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14 Attorneys for Plaintiffs and Counterclaim-Defendants

15 UNITED STATES DISTRICT COURT

16 FOR THE EASTERN DISTRICT OF CALIFORNIA

17 DUARTE NURSERY, INC., et al., )

18 Plaintiffs, )

19 v. )

20 UNITED STATES ARMY CORPS OF ENGINEERS; )  
et al., )

21 Defendants. )

22 \_\_\_\_\_ )  
23 UNITED STATES OF AMERICA, )

24 Counterclaim-Plaintiff, )

25 v. )

26 DUARTE NURSERY, INC., et al., )

27 Counterclaim-Defendants. )  
28 \_\_\_\_\_ )

No. 2:13-cv-02095-KJM-DAD

**PLAINTIFFS' NOTICE  
OF MOTION AND  
MOTION TO FILE SECOND  
AMENDED COMPLAINT**

Date: August 7, 2015

Time: 10:00 a.m.

Honorable Kimberly J. Mueller  
Courtroom 3, 15th Floor

PACIFIC LEGAL FOUNDATION  
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1           **TO ALL PARTIES AND ATTORNEYS OF RECORD YOU ARE HEREBY GIVEN**  
2 **NOTICE** that on August 7, 2015, at 10:00 a.m., or as soon thereafter as the Court’s schedule  
3 permits, before the Honorable Kimberly J. Mueller, in Courtroom 3 of the United States District  
4 Court for the Eastern District of California, Sacramento Division, located at 501 I Street,  
5 Sacramento, California 95814, Plaintiffs Duarte Nursery, Inc., and John Duarte hereby move for  
6 leave to file the accompanying proposed Second Amended Complaint.

7           The motion is made pursuant to Federal Rules of Civil Procedure, Rules 15(a)(2) and  
8 16(b)(4), on the grounds that because of the discovery of evidence supporting the necessary  
9 allegations of a First Amendment retaliation claim, and Plaintiffs’ diligence in bringing this  
10 motion, granting leave to amend the complaint to re-allege facts occurring after the filing of the  
11 complaint (evidence of such facts having become available to Plaintiffs for the first time following  
12 the expiration of the Court’s previous grant of leave to amend) and a cause of action based thereon,  
13 is warranted.

14           Pursuant to the Court’s order on May 14, 2015, counsel certifies that Plaintiffs, through  
15 counsel, have met and conferred with the federal parties by email from June 23 through July 2 and  
16 sought their stipulation to the proposed amendment. Meet and confer efforts included providing  
17 the federal parties with a copy of the proposed pleading, highlighted to show deleted and added  
18 text, and an email exchange on the legal and factual issues involved. Following this exchange of  
19 information, the United States has advised Plaintiffs that it opposes the motion to amend, on the  
20 grounds that it considers the information on which the amended allegations are based not to be  
21 new, and it disagrees that the amended allegations state a claim for relief. However, Plaintiffs and  
22 the United States were able to reach a limited agreement under which Plaintiffs have limited the  
23 number of additional parties named in the amended pleading, based on the United States’  
24 representation that naming it as an additional defendant is adequate to ensure compliance with any  
25 order issued by the Court.

26           Pursuant to this notice, Plaintiffs hereby move for leave to file the accompanying proposed  
27 Second Amended Complaint, under Federal Rules of Civil Procedure, Rules 15(a)(2) and 16(b)(4).  
28 This motion is based on this notice of motion, this motion, the concurrently filed supporting

1 memorandum of points and authorities, the accompanying declaration of Anthony L. François, the  
2 accompanying proposed Second Amended Complaint (attached as Exhibit A to the François  
3 Declaration), the proposed order filed herewith, and all pleadings, documents, orders, or rulings  
4 filed in this matter, and oral argument before this Court.

5 DATED: July 7, 2015.

6 Respectfully submitted,

7 M. REED HOPPER  
8 ANTHONY L. FRANÇOIS  
9 DAVID M. IVESTER  
10 PETER PROWS  
11 GERALD E. BRUNN

12 By           /s/ Anthony L. François            
13 ANTHONY L. FRANÇOIS

14 *Attorneys for Plaintiffs,*  
15 *Duarte Nursery, Inc., and John Duarte*

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14 Attorneys for Plaintiffs and Counterclaim-Defendants

15 UNITED STATES DISTRICT COURT

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21 Defendants. )

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23 UNITED STATES OF AMERICA, )

24 Counterclaim-Plaintiff, )

25 v. )

26 DUARTE NURSERY, INC., et al., )

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No. 2:13-cv-02095-KJM-DAD

**PLAINTIFFS' POINTS &  
AUTHORITIES IN SUPPORT OF  
MOTION TO FILE SECOND  
AMENDED COMPLAINT**

Date: August 7, 2015

Time: 10:00 a.m.

Honorable Kimberly J. Mueller  
Courtroom 3, 15th Floor

**INTRODUCTION**

1  
2 Plaintiffs Duarte Nursery, Inc., and John Duarte (collectively Plaintiffs or Duarte) move  
3 to file the accompanying proposed Second Amended Complaint. The motion and these points and  
4 authorities and supporting declaration show good cause why amendment should be allowed after  
5 issuance of the scheduling order herein, and that leave to amend should be granted.

6 In October, 2013, Duarte filed this suit against the Army Corps for its violation of the Due  
7 Process Clause in ordering Duarte to cease work on Duarte Nursery’s Property without a hearing.  
8 ECF 1. The Army Corps moved to dismiss the Complaint, which the Court denied on April 23,  
9 2014. ECF 27. The Army Corps answered the Complaint, and the United States filed its  
10 Counterclaim against Duarte for alleged violations of the Clean Water Act. ECF 28. Duarte then  
11 moved to supplement the Complaint to allege a cause of action against the Army Corps for First  
12 Amendment retaliation. The United States and Army Corps did not oppose Duarte’s motion to  
13 supplement, and the Court granted it on August 6, 2014. ECF 40. Duarte filed the First  
14 Supplemental Complaint on August 20, 2014. ECF 41.

15 The United States then moved to dismiss the First Supplemental Complaint on a variety  
16 of grounds. On March 24, 2015, the Court denied the motion except as to the Supplemental Sixth  
17 Cause of Action for First Amendment retaliation. The Court dismissed this claim for failure to  
18 state a claim, and granted Duarte leave to file a Second Amended Complaint by April 14, 2015.  
19 ECF 63, at 9. The Court’s March 24, 2015 ruling (March 24 Ruling) clarifies the additional facts  
20 that Duarte must allege in order to state a claim for First Amendment retaliation: retaliatory  
21 motive on the part of the Army Corps, and that the United States would not have filed the  
22 Counterclaim absent such retaliatory motive. ECF 63, at 7-8.

23 Duarte did not amend by the Court’s April 14, 2015, deadline because Plaintiffs did not  
24 then have evidence to support the necessary additional allegations of retaliation. Since that date,  
25 Duarte has obtained evidence sufficient to allege the necessary additional facts to state a claim for  
26 First Amendment retaliation against the Army Corps and United States. Duarte moves for leave  
27 to file a Second Amended Complaint now that the necessary additional allegations can be made.  
28 *See Decl. of Anthony L. François ¶¶ 7-11.*

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1 The proposed Second Amended Complaint alleges the necessary additional facts to state  
2 a claim against the Army Corps and the United States for First Amendment retaliation, and adds  
3 the United States as a defendant to ensure that the Court can provide effective injunctive relief.  
4 *See* Decl. of Anthony L. François ¶ 6, and Exhibit A. The Court should find good cause for Duarte  
5 to bring this motion now, and should grant leave to file the proposed Second Amended Complaint.

6 **STANDARD OF REVIEW**

7 Following the issuance of a scheduling order, a party seeking leave to amend pleadings  
8 must first satisfy Federal Rule of Civil Procedure 16(b)'s "good cause" standard. *Johnson v.*  
9 *Mammoth Recreations, Inc.*, 975 F.2d 604, 608-09 (9th Cir. 1992). Rule 16(b)(4) states that a  
10 "schedule may be modified only for good cause and with the judge's consent." This good cause  
11 evaluation "is not coextensive with an inquiry into the propriety of the amendment under . . . Rule  
12 15.'" *Johnson*, 975 F.2d at 609 (quoting *Forstmann v. Culp*, 114 F.R.D. 83, 85 (M.D.N.C. 1987)).  
13 Distinct from Rule 15(a)'s liberal amendment policy, Rule 16(b)'s good cause standard focuses  
14 primarily on the diligence of the moving party, *id.*, and that party's reasons for seeking  
15 modification, *C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 984 (9th Cir.  
16 2011).

