remediation option. As such, Exxon did not have a duty to disclose this information.

Furthermore, plaintiff has failed to plausibly plead that it would have not entered the Access Agreement if it had known about the remediation system plan. The Access Agreement already provided that the Large Tanks were to remain on the premises and only directed Exxon to remove the Small Tanks if such removal was feasible. The Access Agreement also provided that the execution of any remediation plan that Exxon negotiated with DEC “not diminish the value of the Premises.” Access Agreement ¶ 1(e).

D. Additional Evidence Submitted by Exxon

For the reasons outlined in the prior section, plaintiff's motion to amend is denied because the PAC is futile. In addition, evidence submitted by Exxon, to which plaintiff has never explicitly objected, further establishes that plaintiff's proposed claims are meritless.¹⁹

As Exxon points out, the undisputed evidence in the record reveals that “the possibility that remediation would include removal of all tanks ... was openly and

blatantly discussed and was something of which plaintiff was aware.”²⁰ Def.’s Mem. at 18 (emphasis in original). Although none of the evidence cited by Exxon establishes that plaintiff was, in fact, aware of the CAP and USTDP, Exxon’s evidence still undermines the crux of plaintiff’s fraud claim, which asserts that plaintiff would have never agreed to purchase the Large Tanks if it had known that the Large Tanks were potentially contributing to contamination and that DEC had approved Exxon’s proposed CAP and USTDP.

*18 Plaintiff already knew that the Large Tanks were possibly defective and that remediation might include their removal (and was surely aware that any remediation associated with the Large Tanks had the potential to be very costly). In light of that knowledge, and based on the current record, there is only one plausible explanation for plaintiff’s decision to agree to the provision in the Access Agreement that called for plaintiff to purchase the Large Tanks—plaintiff simply never considered the possibility that Exxon would assert that the Access Agreement obligated plaintiff to purchase the Large Tanks in a manner that would result in the costs of remediation being shifted to plaintiff.²¹ This, however, does not raise an issue of fraud. The critical fact—the terms of the Access Agreement—was known to plaintiff. If plaintiff erred in analyzing its potential contractual liability under

those terms, it is that error, and not Exxon’s failure to disclose information about the Large Tanks, that induced plaintiff to enter into the Access Agreement. Additional information about the Large Tanks and the potential remediation costs associated with them would not have deterred plaintiff from accepting the provision in the Access Agreement that called for plaintiff to purchase the Large Tanks.²²

Although I would deny plaintiff’s motion to amend even without the additional evidence submitted by Exxon, that evidence provides another basis to deny the motion. In light of this conclusion, it is unnecessary to decide whether plaintiff’s amendment was pursued in bad faith.

III. CONCLUSION

For the reasons outlined above, plaintiff’s motion for leave to amend is denied.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 4174862

Footnotes

- 1 Durnin is a Professional Engineer in the Division of Environmental Remediation at DEC. PAC ¶ 50.
- 2 Winsor was Exxon’s Remediation Territory Manager. PAC ¶ 28. At some point during the relevant events, Winsor’s last name changed to Tacchino. For ease of reference, she is referred to throughout as “Winsor.”
- 3 In its reply brief, plaintiff offers additional evidence regarding the variance and Certificate of Occupancy issued by New York City that permitted the premises to be used as a gasoline service station. Decl. of Richard W. Young in Further Supp. of Pl.’s Mot. for Leave to Amend (“Young Reply Decl.”) ¶ 2, ECF No. 77. According to plaintiff, if the premises were not used as a gasoline service station for two continuous years, both the variance and the Certificate of Occupancy would lapse. *Id.* (discussing both Certificate of Occupancy and variance); PAC ¶ 8 (discussing only variance). The triggering event for the commencement of this two year period appears to have been either: (1) when Exxon stopped dispensing gasoline on the premises (which occurred in May 2004); or (2) when Exxon removed the USTs (which, as explained *infra*, occurs in August 2007). See Email dated June 4, 2004, Young Reply Decl., Ex. A; Emails Dated June 29, 2005, Young Reply Decl., Ex. A; May 30, 2008 Ltr. from Architect Adam Vassalotti to Kramer, Young Reply Decl., Ex. A.
- 4 Plaintiff asserts that “[t]he documents ... reveal that Exxon was on notice that [DEC] was mandating that the Premises be shut down due to contamination.” Pl.’s Mem. in Supp. of Mot. for Leave to File Am. Compl. (“Pl.’s Mem.”) at 18, ECF No. 72 (emphasis added). Plaintiff provides no citation for this proposition, which presumably refers to the Aug. 30, 2004, letter’s statement regarding “closure of the site.” When the August 30, 2004, letter is read in its entirety, it becomes clear that Durnin is discussing the closure of DEC’s ongoing “Spill” inquiry and not the premises, per se. See Aug. 30, 2004, Ltr. (stating that if report that Exxon will prepare as part of remediation indicates that “all the contamination has been removed from both on-site and offsite, [Exxon should] request [DEC] to close the open Spill at this site”); *id.* (stating that

- if report "indicates that there is residual contamination remaining at the site, perform an on-site and off-site exposure assessment to determine if this Spill site can be closed.")
- 5 Most, if not all, of the information regarding the extent of contamination appears to have been contained in formal written correspondence between DEC and Exxon (or Exxon's agents). In fact, DEC's August 30, 2004, letter, which is attached to the PAC, included the most recent information on the extent of the contamination prior to the execution of the Access Agreement in December 2005. Aug. 30, 2004, Ltr.
- 6 Attached to plaintiff's complaint is a bill of sale with different terms. However, even that bill of sale required plaintiff to release, indemnify, and hold Exxon harmless for any existing or future liability stemming from plaintiff's acquisition or use of the USTs. Young Decl., Ex. O.
- 7 This allegation, along with Exxon's consideration of the remediation system plan after DEC approved the CAP and USTDP, indicates that the approved CAP and USTDP, which called for removal of all of the USTs, was not "set in stone," as plaintiff at times implies.
- 8 As part of this claim, the PAC adds new paragraphs alleging that Exxon entered into the Access Agreement with no intention of performing its obligations. PAC ¶¶ 123, 126.
- 9 The April 1, 2011, Order erroneously stated that the Access Agreement was executed in May 2004. However, the April 1, 2011, Order clearly intended to preclude documents pre-dating May 2004 because that is when the parties began negotiating the Access Agreement.
- 10 Although plaintiff attached copies of certain correspondence between Exxon and DEC to its complaint, plaintiff did not include copies of the letters between DEC and Exxon dated November 4, 2004, December 10, 2004, and March 14, 2005. Plaintiff, however, previously submitted copies of these documents to the Court in support of its motion to compel. See Reply Decl. of Richard W. Young, ECF No. 30, Ex. C (Nov. 5, 2004, letter), Ex. D (Dec. 10, 2004, letter and attached USTDP indicating that the Large Tanks would be removed), Ex. F (Mar. 14, 2005, letter indicating that "the CAP includes a plan to remove the [USTs]").
- 11 Any potential arguments that plaintiff could have raised regarding the import of the June 25, 2009, letter would be meritless. First, the June 25, 2009, letter's reference to "the gasoline USTs, [and] filling and dispensing systems" clearly encompasses the Large Tanks. Second, although the June 25, 2009, letter does not explicitly state that Exxon's proposed CAP also called for removal of all of the USTs, the letter's disclosure of the substance of the USTDP was sufficient to establish the factual basis for the "crux" of plaintiff's fraud theory.
- 12 Although not necessary to my conclusion that good cause is lacking here, I note that plaintiff's first mention of a potential fraud claim in its April 13, 2010, letter coincides with the retention of additional counsel by plaintiff. Because the June 25, 2009, letter revealed the factual basis for plaintiff's fraud claim, the timing of the April 13, 2010, letter suggests that plaintiff's decision to raise the prospect of a fraud claim in April 2010 may have had more to do with a strategic shift by new counsel than the discovery that plaintiff had recently obtained. *Cf. Holland v. Goord*, No. 05-CV-6295, 2010 WL 3946297, at *3-4 (W.D.N.Y. Aug. 17, 2010) (report and recommendation holding that prior counsel's failure to recognize the applicability of a defense failed to establish good cause), *adopted by*, 2010 WL 3946292 (W.D.N.Y. Oct. 8, 2010).
- 13 Although the June 25, 2009, letter, the October 5, 2006, letter, and Durnin's deposition testimony are not mentioned in the PAC, that evidence can, of course, be considered in determining whether plaintiff's proposed amendments should be permitted under Rule 15(a) and Rule 16(b).
- 14 Some of the information underlying Omission # 5—specifically, the fact that one remediation option involved removal of all of the USTs—was also discussed in the correspondence between DEC and Exxon concerning the proposed CAP and USTDP. Therefore, plaintiff has also failed to show good cause regarding its claims based on that information.
- 15 Plaintiff also argues that, although Exxon was required under the Access Agreement, to forward plaintiff information about the remediation, Exxon never did so. Pl.'s Reply Mem. at 8 n. 3. However, any violation of the Access Agreement is irrelevant to plaintiff's claim that Exxon's failure to disclose fraudulently induced it to execute the Access Agreement. Moreover, Exxon's failure to disclose information to Nat Castagna in 2004 after he contacted GSC (which plaintiff perplexingly cites to in support of the argument above) is irrelevant to the question of whether the documents at issue were available from DEC.
- 16 The full text of this email states:
- Recommend waiting for the [DEC] attorney (Lou Oliva) to contact [plaintiff's] attorney regarding access, before placing a dealer under agreement to re-open. The [DEC] is only going to discuss granting [Exxon] access to the site, not requiring the tanks to be removed. We should hear back in a week. Ultimately, it is a business decision to re-open or pull tanks. If the NYDEC places pressure on the [plaintiff] for access, maybe the [plaintiff] will want to have the tanks removed.

PAC ¶ 64.

- 17 Any discussion of the Access Agreement in the instant opinion is not intended to express any view on the ultimate merits of the breach of contract claims at issue in this litigation.
- 18 Plaintiff's theory on its breach of contract claims suggests that Exxon may have been permitted to remove the Large Tanks provided that it replaced them. In that case, Omission # 6 would be irrelevant because that information merely indicated that Exxon had made a choice permitted by the Access Agreement. To the extent that Omission # 6 could be interpreted to suggest that Exxon had decided to both remove the Large Tanks and to not replace them, Omission # 6 would indicate that Exxon intended to breach the Access Agreement.
- 19 Plaintiff's only argument related to this issue is a single sentence asserting that the Court should not engage in "fact-finding that is not appropriate" on a motion to amend. Pl.'s Reply Mem. at 1.
- 20 The additional evidence submitted by Exxon indicates that Kramer, who represented plaintiff during the negotiation of Access Agreement, and Nat Castagna were aware that the Large Tanks were possibly defective and that remediation might include their removal. See June 8, 2004, Ltr. from Exxon to Kramer at 2 (informing Kramer that it was Exxon's intent to "remove the underground storage tanks and lines as permitted by the lease"), Kaufman Decl., Ex. 12; Aug. 2, 2005, Diary Entry of Leonard Kramer (stating that if "tight tanks" do not "pass test—then will remove [and] not replace"), Kaufman Decl., Ex. 13, ECF No. 82; Aug. 22, 2005, Diary Entry ("Nat has estimate on replacing tanks"), Kaufman Decl., Ex. 13; Kramer Dep. 186 (indicating that Kramer was aware that remediation might include removal of the Large Tanks), Kaufman Decl., Ex. 22, ECF No. 82; Durnin Dep. 139–40 (indicating that Durnin told Nat Castagna that "remediation may include removing tanks from the ground"), Young Reply Decl., Ex. C; cf. Aug. 15, 2006, Ltr. from Kramer to XOM, (post-Access Agreement letter indicating that although Kramer was not aware of the CAP and USTDP at the time of this letter, Kramer still knew that there was a possibility that the Large Tanks were defective, and that any sale of the Large Tanks to plaintiff prior to the completion of the remediation "would have the net effect of shifting Exxon's responsibility to [plaintiff]"), Young Reply Decl., Ex. B. It should be noted that all of this evidence concerns plaintiff's knowledge (and facts within plaintiff's possession). Therefore, none of the discovery that plaintiff has sought in its motion to compel would have any bearing on this issue.
- 21 It appears that the cost of remediation related to the Large Tanks would be shifted to plaintiff if plaintiff purchased the Large Tanks prior to the completion of remediation and/or the bill of sale contained provisions that would render plaintiff liable for remediation costs.
- 22 Plaintiff may have, for reasons not disclosed in the current record, entered into the Access Agreement cognizant that the terms of the Access Agreement could potentially expose it to remediation costs associated with the Large Tanks. In that case, plaintiff consciously undertook a risk, and its knowledge about the Large Tanks would only underscore that a failure to request all relevant records from DEC would be patently unreasonable.

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2010 WL 4977761

Only the Westlaw citation is currently available.
United States District Court,
E.D. California.

Jeffrey ALTMAN, Plaintiff,
v.
HO SPORTS COMPANY, INC., dba Hyperlite,
Ben Sims, and Does 1 to 100, Defendants.

No. 1:09-CV-1000 AWI JLT.

|
Dec. 2, 2010.

Attorneys and Law Firms

Illya Hooshang Broomand, Gold River, CA, for Plaintiff.

Randolph T. Moore, Snell & Wilmer LLP, Costa Mesa,
CA, for Defendants.

**ORDER ON PLAINTIFF'S MOTION
FOR RECONSIDERATION**

ANTHONY W. ISHII, Chief Judge.

*1 This is a state law products liability case brought by Plaintiff Jeffrey Altman ("Altman") against Defendants HO Sports Company, Inc. ("HOS"). The product at issue is a wakeboard boot. The active complaint in this case is the Second Amended Complaint ("SAC"). The SAC was filed on December 9, 2009. On August 26, 2010, Altman filed a motion to amend his complaint with the Magistrate Judge. Altman sought to add three new causes of action: negligent misrepresentation, intentional misrepresentation, and false advertising. On September 16, 2010, the Magistrate Judge denied the motion. On September 30, 2010, Altman filed this motion to reconsider the Magistrate Judge's ruling. For the reasons that follow, Altman's motion will be denied.

PLAINTIFF'S MOTION

Plaintiff's Argument

Altman argues that the five factors that a court is to consider under Federal Rule of Civil Procedure 15 weigh in favor of allowing him to file a third amended complaint.

First, Altman argues that no undue prejudice will result if amendment is allowed because he is willing to stipulate to a continuance of either the discovery deadline or the trial date.¹

Second, Altman argues that there is no undue delay because, in April 2010, he informed HOS that he wanted to wait until he deposed Ms. Zimmer before amending the complaint. Due to the premature birth of Ms. Zimmer's child, her deposition was not taken until August 10, 2010. Within days of the deposition, HOS was contacted regarding a stipulation to file an amended complaint. Further, HOS failed to produce responsive discovery, which delayed in the discovery of the facts that are pled in the proposed amended complaint.

Third, as Magistrate Judge Thurston found, the motion to amend was not brought in bad faith.

Fourth, there has not been repeated failures to cure deficiencies. Although two prior amended complaints were filed, neither sought to add the three new proposed causes of action. The claims in the active complaint relate to HOS's knowledge that the current boot was improperly designed, yet still placed the boot out to the public. The proposed allegations relate to the fact that HOS set forth changes to the advertisements without knowledge as to the veracity of the statements. While claims of testing were previously known, the fact that HOS did not seek to identify any testing on the product before placing it on the market was not known until August 2010.

Fifth, the proposed amendment is not futile. Although the Magistrate Judge thought that the false advertising claim appears to be moot, there were no concerns about mootness or futility as to the other two causes of action.

Defendant's Opposition

HOS argues that Altman is improperly including arguments and evidence that were not presented to the Magistrate Judge. HOS also argues that there has been no showing that the Magistrate Judge's findings and conclusions were either clearly erroneous or contrary to law. The Magistrate Judge's rulings each have a basis in the record and are supported by proper analysis.²

Magistrate Judge's Ruling

*2 In denying Altman leave to amend, the Magistrate Judge analyzed the appropriate five factors for deciding a motion to amend under Rule 15. *See* Court's Docket Doc. No. 78; *cf. Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir.1990). The Magistrate Judge found that Altman was aware in November 2009 that HOS had no documents regarding testing of the boot and was also aware in December 2009 of the advertising brochure at issue. *See id.* at p. 4. Further, at his deposition, Altman testified about his concern over the sufficiency of the testing as contrasted with statements made in advertising. *See id.* at 5. The Magistrate Judge concluded that Altman was aware of the bases for the new causes of action at the time he filed the SAC. *See id.*

With respect to undue delay, the Magistrate Judge found that there was undue delay because the documents that supported the new causes of action were in Altman's possession since "the end of last year," i.e. November/December 2009, and Zimmer's deposition did not provide facts that support the new causes of action. *Id.* at 6. Rule 11 did not require Altman to have every piece of evidence before amending a complaint, rather Rule 11 allows an allegation to be made if the allegation will likely have support after a reasonable time for investigation and discovery. *See id.* at 7. Further, in the moving papers Altman admitted that, in the beginning of 2010, he had informed HOS of his intention to included a misrepresentation cause of action. *See id.* Since the beginning of 2010, Altman knew that he wanted to add misrepresentation causes of action and could have done so much sooner. *See id.* at 6–7.

With respect to bad faith, the Magistrate Judge found that Altman did not act in bad faith. *See id.* at 7–8.

With respect to futility, the Magistrate Judge found that the false advertising claim is futile, but that the remaining two claims for intentional and negligent misrepresentation were not. *See id.* at 8.

Finally, with respect to prejudice, the Magistrate Judge found that the looming discovery deadlines would not provide sufficient opportunity for HOS to conduct discovery on the new claims and thus, HOS would be hindered in preparing its defense. *See id.* at 8–10. While HOS may have known since early to mid 2010 that Altman may want to allege misrepresentation claims, not only was

HOS under no obligation to conduct discovery on unpled causes of action, but the federal rules would prohibit such discovery.

The Magistrate Judge's order concluded: "In light of [Altman's] failure to include these new causes of action in the [SAC] and given his undue delay, the futility of the third cause of action and the evidence that [HOS] will suffer prejudice if the motion is granted, [Altman's] motion to amend is denied." *Id.* at 10.

*Legal Standards**Rule 15—Amendments*

When a party may no longer amend a pleading as a matter of right under Rule of Civil Procedure 15(a)(1), the party must either petition the court for leave to amend or obtain consent from the adverse parties. Fed. R. Civ. Pro. 15(a)(2); *Keniston v. Roberts*, 717 F.2d 1295, 1300 (9th Cir.1983). Rule 15(a)(2) instructs courts to "freely give leave [to amend] when justice so requires." Fed. R. Civ. Pro. 15(a)(2); *Zucco Partners, LLC v. Digimarc Ltd.*, 552 F.3d 981, 1007 (9th Cir.2009). "This policy is to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir.2003); *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir.2001). "This liberality in granting leave to amend is not dependent on whether the amendment will add causes of action or parties." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir.1987). However, a court may deny leave to amend "due to 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 ..., and futility of amendment." *Zucco*, 552 F.3d at 1007; *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir.2008). Prejudice to the defendant is the most important factor, but amendment may be denied upon a sufficiently strong showing of other factors. *See Eminence Capital*, 316 F.3d at 1052; *Keniston*, 717 F.2d at 1300. Where a plaintiff has previously been granted leave to amend and has subsequently failed to add the requisite particularity to its claims, the "district court's discretion to deny leave to amend is particularly broad." *Zucco*, 552 F.3d at 1007; *Rubke v. Capital Bancorp, Ltd.*, 551 F.3d 1156, 1157 (9th Cir.2009); *Metzler Inv. GmbH v. Corinthian Colleges, Inc.* 540 F.3d 1049, 1072 (9th Cir.2008). Further, a court "does not abuse its discretion in denying a motion to amend where the movant presents no new facts but only new

theories and provides no satisfactory explanation for his failure to fully develop his contentions originally.” *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir.1995); *Allen v. City of Beverly Hills*, 911 F.2d 367, 374 (9th Cir.1990).

Rule 72—Review Of A Magistrate Judge's Non-Dispositive Orders

*3 A district court may refer pretrial issues to a magistrate judge under 28 U.S.C. § 636(b)(1). *See Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1414 (9th Cir.1991). If a party objects to a non-dispositive pretrial ruling by a magistrate judge, the district court will review or reconsider the ruling under the “clearly erroneous or contrary to law” standard. Fed. R. Civ. Pro. 72(a); *Osband v. Woodford*, 290 F.3d 1036, 1041 (9th Cir.2002); *Grimes v. City of San Francisco*, 951 F.2d 236, 240–41 (9th Cir.1991) (holding that magistrate judge's order “must be deferred to unless it is ‘clearly erroneous or contrary to law’”). A magistrate judge's factual findings are “clearly erroneous” when the district court is left with the definite and firm conviction that a mistake has been committed. *Security Farms v. International Bhd. of Teamsters*, 124 F.3d 999, 1014 (9th Cir.1997); *Green v. Baca*, 219 F.R.D. 485, 489 (C.D.Cal.2003). However, the district court “may not simply substitute its judgment for that of the deciding court.” *Grimes*, 951 F.2d at 241. The “contrary to law” standard allows independent, plenary review of purely legal determinations by the magistrate judge. *See Haines v. Liggett Group, Inc.*, 975 F.2d 81, 91 (3rd Cir.1992); *Green*, 219 F.R.D. at 489; *see also Osband*, 290 F.3d at 1041. “An order is contrary to law when it fails to apply or misapplies relevant statutes, case law, or rules of procedure.” *Knutson v. Blue Cross & Blue Shield of Minn.*, 254 F.R.D. 553, 556 (D.Minn.2008); *Rathgaber v. Town of Oyster Bay*, 492 F.Supp.2d 130, 137 (E.D.N.Y.2007); *Surles v. Air France*, 210 F.Supp.2d 501, 502 (S.D.N.Y.2001); *see Adolph Coors Co. v. Wallace*, 570 F.Supp. 202, 205 (N.D.Cal.1983). “Motions for reconsideration and objections to a Magistrate Judge's order are not the place for a party to make a new argument and raise facts not addressed in his original brief.” *Jones v. Sweeney*, 2008 U.S. Dist. LEXIS 83723, *4, 2008 WL 3892111 (E.D.Cal. Aug. 21, 2008); *see Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137–38 (2d Cir.1994); *Campbell v. Cal. Dep't of Corr. & Rehab.*, 2009 U.S. Dist. LEXIS 71284, *2 (E.D.Cal. Aug. 4, 2009); *United States Fire Ins. Co. v. Bunge N. Am., Inc.*, 244 F.R.D. 638, 641 (D.Kan.2007).

