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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 A-TEK MECHANICAL, INC., CURLY
12 PHOM,
13 Plaintiff,
14 v.
15 KHW SERVICES, INC., JEFF
16 NEWTON, SARAH NEWTON, and
17 DOES 1 through 10, inclusive,
Defendants.

Case No.: 3:21-cv-01974-H-DDL

**ORDER GRANTING DEFENDANT'S
MOTION FOR LEAVE TO FILE
COUNTERCLAIM**

[Doc. No. 43.]

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19 Defendant KHW Services, Inc. ("Defendant") filed the present motion for leave to
20 file counterclaim against Plaintiffs A-Tek Mechanical, Inc. and Curly Phom (collectively,
21 "Plaintiffs") on December 2, 2022. (Doc. No. 43.) On December 23, 2022, Plaintiffs filed
22 an opposition. (Doc. No. 46.) On December 30, 2022, Defendant filed a reply. (Doc. No.
23 47.)

24 A hearing on the motion is currently scheduled for Monday, January 30, 2023, at
25 10:30 a.m. The Court, pursuant to its discretion under Local Rule 7.1(d)(1), determines this
26 matter is appropriate for resolution without oral argument, submits the motion on the
27 parties' papers, and vacates the hearing. For the reasons below, the Court grants Defendant
28 KHW Services, Inc.'s motion for leave to file counterclaim.

BACKGROUND

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2 On November 22, 2021, Plaintiffs filed a complaint against Defendants KHW
3 Services, Inc., Jeff Newton, Sarah Newton, and Does 1 through 10 (collectively,
4 “Defendants.”) (Doc. No. 1.) In their complaint, Plaintiffs alleged twelve causes of action
5 for: (1) alter ego; (2) breach of contract; (3) breach of the covenant of good faith and fair
6 dealing; (4) breach of fiduciary duty; (5) trespass to chattels; (6) fraud; (7) unfair
7 competition; (8) intentional interference with existing contract; (9) intentional interference
8 with prospective economic advantage; (10) unjust enrichment & constructive trust; (11)
9 declaratory relief; and (12) injunctive relief. (Doc. No. 1.) On January 19, 2022, Defendants
10 filed a motion to dismiss, which the Court denied on August 1, 2022. (Doc. Nos. 8, 19.)
11 On August 16, 2022, Defendants KHW Services, Inc. and Jeff Newton each filed answers
12 to Plaintiffs’ complaint. (Doc. Nos. 21, 22.) On August 17, 2022, Defendants filed a motion
13 for reconsideration, which the Court granted in part and denied in part on October 13, 2022.
14 (Doc. Nos. 23, 34.)

15 On November 2, 2022, the parties conducted an Early Neutral Evaluation with the
16 magistrate judge that did not result in a settlement. (Doc. No. 37.) The magistrate judge
17 issued a scheduling order regulating discovery and other pretrial proceedings following the
18 Early Neutral Evaluation (Doc. No. 39.) The scheduling order required that “[a]ny motion
19 to join other parties, to amend the pleadings, or to file additional pleadings” be filed by
20 December 2, 2022. (Doc. No. 39.) On December 2, 2022, Defendant KHW Services, Inc.
21 filed the present motion for leave to file counterclaim against Plaintiffs. (Doc. No. 43.) In
22 its motion, Defendant seeks leave to file counterclaim against Plaintiffs for breach of
23 contract due to allegedly unpaid consulting fees and an unpaid bonus (Doc. No. 43.)

DISCUSSION

I. Legal Standards

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26 Federal Rule of Civil Procedure 15(a) allows a party to amend its pleading once as a
27 matter of right prior to service of a responsive pleading. Thereafter, “a party may amend
28 that party’s pleading only by leave of the court or by written consent of the adverse party

1 and leave shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a). The Ninth
2 Circuit has instructed that this policy is “to be applied with extreme liberality.” Owens v.
3 Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001). “Five factors are taken
4 into account to assess the propriety of a motion for leave to amend: bad faith, undue delay,
5 prejudice to the opposing party, futility of amendment, and whether the plaintiff has
6 previously amended the complaint.” Johnson v. Buckley, 356 F.3d 1067, 1077 (9th Cir.
7 2004). The decision whether to grant leave to amend “is entrusted to the sound discretion
8 of the trial court.” Pisciotta v. Teledyne Indus., Inc., 91 F.3d 1326, 1331 (9th Cir. 1996).

