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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

HOWARD APPEL, <i>et al.</i> ,		
	Plaintiffs,	
v.		
BOSTON NATIONAL TITLE AGENCY, LLC,		
	Defendant.	

Case No. 18-cv-873-BAS-MDD  
**ORDER GRANTING  
PLAINTIFFS’ MOTION FOR  
LEAVE TO FILE FIRST  
AMENDED COMPLAINT**  
**[ECF No. 41]**

Presently before the Court is Plaintiffs Howard Appel, David Cohen, and Ke’e Partners, LLC’s Motion for Leave to File First Amended Complaint, (“Mot. ECF No. 41). Defendant Boston National Title Agency, LLC filed an opposition to the Motion, (“Opp’n,” ECF No. 49), and Plaintiffs filed a reply in support of the Motion, (“Reply,” ECF No. 53.)<sup>1</sup> The Court finds this Motion suitable for determination on the papers and without oral argument. Civ. L. R. 7.1(d)(1). For the reasons stated below, the Court **GRANTS** Plaintiffs’ Motion.

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<sup>1</sup> Defendant objects to the declaration of Benjamin Reynolds and exhibits attached to Plaintiffs’ Reply, claiming the documents are improper “late-filed evidence.” (ECF No. 55.) Mr. Reynolds attaches deposition transcripts to his declaration and Defendant argues it is prejudiced by the addition of “new facts at this late stage.” (*Id.* at 3.) The Court does not rely on the declaration or its attachments and therefore does not consider Defendant’s objections.

1 **I. BACKGROUND**

2 The facts of this case began in June 2017, when Plaintiffs placed a bid to  
3 purchase a property located in Fiji. The auction company for the sale was Concierge  
4 Auctions, LLC. Concierge informed Plaintiffs that they had won the auction, and  
5 Plaintiffs deposited \$285,000 in escrow with Defendant Boston National, the escrow  
6 services company used by Concierge. (“Compl.,” ECF No. 1, at ¶ 10 (Plaintiffs  
7 wired \$100,000 to an escrow account held by Boston National on June 21, 2017 and  
8 \$185,000 on July 3, 2017).)<sup>2</sup> However, the owners of the property ended up  
9 canceling the sale in approximately July 2017.<sup>3</sup> (Mot. 2.) On September 14, 2017,  
10 Plaintiffs, through an attorney, requested Defendant provide them with “escrow  
11 instructions” from the Fiji property owners. (ECF No. 41-2, at 66.)<sup>4</sup> Defendant’s  
12 representative responded by asking, “By escrow instructions, do you mean an Escrow  
13 Agreement?” and noted that no agreement was signed between Defendant and  
14 Plaintiffs. (*Id.*) Plaintiffs demanded Boston National return their funds on  
15 September 28, 2017, and they also allege they demanded Concierge instruct Boston  
16 National to do the same. (ECF No. 41-2, at 77; Compl. ¶ 15.) Boston National  
17 refused and Plaintiffs allege Boston National had improperly given Concierge  
18 “complete control” over the funds. (Compl. ¶ 16.)

19 Plaintiffs filed suit against Concierge and its employees in November 2017,  
20 alleging inducement, concealment, misrepresentation, and violations of the  
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22 <sup>2</sup> Defendant filed evidentiary objections to the declaration of Plaintiffs’ counsel Benjamin Reynolds  
23 and to various exhibits provided by Plaintiffs. (ECF No. 49-1.) Defendant notes it does not dispute  
24 the underlying facts behind much of the declaration, namely, that Plaintiffs deposited \$285,000  
25 with Defendant in 2017 which was returned in May 2018. But Defendant argues the declaration  
26 and documents are irrelevant and that Mr. Reynolds does not have firsthand knowledge of the  
27 information within the documents. These objections are meaningless considering Defendant agrees  
28 that the important facts are correct, and the Court does not rely on Mr. Reynolds’ account, but on  
the facts. The Court **OVERRULES** the objections.

<sup>3</sup> The Court understands the parties debate how and when the sale was cancelled, and the Court  
does not opine one way or the other on this issue.