*Discussion*³

As an initial matter, Altman has not challenged the Magistrate Judge's conclusion that the proposed false advertising cause of action (which is pursuant to California Business and Professions Code § 17500) is futile. Futility by itself is a ground to deny an amendment. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir.1995). Because Altman does not challenge the finding that his false advertising claim is futile, reconsideration regarding that proposed cause of action is not warranted. *See id.*

With respect to the remaining causes of action for misrepresentation, Altman has not cited the pertinent law for reviewing a magistrate judge's orders. Under the appropriate standard of review, reconsideration of a magistrate judge's non-dispositive orders is appropriate under the clearly erroneous or contrary to law standard. *See Osband*, 290 F.3d at 1041. Altman does not adequately address the Magistrate Judge's actual order, and he has not shown how the key findings of the Magistrate Judge are clearly erroneous or contrary to law.

*4 With respect to the conclusion that the bases for the misrepresentation claims were sufficiently known to Altman at the time of the SAC, the crux of the proposed misrepresentation claims revolve around inadequate testing and that the boot would properly release. *See Proposed Amended Complaint* at ¶¶ 35, 36, 43, 44. However, allegations that the product was defective because there was inadequate testing and that the boot would not release as expected appeared in the SAC. *See SAC* at ¶ 20, 21. The allegations are essentially the same, with the only significant difference being that the proposed complaint mentions representations on the internet and on brochures. Otherwise, the issues of inadequate testing and whether the boot would properly release have been in the case since the filing of the SAC. Further, there is no dispute that Altman had possession of the advertising brochure at issue, and knew that HOS had no documents regarding testing, at the time of the amended complaint. Altman has not shown how this conclusion was clearly erroneous or contrary to law.

With respect to the conclusion that there was undue delay, the Magistrate Judge concluded that Altman was aware of the bases for the misrepresentation claim at the time of the SAC, i.e. December 2009/January 2010, and Altman had obtained several stipulations for extensions of time that

acknowledged his desire to plead these claims. Further, the similarity in allegations between paragraphs 20 through 21 of the SAC and paragraphs 35 through 36 and 43 through 44 of the proposed amended complaint show that the misrepresentation claims could have been added much sooner. As the Magistrate Judge concluded, given the requirements of Rule 11, there was not a compelling reason to wait eight months, that is just prior to the end of discovery, before formally attempting to amend.⁴ Altman has not shown how the Magistrate Judge's conclusion regarding undue delay was clearly erroneous or contrary to law.

With respect to prejudice, Altman does not address the Magistrate Judge's concern regarding the importance of the scheduling deadlines, and in particular the discovery deadline. It is the close of discovery that created the most significant prejudice.⁵ As the Magistrate Judge's citations indicate, the Ninth Circuit has recognized the importance of scheduling conference orders. *See* Court's Docket Doc. No. 78 at p. 10 (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir.1992)). Although extending deadlines and extending the trial date may alleviate, if not completely eliminate the identified

prejudice, there was no formal motion to alter the scheduling order or obtain a new trial date pending at the time Altman's motion to amend was decided. Altman has not shown that the Magistrate Judge's conclusion that HOS would suffer prejudice is contrary to law or clearly erroneous.⁶

CONCLUSION

Altman seeks reconsideration of the Magistrate Judge's denial of his motion to amend his complaint. Because Altman has not shown that Magistrate Judge's findings and conclusions are clearly erroneous or contrary to law, reconsideration is inappropriate.

*5 Accordingly, IT IS HEREBY ORDERED that Plaintiff's motion for reconsideration is DENIED.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 4977761

Footnotes

- 1 Altman also states that he is willing, and has offered on several occasions, to make himself available to continue his deposition.
- 2 HOS's arguments are lengthier and more in-depth. Given the resolution of the motion, the Court will simply use this "short hand description" of HOS's position.
- 3 The Court will not consider arguments or evidence that were presented to it, but that were not presented to the Magistrate Judge. *See Jones*, 2008 U.S. Dist. LEXIS 83723 at *4, 2008 WL 3892111; *United States Fire*, 244 F.R.D. at 641.
- 4 Altman received additional information about HOS's testing efforts and some of the bases (or lack thereof) for the representations in advertising at the August 2010 deposition of Tom Curtin. However, the contention that there was inadequate testing (which is what is alleged in the proposed amended complaint), and that the boot would not properly release, were already alleged in the SAC. *Cf.* SAC ¶¶ 20–21 with Plaintiff's Ex. B at ¶¶ 35–36, 43–44.
- 5 HOS argued that it would need to obtain an advertising expert if permission to file the proposed amended complaint was granted. However, with the finding that the false advertising claim is futile, it would not appear that HOS would need an "advertising expert." In light of the futility of the false advertising claim, at this point the Court does not see prejudice to HOS in terms of expert witnesses.
- 6 The Court notes that on November 19, 2010, the Magistrate Judge amended the scheduling order. The dispositive motions deadline, the pre-trial conference date, and the trial date have all been moved. *See* Court's Docket Doc. No. 167.

2016 WL 3144049

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

Lifeguard Licensing Corp. and
Popularity Products, LLC, Plaintiffs,

v.

Jerry Kozak, Ann Arbor T-Shirt Company,
LLC, and Richard Winowiecki, Defendants.

15 Civ. 8459 (LGS)(JCF)

|
Signed May 23, 2016

MEMORANDUM AND ORDER

FRANCIS C. FRANCIS IV, UNITED STATES
MAGISTRATE JUDGE

Just as a plaintiff may not take discovery regarding unpled claims, so a defendant is precluded from seeking discovery concerning unpled defenses. This is an intellectual property dispute over the use of the trademark designation LIFEGUARD on various types of apparel. The defendants — Ann Arbor T-Shirt Company, LLC (“Ann Arbor”), Jerry Kozak, and Richard Winowiecki — now move for an order (1) compelling the plaintiffs — Lifeguard Licensing Corp. (“Lifeguard Licensing”) and Popularity Products, LLC (“Popularity”) — to produce all requested discovery material; (2) compelling the plaintiffs to use a third-party vendor to search and produce responsive electronically-stored information; (3) compelling the plaintiffs to use a third-party vendor to search and produce responsive tangible materials; (4) compelling the plaintiffs to produce responsive documents in the possession of their prior counsel; (5) compelling the plaintiffs to reappear for their depositions to testify about documents that have allegedly been improperly withheld; and (6) granting sanctions, including dismissal of the action and an award of costs.

For the following reasons, the motion is granted in part and denied in part.

Background

Lifeguard Licensing owns the federal trademark registrations for the designations LIFEGUARD and LIFE GUARD for use on swim trunks, men's underwear, and T-shirts. (Complaint (“Compl.”), ¶ 19). Lifeguard Licensing has granted Popularity an exclusive license with respect to the marks for T-shirts. (Compl., ¶ 22).

On September 25, 2015, Ann Arbor received a cease-and-desist letter from Lifeguard Licensing, threatening litigation if Ann Arbor did not halt its sale of shirts featuring the word “Lifeguard.” (Declaration of Thomas P. Heed dated April 7, 2016 (“Heed Decl.”), ¶ 12). When the parties were unable to resolve their differences amicably, Ann Arbor commenced a declaratory judgment action in the United States District Court for the Eastern District of Michigan, Docket No. 4:15-cv-13647. (Heed Decl., ¶¶ 13, 19). In that case, Ann Arbor sought a declaration that, among other things, its use of the word “Lifeguard” was strictly functional; the mark LIFEGUARD is generic; and the use of the word “Lifeguard” on T-shirts is a fair or descriptive use, and therefore not infringing. (Heed Decl., ¶¶ 14-16). Lifeguard Licensing and Popularity were served with the complaint in the Michigan action on October 19, 2015. (Heed Decl., ¶ 20).

On October 27, 2016, the plaintiffs commenced the instant action for infringement in this court. Lifeguard and Popularity filed a motion to dismiss the Michigan action on November 28, 2016, and, two days later, the defendants moved to dismiss this case. On December 17, 2015, the initial pretrial conference in this action was held by telephone before the Honorable Lorna G. Schofield, U.S.D.J. Counsel discussed with the court the dueling lawsuits as well as the impact of the pending motion to dismiss on any discovery schedule. Judge Schofield stated:

*2 I do not extend discovery or stay actions generally because of the pendency of a motion to dismiss, and so I'm not doing that here. Particularly, since it seems as though there's a bona fide dispute between the parties, you're going to have to exchange discovery in any event regardless of where this case proceeds.

(Transcript of telephone conference dated Dec. 17, 2015, attached as Exh. E to Heed Decl., at 11).

Thereafter, the defendants served requests for the production of documents on Lifeguard Licensing and on Popularity and scheduled the depositions of the plaintiffs. (Defendant's [sic] First Rule 34 Request for the Production of Documents [to Popularity], attached as Exh. A to Heed Decl.; Defendant's [sic] First Rule 34 Request for the Production of Documents [to Lifeguard Licensing], attached as Exh. B to Heed Decl.). The plaintiffs responded to both sets of requests. (Plaintiff Popularity Product [sic] LLC's Responses to Defendants' Demand for Discovery and Inspection, attached as Exh. C to Heed Decl.; Plaintiff Lifeguard Licensing Corporation's Responses to Defendants' Demand for Discovery and Inspection ("Lifeguard Doc. Resp."), attached as Exh. D to Heed Decl.). The defendants considered the plaintiffs' responses to be deficient and sought to adjourn the plaintiffs' depositions until the dispute could be resolved, but the plaintiffs declined.

On April 5, 2016, the Michigan action was dismissed for lack of personal jurisdiction, and on April 7, 2016, the defendants filed the instant motion. I will address the specific discovery demands and responses in more detail below.

Discussion

A. Discovery Concerning Defenses

According to the defendants, "[t]his motion presents the simple question of whether plaintiffs should be permitted to file a lawsuit and then, due to the pendency of a pre-answer motion to dismiss, refuse to produce (or even search for) discoverable information relevant to the defendants' likely defenses and counterclaims." (Defendants' Memorandum of Law in Support of Motion to Compel Production of Documents from Plaintiffs Lifeguard Licensing Inc. and Popularity Products LLC ("Def. Memo.") at 1). On that basis, the defendants contend that they are entitled to discovery of information that would go to possible defenses of "genericness, descriptive use, functional use, and naked licensing." (Def. Memo. at 7).

Prior to December 1, 2015, Rule 26(b)(1) contained a two-tier definition of the scope of discovery. First, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any claim or defense" Fed. R. Civ. P. 26(b)(1). Second, "[f]or good cause, the court may

order discovery of any matter relevant to the subject matter involved in the action." Fed. R. Civ. P. 26(b)(1) (amended 2015). The 2015 amendments, however, deleted the second tier, so that discovery now extends only as far as information relevant to claims or defenses. Fed. R. Civ. P. 26 advisory committee's note to 2015 amendment ("The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action.").

Even before 2015 amendment, it was well-established that information relevant only to claims not yet pled was beyond the scope of discovery, at least without leave of court. Thus, in United States v. \$17,980.00 in United States Currency, No. 3:12-cv-1463, 2014 WL 4924866 (D. Or. Sept. 30, 2014), a forfeiture case, the court reasoned:

*3 A party must be able to rely on its opponent's pleadings in guiding discovery. See McHenry v. Renne, 84 F.3d 1172, 1177-78 (9th Cir. 1996) (providing that an affirmative pleading must "fully set[] forth who is being sued, for what relief, and on what theory, with enough detail to guide discovery."). Thus, the fact that Plaintiff arguably had notice of Claimant's allegation of factual ownership of the Defendant Currency does not mitigate the prejudice to Plaintiff in relying on Claimant's pleading of a possessory interest while conducting discovery. To hold otherwise would force parties to conduct often wasteful discovery on myriad unpled, but arguably factually-plausible claims.

Id. at *4. Similarly, another court explicitly stated that the federal rules prohibit discovery on unpled claims. Altman v. Ho Sports Co., No. 1: 09-CV-1000, 2010 WL 4977761, at *2 (E.D. Cal. Dec. 2, 2010); see also 246 Sears Road Realty Corp. v. Exxon Mobile Corp., No. 09 CV 889, 2012 WL 4174862, at *8 (E.D.N.Y. Sept. 18, 2012) (noting that court had denied discovery of unpled fraud claims); Travelers Insurance Co. v. Broadway West Street Associates, 164 F.R.D. 154, 158 (S.D.N.Y. 1995).

There are sound reasons for limiting discovery to claims that have been pled, and those reasons apply with full force to defenses as well. First, it would be a waste of resources to devote discovery to issues that may never be addressed in the litigation. Second, a party and its attorney must have conducted "an inquiry reasonable under the circumstances" before filing a pleading. Fed. R. Civ. P. 11(b). Permitting discovery on unpled claims or defenses would dilute this obligation by permitting a

party to file one plausible claim and then take discovery on any tangentially related potential claims before deciding whether to actually assert them. Finally, and perhaps most significantly, Rule 26(b)(1) makes no distinction between claims and defenses; to be discoverable, information must be “relevant to a party’s claim or defense.” And the plain language of the Rule does not provide for discovery of “likely,” “anticipated,” or “potential” claims or defenses.

Nevertheless, the defendants contend that Judge Schofield has already permitted the discovery sought. They reason that: they had raised the defenses as to which they now seek discovery as affirmative claims in the Michigan action; the pendency of the Michigan action was discussed with Judge Schofield; and Judge Schofield recognized that the defendants “had the right to discovery issues germane (1) to their eventual defenses in this suit; and (2) to their Michigan Action.” (Def. Memo. at 3-4). This syllogism fails in a number of respects. First, the Michigan Action has been dismissed, so there is no extant pleading to which the defendants can tie their requested discovery. Second, Judge Schofield said nothing about the scope of discovery in this action. Rather, she observed that because the parties would eventually have to exchange discovery in one forum or the other, she would not stay discovery here during the pendency of the motion to dismiss in this action. Now that the Michigan Action has been dismissed, the pleadings in this case define the scope of discovery.

Finally, the defendants complain that it is inequitable for the plaintiffs to be able to take discovery on their claims while the defendants are delayed in seeking information to support potential defenses. This is a problem of the defendants’ own making. Whatever their strategic reasons for moving to dismiss before answering, nothing precluded the defendants from filing an answer together with their motion to dismiss, asserting any available defenses, and thereby providing the predicate for the discovery they seek.

*4 To be sure, Rule 12(b) provides that a motion raising certain defenses, including a defense of lack of personal jurisdiction such as the defendants asserted here, “must be made before pleading if a responsive pleading is allowed.” Nevertheless, “[a]lthough Fed. R. Civ. P. 12(b) encourages the responsive pleader to file a motion to dismiss before pleading, nothing in the rule prohibits the filing of a motion to dismiss with an answer” Beary v. West Publishing Co., 763 F.2d 66, 68 (2d Cir. 1985). Nor

does the rule prohibit filing the answer after a motion to dismiss has been filed but before it has been decided. See Hicks v. City of Vallejo, No. 2:14-cv-669, 2015 WL 3403020, at *1 & n.2 (E.D. Cal. May 27, 2015) (noting that where defendant submitted answer while motion to dismiss pending, only consequence was that motion should technically be considered motion for judgment on the pleadings pursuant to Rule 12(c)).

Accordingly, the defendants’ motion is denied insofar as it seeks to compel discovery responses related to the unpled defenses of genericness, naked licensing, descriptive use, or functional use.

B. Plaintiffs’ Search for Responsive Documents

Next, the defendants seek an order requiring the plaintiffs to engage third-party vendors to search both the plaintiffs’ electronically stored information (“ESI”) and their hard copy document repositories. According to the defendants, the plaintiffs’ search has been deficient, and, in some instances, non-existent. (Def. Memo. at 8-10). The plaintiffs, in turn, argue that where they have not produced documents, it is because (1) they have already disclosed what they have; (2) they possess no responsive materials; or (3) they have asserted valid objections. (Declaration of Gerald Grunsfeld dated April 21, 2016 (“Grunsfeld Decl.”), ¶ 12).

The problem with the plaintiffs’ argument is that they do not appear to have conducted a search sufficient to make confident representations concerning the completeness of their production. There is, of course, no obligation to search sources that are reasonably certain not to contain responsive information. And, depending upon the size of an organization, the knowledge of the information custodians, and the extent to which documents are properly labeled and segregated, a party may be able to represent that a particular email account or server or file cabinet contains no relevant documents. But that is not the case here. For example, Lifeguard Licensing has communicated with Popularity by email (Deposition of Ruben Azrak dated March 10, 2016 (“Azrak Dep.”) at 142-43; Deposition of Benjamin Tebele dated March 11, 2016 (“B. Tebele Dep.”) at 31-32; Deposition of Daniel Tebele dated March 11, 2016 (“D. Tebele Dep.”) at 13-14), yet no search was conducted of the computers of either company (Azrak Dep. at 183; B. Tebele Dep. at 79-80; D. Tebele at 39-40), nor of the phones of Lifeguard Licensing’s principal and Popularity’s principal, which are

sometimes used for email communication (Azrak Dep. at 142, 183; B. Tebele Dep. at 31, 79). Similarly, the principal of Popularity indicated that no search was conducted of the filing cabinet in which that company maintains copies of its licensing agreements with Lifeguard Licensing. (B. Tebele Dep. at 25).

The plaintiffs must therefore conduct a further search for responsive documents of both their physical filing systems and their electronic document repositories. These searches shall not be conducted, however, until the parties have met and conferred with respect to the proper scope of the defendants' document requests. There is no basis for requiring the searches to be conducted by third-parties, as the flaws in the plaintiffs' prior search do not relate to any technical incompetence nor to any demonstrated attempt to secrete evidence.

C. Possession, Custody, or Control

*5 The plaintiffs have objected to producing documents relating to prior litigations, partly on the basis that those materials are not in their possession, but, instead, in the possession of their prior counsel, Pryor & Cashman. (Lifeguard Doc. Resp. No. 12; Def. Memo. at 11; Def. Reply at 5). However, “[u]nder Fed. R. Civ. P. 34, which governs the production of documents during discovery, the clear rule is that documents in the possession of a party's current or former counsel are deemed to be within that party's ‘possession, custody and control.’ ” MTB Bank v. Federal Armored Express, Inc., No. 93 Civ. 5594, 1998 WL 43125, at *4 (S.D.N.Y. Feb. 2, 1998) (emphasis omitted); accord Polanco v. NCO Portfolio Management, No. 11 Civ. 7177, 2013 WL 3733391, at *2 (S.D.N.Y. July 15, 2013); CSI Investment Partners II, L.P. v. Cendant Corp., No. 00 Civ. 1422, 2006 WL 617983, at *6 (S.D.N.Y. March 13, 2006); Johnson v. Askin Capital Management, 202 F.R.D. 112, 114 (S.D.N.Y. 2001). Therefore, to the extent that the requested documents are in the possession of Pryor & Cashman and are not otherwise subject to a proper objection, the plaintiffs shall produce them.

D. Continued Depositions

The defendants' application to compel the plaintiffs to reappear for continued depositions is denied without prejudice to being renewed after the production of additional documents as required by this order. At that time, the defendants should be able to demonstrate

with greater specificity the need to depose any witness concerning newly-produced information.

E. Sanctions

The discovery deficiencies alleged by the defendants would not, under any circumstances, justify severe sanctions such as dismissal of the action. See Agiwal v. Mid Island Mortgage Corp., 555 F.3d 298, 302 (2d Cir. 2009) (holding that harsh sanctions such as default and dismissal reserved for extreme situations); see also Shcherbakovkiy v. Da Capo Al Fine, Ltd., 490 F.3d 130, 140 (2d Cir. 2007) (noting that “the severity of sanction must be commensurate with the noncompliance”).

Nor, in this circumstance, are the defendants entitled to the costs incurred in filing their motion. When a court grants a motion to compel discovery, “the court must ... require the party ... whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. Fed. R. Civ. P. 37(a)(5)(A). However, the court must not order this payment if ... the opposing party's nondisclosure, response, or objection was substantially justified.” Fed. R. Civ. P. 37(a)(5)(A)(ii). In this case, the plaintiffs' position, even where I have rejected it, had a substantial justification. Moreover, any award of fees to the defendants would be offset by the fees to which the plaintiffs would be entitled by virtue of having prevailed on other issues. Fed. R. Civ. P. 37(a)(5)(B), (C). Accordingly, no costs or fees will be awarded to any party in connection with this motion.

Conclusion

For the reasons set forth above, the defendants' motion to compel discovery (Docket no. 55) is granted in part and denied in part. Within one week of the date of this order, counsel shall meet and confer with respect to the scope of discovery generally and the plaintiffs' objections to the defendants' document demands in particular. Within three weeks thereafter, the plaintiffs will conduct the further searches required by this order and produce responsive documents.

