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APPENDIX A

Case: 17-55899 10/04/2018 DktEntry: 46

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES G. KINNEY
Plaintiff-Appellant,

v.

No. 17-55899
D.C. No. 8:16-cv-0796-RGK
Central Dist. of Cal. (LA)

THEE ARCH BAY COMMUNITY SERVICES DISTRICT; et al.,
Defendants-Appellees.

FILED
OCT 4 2018
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ORDER

Before: SILVERMAN, BEA, and WATFORD, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Kinney's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 45) are denied.

Kinney's request for judicial notice (Docket Entry No. 45) is denied.

No further filings will be entertained in this closed case.

APPENDIX B

Case: 17-55899 05/23/2018 DktEntry: 44-1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES G. KINNEY
Plaintiff-Appellant,

v.

No. 17-55899
D.C. No. 8:16-cv-0796-RGK
Central Dist. of Cal. (LA)

THEE ARCH BAY COMMUNITY SERVICES DISTRICT; et al.,
Defendants-Appellees.

FILED
MAY 23 2018
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MEMORANDUM *

Appeals from the United States District Court for the Central District of California R. Gary Klausner, District Judge, Presiding
Submitted May 15, 2018**
Before: SILVERMAN, BEA, and WATFORD, Circuit Judges.

Charles G. Kinney appeals pro se from the district court's judgment dismissing his action

alleging violations of the Clean Water Act ("CWA"), 33 U.S.C. § 1365. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for lack of subject matter jurisdiction due to insufficient notice under the CWA. *Washington Trout v. McCain Foods, Inc.*, 45 F.3d 1351, 1353 (9th Cir. 1995). We affirm.

The district court properly determined that it lacked subject matter jurisdiction over Kinney's action because Kinney failed to provide defendants with adequate notice of the alleged CWA violations. *See* 40 C.F.R. § 135.3 (notice under CWA must provide sufficient information to permit recipient to identify violation); *Washington Trout*, 45 F.3d at 1354-55 (affirming dismissal of CWA action for lack of subject matter jurisdiction where notice was "insufficient as required by the regulations promulgated under the CWA"); *see also Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989) (stating that the Declaratory Judgment Act "only creates a remedy and is not an independent basis for jurisdiction").

The district court did not abuse its discretion by dismissing Kinney's claims against defendant Three Arch Bay Community Services District ("TAB") because Kinney failed to effectuate timely service of the summons and complaint on TAB or to show good cause for this failure. *See* Fed. R. Civ. P. 4(m) (requiring service within 90 days after the complaint is filed); *In re Sheehan*, 253 F.3d 507, 511-13 (9th Cir. 2001) (setting forth standard of review and discussing district court's broad discretion to dismiss the action without prejudice). For this same reason,

the district court did not abuse its discretion by denying Kinney's motion for entry of default against TAB. *See* Fed. R. Civ. P. 55(a) (entry of default); *Aldabe v. Aldabe*, 616 F.2d 1089, 1092-93 (9th Cir. 1980) (setting forth standard of review).

The district court did not abuse its discretion by dismissing the complaint without leave to amend because amendment would be futile. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (setting forth standard of review and explaining that dismissal without leave to amend is proper when amendment would be futile).

We reject Kinney's contention that the district court erred by assigning this case to Judge Klausner in the Western Division of the U.S. District Court for the Central District of California.

We do not consider arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

The Chaldus' motion to take judicial notice (Docket Entry No. 14) is granted.

AFFIRMED.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Kinney's request for oral argument, set forth in the opening brief, is denied.

APPENDIX C

Case: 8:16-cv-00796 06/15/2017 DktEntry: 89

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIF.

CHARLES G. KINNEY
Plaintiff,
v. D.C. No. 8:16-cv-0796-RGK
Central Dist. of Cal. (LA)

THEE ARCH BAY COMMUNITY SERVICES DISTRICT; et al.,
Defendants.

CIVIL MINUTES - GENERAL
Case No. **SA CV 16-00796 RGK (JCx)**
Date June 15, 2017
Title ***CHARLES KINNEY v. THREE ARCH BAY COMMUNITY SERVICES DISTRICT, et al***
Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE
Sharon L. Williams (Not Present)
Not Reported N/A
Deputy Clerk Court Reporter / Recorder Tape No.
Attorneys Present for Plaintiffs: Not Present
Attorneys Present for Defendants: Not Present

Proceedings: (IN CHAMBERS) Order Re: Motions for Summary Judgment (DE 50 and DE 52)

I. INTRODUCTION

On July 10, 2016, Charles Kinney filed a First Amended Complaint ("FAC") against Three Arch Bay Community Services District ("TAB"), Charles Viviani ("Viviani"), and John and Lynn Chaldu ("Chaldus"). The FAC asserts three claims arising from alleged violations of the Clean Water Act ("CWA" or the "Act").

