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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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CALIFORNIA DEPARTMENT OF TOXIC
SUBSTANCES CONTROL and the TOXIC
SUBSTANCES CONTROL ACCOUNT,

Plaintiffs,

v.

JIM DOBBAS, INC. a California
corporation; CONTINENTAL RAIL,
INC., a Delaware corporation;
DAVID VAN OVER, individually;
PACIFIC WOOD PRESERVING, a
dissolved California
corporation; WEST COAST WOOD
PRESERVING, LLC., a Nevada
limited liability company; and
COLLINS & AIKMAN PRODUCTS, LLC,
a Delaware limited liability
company,

Defendants.

No. 2:14-CV-00595 WBS EFB

ORDER RE: MOTION TO INTERVENE
AND SET ASIDE DEFAULT

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Plaintiffs Department of Toxic Substances Control and
the Toxic Substances Control Account (collectively "DTSC") sought
recovery of costs and interest incurred during the cleanup of a

1 wood preserving operation in Elmira, California against multiple
2 defendants under the Comprehensive Environmental Response,
3 Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et
4 seq. (First Am. Compl. ("FAC") at ¶ 19.) DTSC obtained an entry
5 of default against a canceled Delaware corporation, defendant
6 Collins & Aikman Products, LLC ("C&A Products") in 2015 after it
7 failed to respond to DTSC's First Amended Complaint. (Docket No.
8 129.) Presently before the court is The Travelers Indemnity
9 Company's ("Travelers") motion to intervene as a defendant in
10 this matter and vacate default against its insured, C&A Products.
11 (Mot. to Intervene and Vacate Default ("Mot.") at 2 (Docket No.
12 196).)

13 I. Motion to Intervene

14 Travelers seeks to intervene as of right or, in the
15 alternative, permissively under Federal Rule of Civil Procedure
16 Rule 24. (Mot. at 6.)

17 In order to intervene as of right, the party must
18 demonstrate that it has an interest in the litigation and that
19 interest would be practically impaired if the intervention was
20 not granted. Cal. Dep't. of Toxic Substances Control v.
21 Commercial Realty Projects, Inc., 309 F.3d 1113, 1119 (9th Cir.
22 2002) (quoting United States v. State of Washington, 86 F.3d
23 1499, 1503 (9th Cir. 1996)). Ordinarily, insurance companies do
24 not have an interest in actions between those they insure and
25 another party when they deny coverage and refuse to provide a
26 defense. Gray v. Begley, 182 Cal. App. 4th 1509, 1522 (2d Dist.
27 2010).

28 However, "an insurer providing a defense under a

1 reservation of rights has not lost its right to control the
2 litigation" and thus retains an interest in the action. Hyundai
3 Motor Am. v. Nat'l Union Fire Ins. Co. of Pittsburgh, No. SACV
4 08-00020-JVS (RNBx), 2010 WL 11468348, at *3 (C.D. Cal. Oct. 26,
5 2010) (citing Gray, 182 Cal. App. 4th at 1523-24)). Under
6 California law, where the insured defendant is "legally
7 incapacitated" because of suspension or cancelation, the insurer
8 can intervene in the action under a reservation of rights because
9 "if an insurer were unable to intervene . . . the insurer would
10 be deprived of any opportunity to 'contest its insured's fault or
11 the available damages.'" B.G.N. Fremont Square Ltd. v. Chung,
12 No. CV 10-9749 GAF (RZx), 2011 WL 13129968, at *5 (C.D. Cal. Sep.
13 27, 2011) (citing APL Co. Pte. Ltd. v. Valley Forge Ins. Co., No.
14 C 09-05641 MHP, 2010 WL 1340373, at *4 (N.D. Cal. Apr. 5, 2010).

15 But here, Travelers has both disclaimed coverage and
16 any duty to defend C&A Products (See Decl. of Alexander E.
17 Potente ("Potente Decl.") at Exs. B & C (Docket Nos. 197-2, 197-
18 3)) and refused to provide a defense under a reservation of
19 rights.¹ (Decl. of Laura J. Zuckerman ("Zuckerman Decl.") at 2
20 (Docket No. 215-1).) Accordingly, Travelers forfeited any direct
21 interest in the action and the court will not permit it to
22 intervene as of right.

