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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

PACIFIC VIBRATIONS, LLC,  
  
Plaintiff,  
  
v.  
  
SLOW GOLD LIMITED, et al.,  
  
Defendants.

Case No.: 22cv1118-LL-DDL

**ORDER GRANTING SLOW GOLD’S  
MOTION FOR LEAVE TO FILE  
FIRST AMENDED  
COUNTERCLAIM**

[ECF No. 50]

Before the Court is Defendant Slow Gold Limited’s Motion for Leave to File First Amended Counterclaim against Plaintiff and Counter-Defendant Pacific Vibrations, LLC. ECF No. 50 (“Motion” or “Mot.”). Plaintiff filed an Opposition [ECF No. 58 (“Opposition” or “Oppo.”)], and Defendant filed a Reply [ECF No. 60]. The Court took this matter under submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons stated below, the Court **GRANTS** Defendant’s Motion.

**I. BACKGROUND**

On March 11, 2022, Plaintiff filed a complaint in state court against Defendants Slow Gold Limited, Simon Charles Tucker, Cassie Green, and Bradley John Hockridge alleging the following causes of action: (1) breach of contract; (2) unfair competition,

1 (3) federal trademark infringement, (4) California common law trademark infringement,  
2 and (5) false designation of origin. ECF No. 1-2 at 5–27.

3 On July 29, 2022, Defendant filed its notice of removal and its answer. ECF Nos. 1;  
4 1-2 at 29–38; 5. On October 17, 2022, the Court issued a scheduling order setting pretrial  
5 deadlines, including a filing deadline of December 2, 2022 for any motion to join other  
6 parties, to amend the pleadings, or to file additional pleadings. ECF No. 11 at 1. The  
7 deadline to complete fact discovery was set for May 5, 2023 *Id.* at 2. The deadline to  
8 complete fact witness depositions only was extended to June 5, 2023. ECF No. 28.

9 On February 10, 2023, the Court issued an Order Granting in Part and Denying in  
10 Part Slow Gold Limited’s Motion for Leave to File Counterclaims. ECF No. 32. On  
11 February 17, 2023, Defendant filed its Counterclaim. ECF No. 35. On February 17, 2023,  
12 Defendant also corresponded with Plaintiff regarding its intention to file a First Amended  
13 Counterclaim (“FAC”), and provided Plaintiff with a draft thereof on February 28, 2023.  
14 ECF No. 50-1, Declaration of Thomas J. Speiss (“Speiss Decl.”) ¶¶ 4, 5; *see also* ECF No.  
15 58-1, Declaration of Ryan J. Altomare (“Altomare Decl.”), ¶ 6. The parties also  
16 participated in a meet and confer concerning the filing of the proposed FAC on February  
17 28, 2023. Speiss Decl. ¶ 5; Altomare Decl. ¶ 7. On March 7, 2023, Defendant filed this  
18 Motion seeking leave to file a FAC against Plaintiff. ECF No. 50.

## 19 **II. LEGAL STANDARD**

20 Once a party has served its pleading, there is a short period of time when the party  
21 may amend it once as a matter of right. Fed. R. Civ. P. 15(a)(1). In all other cases, a party  
22 may amend its pleading only with written consent from the opposing party or permission  
23 from the court. Fed. R. Civ. P. 15(a)(2). “The court should freely give leave when justice  
24 so requires.” *Id.* This policy should be applied with “extreme liberality” to reflect the  
25 underlying purpose of Rule 15 “to facilitate decision on the merits, rather than on the  
26 pleadings or technicalities.” *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981).

27 Leave to amend should be granted absent a showing of “undue delay, bad faith or  
28 dilatory motive, futility of amendment, and prejudice to the opposing party.” *Id.* at 980

1 (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Prejudice to the opposing party is the  
2 factor that carries the greatest weight. *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048,  
3 1052 (9th Cir. 2003). “Absent prejudice, or a strong showing of any of the remaining  
4 *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to  
5 amend.” *Id.* “The party opposing amendment bears the burden of showing prejudice.” *DCD*  
6 *Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987).