SO ORDERED.

All Citations

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84 F.3d 1172

United States Court of Appeals,
Ninth Circuit.

Keith McHENRY; Eric
Warren, Plaintiffs–Appellants,

v.

Louise RENNE; John Willett; Charles Gallman;
Frank Reed; Mary Burns; Timothy Hettrich; (Fnu)
Blackwell; Edward Garcia; Mark Hernandez; Robert
Battaglia; Robert J. Brodник; S. Quadrelli; R. Farris,
12212; John Does 1–10; Dirk Beijen; Richard
Hongisto; Russell Matli # 1751 and the City and
County of San Francisco, Defendants–Appellees.

No. 94–15179.

Argued and Submitted June 14, 1995.

Decided May 28, 1996.

Plaintiffs filed § 1983 action against various public officials and police officers concerning alleged harassment during distribution of free food and political literature in city parks. The United States District Court for the Northern District of California, Vaughn R. Walker, J., 1993 WL 515866, dismissed with prejudice. Appeal was taken. The Court of Appeals, Kleinfeld, Circuit Judge, held that district court did not abuse its discretion in dismissing third amended complaint with prejudice for violation of general pleading rules and court's prior orders requiring short, clear statement of claims sufficient to allow defendants to prepare responsive pleading.

Affirmed.

West Headnotes (9)

[1] Federal Courts

⚡ Pleading

Dismissal of complaint with prejudice for failure to comply with court's order to amend

complaint to comply with general rules of pleading is reviewed for abuse of discretion. Fed.Rules Civ.Proc.Rule 8, 28 U.S.C.A.

380 Cases that cite this headnote

[2] Federal Courts

⚡ Dismissal or nonsuit in general

District judge's evaluation of whether plaintiff complied with court order, for purposes of reviewing dismissal for violation of court order, is entitled to considerable weight. Fed.Rules Civ.Proc.Rule 41(b), 28 U.S.C.A.

2 Cases that cite this headnote

[3] Federal Civil Procedure

⚡ Certainty, Definiteness and Particularity

Claims subject to heightened pleading standard are not excepted from general pleading requirements of simplicity, directness, and clarity; pleading containing prolix evidentiary averments, which are largely irrelevant or of slight relevance, rather than clear and concise averments stating which defendants are liable to plaintiffs for which wrongs based on evidence, defeats one of purposes of heightened pleading standard to avoid unnecessary discovery. Fed.Rules Civ.Proc.Rule 8, 28 U.S.C.A.

257 Cases that cite this headnote

[4] Federal Civil Procedure

⚡ Other Remedy, Availability or Prior Use of

District judge should first consider less drastic alternatives, but need not exhaust them all before finally dismissing case. Fed.Rules Civ.Proc.Rule 41(b), 28 U.S.C.A.

20 Cases that cite this headnote

[5] Federal Civil Procedure

⚡ Violation of a court order or rule in general

Federal Civil Procedure

Effect

Since harshness is key consideration in district judge's exercise of discretion in dismissing case with prejudice for violation of court order, it is appropriate that judge consider strength of plaintiff's case, if such information is available, before determining whether dismissal with prejudice is appropriate. Fed.Rules Civ.Proc.Rule 41(b), 28 U.S.C.A.

12 Cases that cite this headnote

[6] Federal Civil Procedure

Claim for relief in general

Federal Civil Procedure

Insufficiency in general

Rule requiring each averment of pleading to be simple, concise, and direct, applies to good claims as well as bad, and may be basis for dismissal independent of whether pleadings are subject to dismissal for failure to state a claim. Fed.Rules Civ.Proc.Rules 8, 12(b)(6), 28 U.S.C.A.

423 Cases that cite this headnote

[7] Federal Civil Procedure

Grounds in general

Federal Civil Procedure

Violation of a court order or rule in general

Although complaint is not defective for failure to designate statute or other provision of law violated, district judge may in his or her discretion, in response to motion for more definite statement, require such detail as may be appropriate in particular case, and may dismiss complaint if order is violated. Fed.Rules Civ.Proc.Rules 12(e), 41(b), 28 U.S.C.A.

144 Cases that cite this headnote

[8] Federal Civil Procedure

Insufficiency in general

Rights of defendants to be free from costly and harassing litigation, and rights of litigants

awaiting their turns to have other matters resolved, must be considered in determining whether to dismiss prolix, confusing complaint. Fed.Rules Civ.Proc.Rule 8, 28 U.S.C.A.

284 Cases that cite this headnote

[9] Federal Civil Procedure

Violation of a court order or rule in general

Federal Civil Procedure

Insufficiency in general

Federal Civil Procedure

Effect

District court did not abuse its discretion in dismissing third amended complaint with prejudice for violation of general pleading rules and court's prior orders requiring short, clear statement of claims sufficient to allow defendants to prepare responsive pleading, in light of district court's prior unsuccessful use of less drastic alternatives by allowing repleading twice, court's consideration of strength of plaintiffs' case by referring matter for extensive analysis by magistrate, and court's consideration of extensive burden imposed on defendants by same plaintiffs in related litigation; 53-page third amended complaint was written more as a press release and failed to obey court's prior orders to identify which defendants were liable on which claims. Fed.Rules Civ.Proc.Rules 8, 41(b), 28 U.S.C.A.

97 Cases that cite this headnote

Attorneys and Law Firms

*1174 Randy Baker, Berkeley, California, for plaintiffs-appellants.

Margaret W. Baumgartner, Deputy City Attorney, San Francisco, California, for defendants-appellees.

Appeal from the United States District Court for the Northern District of California, Vaughn R. Walker, District Judge, Presiding. D.C. No. CV-92-01154-VRW.

Before: GOODWIN, FARRIS and KLEINFELD, Circuit Judges.

Opinion

KLEINFELD, Circuit Judge:

The district judge dismissed plaintiffs' complaint under Federal Rules of Civil Procedure 8, 12, and 41 because it did not contain a short and plain statement of their claims for relief, did not give defendants a fair opportunity to frame a responsive pleading, and did not give the court a clear statement of claims. The district court had given plaintiffs three opportunities to amend the complaint in accord with the judge's instructions, but the third amended complaint restated the prior ones without curing their deficiencies. We affirm.

FACTS

We take the facts from plaintiffs' third amended complaint as best we can. Because it is fifty-three pages long, and mixes allegations of relevant facts, irrelevant facts, political argument, and legal argument in a confusing way, we cannot be sure that we have correctly understood all the averments. If we have not, plaintiffs have only themselves to blame.

According to the complaint, plaintiff McHenry made it a practice to give out free food and political literature in city parks. The Mayor, City Attorney, Chief of Police, and other public officials and police officers in San Francisco conspired to harass McHenry with unreasonable arrests on such charges as failure to obtain the permits required to display signs in parks or to distribute food to the public. McHenry alleges that he was physically assaulted by, or at the direction of, various defendants and charged with driving on a suspended license.

The City obtained a preliminary injunction in the California Superior Court prohibiting McHenry from distributing food without the necessary health and park permits. He alleges that the City changed its regulations in bad faith to deny him a permit and that the City's initiation

of legal proceedings charging McHenry with contempt for violating the state injunction by distributing food without a permit was in bad faith. The complaint also alleges that plaintiff Warren had been protesting the police treatment of McHenry and suffered a retaliatory arrest as a result.

Plaintiffs initial complaint was thirty-five pages and alleged various causes of action under 42 U.S.C. § 1983. Plaintiffs did not serve this complaint, but instead filed an amended complaint dropping Andrea McHenry as a plaintiff and adding various defendants.

The thirty-seven page amended complaint is mostly an extended narrative of the details of the various activities of plaintiff McHenry, and his numerous alleged arrests. At the end of his complaint, plaintiff McHenry purports to set out two counts, one for damages and one for declaratory and injunctive relief. McHenry's claims are set out in a single sentence thirty lines long, alleging numerous and different violations of rights, without any specification of which of the twenty named defendants or John Does is liable for which of the wrongs. Another, similar, paragraph lays out the claims on behalf of plaintiff Warren. The only specificity given is that no punitive damages are sought from the City of San Francisco and no damages are sought from defendant Superior Court of California. This complaint was part of a long history of complaints against the City and County of San Francisco and its employees, from elected officials to gardeners, claiming that each arrest of McHenry was part of a broad conspiracy to interfere with his constitutional rights.

*1175 The City moved to dismiss for failure to comply with Federal Rules of Civil Procedure 8(a) and 12(e). It moved to dismiss some of the apparent claims on the basis of the statute of limitations, absolute and qualified immunity, collateral estoppel, and the State Tort Claims Act.

The district judge wrote a thorough and careful order dismissing this first amended complaint without prejudice. The court particularly noted the impossibility of figuring out which defendants were allegedly liable for which wrongs, and noted the obvious bars to a number of the apparent claims:

Plaintiffs have made sweeping allegations against the city and various government employees, but the complaint frequently does not make clear connections between specific allegations and individual defendants.

Defendants charge that the vague wording of the complaint makes it excessively difficult for individual defendants to formulate proper defenses and subject the city and others to unnecessary discovery.

...

Plaintiffs complaint does provide specific allegations of fact to support the claim that defendants have intentionally deprived plaintiffs of their constitutional rights. Nevertheless, as the complaint stands now it does not properly notify individual defendants of the allegations with which they are charged. Given the number and diversity of named defendants and the breadth of the allegations, claims which vaguely refer to "defendants" or "other responsible authorities" will not suffice. Defendants' motion for a more definite statement pursuant to F.R.C.P. 12(e), is granted, and plaintiffs are ordered to file a second amended complaint which clearly and concisely explains which allegations are relevant to which defendants.

...

Many of the named defendants may be able to assert absolute or qualified immunity as a defense, but unfortunately plaintiffs' complaint does not provide enough detail for the court to determine the appropriateness of these defenses at this time. For this reason, defendants' motion to dismiss on the immunity grounds is denied without prejudice. Defendants may refile the motion once plaintiffs have submitted a second amended complaint.

The court also ordered plaintiffs to show cause why defendants not served within 120 days should not be dismissed under Federal Rule of Civil Procedure 4(j). Subsequently, the court dismissed the claims against those defendants where plaintiffs had not shown any substantial reasons for late service, but denied the motions to dismiss where plaintiffs had shown good cause for the delay.

Plaintiffs then filed a second amended complaint, which contained identically argumentative and prolix allegations, but added a section at the end in which the conduct attributed to each defendant was outlined. The complaint was now forty-three pages. The section naming particular defendants linked them up with parts of the narrative, but still did not tell them of what constitutional torts they were accused.

The court again dismissed without prejudice. The district judge wrote another careful order, this time giving plaintiffs specific instructions on how to rewrite their complaint so that it could be adjudicated:

In its order of October 8, 1992, this court dismissed plaintiff's first amended complaint without prejudice because it failed to provide the individual defendants with proper notice of the claims being asserted against them and, as such, did not afford defendants a fair opportunity to assert immunity defenses. Plaintiff's response to this order, the second amended complaint, largely mirrors the narrative ramblings of the first amended complaint except that it also includes a section entitled "Summary of Allegations Against Individual Defendants." Plaintiff's contend that this section of their otherwise deficient complaint ameliorates any problems which defendants may have had in formulating qualified immunity defenses. Defendants have now moved to dismiss the second amended complaint, reasserting the argument that the complaint is too vague to enable defendants to frame a responsive pleading, FRCP 12(e), and alternatively submitting that all of the individual defendants are *1176 entitled to qualified or absolute immunity from plaintiff's claims.

Plaintiff's complaint fails to comply with the court's directive to explain clearly how each defendant is implicated by plaintiff's allegations. For no apparent reason and though they are represented by counsel, plaintiffs have consistently eschewed the traditional pleading style which prescribes a "short and plain statement" of basic allegations followed by an outline of each legal claim based on specific allegations of fact. Instead, plaintiffs have re-submitted their complaint in its original novelized form, with only their new "Summary" directed at delineating their allegations. While plaintiff's "Summary" does attempt to link plaintiff's fact allegations to specific defendants, it does nothing to inform defendants of the *legal* claims being asserted. In wholly inadequate fashion, plaintiffs present their legal claims in a mere two paragraphs in the form of an undifferentiated list near the end of the forty-three page complaint. See Second Amended Complaint, ¶¶ 94 and 104.

Because plaintiff's second amended complaint still does not provide defendants with a fair opportunity to frame a responsive pleading, defendants' motion

to dismiss pursuant to FRCP 12(e) is GRANTED. Plaintiffs shall have one last opportunity to file a proper complaint which states clearly how each and every defendant is alleged to have violated plaintiffs' legal rights. See *Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir.1991). In conforming with this order, plaintiffs would be well advised to edit or eliminate their twenty-six page introduction and focus on linking their factual allegations to actual legal claims. The purpose of the court system is not, after all, to provide a forum for storytelling or political griping, but to resolve legal disputes.

Unfortunately, it is impossible properly to consider defendants' immunity defenses at this time, because immunity will attach only for specific claims. After plaintiffs have submitted their final pleading, the court will reconsider defendants' motion to dismiss based on immunity.

SO ORDERED.

The complaint is, as the district court said, mostly, "narrative ramblings" and "storytelling or political griping." It is not in what the district court called "the traditional pleading style which prescribes a short and plain statement," and it does not provide defendants notice of what legal claims are asserted against which defendants.

Plaintiffs did not obey the judge's instructions to file a complaint "which states clearly how each and every defendant is alleged to have violated plaintiffs' legal rights" and his instructions to "edit their twenty-six page introduction and focus on linking their factual allegations to actual legal claims." Instead, they filed a fifty-three page third amended complaint repeating the vices of the second amended complaint. Instead of editing their twenty-six page introduction, plaintiffs expanded it. The complaint still reads like a magazine story instead of a traditional complaint. This time, the claims for relief designated legal theories on which the relief was based, but the plaintiffs did not specify which defendants were liable on which of the claims. Instead, each claim says "defendants'" conduct violated various rights of plaintiffs, without saying which defendants.

The district court had said in its order dismissing the second amended complaint that plaintiffs would have "one last opportunity to file a proper complaint." After

receiving the third amended complaint, the judge noted that it had been submitted "paying little heed to the court's previous orders." The new section spelling out what the claims are "hardly improves matters, as each of the newly delineated claims incorporates 122 paragraphs of confused factual allegations and then merely makes perfunctory reference to a legal claim said to arise from these undifferentiated facts."

The judge was concerned, however, that dismissal with prejudice based on the plaintiff's failure to comply with prior orders "might unfairly punish plaintiffs for their counsel's ineptitude." The judge therefore referred the case to a magistrate for preparation of a "report which assesses the viability of plaintiffs' claims in light of defendants' motion to dismiss."

*1177 The magistrate wrote a thirty-page report, recommending dismissal of the complaint on the ground that plaintiffs had failed to comply with the court's order dismissing the second amended complaint. The magistrate also reported that most, but not all, of the claims would be dismissed, even aside from this failure to comply with the court order because they failed to state claims upon which relief could be granted and on other grounds. The magistrate also noted that "no attempt is made to match up the specific factual allegations and the specific legal claims to a specific defendant. The result is that defendants and this court are literally guessing as to what facts support the legal claims being asserted against certain defendants."

The court then dismissed plaintiffs' complaint with prejudice, and noted that "the prior complaints presented long-winded tales of municipal conspiracy and police misconduct, but failed properly to notify the individual defendants of the legal claims they faced.... The larger part of this new complaint restates the second amended complaint without curing any of that prior complaint's deficiencies." The judge decided that "another order to dismiss with leave to replead would serve no purpose but to exacerbate the cost of this action to all concerned parties," and entered the dismissal.

ANALYSIS

[1] [2] We review dismissal of a complaint with prejudice for failure to comply with a court's order to amend the

complaint to comply with Rule 8 for abuse of discretion. *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 673–74 (9th Cir.1981); *Schmidt v. Herrmann*, 614 F.2d 1221, 1223–24 (9th Cir.1980). The judge in this case dismissed the case pursuant to Federal Rule of Civil Procedure 41(b) for violation of a court order. The court order was pursuant to Federal Rule of Civil Procedure 8(e) (1), requiring that “each averment of a pleading shall be simple, concise, and direct.” It was also pursuant to Rule 12(e), authorizing the court to strike a pleading or make such other order as it deems just, if a complaint “is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading,” and the judge has already issued an order for a more definite statement which order was not complied with. The district judge's evaluation of whether the plaintiff complied with his order “is entitled to considerable weight.” *Von Poppenheim v. Portland Boxing & Wrestling Comm'n*, 442 F.2d 1047, 1051 (9th Cir.1971).

The Federal Rules require that averments “be simple, concise, and direct.” The drafters of the rules anticipated that some lawyers and judges, particularly in code pleading states with different rules, might not understand just what was meant. Accordingly, Federal Rule of Civil Procedure 84 provided for an official Appendix of Forms “intended to indicate the simplicity and brevity of statement which the rules contemplate.” The complaints in the official Appendix of Forms are dramatically short and plain. For example, the standard negligence complaint consists of three short paragraphs:

1. Allegation of jurisdiction.
2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff, who was then crossing said highway.
3. As a result plaintiff was thrown down and had his leg broken, and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars and costs.

Fed.R.Civ.P. Form 9. This complaint fully sets forth who is being sued, for what relief, and on what theory, with

enough detail to guide discovery. It can be read in seconds and answered in minutes.

By contrast, the complaint in the case at bar is argumentative, prolix, replete with redundancy, and largely irrelevant. It consists largely of immaterial background information. For example, the complaint explains that plaintiff McHenry cofounded his political organization in Cambridge, Massachusetts in *1178 1980, which is irrelevant. It explains that McHenry's organization adheres to “the principles of non-violence developed by Gandhi and King,” also irrelevant. It tells what brand of motorbikes the police officers who arrested people rode, and points out that a journalist was injured by a police officer at one of the mass arrests at Food Not Bombs distributions. It describes in detail settlement negotiations which Food Not Bombs had at various times and in various other law suits, telling what a United States district judge told the City he was considering in a settlement conference in another lawsuit. It accuses persons other than the defendants of having “falsely told members of the press” about an injunction. The complaint says, and illustrates with a dramatic illustration of the mayor rising from his desk chair, that Mayor Agnos seemed quite angry when he met with McHenry.

None of this material has any resemblance to the sample pleadings in the official Appendix of Forms. Rather than set out the basis for a lawsuit, the pleading seems designed to provide quotations for newspaper stories. Despite all the pages, requiring a great deal of time for perusal, one cannot determine from the complaint who is being sued, for what relief, and on what theory, with enough detail to guide discovery.

Plaintiffs urge that heightened standards of pleading applicable to some of their constitutional tort claims required the kind of pleading they filed. We assume without deciding that the claims plaintiffs sought to plead were subject to a heightened pleading standard. *Compare Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) (rejecting a heightened pleading standard in civil rights cases alleging municipal liability as inconsistent with a liberal system of notice pleading); *with Branch v. Tunnell*, 937 F.2d 1382, 1387 (9th Cir.1991) (adopting a heightened pleading standard in cases where subjective intent is an element of a constitutional tort action); *Branch v. Tunnell*, 14 F.3d 449, 455–57 (9th Cir.1994).

[3] A heightened pleading standard is not an invitation to disregard's Rule 8's requirement of simplicity, directness, and clarity. The "particularity" requirement of a heightened pleading standard, requiring "nonconclusory allegations containing evidence of unlawful intent," as opposed to "bare allegations of improper purpose," has among its purposes the avoidance of unnecessary discovery. *Branch*, 937 F.2d at 1386. If the pleading contains prolix evidentiary averments, largely irrelevant or of slight relevance, rather than clear and concise averments stating which defendants are liable to plaintiffs for which wrongs, based on the evidence, then this purpose is defeated. Only by months or years of discovery and motions can each defendant find out what he is being sued for. The expense and burden of such litigation promotes settlements based on the anticipated litigation expense rather than protecting immunity from suit. Judgment and discretion must be applied by district judges to determine when a pleading subject to a heightened pleading standard has violated Rule 8, but there is nothing unusual about a standard requiring judges to exercise judgment and discretion. We have affirmed dismissal with prejudice for failure to obey a court order to file a short and plain statement of the claim as required by Rule 8, even where the heightened standard of pleading under Rule 9 applied. *Schmidt v. Herrmann*, 614 F.2d at 1223-24. In *Schmidt*, as in the case at bar, the very prolixity of the complaint made it difficult to determine just what circumstances were supposed to have given rise to the various causes of action.

[4] Dismissal with prejudice of a complaint under Rule 41(b) is a harsh remedy, so we look to see whether the district court might have adopted less drastic alternatives. *Nevijel v. North Coast Life Insurance*, 651 F.2d at 674. The district judge should first consider less drastic alternatives, but "need not exhaust them all before finally dismissing a case." *Von Poppenheim*, 442 F.2d at 1054; *Nevijel*, 651 F.2d at 674. The district judge in the case at bar had used less drastic alternatives, such as permitting plaintiffs to replead twice. He considered the less drastic alternative of allowing plaintiffs to replead again, but decided based on plaintiffs' violation *1179 of his previous orders that repleading would be futile.

[5] The "harshness of a dismissal with prejudice is directly proportionate to the likelihood that plaintiff would prevail if permitted to go forward to trial. Since harshness is a key consideration in the district judge's

exercise of discretion, it is appropriate that he consider the strength of a plaintiff's case if such information is available to him before determining whether dismissal with prejudice is appropriate." *Von Poppenheim*, 442 F.2d at 1053 n. 4. In the case at bar, the district judge did consider the strength of the plaintiffs' case. He determined that much of the complaint failed to state claims on which relief could be granted, or would be barred by statutes of limitation and immunities. We do not suggest that the referral to the magistrate and the extensive, thorough analysis performed by the magistrate were prerequisites for dismissal. They amounted to an especially careful approach to determining that in this particular case, dismissal with prejudice was really not very harsh, because if the complaint were not dismissed under Rule 8, most of it would be dismissed anyway without ever reaching the merits.

The burden imposed by plaintiffs on defendants in related litigation was appropriately considered by the district court. The district court noted that plaintiffs had filed a 108 page complaint and alleged 80 causes of action in a case against the City in state court, *McHenry v. Agnos*, San Francisco Superior Court Case No. 941976, and a 66 page Fourth Amended complaint in another related state case. *McHenry v. Agnos*, San Francisco Superior Court Case No. 927-377. This kind of history "supports the conclusion that the trial court's dismissal of this action was not an abuse of discretion," in part because "appellees herein have had to spend a large amount of time and money defending against [appellants] poorly drafted proceedings in this and related actions." *Nevijel*, 651 F.2d at 674-75.

[6] The propriety of dismissal for failure to comply with Rule 8 does not depend on whether the complaint is wholly without merit. The magistrate was able to identify a few possible claims which were not, on their face, subject to being dismissed under Rule 12(b)(6). Rule 8(e), requiring each averment of a pleading to be "simple, concise, and direct," applies to good claims as well as bad, and is a basis for dismissal independent of Rule 12(b)(6). See *Nevijel*, 651 F.2d at 673; *Von Poppenheim*, 442 F.2d at 1053 n. 4.

Plaintiffs urge that the district court order governing their second amended complaint, which they violated, was inconsistent with *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1223-24 (9th Cir.1990). In the

order dismissing the second amended complaint, the judge instructed the plaintiffs to “file a proper complaint which states clearly how each and every defendant was alleged to have violated plaintiffs’ legal rights.” This was a reformulation of the instruction the judge gave when he dismissed the first amended complaint, that the plaintiffs file a pleading “which clearly and concisely explains which allegations are relevant to which defendants.” We held in *McCalden* that a plaintiff “is not required to state the statutory or constitutional basis for his claim, only the facts underlying it.” *Id.* at 1223.

[7] There are two reasons why plaintiffs’ argument from *McCalden* is wrong. First, the defect to which the judge was alluding was failure to say which wrongs were committed by which defendants, not failure to identify the statutes or constitutional provisions making the conduct wrong. Second, even though a complaint is not defective for failure to designate the statute or other provision of law violated, the judge may in his discretion, in response to a motion for more definite statement under Federal Rule of Civil Procedure 12(e), require such detail as may be appropriate in the particular case, and may dismiss the complaint if his order is violated. Fed.R.Civ.P. 41(b).

[8] Prolix, confusing complaints such as the ones plaintiffs filed in this case impose unfair burdens on litigants and judges. As a practical matter, the judge and opposing counsel, in order to perform their responsibilities, cannot use a complaint such as the one plaintiffs filed, and must prepare outlines to determine who is being sued for what. *1180 Defendants are then put at risk that their outline differs from the judge’s, that plaintiffs will surprise them with something new at trial which they reasonably did not understand to be in the case at all, and that res judicata effects of settlement or judgment will be different from what they reasonably expected. “[T]he rights of the defendants to be free from costly and harassing litigation must be considered.” *Von Poppenheim* at 1054.

The judge wastes half a day in chambers preparing the “short and plain statement” which Rule 8 obligated

plaintiffs to submit. He then must manage the litigation without knowing what claims are made against whom. This leads to discovery disputes and lengthy trials, prejudicing litigants in other case who follow the rules, as well as defendants in the case in which the prolix pleading is filed. “[T]he rights of litigants awaiting their turns to have other matters resolved must be considered....” *Nevijel*, 651 F.2d at 675; *Von Poppenheim*, 442 F.2d at 1054. While commendable in its consideration for plaintiffs in this case, the magistrate’s thorough analysis and thirty-page report, and the judge’s study of the report, took a great deal of time away from more deserving litigants waiting in line.

[9] Appellants also argue that various substantive bases for dismissal of some of their claims were mistaken. We need not reach those issues, because the district court did not abuse its discretion in dismissing the entire complaint for violation of Rule 8 and of the court’s orders.

“The forms of action we have buried, but they still rule us from their graves.” F.W. Maitland, *The Forms of Action At Common Law* 2 (A.H. Chaytor and W.J. Whittaker ed.1965)(1909). As Maitland explains, there are good reasons why the forms of action still shape pleadings, though the rules no longer require pleadings to conform to the ancient forms. Pleadings of the kind shaped by the traditional forms enable determination of the competence of the court, the appropriate procedures for the particular type of adjudication, the type of trial, and the remedies available. *Id.* at 2–3. Something labeled a complaint but written more as a press release, prolix in evidentiary detail, yet without simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs, fails to perform the essential functions of a complaint.

AFFIRMED.

All Citations

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1995 WL 348181

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut, Judicial District of Fairfield.

George L. ROSADO, et al.

v.

BRIDGEPORT ROMAN CATHOLIC DIOCESAN CORPORATION, et al.

No. CV 93 302072.

|

May 31, 1995.

MEMORANDUM OF DECISION RE MOTION TO COMPEL, MOTION FOR SANCTIONS, MOTION FOR PROTECTIVE ORDERS, OBJECTION TO MOTION TO COMPEL

LEVIN, Judge.

*1 The plaintiffs allege that they were sexually assaulted by the defendant Raymond Pcolka while he was a priest employed by the defendant Bridgeport Roman Catholic Diocesan Corporation (Diocese). During the times that the assaults allegedly occurred, the defendant, Bishop Walter Curtis, was the chief officer of the Diocese. The plaintiffs allege that the Diocese and Bishop Curtis are liable for the assaults based on the negligent supervision of Pcolka by those defendants and based on the doctrine of respondeat superior.

The plaintiffs noticed the depositions of Pcolka, Bishop Curtis and Bishop Edward Eagan. After the court issued certain protective orders pursuant to Practice Book § 221¹ and *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), the plaintiffs renoticed Pcolka's deposition. At that deposition, Pcolka asserted privileges to various questions. The plaintiffs have now filed a motion for sanctions and a motion to compel Pcolka to answer those questions, pursuant to Practice Book § 231.² Pcolka has moved for a further protective order to preserve his constitutional and

testimonial privileges, pursuant to Practice Book §§ 231, 247(c).³

I

The principal area of dispute concerns Pcolka's asserting his privilege against self-incrimination to several questions during the deposition.⁴

"It is an established principle, that a person cannot, in a suit against him, be compelled to produce evidence against himself; and by strong analogy, he ought equally to be protected in his interest, when called on to testify for another." *Benjamin v. Hathaway*, 3 Conn. 528, 532 (1821). This principle is embodied in Article first § 8 of the constitution of the state of Connecticut which provides in part: "No person shall be compelled to give evidence against himself..." Also, the Fifth Amendment to the Constitution of the United States provides that no person "shall be compelled ... to be a witness against himself..." Despite the somewhat different verbiage employed in these laws, there is no substantive difference between them insofar as testimony is sought; *State v. Asherman*, 193 Conn. 695, 712-713, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S.Ct. 1749, 84 L.Ed.2d 814 (1985); although our state constitution may afford greater protection with respect to the production of documents. See *Burritt Interfinancial Bancorporation v. Brooke Pointe Associates*, 42 Conn.Sup. 445, 453-454, 625 A.2d 851 (1992). "This law has also been codified by the adoption of General Statutes § 52-199..."⁵ *Westport National Bank v. Wood*, 31 Conn.Sup. 266, 267, 328 A.2d 724 (1974); see also General Statutes § 51-35(b).⁶

The privilege "against self-incrimination 'not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.' *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316 38 L.Ed.2d 274 (1973)." *Olin Corporation v. Castells*, 180 Conn. 49, 53, 428 A.2d 319 (1980). The privilege extends to pretrial civil discovery proceedings, including depositions. *Estate of Fisher v. Commissioner of Internal Revenue*, 905 F.2d 645, 648-649 (2d Cir.1990); *Bank One of Cleveland, N.A. v. Abbe*,

916 F.2d 1067, 1074 (6th Cir.1990); *Maco-Bibb County Hosp. Auth. v. Continental Ins.*, 673 F.Sup. 1580, 1582 (M.D.Ga.1987); *McIntyre's Mini Computer v. Creative Synergy Corp.*, 115 F.R.D. 528, 529 (D.Mass.1987); see *Olin Corporation v. Castells*, supra, 180 Conn. 53-54; see also *Westport National Bank v. Wood*, supra, 31 Conn.Sup. 267, construing General Statutes § 52-199. Its availability “ ‘does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.’ ” *Estelle v. Smith*, 451 U.S. 454, 462, 101 S.Ct. 1866, 1873, 68 L.Ed.2d 359 (1981) (quoting *In re Gault*, 387 U.S. 1, 49, 87 S.Ct. 1428, 1455, 18 L.Ed.2d 527 (1967)).

*2 “The standard for determining whether a claim of privilege is justified is ‘ “whether the claimant is confronted by substantial and ‘real,’ and not merely trifling or imaginary, hazards of incrimination.” ’ *United States v. Apfelbaum*, 445 U.S. 115, 128, 100 S.Ct. 948, 956, 63 L.Ed.2d 250 (1980) (citations omitted). . . .” *United States v. Rubio-Topete*, 999 F.2d 1334, 1338 (2d Cir.1993). “A court may not deny a witness’ invocation of the fifth amendment privilege against compelled self-incrimination unless it is ‘ “ ‘perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have [a] tendency’ to incriminate.” ’ (Emphasis in original.) *State v. Williams*, 200 Conn. 310, 319, 511 A.2d 1000 (1986), quoting *Hoffman v. United States*, 341 U.S. 479, 488, 71 S.Ct. 814, 95 L.Ed. 1118 (1951); *State v. Simms*, 170 Conn. 206, 209, 365 A.2d 821, cert. denied, 425 U.S. 954, 96 S.Ct. 1732, 48 L.Ed.2d 199 (1976).” *In re Keijam T.*, 226 Conn. 497, 503-504, 628 A.2d 562 (1993). Therefore, “before refusing to allow the privilege, the trial court must find that the answers to any questions proposed cannot possibly have a tendency to incriminate.” *State v. Cecarelli*, 32 Conn.App. 811, 819, 631 A.2d 862 (1993). “[T]he right to one’s privilege against prosecution that could result from the testimony sought does not depend upon the likelihood of prosecution but upon the possibility of prosecution.” *State v. Williams*, supra, 200 Conn. 319. “ ‘To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.’ *Hoffman v. United States*, supra, [341 U.S.] 486-87; *State v. Simms*, supra, [170 Conn.] 209. In appraising a fifth amendment claim by a witness, a judge ‘must

be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.’ (Internal quotation marks omitted.) *State v. Williams*, supra, [200 Conn.] 319.” *In re Keijam T.*, supra, 226 Conn. 504.

Based on the allegations of the plaintiffs’ complaints, it certainly is possible that answering the questions to which he asserted his Fifth Amendment privilege might endanger Pcolka “because injurious disclosure might result.” Notably, the defendant Pcolka has represented, and the plaintiffs have not denied, that at the inception of this litigation the plaintiffs’ attorney gave a statement to the news media in which he declared that he would seek Pcolka’s criminal prosecution. Ordinarily, in light of such public pronouncements it would be a strange kind of argument for the plaintiffs to maintain, as they now do, that the defendant is not confronted by substantial and real, and not merely trifling or imaginary, hazards of incrimination; *United States v. Rubio-Topete*, supra, 999 F.2d 1338; and ordinarily, it would be an equivocal type of justice to so hold. “The plaintiff[s] cannot have it both ways.” *Kelemen v. Rimrock Corporation*, 207 Conn. 599, 607, 541 A.2d 865 (1988).

*3 Now, however, the plaintiffs argue that all applicable statutes of limitation have expired with respect to the acts complained of against Pcolka. “It is generally held that a witness cannot invoke the privilege against self-incrimination where he is either immune from prosecution, or where prosecution is barred by a statute of limitations. See 98 C.J.S. *Witnesses* § 437 (1957); 23 Am.Jur.2d *Depositions & Discovery* § 38 (1985). ‘A legal limitation of the time of prosecution is in practical effect an expurgation of the crime; so after the lapse of the time fixed by law the privilege ceases.’ 8 Wigmore on Evidence § 2279 (McNaughton rev. 1961). The constitution protects against only real danger of prosecution, not mere speculative possibilities.” *Leonard v. Williams*, 100 N.C.App. 512, 397 S.E.2d 321, 323 (1990); see *United States v. Aeilts*, 855 F.Sup. 1114, 1119 (C.D.Cal.1994); *Siviglia v. Siviglia*, 138 F.R.D. 452, 453 (E.D.Pa.1991); *Belmonte v. Lawson*, 750 F.Sup. 735, 739 (E.D.Va.1990); *Clark v. City of Munster*, 115 F.R.D. 609, 616 (N.D.Ill.1987) (stating that expiration of the statute of limitations is “[o]ne of the factors which must be considered in determining whether a witness has a reasonable fear of prosecution”); *Hollowell v. Hollowell*,

369 S.E.2d 451, 453 (Va.App.1988); *Handley v. Handley*, 460 So.2d 162, 165 (Ala.Civ.App.1983).

The last acts of which the plaintiffs complain allegedly occurred in 1982. Pcolka has not suggested that any other year is operative for purposes of determining whether the statute of limitations has expired. Indeed, he does not dispute that all relevant statutes of limitations have expired in the State of Connecticut. See Conn.Gen.Stat. § 54-193a.⁷

However, Pcolka maintains that the statute of limitations has not expired in the State of New Hampshire. “The privilege against self-incrimination traditionally can be invoked where the claim is made that answering the question will subject the individual to criminal prosecution in another state. *United States v. Freed*, 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971); *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968); *Malloy v. Hogan*, *supra*, [378 U.S. 1]; 81 Am.Jur.2d *Witnesses* § 43.” *State v. Burton*, 254 S.E.2d 129, 137-138 (W.Va.1979).

It would unduly lengthen this already lengthy opinion to indulge in a comprehensive analysis of the New Hampshire statutes of limitations with respect to sexual crimes against minors, and it is unnecessary to do so. Suffice it to say that until 1987 the applicable statute of limitations in New Hampshire for a felony was six years; for a misdemeanor, one year. N.H.R.S.A. 625:8I(a), (b), (c) (1986). The acts complained of by the plaintiffs could be construed to be aggravated felonious sexual assault in New Hampshire, which was a class A felony until 1987; N.H.R.S.A. 632-A:2 (1986); felonious sexual assault, which was a class B felony in New Hampshire; N.H.R.S.A. 632-A:3 (1986); or sexual assault, which was a misdemeanor in New Hampshire. N.H.R.S.A. 632-A:4 (1986). Also, New Hampshire Revised Statutes Annotated 632-A:7 provided: “Except in those cases where the victim was less than 18 years of age, no prosecution may be maintained under this chapter unless the alleged offense was brought to the attention of a law enforcement officer within 6 months after its occurrence.”

*4 “Effective January 1, 1987, ... the legislature extended the statute of limitations by amending RSA 632-A:7 to provide that ‘[i]n cases where the victim was under the age of 18 when the alleged sexual assault offense occurred, the statute of limitations shall not begin to

run until the victim reaches the age of 18.’ RSA 632-A:7, I (Supp.1986) (1986 amendment). Effective April 27, 1990, the legislature repealed RSA 625:8 to provide that ‘where the victim was under 18 years of age when the alleged offense occurred, [prosecutions for offenses under RSA chapter 632-A may be commenced] within 22 years of the victim’s eighteenth birthday.’ RSA 625:8, III(d) (Supp.1993) (1990 amendment).” *State v. Martin*, 138 N.H. 508, 643 A.2d 946, 948 (1994). However, in *State v. Hamel*, 138 N.H. 392, 643 A.2d 953 (1994), the Supreme Court of the State of New Hampshire, citing an 1852 New Hampshire case and a 1928 Second Circuit case authored by Judge Learned Hand, held that “[a]fter the limitations period has run ... it is a vested defense of right that cannot be taken away by legislative enactment. See *Willard [v. Harvey]*, 24 N.H. [344] at 354 [4 Fost. 344 (1952)]; *Falter v. United States*, 23 F.2d 420, 425-26 (2d Cir.), *cert. denied*, 277 U.S. 590, 48 S.Ct. 528, 72 L.Ed. 1003 (1928).” *Id.*, 643 A.2d 955. The plaintiffs emphasize that the wrongs which Pcolka is alleged to have committed in New Hampshire necessarily were committed prior to the time when he sold his cabin in New Hampshire, in 1976 or 1977, and that the longest applicable statute of limitations, six years, therefore expired in 1982 or 1983, before the New Hampshire legislature extended the statute of limitations. Therefore, under *Hamel*, claim the plaintiffs, there is no possibility that Pcolka may be prosecuted for the wrongs he allegedly committed in that state.

Notwithstanding the vicissitudes in the New Hampshire statute of limitations with respect to sexual crimes, N.H.R.S.A. 625:8 VI has continuously provided in pertinent part, and at all times relevant to the acts alleged in these actions, that: “The period of limitations does not run: (a) During any time when the accused is continuously absent from the state or has no reasonably ascertained place of abode or work within this state....” Since Pcolka sold his cabin in New Hampshire in 1976 or 1977, within six years of the time of certain criminal acts alleged against him, he is “ ‘confronted by substantial and ‘real,’ and not merely trifling or imaginary, hazards of incrimination.” ’ ” *United States v. Rubio-Topete*, *supra*, 999 F.2d 1338. Otherwise stated, it is far from “*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have [a] tendency’ to incriminate.” (Emphasis in original; internal quotation marks omitted.) *In re Keijam T.*, *supra*, 226 Conn. 503-504. Therefore, this “trial court

[cannot] find that the answers to any questions proposed cannot possibly have a tendency to incriminate.” *State v. Cecarelli*, supra, 32 Conn.App. 819.

*5 That the prosecutorial authorities presently in office in New Hampshire may not intend to prosecute Pcolka is of no moment. See *State v. Williams*, supra, 200 Conn. 319 (“[T]he right to one’s privilege against prosecution that could result from the testimony sought does not depend upon the likelihood of prosecution but upon the possibility of prosecution.”). “The rarity of prosecutions under a particular statute, or a prosecuting attorney’s indication in a particular case that he will not prosecute, are not sufficient to defeat a claim of privilege.... In *United States v. Miranti*, 253 F.2d 135, 139 (2d Cir.1958), for example, the United States Court of Appeals for the Second Circuit stated: ‘We find no justification for limiting the historic protections of the Fifth Amendment by creating an exception to the general rule which would nullify the privilege whenever it appears that the government would not undertake to prosecute. Such a rule would require the trial court, in each case, to assess the practical possibility that prosecution would result from incriminatory answers. Such an assessment is impossible to make because it depends on the discretion exercised by a ... [prosecutor] or his successor.’ ” *Choi v. State*, 316 Md. 529, 560 A.2d 1108, 1112 (1989); see *United States v. Jones*, 703 F.2d 473, 478 (10th Cir.1983) (“Once the court determines that the answers requested would tend to incriminate the witness, it should not attempt to speculate whether the witness will in fact be prosecuted”); *In re Corrugated Container Anti-Trust Litigation*, 620 F.2d 1086, 1091 (5th Cir.1980), cert. denied, 449 U.S. 1102, 101 S.Ct. 897, 66 L.Ed.2d 827 (1981) (“even a remote risk that the witness will be prosecuted for the criminal activities that his testimony might touch on” is sufficient to sustain a privilege claim); *United States v. Johnson*, 488 F.2d 1206, 1209 n. 2 (1st Cir.1973) (“Neither the practical unlikelihood of ... prosecution, nor the Assistant United States Attorney’s denial of an intention to charge [the witness], negated [the witness’s] privilege.”); see also *de Antonio v. Solomon*, 42 F.R.D. 320, 323 (D.Mass.1967); *Mississippi State Bar v. Attorney L.*, 511 So.2d 119, 124 (Miss.1987); *10-Dix Bldg. Corp. v. McDannel*, 134 Ill.App.3d 664, 89 Ill.Dec. 469, 475, 480 N.E.2d 1212, 1218 (1985); *People v. Guy*, 121 Mich.App. 592, 329 N.W.2d 435, 444 (1982); *Application of Van Lindt*, 109 Misc.2d 686, 440 N.Y.S.2d 969 (1981); *Commonwealth v. Strickler*, 481 Pa. 579, 393 A.2d 313, 315 (1978); *Matter of Grant*,

83 Wis.2d 77, 264 N.W.2d 587, 591 (1978); *Vail v. Vail*, 360 So.2d 985, 989-990 (Ala.Civ.App.1977), remanded on other grounds, 360 So.2d 992 (Ala.1978); Note, *Self-Incrimination and the Likelihood of Prosecution Test*, 72 J.Crim.L. & Criminology 671 (1981).⁸

Accordingly, Pcolka’s invocation of the privilege against self incrimination to each of the questions to which he asserted it is sustained. This court cannot find, with respect to any substantive question to which Pcolka asserted the privilege, that it is “perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have [a] tendency’ to incriminate.” (Emphasis in original; citations and internal quotation marks omitted.) *In re Keijam T.*, supra, 226 Conn. 503-504; *State v. Cecarelli*, supra, 32 Conn.App. 819.

II

*6 Pcolka also seeks a protective order with respect to questions asked of him at his deposition relating to the sexual misconduct of other priests.⁹ He claims that “[t]his line of inquiry is totally immaterial to any issue in the case.” The court disagrees.