9 II. Analysis

10 After a careful analysis of the Rule 15 factors set forth in Johnson v. Buckley, the Court
11 concludes that Defendant should be granted leave to file counterclaim. See 356 F.3d at
12 1077.

13 Plaintiff argues that Federal Rule of Civil Procedure 15 does not apply where, as here,
14 Defendant is seeking to file a new pleading rather than amend a previously filed pleading.
15 (Doc. No. 46.) The Court disagrees. “The standard for a motion for leave to file a
16 counterclaim is the same as the standard governing a motion for leave to amend a pleading
17 under Federal Rule of Civil Procedure 15(a).” Parra, Tr. of Laura E. Parra Revocable Tr.
18 Dated Sept. 9, 1994 v. Parra, No. 20-cv-839-DMS-JLB, 2021 WL 2038323, at *6 (S.D.
19 Cal. May 20, 2021).

20 Plaintiff also argues that Defendant incorrectly relies on the standard for amending
21 pleadings under Rule 15 of the Federal Rules of Civil Procedure, rather than the standard
22 under Rule 13(a) of the Federal Rules of Civil Procedure for compulsory counterclaims.
23 (Doc. No. 46.) Plaintiff asserts that under Federal Rule of Civil Procedure 13(a), Defendant
24 was required to allege the counterclaim at the time of Defendant’s answer, filed on August
25 16, 2022. (Doc. No. 46.) Federal Rule of Civil Procedure 13(e), however, states that the
26 “Court may permit a party to file a supplemental pleading asserting a counterclaim that
27 matured or was acquired by the party after serving an earlier pleading.” Fed. R. Civ. P.
28 13(e). Defendant alleges that information received from Plaintiff’s insurance bond agent

1 on November 23, 2022 “shed further light on the veracity of KHW’s claims.” (Doc. No.
2 43 at 4.) Because information relating to Defendant’s counterclaim was “acquired by the
3 party after serving an earlier pleading,” Defendant is not barred from seeking leave to file
4 a counterclaim. Where “leave to file a counterclaim has been timely sought under Rule
5 13(e), the court should grant it applying the same standard as that of an amendment under
6 Rule 15.” Kuschner v. Nationwide Credit, Inc., 256 F.R.D. 684, 689 (E.D. Cal. 2009).
7 Accordingly, the Court conducts its analysis based on the Rule 15 factors.

8 There is no evidence of bad faith by Defendant. In addition, there is no undue delay.
9 Defendant filed the present motion shortly after receiving financial records from Plaintiff
10 A-Tek on November 23, 2022. Defendant filed the motion for leave to file counterclaim
11 within the timeframe required by the scheduling order.

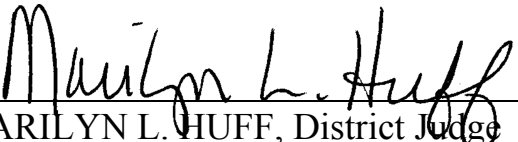
12 There is no evidence of prejudice to Plaintiffs. “The party opposing amendment bears
13 the burden of showing prejudice.” DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 187
14 (9th Cir. 1987). Plaintiffs assert that they would be substantially prejudiced by this
15 counterclaim because the “discovery cutoff in the pending action is fast approaching.”
16 (Doc. No. 46.) The scheduling order requires that all discovery be completed by March 17,
17 2023. (Doc. No. 39.) Because Defendant filed the motion within the time allotted by the
18 scheduling order and discovery in this action is still ongoing, the Court concludes that
19 Plaintiffs have not shown substantial prejudice. Finally, the proposed counterclaim is not
20 futile, and Defendant has not previously sought leave to amend its answer.

21 **CONCLUSION**

22 The Court grants Defendant’s motion for leave to file counterclaim. Defendant must
23 file any counterclaim within **14 days** from the date this order is filed.

24 **IT IS SO ORDERED.**

25 DATED: January 17, 2023

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28 MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT