Travelers Indemnity Company of Connecticut v. Newlin et al

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

TRAVELERS INDEMNITY COMPANY OF CONNECTICUT,

Plaintiff, v. ANTHONY and BLYTHE NEWLIN, as individuals; QUADE & ASSOCIATES, PLC, a California professional liability company; AIG PROPERTY CASUALTY COMPANY, a Pennsylvania corporation, and DOES 1 through 10, inclusive,

Defendants and Related Counterclaims and Third-

Party Complaints.

Case No.: 20cv765-GPC(DEB)

ORDER 1) GRANTING MOTIONS TO DISMISS THE COUNTERCLAIMS BY THE NEWLINS AND QUADE WITH LEAVE TO AMEND; AND 2) S TO DIMISS THE THIRD PARTY COMPLAINTS BY THE NEWLINS, QUADE AND AIG [Dkt. Nos. 32, 33, 50, 51, 52.]

Before the Court are Plaintiff and Counterdefendant Travelers Indemnity Company

motions to dismiss counterclaims filed by Anthony and Blythe Newlin , and Quade & Associates, PLC pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. Nos. 32, 33.) The Newlins and Quade jointly filed an opposition. (Dkt. No. 46.) Travelers filed a reply to the joint opposition. (Dkt. No. 49.) Before the Court are also Third-Party Defendant CCL

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motions to dismiss the third-party complaints pursuant to Rule 12(b)(6) filed by the Newlins, Quade and AIG Property Casualty Company,

AIG . (Dkt. Nos. 50, 51, 52.) AIG filed an opposition. (Dkt. No. 58.) The Newlins and Quade filed a motion for joinder to . (Dkt. Nos. 61, 62.) CCL filed a joint reply. (Dkt. No. 70.) Based on the reasoning below, the Court GRANTS

motion to dismiss with leave to amend and third-party complaints.

Procedural Background On April 22, 2020, Plaintiff Travelers filed a complaint alleging counts for declaratory relief against Defendants the Newlins, Quade and AIG, as well as a breach of contract claim against the Newlins based on facts arising from an underlying state court complaint in San Diego County Superior Court, Case No. 37-2017-00006963-CU-OR- NC entitled Hamadeh et al. v. Newlins, et al.,). (Dkt. No. 1, Compl.) indemnity obligations to the Newlins, Quade and AIG in the Hamadeh Litigation. (Id.) Travelers then filed a first amended complaint on May 1, 2020. (Dkt. No. 5, FAC.) On June 11, 2020, the Newlins and Quade filed a motion to dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6), (Dkt. No. 15), and AIG filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). (Dkt. No. 13.) On September 14, 2020, the

Rule 12(b)(6) and granted the Defendants motion to dismiss pursuant to Rule 12(b)(1) with leave to amend. 1

(Dkt. No. 55.) On September 24, 2020, Travelers filed a second

On October 13, 2020, the Newlins, Quade

1 In its order, the Court directed supplemental briefing on whether a stay should be issued in the case due to the pending cross-complaint filed by the Newlins against CCL arising from the same underlying facts as this case. (Dkt. No. 55 at 27.) On October 9, 2020, AIG and CCL filed their supplemental briefs. 64.) On October 16, 2020, Travelers filed a response. (Dkt. No. 69.) The Court will not consider these arguments until after the pleadings have been settled.

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and AIG filed motions to dismiss the SAC which is not yet fully briefed. (Dkt. Nos. 66, 67.)

On June 11, 2020, the Newlins, AIG and Quade each separately filed a counterclaim against Travelers and each separately filed a third-party complaint against CCL c (Dkt. Nos. 14, 16, 17.) While Travelers filed

, (Dkt. No. 31), it filed the instant fully briefed motions

counterclaims. (Dkt. Nos. 32, 33, 46, 49.) CCL also filed the instant motions to dismiss the third-party complaints filed by the Newlins, AIG and Quade which are fully briefed. (Dkt. Nos. 50, 51, 52, 58, 59, 60, 70.)

Factual Background According to the counterclaim/TPC, the Newlins were the owners of real property located at 16350 Via Del Alba, Rancho Santa Fe, California 92067 from late 2012 until February 2015. (Dkt. No. 16, Newlins Counterclaim/TPC ¶¶ 1, 7.) During that time, the Newlins remodeled, repaired and/or modified two residences on the property as well as made repairs and improvements to the landscape, hardscape and irrigation system. (Id. ¶ 8.) In addition, CCL was contracted by the Santa Fe Irrigation District to perform certain work on the water infrastructure on the property and to move/install a new fire hydrant and to perform certain related site work. (Id. ¶ 8.)