Practice Book § 243 provides for the taking of depositions upon oral examination “subject to the provisions of Section] 217” of the Practice Book.¹⁰ Section 217 is simply a title section, “Scope of Discovery”. The following section, § 218, states the standard for the scope of discovery “in general”.¹¹ It provides in relevant part that a party may obtain discovery of information and disclosure of documents “material to the subject matter involved in the pending action, which are not privileged, whether the discovery or disclosure relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, and which are within the knowledge, possession or power of the party or person to whom the discovery is addressed. Discovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action and if it can be provided by the disclosing party or person with substantially greater facility than it could otherwise be obtained by the party seeking disclosure. It shall not be ground for objection that the information sought will be inadmissible at trial if the information sought

appears reasonably calculated to lead to the discovery of admissible evidence.”

Although this jurisdiction has liberal discovery doctrines; *Tianti v. William Raveis Real Estate, Inc.*, 231 Conn. 690, 701 n. 12, 651 A.2d 1286 (1995); “[d]iscovery is confined to facts material to the [subject matter of the] plaintiff’s cause of action and does not afford an open invitation to delve into the defendant’s affairs.” *Berger v. Cuomo*, 230 Conn. 1, 6-7, 582 A.2d 333 (1990); see *Heyman Associates No. 1 v. Insurance Co. of Pennsylvania*, 231 Conn. 756, 781-782, 653 A.2d 122 (1995). However, “[i]nformation material to the subject matter of a lawsuit certainly includes a broader spectrum of data than that which is material to the precise issues raised in the pleadings”; *Lougee v. Grinnell*, 216 Conn. 483, 489, 582 A.2d 456 (1990); although “it is not without limits.” 4 Moore’s Federal Practice ¶ 26.5[1], p. 26-96.¹² “The key phrase in this definition-[material] to the subject matter involved in the pending action’-has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389-2390, 57 L.Ed.2d 253 (1978). “ [T]he court should and ordinarily does interpret [‘material’] very broadly to mean matter that is relevant to anything that is or may become an issue in the litigation.’ 4 J. Moore, Federal Practice ¶ 26.56[1], p. 26-131 n. 34 (2d ed. 1976).” *Id.*, 437 U.S. 351 n. 12. Material has also been defined to mean “important ... going to the merits...” Black’s Law Dictionary (4th Ed.); see also Ballentine’s Law Dictionary (1969); McCormick on Evidence (3rd Ed.1984) § 185, p. 541. The “subject matter” of this lawsuit is the alleged sexual abuse of male and female children by a single priest employed by the Diocese of Bridgeport.¹³ The plaintiffs allege that the Diocese and Bishop Curtis are liable for their assaults based on the negligent supervision of Pcolka by those defendants and on the doctrine of respondeat superior. The alleged participation with Pcolka of another individual in the heinous acts alleged in the complaint obviously is material. Whether Pcolka ever saw children in the second floor living apartments where clergy dwelled at St. John’s is material since those children may have heard or seen things, including sexual assaults, which bear on the claims in the plaintiffs’ complaint. Moreover, the presence of such children in the rectory bears directly on the plaintiffs’ claim in the case of *See v. Bridgeport Roman Catholic Diocese* that the Diocese “failed to provide or enforce rules

prohibiting clergy from having children in the bedrooms and private apartments of rectories and premises owned and controlled by it.” Discovery is permissible if it may supply a plaintiff with leads to discoverable evidence, an accepted use of discovery. 4 Moore’s Federal Practice ¶ 26.56[1], p. 26-104, citing *Baker v. Proctor & Gamble Co.*, 17 F.R.Serv.2d 30b. 352 Case 1 (S.D.N.Y.1952). “[I]t is not too strong to say that a request for discovery should be considered relevant if there is any possibility that the information may be relevant to the subject matter of the action.” 8 Wright, Miller & Marcus, Federal Practice & Procedure Civil 2d § 2008, pp. 108-109. However, because the court has found that Pcolka’s answers to these questions may tend to incriminate him, his constitutional privilege against incriminating himself precludes the court from granting the plaintiffs’ motion to compel answers to these questions.

III

*7 In their motion to compel, “[t]he plaintiffs request that the [c]ourt order the defendant to answer all questions regarding his medical health, medical problems and/or medical conditions from which he suffers; psychological and/or psychiatric testing which he underwent and the reasons therefore; psychiatric care and treatment as well as any psychiatric conditions from which he suffers.” The plaintiffs allege that during the deposition, “the defendant Pcolka invoked the patient/physician privilege and refused to answer all such questions regarding these topics. The plaintiffs claim that this information is essential to their claims of both intentional conduct on behalf of the defendant Pcolka as well as their claims against the Diocese of Bridgeport and Bishop [Curtis] involving theories of negligence and respondeat superior. The patient/physician privilege,” claim the plaintiffs, “can only be invoked by the physician on behalf of the patient. In other words, the physician is prohibited from revealing information regarding a patient’s condition either orally or through written records unless the patient authorizes the same. Although the [c]ourt has entered certain orders limiting the plaintiffs’ right to obtain medical documents from the defendant’s doctors’ and/or personnel file, the plaintiffs have an absolute right to obtain such information directly from the defendant Pcolka. No privilege exists which would allow the defendant Pcolka to refuse to answer these questions.” Motion to Compel, p. 3. Pcolka objects to this motion and seeks a protective

order with respect to questions “regarding ‘his health, medical problems and/or medical conditions from which he suffers’, if any, since this information is confidential in nature, not admissible in evidence in proof of any claim of the plaintiffs, not raised as a defense by the defendant to any claims of the plaintiff, and not likely to lead to admissible evidence.” Motion by Defendant Raymond Pcolka for Protective Order, pp. 1-2.

Again, while neither the plaintiffs nor the defendant Pcolka have referenced specific questions propounded during the deposition to which Pcolka asserted a privilege, the court has culled certain questions from the deposition transcript and will address the parties' claims within the context of those questions.¹⁴

At common law, “there is no privilege in Connecticut between a physician and patient. *Zeiner v. Zeiner*, 120 Conn. 161, 167, 179 A. 644 [1935].” *State v. Hanna*, 150 Conn. 457, 464, 191 A.2d 124 (1963); see *State v. Robinson*, 203 Conn. 641, 657, 526 A.2d 1283 (1987); Tait and LaPlante's Handbook of Connecticut Evidence § 12.8.1. In recent years, the common law has been modified by statute. In 1990, the General Assembly created a “sweeping privilege” for all health care providers. Tait and LaPlante, op. cit., § 12.8.1, 1995 Supplement; see Public Act No. 90-177. That legislation has been codified as General Statutes § 52-146o.¹⁵

*8 Except for Pcolka's alleged hospitalization at the Institute of Living in 1993, all of the questions to which Pcolka asserted a medical privilege appear to relate to matters preceding 1990. Accordingly, for General Statutes § 52-146o to be applicable, it would have to apply retroactively.

The settled rule in Connecticut is that “[s]tatutes should be construed retroactively only when the mandate of the legislature is imperative. *Adamchek v. Board of Education*, 174 Conn. 366, 369, 387 A.2d 556 (1978), quoting *Michaud v. Fitzryk*, 148 Conn. 447, 449, 171 A.2d 397 (1961); see *New Haven v. Public Utilities Commission*, 165 Conn. 687, 726, 345 A.2d 563 (1974); *Little v. Ives*, 158 Conn. 452, 457, 262 A.2d 174 (1969). Moreover, statutes that effect substantial changes in the law do not apply in pending actions unless it clearly and unequivocally appears that such was the legislative intent; *American Masons' Supply Co. v. F.W. Brown Co.*, 174 Conn. 219, 223, 384 A.2d 378 (1978); *E.M. Loew's Enterprises, Inc.*

v. International Alliance, 127 Conn. 415, 418, 17 A.2d 525 (1941); *Old Saybrook v. Public Utilities Commission*, 100 Conn. 322, 325, 124 A. 33 (1924); and [courts] have consistently expressed [their] reluctance to give such statutes retroactive application. *East Village Associates, Inc. v. Monroe*, 173 Conn. 328, 332, 377 A.2d 1092 (1977). *Sherry H. v. Probate Court*, 177 Conn. 93, 100, 411 A.2d 931 (1979).” (Internal quotation marks omitted.) *In re Judicial Inquiry No. 85-01*, 221 Conn. 625, 632, 605 A.2d 545 (1992).

Public Act No. 90-177 did not provide that it was to apply retroactively. The privilege it conferred was a substantive change in the law and a substantive obligation on health care providers not to disclose certain communications and information. Compare *Sherry H. v. Probate Court*, 177 Conn. 93, 102, 411 A.2d 931 (1979). Moreover, nothing in the policy of the statute militates in favor of its retroactive application. The purpose of such statutory privileges is to encourage candor between a health care provider and her patient and “to protect the therapeutic relationship.” Tait and LaPlante, op. cit., § 12.9.1. To cloak in a privilege, after the fact, a communication in which the parties thereto could have had no reasonable expectation of confidentiality at the time because of the then-existing law would make little sense and not subserve the ends of justice. But see 2 McCormick on Evidence (4th Ed.1984) § 105. The court holds that General Statutes § 52-146o is not retroactive.¹⁶ For the same reasons, 1969 Public Acts 146c,¹⁷ and which confers a privilege on communications (as defined therein) between a psychologist and his patient, is not retroactive.

The only questions posed at the deposition which directly inquire into communications between Pcolka and a health care provider are those questions pertaining to his 1993 hospitalization at the Institute of Living and the following inquiries: “What did Dr. Sires tell you was wrong with you?” “What did Dr. Meshkin do for you?” To the extent that the answers to the latter questions relate to matters preceding October 1, 1961, they are not privileged. To the extent that the answers to these questions relate to matters on and after that date, they are privileged pursuant to 1961 Public Acts No. 529 which, as amended, is now codified as General Statutes § 52-146d.¹⁸ Moreover, pursuant to that statute, Pcolka properly asserted the privilege with respect to the following questions: “When you left the Institute of the Living, why did you leave it?” “Why did you leave

the Institute of the Living?" "Did you leave voluntarily or involuntarily?" "Why did you enter the Institute of the Living?" "Now, were you ever, just answer yes or no, ever shown any psychiatric records regarding your care and treatment? By anyone?" "What was the reason you were up there [at the Institute of Living] at that time?"

*9 Pcolka's motion for a broad protective order based on the patient/physician privilege is denied. The plaintiffs' motion to compel Pcolka to answer "all questions" relating to medical, psychological, or psychiatric matters is denied for two reasons. Firstly, it is evident that even if the answers to many of those questions were not protected by a physician-patient privilege, they are protected by the Fifth Amendment privilege against self-incrimination, discussed supra. The plaintiffs themselves claim that Pcolka's "past mental health is germane to issues involving allegations of sexual abuse." As discussed supra, the privilege against self incrimination extends not only to "answers that would in themselves support a conviction under a ... criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the [witness]." *Hoffman v. United States*, supra, 341 U.S. 486. "To sustain the privilege, it need only be evident from the implications of the question, and the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.*, 341 U.S. 486-87. Secondly, the plaintiffs' claim that "[t]he patient/physician privilege can only be invoked by the physician on behalf of the patient" and that "[n]o privilege exists which would allow the defendant Pcolka to refuse to answer these questions" is wrong. General Statutes § 52-146d(2) defines "communications and records" to include "all oral and written communications and records thereof relating to diagnosis or treatment of a patient's mental condition between the patient and a psychiatrist..." General Statutes § 52-146e(a) provides that such communications and records "shall be confidential..." "Confidential communications" are defined as "[c]ommunications made in confidence; communications made to such persons that the law regards them as privileged beyond forcing a disclosure thereof." *Ballentine's Law Dictionary* (1969), p. 244.

In their motion to compel, "[t]he plaintiffs request that the [c]ourt preclude the defendant Pcolka's counsel, Frank Murphy[,] from instructing the deponent not to answer questions.... The plaintiffs maintain that the information to which Mr. Murphy instructed the deponent not to answer was not information protected by either the attorney-client privilege or information protected by an individual's right against self-incrimination." Pcolka objects, claiming that "[a] review of the transcript and the particular questions will show that appropriate privilege or other objecti[on]s were raised in a timely and appropriate manner by the witness and by counsel. As a result, there is no basis for a preclusion order."

The defendant is correct. A careful review of the transcript reveals that Attorney Murphy confined virtually all of his remarks to the deponent's assertion of various privileges, to objecting to questions previously asked, and to objecting to the form of certain questions. One confrontation arose when the plaintiff's attorney showed Pcolka a signature on a document and asked him if the signature was his, without permitting him to see the rest of the document. Attorney Murphy instructed Pcolka to look at the entire document before he answered. In general, absent a claim of privilege, instructions by an attorney to his client not to answer a question at a deposition is improper. *Gould Investors, L.P. v. General Ins. Co. of Trieste & Venice*, 133 F.R.D. 103, 104 (S.D.N.Y.1990).¹⁹ This, however, was a deposition which was contentious even before it began. After the defendants had sought and had been granted by the court a protective order pursuant to Practice Book § 221, limiting the persons entitled to be present at the deposition and limiting the dissemination of information and documents obtained at the deposition, Pcolka was met as he entered the office of the plaintiffs' attorney with representatives of the news media. After having previously declared that he would seek Pcolka's criminal prosecution, the plaintiffs' attorney proceeded to pose innumerable questions to Pcolka at the deposition which were clearly inculpatory and then claimed that Pcolka's assertion of his privilege against self-incrimination was without a reasonable basis. Under the circumstances, Attorney Murphy comported himself professionally. Neither sanctions nor any other order against him is appropriate.

*10 During the deposition, the plaintiffs' attorney asked Pcolka whether he ever "expressed any problems regarding the vow of chastity" to his "confessor" while he was in the seminary. Pcolka refused to answer based on "confidentiality between priest and confessor."

The assertion here of the privilege as to communications between a priest and a "penitent" arises in an atypical manner. Usually, the claim has arisen in the United States when the clergy member is called to testify. See cases collected in Annotation, "Matters to which the Privilege Covering Communications to Clergymen or Spiritual Adviser Extends," 22 A.L.R.2d 1152, as supplemented. In such a circumstance, General Statutes § 52-146b prohibits a member of the clergy from disclosing confidential communications made to him unless the person making the communication waives the privilege.²⁰ Here, however, the communication is sought from the supposed "penitent", or the person seeking absolution or spiritual advice. The relative dearth of case law involving an attempt to invade the confidential relationship through the penitent himself may be ascribed to the fact that he would ordinarily be able to assert the settled constitutional privilege against self-incrimination, discussed supra. Here, however, for whatever reasons, Pcolka has relied exclusively on a claimed privilege as to confidential communications between "priest and penitent". The court, of course, must take the case, and the issue, as it finds it.

General Statutes § 52-146b is silent as to any privilege insulating the penitent from testifying as to what he or she told the clergy member. The legislative history to the statute assumes that such a privilege did or should exist. 12 H.R.Proc., Pt. 7, 1967 Sess., pp. 7-8; 12 Senate Proc., Pt. 5, 1967 Sess., p. 30.²¹ However, "[t]he statutory language in question is clear and ... admits of no ambiguities. We cannot 'search out some intent which we may believe the legislature actually had and give effect to it, ... we are confined to the intention which is expressed in the words it has used.'..." *United Aircraft Corporation v. Fusari*, 163 Conn. 401, 410-411, 311 A.2d 65 (1972). "The court may not supply a statutory failure to mention the unanticipated situation in express terms merely because the court feels good reason so exists; the remedy in such a situation lies with the general Assembly, not the court." *Id.*, 414. The only other source of such a privilege, in the absence of a statute conferring one, is the common law. *Moore v. McNamara*, 201 Conn. 16, 24, 513 A.2d 660 (1986).

Although "[i]t is perhaps open to argument whether a privilege for confessions to priests was recognized in common law courts during the period before the Restoration[,] ... since the Restoration, and for more than two centuries of English practice, the almost unanimous expression of judicial opinion (including at least two decisive rulings) has denied the existence of a privilege." 8 Wigmore on Evidence (McNaughton rev. 1961) § 2394.

*11 There is no evidence as to whether Connecticut followed the English common law rule, or, rather, the absence of such a rule. The only case which has been located in which a witness was questioned as to what she told her clergyman is *State v. Jones*, 205 Conn. 723, 736-740, 535 A.2d 808 (1988). In that case the witness did not object to the question, the defendant objected "only upon the ground of relevance" at trial; *id.*, 736; and even on appeal the issue of privilege never was raised.²²

In the absence of any case law either way, this court cannot assume that the common law of the State of Connecticut, either now or at the time of its separation from England, comported with that of the mother country in a matter touching upon a settled religious practice and implicating the issue of religious toleration. See 8 Wigmore, *op. cit.*, § 2396, p. 878. It must be recalled that our Connecticut "ancestors never formally adopted the common law of England; one attempt in that direction was made and that was abandoned without action. 4 Col.Rec. 261." *Brown's Appeal*, 72 Conn. 148, 151, 44 A. 22 (1899) (observing that "in many respects, especially in the law of marriage, divorce, land, descent and distribution, there was a wide departure from the English law."). "During the greater part of the colonial era, the common law of England was not deemed to form a part of the jurisprudence of Connecticut, except so far as any part of it might have been accepted and introduced by her own authority. Stat., Ed. 1769, 1; 1 Swift's System, 44." *Graham v. Walker*, 78 Conn. 130, 133, 61 A. 98 (1905). The prevailing view in recent years, as it was nearly 180 years ago, is that "[w]e have, unquestionably, a common law of our own. Its basis is the common law of England; but the superstructure has been modified, with laudable caution, to suit our peculiar circumstances." Preface, 1 Connecticut Reports (1814-1816), p. xxvii (1817), by Thomas Day²³; accord, *Dacey v. Connecticut Bar Assn.*, 184 Conn. 21, 25-26, 441 A.2d 49 (1981). Those circumstances arise from the reality that "[t]he political and legal institutions of Connecticut

have, from the first, differed in essential particulars from those of England.” *Graham v. Walker*, supra, 78 Conn. 133.

In the absence of legislative action, courts have the common law power to declare what the common law is. *Bartholomew v. Schweizer*, 217 Conn. 671, 679, 587 A.2d 1014 (1991); *Nelson v. Steffens*, 170 Conn. 356, 366-367, 365 A.2d 1174 (1976) (*Bogdanski, J., dissenting*), majority opinion overruled, *Ely v. Murphy*, 207 Conn. 88, 540 A.2d 54 (1988). In undertaking this endeavor, a court must be mindful that its delicate task is to make a principled declaration of the common law as it now is, not as it might have been had it been declared at the birth of this State more than two centuries ago. This is so because the very definition of common law is “ ‘the prevailing sense of the more enlightened members of a particular community, expressed through the instrumentality of the courts, as to those rules of conduct which should be definitely affirmed and given effect under the sanction of organized society, in view of the particular *circumstances of the time*, but with due regard to the necessity that the law should be reasonably certain and hence that its principles have permanency and its development be by an orderly process. Such a definition necessarily implies that the common law must change as circumstances change.’ ” (Emphasis added.) *Dacey v. Connecticut Bar Assn.*, supra, 184 Conn. 25-26, quoting *State v. Muolo*, 118 Conn. 373, 378, 172 A. 875 (1934). “The common law ... ‘must be rational and compatible with present society if it is to be respected and upheld.’ (Citations omitted.) *Roth v. Bell*, 24 Wash.App. 92, 100, 600 P.2d 602 (1979). (Emphasis added.)” *Gentry v. Norwalk*, 196 Conn. 596, 605, 494 A.2d 1206 (1985); cf. *Griffin v. Fancher*, 127 Conn. 686, 688, 20 A.2d 95 (1941) (“Our common law is constantly in process of gradual but steady evolution.”); *Swentusky v. Prudential Ins. Co.*, 116 Conn. 526, 531, 165 A. 686 (1933) (The common law “can never be static, but it must be everlastingly developing to meet the changing needs of a changing civilization.”).

*12 Two approaches have been proposed to determine whether the so-called “priest-penitent” privilege should be accorded common law recognition. One approach, espoused by Jeremy Bentham and more recently by Professor Wigmore, is the “utilitarian” approach. The other approach simply declares “the inherent offensiveness of the secular power attempting to coerce an act violative of religious conscience” and forcing its way into the confessional. 1 McCormick on Evidence

(4th Ed.) § 76.2. Both approaches converge at the same point: confidential communications between clergy and penitent should not be intruded upon by the courts. “Even by Bentham, the greatest opponent of privileges, this privilege has ... been conceded to warrant recognition.” 8 Wigmore on Evidence (McNaughton rev. 1961) § 2396.

Wigmore opined that there were “four fundamental conditions ... necessary to the establishment of a privilege against disclosure of communications....” 8 Wigmore, op. cit., § 2285. While these conditions have been criticized because they are “sometimes highly conjectural and defy scientific validation”; Louisell, “Confidentiality, Conformity and Confusion: Privileges in Federal Courts today,” 31 Tul.L.Rev. 101, 111 (1956); they are objective criteria which have been cited with approval by several jurisdictions; 8 Wigmore, op. cit., § 2285 n. 2. The court will examine and apply those criteria to Pcolka’s claim.

