

United States District Court
Northern District of California

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TRAVELERS PROPERTY CASUALTY)	Case No. 12-0371-SC
COMPANY OF AMERICA,)	
)	Related Cases: 11-3638-SC,
Plaintiff,)	13-0088-SC
)	
v.)	ORDER RE: MOTIONS TO
)	<u>DISMISS, STRIKE AND AMEND</u>
CENTEX HOMES, NEWMAYER &)	
DILLION, RGL INC., RGL)	
FORENSICS, and DOES 1 through 10)	
inclusive,)	
)	
Defendants.)	
)	
AND RELATED COUNTERCLAIMS.)	
)	

I. INTRODUCTION

Insurer Travelers Property Casualty Company of America ("Travelers") brings this action against its insured Centex Homes ("Centex") and Centex's counsel, Newmeyer & Dillion, LLP ("Newmeyer") in connection with thirteen underlying construction defect actions Centex and Newmeyer tendered to Travelers for indemnity and defense, specifically the Adams, Adkins, Agles, Ahlberg, Akin, Allie, Balanguie, Bradley, Briseno, Cooley, Garvey, Johnston, and Tapia actions. ECF No. 76 (Third Amended Complaint ("3AC")). Travelers asserts claims for violation of the California

1 Unfair Competition Law, breach of fiduciary duty, and
2 reimbursement. In response, Centex has asserted counterclaims
3 against Travelers for breach of contract, breach of the implied
4 covenant of good faith and fair dealing, and declaratory relief
5 relating to a number of the construction defect actions involved in
6 the 3AC, including the Acupan, Adkins, Ahlberg, Briseno, Cooley,
7 Garvey, Johnston, and Tapia actions.¹ ECF No. 89 ("Countercl.").
8 Now before the Court are Travelers' motions to dismiss and strike
9 Centex's Counterclaim. ECF Nos. 94 ("MTD"), 96 ("MTS"). Also
10 before the Court is Travelers' motion to file a fourth amended
11 complaint. ECF No. 108 ("4AC Mot.").² For the reasons set forth
12 below, these motions are GRANTED in part and DENIED in part.

13
14 **II. DISCUSSION**

15 **A. Travelers' Motions to Dismiss and Strike**

16 Travelers' motions to dismiss and strike are duplicative. The
17 two motions relate to the same issues, raise the same arguments,
18 and essentially seek the same relief. For the most part, the text
19 of both motions is identical. Ironically, Travelers' Rule 12(f)
20 motion to strike is predicated in part on the argument that
21 Centex's counterclaim is redundant. At times, Travelers moves to
22 strike when it should only be moving to dismiss and vice versa.
23 The Court does its best to apply the appropriate standard to

24 _____
25 ¹ Travelers and Centex also asserted claims and counterclaims in
26 connection with the Spicer action. On April 9, 2013, the parties
stipulated to dismiss their claims and counterclaims to the extent
they are predicated on the Spicer action. ECF No. 119 ("Apr. 9
Stip.").

27 ² All three motions are fully briefed. ECF Nos. 101 ("Opp'n to
28 MTD/MTS"), 103 ("Reply ISO MTD/MTS"), 116 ("Opp'n to 4AC Mot."),
120 ("Reply ISO 4AC Mot.").

1 Travelers' various arguments. The Court urges Travelers to refrain
2 from filing duplicative motions in the future, especially
3 duplicative motions to strike, which are generally disfavored.

