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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’  
REPLY 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

1 **INTRODUCTION**

2 Plaintiffs have moved to file their Second Amended Complaint. ECF 80. The United  
3 States’ Opposition, ECF 82, rests solely on the ground that amendment would be futile, based  
4 largely in turn on an irrelevant argument that some of the retaliation evidence could be interpreted  
5 benignly. From this, the United States then proposes the non-sequitur that the allegations in the  
6 amended pleading fail to state a claim for First Amendment retaliation. Plaintiffs reply that this  
7 is not a valid legal argument on the question of whether to grant leave to amend, and respectfully  
8 request that the Court grant the motion to amend.

9 **A. The United States Does Not Dispute Good Cause  
10 To Amend after Entry of the Scheduling Order**

11 The U.S. Opposition does not dispute that good cause exists to allow amendment following  
12 issuance of the scheduling order. Plaintiffs respectfully ask the Court to find that good cause exists  
13 to amend at this time, in satisfaction of Rule 16(b)(4).

14 **B. The United States Does Not Argue Prejudice, Bad Faith, or Delay**

15 The U.S. Opposition does not argue that amendment will unduly prejudice the U.S. or the  
16 Army Corps, or that amendment is sought in bad faith, or that amendment will create undue delay.  
17 The United States does not address *Scott v. Family Dollar Stores*, 733 F.3d 105 (4th Cir. 2013),  
18 or *Campbell v. Emory Clinic*, 166 F.3d 1157, 1162 n.18 (11th Cir. 1999), which Plaintiffs cited as  
19 authority for granting leave to amend. For the reasons set forth in Plaintiffs’ Memo in Support of  
20 Motion to Amend, ECF 80-1 at 4-6, and the U.S. having made no counter-argument, Plaintiffs  
21 respectfully request that the Court find that amendment will not unduly prejudice the United States  
22 or the Army Corps, is not sought in bad faith, and will not cause undue delay.

23 **C. The U.S. Opposition Raises No Argument Against  
24 Amending Paragraphs 48, 49, and 55b**

25 There are amended allegations in the proposed Second Amended Complaint that are not  
26 related to the First Amendment retaliation claim. These appear in paragraphs 48-49, and 55b, on  
27 pages 9 and 11 of the proposed pleading. *See* Decl. of Anthony L. François ¶ 6, and Exhibit A.

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1 The U.S. has raised no objection to these proposed amendments, and Plaintiffs respectfully request  
2 that the Court grant leave for Plaintiffs to make these unopposed amendments.

3 **D. The United States Raises No Valid Argument That Amendment Is Futile**

4 The U.S. Opposition argues only that amending the First Amendment retaliation claim  
5 would be futile. ECF 82 at 5-9. First, the U.S. argues that evidence,<sup>1</sup> which Plaintiffs submitted  
6 to show why they could not amend until now, can be given a benign interpretation on the merits  
7 of the retaliation claim, on which basis the allegations of the proposed pleading are supposedly  
8 inadequate. ECF 82 at 6-8. Second, the U.S. incorrectly argues that one allegation of injury is too  
9 conclusory to adequately allege harm resulting from the government’s retaliation against Plaintiffs.  
10 ECF 82 at 9.

11 **E. Whether a Proposed Amendment Is Futile Depends  
12 on the Allegations, Not the Evidence**

13 The appropriate inquiry into whether the proposed amended allegations are adequate is the  
14 allegations themselves, not the evidence for or against the allegations. As Plaintiffs make clear,  
15 Memo in Support of Motion to Amend, ECF 80-1 at 3-4, the reason they submitted the emails,  
16 reports, and deposition transcript attached to the François Declaration, ECF 80-2 and Exhibits B-F,  
17 is to show *when* the evidence first became available that allows Plaintiffs to responsibly allege all  
18 the required elements of First Amendment retaliation, and explain why they had not been able to  
19 amend within the previous deadline set by the Court.

20 **F. The Proposed Pleading States a Claim for First Amendment Retaliation**

21 The March 24, 2015 Order identifies the elements of a First Amendment retaliation claim:  
22 (1) constitutionally protected activity, (2) government action injuring the speaker adequately to  
23 chill continued exercise of speech, and (3) “that the defendant’s adverse action was substantially  
24 motivated as a response to the plaintiff’s exercise of constitutionally protected conduct.” March 24  
25 Order, ECF 63 at 7-8 (quoting *Schneider v. Cnty. of Sacramento*, S-12-2457 KJM KJN, 2014 WL  
26 \_\_\_\_\_)

27 <sup>1</sup> In asserting inadequacy of evidence, rather than analyzing the allegations, the U.S. is not really  
28 opposing amendment, but rehearsing an argument for trial on the merits. Asserted insufficiency  
of evidence is not a basis for denying leave to amend.

