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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Nat Palaniappan,

10 Plaintiff,

11 v.

12 Gilbert Hospital LLC, *et al.*,

13 Defendants.
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No. CV-17-00517-PHX-JJT

ORDER

15 At issue is Wesco Insurance Company's ("Movant") Motion to Intervene (Doc. 88,
16 Mot.), to which Plaintiff filed a Response (Doc. 89, Resp.) and Movant replied (Doc. 90,
17 Reply). Defendant Gilbert Hospital did not file a responsive brief, and thus neither takes a
18 position opposing nor supporting the Motion. Defendant Principal Financial Group has
19 previously been dismissed from this action. (Doc. 96.)

20 **I. BACKGROUND**

21 Plaintiff filed suit against his employer, Defendant Gilbert Hospital ("Defendant")
22 claiming breach of fiduciary duty under ERISA. (Doc. 45, Am. Compl.) The Court has
23 summarized the relevant factual background in other Orders, such as the Order granting
24 Defendant Principal Financial Group's Motion to Dismiss (Doc. 96 at 1–3.) The Court will
25 not restate the history behind Plaintiff's claims here.

26 Movant is the insurance provider for Defendant's parent company. (Mot. at 2.)
27 Pursuant to their insurance policy, Movant retained defense counsel on behalf of Defendant
28 in this matter. (Mot. at 2.) Defendant then filed a Notice of Involuntary Bankruptcy Case

1 Filing on May 17, 2018. (Doc. 74.) Movant’s appointed counsel, Mr. Daniel Garrison,
2 subsequently moved to withdraw from this case pursuant to local Rule of Civil Procedure
3 83.3(b)(2). (Doc. 76.) The Court granted Mr. Garrison’s Motion to Withdraw on June 7,
4 2018, and set a deadline of July 13, 2018, for Defendant to retain new counsel. (Doc. 79.)

5 On July 25, 2018, Movant filed a Motion to Intervene, alleging that when Movant
6 attempted to retain new counsel before the Court’s deadline, Defendant’s receiver refused
7 to cooperate. (Mot. at 2.) Movant alleges that “[t]he receiver indicated it had no interest in
8 a defense unless [Movant] confirmed unreserved coverage for both defense or immunity;
9 otherwise, Plaintiff could obtain judgment and seek a portion of liquidated assets in the
10 receivership proceedings.” (Mot. at 2.) Movant now seeks to intervene for two reasons:
11 “(a) to obtain a declaration that the receiver’s refusal to consent to defense under
12 reservation is a breach of the cooperation clause [of parties’ insurance coverage
13 agreement], or alternatively (b) to protect its interests in the litigation by mounting a
14 defense against claims made by Plaintiff against [Defendant.]” (Mot. at 2.)

15 **II. LEGAL STANDARD**

16 **A. Intervention as a Matter of Right**

17 Federal Rule of Civil Procedure 24(a) permits intervention as a matter of right on a
18 timely motion. While the Ninth Circuit Court of Appeals construes Rule 24(a) liberally in
19 favor of potential intervenors, the applicant for intervention bears the burden of
20 demonstrating that he has satisfied the elements for intervention. *See Ctr. for Biological*
21 *Diversity v. U.S. Bureau of Land Mgmt.*, 266 F.R.D. 369, 372 (D. Ariz. 2010); *see also*
22 *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006). Applicants are required to satisfy a
23 four-part test for intervention by right:

- 24 (1) the motion must be timely; (2) the applicant must claim a “significantly
25 protectable” interest relating to the property or transaction which is the
26 subject of the action; (3) the applicant must be so situated that the disposition
27 of the action may as a practical matter impair or impede its ability to protect
28 that interest; and (4) the applicant’s interest must be inadequately represented
by the parties to the action.

1 *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1148 (9th Cir. 2010) (quoting *Cal. ex*
2 *rel. Lockyer v. United States*, 450 F.3d 436, 440 (9th Cir. 2006)). “Failure to satisfy any
3 one of the requirements is fatal to the application” *Perry v. Proposition 8 Official*
4 *Proponents*, 587 F.3d 947, 950 (9th Cir. 2009) (citation omitted). In determining whether
5 the requirements are met, “courts are guided primarily by practical and equitable
6 considerations, and the requirements for intervention are broadly interpreted in favor of
7 intervention.” *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004).