4 **i. Legal standard**

5 A Rule 12(b)(6) motion to dismiss "tests the legal sufficiency
6 of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001).
7 "Dismissal can be based on the lack of a cognizable legal theory or
8 the absence of sufficient facts alleged under a cognizable legal
9 theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699
10 (9th Cir. 1988). "When there are well-pleaded factual allegations,
11 a court should assume their veracity and then determine whether
12 they plausibly give rise to an entitlement to relief." Ashcroft v.
13 Iqbal, 556 U.S. 662, 664 (2009). However, "the tenet that a court
14 must accept as true all of the allegations contained in a complaint
15 is inapplicable to legal conclusions. Threadbare recitals of the
16 elements of a cause of action, supported by mere conclusory
17 statements, do not suffice." Id. at 663 (citing Bell Atl. Corp. v.
18 Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a
19 complaint must be both "sufficiently detailed to give fair notice
20 to the opposing party of the nature of the claim so that the party
21 may effectively defend against it" and "sufficiently plausible"
22 such that "it is not unfair to require the opposing party to be
23 subjected to the expense of discovery." Starr v. Baca, 633 F.3d
24 1191, 1204 (9th Cir. 2011).

25 Pursuant to Federal Rule of Civil Procedure 12(f), the Court
26 may strike from a pleading "any redundant, immaterial, impertinent,
27 or scandalous matter." "The purposes of a Rule 12(f) motion is to
28 avoid spending time and money litigating spurious issues." Barnes

1 v. AT&T Pension Ben. Plan-Nonbargained Program, 718 F. Supp. 2d
2 1167, 1170 (N.D. Cal. 2010). "While a Rule 12(f) motion provides
3 the means to excise improper materials from pleadings, such motions
4 are generally disfavored because the motions may be used as
5 delaying tactics and because of the strong policy favoring
6 resolution on the merits." Id.

7 **ii. The Adkins and Garvey actions**

8 Travelers moves to dismiss Centex's Counterclaim to the extent
9 that is based on the Adkins and Garvey actions on the ground that
10 Centex's claims are duplicative of claims raised in earlier-filed
11 actions between the parties, specifically Travelers v. Centex, Case
12 No. 11-3638-SC (N.D. Cal.) ("Travelers v. Centex II"), and
13 Travelers v. Centex, 12-00496-VAP (C.D. Cal.) ("Travelers v. Centex
14 IV").^{3, 4} Travelers v. Centex II is currently pending before the
15 undersigned and has been related to the instant action, and
16 Travelers v. Centex IV was pending before Judge Phillips in the
17 Central District of California. On April 30, 2013, the parties
18 stipulated to the dismissal with prejudice of their claims and
19 counterclaims in Travelers v. Centex IV, and Judge Phillips
20 approved the stipulation the following day.

21 Centex acknowledges that its counterclaims are duplicative
22 with respect to the Adkins and Garvey actions. MTD/MTS Opp'n at 8.
23 However, Centex argues that Travelers' Adkins- and Garvey-related
24

25 ³ Travelers also argues that Centex's allegations relating to the
26 Spicer action are duplicative of Travelers v. Centex II and
Travelers v. Centex IV. In light of the parties' April 9
Stipulation, this issue is now moot.

27 ⁴ Travelers has filed at least seven separate actions against
28 Centex in California courts, all of them relating to disputes over
coverage for various underlying construction defect actions.

1 claims are also duplicative. Id. As such, Centex reasons that the
2 fairest solution would be either to dismiss the duplicative claims
3 of both parties or to stay both parties' duplicative claims. Id.

4 As Travelers points out, Centex raised an almost identical
5 argument when it moved to dismiss Travelers' claims on October 26,
6 2012. See ECF No. 79 at 8-9. Judge Hamilton, who was previously
7 assigned to this case, apparently rejected the argument, as she
8 denied Centex's motion and found that "disputed issues of fact
9 preclude[d] dismissal." ECF No. 87. The law of the case doctrine
10 precludes the Court from reopening previously decided issues.

11 While Judge Hamilton's order did not directly address Centex's
12 arguments regarding duplication, "[t]he law of the case applies to
13 issues decided explicitly or by necessary implication in [a]
14 court's previous disposition." Leslie Salt Co. v. United States,
15 55 F.3d 1388, 1393 (9th Cir. 1995) (quotations omitted). "The law
16 of the case turns on whether a court previously decide[d] upon a
17 rule of law . . . not on whether, or how well, it explained the
18 decision." Christianson v. Colt Indus. Operating Corp., 486 U.S.
19 800, 817 (1988) (quotations omitted). In denying Centex's motion
20 to dismiss, Judge Hamilton necessarily reached a decision on
21 Centex's argument regarding duplicative suits.