<sup>4</sup> Plaintiffs attached all exhibits as one large attachment, (ECF No. 41-2), thus the page references  
refer to the CM/ECF pincite.

1 Racketeer Influenced and Corrupt Organizations Act (“RICO”), unfair competition  
2 law, and false advertising law. (17-cv-2263-BAS-MDD (“*Concierge*”).) Boston  
3 National is not named in the *Concierge* matter. On April 13, 2018, the Court granted  
4 *Concierge*’s motion to compel arbitration and ordered Plaintiffs and *Concierge* to  
5 proceed to arbitration. The Court stayed the action as to all parties and all claims.

6 On May 4, 2018, Plaintiffs filed the present action against Boston National.  
7 Plaintiffs assert claims of breach of fiduciary duty, negligence, and accounting. In  
8 sum, Plaintiffs allege Boston National delayed in returning the escrow funds for  
9 various reasons. (*See generally* Compl. (alleging *inter alia*, misrepresentation and  
10 collusion).) Plaintiffs also allege Boston National conducts “illegal unlicensed real  
11 estate broker activities.” (*Id.* ¶ 10.) Boston National returned the \$285,000 on May  
12 24, 2018, (“*Witcher Decl.*,” ECF No. 49-3, at ¶ 4), but Plaintiffs request damages  
13 “proximately caused by Boston National’s breach,” punitive damages, and a forensic  
14 accounting of the escrow funds that were held by Boston National. (Compl., Prayer.)  
15 Plaintiffs also claim they incurred “hundreds of thousands of legal fees” before the  
16 funds were returned. (Mot. 6.)

17 The parties proceeded to discovery. Plaintiffs state on December 14, 2018,  
18 they discovered for the first time that there were no valid escrow instructions  
19 regarding the return of the \$285,000. (*See* ECF No. 32-1 at 52 (Boston National  
20 admitting in its response to a request for admission that “it did not receive any  
21 instructions from [the Fiji Property owners] regarding the \$100,000 deposited by  
22 [Plaintiff Ke’e Partners]”; *see also id.* at 60 (same response as to the \$185,000).)  
23 Further, on December 18, 2018, Plaintiffs state they discovered for the first time that  
24 Boston National had “ceded its fiduciary duties and control over” the escrow funds  
25 to *Concierge*. (Opp’n 9; *see* ECF No. 41-2, at 70 (email from a *Concierge*  
26 representative stating, “[w]e [*Concierge*] appreciate your [*Boston National*]  
27 cooperation and that you will not disburse the \$285k in escrow unless we provide  
28 instructions.”). Plaintiffs state this “triggered Plaintiffs to conduct additional

1 research into” Defendant’s status and then discovered Defendant “does not appear to  
2 be registered with the Secretary of State to do business in California, and does not  
3 appear to be a licensed escrow agent.” (Mot. 3 n.6.)

4 After learning that there were no valid escrow instructions, that Defendant  
5 gave control of the funds to Concierge, and that Defendant could not lawfully  
6 perform escrow services in California, Plaintiffs began meeting and conferring with  
7 Defendant on December 20, 2018 regarding their intent to amend their complaint.  
8 (Mot. 3.) Obviously, the meeting did not resolve the issue. On January 25, 2019,  
9 Plaintiffs requested Judge Dembin amend the scheduling order to extend the pleading  
10 deadline and for leave to file a first amended complaint. (ECF No. 32.) On February  
11 19, 2018, Judge Dembin declined to amend the pleading deadline and directed  
12 Plaintiffs to seek leave to file an amended complaint from this Court if they wished  
13 to do so. (ECF No. 37.)<sup>5</sup> Plaintiffs filed the present Motion on March 7, 2019.

14 Plaintiffs seek to add six new claims to their current three-claim complaint.  
15 The proposed new claims are: (1) Violations of California Business & Professions  
16 Code section 17200 *et seq.* (“UCL”); (2) Fraudulent Concealment; (3) Fraudulent  
17 Misrepresentation; (4) Negligent Misrepresentation; (5) Violations of California  
18 Business & Professions Code section 17500 *et seq.* (“False Advertising Law”); and  
19 (6) Conversion.

