

1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 OAKLAND DIVISION
4

5 NEWPORT BUILDERS, INC., a Nevada
6 corporation,

7 Plaintiff,

8 vs.

9 NORTH BAY CONSTRUCTION, INC., a
10 California corporation,

11 Defendant.

Case No: C 09-0184 SBA

**ORDER GRANTING DEFENDANT'S
MOTION FOR ORDER ALLOWING
THE FILING OF: AMENDED
ANSWER AND COUNTERCLAIM**

[Docket 93]

12 The instant diversity jurisdiction action arises from a business dispute between former
13 partners, Plaintiff, Newport Builders, Inc. (Plaintiff), and Defendant, North Bay Construction,
14 Inc. (Defendant or North Bay). See 28 U.S.C. § 1332. The parties are presently before the
15 Court on Defendant's Motion for Order Allowing the Filing of: Amended Answer and
16 Counterclaim. Having read and considered the papers filed in connection with this matter, and
17 being fully informed, the Court hereby GRANTS the motion for the reasons set forth below.
18 The Court, in its discretion, finds this matter suitable for resolution without oral argument. See
19 Fed.R.Civ.P. 78(b).

20 **I. BACKGROUND**

21 This case arises from an *excessively overlitigated* dispute concerning the construction of
22 an 800-acre residential development known as "Fountainview," located in Santa Rosa,
23 California. The development was owned by an investment partnership known as Fountainview
24 No. 3 Investors (Fountainview Investors). Fountainview Investors was organized as a limited
25 partnership, with Newport Builders LP as its general partner. Newport Builders LP is a limited
26 partnership in which Plaintiff is the general partner and Defendant is the limited partner.
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1 On January 14, 2009, Plaintiff filed the instant action against North Bay, and
2 subsequently filed a First Amended Complaint on February 9, 2009, and a Second Amended
3 Complaint (SAC) on September 29, 2009. The SAC alleges six state law causes of action for:
4 (1) Breach of Partnership Agreement; (2) Breach of the Implied Covenant of Good Faith and
5 Fair Dealing; (3) Breach of Oral Contract; (4) Intentional Interference with Prospective
6 Economic Advantage; (5) Breach of Fiduciary Duty; (6) Disassociation of North Bay from
7 Newport Builders LP; and (6) Dissolution and Winding Up of Newport Builders LP. (Docket
8 76.) On October 9, 2009, Defendant filed its Answer and Counterclaim in response to the
9 SAC. (Docket 77.) The Counterclaim named Plaintiff and Gene Lenzi (Lenzi), who allegedly
10 is in control of Plaintiff, as counter-defendants.

11 On April 9, 2009, shortly after commencing this action, Plaintiff filed a separate state
12 court action against Defendant alleging the same claims at issue in this case. See Newport
13 Builders, Inc. v. North Bay Constr. Inc., San Francisco County Super. Ct., Case No. CGC 09-
14 487006; Senneff Decl. Ex. B. Defendant sought an extension of time to respond to the new
15 complaint. Plaintiff refused to stipulate to an extension, and sought the entry of default against
16 Defendant. Senneff Decl. ¶ 4. The state court denied the request for default, and granted
17 Defendant an extension of time to file its responsive pleading. In the meantime, because of
18 purported difficulties in serving Lenzi with the Counterclaim in the federal action, Defendant
19 opted to dismiss its Counterclaim without prejudice, and instead, reassert those claims in the
20 state court action. Senneff Decl. ¶ 4. Defendant filed a notice of voluntary dismissal of its
21 Counterclaim on November 5, 2009. (Docket 89.)

22 Shortly after Defendant dismissed its federal Counterclaim, Plaintiff dismissed all of its
23 claims against Defendant in the state court action. As a result, Defendant requested that
24 Plaintiff stipulate to allow Defendant to reassert its previously dismissed Counterclaim (only as
25 to Plaintiff) in this action. Senneff Decl. Ex. F. Plaintiff expressed no concern regarding the
26 proposed amendment to the Answer, but apparently took exception to the Counterclaim. Id.
27 ¶ 4. Unable to resolve the dispute, Defendant now moves the Court for leave to file an
28 amended Answer and Counterclaim.

1 **II. LEGAL STANDARD**

2 Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend a pleading should
3 be “freely given when justice so requires.” Fed. R. Civ. P. 15(a)(2); Moss v. United States
4 Secret Serv., 572 F.3d 962, 972 (9th Cir. 2009). Rule 15 “is to be applied with extreme
5 liberality.” Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003) (per
6 curiam) (internal quotation marks omitted). The decision to grant or deny a request for leave to
7 amend rests in the discretion of the trial court. See California v. Neville Chem. Co., 358 F.3d
8 661, 673 (9th Cir. 2004).