22 In any event, contrary to Centex's argument, dismissing
23 Centex's counterclaims regarding the Adkins and Garvey actions
24 while retaining Travelers' Adkins- and Garvey-related claims will
25 not lead to inequitable results. Centex may still pursue identical
26 Adkins and Garvey related counterclaims in Travelers v. Centex II,
27 which is currently pending before the undersigned. The fact that
28 Centex may only pursue these counterclaims in one action -- as

1 opposed to two -- will not prejudice them in any way. Even if all
2 of Travelers' Adkins and Garvey related claims do arise from the
3 same transaction or occurrence, Travelers is asserting different
4 causes of action in its actions against Centex. Further, since the
5 only two remaining active cases concerning the Adkins and Garvey
6 actions are both pending before the undersigned, the chance of
7 inconsistent rulings is minimal.

8 For these reasons, the Court GRANTS Travelers' motion to
9 dismiss with respect to the aspects of Centex's Counterclaim which
10 relate to the Adkins and Garvey actions.

11 **iii. The Acupan action**

12 Travelers next moves to dismiss and strike all references to
13 the Acupan action from Centex's Counterclaim. MTD at 9, MTS at 10.
14 Specifically, Travelers targets a portion of paragraph 115a of the
15 Counterclaim, which states that Travelers waited 446 days to
16 respond to Centex's tender of the Acupan action. Travelers
17 contends that this reference is irrelevant, since Centex requests
18 no relief in connection with the Acupan action. MTS at 10. Centex
19 responds that its allegations concerning the Acupan action support
20 its claim that Travelers has a pattern and practice of failing to
21 immediately defend its insured. Opp'n to MTD/MTS at 17 n.7.

22 As Centex's reference to the Acupan action does not undermine
23 the plausibility of its Counterclaim, Travelers' motion to dismiss
24 this reference lacks merit. The Court reaches a different
25 conclusion with respect to Travelers' motion to strike. Travelers'
26 conduct with respect to the Acupan action is immaterial to the
27 instant dispute. If Centex wishes to show that Travelers has a
28 pattern or practice of failing to timely respond to the tender of

1 construction defect actions, then Centex may attempt to draw from
2 the numerous other construction defect actions that are actually at
3 issue in this case. Accordingly, the Court strikes Centex's
4 reference to the Acupan action.

5 **iv. The Ahlberg, Briseno, Cooley, Johnston, and Tapia**
6 **actions**

7 Travelers also moves to dismiss Centex's Counterclaim to the
8 extent that it is predicated on the Ahlberg, Briseno, Cooley,
9 Johnston, and Tapia actions. After being sued by homeowners in
10 these underlying actions, Centex filed cross-complaints in each
11 action asserting claims for breach of written, oral, and implied
12 contract; equitable indemnity; contribution and repayment; and
13 declaratory relief. ECF No. 97 ("MTD/MTS RJN") Exs. F-J. In these
14 state court actions, Centex seeks a declaration regarding the
15 appropriate allocation of Centex's defense fees, as well as its
16 right to independent counsel. Id. After filing these cross-
17 complaints in state court, Centex filed the Counterclaim at issue
18 here. Travelers contends that Centex's Counterclaim should be
19 dismissed because it is duplicative of the state court cross-
20 complaints.

21 Centex does not dispute that its Counterclaim is redundant
22 with respect to the Ahlberg, Briseno, Cooley, Johnston, and Tapia
23 actions. See Opp'n to MTD/MTS at 8. However, it argues that these
24 aspects of the Counterclaim should not be dismissed because they
25 are compulsory. Federal Rule of Civil Procedure 13(a) provides
26 that a counterclaim is compulsory if it (1) "arises out of the
27 transaction or occurrence that is the subject matter of the
28 opposing party's claim," and (2) "does not require adding another

1 party over whom the court cannot acquire jurisdiction." These
2 criteria appear to be met here. However, Rule 13 also provides
3 that a counterclaim is not compulsory if "when the action was
4 commenced, the claim was the subject of another pending action."
5 Fed. R. Civ. P. 13(a)(2)(A). Centex argues that "it remains an
6 open question whether this exception applies in this circumstance,"
7 since its state court cross-complaints are limited to declaratory
8 relief while its Counterclaim in this action seeks damages for
9 breach of contract and bad faith. Opp'n to MTD/MTS at 8.
10 Travelers does not address this argument other than to suggest that
11 Centex may amend its cross-complaints in the underlying actions to
12 add additional claims. Reply ISO MTD/MTS at 6.

13 Centex also argues that the Court should either dismiss both
14 parties' duplicative claims regarding the Ahlberg, Briseno, Cooley,
15 Johnston, and Tapia actions or stay this action, pending resolution
16 of the earlier filed actions. Opp'n to MTD/MTS at 8. Centex
17 contends that, under Adams v. California Department of Health
18 Services, 487 F.3d 684, 688 (9th Cir. 2007), Travelers may not
19 maintain separate actions involving the same subject matter at the
20 same time in the same court. Id. However, since the Ahlberg,
21 Briseno, Cooley, Johnston, and Tapia actions are pending before a
22 state court, Adams is clearly inapposite here. The appropriate
23 standard for dealing with parallel state and federal actions was
24 enunciated by the Supreme Court in Colorado River Water
25 Conservation District v. United States, 424 U.S. 800, 813 (1976).

26 Under Colorado River, courts consider eight factors when
27 determining whether to dismiss or stay a parallel federal
28 proceeding:

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2 (1) which court first assumed jurisdiction over any
3 property at stake; (2) the inconvenience of the
4 federal forum; (3) the desire to avoid piecemeal
5 litigation; (4) the order in which the forums obtained
6 jurisdiction; (5) whether federal law or state law
7 provides the rule of decision on the merits; (6)
8 whether the state court proceedings can adequately
9 protect the rights of the federal litigants; (7) the
10 desire to avoid forum shopping; and (8) whether the
11 state court proceedings will resolve all issues before
12 the federal court.

13 R.R. St. & Co. Inc. v. Transp. Ins. Co., 656 F.3d 966, 978-79 (9th
14 Cir. 2011). Determination of whether to stay or dismiss a parallel
15 federal action does not rest on a mechanical checklist, but on
16 careful balancing of the important factors relevant to the decision
17 as they apply in a given case, which may vary from case to case.
18 Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 16
19 (1983).

20 The Court finds that the Colorado River factors favor staying
21 Centex's Counterclaim as it relates to the Ahlberg, Briseno,
22 Cooley, Johnston, and Tapia actions while allowing Travelers'
23 claims to proceed as to those actions. The two most important
24 factors in this case are the desire to avoid piecemeal litigation,
25 and the order in which the forums obtained jurisdiction.

26 Centex's Counterclaim creates more than the mere possibility
27 of piecemeal litigation. The Counterclaim raises issues identical
28 to those currently pending before the state court. While Centex
may be seeking additional remedies in federal court, both this
court and the state courts presiding over the Ahlberg, Briseno,
Cooley, Johnston, and Tapia actions will need to address the same
legal and factual issues. On the other hand, Travelers' claims
present a much more limited possibility of piecemeal litigation.

1 Most of the issues in the Ahlberg, Briseno, Cooley, Johnston, and
2 Tapia cross-complaints -- whether Travelers owes Centex a duty to
3 defend and indemnify and whether it actually breached those duties
4 -- are irrelevant to the instant action. Accordingly, the state
5 court's adjudication of these cross-complaints is unlikely to
6 result in inconsistent rulings.

