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United States District Court, D. Hawai'i.

AMERICAN AUTOMOBILE INSURANCE COMPANY, a Missouri corporation; National Surety Corporation, a Illinois corporation, Plaintiffs,

v.

HAWAII NUT & BOLT, INC., Defendant.

CIV. NO. 15-00245 ACK-KJM

|

Signed 05/13/2016

Attorneys and Law Firms

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Judith Ann Pavey, Maile S. Miller, Terence J. O'Toole, Starn O'Toole Marcus & Fisher, Honolulu, HI, for Defendant.

ORDER GRANTING PETITIONER AND REAL PARTY IN INTEREST SAFEWAY, INC.'S MOTION FOR LEAVE TO: (1) SUBSTITUTE AND/OR JOIN SAFEWAY INC. AS DEFENDANT/COUNTERCLAIM PLAINTIFF, AND FOR A CHANGE OF CAPTION; AND (2) FILE A FIRST AMENDED COUNTERCLAIM AGAINST PLAINTIFF/ COUNTERCLAIM DEFENDANTS AMERICAN AUTOMOBILE INSURANCE COMPANY AND NATIONAL SURETY CORPORATION AND ADDITIONAL COUNTERCLAIM DEFENDANTS DOUGLAS MOORE, MONARCH INSURANCE SERVICES, INC. AND INSURANCE ASSOCIATES, INC.

Kenneth J. Mansfield, United States Magistrate Judge

***1** Before the Court is Petitioner And Real Party In Interest Safeway, Inc.'s Motion for Leave To: (1) Substitute and/or Join Safeway Inc. as Defendant/ Counterclaim Plaintiff, and for a Change of Caption; and (2) File a First Amended Counterclaim Against Plaintiff/Counterclaim Defendants American Automobile Insurance Company and National Surety Corporation and Additional Counterclaim Defendants Douglas Moore, Monarch Insurance Services, Inc. and Insurance Associates, Inc. filed on February 26, 2016 (the "Motion"). *See* ECF No. 25. Plaintiffs/Counterclaim Defendants American Automobile Insurance Company and National Surety Corporation (collectively "Insurers") filed their Opposition on April 11, 2016. *See* ECF No. 29. Safeway, Inc. ("Safeway") filed its Reply on April 18, 2016. *See* ECF No. 30. The Court held a hearing on this matter on April 28, 2016 at 9:30 a.m. Terence J. O'Toole, Esq. and Maile S. Miller, Esq. appeared on behalf of Safeway, and Richard B. Miller, Esq. appeared on behalf of Insurers. After careful consideration of the Motion, the arguments of counsel, and the record established in this action, the Court GRANTS the Motion.

BACKGROUND

This action arises from a complaint Safeway filed in the Circuit Court of the First Circuit, State of Hawaii (the "State Court"), on June 22, 2009 ("Underlying Lawsuit"), against a number of defendants including the Defendant in the instant action, Hawaii Nut & Bolt, Inc. ("HNB"). Safeway filed the Underlying Lawsuit in connection with the installation of a waterproof traffic deck coating system (the "Coating System") on the roof deck parking area and ramp ("Roof Deck") of the Safeway Kapahulu store ("Safeway Kapahulu"). *See* ECF No. 12-2 at 3; Complaint ("Compl.") ¶ 4.

Safeway alleged that shortly after it opened Safeway Kapahulu for business, the store began experiencing pervasive water leaks that penetrated into Safeway Kapahulu through the Roof Deck, disrupting business operations and causing damage to Safeway's business and reputation. ECF No. 12-2 at 9; Compl. ¶ 31. Safeway alleged that the Coating System caused the water leaks and that HNB was liable in part for the disruption and damage because it was involved in the selection, design, planning preparation, supply, and/or installation of the Coating System on the Roof Deck. *See* ECF No. 12-2 at 3, 10; Compl. ¶ 7, 35.