## 20 **II. LEGAL STANDARD**

### 21 **A. Modification of Scheduling Order Under Rule 16(b)**

22 Federal Rule of Civil Procedure 16(b) provides that the district court must  
23 issue a scheduling order that limits the time to join other parties, amend the pleadings,  
24 complete discovery, and file motions. Once in place, “[a] schedule may be modified  
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26 <sup>5</sup> Both parties misinterpret Judge Dembin’s order. He did not “invite” Plaintiffs to file a motion,  
27 as Plaintiffs state, nor did he “deny” Plaintiffs leave to amend, as Defendant argues. He did not  
28 rule on the merits of the issue, but only directed Plaintiffs toward the correct path given that  
Plaintiffs were requesting leave to amend after the pleading deadline had passed. Such a request  
must be presented to the district judge.

1 only for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). The  
2 “good cause” requirement primarily considers the diligence of the party seeking the  
3 amendment. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.  
4 1992). “The district court may modify the pretrial schedule if it cannot reasonably  
5 be met despite the diligence of the party seeking the extension.” *Id.* (internal citation  
6 and quotation marks omitted). “If [the] party was not diligent, the inquiry should  
7 end.” *Id.*

8 In interpreting the “good cause” requirement under Rule 16(b), the court  
9 considers, primarily, “the diligence of the party seeking the amendment.” *Johnson*,  
10 975 F.2d at 609. As a secondary consideration, the court considers the degree of  
11 prejudice to the opposing party. *Id.* “A need to reopen discovery and therefore delay  
12 the proceedings supports a district court’s finding of prejudice from a delayed motion  
13 to amend the complaint.” *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194  
14 F.3d 980, 986 (9th Cir. 1999).

15 If the court finds that there is good cause to modify the schedule, the court then  
16 turns to Rule 15(a) to determine whether the amendment sought should be granted.  
17 *See Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 607 (E.D. Cal. 1999) (“As the Ninth  
18 Circuit explained in [*Johnson*], once the district court has filed a pretrial scheduling  
19 order pursuant to Rule 16 which establishes a timetable for amending pleadings, a  
20 motion seeking to amend pleadings is governed first by Rule 16(b), and only  
21 secondarily by Rule 15(a).”).

22 **B. Amendment of Complaint Under Rule 15(a)**

23 Under Federal Rule of Civil Procedure 15(a), a plaintiff may amend its  
24 complaint once as a matter of course within specified time limits. Fed. R. Civ. P.  
25 15(a)(1). “In all other cases, a party may amend its pleading only with the opposing  
26 party’s written consent or the court’s leave. The court should freely give leave when  
27 justice so requires.” Fed. R. Civ. P. 15(a)(2).

28 While courts exercise broad discretion in deciding whether to allow

1 amendment, they have generally adopted a liberal policy. *See United States ex rel.*  
2 *Ehmcke Sheet Metal Works v. Wausau Ins. Cos.*, 755 F. Supp. 906, 908 (E.D. Cal.  
3 1991) (citing *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1324 (9th Cir.), *rev'd*  
4 *on other grounds*, 459 U.S. 810 (1982)). Accordingly, leave is generally granted  
5 unless the court harbors concerns “such as undue delay, bad faith or dilatory motive  
6 on the part of the movant, repeated failure to cure deficiencies by amendments  
7 previously allowed, undue prejudice to the opposing party by virtue of allowance of  
8 the amendment, futility of amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182  
9 (1962). The non-moving party bears the burden of showing why leave to amend  
10 should not be granted. *Genentech, Inc. v. Abbott Labs.*, 127 F.R.D. 529, 530–31  
11 (N.D. Cal. 1989).

