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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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LIBERTY INSURANCE CORP.,

Plaintiff,

vs.

SOUTHWEST TRADERS INCORP.,

Defendant.

NO. ED CV-12-02151-JLQ

**ORDER RE: MOTION FOR  
LEAVE TO FILE  
COUNTERCLAIM**

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BEFORE THE COURT is Defendant Southwest Traders Incorporated ("Southwest") Motion for Leave to File Counterclaim. (ECF No. 18). Plaintiff Liberty Insurance Corporation ("Liberty") has filed an Opposition Brief (ECF No. 20) and Southwest has filed a Reply (ECF No. 21).

**I. Introduction/Procedural History**

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Liberty initiated this action by filing a Complaint on December 6, 2012. The Complaint is four pages long and contains one claim for breach of an insurance policy, that breach being the alleged failure to pay a retrospective premium adjustment. Southwest answered the Complaint on January 15, 2013. The Answer contained eight affirmative defenses, but did not assert any counterclaims.

On February 21, 2013, the parties filed a Joint Status Report (ECF No. 10), as was required by the court in advance of the Scheduling Conference. That Status Report stated that the parties believed that the following was the principal factual issue in the case: "Whether Southwest Traders owes retrospective premiums and other amounts to Liberty under the workers' compensation policy that it issued, and, if so, in what amount." (ECF No. 10, p. 3). The Status Report stated that Southwest was evaluating whether to join

1 additional parties. The parties jointly proposed a trial date of December 11, 2013.

2 The court held a Scheduling Conference on March 7, 2013, and issued a  
3 Scheduling Order. (ECF No. 19). The Scheduling Order provided that any motion to  
4 amend pleadings or add named parties shall be served no later than April 5, 2013. It also  
5 set this matter for bench trial on December 11, 2013, as no demand had been made for a  
6 jury trial. On April 5, 2013, Southwest filed the Motion for Leave to file a Counterclaim  
7 and in the proposed Counterclaim demands a trial by jury.

## 8 **II. Standard for Leave to Amend**

9 Pursuant to Fed.R.Civ.P. 15(a), leave of court is required for Southwest's proposed  
10 amendment. The court "should freely give leave when justice so requires." Fed.R.Civ.P.  
11 15(a)(2). Whether to grant such leave, rests in the discretion of the court. *Foman v.*  
12 *Davis*, 371 U.S. 178, 182 (1962). The court may deny leave to amend where there has  
13 been undue delay, bad faith, or dilatory motive on the part of the movant, or where the  
14 amendment would be futile. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007  
15 (9th Cir. 2009).

## 16 **III. Discussion**

17 Southwest's proposed Counterclaim contains 16 counts, and is 27-pages long. It is  
18 not simply a Counterclaim, but rather seeks to add an additional party to this litigation--  
19 Sullivan Curtis Monroe Insurance Services, LLC ("Sullivan Curtis"), an insurance broker.  
20 Liberty opposes the proposed amendment, both as to the counterclaims against Liberty,  
21 and the addition of Sullivan Curtis.

### 22 **A. The Claims Against Sullivan Curtis**

23 Seven of the sixteen claims are asserted against Sullivan Curtis. Southwest  
24 contends that the proposed Counterclaim "seeks to resolve issues arising from the same  
25 contract alleged in Liberty's Complaint and to resolve issues in a related auto policy."  
26 (ECF No. 18, p. 3). Southwest's Motion omits nearly any mention of the fact that  
27 Southwest is seeking to bring another party into this action. There is one brief mention of  
28 "theories of relief....against Southwest's insurance broker", but Sullivan Curtis is not even

1 mentioned by name in the Motion. Instead, Sullivan Curtis is merely included in the  
2 proposed Counterclaim (ECF No. 18, Ex. A). The claim against Sullivan Curtis is not in  
3 fact a counterclaim, but would rather be a claim against a third-party.

4 A defending party, such as Southwest, may assert a claim against a third-party who  
5 is or may be liable to Southwest for all or part of the claim against it. However, in order  
6 to do so, Southwest must "obtain the court's leave if it files the third-party complaint  
7 more than 14 days after serving its original answer." Fed.R.Civ.P. 14(a)(1). Liberty  
8 argues that Southwest failed to properly seek leave of court to add a third-party because  
9 Southwest only sought leave to assert counterclaims. As a technical matter, the court  
10 agrees that Southwest did not properly seek leave to file a third-party complaint against  
11 Sullivan Curtis. Southwest's Motion fails to mention Sullivan Curtis and fails to cite to  
12 Rule 14. Southwest in its Reply addresses for the first time Rule 14 and acknowledges  
13 that whether to allow a third-party defendant to be impleaded is within the discretion of  
14 this court.

15 Additionally, Southwest's claim is not a proper third-party claim. "A third-party  
16 claim may be asserted only when the third party's liability is in some way dependent on  
17 the outcome of the main claim and is secondary or derivative thereto." *Stewart v.*  
18 *American Int. Oil & Gas*, 845 F.2d 196, 199 (9th Cir. 1988). The Ninth Circuit further  
19 stated that the "crucial characteristic" of a Rule 14 claim is that a "defendant is attempting  
20 to transfer to the third-party defendant the liability asserted against him by the original  
21 plaintiff." *Id.* at 200. Southwest is not asserting that Sullivan Curtis is actually the party  
22 liable to Liberty for breach of contract/unpaid premiums. Rather, Southwest alleges that  
23 it had a Professional Services Agreement with Sullivan Curtis and that Sullivan Curtis  
24 provided poor advice about coverage proposals, and failed to properly service policies,  
25 etc. Those claims need not be asserted in this lawsuit. "It is not sufficient that the third-  
26 party claim is a related-claim; the claim must be derivatively based on the original  
27 plaintiff's claim." *Zero Tolerance Entertainment v. Ferguson*, 254 F.R.D. 123, 126 (C.D.  
28 Cal. 2008). Southwest's request for leave to amend to assert third-party claims against

