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

TRAVELERS INDEMNITY COMPANY OF)	Case No. 11-CV-03638-SC
CONNECTICUT; and ST. PAUL FIRE)	
AND MARINE INSURANCE COMPANY,)	ORDER GRANTING DEFENDANT'S
)	<u>MOTION FOR RECONSIDERATION</u>
Plaintiffs,)	
)	
v.)	
)	
CENTEX HOMES; and CENTEX REAL)	
ESTATE CORPORATION,)	
)	
Defendants.)	
)	
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)	
)	

On April 8, 2013 the Court issued an order granting in part and denying in part the above-captioned parties' cross-motions for partial summary judgment. ECF No. 170 ("Apr. 2013 Order"). With the Court's leave, Defendant Centex Homes ("Centex") now moves for reconsideration of the April 2013 Order. ECF No. 213 ("Mot."). The primary question raised by the Motion is whether an insurer loses its right to control the defense of its insured if it fails to provide the insured with a defense immediately after its duty to defend has been triggered, where the insurer subsequently accepts the insured's tender and offers to provide a defense, and where the insurer reimburses the insured for any legal costs incurred prior

1 to its acceptance of the insured's tender. The Motion is fully
2 briefed, ECF Nos. 219 ("Opp'n"), 221 ("Reply"), and appropriate for
3 determination without oral argument per Civil Local Rule 7-1(b).
4 Having reviewed the arguments presented by the parties, the Court
5 finds that its April 2013 Order as to Travelers' right to control
6 Centex's defense in the Acupan and Conner actions was inconsistent
7 with a case decided by the California Court of Appeal in May 2013,
8 J.R. Mktg., L.L.C. v. Hartford Cas. Ins. Co., 216 Cal. App. 4th
9 1444 (2013), and affirmed in relevant part by the California
10 Supreme Court in August 2015, Hartford Cas. Ins. v. J.R. Mktg., 61
11 Cal. 4th 988 (Aug. 10, 2015). Accordingly, the Court finds that
12 its April 2013 Order as to Travelers' right to control Centex's
13 defense in the Acupan and Conner actions was in error. Centex's
14 motion for reconsideration is GRANTED.

15
16 **I. BACKGROUND**

17 **A. Factual Background**

18 Centex participates in the development of residential
19 communities throughout California, though it does not perform any
20 actual construction work. Instead, it hires subcontractors to
21 build the homes it sells. These subcontractors include American
22 Woodmark ("Woodmark"), Foremost Superior Marble ("Foremost"), West
23 Coast Countertops ("West Coast"), Fresno Precision Plastics
24 ("Fresno"), and Executive Landscape ("Executive"). Each of these
25 subcontractors purchased commercial general liability insurance
26 from the above-captioned Defendants (collectively, "Travelers"),
27 and the policies name Centex as an additional insured.

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1 This case arises from a number of underlying construction
2 defect lawsuits filed against Centex in California state court.
3 These underlying suits include the Adkins, Garvey, Acupan, and
4 Conner actions. Centex tendered each of these actions to Travelers
5 pursuant to one or more of the insurance policies described above.
6 It is undisputed that, in each of these actions, some time elapsed
7 between Centex's tender and Traveler's decision to provide a
8 defense subject to a reservation of rights. In the interim, Centex
9 retained the law firm of Newmeyer and Dillion LLP ("Newmeyer") to
10 defend it in the underlying actions. When Travelers finally agreed
11 to provide a defense, it insisted on appointing its own counsel.
12 Centex insisted on retaining Newmeyer, arguing that Travelers lost
13 its right to control the defense by waiting too long to provide
14 one. As the facts surrounding the tender of the Acupan and Conner
15 actions are pertinent to the instant motion, the Court recounts
16 them below.

17 Centex first tendered the Acupan action to Travelers under the
18 Fresno policy on April 8, 2010. On September 13, 2010, Travelers
19 concluded that there was no potential for coverage under the Fresno
20 policy and declined to provide a defense. ECF No. 148-14. Several
21 months later, on June 28, 2011, Travelers reversed course and
22 agreed to provide a defense pursuant to the Fresno Policy, subject
23 to a reservation of rights. ECF No. 148-18. Centex also tendered
24 the Acupan action under the West Coast policy on January 21, 2011.
25 ECF No. 148-24. On June 1, 2011, after requesting and receiving
26 additional information, Travelers agreed to participate in Centex's
27 defense under the West Coast policy, subject to a reservation of
28 rights. ECF Nos. 148-16, 148-26.

1 Centex tendered the Conner action to Travelers under the
2 Executive policy on September 8, 2010. ECF No. 148-27. About two
3 weeks later, on September 22, Travelers requested additional
4 information. ECF No. 148-28. Centex responded to the request that
5 very same day. ECF No. 146-11. On January 21, 2011, Travelers
6 agreed to participate in Centex's defense in the Conner action
7 under the Executive policy subject to a reservation of rights. ECF
8 No. 148-29.

9 **B. Procedural History**

10 On July 25, 2011, Travelers filed the instant action against
11 Centex. ECF No. 1. One month later Travelers filed a First
12 Amended Complaint, which asserts causes of action for (1)
13 declaratory relief, (2) breach of contract, (3) breach of the
14 implied covenant of good faith and fair dealing, and (4)
15 reimbursement. Among other things, Travelers seeks a judicial
16 declaration that it had the right to control Centex's defense in
17 the Garvey, Adkins, Acupan, and Conner actions.

18 On May 10, 2012, the Court issued an order granting Centex's
19 motion for partial summary judgment and partial judgment on the
20 pleadings. ECF No. 56 ("May 2012 Order"). Among other things, the
21 Court found that, since the duty to defend is immediate, Travelers
22 lost its right to control the defense of the Garvey and Adkins
23 actions when it declined to participate in the defense of those
24 actions in late 2010 and early 2011. May 2012 Order at 9-10. The
25 Court also rejected Travelers' argument that Centex needed to show
26 that Travelers intended to waive its right to control the defense
27 of Garvey and Adkins actions, reasoning: "[A] court need not

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1 discern an insurer's intent to determine whether it has breached
2 that duty. A delay is evidence enough." Id. at 13.

3 The Court reconsidered and reversed this decision when it
4 ruled on the parties' cross-motions for partial summary judgment on
5 April 8, 2013. Centex had asked the Court to find that Travelers'
6 delay in responding to Centex's tenders of the Acupan and Conner
7 actions divested Travelers of its right to control the defense of
8 those actions. April 2013 Order at 11. Travelers responded that,
9 under Chase v. Blue Cross of California, 42 Cal. App. 4th 1142
10 (Cal. Ct. App. 1996), an insurer could only lose a contractual
11 right under theories of waiver, forfeiture, or estoppel. See id.
12 The Court agreed, finding that "an insurer cannot lose its right to
13 control the defense of its insured through delay alone. Rather, it
14 may only lose that right through waiver, forfeiture, or estoppel,
15 none of which have been proven by Centex." Id. at 13. The Court
16 denied Centex's motion for summary judgment on the issue of whether
17 Travelers had lost its right to control the defense of the Acupan
18 and Conner actions, and vacated its prior decision that Travelers
19 had lost its right to control the defense of the Garvey and Adkins
20 actions. Id. at 16. The Court also found that there were triable
21 issues of fact as to whether Travelers had a duty to defend the
22 Garvey, Adkins, Acupan, and Conner actions. Id. at 6.

23 Centex subsequently filed a motion for reconsideration
24 concerning the Court's vacation of the May 2012 Order and the
25 Court's findings with respect to the Garvey and Adkins actions.
26 ECF No. 195. Centex also sought leave to file a motion for
27 reconsideration on whether Travelers lost the right to control
28 Centex's defense in the Acupan and Conner actions. Id. The Court

1 granted Centex's motion, finding that its April 2013 Order as to
2 the Garvey and Adkins actions was inconsistent with the Court of
3 Appeal's decision in J.R. Marketing, which was decided after the
4 April 2013 Order. ECF No. 200. The Court also granted Centex's
5 motion for leave to file a motion for reconsideration as to the
6 Acupan and Conner actions. Id. Subsequently, Centex filed the
7 instant motion for reconsideration concerning Travelers' right to
8 control Centex's defense with respect to the Acupan and Conner
9 actions. Before issuing an order on Centex's motion, however, the
10 Court stayed the case pending the California Supreme Court's review
11 of the Court of Appeal's decision in J.R. Marketing. The
12 California Supreme Court affirmed in relevant part the Court of
13 Appeal's decision on August 10, 2015, Hartford Cas. Ins., 61 Cal.
14 4th at 997, and the Court subsequently lifted the stay in this
15 case, ECF No. 233. Now before the Court is Centex's motion for
16 reconsideration as to Travelers' right to control Centex's defense
17 in the Acupan and Conner actions.

18

19 **II. LEGAL STANDARD**

20 A party may ask a court to reconsider and amend a previous
21 order pursuant to Federal Rule of Civil Procedure 59(e) and Civil
22 Local Rule 7-9. Rule 59(e) offers "an extraordinary remedy, to be
23 used sparingly in the interests of finality and conservation of
24 judicial resources." Carroll v. Nakatani, 342 F.3d 934, 945 (9th
25 Cir. 2003) (quotations omitted). Civil Local Rule 7-9(b) provides
26 that a party moving for reconsideration must generally show: (1) an
27 intervening change in controlling law, (2) the emergence of new
28 material facts, or (3) a manifest failure by the Court to consider

1 material facts or dispositive legal arguments. "Whether or not to
2 grant reconsideration is committed to the sound discretion of the
3 court." Navajo Nation v. Confederated Tribes and Bands of the
4 Yakama Indian Nation, 331 F.3d 1041, 1046 (9th Cir. 2003).

5 As Centex moves for reconsideration of a summary judgment
6 order, the Court also employs the legal standard set forth in
7 Federal Rule of Civil Procedure 56. Entry of summary judgment is
8 proper "if the movant shows that there is no genuine dispute as to
9 any material fact and the movant is entitled to judgment as a
10 matter of law." Fed. R. Civ. P. 56(a). Summary judgment should be
11 granted if the evidence would require a directed verdict for the
12 moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251
13 (1986). Thus, "Rule 56[] mandates the entry of summary judgment
14 . . . against a party who fails to make a showing sufficient to
15 establish the existence of an element essential to that party's
16 case, and on which that party will bear the burden of proof at
17 trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "The
18 evidence of the nonmovant is to be believed, and all justifiable
19 inferences are to be drawn in his favor." Anderson, 477 U.S. at
20 255.

21 22 **III. DISCUSSION**

23 In general, an insurer has the right to control the defense it
24 provides to its insured. James 3 Corp. v. Truck Ins. Exch., 91
25 Cal. App. 4th 1093, 1105 (2001). However, when an insurer breaches
26 its duty to defend, the insurer forfeits its right to control the
27 defense of the action. J.R Mktg., L.L.C. v. Hartford Casualty Ins.
28

1 Co., 216 Cal. App. 4th 1444 (2013); Intergulf Dev. v. Super. Ct.,
2 183 Cal. App. 4th 16, 20 (2010).

3 In J.R. Marketing, the defendant insurer refused to defend or
4 indemnify the plaintiff insured in an underlying lawsuit. 216 Cal.
5 App. 4th at 1449. The insured hired the law firm of Squire Sanders
6 L.L.P. ("Squire") to defend it in the underlying action and bring
7 suit against the insurer for coverage. Id. The insurer then
8 reconsidered its position and agreed to provide the insured with a
9 defense, but the insurer refused to pay defense costs incurred
10 prior to a certain date and insisted that its own counsel represent
11 the insured in place of Squire, the insured's chosen Cumis
12 counsel.¹ Id.

13 On summary adjudication, the trial court in J.R. Marketing
14 found that the insured was entitled to Cumis counsel from the date
15 it tendered the underlying action and that the insurer could not
16 invoke the provisions of California Civil Code section 2860 that
17 cap the amount of fees payable to Cumis counsel. Id. at 1449-50.
18 The trial court found that section 2860's protections were
19 unavailable since the insurer had breached and continued to breach
20 its defense obligations by failing to pay all reasonable and
21 necessary defense costs incurred by the insured, and by failing to
22 provide Cumis counsel. Id. at 1450. The Court of Appeal affirmed,
23 reasoning: "Where, as here, the insurer breaches its duty to defend
24 the insured, the insurer loses all right to control the defense,
25 including, necessarily, the right to control financial decisions
26 such as the rate paid to independent counsel or the cost-

27 _____
28 ¹ In California, an insured is entitled to independent counsel,
a.k.a. Cumis counsel, where a conflict exists because of an
insurer's control over the litigation. See Cal. Civ. Code § 2860.

1 effectiveness of any particular defense tactic or approach." Id.
2 at 1457. The California Supreme Court subsequently affirmed that
3 portion of the Court of Appeal's decision. J.R. Mktg., L.L.C., 61
4 Cal. 4th at 997; see also id. at 1002 ("where . . . the insurer
5 wrongfully refused to defend the insured or to afford Cumis
6 counsel, the insured may proceed as he or she deems appropriate,
7 and the insurer forfeits all right to control the insured's
8 defense, including the right to determine litigation strategy.").

9 J.R. Marketing stands for the proposition that an insurer
10 loses its right to control the insured's defense upon breach of its
11 duty to defend. Accordingly, the Court's holding in its April 2013
12 Order that an insurer can lose its right to control the insured's
13 defense solely "through waiver, forfeiture, or estoppel" was in
14 error. April 2013 Order at 13. In its Order dated August 26,
15 2013, the Court found that Travelers breached its duty to defend as
16 to the Garvey and Adkins actions when it wrongfully denied Centex's
17 tenders. ECF No. 200 at 11. Unlike the Garvey and Adkins actions,
18 however, Travelers accepted Centex's tenders of the Acupan and
19 Conner actions. Nevertheless, Travelers' response took 131 and 135
20 days, respectively, during which time Centex hired its own counsel
21 and incurred legal expenses (although Travelers subsequently
22 reimbursed Centex for those expenses). The issue on the instant
23 motion for reconsideration, therefore, is whether this delay
24 constitutes a breach of Travelers' duty to defend such that
25 Travelers lost its right to control Centex's defense.

26 Neither the parties nor the Court were able to find a case
27 clearly delineating the point at which an insurer's delay amounts
28 to a breach of its duty to defend. In general, to establish a duty

1 to defend, the burden is on the insured to make a prima facie
2 showing that a third party claim potentially falls within the
3 insuring provisions of its policy. Anthem Electronics, Inc., 302
4 F.3d at 1054. In addition, an insurer's duty to defend will not
5 ripen until a third party files a complaint against the insured.
6 See Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co., 18 Cal. 4th
7 857, 886 (1998). However,

8 [t]his should not be understood literally to mean the
9 instant the insurer receives the complaint filed against
10 its insured and before any investigation is made.
11 Rather, it probably means the point in time a liability
insurer is required to act on the insured's behalf (e.g.
when an answer to the complaint is due).

12 Croskey, et al., Cal. Prac. Guide Ins. Lit. Ch. 7B-C (Rutter 2013).
13 At that point, the insurer has an immediate duty to defend until it
14 can show conclusively that the damages sought in the third party
15 lawsuit are not covered under the policy. See Montrose Chem. Corp.
16 v. Superior Court, 6 Cal. 4th 287, 295 (1993). ("Imposition of an
17 immediate duty to defend is necessary to afford the insured what it
18 is entitled to: the full protection of a defense on its behalf.");
19 id. at 300 ("[T]he insured need only show that the underlying claim
20 may fall within policy coverage; the insurer must prove it
21 cannot.") (emphasis added).

22 Here, Centex tendered its defense in the Acupan action on
23 January 21, 2011. It made a prima facie showing that the action
24 potentially fell within its coverage by February 1, 2011 when it
25 submitted copies of subcontracts and other documents at Travelers'
26 request. However, the complaint in the Acupan action was not filed
27 until April 19, 2011. In California, a responsive pleading is not
28 due until 30 days after the complaint is filed. Cal. Rules of
Court 3.110. Thus, Travelers' duty to defend was not triggered

1 until May 19, 2011. Travelers did not accept Centex's tender,
2 however, until June 1, 2011. Thus, there were at least 13 days
3 during which Travelers had a duty to defend Centex but did not
4 provide a defense. As a result, Centex had to employ its own
5 counsel.

6 Centex tendered its defense in the Conner action on
7 September 8, 2010, at which point it had made a prima facie showing
8 that the action potentially fell within its coverage. The
9 complaint in the Conner action was not filed, however, until
10 October 15, 2010. Travelers' duty to defend therefore arose on
11 November 15, 2010, the date on which a responsive pleading was due
12 from Centex. Travelers did not accept Centex's tender, however,
13 until January 21, 2011. Its acceptance, therefore, was made 67
14 days after its duty to defend was triggered.

15 Travelers argues that it did not breach its duty to defend
16 because (1) it had a right to conduct a reasonable investigation
17 before accepting Centex's tender and (2) it reimbursed Centex for
18 legal costs incurred prior to accepting Centex's tender. The duty
19 to defend imposes upon the insurer several responsibilities,
20 including that it "employ competent counsel to represent the
21 assured." Merritt v. Reserve Insurance Co., 34 Cal. App. 3d 858,
22 882 (1973). A failure to provide counsel or to guarantee the
23 payment of legal fees immediately after an insurer's duty to defend
24 has been triggered constitutes a breach of the duty to defend, even
25 if the insurer later reimburses the insured. See Montrose Chem.
26 Corp., 6 Cal. 4th at 295, 300. After all, "[t]he insured's desire
27 to secure the right to call on the insurer's superior resources for
28 the defense of third party claims is, in all likelihood, typically

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1 as significant a motive for the purchase of insurance as is the
2 wish to obtain indemnity for possible liability." Id. at 295-96.
3 Of course, an insurer is free to conduct an investigation beyond
4 the point at which its duty to defend has been triggered. Such an
5 investigation may lead to facts establishing that there is no
6 possibility of coverage, thereby ending the insurer's duty to
7 defend. An insurer may not, however, deprive an insured of the
8 security implicit in the duty to defend -- specifically, "the right
9 to [immediately] call on the insurer's superior resources" as
10 opposed to having to marshal its own resources to mount a defense
11 against a claim that possibly falls within the policy's coverage.
12 Id.

13 Accordingly, the Court finds that Travelers breached its duty
14 to defend by failing to provide Centex with a defense at least 30
15 days after the complaints were filed in the Acupan and Conner
16 actions. Upon breaching its duty to defend, Travelers also lost
17 its right to control Centex's defense. See J.R Mktg., L.L.C., 216
18 Cal. App. at 1457.

19

20 **IV. CONCLUSION**

21 For the forgoing reasons, the Court GRANTES Centex's motion
22 for reconsideration and finds that Travelers lost its right to
23 control Centex's defense in the Acupan and Conner actions.

24

25 IT IS SO ORDERED.

26

27 Dated: October 7, 2015

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UNITED STATES DISTRICT JUDGE