### 12 **III. ANALYSIS**

#### 13 **A. Modification of Scheduling Order Under Rule 16(b)**

14 The basis of Plaintiffs’ proposed amendment is the allegation that Defendant  
15 misrepresented it was a licensed escrow agent and that Defendant had no basis to  
16 withhold Plaintiffs’ escrow funds or cede control of the funds to Concierge.  
17 Plaintiffs claim their allegations are based on Defendant’s

18 illegal unlicensed real estate broker activities within California, through  
19 which it fraudulently solicited and induced them into bidding for the  
20 Fiji Property; fraudulently used shill bidders to induce them into  
21 increasing their bid; and fraudulently misrepresented that they had  
22 “won” the auction despite actual pre-auction knowledge of the Fiji  
Property owner’s refusal to sell.

23 (Mot. 5 n.9.) Plaintiffs claim their allegation that Defendant is unlicensed is the basis  
24 for their UCL, false advertising, and concealment claims. (Mot 16.) Defendant’s  
25 “admission” that it did not receive any escrow instructions is the basis for Plaintiffs’  
26 fraud, breach of fiduciary duty, and negligence claims. (*Id.*) Plaintiffs claim the  
27 evidentiary source of their allegations was revealed in discovery. Therefore  
28 Plaintiffs argue they did not delay in requesting amendment once they learned the

1 basis of the new allegations, and there is good cause to amend the scheduling order.

2 First, Defendant stresses that Plaintiffs did not serve interrogatories or requests  
3 for admission until after the deadline to amend the complaint (October 8, 2018) and  
4 after Defendant served its own written discovery. (Opp’n 13.)<sup>6</sup> This appears to be  
5 true, however, Plaintiffs started the discovery process on August 14, 2018 by sending  
6 Defendant requests for production, (Mot. 6); the fact that Plaintiffs did not begin all  
7 discovery at this time does not show a lack of diligence.

8 Next, Defendant argues Plaintiffs actually became aware that there were no  
9 separate escrow instructions and “no contract or instructions with the sellers” as early  
10 as September 2017. (Opp’n 2, 14.) But, the evidence Defendant cites for this  
11 proposition does not support this position. (*Id.*) It is true that Plaintiffs were aware  
12 long ago that Boston National was the escrow agent for the sale, and that Plaintiff  
13 Appel had used Boston National as an escrow agent for various transactions in the  
14 past. (Exhibit A to ECF No. 49-2, at 25:22–26:1.) But these facts alone are not the  
15 basis of the allegations. The allegations in the proposed amended complaint relate  
16 to the alleged misconduct that Plaintiffs state they later discovered, i.e. *inter alia*,  
17 that Defendant knew the sale was cancelled but did not return Plaintiffs’ funds, but  
18 instead deferred to Concierge; and Defendant misrepresented that it was licensed to  
19 perform escrow services in California.

20 Although Plaintiffs could have conducted a public records search at any time,  
21 the Court understands that Plaintiffs had no reason to believe Defendant was not  
22 licensed, and only felt the need to conduct a search after receiving certain discovery  
23 responses. And there is no evidence that Plaintiffs were aware of the facts and  
24 theories supporting amendment earlier than when they received certain discovery  
25 responses. Thus, Plaintiffs are not seeking to add legal theories that they were aware  
26 of when they filed their original complaint, nor are they changing their “litigation

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28 <sup>6</sup> Defendant served its first set of Special Interrogatories, Requests for Admission, and Requests  
for Production of Documents on October 9, 2018. (“Dalton Decl.,” ECF No. 49-2, ¶ 4.)

1 strategy” as Defendant suggests. (Opp’n 11.)

2 The Court finds Plaintiffs acted diligently in moving to amend the scheduling  
3 order after discovering the new information. After receiving the relevant documents  
4 on December 14 and 18, 2018, Plaintiffs met and conferred with Defendant only a  
5 few days later regarding their desire to amend. (Mot. 3); *contra Schwerdt v. Int’l*  
6 *Fidelity Ins. Co.*, 28 F. App’x 715, 719 (9th Cir. 2002) (finding no good cause when  
7 the plaintiff knew of the basis for his proposed amendment one month before  
8 informing defendant of his intent to amend). When the parties were unable to resolve  
9 the issue, Plaintiff filed a motion shortly afterwards. The Court finds Plaintiff has  
10 been diligent in this process and therefore finds good cause to amend the scheduling  
11 order to allow amendment.

