IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TRAVELERS INDEMNITY COMPANY OF CONNECTICUT; and ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Plaintiffs, v. CENTEX HOMES; and CENTEX REAL ESTATE CORPORATION, Defendants.	Case No. 14-cv-02378 ORDER GRANTING MOTION TO DISMISS

I. INTRODUCTION

Now pending before the Court is Defendants Centex Homes and Centex Real Estate Corporation's (collectively "Defendants" or "Centex") motion to dismiss Plaintiffs' First Amended Complaint, ECF No. 20 ("FAC"), for lack of subject-matter jurisdiction and failure to state a claim. Plaintiffs Travelers Indemnity Company of Connecticut ("Travelers Indemnity") and St. Paul Fire and Marine Insurance Company ("St. Paul") oppose the motion. The motion is

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fully briefed[1] and suitable for decision without oral argument pursuant to Civil Local Rule 7-1(b). For the reasons set forth below, Defendants' motion to dismiss is GRANTED. Plaintiffs' equitable reimbursement and breach of contract claims are DISMISSED WITHOUT PREJUDICE. Plaintiffs' declaratory relief claims are DISMISSED WITHOUT PREJUDICE to the extent that they are premised on Centex's violation of its duty to cooperate.

II. BACKGROUND

This is one of a large number of similar insurance disputes between these parties. Centex builds homes. FAC ¶ 3. Travelers Indemnity and St. Paul (collectively "Plaintiffs") are insurers. Id. ¶¶ 1-2. Travelers Indemnity issued two insurance policies to Golden State Carpet Service, Inc. (the "Golden Carpet Policies"), and St. Paul issued insurance to Mike McCall Landscape, Inc. (the "Mike McCall Policy"). Id. ¶¶ 8, 10. The Golden Carpet Policies granted Travelers Indemnity the right to retain counsel of its choosing in representing the insured (or any additional insureds) and included a covenant requiring the insured to cooperate with Travelers Indemnity in the investigation or settlement of any covered claim or lawsuit against the insured. Id. ¶ 9. The Golden Carpet Policies also prohibited the insured from voluntarily making any payment towards its defense without Travelers Indemnity's consent. Id. The Mike McCall Policy granted St. Paul the right to retain counsel of its choosing to represent the insured (or any

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[1] ECF Nos. 21 ("Mot."); 22 ("Opp'n"); 25 ("Reply"); 30 ("Travelers Supp. Br."); 32 ("Centex Supp. Br.").

additional insureds) and required the insured to cooperate with St. Paul in any defense covered by the policy. Id. ¶ 11.

In January 2014, several owners of homes in Brentwood, California filed suit against Centex in California state court, alleging a number of construction defects (the "Underlying Action"). Id. ¶ 12. On May 2, 2014, Centex tendered the Underlying Action to Plaintiffs as an additional insured under the Golden Carpet Policies and the Mike McCall Policy. Id. ¶ 13. Plaintiffs responded on May 23, 2014 by agreeing to defend Centex under a reservation of rights and asserting its right to retain counsel of its choice. Id. ¶¶ 14-16. Plaintiffs appointed David Lee to represent Centex in the Underlying Action. Id. ¶¶ 14, 17. On June 18, 2014, Centex responded to Plaintiffs' reservation of rights letters by asserting its right to independent counsel. Centex also insisted that Plaintiffs pay the fees of Centex's independent counsel, Newmeyer & Dillon ("Newmeyer"). Centex informed Plaintiffs that if they refused to pay Newmeyer's fees, Centex would agree to allow Mr. Lee to defend the action only if Plaintiffs agreed to pay Mr. Lee's fees as well as all vendor invoices in the action. Centex also claimed that conflicts exist between Mr. Lee and Centex, and informed Plaintiffs that Centex would file a motion to disqualify counsel and reserved its right to seek reimbursement for Newmeyer's fees. Id. ¶ 17.

In response to Centex's letter, Plaintiffs filed this lawsuit in federal court. Plaintiffs seek declaratory relief under California law, in the form of a declaration that, with respect to both the Golden Carpet and Mike McCall policies, (1) Plaintiffs have the right to control Centex's defense in the Underlying

Action; (2) Centex is not entitled to the appointment of independent counsel; (3) Centex has breached its duty to cooperate; and (4) Centex's appointment of independent counsel constitutes a voluntary payment for which Plaintiffs are not obligated to reimburse Centex. Id. ¶¶ 21, 26. Plaintiffs also seek equitable reimbursement for any fees they have paid or will pay in defending Centex in the underlying action. Centex now moves to dismiss.

III. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a complaint must be both "sufficiently detailed to give fair notice to the opposing party of the nature of the claim so that the party may effectively defend against it" and "sufficiently plausible" such that "it is not unfair to require the opposing party to be

subjected to the expense of discovery." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

IV. DISCUSSION

A. Diversity Jurisdiction

The only basis for subject-matter jurisdiction that Plaintiffs assert is diversity jurisdiction under 28 U.S.C. Section 1332. FAC ¶ 6. Section 1332 provides for federal jurisdiction in cases between parties of diverse citizenship in which the amount in controversy exceeds $75,000. Jurisdiction is determined at the time a lawsuit is filed. Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567, 570-71 (2004). The amount in controversy is ordinarily determined from the face of the pleadings. If a defendant raises a factual challenge to jurisdiction, dismissal is warranted only if it appears to a legal certainty that the required amount cannot be recovered. Pachinger v. MGM Grand Hotel-Las Vegas, Inc., 802 F.2d 362, 363-64 (9th Cir. 1986).

There is no dispute that the parties in this case are diverse, but Centex argues that the amount in controversy does not exceed $75,000, for two reasons. First, Centex argues that Plaintiffs improperly aggregate the claims by the two plaintiffs against the two defendants in this case. Second, Centex asserts that, at the time the lawsuit was filed, the amount in controversy did not exceed $75,000.

1. Aggregation

Centex first argues that Plaintiffs improperly aggregate the claims between the two plaintiffs and the two defendants to reach the jurisdictional threshold. Plaintiffs counter by arguing that

"[c]laims against two or more defendants may be aggregated for the purpose of attaining the jurisdictional amount if they are jointly liable to the plaintiff." Opp'n at 17. Oddly, Travelers cites in support United States v. Southern Pacific Transportation Company, in which the Ninth Circuit held that the plaintiffs' claims could not be aggregated to meet the amount in controversy. 543 F.2d 676, 683 (9th Cir. 1976). Regardless, the problem here is not that each plaintiff's claims may not be aggregated against both defendants. The problem is that there are two different plaintiffs (Travelers Indemnity and St. Paul) whose claims stem from two different insurance contracts.[2]

Applying Southern Pacific -- the case Travelers cites -- is rather straightforward. In that case, the Ninth Circuit held that the plaintiffs could aggregate their claims only if those claims derived from rights the plaintiffs held in group status. Id. Here, Travelers Indemnity and St. Paul do not hold any rights in group status; their rights come from separate contracts with different entities (Travelers Indemnity contracted with Golden State Carpets, while St. Paul contracted separately with Mike McCall Landscape).

Unfortunately for Centex, the prohibition on aggregation does not matter at all in this case. As discussed below, Plaintiffs assert that the fees and costs they will incur in defending the

[2] That is, the issue is not that St. Paul's claims may not be aggregated against Centex Homes and Centex Real Estate, or that Travelers Indemnity's claims may not be aggregated against Centex Homes and Centex Real Estate. The problem is that St. Paul's claims are separate from Travelers Indemnity's claims, and those claims may not be aggregated. Plaintiffs give this issue short shrift in their brief and do not explain why they believe that two different contracts involving entirely distinct parties give them rights held in group status.

Underlying Action will exceed $300,000. Thus, if the Court were to accept Plaintiffs' estimate of the amount in controversy, it follows that the amount in controversy in at least one plaintiff's claims must exceed the jurisdictional threshold.[3] Because the Court would then have jurisdiction over at least one plaintiff's claims, supplemental jurisdiction would exist over the other plaintiff's claims. See Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 559 (2005) ("If the court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a 'civil action' within the meaning of § 1367(a), even if the civil action over which it has jurisdiction comprises fewer claims than were included in the complaint."). Accordingly, Plaintiffs' (admittedly improper) aggregation of Plaintiffs' claims fails to divest the Court of jurisdiction.