Safeway contended that HNB represented to Safeway that the Coating System would provide a 20-year watertight system for the Roof Deck and would perform as intended in Hawaii's climatic conditions. *See* ECF No. 12-2 at 7; Compl. ¶ 21. Safeway alleged that HNB failed to inform

Safeway, however, that the Coating System had never been used in Hawaii and that other applications of the Coating System in Hawaii and elsewhere had failed. *See* ECF No. 12-2 at 8; Compl. ¶ 23. Safeway alleged that notwithstanding HNB's representations about the Coating System's suitability, the Coating System experienced wholesale failures and continuous leaks. *See* ECF No. 12-2 at 10; Compl. ¶ 35. Accordingly, Safeway alleged the following claims against HNB: breach of contract; breach of the covenant of good faith and fair dealing; negligence; gross negligence; breach of express and implied warranties; unjust enrichment; negligent misrepresentation and/or omission; intentional misrepresentation and/or fraudulent concealment; product defects; and negligent design and manufacture of product. *See* ECF No. 12-2. HNB subsequently tendered defense of the Underlying Lawsuit to Insurers and Insurers agreed to defend HNB, subject to a reservation of rights. ECF No. 11-4 at 19; ECF No. 29 at 10. Trial in the Underlying Lawsuit was scheduled to begin in the State Court on October 26, 2015. ECF No. 25-1 at 9.

***2** On June 29, 2015, Insurers filed a Complaint for Declaratory Judgment in this Court alleging the following: (1) the claims in the Underlying Lawsuit were not for "property damage" or "bodily injury" caused by an "occurrence," or "personal injury" or "advertising injury" within the coverage of insurance policies issued by Insurers; and (2) coverage was precluded by one or more of the policies' exclusions. ECF No. 11-4 at 2. HNB filed a Counterclaim against Insurers on September 4, 2015 ("HNB's Counterclaim"), alleging bad faith and requesting declaratory judgment that HNB was entitled to a defense and potential indemnification from Insurers in connection with Safeway's claims in the Underlying Lawsuit (Insurers' Complaint for Declaratory Judgment and HNB's Counterclaim hereinafter collectively referred to as "the Federal Action"). ECF No. 14.

The parties in the Underlying Lawsuit appeared before this Court for a settlement conference on October 20, 2015. *See* ECF No. 21. No settlement was reached as to the Federal Action; however, Safeway agreed to settle the Underlying Lawsuit with HNB by taking an assignment of HNB's claims against Insurers and entering into a stipulated judgement in an amount that reasonably reflected HNB's exposure if the Underlying Lawsuit were to go to trial. *See* ECF No. 25-4 at 12. In exchange for the assignment and stipulated judgment, Safeway agreed that it would not pursue HNB for the judgment. *Id.* The settlement terms were memorialized in a Settlement and Mutual Release Agreement (the "Settlement Agreement") dated February 12, 2016. *See* ECF No. 25-3. The assignment clause of the Settlement Agreement ("Assignment Clause") assigns all of HNB's claims against Insurers to Safeway. *See* ECF No. 25-3 at 6. The State Court filed the Stipulated Judgment and Order on February 19, 2016 ("Stipulated Judgment"). *See* ECF No. 25-4.

Safeway subsequently filed the instant Motion, requesting that the Court grant Safeway leave to substitute and/or join Safeway as a party defendant and counterclaim plaintiff in the Federal Action based on the Assignment Clause. ECF No. 25 at 2. Safeway also requests that this Court grant Safeway leave to amend HNB's Counterclaim to add claims for breach of contract, reformation, and alternatively, for negligent misrepresentation and omission against Insurers, and to add claims for breach of contract, negligence, promissory estoppel, and breach of fiduciary duty against the Monarch Insurance Services, Inc., and Insurance Associates, Inc. (collectively the "Brokers").

DISCUSSION

I. Substitution or Joinder under the Federal Rules of Civil Procedure

A. Rule 25(c) Applies in the Instant Action.

Safeway seeks leave of this Court to substitute or join the instant action as a party defendant/counterclaim plaintiff pursuant to Rule 17(a) and Rule 25(c) of the Federal Rules of Civil Procedure. ECF No. 25-1 at 6. Safeway contends that HNB transferred its claims against Insurers pursuant to the Assignment Clause of the Settlement Agreement; thus, Safeway is the real party in interest in this action pursuant to Rule 17(a) and should be substituted or joined pursuant to Rule 25(c). ECF No. 25 at 4.

Rule 17(a) requires that an action "be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). Where all rights under a contract have been transferred, the assignee is the "real party in interest" pursuant to Rule 17(a) and may be substituted or joined in an action as the real party in interest. *Nw. Oil & Ref. Co. v. Honolulu Oil Corp.*, 195 F. Supp. 281, 287 (D. Mont. 1961). *See also* 6A Fed. Prac. & Proc. Civ. § 1545 (3d ed.) ("Under present law an assignment passes the title to the assignee so that the assignee is the owner of any claim arising from the chose and should be treated as the real party in interest under Rule 17(a)."). Under Rule 25(c),

the Court may substitute or join a party to an ongoing action where an original party to an action transfers an interest to that party after the action has already commenced. *Hilbrands*, 509 F.2d at 1323; *Kowalski v. Integral Seafood LLC*, No. CIV 05-00679 BMK, 2007 WL 1376378, at *3 (D. Haw. May 4, 2007). Accordingly, both Rule 17(a) and Rule 25(c) may apply where as here, a party assigned an interest to another party.