12 **B. Amendment of Complaint Under Rule 15(a)**

13 Rule 15 governs amendments to pleadings and encourages courts to “freely  
14 give leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). The Court  
15 now looks for evidence of undue delay, Plaintiffs’ bad faith or dilatory motive, any  
16 failure to cure deficiencies by previous amendments, undue prejudice to Defendant,  
17 or futility of amendment. *See Foman*, 371 U.S. at 182.

18 The Court finds no evidence of undue delay, given this action began  
19 approximately one year ago and there is no evidence Plaintiffs unreasonably delayed  
20 in requesting amendment after learning what they deemed to be the pertinent facts.  
21 It is true that Defendant’s motion for summary judgment is pending, and that “[t]he  
22 timing of the motion [for leave to amend], after the parties had conducted discovery  
23 and a pending summary judgment motion had been fully briefed, weighs heavily  
24 against allowing leave.” *Schlacter–Jones v. General Tele. of California*, 936 F.2d  
25 435, 443 (9th Cir. 1991) (abrogated on other grounds by *Cramer v. Consol.*  
26 *Freightways, Inc.*, 255 F.3d 683 (9th Cir. 2001)). But in so holding, the *Schlacter–*  
27 *Jones* court reasoned, “[a] motion for leave to amend is not a vehicle to circumvent  
28 summary judgment.” *Id.* The Court does not find that Plaintiffs here are seeking to



1 avoid summary judgment by adding claims, as the present Motion was filed one day  
2 before the motion for summary judgment and there is no indication Plaintiffs are  
3 seeking to add more claims simply to circumvent the currently requested judgment  
4 or to delay the proceedings.

5       There is also no evidence of bad faith, and the Court notes that this is Plaintiffs’  
6 first request to amend their complaint. As to prejudice, Defendant argues it will be  
7 prejudiced by the amendment. And indeed, this case has progressed considerably  
8 since its filing in May 2018. Defendant’s motion for summary judgment is pending,  
9 and discovery has been closed since March 8, 2019. (*See* ECF No. 22 (scheduling  
10 order).) However, the Court would not allow an amended complaint of this type  
11 without allowing discovery on the new claims, as the Court agrees the new claims  
12 broaden the breadth of this case. And certainly, the reopening of discovery will delay  
13 the proceedings of this case. Having to broaden one’s defense strategy and engage  
14 in more discovery would burden any defendant. But, all of the proposed new claims  
15 arise from the same factual allegations in Defendant’s failure to return the escrow  
16 funds and the Court does not see a “radical[] shift” in the nature of this case, as  
17 Defendant presents. (Opp’n 19 (quoting *Morongo Band of Mission Indians v. Rose*,  
18 893 F.2d 1074 (9th Cir. 1990).) The case still has the same foundation and purpose,  
19 now with broader and more numerous allegations. While Defendant will be  
20 prejudiced by the amendment, the Court does not find the prejudice to be  
21 unreasonable.

22       Defendant finally argues the proposed amendments are futile. Defendant  
23 argues there is no evidence that Plaintiffs incurred any damages, their claim does not  
24 meet the amount in controversy of \$75,000, and Plaintiffs failed to join Concierge as  
25 a party. (Opp’n 17–18.) As to the first two arguments, Plaintiffs argue they are  
26 entitled to attorney’s fees incurred to recover the funds, interest on the escrow funds,  
27 and any ill-gotten gains from Boston National’s misuse of the funds. Plaintiffs also  
28 assert the theory of “tort of another.” Based on those allegations, it cannot be

1 determined to a legal certainty that Plaintiffs fail to meet the amount in controversy  
2 requirement. *See* 28 U.S.C. § 1332(a); *Naffe v. Frey*, 789 F.3d 1035 1039–40 (9th  
3 Cir. 2016) (setting forth elements of diversity jurisdiction and explaining that the  
4 “legal certainty” test requires a “district court [to] accept the amount in controversy  
5 claimed by the plaintiff unless it can declare to a legal certainty that the case is worth  
6 less”).

7 Father, as to the failure to join Concierge as an indispensable party, Boston  
8 National devotes only one paragraph to the argument in its opposition, the gist of  
9 which is that Defendant’s participation in the business deal arose out of the auction  
10 by Concierge. (Opp’n 18.) Defendant conclusory argues Concierge “is at the nexus  
11 of this matter and its absence creates the possibility of conflicting judgments and  
12 prejudice to the parties.” (*Id.*) Defendant did not previously file a motion under Rule  
13 12(b)(7). The parties’ relationship is the same now as it was in the prior complaint,  
14 and the Court declines to convert one paragraph of Defendant’s opposition to a  
15 motion under Rule 12(b)(7) and engage in a detailed analysis of failure to join a party  
16 under Rule 19 at this stage. Defendant has not met its burden in showing joinder is  
17 necessary. In sum, the Court rejects Defendant’s futility arguments because  
18 Defendant has not shown that Plaintiffs are unable to obtain any relief from their  
19 proposed amendments. “If the underlying facts or circumstances relied upon by a  
20 plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to  
21 test his claim on the merits.” *Foman*, 371 U.S. at 182.

22 Defendant has not met its burden in establishing why leave to amend should  
23 not be granted. The Court grants Plaintiffs leave to file a first amended complaint.

24 **C. Defendant’s Request for Leave to Conduct Further Discovery**

25 Defendant requests the following if the Court grants Plaintiffs leave to file an  
26 amended complaint:

- 27 (1) it be granted leave to serve a new round of written interrogatories  
28 and requests for admission on Plaintiffs; (2) discovery be limited to the

1 transactions between Plaintiffs and Boston National—excluding  
2 unrelated third party private information; (3) discovery and pre-trial  
3 motion practice be reopened; and (4) the Court, after discovery and  
4 motion practice is reopened, grant a continuation of the discovery and  
5 motion deadlines and trial date at least 180 days to accommodate the  
6 radical shift in the nature of the case.

6 (Opp’n 20.) Plaintiffs do not respond to Defendant’s requests. (*See generally*  
7 Reply.) The Court finds good cause to re-open discovery limited to the new  
8 allegations in Plaintiffs’ first amended complaint. The parties are to meet and confer  
9 to prepare and submit a joint discovery plan and scheduling order to Judge Dembin,  
10 who will determine the scope of the new discovery and set a schedule for this case  
11 going forward.<sup>7</sup>

12 Further, the Court finds it is proper to **DENY WITHOUT PREJUDICE**  
13 Defendant’s motion for summary judgment. (ECF No. 42). It would not be  
14 economical for the Court to analyze Defendant’s motion for summary judgment at  
15 this time and instead is most prudent to allow Defendant to file a new motion for  
16 summary judgment after it has conducted discovery on all of Plaintiffs’ claims. *See*  
17 *U.S. v. W.R. Grace*, 526 F.3d 499, 509 (9th Cir. 2008) (noting the court has inherent  
18 authority to manage its docket).

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27 <sup>7</sup> Plaintiffs do not address whether or not they also request leave to engage in further discovery  
28 related to their new claims. The parties are to address this issue in the discovery plan they submit  
to Judge Dembin.

1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court **GRANTS** Plaintiffs’ motion for leave to  
3 amend, (ECF No. 41), and **DENIES WITHOUT PREJUDICE** Defendant’s motion  
4 for summary judgment, (ECF No. 42). The Court grants the parties leave to re-open  
5 discovery pertaining only to the new claims in Plaintiffs’ amended complaint.  
6 Plaintiffs **SHALL** file the amended complaint attached to their motion within five  
7 (5) days of the issuance of this Order and the parties **SHALL** submit a joint discovery  
8 plan and scheduling order to Judge Dembin within fourteen (14) days of the issuance  
9 of this Order.

10 **IT IS SO ORDERED.**  
11 **DATED: May 17, 2019**

  
**Hon. Cynthia Bashant**  
**United States District Judge**

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