### 7 **III. DISCUSSION**

8 Defendant argues that it should be allowed leave to file its FAC for two reasons:

9 (1) the allegations of the claim for breach of contract set forth in the pending  
10 Counterclaim, as the Court noted in the Order granting leave to file that  
11 pleading, are not entirely clear and unambiguous, shortcomings which the  
12 court stated would be best addressed by motion, and which Slow Gold has  
undertaken to correct in the FAC; and,

13 (2) Slow Gold’s claim for relief arising from Plaintiff’s persistent delivery of  
14 defective products for marketing and sale by Slow Gold pursuant to the  
15 parties’ distribution agreement – as alleged in the pending Counterclaim,  
16 and as further revealed in discovery obtained since the pending  
17 Counterclaim was drafted – can only be fully addressed and remedied by  
18 a claim for breach of the covenant of good faith and fair dealing that is  
implied in that distribution agreement, and the FAC adds that claim for  
relief.

19 Mot. at 2; *see also* Mot. at 10-11. Plaintiff claims that both of Defendant’s arguments fail  
20 and leave to amend should be denied.

21 The Court will consider the *Foman* factors of undue delay, bad faith or dilatory  
22 motive, futility of amendment, and prejudice to the opposing party. *Foman v. Davis*, 371  
23 U.S. at 182.

#### 24 **A. Undue Delay and Prejudice**

25 Defendant claims that it did not unduly delay in filing this Motion, and was diligent  
26 in bringing its proposed FAC before the Court. Mot. at 11-12. Defendant also argues that  
27 Plaintiff will not be prejudiced by the FAC because “Plaintiff has propounded discovery  
28 requests that encompass the issues that are raised by the claim for breach of the implied

1 covenant of good faith.” *Id.* at 12-13. Plaintiff opposes on the grounds that “the allegations  
2 of the new proposed counterclaim are in fact based on facts and theories Slow Gold knew  
3 or should have known at the time it filed the original pleading.” *Oppo.* at 12. Plaintiff  
4 argues that “Slow Gold has offered nothing explaining why it was not known and why it  
5 could not file its counterclaims on these issues in a timely manner.” *Id.* at 13. Plaintiff also  
6 argues that the proposed amendment is prejudicial to Plaintiff because the “addition of  
7 these counterclaims will only increase the discovery required to be conducted by the parties  
8 and may require supplemental responses to address the counterclaims, driving up litigation  
9 costs.” *Id.* at 14-15.

10 “Undue delay is delay that prejudices the nonmoving party or imposes unwarranted  
11 burdens on the court.” *Davis v. Powell*, 901 F. Supp. 2d 1196, 1212 (S.D. Cal. 2012)  
12 (quoting *BNSF Ry. Co. v. San Joaquin Valley R. Co.*, No. 1:08-CV-01086-AWI, 2011 WL  
13 3328398, at \*2 (E.D. Cal. Aug. 2, 2011)). “The fact that [an] amended counterclaim may  
14 cause more work does not constitute prejudice.” *Fru-Con Constr. Corp. v. Sacramento*  
15 *Mun. Util. Dist.*, 2006 WL 3733815, at \*5 (E.D. Cal. 2006).

16 The Court finds Defendant has not unduly delayed in filing this Motion. Defendant  
17 informed Plaintiff of its intention to file the FAC the same day it filed the original  
18 counterclaim. Less than ten days later, Defendant provided Plaintiff with the proposed FAC  
19 and “met and conferred” regarding it. The instant Motion was filed within one week of the  
20 meet and confer. Although discovery has begun and the deadline for fact discovery is  
21 closed, there is still time for fact depositions until June 5, 2023. Additionally, Defendant  
22 states that it has “commit[ted] to full, reasonable cooperation with Plaintiff as needed to  
23 accommodate Plaintiff’s legitimate additional discovery needs, if any.” Reply at 12. The  
24 Court does not find that allowing a FAC at this stage of the litigation will prejudice Plaintiff  
25 or burden the Court. The Court’s finding of no undue delay and no prejudice weighs toward  
26 granting the Motion.

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**B. Bad Faith**

1           **B. Bad Faith**  
2           Defendant contends that it brings this Motion in good faith because the factual  
3 allegations to support its breach of contract claim and the additional claim for breach of  
4 the implied covenant of good faith and fair dealing are fully supported by the law. Mot. at  
5 12. Defendant argues that it seeks to bring the additional counterclaim for “breach of  
6 implied covenant of good faith and fair dealing only because its further analysis of the  
7 correct legal basis for relief for Plaintiff’s prolonged and excessive delivery of defective  
8 products, the scope of which is better understood based on Plaintiff’s discovery responses  
9 since the original Counterclaim was drafted, indicates that the correct legal theory is breach  
10 of the implied covenant of good faith.” *Id.* at 12. Defendant also argues that it “has a more  
11 complete understanding of the scope of [the alleged] injury based on facts disclosed by  
12 Plaintiff in discovery since the initial Counterclaim was filed.” *Id.* at 11. Plaintiff argues  
13 that Defendant has shown bad faith by “attempting to use the Court’s concern regarding  
14 the deficiencies of the counterclaim as a second bite at the apple to insert new theories of  
15 liability against the Plaintiff/counter defendants.” *Oppo.* at 11. Plaintiff also argues that  
16 “Slow Gold offers no evidence why it was not able to assert [the breach of the implied  
17 covenant of good faith and fair dealing] counterclaim when it first sought leave to file its  
18 first counterclaim back in December 2022.” *Id.*

