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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PROVIDE COMMERCE, INC., a Delaware corporation,	}	Civil No.12cv0516 AJB (WVG)
Plaintiff,		
v.	}	ORDER GRANTING EX PARTE MOTION TO DENY PROVIDE’S MOTION FOR PARTIAL SUMMARY JUDGEMENT TO ALLOW DISCOVERY
HARTFORD FIRE INSURANCE COMPANY, a Connecticut corporation, SENTRY INSURANCE		
A MUTUAL COMPANY, a Wisconsin corporation, CERTAIN		
UNDERWRITERS AT LLOYD’S LONDON, an Unincorporated association, and DOES 1 - 100,		[Doc. No. 93]
Defendants.		

This matter comes before the Court on Defendant/Counter-Claimant Sentry Insurance A Mutual Company’s (“Sentry”) ex parte Motion to Deny or Continue Provide Commerce, Inc.’s (“Provide”) Motion for Partial Summary Judgment. (Doc. No. 93.) After careful consideration of the parties briefs and arguments, the Court finds a continuance is warranted. For the following reasons, Sentry’s Ex Parte Motion to Deny or Continue is GRANTED.

1 **I. BACKGROUND**

2 The instant action involves an insurance dispute relating to Hartford Fire Insur-
3 ance Company (“Hartford”), Sentry, and ACE Capital Limited, ACE Capital V Limited,
4 and Brit UW Limited (“Underwriters”) coverage for underlying class actions consoli-
5 dated in this District (collectively “Defendants”). (Doc. No. 1, Ex. A.) Plaintiff Provide
6 Commerce (“Provide”) brought this litigation against all three Defendants seeking
7 defense expenses incurred by Provide in defending two consumer class action law suits
8 consolidated in this District, (1) *In re EasySaver Rewards Litigation*, Case No. 09cv2094
9 (“*EasySaver*”) and (2) *Cox et al. v. Clarus Marketing Group, LLC, et al.*, Case No.
10 11cv2711 (“*Freeshipping*”), as well as a third lawsuit, *Glassybaby, LLC v. Provide Gifts*
11 *Inc. dba Red Envelope, et al.* Case No. 11cv380 (“*Glassybaby*”). (Doc. No. 84 at 8.)

12 On February 1, 2012, Provide filed the action in the Superior Court of California,
13 County of San Diego against Hartford, Sentry, Underwriters, and Does 1-100, for: (1)
14 breach of contract; (2) breach of the implied covenant of good faith and fair dealing; and
15 (3) declaratory relief. (Doc. No. 1, Ex. A.) Underwriters removed the case to this Court
16 on March 1, 2012. (*Id.* at 1). Sentry filed a timely Answer and Counterclaim on March
17 27, 2012. (Doc. No. 11.) Sentry’s Counterclaim asserted a claim for reimbursement,
18 rescission, and declaratory relief, among other things. As against Hartford and Underwr-
19 iters, Sentry alleged various contribution cross-claims relating to defense fees and costs
20 in the *EasySaver* and *Free Shipping* Litigations. (*Id.*)

21 On January 31, 2013 Judge Gallo held an Early Neutral Evaluation Conference
22 (“ENE”) with counsel and representatives from all parties. (Doc. No. 57.) The case did
23 not settle; Judge Gallo continued the ENE and stayed all discovery with the exception of
24 “accounting data.” (*Id.* at 2.) The ENE was taken off-calendar as the Parties agreed to
25 private mediation. However the case failed to settle. The stay on discovery was not
26 lifted, and on December 10, 2013, Judge Gallo ordered that any motions for summary
27 judgment or cross-motions for summary judgment must be filed on or before February
28 14, 2014. (Doc. No. 79.) In that same December 10, 2013 Order, Judge Gallo expanded

1 the scope of discovery to allow the parties to respond to summary judgment motions.
2 (*Id.*) The Parties complied with Judge Gallo’s order and each filed their respective
3 Motions for Summary Judgment on the date imposed.