17 If good cause exists, the party next must satisfy Rule 15(a). *Cf. Johnson*, 975 F.2d at 608.  
18 Federal Rule of Civil Procedure 15(a)(2) states "[t]he court should freely give leave [to amend  
19 pleadings] when justice so requires" and the Ninth Circuit has "stressed Rule 15's policy of  
20 favoring amendments." *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir.1989).  
21 "In exercising its discretion [to grant leave to amend] 'a court must be guided by the underlying  
22 purpose of Rule 15—to facilitate decision on the merits rather than on the pleadings or  
23 technicalities.'" *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (quoting  
24 *United States v. Webb*, 655 F.2d 977, 979 (9th Cir.1981)). However, "the liberality in granting  
25 leave to amend is subject to several limitations. Leave need not be granted where the amendment  
26 of the complaint [1] would cause the opposing party undue prejudice, [2] is sought in bad faith,  
27 [3] constitutes an exercise in futility, or [4] creates undue delay." *Ascon Props.*, 866 F.2d at 1160  
28 (citations omitted). The consideration of prejudice to the opposing party carries the greatest

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1 | weight. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). In addition,  
2 | a court should look to whether the plaintiff has previously amended the complaint, as “the district  
3 | court’s discretion is especially broad ‘where the court has already given a plaintiff one or more  
4 | opportunities to amend [its] complaint.’” 866 F.2d at 1161 (quoting *Leighton*, 833 F.2d at 186  
5 | n.3).

6 | **ARGUMENT**

7 | **I**

8 | **PLAINTIFFS DEMONSTRATE GOOD**  
9 | **CAUSE FOR MOVING TO AMEND AT THIS TIME**

10 | Plaintiffs have been diligent in filing this motion. In the March 24 Ruling, the Court  
11 | granted Plaintiffs leave to amend in order to restate their Sixth Claim with sufficient factual  
12 | allegations. ECF 63, at 9. That leave expired on April 14, 2015, at which time Plaintiffs were not  
13 | in possession of adequate evidence to support the necessary additional allegations consistent with  
14 | the March 24 Ruling.

15 | Following April 14, 2015, Plaintiffs for the first time obtained evidence tending prove the  
16 | additional facts which must be alleged in order to amend their First Amendment retaliation claim.  
17 | This evidence is in documents received from the United States on or about May 4, 2015, in  
18 | response to Duarte’s requests for production; the deposition of Matthew Kelley of the Army Corps  
19 | staff, on May 21, 2015; and in an email sent on May 28, 2015 by Caleb Unruh, a third party  
20 | witness, to the attorneys for the United States, objecting to the time and place of their intended  
21 | deposition of him. Decl. of Anthony L. François ¶¶ 7-11. Plaintiffs have filed this motion about  
22 | a month from receipt of the transcript of Mr. Kelley’s deposition, and less than three months from  
23 | the deadline the Court originally set for amendment.

24 | Plaintiffs have satisfied Rule 16(b)(4)’s requirement of good cause to allow amendment  
25 | following entry of the scheduling order. They were not in a position to amend by the original  
26 | deadline set by the Court, because they lacked evidence of the additional facts which the March 24  
27 | Ruling made clear would need to be alleged. They have nonetheless proceeded diligently with  
28 | discovery, and now have evidence sufficient to allege the necessary additional facts to state a claim

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1 against the Army Corps and the United States for First Amendment retaliation. Plaintiffs have then  
2 diligently moved for the Court's leave to file the proposed Second Amended Complaint.

3 The Court should find good cause, in satisfaction of Rule 16(b)(4) and the requirements of  
4 the Scheduling Order herein, to allow Plaintiffs to move at this time for leave to file their proposed  
5 Second Amended Complaint.

6 **II**

7 **THE COURT SHOULD GRANT LEAVE TO**  
8 **FILE THE SECOND AMENDED COMPLAINT**

9 The March 24 Ruling provided leave to amend until April 14, 2015. The factors in favor  
10 of granting leave at that time remain in effect now. Under the liberal policy in favor of  
11 amendment, the Court should grant the same leave to amend now which the March 24 Ruling  
12 allowed just a few months ago.

13 **A. Amendment Will Not Unduly Prejudice the Army Corps or United States.**

14 Allowing amendment would not cause the Army Corps or United States undue prejudice.  
15 Discovery remains open, and dispositive motions are not due to be heard until November. *See,*  
16 *e.g., Solomon v. North American Life & Cas. Ins. Co.*, 151 F.3d 1132, 1139 (9th Cir. 1998) (need  
17 to re-open discovery as grounds to deny amendment); *Campbell v. Emory Clinic*, 166 F.3d 1157,  
18 1162 n.18 (11th Cir. 1999) (closure of discovery and decision on dispositive motions as grounds  
19 for denial of amendment); *compare Campbell v. Emory Clinic*, 166 F.3d at 1162 n.18 (leave to  
20 amend proper while discovery was still ongoing and dispositive motions had yet to be filed). In  
21 *Scott v. Family Dollar Stores, Inc.*, the Fourth Circuit reversed the district court, which had denied  
22 leave to amend on the grounds of prejudice. The court of appeal noted that the length of time  
23 between the filing of the complaint and the motion to amend (three years) had mostly been  
24 consumed with the defendant's multiple efforts to obtain dismissal of the case. 733 F.3d 105, 117-  
25 18 (4th Cir. 2013). The court of appeal also noted that the proposed amendment did not allege an  
26 entirely new theory but instead elaborated on a previously but inadequately pled claim. *Id.* at 118.