2. Amount in Controversy

In each of their three claims, Plaintiffs seek damages in the amount of all defense or indemnification fees and costs they have paid or will pay on Centex's behalf in the Underlying Action. FAC ¶¶ 31, 35, 40. According to Centex, at the time Plaintiffs filed suit, Centex had incurred only $6,304.33 in fees and costs in the Underlying Action, and none of those fees or costs had been paid by Plaintiffs. ECF No. 21-1 ("O'Connell Decl.") ¶¶ 4, 6. Where, as here, a plaintiff brings a claim for declaratory relief, the amount in controversy "is not what might have been recovered in money, but rather the value of the right to be protected or the injury to be

[3] Assuming arguendo that one plaintiff's claims are worth $75,000 (the maximum amount that would fail to satisfy the amount in controversy requirement), the other plaintiff's claims would be worth $225,000, and the Court would have jurisdiction over the second plaintiff's claims.

prevented." Jackson v. Am. Bar Ass'n, 538 F.2d 829, 831 (9th Cir. 1976). The Ninth Circuit has warned that "insurance companies may not be permitted, under the guise of seeking declaratory judgments, to drag into the federal courts the litigation of claims over which, because involving less than the jurisdictional amount, it was never intended that the federal courts should have jurisdiction." Canadian Indem. Co. v. Republic Indem. Co., 222 F.2d 601, 604 (9th Cir. 1955) (quoting Mut. Life Ins. Co. of New York v. Moyle, 116 F.2d 434, 437 (4th Cir. 1940)).

Plaintiffs accept Centex's figures and do not claim that they have paid anything at this point. Opp'n at 18. However, Plaintiffs assert that they expect fees and costs in the Underlying Action to total over $300,000. Centex argues that, because jurisdiction is determined at the moment a case is filed, the Court may not consider future fees and costs in determining the amount in controversy.

District courts in California are split as to whether future fees and costs may be considered in calculating the amount in controversy. Compare Travelers Cas. Ins. Co. of Am. v. Am. Home Realty Network, Inc., No. C 12-2637 PJH, 2013 WL 271668, at *3-4 (N.D. Cal. Jan. 24, 2013) (Hamilton, J.) (holding that because "Travelers did not notify defendants that it had accepted the tender of the . . . action until June 7, 2012, and had not incurred any defense costs until that point, there was no amount in controversy as of May 22, 2012 when the complaint was filed -- and thus, no diversity jurisdiction."), with Travelers Cas. Ins. Co. of Am. v. Am. Home Realty Network, Inc., No. 13-0360 SC, 2013 WL 1808984, at *5 (N.D. Cal. Apr. 29, 2013) ("The Court finds that

Travelers has shown, based on its pleadings, declarations, and arguments, that a duty to defend the Regional Action would result in costs totaling more than $75,000 . . . .") (Conti, J.), and Travelers Indem. Co. of Conn. v. Centex Homes, No. 1:14-CV-217-LJO-GSA, 2014 WL 2002320, at *5 (E.D. Cal. May 15, 2014) (O'Neill, J.) ("[T]he Court finds that subject matter jurisdiction exists because Plaintiffs allege their anticipated costs in defending Centex . . . exceed $75,000."). The undersigned has previously held that future fees and costs may be considered part of the "injury to be prevented" under Jackson, and the Court continues to so hold. See Am. Home Realty, 2013 WL 1808984, at *5.

However, there is a wrinkle here that was not raised in American Home Realty. In addition to its declaratory relief action, Plaintiffs bring a claim for equitable reimbursement. An insurer may only seek a claim for equitable reimbursement "after providing an entire defense." State v. Pac. Indem. Co., 63 Cal. App. 4th 1535, 1550 (Cal. Ct. App. 1998) (emphasis in original). To support their claim, therefore, Plaintiffs allege that "TRAVELERS' duty to defend CENTEX has now ceased and any payments made to CENTEX for fees incurred from the date of tender until the date of CENTEX's breach constitute an entire defense." FAC ¶ 38. But if the Court were to presume the truth of that allegation -- and therefore to accept that Plaintiffs have already provided an entire defense -- then it is difficult to see how Plaintiffs can assert that the amount in controversy is dependent on future costs of defense.

For two reasons, the Court finds that it may consider future fees and costs for the amount in controversy, even in the face of

Plaintiffs' allegations. First, the Court holds that the allegations that Plaintiffs' duty to defend has ceased and that Plaintiffs provided an entire defense are legal conclusions, not factual allegations. As a result, they are not entitled to a presumption of truth. See Iqbal, 556 U.S. at 679. Second, if Plaintiffs were instead to bring this lawsuit after the Underlying Action had ceased, Plaintiffs would presumably have incurred the costs they anticipate -- so those costs constitute the value of the injury to be prevented. As a result, it is still proper to consider the future cost of litigating in the amount in controversy, consistent with Jackson. The Court finds that it has diversity jurisdiction over this case because the parties are diverse and it does not appear to a legal certainty that the amount in controversy does not exceed $75,000.