4 On February 14, 2014, Provide, Sentry, Hartford, and Underwriters all filed
5 motions for summary judgment. (Doc. Nos. 80, 82, 84, and 82 respectively.) In particu-
6 lar, Provide’s motion sought a declaration that Sentry owed Provide a duty to defend,
7 breached that duty, and could not avail itself to the rescission defense nor the advantage
8 of Civil Code Section 2860. (Doc. No. 80.) Sentry now asks this Court to deny, con-
9 tinue, or take off calendar Plaintiff/Counter-Defendant Provide’s Motion for Partial
10 Summary Judgment pursuant to Federal Rule of Civil Procedure 56(d).¹ (Doc. No. 93.)

11 Oppositions to each of the summary judgment motions were due on March 14,
12 2014. On March 7, 2014, this Court was notified of Sentry’s intent to file a Motion to
13 Continue Provide’s Motion for Partial Summary Judgment. Sentry did so that same day.
14 Counsel for Provide contacted the Court, seeking an extension of time to file Provide’s
15 Opposition to the Motion to Continue. Finding good cause, the Court granted Provide a
16 week long extension. Provide filed its Opposition on March 14, 2014. (Doc. No. 98.)
17 The Court vacated the briefing schedule for all motions for summary judgment, finding it
18 best to consider all the motions together rather than in piecemeal fashion.

19 **II. LEGAL STANDARD**

20 Rule 56(d) provides a device for litigants to avoid summary judgment when they
21 have no had sufficient time to develop affirmative evidence. *Burlington Northern Santa*
22 *Fe R. Co. v. Assiniboine and Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773
23 (9th Cir. 2003). “The general principle of Rule 56(f) is that ‘summary judgment should
24 be refused where the nonmoving party has not had the opportunity to discover informa-
25 tion that is essential to his opposition.’ *Price v. Western Resources, Inc.*, 232 F.3d 779,
26 793 (10th Cir.2000) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 n.5, 106 S.

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28 ¹ The 2010 Amendments brought former subdivision (f) to subdivision (d) without substantial
change. Fed. R. Civ. Proc. 56 advisory committee’s note to 2010 Amendments.

1 Ct. 2505 (1986)). District courts should grant a Rule 56(d) motion “fairly freely” where
2 a summary judgment motion is filed before a party has had a realistic opportunity to
3 pursue discovery relevant to its theory of the case. *Burlington*, 323 F.3d at 773.

4 Pursuant to Rule 56(d), this Court has the discretion to either deny or continue a
5 motion for summary judgment “if a party opposing the motion shows by affidavit that,
6 for specified reasons, it cannot present facts essential to justify its position.” Thus, this
7 Court has discretion to continue this motion for summary judgment if opposing party
8 needs to discover essential facts. *Cal. Union. Ins. Co. v. American Diversified Sav.*
9 *Bank*, 914 F.2d 1271 (9th Cir.1990), *cert. denied*, 498 U.S. 1088, 111 S. Ct. 966 (1991).
10 A party must show how additional discovery would preclude summary judgment and
11 why a party cannot immediately provide “specific facts” demonstrating a genuine issue
12 of material fact. *Mackey v. Pioneer Nat. Bank*, 867 F.2d 520, 523-24 (9th Cir. 1989).
13 The party requesting a continuance must identify by affidavit the specific facts that
14 further discovery would reveal, and explain why those facts would preclude summary
15 judgment. *California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998).

16 **III. DISCUSSION**

17 In its Motion to Deny or Continue and Affidavit filed in support, Sentry claims it
18 was not afforded an opportunity to conduct discovery since the instant Complaint was
19 filed, as discovery was stayed pursuant to an Order of Magistrate Judge William V.
20 Gallo.² Sentry argues it has not been allowed to conduct any formal discover relating to
21 the allegations in Provide’s Complaint, Sentry’s Counterclaim, and in particular, Sentry’s
22 affirmative defenses of rescission and lack of coverage. (Doc No. 93, Declaration of
23 Todd R. Haas (“Haas Decl.”))