7 Further, Centex's cross-complaints in the underlying state
8 actions were filed long before Centex filed its counterclaim in
9 this action on January 23, 2013. The Ahlberg, Briseno, Cooley,
10 Johnston, and Tapia cross-complaints were filed on June 4, 2012,
11 March 12, 2012, September 10, 2012, and May 15, 2012, respectively.
12 RJN Exs. G-J. In contrast, Travelers filed the instant action on
13 January 24, 2012, well before Centex filed the cross-complaints in
14 the underlying actions. See ECF No. 1.

15 The Court finds that the most efficient and equitable remedy
16 is to stay Centex's Counterclaim to the extent that it is
17 predicated on the Ahlberg, Briseno, Cooley, Johnston, and Tapia
18 actions pending the resolution of Centex's cross-complaints in
19 those actions. Travelers' claims with respect to these actions may
20 proceed.

21 v. **The Fair Claims Settlement Practices Act**

22 In its Counterclaim, Centex alleges that Travelers violated
23 the California Fair Claims Settlement Practices Act, Cal. Code
24 Regs. tit. 10, § 2695 et seq., by failing to respond to Centex's
25 tenders within forty calendar days. Travelers moves to dismiss and
26 strike these claims on a number of grounds. First, Travelers
27 argues that violation of the Act cannot support a private right of
28 action. MTD at 16. Centex concedes this point and does not oppose

1 the Court striking paragraphs of the Counterclaim that indicate
2 that Centex is asserting an independent cause of action for
3 violation of the Act. Opp'n to MTD/MTS at 16. Accordingly, the
4 Court strikes paragraphs 123(b), 125(b), 131(b), 133(b), 135(b),
5 137(b), 139(b), 141(b), 143(b), 145(b), 149(b), 151(b), 155(b),
6 157(b), 161(b), 163(b), and 165(b).

7 Travelers argues that the remaining references should also be
8 struck because they do not support Centex's claims for bad faith or
9 breach. The provisions of the Act cited by Centex provide: "Upon
10 receiving proof of claim, every insurer . . . shall immediately,
11 but in no event more than forty (40) calendar days later, accept or
12 deny the claim, in whole or in part." Cal. Code Regs. tit. 10, §
13 2695.7(b). Centex contends that these provisions apply because its
14 tender of the underlying construction defect actions constituted a
15 proof of claim. Travelers argues that Centex submitted a "notice
16 of legal action," not a "proof of claim," and thus the forty-day
17 requirement is inapplicable here.

18 The provisions of the Act define "proof of claim" as "any
19 evidence or documentation in the possession of the insurer, whether
20 as a result of its having been submitted by the claimant or
21 obtained by the insurer in the course of its investigation, that
22 provides any evidence of the claim and that reasonably supports the
23 magnitude or the amount of the claimed loss." Id. § 2695.2(s).
24 The regulations define "notice of legal action" as "notice of an
25 action commenced against the insurer with respect to a claim, or
26 notice of action against the insured received by the insurer, or
27 notice of action against the principal under a bond, and includes
28 any arbitration proceeding." Id. § 2695.2(o). The regulations

1 require insurers to respond to communications regarding claims
2 within certain time periods, but they relieve insurers from those
3 requirements where a notice of legal action is involved. Id. §
4 2695.5(b), (e).

5 Centex's reading of the statute is not convincing. Under its
6 interpretation, the tender of an action constitutes evidence that
7 "reasonably supports the magnitude or amount of the claimed loss."
8 However, at the time of the tender, the amount of the claimed loss
9 is generally unknown. The insured cannot possibly predict whether
10 the plaintiff in the underlying action will prevail, and, in any
11 event, the insured's position is generally that the plaintiff's
12 claims lack merit.