8 **B. Permissive Intervention**

9 Federal Rule of Civil Procedure 24(b) governs permissive intervention. An
10 applicant must demonstrate: ““(1) independent grounds for jurisdiction; (2) [that] the
11 motion is timely; and (3) [that] the applicant’s claim or defense, and the main action, have
12 a question of law or a question of fact in common.”” *S. Cal. Edison Co. v. Lynch*, 307 F.3d
13 794, 803 (9th Cir. 2002) (quoting *United States v. City of L.A.*, 288 F.3d 391, 403 (9th Cir.
14 2002)). Even where those three elements are satisfied, however, the district court retains
15 the discretion to deny permissive intervention. *Id.* (citing *Donnelly v. Glickman*, 159 F.3d
16 405, 412 (9th Cir. 1998)). In exercising its discretion, a court must consider whether
17 intervention will unduly delay or prejudice the original parties and should consider whether
18 the applicant’s interests are adequately represented by the existing parties and judicial
19 economy favors intervention. *Venegas v. Skaggs*, 867 F.2d 527, 530-31 (9th Cir. 1998).

20 **III. ANALYSIS**

21 Movant argues that it meets the criteria for either intervention as a matter of right or
22 permissive intervention. (Mot. at 3.) Plaintiff’s Response is difficult to understand, though
23 Movant construes it as an argument that the Motion to Intervene was not timely. (Reply at
24 1.) Ultimately, the Court need not address the dispute about the timeliness of the Motion
25 because Movant’s intervention will be denied on other grounds.

26 Movant is correct that an insurer whose policy might be affected by litigation
27 brought against its insured typically satisfies the Rule 24(a)(2) requirement of having a
28 “significantly protectable interest relating to the property or transaction which is the subject

1 of the action.” See *Aerojet Gen. Corp.*, 606 F.3d at 1148 (internal citation omitted). But
2 there is a significant exception to this rule which Movant fails to address. When the insurer
3 agrees to defend the insured under a reservation of rights, as Movant has here,¹ the insurer
4 loses its right to intervene except under specific circumstances. See *Travelers Indemnity*
5 *Co. v. Dingwell*, 884 F.2d 629, 638 (1st Cir. 1989).² Intervention as a matter of right
6 becomes unavailable in these circumstances because the insurer’s interest in the litigation
7 no longer satisfies the requirement that “[t]he interest must be direct, not contingent.” *Id.*
8 (citing *Restor-A-Dent Dental Laboratories, Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d
9 871, 874 (2d Cir. 1984)). “When the insurer offers to defend the insured but reserves the
10 right to deny coverage, . . . the insurer’s interest in the liability phase of the proceeding is
11 contingent on the resolution of the coverage issue.” *Id.* The insurer’s interest is therefore
12 no longer an interest that is “direct, substantial, and legally protectible,” as required under
13 Rule 24(a)(2) because it is a contingent—not direct—interest. *Id.* (citing *Flynn v. Hubbard*,
14 782 F.2d 1084, 1092 (1st Cir. 1986) (Coffin, J., concurring)).

15 The rationale behind requiring a direct interest on the part of an intervening insurer
16 is that “[a]llowing the insurer to intervene to protect its contingent interest would allow it
17 to interfere with and in effect control the defense. Such intervention would unfairly restrict

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19 ¹ Insurer “issued a reservation of rights in this matter on July 12, 2017, indicating
20 that most, if not all, claims and damages in this lawsuit are precluded from coverage.”
21 (Mot. at 2.) The reservation of rights letter is attached as Exhibit A to Movant’s Motion.
22 Defendant refused Movant’s offer of substitute counsel after Mr. Garrison withdrew from
23 this case because Defendant’s “receiver will not consent to defense under the reservation.”
24 (Mot. at 2.)