24 Specifically, Sentry argues it is improper for this Court to rule on the summary
25 judgment motion without allowing Sentry to seek discovery relating to Provide’s

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27 ² Judge Gallo’s February 1, 2013 Order permitted only limited discovery of “accounting data,”
28 defined as: (1) invoices from attorneys and law firms; (2) payments made by insurance companies to the
insureds, attorneys, law firms, and other insurance companies . . . ; (3) payments made by Plaintiff to
attorneys and law firms . . . ; (4) attorney generated spreadsheets . . . ; and (5) auditing reports. (Doc. No.
57 at 2.)

1 allegation on Sentry's breach of the duty to defend based on delay and Sentry's affirma-
2 tive defenses. (Haas Decl. at 7-11.) Provide opposes Sentry's Motion arguing: (1)
3 Sentry's Ex Parte Motion was improper and should have been filed as a noticed motion;
4 (2) Sentry has failed to make the necessary showing to warrant a Rule 56(d) continuance;
5 and (3) Sentry's proposed discovery is impermissible as it may prejudice Provide's
6 defense of the underlying *EasySaver* Litigation. (Doc. No. 98.) As an alternative,
7 Provide argues that "at a minimum, this Court should rule on Sentry's initial breach of
8 the duty to defend and forfeiture of the rate limitation provisions of Civil Code Section
9 2860." (Doc. No. 98 at 23.)

10 As to Provide's first argument, the Court notes and is mindful of Provide's
11 position. However, the Court must consider the entirety of the situation and the view-
12 points of all the parties involved. First, the Parties' respective Oppositions to all the
13 motions for summary judgment were to be filed on March 14, 2014. Counsel for Sentry,
14 Mr. Todd Haas, states that he was out of the office since late January due to the declining
15 health of his mother-in-law, who ultimately passed away on February 13, 2014. (Haas
16 Decl. at 4-5.) When Mr. Haas returned to work, he immediately contacted counsel for
17 Provide regarding this matter of a continuance. The Parties engaged in several e-mail
18 communications starting in February 20, 2014. With the Parties' Opposition deadline
19 approaching, the parties were unable to reach a mutual agreement. (*Id.* at 5.) Thus,
20 Sentry found it necessary to file the Ex Parte Motion. Second, given Sentry's lengthy
21 Motion, Declaration, and Exhibits attached, the Court granted Provide a full week
22 extension to file its Opposition such that Provide would be given a more meaningful
23 opportunity to respond. Third, the Court disagrees with Provide's contention that Sentry
24 asks this Court to deny Provide's Motion for Partial Summary Judgment based on the
25 merits of the summary judgment motion. (Doc. No. 98 at 7.) Instead, Sentry's Motion
26 merely asks that the summary judgment motion be denied, continued, or vacated to allow
27 further discovery. In this respect, a denial without prejudice would be the proper Court
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1 order as this Court cannot consider the merits of a summary judgment record with an
2 incomplete record.

3 As to Provide's second argument, the Court is satisfied that Sentry has made the
4 necessary showing to grant a motion to continue under Rule 56(d). In the February 20,
5 2014 Haas letter, counsel for Sentry describes in detail the discovery needed to oppose
6 summary judgment. (Doc. No. 98 ex. 6.) The Court carefully reviewed the letter and
7 given the issues in Provide's summary judgment motion, as well as the various pleadings
8 by all the Parties involved, it is not unreasonable that Sentry needs this discovery to
9 develop Sentry's opposition and theories in the case. The Court also notes the unique
10 procedural posture of the instant litigation. By order of Judge Gallo, the Parties were
11 only permitted to pursue limited discovery of "accounting data" since February 1, 2013.
12 (Doc. No. 57.) Indeed, when the scope of discovery was expanded to allow the parties to
13 respond to summary judgment motions on December, 10, 2013, the Parties only had
14 roughly two months before all motions for summary judgment had to be filed. Given the
15 fact intensive nature of this complicated litigation, the number of parties involved, and
16 the issues brought forth for summary adjudication, the Court does not find a two month
17 period to be sufficient to pursue meaningful discovery. Sentry has shown by affidavit:
18 (1) the facts they hope to elicit from further discover; (2) the facts exists; and (3) these
19 facts are essential to resist Provide's summary judgment motion.

