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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES, for the Use of
ELEVATOR TECHNOLOGY, a
California corporation,

Civ. S-06-1443 JAM GGH

ORDER GRANTING MOTION TO FILE
COUNTERCLAIM

Plaintiff,

v.

FLAGG BUILDING IMPROVEMENTS, et

al.,

Defendants.

This matter comes before the Court on Defendant Flagg Building Improvements' ("FBI") motion to file a counterclaim pursuant to Rule 13(e) of the Federal Rules of Civil Procedure.¹

¹Defendant's motion, filed January 14, 2008, sought to continue discovery and trial beyond the dates set by the Scheduling Order at Docket 10. On September 5, 2008 at Docket 62, this Court issued a Status (Pre-Trial Scheduling) Order, which extended discovery and trial. Pursuant to the Status Order at Docket 62, discovery is to be completed by January 21, 2009 and trial is set for June 8, 2009.

1 Plaintiff Elevator Technology ("ET") opposes the motion. For
2 the reasons set forth below, Defendant's motion is GRANTED.²

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4 Federal Rule of Civil Procedure 13(e) provides, in
5 pertinent part: "[a] claim which either matured or was acquired
6 by the pleader after serving a pleading may, with the permission
7 of the court, be presented as a counterclaim by supplemental
8 pleading." Fed.R. Civ. P. 13(e). Courts have construed Federal
9 Rule 13 in conjunction with Federal Rule 15, applying factors to
10 consider for leave to amend to counterclaims. See Intel v.
11 Hyundai Elec. America, Inc., 692 F. Supp. 1113, 1117 (N.D. Cal.
12 1987). "Rule 15(a) is very liberal and leave to amend 'shall be
13 freely given when justice so requires.' But a district court
14 need not grant leave to amend where the amendment: (1)
15 prejudices the opposing party; (2) is sought in bad faith; (3)
16 produces an undue delay in litigation; or (4) is futile."
17 Amerisource Bergen Corp. v. Dialysist West, Inc., 465 F.3d 946,
18 951 (9th Cir. 2006); Eminence Capital, LLC v. Aspeon, Inc., 316
19 F.3d 1048, 1051-52 (9th Cir. 2003). "These factors, however,
20 are not of equal weight in that delay, by itself, is
21 insufficient to justify denial of leave to amend." DCD
22 Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1986).
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28 ²Because oral argument will not be of material assistance,
the court orders this matter submitted on the briefs. E.D.Cal.
L.R. 78-230(h).

1 Here, because it does not appear that FBI's proposed
2 counterclaim would substantially alter the nature of the
3 litigation or require significant additional discovery or cause
4 substantial delay, it cannot be said Plaintiff would suffer
5 substantial prejudice by the delay in FBI's filing a
6 counterclaim. See Hip Hop Beverage Corp. v. RIC Representcoes
7 Importacao e Comercio Ltda., 220 F.R.D. 614, 622 (C.D. Cal.
8 2003) ("Undue prejudice' means substantial prejudice or
9 substantial negative effect; the Ninth Circuit has found such
10 substantial prejudice where the claims sought to be added 'would
11 have greatly altered the nature of the litigation and would have
12 required defendants to have undertaken, at a late hour, an
13 entirely new course of defense.' "); see also In re Circuit
14 Breaker Litigation, 175 F.R.D. 547, 551 (C.D. Cal. 1997) ("The
15 need for additional discovery is insufficient by itself to deny
16 a proposed amended pleading."); Moore ex rel. Moore v. County of
17 Kern, 2007 WL 2802167, *6 (E.D. Cal. 2007) (the mere fact of
18 some additional discovery does not necessarily amount to the
19 substantial prejudice required for denying leave to amend where
20 no substantial delay would result). While it is clear that FBI
21 could have acted more expeditiously in requesting leave to file
22 a counterclaim, it appears granting the motion will not delay
23 the final resolution of this action. Therefore, granting the
24 requested relief will not, as ET claims, cause undue prejudice
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1 by unnecessarily prolonging the litigation. Pl's Opp., Feb. 1,
2 2008, 4:22. Moreover, the Court finds FBI's proposed
3 counterclaim for breach of contract to recover liquidated
4 damages has merit and is not precluded by bad faith or futility.
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6 In short, after carefully considering the papers submitted
7 in this matter, it is hereby ordered that leave to file a
8 counterclaim, pursuant to Rule 13(e), is GRANTED. Defendant has
9 fifteen (15) days from service of this Order to file its
10 counterclaim.
11

12 IT IS SO ORDERED.

13 Dated: October 6, 2008



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE