

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NATIONAL CASUALTY COMPANY, Plaintiff, v. NATIONAL STRENGTH AND CONDITIONING ASSOCIATION, Defendant, NATIONAL STRENGTH AND CONDITIONING ASSOCIATION, Counter-Claimant, v. NATIONAL CASUALTY COMPANY, Counter-Defendant.

Case No.: 18-CV-1292 JLS (KSC)

**ORDER GRANTING MOTION FOR
LEAVE TO FILE FIRST AMENDED
COUNTERCLAIM**

(ECF No. 30)

Presently before the Court is Defendant and Counter-Claimant National Strength and Conditioning Association’s (“NSCA”) Motion for Leave to File First Amended Counterclaim (“Mot.,” ECF No. 30). Also before the Court is Plaintiff and Counter-Defendant National Casualty Company’s (“NCC”) Opposition to (“Opp’n,” ECF No. 39) and the NSCA’s Reply in Support of (“Reply,” ECF. 42) the Motion. Having carefully

1 considered the NSCA’s proposed amendments, the Parties’ arguments, and the law, the
2 Court **GRANTS** the NSCA’s Motion.

3 **BACKGROUND**

4 This case came before the Court on June 14, 2018, when NCC filed its original
5 declaratory relief action against the NSCA regarding NCC’s duty as the NSCA’s insurer
6 to prosecute, indemnify, and/or defend the NSCA in two underlying civil lawsuits. *See*
7 *generally* ECF No. 1 (“Compl.”). The NSCA filed its initial Counterclaim on July 12,
8 2018, *see generally* ECF No. 7, and the instant Motion on June 24, 2019. *See generally*
9 ECF No. 30.

10 **LEGAL STANDARD**

11 Under Federal Rule of Civil Procedure 15(a), a plaintiff may amend their complaint
12 once as a matter of course within specified time limits. Fed. R. Civ. P. 15(a)(1). “In all
13 other cases, a party may amend its pleading only with the opposing party’s written consent
14 or the court’s leave. The court should freely give leave when justice so requires.” Fed. R.
15 Civ. P. 15(a)(2). Courts generally grant leave to amend absent a showing of “undue delay,
16 bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies
17 by amendments previously allowed, undue prejudice to the opposing party by virtue of
18 allowance of the amendment, [or] futility of amendment.” *Foman v. Davis*, 371 U.S. 178,
19 182 (1962). “Rule 15(a) ‘is to be applied with extreme liberality,’ and whether to permit
20 amendment is a decision ‘entrusted to the sound discretion of the trial court.’” *EFG Bank*
21 *AG, Cayman Branch v. Transam. Life Ins. Co.*, No. 216CV08104CASGJSX, 2019 WL
22 5784739, at *3 (C.D. Cal. Nov. 4, 2019) (quoting *Morongo Band of Mission Indians v.*
23 *Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990); *Jordan v. Cty. of Los Angeles*, 669 F.2d 1311,
24 1324 (9th Cir. 1982)).

25 **DISCUSSION**

26 The NSCA requests leave to file its First Amended Counterclaim (“FACC”) to
27 include new allegations concerning NCC’s alleged breaches of its duty to defend and its
28 other obligations to the NSCA in the two underlying civil lawsuits. Mot. at 5–6. The

1 FACC also includes a new counterclaim for violations of California’s Unfair Competition
2 Law (“UCL”), California Business and Professions Code § 17200, based on the same
3 conduct giving rise to the NSCA’s counterclaims. *Id.* at 6. Lastly, the FACC makes clear
4 that the NSCA is seeking punitive damages from NCC. *Id.*

5 The NSCA contends that it should be granted leave to amend because NCC will not
6 suffer prejudice because no discovery has been taken in the action, and both parties will
7 have ample opportunity to conduct extensive discovery concerning the issues raised in the
8 FACC.¹ *Id.* at 8–9. Further, the NSCA contends that it has not acted in bad faith because
9 it sought leave to amend at an early stage in the litigation and it raises valid claims against
10 NCC. *Id.* at 9. The NSCA also asserts that the instant Motion is timely and does not unduly
11 delay the litigation. *Id.* at 9. Finally, the NSCA maintains that the proposed FACC is not
12 futile because “the facts pled support the relief sought, and NSCA should have the
13 opportunity to seek all available relief in this Court for [NCC]’s misconduct.” *Id.* at 10.