Presently before the Court are Chaldus' and Viviani's Motions for Summary Judgment. For the reasons before, the Court **DISMISSES** the matter for lack of subject-matter jurisdiction and **DENIES** the Motions as moot.

II. FACTUAL BACKGROUND

The following facts are undisputed or from judicially noticed materials.

Kinney owns a real property on Virginia Way in Laguna Beach, California (the "City"). Chaldus and Viviani own properties across the street from Kinney. TAB is a community services district for the Three Arch Bay subdivision in the City.

TAB operates a municipal-separate-storm-sewer system ("MS4") under a National-Pollutant-Discharge-Elimination-System ("NPDES") permit. TAB's MS4 discharges mud, silt, sand, debris, sediment, and other pollutants along with storm-water runoff from its land. More severe during rain storms, part of the runoff passes downhill through Kinney's property, across Virginia Way, and eventually into the Pacific Ocean.

Kinney accuses Chaldus and Viviani of impeding the runoff on their properties, thereby increasing the amount of pollutant deposits on Kinney's property. On December 13, 2011, Kinney sued Chaldus and Viviani in state court

asserting nuisance and trespass claims. (State Compl. paras. 40-50, in Pl.'s Opp'n Chadlus' Summ. J. Mot. "Pl.'s Opp'n", ECF No. 68, fn. 1). In 2015, Kinney sent letters to the California Regional Water Quality Control Board ("CRWQCB") and the Environmental Protection Agency (EPA) regarding the pollutant discharge in the Pacific Ocean. (*See* CRWQCB and EPA letters, in Pl.'s Opp'n 53-57).

In the FAC, Kinney alleges that Chaldus and Viviani "discharged pollutants into the [Pacific Ocean] without a NPDES permit and/or [violating] the applicable NPDES permit..." thereby violating the CWA. (FAC para. 12, ECF No. 14; s*ee also* FAC paras. 2, 23, 25, 27).

III. JUDICIAL STANDARD

A matter must be dismissed for lack of subject-matter jurisdiction. See Fed.R.Civ.P. 12(b)(1). "A district court may hear evidence and make findings of fact necessary to rule on the subject-matter-jurisdiction question prior to trial..." *Rosales v. United States*, 824 F.2d 799, 803 (9th Cir. 1987). Where "the jurisdictional issue and substantive claims are so intertwined that resol[ving] the jurisdictional question is dependent on factual issues going to the merits, the district court should employ the standard applicable to a motion for summary judgment." *Autery v. United States*, 424 F.3d 944, 956 (9th Cir. 2005). Under this standard, the court can dismiss the matter "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Rosales*, 824 F.2d at 803. A court may make jurisdictional findings on parties' evidence such as declarations,

deposition testimony, and other evidence. *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 268 (9th Cir. 1995).

IV. DISCUSSION

Chaldus and Viviani contend that Kinney's FAC fails for thee reasons: (1) statute of limitations; (2) deficient CWA notices; and (3) nonviolation of the CWA. Although the arguments appear well-reasoned, the Court will only address the deficient-notice argument because of its jurisdictional effect.

The CWA proscribes water pollution and prescribes a citizen-enforcement scheme. It "prohibit[s] the discharge of any pollutant from a point source into navigable water of the United State without an NPDES permit." *Natural Res. Def. Council v. U.S. E.P.A.*, 542 F.3d 1235, 1238 (9th Cir. 2008). It allows private citizens to bring a civil suit "against any person... who is alleged to [violate] (A) an effluent standard of limitation under [the Act] or (B) an order issued by the Administrator [of the EPA] or a State with respect to a standard or limitation." 33 U.S.C. Sec 1365(a)(1). Under CWA's notice requirement, however, no citizen suit may be brought until "sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order." 33 U.S.C. Sec. 1365(b)(1)(A). In the Ninth Circuit, failure to comply with the notice requirement deprives the courts of subject-matter jurisdiction. *Wash. Trout v. McCain Foods, Inc.*, 45 F.3d 1351, 1353-54 (9th Cir. 1995);

Ctr. for Biological Diversity v. Marina Point Dev. Co., 566 F.3d 794, 800 (9th Cir. 2009).

Kinney fails to adequately notify Chaldus and Viviani as well as the relevant government entities.