Around October 18, 2013, CCL submitted a bid to the Santa Fe Irrigation District

- property while the Newlins were the owners. (Id. ¶¶ 16-18.) CCL was awarded the contract and on December 2, 2013, CCL signed the Santa Fe Irrigation District Contract. (Id. ¶ 18.) The Santa Fe Irrigation District Contract required CCL to procure certain insurance. (Id. ¶¶ 19-21.) As such, CCL purchased Commercial General Liability policies of insurance from Travelers for dates of coverage from April 1, 2014 April 1,

Id. ¶ 29.) Per the Santa Fe Irrigation District Contract, CCL named the Newlins as additional insureds on the CCL Policies. (Id. ¶¶ 21, 31.) The Contract requ defend . . . indemnify and hold District, its officials, officers,

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agents, employees, owners of property upon which Contractor will perform Work . . .free and harmless from any claims . . . arising out of or incident to any acts, omissions or willful misco Id. ¶ 22.) Per the Santa Fe Irrigation District project, t

with the Santa Fe Irrigation District around October 8, 2013 concerning certain work on the water infrastructure systems that was located on the property. (Id. ¶ 24.) The Property Owner Contract also stated that CCL is to defend and hold harmless any claims arising out of the acts, omission or willful misconduct of the contractor. (Id. ¶ 26.) Around April 2014, CCL submitted a change order, approved by the Santa Fe Irrigation District, to relocate the fire hydrant to the end of the cul-de-sac on Via Del Alba. (Id. ¶ 28.)

Around February 18, 2015, the Newlins sold the property to Bassim Hamadeh, Seidy Hamadeh and the Ravello Trust (collectively p Id. ¶ 9.) On February 24, 2017, the Hamadeh plaintiffs filed a

complaint in San Diego Superior Court against the Newlins and others for negligent misrepresentation, negligence and breach of contract. (Id. ¶ 10.) On October 12, 2017, the Hamadeh plaintiffs filed a first amended complaint adding claims for fraud by concealment, intentional misrepresentation, negligence per se under California Business & Professions Code section 7028 et seq., fraudulent inducement and negligence per se under California Civil Code section 1102 et seq. (Id.) The Hamadeh Litigation arose from the misrepresentation and/or concealment relied upon by the Hamadeh plaintiffs when they purchased the property concerning alleged defects with the modification and remodel work performed by the Newlins and/or on behalf of the Newlins. (Id.) AIG issued a homeowner policy to the Newlins for the policy period, November 29, 2014 to November 29, 2015, which provided liability coverage, including defense, for qualifying damages for property damage caused by an occurrence and subject to limitations and exclusions. (Id. ¶ 7.) The Newlins tendered their defense in the Hamadeh Litigation to AIG, its insurer, and it provided a full defense to the Newlins

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under a reservation of rights. (Id. ¶ 11.) After the tender, AIG assigned panel counsel, Patrick J. Mendes, Esq. of Tyson & Mendes, LLP to defend the Newlins. (Id. ¶ 12.) In

of Quade & Associates, a PLC as independent counsel under California Civil Code section 2860. (Id.) Around May 23, 2017, after Quade transmitted to CCL a Notice of Tender of Defense and Demand for Indemnification and Notice of Claim demanding that CCL defend and indemnify the Newlins for claims made by the Hamadeh plaintiffs related to

, Id. ¶ 32.) On

avelers acknowledging receipt of the tender to CCL. (Id. ¶ 33.) On July 14, 2017, Ms. Donna Moore of the firm Diederich & Associates emailed Quade indicating she had been retained by Travelers to represent CCL. (Id. ¶ 35.) On August 3, 2017, Quade te

Id. ¶ 36.) On October 6, 2017, Travelers sent a letter to Quade representing that Travelers would defend the Newlins in the Hamadeh Litigation under a full reservation of rights and defenses under the CCL policies. (Id. ¶ 37.) The rights reserved included the issue of (1) whether the damages resulted from an occurrence, a term defined in the CCL policies to mean, in pertinent part, an accident , and (2) the extent to which coverage is afforded under the Blanket Additional Insured Endorsements in the CCL policies which limit coverage to injury or damage . . . caused by acts or omissions of CCL. (Id.) Further, the October 6, 2017 letter represented that coverage under the CCL policies to the Newlins as additional insureds Id. ¶ 38.) Travelers also identified Bohm Wildish LLP as its chosen defense counsel and indicated that