27 ///

28 ///



1 Duarte's motion is very similar to the one that the court of appeal held should be granted  
2 in *Scott v. Family Dollar Stores*. In both, much of the time since the filing of the original  
3 complaint has been consumed with disposition of defense motions to dismiss. Duarte filed the  
4 Complaint on October 10, 2013, twenty-one months ago. ECF 1 (Compl., Oct. 10, 2013). Almost  
5 half of that time has elapsed with Federal motions to dismiss pending. ECF 10 (Army Corps  
6 Motion to Dismiss, December 23, 2013), ECF 27 (April 23, 2014, order denying motion); ECF 46  
7 (U.S. Motion to Dismiss First Supplemental Complaint, September 12, 2014); ECF 63 (March 24,  
8 2015, Ruling on second motion to dismiss). And, the proposed Second Amended Complaint does  
9 not allege a new theory. Rather, it elaborates additional factual allegations in support of the  
10 previously pled Sixth Claim for First Amendment retaliation, in order to satisfy the requirements  
11 for adequately stating that claim, as set forth in the March 24 Ruling. For these reasons, and since  
12 this motion is brought before the close of discovery and well before the filing of dispositive  
13 motions, *see Campbell v. Emory Clinic*, 166 F.3d at 1162 n.18, the Court should find no prejudice  
14 to the Defendants.

15 **B. Amendment Is Not Sought in Bad Faith.**

16 Duarte first disclosed its First Amendment retaliation claim when it moved to supplement  
17 the Complaint in June, 2014. ECF 34 & 35. The Army Corps and United States did not oppose  
18 that motion. ECF 39. The Army Corps and United States have been on notice for a year that  
19 Duarte contends that the Counterclaim is retaliatory. Their access to evidence on this claim has  
20 been better than Duarte's for most of that time, since it has been in their exclusive possession until  
21 the recent discovery events described above. There is no basis to claim that this motion seeks to  
22 delay the proceedings or 'sand-bag' the Defendants.

23 **C. Amendment Would Not Be Futile.**

24 The March 24 Ruling identifies the necessary additional facts that Duarte must allege in  
25 order to state a claim for First Amendment retaliation: retaliatory motive on the part of the Army  
26 Corps, without which the United States would not have filed the Counterclaim. ECF 63, at 8. The  
27 proposed Second Amended Complaint directly alleges, in much more detail than the First  
28 Supplemental Complaint, that (1) the Army Corps did not initially intend to seek the filing of a

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1 civil suit against Duarte, (2) that Duarte’s Complaint and related media activities were the reason  
2 that the Army Corps changed direction and sought the filing of a civil enforcement action, (3) that  
3 the Army Corps’ determination that Duarte’s alleged Clean Water Act violation was flagrant was  
4 legally unjustified, and (4) that the United States would not have filed the Counterclaim absent the  
5 Army Corps’ retaliatory motive against Duarte. Proposed Second Am. Compl., pp. 14-15, ¶¶ 82-  
6 85, at Exhibit A to Decl. of Anthony L. François. These allegations state a claim against the Army  
7 Corps and United States for First Amendment retaliation, consistent with the Court’s March 24  
8 Ruling.

9 **D. Amendment Will Not Create Undue Delay.**

10 The Army Corps and United States have been on fair notice of this contention for a year.  
11 Discovery remains open until October 2 of this year, and dispositive motions are not yet filed and  
12 may be heard until November 6 of this year.<sup>1</sup>

13 Absent the presence of any of the above factors, the liberal policy in favor of amendment  
14 should prevail, and Duarte respectfully requests that the Court grant leave to file the accompanying  
15 proposed Second Amended Complaint attached as Exhibit A to the Declaration of Anthony L.  
16 François.

17 **CONCLUSION**

18 For the foregoing reason, the Court should grant the motion.

19 DATED: July 7, 2015.

20 Respectfully submitted,

21 M. REED HOPPER  
22 ANTHONY L. FRANÇOIS  
23 DAVID M. IVESTER  
24 PETER PROWS  
25 GERALD E. BRUNN

26 By           /s/ Anthony L. François            
27 ANTHONY L. FRANÇOIS  
28 Attorneys for Plaintiffs and Counterclaim-  
Defendants Duarte Nursery, Inc., et al.

