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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

<p>NATIONAL CASUALTY COMPANY, Plaintiff, v. NATIONAL STRENGTH AND CONDITIONING ASSOCIATION, Defendant.</p> <hr/> <p>NATIONAL STRENGTH AND CONDITIONING ASSOCIATION, Counter-Claimant, v. NATIONAL CASUALTY COMPANY, Counter-Defendant.</p>	<p>Case No.: 18-CV-1292 JLS (KSC)</p> <p><b>ORDER: (1) DENYING DEFENDANT’S EX PARTE APPLICATION AND DENYING AS MOOT THE NSCA’S MOTION TO FILE DOCUMENTS UNDER SEAL, (2) REQUESTING ADDITIONAL BRIEFING, AND (3) CONTINUING HEARING</b></p> <p>(ECF Nos. 49, 56, 100, 102, 103)</p>
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Case No.: 18-CV-1292 JLS (KSC)

**ORDER: (1) DENYING  
DEFENDANT’S EX PARTE  
APPLICATION AND DENYING AS  
MOOT THE NSCA’S MOTION TO  
FILE DOCUMENTS UNDER SEAL,  
(2) REQUESTING ADDITIONAL  
BRIEFING, AND (3) CONTINUING  
HEARING**

(ECF Nos. 49, 56, 100, 102, 103)

Presently before the Court are Plaintiff/Counter-Defendant National Casualty Company’s Motion for Summary Judgment (ECF No. 49) and a Motion for Partial Summary Judgment filed by Defendant/Counter-Claimant National Strength and Conditioning Association (“NSCA”) (ECF No. 56) (together, the “Motions for Summary Judgment”), which are set to be heard on June 11, 2020, *see* ECF No. 100, as well as the

1 NSCA’s Ex Parte Application for Leave to File Sur-Reply to Respond to Erroneous  
2 Statements in NCC’s Reply in Support of Its Motion for Summary Judgment (“Ex Parte  
3 App.,” ECF No. 102) and Motion for Order to Seal Its Sur-Reply in Support of Its Motion  
4 for Partial Summary Judgment (“Mot. to Seal,” ECF No. 103) and NCC’s Opposition to  
5 the Ex Parte Application (“Ex Parte Opp’n,” ECF No. 105). Having carefully reviewed  
6 the Parties’ arguments and the law, the Court **DENIES** the NSCA’s Ex Parte Application,  
7 **DENIES AS MOOT** the NSCA’s Motion to Seal, **ORDERS** the Parties to submit  
8 additional briefing on the Motions for Summary Judgment, and **CONTINUES** the hearing  
9 on the Motions for Summary Judgment to accommodate the additional briefing requested  
10 by the Court.

#### 11 **THE NSCA’S EX PARTE APPLICATION AND MOTION TO SEAL**

12 Approximately two months after NCC filed its reply in support of its Motion for  
13 Summary Judgment, *see Ex Parte Opp’n* at 3; *see also* ECF No. 85, the NSCA requests  
14 leave to file a sur-reply “to respond to erroneous statements made in . . . National Casualty  
15 Company’s Reply.” *Ex Parte App.* at 1. As NCC notes, *see Ex Parte Opp’n* at 2, “[c]ourts  
16 generally view motions for leave to file a sur-reply with disfavor,” although “permitting  
17 the filing of a sur-reply is within the discretion of the district court,” but “only where a  
18 valid reason for such additional briefing exists.” *Whitewater W. Indus., Ltd. v. Pac. Surf*  
19 *Designs, Inc.*, No. 317CV01118BENBLM, 2018 WL 3198800, at \*1 (S.D. Cal. June 26,  
20 2018) (quoting *Johnson v. Wennes*, No. 08-cv-1798, 2009 WL 1161620, at \*2 (S.D. Cal.  
21 April 28, 2009)) (citing *Schmidt v. Shah*, 696 F. Supp. 2d 44, 60 (D.D.C. 2010); *Hill v.*  
22 *England*, No. CVF05869RECTAG, 2005 WL 3031136, at \* 1 (E.D. Cal. Nov. 8, 2005)).

23 Here, NCC made an error concerning the pagination of the NSCA’s exhibits and  
24 cited contrary testimony from its corporate designee concerning to whom NCC would defer  
25 in deciding whether there exist reasonable grounds for the NSCA to appeal in the  
26 underlying action. *See Ex Parte App.* at 2–4. To the extent they are material, the Court is  
27 capable of reviewing those portions of Mr. Rogissart’s testimony cited by both the NSCA  
28 and NCC; accordingly, “the Court finds that [the NSCA]’s request for leave to file a sur-

1 reply is merely an attempt to have the last word on this issue,” which “is precisely why  
2 Courts so thoroughly disfavor requests to file sur-replies.” *See Whitewater W. Indus.*, 2018  
3 WL 3198800, at \*1. Accordingly, the Court **DENIES** the NSCA’s Ex Parte Application  
4 and **DENIES AS MOOT** its attendant Motion to Seal.

5 **REQUEST FOR ADDITIONAL BRIEFING AND CONTINUANCE**

6 Although the Parties already have filed voluminous briefs regarding their pending  
7 Motions for Summary Judgment, *see* ECF Nos. 49, 55, 56, 65, 68, 71, 82, 83, 85, 88, 95,  
8 96, 98, the Court believes that further briefing on the following discrete issues would assist  
9 the Court in preparing for the hearing on the Motions and, ultimately, its determination of  
10 them. Specifically, the Court is interested in (1) the sufficiency of the reservation of rights  
11 letter from Carolyn Kanalos of K&K Insurance to Thomas James dated May 16, 2014,  
12 particularly the necessity of the insurer explicitly informing the insured that there exists a  
13 conflict of interest and of the insured’s right to independent counsel; (2) whether breach of  
14 the duty to defend resulting from the failure to provide independent counsel in a conflict-  
15 of-interest situation gives rise to a cause of action for damages or for estoppel; (3) who, if  
16 anyone, bears the burden of establishing that there would have been a more favorable  
17 outcome but-for any such breach of the duty to defend resulting from the failure to provide  
18 independent counsel in a conflict-of-interest situation; and (4) the preclusive effect, if any,  
19 of a final judgment following appeal regarding the issue and/or terminating sanctions  
20 *CrossFit, Inc. v. National Strength and Conditioning Association*, No. 3:14-CV-1191 JLS  
21 (KSC) (S.D. Cal. filed May 12, 2014).

22 Accordingly, the Court **ORDERS ADDITIONAL BRIEFING**, not to exceed ten  
23 (10) pages per side, to be filed on or before fourteen (14) days from the date on which this  
24 Order is electronically docketed. To accommodate the additional briefing requested by the

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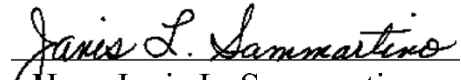
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1 Court, the Court **CONTINUES** the hearing on the Motions for Summary Judgment to  
2 July 2, 2020 at 1:30 p.m.

3 **IT IS SO ORDERED.**

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5 Dated: June 4, 2020

  
6 Hon. Janis L. Sammartino  
7 United States District Judge  
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