B. Ripeness

1. Duty to Cooperate

Plaintiffs' breach of contract claim and some of Plaintiffs' declaratory relief claims are premised on Centex's alleged failure to fulfill the duty to cooperate mandated by the insurance policies. FAC ¶¶ 20(c), 25(c), 29, 33. Centex argues that Plaintiffs' claims based on breach of the duty to cooperate are not ripe.

"If a case is not ripe for review, then there is no case or controversy, and the court lacks subject-matter jurisdiction." Principal Life Ins. Co. v. Robinson, 394 F.3d 665, 669 (9th Cir. 2005). The traditional ripeness standard is "whether 'there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the

issuance of a declaratory judgment.'" Id. (quoting Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941)).

Centex argues that Plaintiffs' claims are unripe because those claims depend upon Centex's future, hypothetical refusal to acknowledge Plaintiffs' right to control Centex's defense in the Underlying Action. Mot. at 3-4. Plaintiffs reply that Centex's acceptance of Mr. Lee as counsel was under a reservation of rights and conditioned on Plaintiffs' agreement to pay Mr. Lee's fees as well as all vendor invoices in the action, even though other insurers were also defending Centex. Additionally, Plaintiffs point out that Centex asserted its right to retain counsel of its choice due to an alleged conflict between Centex and Mr. Lee. FAC ¶ 17. Plaintiffs argue that these demands constitute refusal to allow them to control the defense, despite Centex's express statement to the contrary. Opp'n at 6-7.

"Where the jurisdictional issue is separable from the merits of the case, the judge may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary." Thornhill Pub. Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979). "However, where the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983). Here, the jurisdictional issue is not separable from the merits of the case: both ripeness and Plaintiffs' substantive claims depend

on the truth of its contention that Centex has refused to allow Plaintiffs to control the defense. Accordingly, the Court will consider only the factual allegations in the FAC, and will presume them to be true.

That said, the Court finds that Centex's letter in response to Plaintiffs' reservation of rights is incorporated by reference into the FAC. The incorporation by reference doctrine permits the Court to "take into account documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading." Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005). The FAC alleges the contents of the letter in Paragraph 17, and Centex attaches the letter as an exhibit to a declaration filed with its motion to dismiss. See ECF No. 21-1 ("O'Connell Decl.") Ex. B (the "Centex Letter"). Its contents are not in dispute.

Plaintiffs argue that "[t]he allegations [in the FAC] clearly state that Centex breached by refusing counsel." Opp'n at 12 (emphasis added). Not so. Paragraph 17 of the FAC summarizes the contents of the Centex Letter but states only that Centex conditioned its acceptance of Mr. Lee as counsel upon Plaintiffs' agreement to pay his fees. Given that Travelers was already obligated to defend Centex under the insurance policies, the Court cannot conclude that asking Travelers to pay for the lawyer it appointed in any way constituted refusal of Plaintiffs' choice. It is true that the FAC later characterizes the Centex Letter as a refusal to allow Plaintiffs to appoint counsel. See FAC ¶¶ 20(c), 25(c). But the FAC does not allege any communication from Centex other than the Centex Letter, and it is clear that the Centex

Letter does not refuse to allow Plaintiffs to appoint counsel or control the defense.

Next, the Court turns to the issue of Centex's insistence that Plaintiffs pay all expert and vendor fees as a condition for accepting appointment of Mr. Lee as co-counsel. Plaintiffs take issue with this condition because other insurers are also involved in Centex's defense in the underlying action, and Plaintiffs apparently believe that Centex is obliged to divide these fees and costs among its insurers. Again, Plaintiffs are incorrect. In Travelers Property Casualty Company of America v. Centex Homes, the undersigned held that cooperation clauses similar to those at issue here did not create a duty to tender a case to other insurers, and that it was the insurer's responsibility to seek contribution. Travelers Prop. Cas. Co. of Am. v. Centex Homes, No. 11-3638-SC, 2013 WL 1411135, at *4 (N.D. Cal. Apr. 8, 2013) (Conti, J.). Moreover, "[a]n insurer generally cannot use its right to seek contribution from other insurers to avoid fronting an insured's full defense costs." Id. at *3 (citing Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co., 45 Cal. App. 4th 1, 105–06 (Cal. Ct. App. 1996)). As a matter of law, therefore, Centex's request that Plaintiffs pay all of its expert and vendor costs cannot constitute a refusal to allow Travelers to control the defense.