14 In its Opposition, NCC does not contest that the NSCA should be granted leave to
15 plead the new allegations contained in the FACC, including that NCC breached its duty to
16 the NSCA with respect to the underlying civil lawsuits. *See generally* Opp’n. Instead,
17 NCC opposes the Motion solely on the ground that the NSCA’s proposed UCL
18 counterclaim is futile because the remedies available under the UCL are limited to
19 restitution and injunctive relief. *Id.* at 3. NCC contends that, because restitution and
20 injunctive relief are equitable remedies, they are not available unless the NSCA lacks an
21 adequate remedy at law. *Id.* at 4. As a result, NCC claims that the proposed UCL cause
22 of action is futile because the NSCA has an adequate remedy at law in the form of monetary
23 damages for NCC’s alleged wrongful conduct. *Id.*

24 As the NSCA points out and as the Court agrees, however, NCC fails to consider
25 that the request for injunctive relief outlined in the FACC pertains not only to the NSCA,
26

27
28 ¹ It appears that the Parties have since engaged in discovery and that fact discovery closed on March 6,
2020. See ECF No. 48 ¶ 1.

1 but also to other of NCC's insureds. Reply at 4. The NSCA's request for injunctive relief
2 should be denied only if "there is no reasonable probability that past acts complained of
3 will recur." *Cal. Serv. Station etc. Ass'n. v. Union Oil Co.*, 232 Cal. App. 3d 44, 57 (1991).
4 Here, NCC's alleged wrongful acts are, by their very nature, capable of repetition. The
5 Court therefore is not persuaded that the proposed UCL counterclaim is futile. Regardless,
6 denial of a leave to amend on the basis of futility alone is rare and, "[o]rdinarily, courts
7 will defer consideration of challenges to the merits of a proposed amended pleading until
8 after leave to amend is granted and the amended pleading is filed." *Utterkar v. Ebix, Inc.*,
9 No. 14-CV-02250-LHK, 2015 WL 5027986, at *3 (N.D. Cal. Aug. 25, 2015) (citing
10 *Netbula, LLC v. Distinct Corp.*, 212 F.R.D. 534, 539 (N.D. Cal. 2003)).

11 In sum, "[a]bsent prejudice, or a strong showing of any . . . [other] factors, there
12 exists a presumption under Rule 15(a) in favor of granting leave to amend." *Eminence
13 Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). In considering whether
14 prejudice, bad faith, undue delay, or futility exist, "it is the consideration of prejudice to the
15 opposing party that carries the greatest weight." *Id.* Here, NCC concedes that the FACC
16 is not prejudicial or made in bad faith and that it will not cause undue delay. See generally
17 *Opp'n*. Consequently, the Court finds leave to amend appropriate. See *Eminence Capital*,
18 316 F.3d at 1048.

19 CONCLUSION

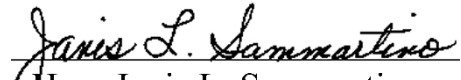
20 Based on the foregoing, the Court **GRANTS** the NSCA's Motion for Leave to File
21 First Amended Counterclaim (ECF No. 30). The NSCA **SHALL FILE** the First Amended
22 Counterclaim, previously filed at ECF No. 38-1-7, within seven (7) days of the electronic
23 docketing of this Order. The Parties **SHALL MEET AND CONFER**² and **SHALL FILE**
24 a joint status report within fourteen (14) days of the electronic docketing of this this Order
25 ///

26 _____
27 ² In light of the current COVID-19 public emergency, *see, e.g.*, Order of the Chief Judge No. 18 (S.D.
28 Cal. filed Mar. 17, 2020); Executive Order N-33-20, Executive Department of the State of California
(March 19, 2020), the Parties are encouraged to meet and confer telephonically.

1 concerning the impact, if any, of this Order and the NSCA's FACC on the pending
2 summary judgment motions. *See* ECF Nos. 49, 56.

3 **IT IS SO ORDERED.**

4
5 Dated: April 3, 2020


6 Hon. Janis L. Sammartino
7 United States District Judge
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28