A. Inadequate Notice to Chaldus and Viviani

The CWA specifies that "[n]otice... shall be given in such a manner as the [EPA] shall prescribe by regulation." 33 U.S.C. Sec. 1365(b). Under EPA regulation, notice regarding an alleged violation of a standard, limitation, or order "shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated..." 40 C.F.R. Sec. 135.3(a). Although the notice "does not need to describe every detail of every violation, it need[s to] provide enough information [so] that the defendant can identify and correct the problem." *San Francisco BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1155 (9th Cir. 2002). In other words, "the notice must be sufficiently detailed to allow the alleged violator to know what it is doing wrong so that it will know what corrective actions will prevent a lawsuit." *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 951 (9th Cir. 2002); *San Francisco BayKeeper*, 309 F.3d at 1155. Notice must be given for each distinct type of violation. *Cal. Sportfishing Prot. Alliance v. City of W. Sacramento*, 905 F.Supp. 792, 799 (E.D. Cal. 1995).

Here, erroneously asserts that he gave Chaldus and Viviani notice through his state-action complaint. (Pl.'s Opp'n 6; Pl.'s Opp'n Viviani's Summ. J. Mot. 6, ECF No. 67.) But that

complaint does not suffice as a CWA notice. Although the complaint mentions that storm-water runoff passes through Chaldus' and Viviani's properties on its way to the ocean, its thrust and the basis of its claims are flooding on Virginia Way and flooding and sediment deposits on Kinney's property. (*Compare* State Compl. para. 10, *with* State Compl. paras. 15, 20, 25, 26, 32.) The state-action complaint does not alleged any CWA standard, limitation, or order that Chaldus or Viviani violated. As such, it did not permit them to identify and correct any real or potential CWA problem. Indeed, the problem and the corrective action Kinney identified in the state-action complaint may lead to, rather than cure, CWA violations. According to the complaint, the root problem is "those surface waters *could not travel* westward in [a] path *toward the ocean*." (Id. para. 48 (emphases added).) The goal of corrective action identified therein is to stop the flooding and mud problems on Virginia Way and on Kinney's property. (*Id.* paras. 21, 23, 27, 34, 36). Accordingly, a reasonable corrective action that may address the state-action complaint is to open up a westward channel for surface waters to travel toward the ocean, thereby stopping the flooding and mud problems. This may dump more pollutants into the Pacific Ocean, or at least may do nothing to prevent "the discharge of ... pollutant[s] from a point source into [the Pacific Ocean] without an NPDES permit." *Natural Res. Def. Council,* 542 F.3d at 1238; *see also* 33 U.S.C. Sec. 1362(14) (such a channel would meet the definition of "point source"). Thus, the state-

action complaint does not provide adequate CWA notice.

In opposition, Kinney cites three Ninth-Circuit cases to argue adequate notice. (Pl.'s Opp'n 4, 6.) But these cases do not support his argument. *See Bosma Dairy*, 305 F.3d at 948 ("[Plaintiff] sent [defendant] a 60-day notice of intent to sue [defendant] under the citizen suit provision of the federal *CWA*.") (emphasis added); *San Francisco BayKeeper*, 309 F.3d at 1156 ("[Plaintiff] notified [defendant] of its intention to file suit *for violati[ng] the Clean Water Act*." (emphasis added); *Waterkeepers N. Cal. v. AG Indus. Mfg., Inc.*, 375 F.3d 913, 915 (9th Cir. 2004) (same). Indeed, "citizen plaintiffs [are required] to notify alleged violators of their intent to sue" under the Act. *Waterkeepers*, 375 F.3d at 916; see also 40 C.R.R. Sec. 135.2(a) (requiring notice of intent to file suit under the Act). Kinney's state-action complaint, however, does not refer to the CWA, much less his intent to sue thereunder.

Thus, Kinney failed to provide adequate CWA notice to Chaldus and Viviani; his FAC fails for lack of jurisdiction.

B. <u>Inadequate Notice to EPA and California</u>

Additionally, Kinney also failed to give adequate notice to EPA and the State of California.

Under EPA regulation, notice regarding an alleged CWA violation "shall include.. the person or person responsible for the alleged violation..." 40 C.F.R. Sec. 135.3(a). Furthermore, "[a] *copy* of the notice shall be mailed to the EPA and the State. 40 C.F.R. Sec. 135.2(a)(1) (emphasis added).

Kinney asserts that he notified the EPA and, through CRWQCG, the State of California, of Chaldu's and Viviani's violations. But these notices have two deficiencies. First they named TAB and the City, not Chaldus and Viviani, as violators. (*See* Beggs Decl. Ex. 2 at 30:3-20, ECF No. 50-4; *see also* CRWQCB and EPA letters, Pl.'s Opp'n 53-57 (letters acknowledging allegation sof CWA violations by TAB and the City without mentioning Chaldus and Viviani).) Second they evidently were not copies of the state-court complaint that Kinney asserts to be notices of the Chaldus and Viviani.