“(1) Does the communication originate in a confidence of secrecy?” 8 Wigmore, op. cit. §§ 2285, 2396, p. 878. It is essential to understand that in the Roman Catholic Church, “[c]onfession of all grave sins which have not yet been directly forgiven in the sacrament is required by the very nature of the sacrament, and is therefore divine law. This obligation to confess extends to grave sins, as far as the penitent is conscious, after serious examination of conscience, of being guilty (even subjectively) of them, but it extends only to them. And then the obligation extends to all such sins, even secret and interior ones, according to their actual species ..., and their number....” Rahner, *Encyclopedia of Theology*, p. 1190 (1975). For centuries, Church law has imposed the strict obligation of making a valid confession each year if one is conscious of serious sin. *Ibid.*; 7 *Encyclopedia Americana* (1994), p. 534. Protestantism has practiced common confession of the entire congregation, individual confession in the presence of the whole congregation, and a private confession to the minister. Angeles, *Dictionary of Christian theology* (Harper & Row 1985), pp. 56-57. “The orthodox tradition developed the practice of the auricular (“to the ear”) confession to a priest as a surrogate of God.” 12 *Encyclopedia of Religion*, p. 341. When given in confidence, and always in the Roman Catholic Church, the confession is protected by the seal of confession. Rahner, *Encyclopedia of Theology*, op. cit. In the Catholic Church, “[c]onfessions usually are heard in a small enclosed compartment, called a *confessional*, in churches or oratories. In appearance the

confessional resembles a sentry box. The priest sits inside; the penitent kneels outside and communicates with the priest through a finely perforated grating or a lattice of closely spaced crossing bars. Some confessionals have three compartments: the center one serving the priest and the flanking ones accommodating the penitents. The priest establishes communication with the penitent by moving a slide that covers the small grating that is the wall between him and the penitent.” 7 Encyclopedia Americana (1994), p. 534. Thus, in the Roman Catholic Church, dogmatically and physically, the confessional communication originates in a confidence of secrecy.

*13 “(2) Is confidentiality of communication essential to the relation?” 8 Wigmore, op. cit., §§ 2285, 2396, p. 878. “In other words, would penitential confessions, under such a system as the above, continue to be made if they were liable to be demanded for disclosure in a court of justice when needed?” 8 Wigmore, op. cit., § 2396, p. 878. It is true that empirical data is lacking on this issue, but that is so because “in very few instances was a clergyman required to testify as to confidences communicated to him by a penitent”; Note, “Testimonial Privilege and Competency in Indiana,” 27 Ind.L.J. 256, 267 (1952); and because the penitent enjoys an additional, distinct privilege against self-incrimination. However, the court may take judicial notice “of the motives which influence and control human action....” *Howe v. Raymond*, 74 Conn. 68, 72, 49 A. 854 (1901). As Wigmore acknowledges, “[i]n so far as such confessions concern crimes and wrongs, they might certainly, in some indefinite but substantial measure, be discontinued, and the penitential relation be to that extent annulled.” 8 Wigmore, op. cit., § 2396, p. 878. Common sense compels the conclusion that confidentiality of communication is essential to the continuance of the institution of confession.

“(3) Does the penitential relation deserve recognition and countenance? In a state where toleration of religions exists by law,” writes Wigmore, “and where a substantial part of the community professes a religion practicing a confessional system, this question must be answered in the affirmative. Historically, the failure to recognize the privilege during three centuries in England has probably been due to a reluctance to concede this affirmative answer. The disabilities of adherents of the Papal Church in England and Ireland—the only church actually enforcing a confessional system—also involved a disfavor to that system.” 8 Wigmore, op. cit., § 2396, p. 878. This is

“demonstrated by Oliver Cromwell's directive regarding religious liberty to the Catholics in Ireland: ‘ “As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to celebrate the Mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted.” ’ Quoted in S. Hook, *Paradoxes of Freedom* 23 (1962). See P. Kurland, *Religion and the Law* 22 (1962).” *McDaniel v. Paty*, 435 U.S. 618, 642, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978).

In Connecticut, the “superstructure” of our common law must be informed by statutory enactments since our political departure from England. “The rules pertaining to the admissibility of evidence in Connecticut are subject to the exercise of both judicial and legislative authority. *State v. James*, 211 Conn. 555, 560, 560 A.2d 426 (1989); C. Tait & J. LaPlante, *Connecticut Evidence* (2d Ed. 1993 Sup.) 1.1.2. ‘Plainly, every statute has some boundaries, and the question then arises whether, and when, it is appropriate to apply the statute, as a matter of common law, beyond its designated boundaries.’ E. Peters, ‘Common Law Judging in a Statutory World: An Address,’ 43 U.Pitt.L.Rev. 995, 1005 (1982). In other contexts, ‘we have previously used statutes as a useful source of policy for common law adjudication, particularly if there was a close relationship between the statutory and common law subject matters.’ *Fahy v. Fahy*, 227 Conn. 505, 514, 630 A.2d 1328 (1993); accord *New England Savings Bank v. Lopez*, 227 Conn. 270, 281, 630 A.2d 1010 (1993); *Canton Motorcar Works, Inc. v. DiMartino*, 6 Conn.App. 447, 453, 505 A.2d 1255, cert. denied, 200 Conn. 802, 509 A.2d 516 (1986).” *State v. Kulmac*, 230 Conn. 43, 52-53, 644 A.2d 887 (1994). As discussed supra, the General Assembly already has recognized and countenanced the penitential relation, albeit only by protecting communications therein from forced disclosure from the clergy. Additionally, here, unlike England, we enjoy written constitutions. Article First § 3 of the Constitution of the State of Connecticut has, since 1818, provided: “The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in the state; provided, that the right hereby declared and established, shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the state.” The First Amendment to the Constitution of the United States enjoins as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....” That Amendment

was held applicable to the states over fifty years ago. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). While these constitutional provisions are not directly dispositive of the issue before the court, which is not claimed to be of constitutional dimension, neither can judges in divining the common law be blind to constitutional mandates which politically and otherwise continue to define us as a people. "The Free Exercise Clause commits government itself to religious tolerance"; *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, ---, 113 S.Ct. 2217, 2234, 124 L.Ed.2d 449 (1993); but it mandates even more. "[I]t affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). Conversely our "national attitude toward religious tolerance ... has operated affirmatively to help guarantee the free exercise of all forms of religious belief." *Walz v. Tax Commission*, 397 U.S. 664, 678 (1970). "This does not mean that the right to participate in religious exercises is absolute, or that the State may never prohibit or regulate religious practices. [The United States Supreme Court has] recognized that even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.... the conduct or actions so regulated [, however,] have invariably posed some substantial threat to public safety, peace or order." (Internal quotations marks omitted.) *McDaniel v. Paty*, supra, 435 U.S. 642. It does mean that in Connecticut, which for decades has enjoyed a large population of adherents to the Roman Catholic faith, "the penitential relation deserve[s] recognition and countenance", Wigmore's third condition for the establishment of a privilege against disclosure of communications.²⁴

*14 "(4) Would the injury to the penitential relation by compulsory disclosure be greater than the benefit to justice?" Apparently, concedes Wigmore, "it would. The injury is plain; it has been forcibly set forth by Bentham." 8 Wigmore, op. cit., § 2396, p. 878. In his 1827 Treatise, the latter wrote that "with any idea of toleration, a coercion of this nature is altogether inconsistent and incompatible. in the character of penitents, the people would be pressed with the whole weight of the penal branch of the law; inhibited from the exercise of this essential and indispensable article of their religion ... [to the priests, it] would be an order to violate what by them is numbered amongst the most sacred of religious duties.... The advantage gained by the coercion-gained in the shape

of assistance to justice-would be casual, and even rare; the mischief produced by it, constant and all extensive. Without reckoning the instances in which it happened to the apprehension to be realized, the alarm itself, intense and all-comprehensive as it would be, would be a most extensive as well as afflictive grievance.... [T]his institution is an essential feature of the catholic religion, and ... the catholic religion is not to be suppressed by force...." Bentham, 4 *Rationale of Judicial Evidence* (1st ed. 1827), pp. 588-90, quoted in 8 Wigmore, op. cit., § 2396; see also Note, "Testimonial Privilege and Competency in Indiana," 27 Ind.L.Rev. 256, 267 (1952). "On the whole, then," concludes Wigmore, "this privilege has adequate grounds for recognition." 8 Wigmore, op. cit.

As mentioned supra, not all authorities concur that recognition of the privilege is based on utilitarian grounds. "A firmer ground," says McCormick, "appears available in the inherent offensiveness of the secular power attempting to coerce an act violative of religious conscience." 1 McCormick on Evidence (4th Ed.) § 76.2; accord, 2 Mueller & Kirkpatrick, Federal Evidence (2d Ed.) § 211. Whatever the basis, since the early nineteenth century, courts have manifested a reluctance to compel the disclosure of confidential communications to the clergy. *In re Swenson*, 183 Minn. 602, 237 N.W. 589, 590 (1931); *People v. Phillips*, N.Y.Ct.Gen.Sess. (1813), unofficially reported in 1 W.L.J. 109 (1843) and Note, "Privileged Communications to Clergymen," 1 Cath.Law. 199 (1955). More than a century ago, the United States Supreme Court acknowledged the existence of the privilege in dictum. *Totten v. United States*, 92 U.S. 105, 107, 23 L.Ed. 605 (1876) ("suits cannot be maintained which would require of the confidences of the confessional...."). "The privilege protecting confidential communications between members of the clergy and communicants who are seeking spiritual advice or comfort is recognized as a matter of federal common law under Fed.R.Ev. 501"²⁵; 2 Mueller & Kirkpatrick, op. cit. § 211; and was so recognized in case law even prior to the enactment of the Federal Rules of Evidence. See *Mullen v. United States*, 263 F.2d 275 (D.C.Cir.1958). Moreover, every state has now enacted a statute in which the privilege has been sanctioned. See statutes collected in 8 Wigmore, op. cit., § 2395 n. 1; see also 13A Uniform Laws Annotated, Uniform Rules of Evidence § 505(b) ("A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.").

*15 It is true that our statute, General Statutes § 52-146b, does not protect a person from having to disclose communications made by him to a clergyman or to him by a clergyman. And it is also true that unless a statute is constitutionally flawed, a court may not articulate and apply a common law rule which is in conflict with a statute. *Burns v. Gold*, 172 Conn. 210, 222, 374 A.2d 203 (1977). This court is satisfied that the common law rule declared here comports with and is not in conflict with the statute. To paraphrase what our supreme court has said of the attorney-client privilege, the “priest-penitent” privilege being for the protection of the individual’s religious freedom to consult in confidence with his spiritual adviser, the privilege “would obviously be defeated if the disclosure of the confidences, though not compellable from the [clergy], was still obtainable from the [penitent].” *Rienzo v. Santangelo*, 160 Conn. 391, 395, 279 A.2d 565 (1971).

For the foregoing reasons, this court holds, as a matter of common law, that confidential communications made by or to a member of the clergy in his or her religious capacity are privileged from disclosure whether that disclosure is sought from the member of the clergy from whom solace, counsel or spiritual guidance is sought or from the person seeking the religious solace, counsel or guidance. While there is, as yet, no evidence that the defendant committed the acts alleged against him, still, it is not inappropriate to recall Justice Felix Frankfurter’s observation that “[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.” *United States v. Rabinowitz*, 339 U.S. 56, 69, 70 S.Ct. 430, 94 L.Ed. 653 (1950) (*Frankfurter, J., dissenting*), quoted in *State v. Paradise*, 189 Conn. 346, 353, 456 A.2d 305 (1983); see *Scott v. Hammock*, supra, 133 F.R.D. 619 (disclosure of confidential communications by person sued for engaging in various forms of abuse of adopted daughter, held, barred). Pcolka need not disclose the information that he confided to his confessor in the seminary.

VI

Pcolka has moved for a protective order so that he need not disclose his present address. Conceding that “[o]rdinarily, this would not be the proper subject of

either a protective order or a claim of privilege,” Pcolka nonetheless claims that “in the context of this case, some latitude must be granted to the defendant Pcolka in the interests of justice.” Pcolka advances three reasons in support of his motion.

First, Pcolka claims that at the time of his deposition, there was outstanding a plaintiffs’ interrogatory requesting this information to which he had objected and which the plaintiffs had not pursued. The short answer is that the rules for discovery by interrogatory and the rules for discovery by deposition are different. In a deposition, “[e]vidence objected to shall be taken subject to the objections”; Practice Book § 247(b); unless the court limits the scope of the deposition on motion “and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party....” Practice Book § 247(c); see also Practice Book § 221.

*16 Second, Pcolka states that “[i]n light of the exceptional pretrial publicity in this case, there is no reason to expose the persons who are residing at the same location as the defendant Pcolka to harassment and annoyance. This [c]ourt, in the decision dated December 8, 1994, expressed concern about pretrial publicity and the ability of the defendant to obtain a fair trial. Notwithstanding th[at] admonition ..., when ... Pcolka appeared for his deposition ... he was met by newspaper reporters and cameramen.” Pcolka is correct that “there is no reason to expose the persons who are residing at the same location [him] ... to harassment and annoyance.” The plaintiffs’ attorney’s notifying the press of the date and time of Pcolka’s deposition, however, was not violative of the express terms of the court’s December 1994 protective order. At that time, the court ordered, pursuant to *Seattle Times Co. v. Rhinehart*, supra, 467 U.S. 32, that there be no dissemination of information obtained through Pcolka’s deposition, except to persons stated in that order. The court cannot assume that the plaintiffs will violate that order. Cf. *Sierra Club v. Mason*, 365 F.Supp. 47, 50 (D.Conn.1973) (*Newman, J.*); *Moore v. Serafin*, 163 Conn. 1, 11, 301 A.2d 238 (1972). Should such a violation occur, the court has ample authority to deal with it appropriately. See, e.g., Practice Book § 351.²⁶

The third reason advanced by Pcolka for not divulging his address is that “he has fully responded to all communications sent to him through his attorney, and his

attorney has accepted service of process, including service of process for two new cases on February 1, 1995 with the permission of ... Pcolka. At this juncture, there is no need for this information to be released to the plaintiffs, and thereby become public information, since we know that plaintiffs' counsel will publicize everything about this case." In view of what the court already has stated, that Pcolka's attorney has accepted service of process for him is not grounds for Pcolka's not divulging his address. This portion of Pcolka's motion for a protective order is denied. 4 Moore's Federal Practice ¶ 26.57[1]; 23 Am.Jur.2d, Depositions and Discovery, §§ 34, 35. However, in the interests of justice, the court will amend the terms of its December 1994 protective order to provide that information as to Pcolka's address shall not be disseminated *until further order of the court*.

VII

Pcolka also seeks a protective order precluding the plaintiffs from inquiring where he went following his release from the Institute of Living. "This release," argues Pcolka, "was in March 1993, some two months after the suits were instituted by some of the plaintiffs. Since the plaintiffs allege activities which they claim occurred between 1967 and 1982, it is difficult to understand how this information is discoverable under any circumstances."

While this argument has facial appeal, it is not consonant with the applicable standard for pretrial discovery, especially discovery by deposition, discussed supra: Discovery is permissible if it may supply a plaintiff with leads to discoverable evidence, an accepted use of discovery. 4 Moore's Federal Practice ¶ 26.56[1], p. 26-104. Pcolka's motion for a protective order with respect to where he went following his release from the Institute of Living is denied.

VIII

*17 Pcolka seeks a protective order with respect to certain other questions asked during the deposition. As to questions of whether Pcolka took minors to his cabin in New Hampshire and whether he allowed children in his rectory bedrooms, Pcolka's assertion of his privilege

against self-incrimination is sustained in accordance with the discussion of that privilege, supra.

Pcolka seeks a protective order based on his privilege against self-incrimination with respect to the question as to whether he ever spoke with the Bishop regarding the topic of sexual abuse of children. Pcolka's assertion of his privilege to this question has been sustained in part I of this opinion. "To sustain the privilege, it need only be evident from the implications of the question, and the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman v. United States*, supra, 341 U.S. 486-487. "Injurious disclosure" is not confined to answers that would support a conviction but includes any statements "which would furnish a link in the chain of evidence needed to prosecute." *Id.*, 486.

Finally, Pcolka seeks a protective order with respect to why he took off a year when attending St. John's Seminary. He argues that "[t]his event occurred prior to the time he became a priest and predated the first of the plaintiff's claims by many years. Since it is not related to any issue in the case, nor likely to lead to discoverable evidence, the defendant's motion for protective order should be granted in this regard." The court agrees. Discovery "is not without limits." 4 Moore's Federal Practice ¶ 26.5[1], p. 26-96. At some point in the remote past, materiality ceases. This question is beyond that point.

IX

The plaintiffs' motion to compel seeks an order requiring Pcolka to answer questions asked of him regarding what was said in a meeting in which he, his lawyer, a representative of the Diocese, and the Diocese's lawyer were present. Pcolka claims that communications made in that meeting are protected by the attorney-client privilege. The court disagrees.

"It is obvious that professional assistance would be of little or no avail to the client, unless his legal adviser were put in possession of all the facts relating to the subject matter of inquiry or litigation, which, in the indulgence of the fullest confidence, the client could communicate. And it is equally obvious that there would be an end

to all confidence between the client and attorney, if the latter was at liberty or compellable to disclose the facts of which he had thus obtained possession; and hence it has become a settled rule of evidence, that the confidential attorney, solicitor or counselor can never be called as a witness to disclose papers committed or communications made to him in that capacity, unless the client himself consents to such disclosure." *Goddard v. Gardner*, 28 Conn. 172, 174 (1859). " 'Communications between client and attorney are privileged when made in confidence for the purpose of seeking legal advice. *Doyle v. Reeves*, 112 Conn. 521, 523, 152 A. 882 (1931); Tait & LaPlante, Handbook of Connecticut Evidence (1976) § 12.5. By contrast, statements made in the presence of a third party are usually not privileged because there is then no reasonable expectation of confidentiality. *State v. Colton*, 174 Conn. 135, 138-39, 384 A.2d 343 (1977); McCormick, Evidence (2d Ed.1972) 91, p. 188.' *State v. Cascone*, 195 Conn. 183, 186, 487 A.2d 186 (1985). The presence of certain third parties, however, who are agents or employees of an attorney or client, and who are necessary to the consultation, will not destroy the confidential nature of the communications. *State v. Cascone*, supra, 186-87 n. 3." *State v. Gordon*, consultation, will not destroy the confidential nature of the communications. *State v. Cascone*, supra, 186-87 n. 3." *State v. Gordon*, 197

Conn. 413, 423-424, 504 A.2d 1020 (1985); see *State v. Eagan*, 37 Conn.App. 213, 216, 655 A.2d 802 (1995).

*18 "The burden of proving the facts essential to the privilege is on the person asserting it. [citations omitted.] This burden, includes, of course, the burden of proving the essential element that the communication was confidential." *State v. Hanna*, 150 Conn. 457, 466, 191 A.2d 124 (1963). Here, Pcolka has not carried that burden. The attorney-client privilege is strictly construed. *Turner's Appeal*, 72 Conn. 305, 318, 44 A. 310 (1899). With respect to the persons present other than Pcolka and his attorney, "even if we might predicate a desire for confidence by the client, the policy of the privilege would still not protect him, because it goes no further than is necessary to secure the client's subjective freedom of consultation." 8 *Wigmore on Evidence* (McNaughton rev. 1961) § 2311, pp. 602-603.²⁷ The plaintiffs' motion to compel with respect to communications made in the meeting with the Diocese and its attorney is granted.

Order accordingly

All Citations

Not Reported in A.2d, 1995 WL 348181

Footnotes

- 1 Practice Book "Sec. 221. Protective Order (Discovery and Depositions) Upon motion by a party from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court."
- 2 Practice Book "Sec. 231. Order for Compliance; Failure to Answer or Comply with Order (Discovery and Depositions) If any party has failed to answer interrogatories or to answer them fairly, or has intentionally answered them falsely or in a manner calculated to mislead, or has failed to respond to requests for production or for disclosure of the existence and contents of an insurance policy or the limits thereof, or has failed to submit to a physical or mental examination, or has failed to comply with a discovery order made pursuant to Sec. 230A, or has failed to comply with the provisions of Sec. 232, or has failed to appear and testify at a deposition duly noticed pursuant to this chapter, or has failed otherwise substantially to comply with any other discovery order made pursuant to Secs. 222, 226, and 229, the court may, on motion, make such order as the ends of justice require.

"Such orders may include the following:

"(a) The entry of a nonsuit or default against the party failing to comply;

"(b) The award to the discovering party of the costs of the motion, including a reasonable attorney's fee;

"(c) The entry of an order that the matters regarding which the discovery was sought or other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

"(d) The entry of an order prohibiting the party who has failed to comply from introducing designated matters in evidence;

"(e) If the party failing to comply is the plaintiff, the entry of a judgment of dismissal.

"The failure to comply as described in this section may not be excused on the ground that the discovery is objectionable unless written objection as authorized by Secs. 222, 226, and 229 has been filed."

3 Practice Book § 247(c) provides: "At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending may order the officer conducting the examination forthwith to cease taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Sec. 221. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending."

4 At the deposition, Pcolka asserted his privilege against self-incrimination to the following questions:

"Have you had homosexual relations with anybody in 1970?"

"Isn't it a fact that Mr. [name deleted] participated with you in the touching and [sic] of children when you were a parish priest?"

"Up until the time that you graduated from Fairfield Prep., did you have any homosexual relationships with anyone?"

"I'm asking you now whether you had any homosexual relationships up until the time you graduated from Fairfield Prep."

"Did you have any relationships with any, when you were at Fairfield Prep, with any females, sexual relations with any females."

"When you entered the seminary, were you sexually active prior to entering the seminary?"

"So it's your contention that it's a criminal violation to be sexually active in the 1950's; is that it?"

"You are doing that [invoking the Fifth Amendment privilege against self-incrimination] knowingly and you're doing that because you have fear of prosecution for any sexual activities that you may have committed or been involved with in the 1950's; is that correct, sir?"

"Now did you engage in any homosexual activities in the seminary?"

"Did you have any voluntary sexual relations with any priest or any other student while you were at St. Thomas Seminary?"

"Would you tell me whether you observed priests having sexual activity with students at St. Thomas while you were there?"

"Were you yourself ever sexually abused by anyone as a minor?"