9 The party opposing leave to amend carries the burden of showing why leave should not
10 be granted. DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 187 (9th Cir. 1987). In assessing
11 whether to grant leave to amend, the Court should consider factors such as “the presence or
12 absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by
13 previous amendments, undue prejudice to the opposing party and futility of the proposed
14 amendment.” Moore v. Kayport Package Exp., 885 F.2d 531, 538 (9th Cir. 1989) (citing
15 Foman v. Davis, 371 U.S. 178, 182 (1962)). Of these factors, prejudice to the opposing party
16 is the most important. Eminence Capital, 316 F.3d at 1051. “Absent prejudice, or a strong
17 showing of any of the remaining Foman factors, there exists a presumption under Rule 15(a) in
18 favor of granting leave to amend.” Id.

19 An analogous standard applies to motions to add a counterclaim. Rule 13(f) states that
20 “[t]he court may permit a party to amend a pleading to add a counterclaim if it was omitted
21 through oversight, inadvertence, or excusable neglect or if justice so requires.” Fed.R.Civ.P
22 13(f). The same factors that are used to assess the propriety of granting leave to amend a
23 pleading also apply to amendments to pleadings that assert counterclaims. See Nunes v.
24 Ashcroft, 375 F.3d 805, 808 (9th Cir. 2004); Hip Hop Beverage Corp. v. Ric Representacoes
25 Importacao E Comercio, Ltd., 220 F.R.D. 614, 620 (C.D. Cal. 2003) (“courts presented with
26 motions for leave to amend a pleading to add an omitted counterclaim generally adhere[] to
27 the liberal amendment policy of Rule 15 in deciding whether to grant the requested leave.”)
28 (internal quotation marks omitted)).

1 **III. DISCUSSION**

2 **A. AMENDMENT OF ANSWER**

3 Defendant seeks to amend its Answer to include a request in its prayer for relief for
4 dissolution of the limited partnership or an accounting. Plaintiff has expressed no opposition to
5 this proposed amendment. Given the extreme liberality of Rule 15, coupled with Plaintiff’s
6 lack of opposition, the Court grants Defendant leave to amend to file an amended Answer.

7 **B. PROPOSED COUNTERCLAIM**

8 Defendant’s proposed Counterclaim alleges two causes of action against Defendant for:
9 (1) Dissolution of Newport Builders LP and (2) Accounting. Defendant alleges that under the
10 terms of the Newport Builders LP Partnership Agreement, Newport Builders LP should already
11 have wound up its business and dissolved, and that its assets should have been distributed to
12 Defendant, among others. The Counterclaim further alleges that Plaintiff, as general partner of
13 Newport Builders LP, is depleting the partnership’s assets by pursuing unnecessary and
14 duplicative litigation in state and federal courts. *Id.* Defendant seeks the dissolution of
15 Newport Builders LP as well as an accounting to determine what assets have been expended
16 and what assets remain.

17 Without citation to any *relevant* authority, Plaintiff characterizes Defendant’s
18 Counterclaim as a claim for “waste” of partnership assets, and argues that such a claim is not
19 ripe until the pending state and federal court litigation is concluded. Pl.’s Opp’n at 6-10. This
20 contention lacks merit. Defendant merely seeks a “decree of dissolution” of the partnership
21 and an accounting to ascertain the partnership’s assets. Senneff Decl. Ex. A ¶¶ 7, 10. Thus, to
22 the extent the partnership is dissolved, its assets will be liquidated and distributed in
23 accordance with each partner’s share, as determined by an accounting. See Hooper v. Barranti,
24 81 Cal.App.2d 570, 578-79 (1947).¹ Notably, Plaintiff cites no authority to support its
25 contention that these equitable claims are dependent on the resolution of pending litigation.
26 Nor has Plaintiff articulated any particular prejudice in allowing the proposed Counterclaim.

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28 ¹ Whether Defendant is entitled to any *additional* relief is not before the Court and is not
addressed in this Order.

1 Plaintiff also argues that Defendant has not shown the requisite “inadvertence, oversight
2 or excusable neglect” under Rule 13(f) to permit the proposed Counterclaim. Defs.’ Opp’n at
3 12-14. Specifically, Plaintiff contends that Defendant has failed to provide any explanation for
4 dismissing its Counterclaim in November 2009, and that its decision to do so was purely
5 “tactical.” Id. at 13. The Court disagrees. Defendant previously dismissed its Counterclaim in
6 order to pursue its claims in the state court action. It was only because of Plaintiff’s decision to
7 dismiss all of its claims against Defendant in the state court case that Defendant moved to
8 reassert its previously dismissed Counterclaim in this Court. The Court is thus satisfied that
9 Defendant has made a sufficient showing of excusable neglect to permit the filing of its
10 Counterclaim.

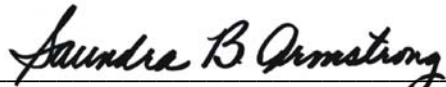
11 **IV. CONCLUSION**

12 For the reasons stated above,

13 IT IS HEREBY ORDERED THAT Defendant’s Motion for Order Allowing the Filing
14 of: Amended Answer and Counterclaim (Docket 93) is GRANTED. Defendant shall file its
15 Amended Answer and Counterclaim within five days of the date this Order is filed.

16 IT IS SO ORDERED.

17 Dated: February 24, 2010

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19 SAUNDRA BROWN ARMSTRONG
20 United States District Judge
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