***3** Notwithstanding Rule 17(a)'s mandate that an action be prosecuted by the "real party in interest," Rule 17(a) controls when an interest is transferred before commencement of a suit. *Id.* When the transfer occurs during the pendency of the action, Rule 25(c), not Rule 17(a), applies to the determination of whether a transferee may be substituted or joined in an action. *See Hilbrands*, 509 F.2d at 1323 (holding that the district court erred in relying on Rule 17(a) because the transfer of interest occurred after the suit had commenced). Here, neither party disputes that the assignment occurred during the pendency of this action. Accordingly, the Court finds that Rule 25(c) applies in the instant action. Under Rule 25(c), the Court may permit Safeway to be substituted in the action as the new party in interest or may join Safeway with HNB as the Defendant/ Counterclaim Plaintiff.

B. The Court Orders Joinder Pursuant to Rule 25(c).

Insurers argue that under Hawaii law, an insurance policy's assignability is determined by its own terms. ECF No. 29 at 13 (citing HRS § 431:10-228); *Del Monte Fresh Produce (Hawaii), Inc. v. Fireman's Fund Ins. Co.*, 117 Haw. 357, 370, 183 P.3d 734, 747 (2007) ("*Del Monte*"). Insurers assert that the policies issued to HNB require that HNB obtain Insurers' consent to effectuate any transfer of HNB's rights and duties under the policies. *See* ECF No. 29 at 13-14. Insurers thus contend that substituting and/or joining Safeway to the instant action is improper because the Assignment Clause is invalid as a matter of law without Insurer's consent. ECF No. 29 at 16. The Court disagrees.

Under Hawaii law, a policy may indeed be assignable or not assignable, as provided by its terms. HRS § 431:10-228. In *Del Monte*, the Hawaii Supreme Court held that an assignment of certain policies through a Bill of Sale and Assumption Agreement was invalid because the policies at issue contained a no assignment clause that required the consent of the insurer to bind it to any assignment made by the named insured. *Del Monte*, 117 Haw. at 370, 183 P.3d at 747. The Court held that because the policies at issue were assigned without the insurers' consent, the transferee of the policies at issue was not an insured under the insurance policies; therefore, the insurer did not owe the transferee of the policies any duties to defend or indemnify. *Id.*

Del Monte is, however, distinguishable from the instant action. Here, HNB did not assign its policies to Safeway; it assigned all of its claims against Insurers and Brokers "in connection with and as a result of [Insurers'] refusal to make a reasonable settlement offer to settle Safeway's claims against HNB." ECF No. 25-3 at 6. Safeway neither purports to be the new owner of the policies nor does it assert that Insurers owe Safeway any duties to defend or indemnify.

The Court is unable to find any Hawaii cases prohibiting assignments of claims based on a no assignment clause. Furthermore, a great weight of authority indicates that Courts have interpreted no assignment clauses to prohibit only assignments of policy coverage, not assignments of an accrued cause of action. 2 Insurance Claims and Disputes § 9:15 (6th ed.) (listing cases). An overwhelming number of Courts have upheld the validity of assignments notwithstanding a no assignment clause in the policy for reasons similar to those alleged by Safeway and HNB, *i.e.*, Insurers refused to reasonably settle Safeway's claims against HNB. *See, e.g., Wood v. Preferred Contractors Ins. Co. Risk Retention Grp. LLC*, No. CV 14-128-M-DLC, 2015 WL 6830316, at *5 (D. Mont. Nov. 6, 2015) (holding that the transfer/assignment provision in the policy at issue, which purported to require the insurer's consent prior to any assignment, was ineffectual because of insured breach of the duty to defend); *Fluor Corp. v. Superior Court*, 354 P.3d 302, 325-26 (2015) (Cal. 2015) (providing an extensive list of cases in which Courts have voided consent clauses as applied to post loss assignment of rights to invoke liability insurance coverage); *Tilden-Coil Constructors, Inc. v. Landmark Am. Ins. Co.*, 721 F. Supp. 2d 1007, 1013 (W.D. Wash. 2010) ("Under Washington law, [w]hen an insurer refuses to settle a claim in a liability lawsuit, the insured may, without the insurer's consent, negotiate a settlement with the plaintiff and assign the coverage and bad faith claims to the plaintiff in exchange for a covenant not to execute against the insured.") (internal quotations omitted) (citation omitted) (alterations in original). Accordingly, without passing judgment on the validity of the assignment at issue in this case, the Court concludes that HNB's assignment was not per se invalid based on the no assignment clause.