<sup>1</sup> The parties have already exchanged expert witness reports, but Duarte does not anticipate that any expert testimony will be necessary to the First Amendment retaliation claim.

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**DECLARATION OF  
ANTHONY L. FRANÇOIS  
IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
LEAVE TO FILE SECOND  
AMENDED COMPLAINT**

Date: August 7, 2015

Time: 10:00 a.m.

Honorable Kimberly J. Mueller  
Courtroom 3, 15th Floor

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1 I, Anthony L. François, do declare as follows:

2 1. I am an attorney duly licensed in the State of California and admitted to practice  
3 before the United States District Court for the Eastern District of California.

4 2. I am an attorney for Plaintiffs in this case.

5 3. I am familiar with the matters stated herein, and if called could competently testify  
6 thereto, based upon personal knowledge.

7 4. Attached hereto as Exhibit A is Plaintiffs' proposed Second Amended Complaint,  
8 which the accompanying motion seeks the Court's leave to file.

9 5. Exhibit A includes the text of the First Supplemental Complaint filed in this case,  
10 along with the proposed amended allegations, in one document as required by Local Rule 220.

11 6. The amended allegations in Exhibit A appear in the caption, and at page 3,  
12 paragraph 10; page 9, paragraphs 48-49; page 11, paragraph 55b; pages 14-15, paragraphs 82-95;  
13 pages 19-20, paragraphs 116-121; and page 21, paragraph 9 of the Prayer for Relief. All remaining  
14 paragraphs are exactly as they appear in the First Supplemental Complaint. The only other change  
15 in the proposed pleading is the renumbering of paragraphs.

16 7. The evidence necessary to support the amended allegations was not available to  
17 Plaintiffs prior to May 4, 2015, and was not fully available until June 5, 2015, as set forth in more  
18 detail below.

19 8. On May 14, 2015, the United States and Corps of Engineers produced documents  
20 in response to a discovery request from Plaintiffs. None of these documents were previously  
21 available to Plaintiffs, because they were in the custody of the Army Corps and unknown to  
22 Plaintiffs until produced. These documents included:

23 A. Internal Army Corps emails (USACE0001310-15) dated October 9 and 10,  
24 2013, alerting Army Corps Sacramento District staff to the filing of Plaintiffs' lawsuit on  
25 October 10, 2013 (Exhibit B hereto).

26 B. Army Corps Memorandum for Record (USAE0000563-67) summarizing  
27 investigation of alleged Clean Water Act violations on the Property, showing electronic signature

28 ///

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1 on the last page, within hours of the filing of Plaintiffs' Complaint on October 10, 2013 (Exhibit  
2 C hereto).

3 C. Army Corps' October 11, 2013, referral of Duarte and related matters to  
4 U.S. EPA (USACE0001720-21, 1711-14) the day following filing of this lawsuit (Exhibit D  
5 hereto).

6 9. On May 21, 2015, Plaintiffs deposed Matthew Kelley, of the Army Corps staff and  
7 author of the Memorandum for Record in Exhibit C hereto. The transcript of Mr. Kelley's  
8 deposition was made available to Plaintiffs on June 5, 2015. Excerpts of Mr. Kelley's deposition  
9 transcript are attached hereto as Exhibit E. They include Mr. Kelley stating:

10 A. To the effect that he was contacted and directed to electronically sign his  
11 investigation report on or about October 10, 2013, to his surprise, transcript at 169-171.

12 B. He had not expected that this matter would result in litigation, transcript  
13 at 267.

14 10. On May 28, 2015, I was forwarded an email by co-counsel, sent by Caleb Unruh  
15 to John Thomas Do, objecting to being deposed in this matter on June 1, 2015 (Exhibit F hereto).  
16 The email attributes the following statements, in reference to Duarte, to Mr. Do: "You know they  
17 sued us. Well, so we are suing them."

18 11. None of the documents or testimony in paragraphs 8-10 above was available to  
19 Plaintiffs prior to May 4, 2015. The documents referenced in paragraph 8 were available to the  
20 Army Corps, but had not been previously provided to Plaintiffs. The email in paragraph 10 was  
21 sent on May 28, 2015. Mr. Kelley was deposed on May 21, 2015, and the transcript of his  
22 deposition was available June 5, 2015.

23 I declare under penalty of perjury that the foregoing is true and correct, to the best of my  
24 knowledge, and that this declaration was executed this 7th day of July, 2015, at Sacramento,  
25 California.

26

27

28

/s/ Anthony L. François  
ANTHONY L. FRANÇOIS