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5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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8 TOWER INS. CO. OF NEW YORK,

No. C 11-03806 SI

9 Plaintiff,

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR LEAVE TO FILE  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

10 v.

11 CAPURRO ENTERPRISES INC., et al.,

12 Defendants.  
\_\_\_\_\_/

13  
14 AND RELATED COUNTERCLAIMS.  
\_\_\_\_\_/


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16 The Court has disposed of the threshold issue of plaintiff-insurer's duty to defend in this  
17 declaratory insurance action in the two orders of December 15, 2011 and April 2, 2011. *See* Dkts. 45  
18 and 68. The Court found that plaintiff Tower Insurance Co. ("Tower") wrongfully denied its insured,  
19 defendant Capurro Enterprises, Inc. ("Capurro"), a defense in an underlying action brought against  
20 Capurro. In the December 15, 2011 Order, the Court also denied Tower's motion for summary  
21 judgment with respect to Capurro's counterclaim for breach of the implied covenant of good faith and  
22 fair dealing. The Court held that it is a question for a jury whether or not Tower's withholding of  
23 benefits was unreasonable, a necessary element of a claim for breach of the implied covenant. *See* Dkt.  
24 45 at 12-13.

25 On July 20, 2012, Tower filed a motion requesting leave to file a second motion for partial  
26 summary judgment on the breach of the implied covenant claim. *See* Dkt. 69. In the attached proposed  
27 motion, Tower argues that it relied on the advice of counsel in denying Capurro's claim, and therefore,  
28 it cannot be held liable for breach of the implied covenant. *See* Dkt 69-1 [Proposed Motion].

1 The Court GRANTS Tower's motion for leave to file a motion for partial summary judgment,  
2 and accepts the proposed motion as filed. Capurro shall file a response no later than **August 17, 2012**.  
3 Tower may file a reply by **August 24, 2012**. A hearing shall be held on the motions on **August 31,**  
4 **2012**.

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7 **IT IS SO ORDERED.**

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9 Dated: August 3, 2012

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12 SUSAN ILLSTON  
13 United States District Judge  
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