20 Finally, as to Provide's third argument, the Court will not be allowing Sentry to
21 pursue all the discovery outlined in the Haas letter without guidance or limitations.
22 Instead, the Court will defer to the experience and judgment of Judge Gallo to determine
23 the scope of discovery going forward and time frame to complete discovery. Judge
24 Gallo not only presides over all discovery matters in the instant litigation, but also
25 presided over all the discovery matters in the *EasySaver* Litigation. The Court is
26 confident that Judge Gallo will devise a discovery plan that will address the Parties
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1 needs and limit prejudice to Provide's defense in the *EasySaver* Litigation.³ Alterna-
2 tively, as Provide itself recognizes, Provide may seek a stay of this insurer's coverage
3 action to prevent prejudicial discovery pending resolution of the underlying liability
4 claims. (Doc. No. 98 at 22; citing *Haskel, Inc. v. Super. Ct.*, 33 Cal. App. 4th 963, 980
5 (Cal. Ct. App. 1995)).

6 The Court denies Provide's request that this Court, at this time, rule on Sentry's
7 initial breach of the duty to defend and forfeiture of the rate limitations in Civil Code
8 Section 2860. The Court is wary of piecemeal adjudication in a complicated insurance
9 dispute such as this. Indeed, ruling on one issue will likely impact another. For the same
10 reasoning, the Court concludes that it is in the best interest of all parties involved to
11 consider all four motions for summary judgment together.

12 **IV. CONCLUSION**

13 For the foregoing reasons, the Court GRANTS Sentry's Ex parte Motion to Deny
14 Provide's Motion for Partial Summary Judgment to Allow Discovery. (Doc. No. 93) The
15 Court further ORDERS as follows:

- 16 1. Provide's Motion for Partial Summary Judgment is DENIED without
17 prejudice, (Doc. No. 80);
- 18 2. Underwriter's Motion for Summary Judgment is DENIED without
19 prejudice, (Doc. No. 81);
- 20 3. Sentry's Motion for Partial Summary Judgment is DENIED without
21 prejudice, (Doc. No. 82);
- 22 4. Hartford's Motion for Summary Judgment is DENIED without
23 prejudice, (Doc. No. 84);
- 24 5. The briefing schedule for all motions for summary judgment remains
25 vacated and the hearing, currently scheduled for June 19, 2014, is vacated;
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28 ³ The *EasySaver* Litigation is currently on appeal before the Ninth Circuit.


1 6. Counsel for the Parties must meet and confer IN PERSON⁴ within the
2 next thirty (30) days to discuss the discovery and timing to ready this
3 matter for the court to address the summary adjudication issues going
4 forward;

5 7. Counsel for the Parties must immediately contact Judge Gallo's chambers to
6 schedule a case management conference at the earliest convenient time for
7 Judge Gallo's calendar following the meet and confer period;

8 8. Any discovery dispute will be directed to Judge Gallo for resolution.

9 IT IS SO ORDERED.

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11 DATED: March 21, 2014

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14 Hon. Anthony J. Battaglia
15 U.S. District Judge
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28 ⁴Meet and Confer letters, emails, or other non face to face mediums will not satisfy the Court's
directive in this regard. Counsel must also certify in writing to Judge Gallo that this in person meet and
confer process has occurred before presenting discovery or scheduling matters to the court.