25 ² The seminal case on this issue comes from the First Circuit, and while the Court
26 did not find that the Ninth Circuit has specifically analyzed the issue, district courts within
27 the Circuit align with the First. See *Dave Drilling Envtl. Engineering, Inc. v. Gamblin*,
28 2015 WL 4051968 at *3 (N.D. Cal. July 2, 2015) (explaining that while the general rule
prevents insurers from intervening as of right, “[s]everal courts have found that insurers
may intervene in circumstances where they do not seek to litigate to the detriment of the
insured, such as when seeking to defend on appeal” or on the question of damages once
liability has already been established). The Arizona Supreme Court adopted the same rule
as the First Circuit as cited in *Travelers Indemnity Co.* for the proposition that “[a]n insurer
that performs the duty to defend but reserves the right to deny the duty to pay should not
be allowed to control the conditions of payment,” thus permitting an insured to enter into
a settlement agreement with a plaintiff without breaching a policy agreement when the
insurer has insisted upon a reservation of rights. *United Servs. Auto. Ass’n. v. Morris*, 741
P.2d 246, 252 (Ariz. 1987)).

1 the insured, who faces the very real risk of an uninsured liability, and grant the insurer ‘a
2 double bite at escaping liability.’” *Id.* (citing *United Servs. Auto. Ass’n.*, 741 P.2d at 252).
3 The Court recognizes that in this case, Defendant has entered receivership, the receiver has
4 already stated that Defendant will not mount a defense, and that Plaintiff would therefore
5 have to collect any awarded damages from “a portion of liquidated assets in the
6 receivership proceedings.” (Mot. at 2.) That may help alleviate the concern that Movant’s
7 intervention would prejudice the insured, as Defendant has indicated that it has no plans to
8 defend against Plaintiff’s claims and would likely end up liable for the entire judgment,
9 whether Movant intervenes or not. But the Court remains concerned that allowing Movant
10 to intervene would permit it to steer the defense in a way that gives it “a double bite at
11 escaping liability.” *United Servs. Auto. Ass’n.* 741 P.2d at 252.

12 Movant would no doubt defend against Plaintiff’s claims in a way that minimizes
13 its own liability and steers any damages toward those areas not covered by its policy. This
14 not only gives Movant a chance to avoid liability before it litigates the policy requirements
15 with Defendant, but it also unfairly prejudices Plaintiff. If Movant were allowed to direct
16 the defense in a way that seeks to guarantee that only Plaintiff’s claims not covered by the
17 policy succeed, Plaintiff would be left to seek his damages from Defendant’s receivership
18 proceedings. But on the other hand, if Movant must litigate the terms of its policy with
19 Defendant in a separate proceeding, Plaintiff may recover on claims that are covered by
20 the policy as determined in Movant and Defendant’s separate action.

21 The case law on this matter, which plainly precludes Movant from intervening as a
22 matter of right in the defense against Plaintiff’s claims, is less clear on whether the Court
23 may grant permissive intervention under Rule 24(b). But having stated its concerns above,
24 the Court cannot be sure that intervention will not prejudice the existing parties, and thus
25 denies Movant’s Motion under Rule 24(b). *See Venegas* 867 F.2d at 530–31. Further,
26 Movant will not be left without a remedy upon denial of its Motion to Intervene. Movant
27 is still free to seek a declaration in a separate action that Defendant’s refusal to defend
28 constitutes a breach of the policy agreement.

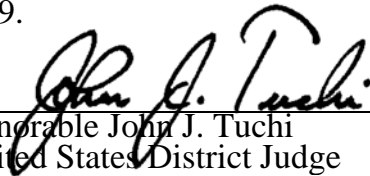
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IV. CONCLUSION

Because Movant offered to defend under a reservation of rights, which Defendant refused, Movant may not intervene in this matter under Rule 24(a)(2) or 24(b). To do so would potentially prejudice both Defendant and Plaintiff and would give Movant two attempts at litigating the matter of its own liability. The Court will thus deny the Motion to Intervene.

IT IS THEREFORE ORDERED denying Intervenor Wesco Insurance Co.’s Motion to Intervene (Doc. 88.)

Dated this 28th day of March, 2019.



Honorable John J. Tuchi
United States District Judge