"So you are refusing to answer on the Fifth Amendment grounds whether anybody abused you as a minor?"

"Did you ever invite children up to that place in New Hampshire?"

"Was there any discussion among the students regarding homosexuality which might have been occurring at the seminary?"

"Did you ever have any conversations with Bishop Eagan regarding the sexual abuse of children?"

"Did you ever treated [sic] in the Institute of the [sic] Living because of the sexual proclivities and problems that you had?"

"Did you have any discussions with the director of vocations regarding the problems you were having at St. John's Seminary?"

"Were you engaged in homosexual activity, voluntary and consenting homosexual activity with students and faculty members while you were at St. John's Seminary?"

"Were any complaints made against you while you were at St. John's Seminary because of homosexual activity between you and other students and/or faculty members?"

"Did you see a psychiatrist because you were having sexual problems while you were at St. John's Seminary?"

"Did you tell anybody in the Bridgeport diocese about your homosexual activity?"

"Now did you have any consensual homosexual relations with faculty or students at St. John's Seminary in Brighton?"

"Did you have any homosexual relations with any minors while you were attending St. John's Seminary whether the acts occurred at the seminary or at any other place?"

"Did you have any heterosexual relations with any minors while you were attending St. John's Seminary whether those acts occurred at the seminary or outside of the seminary?"

"Did you at any time while you were at the seminary break your vow of celibacy?"

"Are you suggesting that a violation of the vow of celibacy is a criminal act in the State of Connecticut?"

"So let me ask you, have you ever broken the vows of celibacy?"

"Are you capable of answering that question on the grounds of the Fifth Amendment?"

"You consider yourself heterosexual?"

"But you refuse to answer whether you consider yourself heterosexual; is that correct?"

"Do you consider yourself homosexual?"

"Do you consider yourself a pedophile?"

"Did you ever have sexual relations with George Rosado?"

"Did you ever sodomize George Rosado?"

"Did you ever have oral sex with George Rosado?"

"Did you ever sodomize William Slossar?"

"Did you ever have oral sex with William Slossar?"

"Did you ever tie him down to a bed and beat him?"

"Was William Slossar ever up to New Hampshire?"

"Was George Rosado ever up to New Hampshire?"

"Did you ever have sexual relations with Diane Sherman?"

"Did you have any discussions with anybody in the Bridgeport diocese in 1976 regarding the sexual activity that you had with Diane Sherman?"

"Did you ever seek such help [for sexual problems] yourself?"

"During that year that you were out, did you have any homosexual relations with anyone?"

"Did you have any heterosexual relations with anybody?"

"Have you ever had any unusual attraction to young children both male and female?"

"And did you in fact have children up in your bedroom when you were at the St. Benedict's did you not?"

"Did you have any women in your room at St. Benedict's?"

"Did you ever have sexual relations with a female student in the convent?"

"Do you recall seeing children on the-in the living apartments that were on the second floor of the rectory at St. John's?"

"You refuse to answer whether you ever saw children there? Is that what you're saying?"

"Did you ever have any children in the-in your quarters in the bedroom of St. John's in your apartment?"

"Did you ever tie any students naked to the bed while you were an assistant pastor on the second floor rectory at St. John's in Bridgeport?"

"In the course of training these boys, would you ever fondle them?"

"As you trained these boys, and as they said mass and left the altar, would you ever hug them, kiss them or touch them on the buttocks?"

"Now, did you ever bring any of the altar boys that were at St. John's up to your place in New Hampshire?"

"Did you ever discuss with a spiritual advisor the fact that you had a problem keeping your hands and the rest of your body away from children?"

"And do you recall during the course of those retreats whether you told anyone that you had sexual relations with young men or young women?"

"Did you discuss with any representative of the diocese the fact that during those retreats that you had sexual relations with young men and women under the age of majority?"

Pcolka also asserted a privilege against self-incrimination regard what he was told by Monsignor Cusack with whom he met in the early 1980's regarding claims of sexual abuse brought against Pcolka.

5 General Statutes "Sec. 52-199. Questions which need not be answered. Self-incrimination. (a) In any hearing or trial, a party interrogated shall not be obliged to answer a question or produce a document the answering or producing of which would tend to incriminate him, or to disclose his title to any property if the title is not material to the hearing or trial.

"(b) The right to refuse to answer a question, produce a document or disclose a title may be claimed by the party interrogated or by counsel in his behalf."

6 General Statutes § 51-35(b) provides: "A person shall not be compelled to give evidence against himself, except as otherwise provided by statute, nor shall such evidence when given by him be used against him."

7 General Statutes "Sec. 54-193a. Limitation of prosecution for offenses involving sexual abuse of minor. Notwithstanding the provisions of section 54-193, no person may be prosecuted for any offense involving sexual abuse, sexual exploitation or sexual assault of a minor except within two years from the date the victim attains the age of majority or seven years after the commission of the offense, whichever is less, provided in no event shall such period of time be less than five years after the commission of the offense."

General Statutes § 54-193 provides: "(a) There shall be no limitation of time within which a person may be prosecuted for a capital felony, a class A felony or a violation of section 53a-54d.

"(b) No person may be prosecuted for any offense, except a capital felony, a class A felony or a violation of section 53a-54d, for which the punishment is or may be imprisonment in excess of one year, except within five years next after the offense has been committed. No person may be prosecuted for any other offense, except a capital felony, a class A felony or a violation of section 53a-54d, except within one year next after the offense has been committed.

"(c) If the person against whom an indictment, information or complaint for any of said offenses is brought has fled from and resided out of this state during the period so limited, it may be brought against him at any time within such period, during which he resides in this state, after the commission of the offense.

"(d) When any suit, indictment, information or complaint for any crime may be brought within any other time than is limited by this section, it shall be brought within such time."

8 The foregoing authorities were collected in the opinion of the court in *Choi v. State* supra, 560 A.2d 1113-1114.

9 At the time of the filing of the subject motions, the plaintiffs had not provided Pcolka with a transcript of the deposition. At the hearing of those motions, counsel provided Pcolka and the court with that transcript, at which time counsel identified the pages of the deposition and the line numbers where the questions in issue could be located. However, in his post-hearing brief, Pcolka has not identified the specific questions to which his various claims of privilege apply. The court could cull out only two questions which relate to the sexual misconduct of others. Those questions are:

"Isn't it a fact that Mr. [name deleted] participated with you in the touching and [sic] of children when you were a parish priest?"

"Do you recall seeing children on the-in the living apartments that were on the second floor of the rectory at St. John's?"

10 Practice Book "243. Depositions Generally. In addition to other provisions for discovery and *subject to the provisions of Sec. 217*, any party who has appeared in a civil action, in any probate appeal, or in any administrative appeal where the court finds it reasonably probable that evidence outside the record will be required, may, at any time after the commencement of the action or proceeding, in accordance with the procedures set forth in this chapter, take the testimony of any person, including a party, by deposition upon oral examination. The attendance of witnesses may be compelled by subpoena as provided in Sec. 245. The attendance of a party deponent or of an officer, director, or managing agent of a party may be compelled by notice to the named person or his attorney in accordance with the requirements of Sec. 244(a). The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes." (Emphasis added.)

- 11 Practice Book "218. In General (Discovery and Depositions). In any civil action, in any probate appeal, or in any administrative appeal where the court finds it reasonably probable that evidence outside the record will be required, a party may obtain in accordance with the provisions of this chapter discovery of information or disclosure, production and inspection of papers, books or documents material to the subject matter involved in the pending action, which are not privileged, whether the discovery or disclosure relates to the claim or defense of the party seeking discovery or to the claim or defense of an other party, and which are within the knowledge, possession or power of the party or person to whom the discovery is addressed. Discovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action and if it can be provided by the disclosing party or person with substantially greater facility than it could otherwise be obtained by the party seeking disclosure. It shall not be ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Written opinions of health care providers concerning evidence of medical negligence, as provided by Public Acts 1986, No. 86-338 12, shall not be subject to discovery except as provided in that section."
- 12 Many of our discovery rules are patterned after federal rules. *State v. Cain*, 225 Conn. 666, 688, 626 A.2d 296 (1993) (*Berdon, J., dissenting*); *John F. Epina Realty, Inc. v. Space Realty, Inc.*, 194 Conn. 71, 82, 480 A.2d 499 (1984); *State v. Shaw*, 185 Conn. 372, 386, 441 A.2d 561 (1981); *Chrysler Credit Corp. v. Fairfield Chrysler-Plymouth*, 180 Conn. 223, 227, 429 A.2d 478 (1980); *Ceco Corporation v. Aetna Insurance Co.*, Superior Court, Judicial District of Hartford-New Britain, No. 342934 (1994 Ct.Sup. 10010, 10011 (1994); *Thomson v. Thomson*, Superior Court, Judicial District of Fairfield, No. FA 93 0311220S (1994 Ct.Sup. 10917, 10918) (1994) ("Our deposition rules are patterned after the federal rules of civil procedure."); *Mailloux v. McDonald*, Superior Court, Judicial District of Litchfield, No. 48291 (1992 Ct.Sup. 3746, 3749) (1992). This is true of Practice Book § 218 which is patterned after the first paragraph of Rule 26(b)(1) of the Federal Rules of Civil Procedure. However, Practice Book § 218 uses the phrase "material to the subject matter" whereas Fed.R.Civ.Proc. 26(b)(1) uses the phrase "relevant to the subject matter". "There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues.... The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove." McCormick on Evidence (3rd Ed.) § 185. By crafting Practice Book § 218 with the word "material" rather than "relevant", the judges of the superior court enacted a rule which arguably is broader than Rule 26, unfettered by connotations of "probative value". However, the two rules are sufficiently similar that federal case law and scholarly treatises on Rule 26 are entitled to "special precedential value". *Plouffe v. New York, N.H. & H.R. Co.*, 160 Conn. 482, 487, 280 A.2d 359 (1971).
- 13 The defendants have denied that Pcolka was "employed" by the Diocese. The court has held in this case that, at this stage of the litigation and "if only for purposes of discovery, it is appropriate to treat the Diocese as the employer." Memorandum of Decision Re Motions for Protective Orders, December 8, 1994.
- 14 As gleaned from the transcript by the court from page references provided by the parties, those questions are as follows:
- "What were the physical problems that you had [at St. John's]?"
- "Now I'm going to ask you what psychiatrist did you see?"
- "Did you ever see a Dr. Sires as a psychiatrist?"
- "Have you seen reports of Dr. Sires regarding your psychological state?"
- "Did you see Dr. Meshkin as you were a seminarian for psychiatric problems?"
- "Were you ever treated in the Institute of the Living because of the sexual proclivities and problems that you had?"
- "Did you see a psychiatrist because you were having sexual problems while you were at St. John's Seminary?"
- "You saw Dr. Sires?"
- "Why did you see Dr. Sires? What were your complaints?"
- "Why did you see Dr. Sires. I don't care what his records say. Why did you see him?"
- "What did Dr. Sires tell you was wrong with you?"
- "Why did you see Dr. Meshken?"
- "What did Dr. Meshkin do for you?"
- "For how long a period were you in the Institute of the Living during 1993?"
- "When did you leave the Institute of the Living in 1993?"

"When you left the Institute of the Living, why did you leave it?"

"Why did you leave the Institute of the Living?"

"Did you leave voluntarily or involuntarily?"

"Why did you enter the Institute of the Living?"

"Now, were you ever, just answer yes or no, ever shown any psychiatric records regarding your care and treatment? By anyone?"

"What was the reason you were up there [at the Institute of Living] at that time?"

"Why did you see a psychiatrist before December of 1960?"

"Did you speak to anybody at the seminary before you started to get psychiatric help?"

"In other words you are refusing to answer whether you spoke with anyone at the seminary before you received psychiatric help?"

"Why did the diocese recommend that you see a psychiatrist?"

"Let me ask you this: Dr. Sires reports that you have problems of late adolescence when he saw you in 1960. What were those problems of late adolescence that you had?"

"Did you have any problems of late adolescence in 1960?"

"Did you exhibit a neurotic reaction in 1960?"

"Were the problems that you had sex related in 1960?"

"Now Dr. Sires concludes on his report directly to the seminary with a copy to the Bridgeport chancellery office dated March 21st of 1962 final recommendation, "if there is any question of this man's stability or ability, I would recommend psychological testing before final vows." Did you ever have any psychological testing before you received your final vows?"

"So you are going to refuse to answer whether you yourself ever took any psychological testing from the time that you saw Dr. Sires up until the time of your final vows; is that correct?"

"And it was suggested that you leave the seminary; is that correct?"

"Are you telling us then it was a doctor that suggested that you leave the seminary?"

"Why did you tell him [Father Curtis] you wanted to take a year off?"

"Did you discuss with him [Monsignor McLaughlin] any problems that you had with your sexual drive or adequacy?"

"Anything that you said to Monsignor McLaughlin you are making the doctor/patient relationship claim about it?"

"Now during that summer-during that year that you were out, were you receiving psychiatric care?"

"While you were at St. Benedict's, did you ever seek psychological or psychiatric attention?"

"While you were at St. John's in Bridgeport, did you ever seek psychological or psychiatric care and attention?"

- 15 General Statutes "Sec. 52-146o. Disclosure of patient communication or information by physician, surgeon or health care provider prohibited. (a) Except as provided in sections 52-146c to 52-146j, inclusive, and subsection (b) of this section, in any civil action or any proceeding preliminary thereto or in any probate, legislative or administrative proceeding, a physician, surgeon or other licensed health care provider shall not disclose (1) any communication made to him by, or any information obtained by him from, a patient or the conservator or guardian of a patient with respect to any actual or supposed physical or mental disease or disorder or (2) any information obtained by personal examination of a patient, unless the patient or his authorized representative explicitly consents to such disclosure."
- 16 Notably, in *State v. Lizotte*, 200 Conn. 734, 742, 517 A.2d 610 (1986), the court held that an amendment to General Statutes § 52-146k, which confers a privilege between a battered woman's counselor and the victim, was not retroactive. This holding was overruled in *State v. Magnano*, 204 Conn. 259, 284, 528 A.2d 760 (1987), but only for the reason that the amendment had been "clarifying" legislation.
- 17 General Statutes "52-146c. Privileged communications between psychologist and patient. (a) As used in this section:
"(1) 'Person' means an individual who consults a psychologist for purposes of diagnosis or treatment;
"(2) 'Psychologist' means an individual licensed to practice psychology pursuant to chapter 383;

"(3) 'Communications' means all oral and written communications and records thereof relating to the diagnosis and treatment of a person between such person and a psychologist or between a member of such person's family and a psychologist;

"(4) 'Consent' means consent given in writing by the person or his authorized representative;

"(5) 'Authorized representative' means (A) an individual empowered by a person to assert the confidentiality of communications which are privileged under this section, or (B) if a person is deceased, his personal representative or next of kin, or (C) if a person is incompetent to assert or waive his privileges hereunder, (i) a guardian or conservator who has been or is appointed to act for the person, or (ii) for the purpose of maintaining confidentiality until a guardian or conservator is appointed, the person's nearest relative.

"(b) Except as provided in subsection (c) of this section, in civil and criminal actions, in juvenile, probate, commitment and arbitration proceedings, in proceedings preliminary to such actions or proceedings, and in legislative and administrative proceedings, all communications shall be privileged and a psychologist shall not disclose any such communications unless the person or his authorized representative consents to waive the privilege and allow such disclosure. The person or his authorized representative may withdraw any consent given under the provisions of this section at any time in a writing addressed to the individual with whom or the office in which the original consent was filed. The withdrawal of consent shall not affect communications disclosed prior to notice of the withdrawal.

"(c) Consent of the person shall not be required for the disclosure of such person's communications:

"(1) If a judge finds that any person after having been informed that the communications would not be privileged, has made the communications to a psychologist in the course of a psychological examination ordered by the court, provided the communications shall be admissible only on issues involving the person's psychological condition;

"(2) If, in a civil proceeding, a person introduces his psychological condition as an element of his claim or defense or, after a person's death, his condition is introduced by a party claiming or defending through or as a beneficiary of the person, and the judge finds that it is more important to the interests of justice that the communications be disclosed than that the relationship between the person and psychologist be protected;

"(3) If the psychologist believes in good faith that there is risk of imminent personal injury to the person or to other individuals or risk of imminent injury to the property of other individuals;

"(4) If child abuse, abuse of an elderly individual or abuse of an individual who is disabled or incompetent is known or in good faith suspected;

"(5) If a psychologist makes a claim for collection of fees for services rendered, the name and address of the person and the amount of the fees may be disclosed to individuals or agencies involved in such collection, provided notification that such disclosure will be made is sent, in writing, to the person not less than thirty days prior to such disclosure. In cases where a dispute arises over the fees or claims or where additional information is needed to substantiate the claim, the disclosure of further information shall be limited to the following: (A) That the person was in fact receiving psychological services, (B) the dates of such services, and (C) a general description of the types of services; or

"(6) If the communications are disclosed to a member of the immediate family or legal representative of the victim of a homicide committed by the person where such person has, on or after July 1, 1989, been found not guilty of such offense by reason of mental disease or defect pursuant to section 53a-13, provided such family member or legal representative requests the disclosure of such communications not later than six years after such finding, and provided further, such communications shall only be available during the pendency of, and for use in, a civil action relating to such person found not guilty pursuant to section 53a-13."

18 As gleaned from the transcript by the court from page references provided by the parties, those questions are as follows:

"What were the physical problems that you had [at St. John's]?"

"Did you ever see a Dr. Sires as a psychiatrist?"

"Have you seen reports of Dr. Sires regarding your psychological state?"

"Did you see Dr. Meshkin as you were a seminarian for psychiatric problems?"

"Were you ever treated in the Institute of the Living because of the sexual proclivities and problems that you had?"

"Did you see a psychiatrist because you were having sexual problems while you were at St. John's Seminary?"

"You saw Dr. Sires?"

"Why did you see Dr. Sires? What were your complaints?"

"Why did you see Dr. Sires. I don't care what his records say. Why did you see him?"

"What did Dr. Sires tell you was wrong with you?"

"Why did you see Dr. Meshken?"

"What did Dr. Meshkin do for you?"

"For how long a period were you in the Institute of the Living during 1993?"

"When did you leave the Institute of the Living in 1993?"

"When you left the Institute of the Living, why did you leave it?"

"Why did you leave the Institute of the Living?"

"Did you leave voluntarily or involuntarily?"

"Why did you enter the Institute of the Living?"

"Now, were you ever, just answer yes or no, ever shown any psychiatric records regarding your care and treatment? By anyone?"

"What was the reason you were up there [at the Institute of Living] at that time?"

"Why did you see a psychiatrist before December of 1960?"

"Did you speak to anybody at the seminary before you started to get psychiatric help?"

"In other words you are refusing to answer whether you spoke with anyone at the seminary before you received psychiatric help?"

"Why did the diocese recommend that you see a psychiatrist?"

"Let me ask you this: Dr. Sires reports that you have problems of late adolescence when he saw you in 1960. What were those problems of late adolescence that you had?"

"Did you have any problems of late adolescence in 1960?"

"Did you exhibit a neurotic reaction in 1960?"

"Were the problems that you had sex related in 1960?"

"Now Dr. Sires concludes on his report directly to the seminary with a copy to the Bridgeport chancellery office dated March 21st of 1962 final recommendation, "if there is any question of this man's stability or ability, I would recommend psychological testing before final vows." Did you ever have any psychological testing before you received your final vows?"

"So you are going to refuse to answer whether you yourself ever took any psychological testing from the time that you saw Dr. Sires up until the time of your final vows; is that correct?"

"And it was suggested that you leave the seminary; is that correct?"

"Are you telling us then it was a doctor that suggested that you leave the seminary?"

"Why did you tell him [Father Curtis] you wanted to take a year off?"

"Did you discuss with him [Monsignor McLaughlin] any problems that you had with your sexual drive or adequacy?"

"Anything that you said to Monsignor McLaughlin you are making the doctor/patient relationship claim about it?"

"Now during that summer-during that year that you were out, were you receiving psychiatric care?"

"While you were at St. Benedict's, did you ever seek psychological or psychiatric attention?"

"While you were at St. John's in Bridgeport, did you ever seek psychological or psychiatric care and attention?"

- 19 "If improper, bad faith, or oppressive questions are asked during a deposition, the procedure is for counsel to immediately contact a Superior Court Judge for a ruling[;] Practice Book 247(c)[;] not direct a witness to refuse to answer a question...." *Goenne v. Aetna Life & Casualty Co.*, Superior court, Judicial District of Hartford-New Britain at Hartford, No. 511006 (1994 Ct.Sup. 2108, 2111-2112) (1994) (*Corradino, J.*). In some judicial districts, however, where judicial resources are especially scarce, this procedure may be utopian. To expect to contact a Superior Court judge on the same day of the deposition, let alone immediately, may be unrealistic. Indeed, in many judicial districts, the procedure virtually is unheard of. To compound the problem, in a case such as this it may be necessary to contact the judge who has familiarity with the case.