13 That being said, Travelers' motion to strike is far too broad.
14 Travelers asks the Court to strike a number of allegations that
15 concern the timeliness of Travelers' response to Centex's tenders
16 but do not expressly reference the Fair Claims Settlement Practices
17 Act. Regardless of whether the provisions of the Act apply,
18 Travelers owed Centex an "immediate" duty to defend all claims that
19 were potentially covered under Travelers' policies. Montrose Chem.
20 Corp. v. Sup. Ct., 6 Cal. 4th 287, 295 (Cal. 1993). At this stage
21 and in this posture, it would be inappropriate to determine whether
22 Travelers breached its duty to provide an immediate defense and to
23 determine whether this alleged breach supports a finding of bad
24 faith. Striking the other paragraphs targeted by Travelers could
25 potentially divest Centex of the right to conduct discovery on this
26 issue.

27 Accordingly, the Court dismisses Centex's Counterclaim to the
28 extent that it asserts an independent cause of action for violation

1 of the Fair Claims Settlement Practices Act. The Court also
2 dismisses Centex's counterclaim to the extent that it asserts that
3 a violation of the Act constitutes evidence of bad faith or
4 resulted in Travelers' forfeiture of its right to control Centex's
5 defense. Travelers motion to strike is granted, but only with
6 respect to paragraphs 123(b), 125(b), 131(b), 133(b), 135(b),
7 137(b), 139(b), 141(b), 143(b), 145(b), 149(b), 151(b), 155(b),
8 157(b), 161(b), 163(b), and 165(b).

9 **B. Motion for Leave to Amend**

10 Travelers moves to file a fourth amended counterclaim. The
11 amended complaint would (1) name RGL Forensics, Inc. ("RGL") as a
12 defendant as to all existing causes of action, and (2) add fourth
13 and fifth causes of action fraud and accounting against all
14 defendants, including RGL. MTA at 1. As part of its fraud claims,
15 Travelers asserts that Centex and Newmeyer misrepresented
16 Newmeyer's hourly rates. Specifically, Centex and Newmeyer
17 allegedly reached a secret deal whereby Newmeyer would initially
18 bill Centex at \$225 per hour for attorney time, but then charge a
19 higher rate once Centex's insurers, including Travelers, agreed to
20 contribute to Centex's legal defense in the underlying actions.
21 Travelers allegedly learned of this agreement at a deposition held
22 on May 11, 2011.

23 The Court's decision to permit the amendment of a pleading is
24 governed by Federal Rule of Civil Procedure 15. Rule 15(a)(1)
25 allows a party to amend its pleading as a matter of course in a
26 number of circumstances, none of which apply here. "In all other
27 cases, a party may amend its pleading with the opposing party's
28 written consent or the court's leave." Fed. R. Civ. P. 15(a)(2).

1 Leave to amend should be freely given when justice so requires,
2 id., and the general rule is that amendment is permitted unless the
3 opposing party can show undue delay, bad faith, undue prejudice, or
4 futility of amendment, SAES Getters S.p.A. v. Aeronex, Inc., 219 F.
5 Supp. 2d 1081, 1086 (S.D. Cal. 2002).

6 Centex opposes the proposed amendment on a number of grounds.
7 First, Centex argues that Travelers seeks to include allegations
8 relating to the Kent action that the Court already struck from an
9 earlier pleading. As Centex points out, Travelers does not seek
10 any relief based upon Centex's tender of the Kent action. Second,
11 Centex argues that Travelers could not have reasonably relied on
12 its alleged misrepresentations concerning Newmeyer's hourly rates
13 since Travelers continued to pay those rates after it learned of
14 the scheme on May 11, 2011. Third, Centex contends that Travelers
15 proposed fourth amended complaint includes allegations regarding
16 the Spicer action, even though the parties have since stipulated to
17 the dismissal of all claims predicated on that action.