1 Sullivan Curtis is **DENIED**.

2 **B. Counterclaims Against Liberty**

3 Liberty also opposes leave to amend to add counterclaims against it, arguing that  
4 Southwest has unduly delayed those claims. Liberty argues that as Southwest had not, at  
5 the time of filing the Motion, conducted any discovery, Southwest therefore knew of the  
6 basis for the Counterclaim since the inception of this suit. Although it appears that  
7 Southwest could have moved more promptly in seeking amendment, the court does not  
8 find undue delay where the Motion was filed by the deadline set in the Scheduling Order.

9 Liberty argues it will suffer unfair prejudice if the Counterclaim is allowed because  
10 the proposed Counterclaim would "radically shift" the nature of this case and require an  
11 "entirely new course of defense." (ECF No. 20, p. 9). Liberty argues it will be prejudiced  
12 by having to defend all these new claims under the relatively short time frame that was  
13 set for the preparation and trial of a one-count breach of contract claim. There is some  
14 merit to Liberty's argument. Southwest seeks to expand this action by adding an  
15 additional sixteen counts which involve additional entities and additional contracts. As  
16 discussed *supra*, in an exercise of this court's discretion, it has not granted leave to add  
17 the third-party claims against Sullivan Curtis.

18 However, a party is required to bring as a compulsory counterclaim a claim that  
19 arises out of the same transaction or occurrence and does not require the adding of  
20 another party over whom the court cannot acquire jurisdiction. Fed.R.Civ.P. 13(a)(1).  
21 Nine of the sixteen counts in the proposed Counterclaim are asserted against Liberty.  
22 Counts I and II assert breach of contract and breach of duty of good faith and fair dealing  
23 arising out of the same Worker's Compensation Policy at issue in the Complaint. The  
24 court grants leave for Liberty to assert those claims. Counts III and IV relate to a  
25 different policy of insurance, an Auto Policy, and therefore are not compulsory  
26 counterclaims. However, the court may allow such claims as permissive counterclaims.  
27 Fed.R.Civ.P. 13(b).

28 Counts V and VI are tort claims related at least in part to the Worker's

1 Compensation Policy. Liberty argues that Southwest fails to state a claim in Counts V  
2 and VI. Such arguments can be better addressed after Liberty files an Answer or  
3 responsive motion to the amended pleading. Count VII pertains to the Worker's  
4 Compensation Policy. Counts VIII and IX are entitled "set off" and "accounting". Set  
5 off is likely more appropriately considered an affirmative defense. Southwest may fail to  
6 state a claim for an accounting. See Singh v. City of Oakland, 295 Fed.Appx. 118 (9th  
7 Cir. 2008)("The necessary prerequisite to the right to maintain a suit for an equitable  
8 accounting, like all other equitable remedies, is...the absence of an adequate remedy at  
9 law."). Those issues need not be resolved at this time.

10 The court **GRANTS** Southwest's Motion for Leave to the extent of the nine  
11 counterclaims against Liberty.

### 12 **C. Jury Demand**

13 The proposed Counterclaim contains a jury demand. No jury demand was made as  
14 to the issues in the original Complaint, and this matter is currently set for bench trial. The  
15 Counterclaim also includes equitable claims. A party is generally not entitled to a jury  
16 trial on a purely equitable claim. See Shubin v. U.S. Dist. Ct., 313 F.2d 250 (9th Cir.  
17 1963). Resetting this matter for jury trial, may necessitate a brief extension of the  
18 scheduled dates. This matter is currently set for trial in December 2013. The court  
19 would consider resetting it for jury trial in February or March 2014, with a corresponding  
20 extension of other dates. **No later than May 24, 2013**, the parties shall confer and file a  
21 Joint Status Report including their respective positions concerning which issues may be  
22 tried to the jury, and their position as to whether deadlines in the court's Scheduling  
23 Order (ECF No. 19) should be extended, and if so, proposed cut-off and trial dates.

### 24 **IT IS HEREBY ORDERED:**

25 1. Southwest's Motion for Leave (ECF No. 18) is **GRANTED IN PART** and  
26 **DENIED IN PART**. The court grants leave for Southwest to assert the counterclaims  
27 against Liberty in Counts I through IX of its proposed Counterclaim. The court denies  
28 leave to join third-party Sullivan Curtis.

1           2. **Within ten (10) days** of the date of this Order, Southwest shall file its  
2 Counterclaim against Liberty, which shall not include any claims against Sullivan Curtis,  
3 and shall not include any claims not contained in the proposed amendment. (ECF No. 18,  
4 Ex. A).

5           3. **Within fourteen (14) days** of the filing of the Counterclaim, Liberty shall  
6 Answer the Counterclaim or file other responsive pleading or motion.

7           4. No later than **May 24, 2013**, the parties shall file a Joint Status Report, as  
8 discussed *supra*, containing their positions on the matter being set for jury trial and  
9 whether an extension of the current cut-off and trial dates is required.

10           **IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order and  
11 furnish copies to counsel.

12           **DATED** this 1st day of May, 2013.

13   s/ Justin L. Quackenbush  
14   JUSTIN L. QUACKENBUSH  
  SENIOR UNITED STATES DISTRICT JUDGE

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