- 20 General Statutes § 52-146b, entitled "Privileged communications made to clergyman," provides: "A clergyman, priest, minister, rabbi or practitioner of any religious denomination accredited by the religious body to which he belongs who is settled in the work of the ministry shall not disclose confidential communications made to him in his professional capacity in any civil or criminal case or proceedings preliminary thereto, or in any legislative or administrative proceeding, unless the person making the confidential communication waives such privilege herein provided."
- 21 In the House of Representatives, Representative Gerald Stevens remarked that "it may come as a surprise to some of the members of the General Assembly but there is no statutory privilege in the State of Connecticut which today attaches to the communications made between an individual and his priest, rabbi, or practitioner of the particular faith to which he belongs. I am sure we will all agree that there should be a legally recognized privilege between a minister of any faith and the person who communicates information to him in confidence. This is the purpose behind this bill and the amendment which you have on your desk establishes this privilege and requires that the person who has made the confidential communication must waive his right not to have that information revealed before it can be revealed before a court, administrative, or legislative body.... The amendment ... will establish in the State of Connecticut the right of a minister of a particular faith to remain silent concerning a confidential communication unless that right was waived by the person who has passed the information on [to] the minister of his faith...." 12 H.R.Proc., Pt. 7, 1967 Sess., pp. 7-8. Representative Torpey added: "Mr. Speaker, this bill protects the clergyman who refuses to reveal what has been told to him in confidence. But *more important it protects the right of the public to confide in the clergy*. Forty-four states now have such a law. Not one of the forty-four states repealed the law after enacting it. This is sound public policy and *I am certain most citizens believe they already have this legal protection in their confidential dealings with the clergy...*" (Emphasis added.) *Id.*, 8. In the Senate, Senator Jay Jackson remarked: "This is important new legislation creating a privilege between a person and any ordained or licensed clergyman of any religion established in this state or any other state who has settled in the work of his ministry so long as the communication between the two is confidential and is made to the clergyman in his professional capacity." 12 Senate Proc., Pt. 5, 1967 Sess., p. 30.
- 22 On appeal, the defendant in *State v. Jones*, supra, 205 Conn. 736, claimed that the "questions deprived him of his rights to due process, to a fair trial, to freedom of religion, and to equal protection of the laws." While he prevailed on none of these claims, the court, uncharacteristically, took the occasion to "remind the state ... that it must exercise caution when exploring lines of questioning that implicate religious belief," *Id.*, 740. Said the court: "The state should avoid any inquiry into or reference to religious belief or practices unless the nature of the case makes religious belief an unavoidable issue." *Ibid.*
- 23 Thomas Day was the Reporter of the Supreme Court of Errors of the State of Connecticut for over fifty years, from 1802 to 1853. See Obituary, 23 Conn., pp. 668, 669 (1855).
- 24 Other recent statutory enactments should not be overlooked. Communications between a psychologist and patient, between a psychiatrist and patient, between a battered women's or sexual assault counselor and victim are now privileged. See General Statutes §§ 52-146c, 52-146d, 52-146e, 52-146f, 52-146k. This is significant because many members of the clergy now receive training in marriage counseling, psychology and the handling of personality problems; *Scott v. Hammock*, 133 F.R.D. 610, 615 (D.Utah 1990); and are sought out for those purposes. The Scott court opined that the same considerations which underlie such statutory privileges "suggest a broad application of the privilege for communications to clergymen." *Ibid.*
- 25 Rule 501 of the Federal Rules of Evidence provides: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."
- 26 Practice Book § 351 provides in pertinent part: "If a party fails to comply with an order of court ... he may be nonsuited ... by the court."
- 27 *Upjohn v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), on which Pcolka relies, is plainly inapposite.

2014 WL 4924866

Only the Westlaw citation is currently available.
United States District Court,
D. Oregon.

UNITED STATES of America, Plaintiff,

v.

\$17,980.00 IN UNITED STATES
CURRENCY, in rem, Defendant.

No. 3:12-cv-01463-MA.

Signed Sept. 30, 2014.

Attorneys and Law Firms

S. Amanda Marshall, United States Attorney, District of Oregon, Annemarie Sgarlata, Assistant United States Attorney, Portland, OR, for Plaintiff.

Brian L. Michaels, Eugene, OR, for Claimant Donna Dickson.

OPINION AND ORDER

MARSH, Judge.

*1 This civil forfeiture proceeding comes before the Court on Plaintiff's Motion for Summary Judgment or to Strike Claim (# 31) and Claimant Donna Dickson's Amended Motion for Leave to File Amended Claim (# 36). For the reasons set forth below, the Court denies Claimant's Motion to Amend and grants Plaintiff's Motion for Summary Judgment or to Strike Claim.

FACTUAL BACKGROUND

The material facts are undisputed and taken from the parties' submissions on summary judgment, the Declaration of Mark Cromwell (# 2) submitted along with Plaintiff's Complaint, and the Declaration of Claim (# 6) filed by Claimant Donna Dickson.

On January 27, 2012, Officer Rob Havice of the Medford Police Department and a narcotics-detection canine were inspecting packages being offloaded from an airplane and sorted for delivery via FedEx. The narcotics-detection

canine alerted to a package addressed to Claimant. Based on the alert of the narcotics-detection canine, Officer Havice seized the box and obtained a warrant to search the package.

Before opening the package, Detective Cromwell noted that it was addressed to Claimant at an address on Jaynes Drive in Grants Pass, Oregon. Detective Cromwell noted the shipper's address was listed as "G & CO." with an address in Astoria, New York. The phone number associated with the sender's address was the same as that listed for the recipient. In addition, Det. Cromwell noticed the exterior of the box was heavily taped with all of the edges and seams covered by multiple layers of packing tape. When Officer Havice opened the box, the officers found a second box with the seams and edges heavily taped in a similar fashion. Upon opening the second box, the officers located the Defendant Currency sealed inside several layers of vacuum-sealed plastic. The officers found a dish soap-like substance with a heavy fragrance between the layers of vacuum-sealed plastic.

After Plaintiff instituted this forfeiture proceeding on August 13, 2012, Claimant submitted a Declaration of Claim on September 24, 2012, asserting a possessory interest in the Defendant Currency. When asked in her deposition to explain her possessory interest in the Defendant Currency, Claimant responded "[i]t's my money." Claimant's Dep. at 26. Claimant invoked her Fifth Amendment privilege against self-incrimination when asked to explain "how it is [her] money," why she believes it is her money, the circumstances surrounding her possessory interest in the currency, and under what circumstances she acquired an ownership interest in her currency. Claimant Dep. at 26, 34. Claimant also invoked her Fifth Amendment rights to avoid answering questions on a wide variety of subjects, including whether she was expecting the parcel, whether she was familiar with the listed sender or the sender's address, whether the Defendant Currency was ever in her possession, whether anybody had asked her to receive a parcel on their behalf in the past ten years, and whether she had any documentation showing that the Defendant Currency belonged to her. Claimant Dep. at 10-13, 26, 28, 34, 37, 41, 47. In sum, aside from testifying the Defendant Currency was her money, Claimant refused to answer any questions about her relationship to the Defendant Currency.

*2 In her responses to Plaintiff's First Request for Production Claimant asserted that she had no personal or business income tax returns or wage or earnings statements for the last five years. Claimant's Resp. to Pl.'s First Request for Prod. at 3. Claimant invoked, among other objections, her Fifth Amendment privilege to avoid responding to various requests concerning financial documents, business records, and additional tax forms. Claimant's Resp. to Pl.'s First Request for Prod. at 4–9.

On June 10, 2014, after the parties litigated a Motion to Dismiss and completed discovery, Claimant moved to suppress all evidence obtained from the package and Plaintiff moved to strike the claim and, in the alternative, for summary judgment on the grounds that Claimant lacked standing. On July 14, 2014, along with her Response (# 35) to Plaintiff's Motion to Strike or for Summary Judgment, Claimant filed a Motion for Leave to File Amended Claim (# 36) seeking to allege an ownership interest in the Defendant Currency instead of her previously pled possessory interest. On August 4, 2014, Plaintiff submitted its Reply Memorandum and a response opposing Claimant's Motion for Leave to File Amended Claim. The Court took Plaintiff's Motion for Summary Judgment or to Strike Claim and Claimant's Motion for Leave to File Amended Claim under advisement, withholding consideration of Claimant's Motion to Suppress Evidence until after resolution of the current Motions, if necessary.

DISCUSSION

I. Claimant's Motion for Leave to File Amended Claim

When a party moves to amend a pleading outside the period for amendment as a matter of course, “[t]he court should freely give leave when justice so requires.” Fed.R.Civ.P. 15(a)(2); *United States v. \$11,500.00 in U.S. Currency*, 710 F.3d 1006, 1013 (9th Cir.2013). Factors relevant to whether amendment shall be permitted are undue delay in filing the motion to amend and delay or extension of the proceedings, prejudice to the non-moving party, bad faith on the part of the moving party, and futility of the proposed amendment. *See \$11,500.000 in U.S. Currency*, 710 F.3d at 1009; *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 953 (9th Cir.2006); *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir.1999); *Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398

(9th Cir.1986). “[L]ate amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action.” *Acri*, 781 F.2d at 1398.

A. Undue Delay in Filing the Motion to Amend

In evaluating undue delay, the court considers “whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading.” “*AmerisourceBergen Corp.*, 465 F.3d at 953 (quoting *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1388 (9th Cir.1990)). The Ninth Circuit has “held that an eight-month delay between the time of obtaining a relevant fact and seeking a leave to amend is unreasonable.” *Id.* (citing *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 799 (9th Cir.1991)). A motion to amend made near or after the close of discovery necessitates reopening discovery and therefore delays the proceedings. *Solomon v. N. Am. Life and Cas. Ins. Co.*, 151 F.3d 1132, 1139 (9th Cir.1998).

*3 In this case, Claimant certainly knew the alleged facts—her testimony that the Defendant Currency is “[her] money”—at the time she filed her original claim. Claimant Dep. at 26. Moreover, the difference between alleging an ownership interest and alleging a possessory interest is a fundamental concept at the pretrial stages of civil forfeiture proceedings, such that any competent attorney in a forfeiture action would appreciate the well established distinction between the interests and the significance thereof. *See, e.g., United States v. \$999,830.00 in U.S. Currency*, 704 F.3d 1042, 1042–43 (9th Cir.2012); *United States v. \$133,420.00 in U.S. Currency*, 672 F.3d 629, 637–40 (9th Cir.2012); *United States v. \$100,348.00 in U.S. Currency*, 354 F.3d 1110, 1119 (9th Cir.2004).

Claimant has provided no reason for the nearly two-year delay between the filing of her claim and her Motion for Leave to File Amended Claim. In light of the straightforward but significant factual and legal nature of Claimant's proposed amendment, the two-year delay between the filing of the original claim and the instant motion to amend is manifestly unreasonable. Moreover, considering discovery has consumed a substantial portion of the two years of the pendency of this proceeding, reopening discovery at this point would cause further unreasonable delay in the proceedings. Accordingly, this factor militates strongly toward denying the Motion for Leave to Amend Claim.

B. Prejudice to Plaintiff

“A need to reopen discovery and therefore delay the proceedings supports a ... finding of prejudice from a delayed motion to amend.” *Lockheed Martin Corp.*, 194 F.3d at 986 (citing *Solomon*, 151 F.3d at 1139). The Ninth Circuit Court of Appeals has affirmed a finding of prejudice when the amendment comes “at the eleventh hour, after discovery was virtually complete and [the defendant's] motion for summary judgment was pending before the court.” *Roberts v. Arizona Bd. of Regents*, 661 F.2d 796, 798 (9th Cir.1981).

This case is even further along in the proceedings than that which the Ninth Circuit found prejudicial in *Roberts*, as discovery was complete and Plaintiff's Motion for Summary Judgment or to Strike Claim was pending when Claimant moved to amend her claim. Plaintiff asserts that it would have conducted additional discovery on a variety of issues had Claimant pled an ownership interest rather than a possessory interest. Pl.'s Reply at 4. Indeed, the showing a claimant must make at summary judgment to sustain an alleged ownership interest is different than that which a claimant must make to demonstrate standing based on a possessory interest. See *\$999,830 in U.S. Currency*, 704 F.3d at 1042–43. As discussed in full below, Claimant's refusal in discovery to provide any explanation for her possessory interest in the Defendant Currency is fatal to her claim as pled. See *id.* Thus, Plaintiff's decision not to pursue additional discovery was prudent in light of Claimant's pleadings. Claimant's proposed eleventh-hour amendment would, at a minimum, force the Court to reopen discovery and would therefore prejudice Plaintiff. See *Lockheed Martin Corp.*, 194 F.3d at 986; *Roberts*, 661 F.2d at 798.

*4 Claimant argues, however, that Plaintiff was not prejudiced because Claimant testified in her deposition that it was her money, putting Plaintiff on notice of Claimant's ownership interest. Claimant's Dep. at 26. That Plaintiff may have had some *factual* notice of Claimant's allegation of ownership, however, does not equate to notice that Claimant would *plead* an ownership interest, especially in light of the fact that she had not done so for the nearly two-year pendency of this action. A party must be able to rely on its opponent's pleadings in guiding discovery. See *McHenry v. Renne*, 84 F.3d 1172, 1177–78 (9th Cir.1996) (providing that an affirmative pleading must “fully set[] forth who is being sued, for what

relief, and on what theory, with enough detail to guide discovery.”). Thus, the fact that Plaintiff arguably had notice of Claimant's allegation of *factual* ownership of the Defendant Currency does not mitigate the prejudice to Plaintiff in relying on Claimant's pleading of a possessory interest while conducting discovery. To hold otherwise would force parties to conduct often wasteful discovery on myriad unpled, but arguably factually-plausible claims.

In sum, Plaintiff would be prejudiced by permitting Claimant to change her standing theory at this late stage of the proceedings because doing so would necessitate the reopening of discovery. Accordingly, this factor militates toward denying Claimant's Motion for Leave to Amend Claim,

C. Bad Faith

Bad faith or gamesmanship on the part of the moving party is another potential reason to deny a motion to amend a pleading. See *\$11,500.00 in U.S. Currency*, 710 F.3d at 1012; *AmerisourceBergen Corp.*, 465 F.3d at 951. While the Court cannot be certain about Claimant's subjective motivations for waiting almost two years to amend her claim to plead an ownership interest, the factual and legal background suggest it was done in an effort to gain a tactical advantage.

As noted, the legal significance of the distinction between an ownership interest and a possessory interest would be readily apparent to any competent forfeiture attorney. Moreover, the factual basis of Claimant's newly alleged ownership interest has unquestionably been known to Claimant since before she filed her original Claim. Finally, Claimant has offered no explanation for the delay in pleading her ownership interest.

In light of the differences in the standing theories and the foreseeable differences in Plaintiff's discovery and litigation strategy based on whether Claimant alleged a possessory or ownership interest, it is difficult to conceive of any purpose other than gamesmanship behind Claimant's failure to plead her ownership interest. Thus, although the Court cannot be certain of Claimant's subjective motivations, the considerable length of the delay, Claimant's awareness of the facts underlying the amendment, the straightforward legal significance of the change in standing theory, and the foreseeable impact on Plaintiff's discovery strategy all suggest a tactical motivation for Claimant's eleventh-hour change in her

standing theory. Thus, this factor weighs in favor of denying Claimant's Motion for Leave to Amend Claim.

D. Futility of Amendment

*5 “Futility of amendment can, by itself, justify the denial of a motion for leave to amend.” *Gonzalez v. Planned Parenthood of Los Angeles*, 759 F.3d 1112, 1116 (9th Cir.2014)(quoting *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir.1995)). Whether Claimant's alleged ownership interest would be sufficient to establish standing that would survive Plaintiff's Motion for Summary Judgment is a close question. In addition to the claimant's pleadings, “[a] claimant asserting an ownership interest in the defendant property, must also present ‘some evidence of ownership’ beyond the mere assertion in order to survive a motion for summary judgment.” *\$133,420.00 in U.S. Currency*, 672 F.3d at 639 (quoting *United States v. \$81,000.00 in U.S. Currency*, 189 F.3d 28, 35 (1st Cir.1999)). “The fact that property was seized from the claimant's possession, for example, may be sufficient evidence, when coupled with a claim of ownership, to establish standing at the summary judgment stage.” *Id.*

The only evidence in the record concerning Claimant's ownership interest is: 1) The seized parcel was addressed to Claimant; and 2) Claimant's assertion at her deposition that the Defendant Currency is “[her] money.” Whether this evidence is sufficient to meet even the low threshold the Ninth Circuit described in *\$133,420.00 in U.S. Currency* is a close question. Notably, however, in light of Claimant's very broad invocation of her Fifth Amendment privileges to withhold testimony,¹ there is little Claimant could testify to at trial. *See id.* at 640–42 § providing that in a forfeiture proceeding, the court may strike the testimony of a witness who previously invoked her Fifth Amendment privilege to prevent the “witness's improper use of the Fifth Amendment privilege against self-incrimination as a sword as well as a shield.”) As such, Claimant would very likely have to rely on the testimony of others to present additional evidence at trial.² Thus, although the Court does not go so far as to find Claimant's proposed amendment futile, this factor does not provide a countervailing reason to negate the previous three factors.

In sum, Claimant's proposed amendment to the Claim would fundamentally change her theory of standing after the close of discovery. Claimant has provided no reason for the nearly two-year delay in amendment despite having

knowledge of all of the facts underlying the amendment and a straightforward legal landscape. Finally, Claimant would be prejudiced and these proceedings would be unduly extended by the amendment because it would require substantial additional discovery after its initial closure.

Accordingly, Claimant's Motion is precisely the sort of late amendment “to assert new theories” that is not reviewed favorably because “the facts and the theory have been known to the party seeking amendment since the inception of the cause of action.” *See Acri*, 781 F.2d at 1398. Thus, the Court denies Claimant's Motion for Leave to Amend Claim and Claimant must proceed under her alleged possessory interest.

II. Plaintiff's Motion to Strike or for Summary Judgment

*6 Plaintiff moves to strike the Claim or, in the alternative, for summary judgment on the ground that Claimant has failed to establish a sufficient possessory interest to confer standing. “The elements of standing ‘must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.’” *\$133,420.00 in U.S. Currency*, 672 F.3d at 638 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

At the motion to strike stage, a claimant alleging a possessory interest in the defendant property “must offer some ‘factual allegations regarding how the claimant came to possess the property, the nature of the claimant's relationship to the property, and/or the story behind the claimant's control of the property.’” *Id.* (quoting *United States v. \$515,060.42 in U.S. Currency*, 152 F.3d 491, 498 (6th Cir.1998)). “‘Mere *unexplained possession* will not be sufficient.’” *Id.* (quoting *United States v. \$191,910.00 in U.S. Currency*, 16 F.3d 1051, 1057 (9th Cir.1994)) (emphasis in original). *See also \$999,830.00 in U.S. Currency*, 704 F.3d at 1042–43.

Claimant's factual allegations in her Claim read, in full:

Undersigned Declarant Donna Dickson has a possessory interest in all the property seized, as referenced above. When this property was seized there were no controlled substances discovered, nor any

criminal activity of any sort. There was no underlying basis to seize this currency other than the fact it was currency.

Declaration of Claim (# 6) at 1–2. Thus, the only factual allegation in the Claim concerning the nature of Claimant's possessory interest is that Claimant “has a possessory interest in all the property seized.” *Id.* Such a conclusory allegation plainly fails to “offer some ‘factual allegations regarding how the claimant came to possess the property, the nature of the claimant's relationship to the property, and/or the story behind the claimant's control of the property.’” “ *See \$133,420.00 in U.S. Currency*, 672 F.3d at 638. Thus, Claimant fails to allege a possessory interest sufficient to survive a motion to strike for lack of standing.

Even considering Claimant's deposition testimony and the rest of the record on summary judgment, Claimant falls well short of carrying her burden to demonstrate standing. At the summary judgment stage, “a claimant asserting a possessory interest must provide some ‘evidence supporting [her] assertion that [she] has a lawful possessory interest in the money seized.’” “ *Id.* at 639 (quoting *United States v. \$321,470.00 in U.S. Currency*, 874 F.2d 298, 303 (5th Cir.1989)). “ ‘Unexplained naked possession of a cash hoard ... does not rise to the level of the possessory interest requisite for standing to attack the forfeiture proceeding’ at the summary judgment stage.” *Id.* (quoting *United States v. \$42,500.00 in U.S. Currency*, 283 F.3d 977, 983 (9th Cir.2002)). At summary judgment a claimant asserting a possessory interest must offer evidence of an “explanation of how [she] came to possess the money seized.” *Id.* at 640.

Footnotes

- 1 Because the issue has not been presented, the Court assumes without deciding that Claimant properly invoked her Fifth Amendment privilege.
- 2 This point underscores the prejudice to Plaintiff that would be caused by the amendment of the Claim. Because, as discussed below, Claimant has failed to carry her burden to demonstrate standing through her alleged possessory interest, deposing such potential witnesses would be unnecessary and wasteful under Claimant's possessory interest theory of standing. Under Claimant's proposed ownership theory, however, deposing such witnesses would be a vital aspect of Plaintiff's discovery.

*7 As noted, in addition to the brief factual allegations in the Claim, the only relevant facts before the Court on summary judgment are that Claimant was the addressee of the parcel and that she testified that it was “[her] money.” Claimant's Dep. at 26. Claimant offered no explanation of how she came to have her possessory interest in the Defendant Currency. In fact, to the contrary, Claimant invoked her Fifth Amendment privilege each of the several times she was asked to explain her possessory interest. Claimant's Dep. at 26, 34, 47. Thus, because Claimant has not provided any evidence of any “explanation of how [she] came to possess the money seized,” Claimant has failed to carry her burden of demonstrating standing at the summary judgment stage. *See \$133,420.00 in U.S. Currency*, 672 F.3d at 640.

CONCLUSION

For the foregoing reasons, Claimant's Amended Motion for Leave to File Amended Claim (# 36) is DENIED. Plaintiff's Motion for Summary Judgment or to Strike Claim (# 31) is GRANTED and Claimant's Declaration of Claim (# 6) is STRICKEN. Because Claimant lacks standing to contest the forfeiture of the Defendant Currency, Claimant's Motion to Suppress All Evidence Obtained from Package Seized Per Search Warrant (# 30) is DENIED as moot.

IT IS SO ORDERED.

All Citations

Slip Copy, 2014 WL 4924866