18 The Court agrees that many of the allegations in the proposed
19 4AC constitute futile amendments. Judge Hamilton previously struck
20 allegations related to the Kent action from Travelers' first
21 amended complaint. ECF No. 53. Further, in a concurrently filed
22 Order issued in a related case, the undersigned also struck
23 Travelers' Kent allegations. See Case No. 13-0088. The Court sees
24 no reason to reach a different result here. Accordingly,
25 Travelers' 4AC shall not contain allegations related to the Kent
26 action.

27 Certain aspects of Travelers' fraud claims also lack merit.
28 As explained in a concurrently filed Order in Case No. 13-0088,

1 Centex cannot possibly state a claim for fraud based on allegations
2 that it was overbilled for attorney time after May 11, 2011.
3 Travelers argues that such challenges to the pleading should be
4 deferred until after the pleading has been amended. Reply ISO 4AC
5 at 4. In most cases, the Court would be inclined to agree. But
6 here, Travelers is essentially asserting the same fraud claims
7 against the same Defendants in two different actions. Since those
8 fraud claims fail in the other action, they fail here.

9 With respect to Centex's argument that the parties have
10 stipulated to the dismissal of all claims related to the Spicer
11 action, Travelers argues that the Court is required to accept its
12 allegations as true and that Centex's claims regarding an alleged
13 settlement must be ignored. This argument borders on the
14 frivolous. Centex is not challenging the validity of Travelers'
15 factual allegations. Rather, Centex is pointing out that the
16 parties have settled all claims related to the Spicer action. The
17 Court takes judicial notice of the fact that it approved this
18 settlement on April 10, 2013. It remains unclear why Travelers is
19 intent on litigating issues that have already been resolved.

20 The Court also notes that many of Travelers' new claims
21 against RGL are contrary to the court's concurrently filed decision
22 in Case Number 13-0088. In that decision, the Court dismissed with
23 prejudice Travelers' claims for breach of fiduciary duty and
24 reimbursement as to RGL. The same reasoning would apply in the
25 instant action.

26 Accordingly, the Court GRANTS in part and DENIES in part
27 Travelers motion for leave to amend. As set forth in more detail
28 in Section V infra, Travelers shall file an amended complaint

1 consistent with the guidance set forth in this order.

2
3 **V. CONCLUSION**

4 For the foregoing reasons, the Court GRANTS in part and DENIES
5 in part Travelers motions to dismiss and strike Centex's
6 Counterclaim.

- 7 • Centex's Counterclaim is dismissed to the extent that it is
8 predicated on the Adkins and Garvey actions.
- 9 • The Court strikes all references to the Acupan action from
10 Centex's Counterclaim.
- 11 • The Court declines to strike or dismiss Centex's counterclaim
12 to the extent it is predicated on the Ahlberg, Briesno,
13 Cooley, Johnston, and Tapia actions. However, the Court does
14 stay its adjudication of Centex's Counterclaim as to the
15 Ahlberg, Briesno, Cooley, Johnston, and Tapia actions pending
16 the resolution of Centex's cross-complaints in those actions.
- 17 • The Court DISMISSES Centex's Counterclaim to the extent that
18 it asserts an independent cause of action for violation of the
19 Fair Claims Settlement Practices Act and to the extent that it
20 asserts that a violation of the Act constitutes evidence of
21 bad faith or resulted in Travelers' forfeiture of its right to
22 control Centex's defense.
- 23 • The Court also strikes paragraphs 123(b), 125(b), 131(b),
24 133(b), 135(b), 137(b), 139(b), 141(b), 143(b), 145(b),
25 149(b), 151(b), 155(b), 157(b), 161(b), 163(b), and 165(b) of
26 Centex's Counterclaim.

27 Travelers' motion for leave to file a fourth amended complaint is
28 GRANTED in part and DENIED in part. Travelers shall file an

1 amended complaint within thirty (30) days of the signature date of
2 this Order. The amended complaint shall be consistent with the
3 guidance set forth in this Order and the concurrently filed order
4 in Case Number 13-0088-SC.

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IT IS SO ORDERED.

Dated: May 30, 2013



UNITED STATES DISTRICT JUDGE