***4** The Court declines to rule at this time on the legal validity of the assignment at issue because Rule 25(c) requires only

that an interest has been transferred. *See* 7C Fed. Prac. & Proc. Civ. § 1958 (3d ed.) ("[Rule 25(c)] applies to ordinary transfers and assignments[.]"). Answering the question of whether HNB has valid defenses to this assignment, or whether the assignment was invalid under Hawaii law, requires an intense factual and legal analysis, which the Court cannot resolve on the instant record. Substantial discovery appears to be needed by both sides in developing a complete record of what transpired and why. Notwithstanding the need for further discovery on the validity of the assignment, there is an alleged assignment, and the legal claims that flow from that assignment are all part of Safeway's proposed First Amended Counterclaim ("FACC"), discussed below. Accordingly, if the proposed FACC is permitted to go forward, the parties will be able to take full and complete discovery regarding the assignment—Safeway will be able to establish the validity of the assignment, and Insurers will be free to vigorously contest it. *See* ECF No. 25-7 at 19; Proposed FACC ¶ 79 (alleging that Safeway is a real party in interest, and by an assignment of claims from HNB to Safeway, Insurers are liable to Safeway for the damages HNB and Safeway suffered as a result of Insurers' breaches).

The Court emphasizes that permitting a party to join an action pursuant to Rule 25(c) does not create new relationships among parties to a suit. *Educational Credit Management Corporation v. Bernal*, 207 F.3d 595 (9th Cir. 2000). "The most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred." *Id.* (citation omitted). Rule 25(c) "is designed to allow the action to continue unabated when an interest in the lawsuit changes hands." *Id.* (citation omitted). Thus, Insurers and HNB may continue litigating the claims in the Federal Action and any subsequent judgment would be binding on Safeway even if Safeway is not a named party. *See Id.* ("The action may be continued by or against the original party, and the judgment will be binding on his successor in interest even though he is not named.").

When a Court determines, however, that an order of joinder may facilitate the conduct of the litigation, joining the transferee to an action under Rule 25(c) is proper. *See Id.* ("An order of joinder is merely a discretionary determination by the trial court that the transferee's presence would facilitate the conduct of the litigation."); *Hyatt Chalet Motels, Inc. v. Salem Bldg. & Const. Trades Council*, 298 F. Supp. 699, 704 (D. Or. 1968) ("[Rule 25(c)] gives the court a generous discretion in connection with the continuance of actions where there has been a transfer of an interest") (citing *Sun-Maid Raisin Growers of California v. California Packing Corp.*, 273 F.2d 282 (9th Cir. 1959); *McComb v. Row River Lumber Co.*, 177 F.2d 129 (9th Cir. 1949)).

The Court finds that there are sufficient indicia of a transfer of interest from HNB to Safeway to join Safeway under Rule 25(c) and that such joinder would facilitate the conduct of the litigation based on HNB's assignment of claims to Safeway. Accordingly, the Court GRANTS Safeway's Motion to the extent Safeway requests to be joined with HNB pursuant to Rule 25(c). The Court orders Safeway to be joined with HNB as Defendants/Counterclaim Plaintiffs in this action.

II. Leave to Amend FACC

Safeway requests leave to file an amended counterclaim that omits the previous pled claim for declaratory judgment and adds the following three additional causes of action as further described in its proposed FACC: breach of contract, negligent misrepresentation or omission, and reformation. ECF No. 25-1 at 16. Safeway asserts that each of the additional claims relate directly to HNB's allegations regarding Insurers' wrongful denial of coverage and defense of HNB; thus, the proposed causes of action are compulsory counterclaims. *Id.* at 17. In addition, Safeway seeks to add Brokers to this action as additional counterclaim defendants, and to add the following claims against Brokers as further described in its proposed FACC: breach of contract, negligence, promissory estoppel, and breach of fiduciary duty. ECF No. 25-1 at 18-19.