19           The Court does not find that Defendant acted in bad faith. The Court finds it  
20 reasonable that Defendant sought leave to file the FAC in order to address and correct the  
21 shortcomings set forth in the Court’s February 10, 2023 Order Granting in Part and  
22 Denying in Part Slow Gold Limited’s Motion for Leave to File Counterclaims [ECF No.  
23 32]. The Court also finds reasonable Defendant’s explanation for the need to amend its  
24 counterclaims based on facts learned in Plaintiff’s discovery responses since the original  
25 Counterclaim was drafted. Finally, the Court has already found that Defendant acted  
26 diligently in informing Plaintiff about its intention to seek to amend the Counterclaim, and  
27 that the delay in filing the instant motion was not unreasonable. The Court’s failure to find  
28 bad faith weighs toward granting the Motion.

1           **C. Futility**

2           Defendant contends that its proposed counterclaims are not futile because they plead  
3 recognized causes of action that it supports with substantial allegations of fact. Mot. at 13.  
4 Plaintiff argues that (1) “Defendant’s proposed breach of contract [claim] serves no useful  
5 purpose, other than to harass and increase the cost of litigation, because there is already a  
6 breach of contract claim on file which appears to allege the same breaches and seeks the  
7 same relief as the proposed amended counterclaim”, and (2) “the allegations of the breach  
8 of implied covenant of good faith and fair dealing match those of the breach of contract  
9 claim” and are “duplicative, futile, and should not be allowed.” Oppo. at 13-14.

10           A motion to amend may be denied if the amendment would be futile or subject to  
11 dismissal. *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) (citations omitted).  
12 “[A] proposed amendment is futile only if no set of facts can be proved under the  
13 amendment to the pleadings that would constitute a valid and sufficient claim or defense.”  
14 *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988), *implied overruling on*  
15 *other grounds by Ashcroft v. Iqbal*, 556 U.S. 662 (2009). However, denying leave to amend  
16 for futility is “rare and courts generally defer consideration of challenges to the merits of a  
17 proposed amended pleading until after leave to amend is granted and the amended pleading  
18 is filed.” *Duhn Oil Tool, Inc. v. Cooper Cameron Corp.*, No. CV-F-05-1411 OWW/GSA,  
19 2010 WL 596312, at \*14 (E.D. Cal. Feb. 16, 2010) (citing *Netbula, LLC v. Distinct Corp.*,  
20 212 F.R.D. 534, 539 (N.D. Cal. 2003)).

21           Here, the Court finds that the proposed amended counterclaim is not futile. First, on  
22 the breach of contract claim, Defendant states that the proposed amendment seeks to allege  
23 the breach of contract claim more “clearly, cogently, and completely.” Mot. at 10-11. This  
24 proposed amendment is for a recognized cause of action (breach of contract), which  
25 Defendant seeks to support with additional allegations of fact, and may entitle it to relief if  
26 proven. Second, on the claim for breach of implied covenant of good faith and fair dealing,  
27 the Court finds that it is also not futile because it has distinct elements and remedies from  
28 that of a breach of contract claim. Plaintiff has failed to provide sufficient justification to

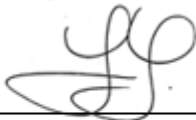
1 depart from the strong presumption in favor of amendment. The Court’s failure to find  
2 futility weighs toward granting the Motion.

3 **D. Conclusion**

4 Considering all the *Foman* factors, the Court finds they weigh in favor of granting  
5 Defendant’s Motion. Accordingly, the Court **GRANTS** Defendant Slow Gold Limited’s  
6 Motion for Leave to File the proposed First Amended Counterclaim as set forth at ECF  
7 No. 50-1 at 9-18. Defendant shall file the FAC on or before **May 15, 2023**.

8 **IT IS SO ORDERED.**

9 Dated: May 11, 2023

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12 Honorable Linda Lopez  
13 United States District Judge  
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