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1 4187364, at \*8 (E.D. Cal. Aug 21, 2014). The March 24 Order identifies the defects in the First  
2 Supplemental Complaint: failure to adequately allege that the Counterclaim “was motivated by  
3 Plaintiffs’ speech,” or “any injury caused by the alleged retaliatory conduct.” ECF 63, at 8:20-25.  
4 The March 24 Order grounds this ruling in the fact that the Counterclaim addresses the same  
5 conduct as the Cease and Desist Order, and that the First Supplemental Complaint merely invited  
6 the Court to infer that the intervening Complaint was a substantial motivation for the Counterclaim.  
7 The cases the March 24 Order cites, and its analysis of those cases, clarify the additional facts that  
8 Plaintiffs must allege: that the Army Corps had a retaliatory motive for referring the underlying  
9 enforcement action to the Department of Justice, and that the United States would not have filed  
10 the Counterclaim absent the Army Corps’ retaliatory motive. March 24, 2015 Order, ECF 63 at 7-  
11 8.<sup>2</sup>

12 The proposed Second Amended Complaint, ECF 80-3, alleges these facts in detail:

- 13 • When it issued the Cease and Desist Order in February of 2013, the Army Corps  
14 did not consider the Plaintiffs’ actions on the Property as appropriate for a civil  
15 lawsuit, and took no further enforcement action against Plaintiffs before they sued  
16 the Army Corps. Proposed Second Amended Complaint, ¶ 82, at 14-15.
- 17 • The Army Corps resumed enforcement activity shortly after Army Corps staff  
18 learned of Plaintiffs’ Complaint and related press release. Proposed Second  
19 Amended Complaint, ¶ 83, at 15.
- 20 • The Army Corps changed its position on the suitability of the underlying  
21 enforcement action for civil litigation, and referred the matter to the Department of  
22 Justice, in retaliation against Plaintiffs for filing the Complaint and making related  
23 statements in the press. Proposed Second Amended Complaint, ¶ 84, at 15.

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25  
26 <sup>2</sup> Plaintiffs disagree with the U.S. Opposition’s reading of the March 24 Order as holding that the  
27 CDO was not retaliatory or that Plaintiffs must allege that the CDO was retaliatory in order to state  
28 a First Amendment retaliation claim. ECF 82 at 5. Instead, Plaintiffs read the Order as stating that  
without alleging more than the mere filing of the Complaint, the Counterclaim cannot be inferred  
to be retaliatory. Plaintiffs have alleged much more in the proposed Second Amended Complaint.

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- 1 • The Complaint and related statements to the press were substantial or motivating
- 2 factors in the Army Corps decision to refer the enforcement action to the
- 3 Department of Justice. *Id.*
- 4 • The decision to refer the enforcement action to the Department of Justice was not
- 5 legally warranted, since it did not in fact meet the regulatory criteria for civil
- 6 enforcement actions. *Id.*
- 7 • The Department of Justice would not have filed the Counterclaim absent the Army
- 8 Corps' retaliatory motive against Plaintiffs. Proposed Second Amended Complaint,
- 9 ¶ 85, at 15.

10 The U.S. does not substantively analyze any of these allegations, and makes no serious  
11 argument that these allegations themselves are inadequate to state a claim for First Amendment  
12 retaliation. Instead, the U.S. offers an irrelevant interpretation of several pieces of the evidence  
13 of the Army Corps' retaliation against Plaintiffs. This analysis is not material to the resolution of  
14 the motion to amend. The only material question is whether the *allegations* state a claim for First  
15 Amendment retaliation. Plaintiffs' Motion, and this Reply, demonstrate that the allegations in the  
16 proposed Second Amended Complaint are more than sufficient.

17 **G. The Proposed Pleading Adequately Alleges Injury**

18 The U.S. argument that the proposed Second Amended Complaint fails to allege injury is  
19 simply incorrect. Paragraph 85 of the amended pleading alleges that the Department of Justice  
20 would not have filed the Counterclaim absent the Army Corps' retaliatory motive. The filing of  
21 the Counterclaim is the injury the United States is looking for. More generally, being retaliated  
22 against for the exercise of rights protected by the First Amendment is the injury that a First  
23 Amendment retaliation claim is meant to redress.

24 Since the United States Opposition raises no relevant or accurate arguments to show the  
25 futility of amendment, Plaintiffs respectfully request that the Court find that amendment would not  
26 be futile.

27 ///

28 ///

**CONCLUSION**

1  
2 Based on the foregoing, Plaintiffs respectfully request that the Court grant Plaintiffs'  
3 Motion to Amend.

4 DATED: July 30, 2015.

5 Respectfully submitted,

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

11 By           /s/ Anthony L. François            
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