***5** Rule 15(a)(2) of the Federal Rules of Civil Procedure allows a party to amend its pleading with leave of court. Although the decision to grant leave to amend is within the discretion of the trial court, the court should be guided by the underlying purpose of Rule 15(a), which is to "facilitate decisions on the merits, rather than on technicalities or pleadings." *James v. Pliler*, 269 F.3d 1124, 1126 (9th Cir. 2001). "If the facts or circumstances relied upon by a plaintiff may be a proper subject of relief, [the plaintiff] ought to be afforded an opportunity to test [their] claims on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Accordingly, the Court should freely give leave when justice so requires. Fed. R. Civ. P. 15(a)(2). This policy is "to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). Unless amendment would cause prejudice to the opposing party, is sought in bad faith, is futile, or creates undue delay, leave to amend should be granted. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992).

Insurers oppose Safeway's request to amend the complaint, arguing that such amendment would prejudice Insurers and that the additional claims against Insurers are futile. For the reasons discussed below, the Court finds that the proposed additional claims against Insurers are not futile, and that permitting Safeway to amend the complaint would not prejudice Insurers.

A. Futility of the Amendment

"Futility of amendment can, by itself, justify the denial of a motion for leave to amend." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). "A proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff–Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). Here, the Court finds that the three additional claims proposed in the FACC are not futile.

First, Safeway alleges that Insurers breached their duties of good faith and fair dealing when Insurers asserted the right not to defend and/or indemnify HNB, and when Insurers failed to participate in good faith settlement negotiations. *See* ECF No. 25-7 at 19. Second, Safeway alleges that Insurers supplied false information regarding the policies issued to HNB, and that they failed to disclose material information regarding the policies. *Id.* at 23. Finally, Safeway alleges that HNB and Insurer mutually intended at the time Insurers issued the policies that the policies would provide coverage for property damage claims arising out of construction related product defects and related claims, such as those alleged in the Underlying Lawsuit. *Id.* at 27.

The Court finds that Safeway has alleged sufficient facts that, if proven, would constitute valid claims for breach of contract, negligent misrepresentation and omission, and reformation. Accordingly, the Court finds that the additional claims proposed in Safeway's FACC are not futile.

B. Prejudice to Insurers

Consideration of prejudice to the opposing party carries the greatest weight in a court's determination of whether to grant leave to amend. *Eminence Capital, LLC*, 316 F.3d at 1052. "The party opposing amendment bears the burden of showing prejudice." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987).

The arguments asserted by Insurers in their Opposition as to why they would be prejudiced by the proposed amendment appear to be centered solely on the premise that Insurers were not bound by the Stipulated Judgment pursuant to *McLellan v. Atchison Ins. Agency, Inc.*, 81 Haw. 62, 69, 912 P.2d 559, 566 (App. 1996). *See* ECF No. 29 at 20. Insurers argue that because Insurers were not a party to the Underlying Lawsuit or in privity with any of the parties in the Underlying Lawsuit, Insurers are not bound by the Stipulated Judgment as a matter of law; thus, Safeway's claims against HNB would have to actually be adjudicated. *Id.* at 20-21. Insurers argue that Safeway's pursuit of those claims would require a trial within a trial, involving issues largely distinct from coverage, and would significantly complicate, prolong, and delay the resolution of the instant declaratory judgment action. *Id.* at 21. Insurers argue that they would incur significant expense to prepare and mount a defense to Safeway's claims against HNB in the Underlying Lawsuit, which would duplicate much of the expense Insurers already incurred in defending HNB over the last six-year period. *Id.*

***6** The Court disagrees that Insurers were not in privity with any of the parties in the Underlying Lawsuit such that Insurers would not be bound by the terms of the Stipulated Judgment pursuant to *McLellan.* In *McLellan*, the insured was involved in three car accidents with his fiancée/passenger. 81 Haw. at 63, 912 P.2d at 560. The fiancée filed suit against the insured for all three of the accidents. *Id.* The insured's insurer proceeded to provide the insured with a defense without any reservation of rights and settled claims related to two of the three accidents; however, the insurer elected to go to trial on claims arising from the remaining accident. *Id.* at 64, 912 P.2d at 561. Before trial began, the insured discharged the attorney provided to him by the insurer, unilaterally entered into a stipulated judgment with his fiancée, and assigned to his fiancée all his claims against the insurer and the party who had sold the insurance policy to the insured on behalf of the insurer (the "Seller"). *Id.* The fiancée subsequently sued the insurer and Seller. *Id.*

