STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 17 CVS 5594
DUKE ENERGY CAROLINAS, LLC and DUKE ENERGY PROGRESS, LLC, Plaintiffs, v. AG INSURANCE SA/NV (f/k/a L'Etoile S.A. Belge d'Assurances); et al., Defendants.	**ORDER ON DEFENDANT FIRST STATE INSURANCE COMPANY'S MOTION FOR LEAVE TO FILE A COUNTERCLAIM FOR EQUITABLE REFORMATION**

1. **THIS MATTER** is before the Court on Defendant First State Insurance Company's ("First State") Motion for Leave to File a Counterclaim for Equitable Reformation (the "Motion") against Plaintiff Duke Energy Carolinas, LLC f/k/a Duke Power Company ("DEC") filed on October 25, 2019 in the above-captioned case. (ECF No. 519.) The Court hereby memorializes its oral ruling at the December 4, 2019 hearing on First State's Motion (the "Hearing").

2. In its Complaint, filed March 29, 2017, (ECF No. 1), and again in its First Amended Complaint, filed February 7, 2018, (ECF No. 232), Plaintiffs DEC and Duke Energy Progress, LLC (collectively, "Duke") asserted claims for insurance coverage against First State. Although both the Complaint and the First Amended Complaint reference "130244" in a chart describing the "policy numbers" of the insurance policies under which Duke seeks coverage from First State in this action, the parties do not appear to dispute that "130244" is a "Memorandum of Insurance" rather than a formal insurance policy. In its Answers to the Complaint and the First Amended

Complaint, (ECF Nos. 110, 272), First State affirmatively acknowledged that it issued First State Policy No. 926308 to DEC's predecessor, and the parties appear to agree that Policy No. 926308 is the First State policy number referenced in Memorandum of Insurance No. 130244.

3. First State seeks leave to amend its Answer to the First Amended Complaint under North Carolina Rules of Civil Procedure ("Rule(s)") 13(f) and 15(a) to assert a counterclaim for equitable reformation to correct what it deems are two (2) "scrivener's errors" in the only copy of Policy No. 926308 that appears in either First State's or Duke's files (the "Policy"). First State first claims that the Policy's expiration date is mistakenly stated in the Policy's declarations page as December 31, 1979 rather than December 31, 1978, the expiration date First State alleges the parties agreed upon. Second, First State contends that the parties agreed that the Policy would contain as Endorsement #1 a dam/impoundment exclusion that First State argues "bars coverage for claims arising out of the ownership, maintenance, use or operation of any dam or impoundment" ("Dam/Impoundment Exclusion"). (First State Ins. Co.'s Mot. for Leave to File Countercl. for Equitable Reformation 2.) First State asserts that the Dam/Impoundment Exclusion incorrectly states that it attached to and formed a part of Policy No. 914868—the original policy number assigned to the Policy—not Policy No. 926308, the policy number under which the Policy was issued. First State thus argues that the only existing copy of the Policy mistakenly omits the Dam/Impoundment Exclusion. First State seeks to amend its

Answer to assert a counterclaim for equitable reformation to remedy these two "errors" in the Policy.

4. Duke opposes the motion on grounds of undue delay and undue prejudice. (Duke's Br. in Opp'n to Def. First State Ins. Co.'s Mot. for Leave to File Countercl. for Equitable Reformation 2–5); *see, e.g.*, *News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 485, 412 S.E.2d 7, 19 (1992) ("Among proper reasons for denying a motion to amend are undue delay by the moving party and unfair prejudice to the non-moving party.").

5. Under Rule 13(f), "[w]hen a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment." N.C. R. Civ. P. 13(f). Rule 15(a) provides that once a responsive pleading has been served, a party may amend its pleading only upon leave of court, or written consent of the opposing party, and such leave to amend must be freely given where justice so requires. *See* N.C. R. Civ. P. 15(a). Read together, Rule 13(f) permits a pleader to seek leave of court to assert a counterclaim, and Rule 15(a) compels the trial court to grant such leave, "when justice so requires." *See, e.g.*, *House Healers Restorations v. Ball*, 112 N.C. App. 783, 785, 437 S.E.2d 383, 385 (1993) (applying Rule 13(f) and Rule 15(a)).

6. The Supreme Court of North Carolina recently reaffirmed that "[t]here is no more liberal canon in the rules than that leave to amend 'shall be freely given when justice so requires.' " *Vaughan v. Mashburn*, 371 N.C. 428, 434, 817 S.E.2d 370, 374 (2018) (quoting 1 G. Gray Wilson, *North Carolina Civil Procedure* §

15-3, at 15-5 (3d ed. 2007)). Rule 15 encourages trial courts to permit amendment liberally and evinces our State's "general policy of allowing an action to proceed to a determination on the merits." *House of Raeford Farms, Inc. v. Raeford*, 104 N.C. App. 280, 282, 408 S.E.2d. 885, 887 (1991) (citation omitted). "[A]mendments should be freely allowed unless some material prejudice to the other party is demonstrated." *Vaughan*, 371 N.C. at 433, 817 S.E.2d at 374 (citing *Mauney v. Morris*, 316 N.C. 67, 72, 340 S.E.2d 397, 400 (1986)). "A motion to amend is directed to the discretion of the trial court." *Mosley & Mosley Builders, Inc. v. Landin, Ltd.*, 97 N.C. App. 511, 516, 389 S.E.2d 576, 578 (1990) (citation omitted).

7. Having reviewed First State's Motion, the briefs in support and in opposition, the parties' representations at the Hearing, and the relevant record, and mindful of our State's strong preference for amendment in furtherance of a merits determination in the absence of material prejudice, the Court concludes, in the exercise of its discretion, that the Motion should be granted. Although First State has delayed in bringing the Motion, the Court concludes that First State's delay, in the unique circumstances of this case, does not work an unfair prejudice against Duke. In particular, the additional discovery necessitated by the proposed counterclaim appears to be limited, any discovery on the proposed counterclaim is not anticipated to impact expert discovery, and the Court will permit any necessary discovery on the proposed counterclaim to be conducted within a reasonable time after the December 16, 2019 fact discovery deadline in this case.[1]

[1] The Court advised at the Hearing that it expected the parties to conduct the remaining discovery on the permitted counterclaim "sooner rather than later." To avoid a future dispute

8. **WHEREFORE**, the Court, in the exercise of its discretion, hereby **GRANTS** First State's Motion and **ORDERS** that the proposed Counterclaim for Equitable Reformation, in the form attached as Exhibit 1 to First State's Motion, is deemed filed as of December 4, 2019. To avoid confusion on the Court's public docket, the Court orders First State to sign and file the proposed Counterclaim, noting in the document title on page 1 that it is **"[DEEMED FILED ON DECEMBER 4, 2019]**." First State should include this same notation in the document title for ECF filing purposes.

9. In addition, the Court, in the exercise of its discretion, hereby **ORDERS** the parties to meet and confer to discuss a timetable for discovery on First State's Counterclaim for Equitable Reformation and file a status report with the Court on the parties' progress concerning such an agreement no later than January 24, 2020.

SO ORDERED, this the 10th day of December, 2019.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge

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concerning a party's delay or untimeliness concerning this discovery, the Court will order the parties through this Order to meet and confer to discuss a timetable for discovery on the counterclaim and report to the Court on the parties' progress concerning such an agreement no later than January 24, 2020.