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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MATCONUSA LP,

11 Plaintiff,

12 v.

13 HOUSTON CASUALTY
14 COMPANY, et al.,

15 Defendants.

CASE NO. C19-1952JLR

ORDER ON MOTION FOR
RECONSIDERATION

16 **I. INTRODUCTION**

17 Before the court is Plaintiff MatconUSA LP's ("Matcon") motion for partial
18 reconsideration of the court's July 14, 2022 order regarding the parties' motions for
19 summary judgment. (Mot. (Dkt. # 137); Reply (Dkt. # 152); *see* 7/14/22 Order (Dkt.
20 # 129).) Defendant Marsh USA Inc. ("Marsh") opposes Matcon's motion. (Resp. (Dkt.
21 # 151); *see also* 7/25/22 Order (Dkt. # 140) (directing Marsh to file a response pursuant
22 to Local Rules W.D. Wash. LCR 7(h)); 7/26/22 Min. Order (Dkt. # 142) (extending the

1 deadline for Marsh to respond.) The court has reviewed the motion, the parties’
2 briefing, the remainder of the record, and the applicable law. Being fully advised,¹ the
3 court GRANTS IN PART Matcon’s motion for reconsideration.

4 II. ANALYSIS²

5 “Motions for reconsideration are disfavored,” and the “court will ordinarily deny
6 such motions in the absence of a showing of manifest error in the prior ruling or a
7 showing of new facts or legal authority which could not have been brought to its attention
8 earlier with reasonable diligence.” Local Rules W.D. Wash. LCR 7(h)(1).

9 Matcon contends that the court erred “by limiting the duty that Marsh owed
10 Matcon to the exercise of ‘reasonable skill, ordinary care, diligence, and good faith in
11 carrying out the instructions of [Westbank Holdings US Ltd. (“Westbank”)] and [Project
12 Stewart LLC (“Project Stewart”)].” (Mot. at 1 (quoting 7/14/22 Order at 26).) It argues
13 that the court erred in two ways. First, Matcon contends the court erred by “imput[ing]
14 the requirement that Marsh be ‘instructed’ by Project Stewart to report a claim, even
15 though the Engagement Letter” between Marsh and Westbank “only requires that Marsh
16 be ‘informed’ by Project Stewart of a claim.” (*Id.* at 3 (emphasis in original); *see*
17 10/19/20 Williams Decl. (Dkt. # 48) ¶ 9, Ex. G (“Engagement Letter”), at 2.) Second,

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19 ¹ No party requests oral argument on the motion (*see* Mot. at 1; Resp. at 1), and the court
20 finds that oral argument would not be helpful to its disposition of the instant motions, *see* Local
Rules W.D. Wash. LCR 7(b)(4).

21 ² Because the court set forth the factual and procedural background of this case in detail
22 in its July 14, 2022 order on the parties’ motions for summary judgment, it does not repeat that
background here. (*See* 7/14/22 Order at 2-13, 17-20.)

1 Matcon argues that the court improperly combined the common law duties of an
2 insurance broker to exercise “reasonable skill and ordinary care and diligence” and “carry
3 out instructions” with Marsh’s “contractual duty to notify insurers of an insurance claim
4 whenever Westbank informs Marsh of a claim.” (Mot. at 1, 3.) Matcon asserts that the
5 court should conclude, instead, that Marsh owes Matcon the same three duties that Marsh
6 owed its clients Project Stewart and Westbank as the insurance broker for the Project:
7 (1) a “duty to exercise reasonable skill and ordinary care and diligence”; (2) a “duty to
8 exercise good faith and carry out instructions”; and (3) a “duty to notify insurers of
9 claims, provided that Marsh is informed in writing by Project Stewart or Westbank of the
10 claim.” (*Id.* at 5.) Marsh, for its part, defends the court’s original statement of the duty
11 Marsh owes to Matcon. (Resp. at 3-4.)

12 After carefully reviewing the July 14, 2022 order and the authority cited therein,
13 the court concludes that a revision to its statement of Marsh’s duty to Matcon is
14 warranted. The court finds *Merriman v. American Guarantee & Liability Insurance*
15 *Company*, 396 P.3d 351 (Wash. Ct. App. 2017) particularly instructive. In *Merriman*, the
16 Washington Court of Appeals found that the defendant insurance adjuster³ owed a tort
17 duty to the plaintiff insureds based on specific duties that the adjuster had voluntarily
18 assumed in a third party administrator agreement with the insurer. *Id.* at 367. The Court
19 of Appeals first reviewed caselaw regarding the duties owed by adjusters to insureds and
20 by agents to intended beneficiaries and concluded that no precedent precluded finding

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22 ³ Independent insurance adjusters, like the defendant in *Merriman*, ordinarily represent
the interests of the insurer, not the insured. *See id.* at 362 (quoting RCW 48.17.101(1)(a)).