The Court held that the Seller was not in privity with any of the parties in the underlying action involving the fiancée and the insured because the insured had discharged the attorney provided to him by the insurer before entering into a stipulated judgment with his fiancée. *Id.* at 69, 912 P.2d at 566. The Court explained that because the insurer was not in privity with any party in the underlying lawsuit, the Seller equally was not involved through privies in that action; thus, no privity existed between the Seller and the insured such that the Seller was bound by the stipulated judgment. *Id.*

McLellan is distinguishable from the instant case. HNB did not discharge counsel provided to it by Insurers. Rather, HNB alleges that, with the assistance of its insurance defense counsel, it assigned its claims against Insurers to Safeway because Insurers refused to make a reasonable settlement offer to settle Safeway's claims against HNB. *See* ECF No. 25-3 at 6. Insurers were at all times in privity with HNB. Although Insurers were actively trying to obtain a court order relieving them of any obligation to defend or indemnify, they had not yet obtained such an order at the time the parties entered into the Stipulated Judgment. Thus, *McLellan* is not persuasive under these facts.

Moreover, Safeway's proposed amended claims for breach of contract, negligent misrepresentation and omission, and reformation, are not based on the Stipulated Judgment. Rather, these claims arise from HNB's purchase of the policy and Insurers' alleged actions and inactions in their defense of the Underlying Lawsuit. Accordingly, the Court finds that Insurers have failed to meet their burden of showing prejudice.

The Court further finds that there is no evidence that the proposed amendment is sought in bad faith or creates undue delay. "Absent prejudice, or a strong showing of bad faith, futility, or undue delay, there exists a presumption under Rule 15(a) in favor of granting leave to amend." *Eminence Capital, LLC*, 316 F.3d at 1052. In light of the Court's above finding that joining Safeway to this action as a defendant/counterclaim plaintiff is proper, the Court finds the presumption in favor of granting leave to amend should be applied to Safeway. Safeway should be given leave to amend the FACC to reflect its addition as a defendant/counterclaim plaintiff. *See Bohn v. McManaman*, No. CIV. 10-00680 DAE, 2011 WL 5190899, at *4 (D. Haw. Oct. 11, 2011), *adopted by*, No. CIV. 10-00680-DAE, 2011 WL 5170303 (D. Haw. Oct. 28, 2011) ("In light of the Court's above finding that intervention and appointment of Booth as substitute class representative are appropriate, the Court further finds that Booth should be given leave to amend the Complaint to reflect her addition as lead plaintiff."). The Court orders Safeway to file and serve its Amended Counterclaim in the form of Exhibit "E" to the Motion within two (2) weeks after the date of this Order.

C. Scheduling

***7** Given the Court's ruling, which will result in new claims and new parties (including Brokers), the Court hereby vacates the trial date and any related pretrial deadlines. The Court will set a further Rule 16 Scheduling Conference after Safeway has filed its Amended Counterclaim and all new parties have entered their appearances in this action.

CONCLUSION

In accordance with the foregoing, the Court GRANTS Petitioner And Real Party In Interest Safeway, Inc.'s Motion for Leave To (1) Substitute and/or Join Safeway Inc. as Defendant/ Counterclaim Plaintiff, and for a Change of Caption; and (2) File a First Amended Counterclaim Against Plaintiff/ Counterclaim Defendants American Automobile Insurance Company and National Surety Corporation and Additional Counterclaim Defendants Douglas Moore, Monarch Insurance Services, Inc. and Insurance Associates, Inc. filed on February 26, 2016, as follows:

(1) The Court GRANTS Petitioner And Real Party In Interest Safeway, Inc.'s Motion for Leave to Join Safeway Inc. as Defendant/Counterclaim Plaintiff, and for a Change of Caption;

(2) The Court GRANTS Petitioner And Real Party In Interest Safeway, Inc.'s Motion for Leave to File a First Amended Counterclaim Against Plaintiff/Counterclaim Defendants American Automobile Insurance Company and National Surety Corporation and Additional Counterclaim Defendants Douglas Moore, Monarch Insurance Services, Inc. and Insurance Associates, Inc., in the form of Exhibit "E" to the Motion within two (2) weeks after the date of this Order; and

(3) The Court vacates the trial date and any related pretrial deadlines.

IT IS SO ORDERED.

All Citations

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