23 Alternatively, permissive intervention may be granted
24 by the district court under its broad discretion. Perry v.
25 Schwarzenegger, 630 F.3d 898, 905 (9th Cir. 2011) (per curiam).

27 ¹ DTSC offered to stipulate to Travelers' intervention if
28 it provides a defense under a reservation of rights. Travelers
refused. (Zuckerman Decl. at 2.)

1 Courts may consider the "nature and extent of the intervenors'
2 interest" and "whether intervention will prolong or unduly delay
3 the litigation." Id. at 905 (citing Spangler v. Pasadena Bd. of
4 Educ., 552 F.2d 1326, 1329 (9th Cir. 1977)). For the reasons
5 above, the court finds Travelers does not have an interest in
6 this litigation and its intervention would only serve to prolong
7 the action. The court will not permit Travelers to intervene
8 permissively, and the court will deny Travelers' motion to
9 intervene.

10 II. Motion to Vacate Default

11 Under Federal Rule of Civil Procedure Rule 55(c), a
12 court may set aside an entry of default for good cause. To
13 determine good cause, a court will consider: (1) whether the
14 party seeking to set aside default engaged in culpable conduct
15 that led to the default; (2) whether the party had a meritorious
16 defense; and (3) whether reopening the default would prejudice
17 the other party. United States v. Signed Personal Check No. 730
18 of Yubran Mesle, 615 F.3d 1085, 1091 (9th Cir. 2010) (internal
19 quotations omitted). "[A] finding that any one of these factors
20 is true is sufficient reason for the district court to refuse to
21 set aside the default." Id.

22 Looking to the Signed Personal Check No. 730 of Yubran
23 Mesle considerations, even if Travelers were permitted to
24 intervene, it has failed to establish good cause to set aside C&A
25 Products' default. First, although there is no claim that
26 Travelers itself engaged in any culpable conduct, the conduct of
27 its insured corporation, through its duly authorized receiver,
28 can be considered culpable. C&A Products was a Delaware limited

1 liability company. Under Delaware law, a cancelled limited
2 liability company can be sued if the Delaware Court of Chancery
3 appoints a trustee or receiver for the company. 6 Del. C. § 18-
4 805. The Court of Chancery's appointed receiver, Brian Rostocki,
5 had "the power, but not the obligation, to defend, in the name of
6 Collins & Aikman Products, LLC, any claims made against it in
7 DTSC v. Dobbas." In re Collins & Aikman Prods., LLC, No. 10348-
8 CB, 2014 WL 6907689, at *1-2 (Del. Ch. Dec. 8, 2014) (Docket No.
9 73-1). Mr. Rostocki accepted service of DTSC's First Amended
10 Complaint and failed to respond, leading to the entry of default.
11 (Docket No. 129.)

12 Second, Travelers has not offered or suggested any
13 meritorious defense that C&A Products would have to the complaint
14 if its default were set aside. Travelers' disagreement with Mr.
15 Rostocki's decision not to respond does not rise to the level of
16 a "meritorious defense" necessary to show good cause. Further,
17 the court expresses no opinion as to the merits of Travelers' own
18 declaratory relief action against DTSC, except to note that the
19 relief sought in that action would not constitute a defense which
20 C&A Products could assert to liability in this action.

21 Third, Travelers has failed to show that reopening the
22 default would not prejudice DTSC. The harm here is "greater"
23 than "simply delaying the resolution of the case." TCI Grp. Life
24 Ins. Plan v. Knoebber, 244 F.3d 691, 701 (9th Cir. 2001),
25 overruled on other grounds by Egelhoff v. Egelhoff ex rel.
26 Breiner, 532 U.S. 141 (2001). DTSC sought entry of default
27 against C&A Products in 2015. Neither C&T Products nor Travelers
28 did anything to attempt to set aside that default for over three

1 years. DTSC relied in good faith on that default and incurred
2 the litigation expenses associated with preparing and filing a
3 motion for entry of judgment on that default. Accordingly, the
4 court will deny Travelers' motion to vacate entry of default.

5 IT IS THEREFORE ORDERED that Traveler's Motion to
6 Intervene and Motion to Vacate Default (Docket No. 196) be, and
7 the same thereby is, DENIED.

8 Dated: October 22, 2019



9 WILLIAM B. SHUBB
10 UNITED STATES DISTRICT JUDGE
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