1 that the adjuster had a duty to inform the insureds about the coverage at issue. *Id.* at
2 365-66. Next, the Court of Appeals determined that the third party administrator
3 agreement supported the position that the insureds “were expected to benefit from [the
4 adjuster’s] performance of its duties” under that agreement—which included promises to
5 “promptly and thoroughly review, process, [a]djust, settle and pay [c]laims under the
6 [p]olicy in full compliance with . . . all applicable legal and regulatory requirements.” *Id.*
7 at 362, 366. It further concluded that finding the adjuster owed a duty to the insureds
8 would advance Washington’s policy of protecting insureds. *Id.* at 366. The Court of
9 Appeals, however, rejected the insureds’ argument that the adjuster owed them a
10 generalized duty of care. *Id.* Instead, it held that,

11 given the duties undertaken by [the adjuster] in the third party administrator
12 agreement; the intent of that agreement to benefit, in part, [the] insureds; and
13 the foreseeable harm to the insureds if [the adjuster’s] relevant promises were
14 not performed, [the adjuster] owed the insureds a duty of reasonable care to
15 perform those promises.

16 *Id.* at 367.

17 Following the steps set out in *Merriman*, the court first concludes that Washington
18 precedent does not foreclose a finding that Marsh owed Matcon a duty of care. Marsh
19 has not identified any Washington precedent that would preclude a finding that Marsh, as
20 the administrator and insurance broker for Project Stewart’s owner-controlled insurance
21 program (“OCIP”), owed a tort duty to Matcon as an enrollee in the OCIP. (*See*
22 *generally* Resp.; Marsh MSJ (Dkt. # 92); Marsh Resp. to Matcon MSJ (Dkt. # 109).)
23 Indeed, Marsh argued on summary judgment that its duty to report OCIP claims to the
24 insurer did not arise unless and until Project Stewart instructed it to do so; it did not argue

1 that Washington precedent precluded finding a tort duty in the first instance. (Marsh
2 MSJ at 17-22; *see also* Marsh Resp. to Matcon MSJ at 15-21.)

3 Second, the court reiterates its conclusion that the agreement between Marsh and
4 Westbank regarding Project Stewart was intended, at least in part, to benefit enrollees in
5 the OCIP. (7/14/22 Order at 23-24.) Marsh's Engagement Letter with Westbank
6 regarding Project Stewart included Marsh's promise to

7 prepare loss notices to insurers and notify insurers of claims; provided that
8 your Marsh claims advocate is informed in writing by you of the claim, and
9 Marsh has placed the applicable policies or the Marsh claims advocate has
10 been provided written notice by you of the applicable carrier and policies.

11 (Engagement Letter at 2; *see also id.* at 1 (defining "you" to mean Westbank).) Because
12 Marsh's promises to Westbank in the Engagement Letter were intended to benefit
13 enrollees, precedent supports finding that Marsh owed Matcon a tort duty. *See*
14 *Merriman*, 396 P.3d at 365-66 (analyzing authority finding tort duties where nonclient
15 plaintiffs were intended to benefit from a promise between a principal and an agent
16 (citing *Trask v. Butler*, 872 P.2d 1080, 1083 (Wash. 1994))); *cf. Centurion Props. III,*
17 *LLC v. Chicago Title Ins. Co.*, 375 P.3d 651, 658 (Wash. 2016) (concluding that a title
18 insurance company did not owe a duty of care to third parties in the recording of legal
19 instruments where the title insurance company's recording was intended to benefit only
20 its client).

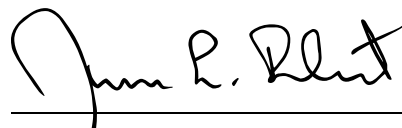
21 Third, the court reiterates its conclusions that (1) it is foreseeable that OCIP
22 enrollees would be harmed if Marsh failed to perform its promise to notify insurers of
claims and (2) recognizing a duty owed by Marsh to OCIP enrollees to perform the

1 promises it made in the Engagement Letter would not unduly burden Marsh's profession.
2 (7/14/22 Order at 24-25.) Thus, consistent with *Merriman*, the court concludes that
3 Marsh owed Matcon a duty to exercise reasonable care in performing the relevant
4 promises it made in the Engagement Letter, including the promise to prepare loss notices
5 and notify insurers of claims provided Marsh was informed in writing by Westbank or
6 Project Stewart of the claim. Absent evidence that Marsh and Westbank agreed that
7 Marsh would take on further duties with respect to OCIP enrollees, the court declines
8 Matcon's invitation to impose on Marsh either a general duty of care to OCIP enrollees
9 or a duty to exercise good faith in carrying out the instructions of enrollees in addition to
10 the instructions of its clients. *See Merriman*, 396 P.3d at 366 (declining to find a general
11 duty of care and limiting the duty to exercising reasonable care to fulfill the promises in
12 the third party administrator agreement).

13 III. CONCLUSION

14 For the foregoing reasons, the court GRANTS IN PART Matcon's motion for
15 reconsideration (Dkt. # 137). The court holds that Marsh owed Matcon a duty to exercise
16 reasonable care in performing the relevant promises it made in the Engagement Letter,
17 including the promise to prepare loss notices and notify insurers of claims provided
18 Marsh was informed in writing by Westbank or Project Stewart of the claim.

19 Dated this 12th day of August, 2022.

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21 JAMES L. ROBART
22 United States District Judge