Thus, Kinney's notices to the government entities do not suffice as CWA notices; his FAC fails for this reason also.

V. EVIDENTIARY OBJECTIONS

To the extent the parties object to any evidence that the Court relies on in this Order, those objections are overruled.

VI. CONCLUSION

Accordingly, the Court **DISMISSES** the matter for lack of subject-matter jurisdiction and **DENIES** Chaldus' and Viviani's Motions for Summary Judgment as moot. See Omeluk, 52 F.3d at 268.

IT IS SO ORDERED

_____ : _____

Initials of Preparer _____

Fn. 1:
Kinney improperly submitted the state-court complaint and other exhibits by appending them to his Opposition. (*See* Standing Order Regarding Newly Assigned Cases para. 6.) The state-court complaint starts on page 15 of the file.

APPENDIX D

Case: 8:16-cv-00796 05/22/2017 DktEntry: 69

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIF.

CHARLES G. KINNEY
Plaintiff,
v. D.C. No. 8:16-cv-0796-RGK
Central Dist. of Cal. (LA)

THEE ARCH BAY COMMUNITY SERVICES DISTRICT; et al.,
Defendants.

CIVIL MINUTES - GENERAL
Case No. **SA CV 16-00796 RGK (JCx)**
Date May 22, 2017
Title ***CHARLES KINNEY v. THREE ARCH BAY COMMUNITY SERVICES DISTRICT, et al***
Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE
Sharon L. Williams (Not Present)
Not Reported N/A
Deputy Clerk Court Reporter / Recorder Tape No.
Attorneys Present for Plaintiffs: Not Present
Attorneys Present for Defendants: Not Present

Proceedings: (IN CHAMBERS) Order re Defendant's Motion to Dismiss (DE 38)

On April 27, 2016, Plaintiff filed his Complaint against Three Arch Bay Community

Services District ("TAB") and three individual defendants alleging violations of the Clean Water Act. On July 10, 2016, Plaintiff filed a First Amended Complaint against the same parties. On September 22, 2016, Plaintiff filed a Proof of Service indicating that TAB was served on August 12, 2016. According to the Proof of Service, the summons and complaint were left with a building security guard. On September 22, 2016, Plaintiff filed an ex parte application for the Clerk to enter default against TAB, as TAB had not filed an answer. On September 27, 2016, the Court denied Plaintiff's application for default on the ground that leaving the summons with a security guard at TAB's place of business did not constitute an adequate method of service. On November 5, 2016, Plaintiff filed an ex parte application for reconsideration of the September 27 order. On November 10, 2016, the Court denied the application for reconsideration.

On November 21, 2016, the Court held a Scheduling Conference and set January 10, 2017, as the last day to amend pleadings. Court records show that no amended pleadings were filed. On March 14, 2017, Plaintiff filed a Proof of Service indicating that the summons and complaint had been served on TAB on March 14, 2017.

TAB now seeks dismissal of the claims against it for insufficient service of process. For the following reasons, the Court grants TAB's motion.

Federal Rule of Civil Procedure 4(m) provides that if a defendant is not served within 90 days after the complaint is filed, and there is no good cause for that failure, a court must either

dismiss the action without prejudice against the defendant or order that service be made within a specified time.

As detailed above, court records show that Plaintiff filed the original complaint on April 27, 2016. Although Plaintiff filed an amended complaint on July 10, 2016, such filing does not restart or otherwise toll the 90-day service period. *See Bolden v. City of Topeka, Kan.*, 441 F.3d 1129, 1148 (10th Cir. 2006); *see also* 4B Wright & Miller, *Federal Practice and Procedure: Civil 3d* §1137, at 377 (2002). Therefore, under Rule 4(m), Plaintiff was required to serve TAB no later than July 26, 2016. Plaintiff attempted to serve TAB on August 12, 2016. The Court found this service ineffective because the summons was left with the building security guard. The Court notes that notwithstanding the defective method of service, the date of service was still late by more two weeks. Plaintiff again attempted service on March 14, 2017, more than seven months after the deadline passed.

Based on the foregoing, the Court **grants** TAB's motion to dismiss pursuant to Rule 4(m) and Rules 12(b)(4) and (5). The Court **dismisses without prejudice** all claims asserted against TAB for insufficient service of process. Fn. 1

IT IS SO ORDERED.

_____ : _____

Initials of Preparer _____

Fn. 1 The Court will not dismiss the action against TAB with prejudice, as Plaintiff's failure to effect timely service of process does not rise to the level of lack of prosecution.