Nor can Centex's warning about Mr. Lee's potential conflicts of interest be construed as a refusal to allow Plaintiffs to control Centex's defense. California law provides that "[i]f the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the

insured, the insurer shall provide independent counsel to represent the insured . . . ." Cal. Civ. Code § 2860(a). Stating that Centex might choose to exercise that statutory right does not mean that Centex refused to allow Plaintiffs to appoint counsel or control the defense. Accordingly, Plaintiffs' claims are not yet ripe.[4]

A judge in the Eastern District of California recently reached a similar conclusion. In Fidelity & Guaranty Insurance Co. v. Centex Homes, Centex sent a letter to its insurer allowing the insurer to appoint co-counsel for Centex's defense. But Centex also explained, as it did here, that Centex believed it was entitled to independent counsel and would allow the insurer to appoint co-counsel subject to a full reservation of rights. No. 1:14-CV-826-LJO-GSA, 2014 WL 4075999, at *3 (E.D. Cal. Aug. 15, 2014). Judge O'Neill found that the letter did not constitute refusal to accept the insurer's appointed counsel. Accordingly, he dismissed the insurer's claims as unripe. Id. at *4.

Thus, the Court finds that Plaintiffs' claims based on Centex's alleged breach of its duty to cooperate are unripe, as Centex has not yet refused to allow Travelers to appoint counsel. Centex explicitly stated that it "will allow Travelers, subject to a full reservation of rights, to appoint co-counsel to participate in the defense of Centex in [the Underlying Action] . . . ."

[4] In their opposition brief, Plaintiffs complain that "[i]f there are any claims that could be riper, Travelers does not know what they are." That is an odd turn of phrase. Just because Plaintiffs believe that they have been wronged does not necessarily mean, as a matter of law, that they must have ripe claims. The issue is not that Plaintiffs have failed to identify the correct legal claims arising from these facts, but that the facts as they stand now do not give rise to ripe claims.

Centex Letter. These claims are DISMISSED WITHOUT PREJUDICE. Plaintiffs may amend these claims if they become ripe. It should be noted, however, that this ruling does not apply to Plaintiffs' declaratory relief claim regarding Newmeyer's fees. Plaintiffs also seek a declaration that they are not obligated to pay any of Newmeyer's fees, because those fee payments constitute voluntary payments that Plaintiffs need not reimburse. As Centex acknowledges, that claim is ripe for adjudication. Reply at 4.

2. Equitable Reimbursement

"To state a claim for equitable reimbursement, Plaintiffs must plead that (1) they agreed to immediately defend Defendant in the [Underlying Action] in its entirety; (2) they paid money to defend claims against Defendant 'that are not even potentially covered' under the insurance policies; and (3) they reserved their right to seek reimbursement." Travelers Indem. Co. of Conn. v. Centex Homes, No. 1:14-CV-217-LJO-GSA, 2014 WL 3778269, at *2 (E.D. Cal. July 30, 2014) (Travelers I) (citing Buss v. Super. Ct., 16 Cal. 4th 35, 47–50 (Cal. 1997)). Generally speaking, "the cause of action for equitable reimbursement is premised on a 'defend now seek reimbursement later' theory." Travelers I at *2 (citing State v. Pac. Indem. Co., 63 Cal. App. 4th 1535, 1549 (Cal. Ct. App. 1998)).

In this case, the FAC alleges only that "TRAVELERS has paid or will pay certain defense fees and costs incurred by Defendant CENTEX in defense in the Underlying Action." FAC ¶ 37 (emphasis added). That is insufficient; to state a ripe claim for equitable reimbursement, Plaintiffs must allege that they paid money to defend Centex's claims in the Underlying Action, not that

Plaintiffs will do so in the future. As discussed above, Plaintiffs do not contest the fact that they have not yet paid anything to cover Centex's defense costs. Consequently, Plaintiffs' equitable reimbursement claim is unripe and is DISMISSED WITHOUT PREJUDICE. Plaintiffs may amend their complaint if this claim becomes ripe.

V. CONCLUSION

For the reasons set forth above, Centex's motion to dismiss is GRANTED. Plaintiffs' breach of contract and equitable reimbursement claims are not ripe, and they are DISMISSED WITHOUT PREJUDICE. Plaintiffs' declaratory relief claims are also unripe to the extent they are premised on violation of the duty to cooperate. Those claims, too, are DISMISSED WITHOUT PREJUDICE. Travelers may amend its complaint if those claims become ripe. Plaintiffs' declaratory relief claims remain undisturbed to the extent that they seek a declaration that Plaintiffs have no obligation to reimburse Centex for Newmeyer's fees.

IT IS SO ORDERED.

Dated: January 5, 2015

UNITED STATES DISTRICT JUDGE