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defense fees and costs incurred by Mr. Bohm. Mr. Bohm will be contacting you shortly to Id. ¶ 39.) On October 19, 2017, Annie Won of Bohm Wildish sent Quade the first of three Notice of Association of Counsel forms, each of which contained incorrect information. (Id. ¶ 40.) On November 1, 2017, Won wrote that this was her third attempt to associate into the matter and Quade had not responded to her numerous emails and calls and asked that she be contacted as soon as possible to discuss the matter. (Id. - coverage counsel, Mr. Hilding, responded advising that having a third firm involved in

association of couns Id. ¶ 41.) Counsel further advised that AIG would be providing the defense through panel counsel and independent counsel and asked Ms. Won to inquire with Travelers about sharing in the cost of the defense. (Id.) On November 29, 2017, Ms. Won responded that she had not received an update from Travelers about her assignment to the case and reasserted that her office remains assigned counsel for the Newlins and requested that the files be sent to her so that she could associate into the case. (Id. ¶ 42.) The next day, Mr. Hilding emailed Ms. Won expressing his concern that Travelers had not yet responded to counsel it selected. (Id. ¶ 43.) In response, Ms. Won referred Mr. Hilding to Sandy Ngo of Travelers and Mr. Hilding contacted her on November 3, 2017 by email and voicemail but Ms. Ngo never responded. (Id. ¶ 44.)

On December 7, 2017, the Newlins filed a cross-complaint against CCL, and others, in the state court action for breach of contract, negligence, negligent misrepresentation, indemnity, contribution, apportionment and declaratory relief. (Id. ¶¶ 13, 45.) On January 17, 2019, Quade sent a letter to Ms. Ngo informing her of the January 24, 2019 mediation but no representatives of Travelers attended the mediation. (Id. ¶ 49.) In January 2019, AIG funded a $900,000 settlement between the Newlins, the Hamadeh plaintiffs and all the Hamadeh cross-defendants except CCL. (Id. ¶ 15.) The

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state court dismissed the Hamadeh complaint and the cross-complaints as to all cross- defendants except CCL. (Id.) During the Hamadeh litigation, AIG paid over $1.5 million in attorney fees on behalf of the Newlins to Tyson Mendes and Quade. (Id. ¶ 14.) CCL and Travelers did not contribute to the defense or indemnification of the Newlins in the Hamadeh action. (Id. ¶ 50.)

third-party complaint against CCL alleges a claim for breach of contract claim, (id. ¶¶ 57-62) and the counterclaim against Travelers asserts claims for breach of insurance contract, (id. ¶¶ 63-70), and breach of implied covenant of good faith and fair dealing, (id. ¶¶ 71-75). The third-party complaint

filed by Quade against CCL and counterclaim against Travelers allege almost identical facts as the Newlins counterclaim/TPC. (Dkt. No. 17,

Quade additionally alleges that while AIG agreed to fund of Quade as independent counsel, California Civil Code section 2860 limits the rate of attorneys fees to $250/hour and the rate of paralegals to $125/hour. (Id. ¶ 15.) Therefore, according to the legal services agreement between Quade and the Newlins, the Newlins are legally obligated to pay Quade the difference of its regular rates of $695/hour for partners, $450/hour for associates and $190/hour for paralegals. (Id.) On June 10, 2020, the Newlins assigned all their rights under the legal services agreement with Quade to recover unpaid excess fees from CCL and/or Travelers while still retaining their own personal rights to pursue claims for emotional distress, punitive damages and attorney s fees incurred in recovering contractual benefits unreasonably withheld by Travelers. (Id. ¶ 17.) Quade alleges that CCL and Travelers are obligated to pay it the excess fees of about $1.7 million, plus interest. (Id. ¶ 18.) Quade asserts breach of contract against CCL, (id. ¶¶ 65-72), breach of contract-duty to defend-independent counsel against Travelers, (id. ¶¶ 73-76), and indemnity, equitable subrogation, waiver/estoppel against Travelers, (id. ¶¶ 77-81). In AIG hird-party complaint against CCL and counterclaim against Travelers, it additionally claims that because CCL owed a primary obligation to defend and indemnify

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the Newlins in the Hamadeh Litigation under the Santa Fe Irrigation District Contract and the Property Owner Contract and refused to do so, counterclaim/TPC ¶¶ 57, 61), AIG instead paid the defense and indemnification of the Newlins. (Id.) Because AIG paid for a loss which would otherwise borne by the

(Id. ¶ 62.) Therefore, AIG alleges equitable subrogation express contractual indemnity against CCL, (id. ¶¶ 56-64), equitable subrogation -contractual promise to procure primary coverage against CCL, (id. ¶¶ 65-69), equitable subrogation express contractual indemnity against Travelers, (id. ¶¶ 70-75), equitable indemnity against Travelers, (id. ¶¶ 76-78), equitable contribution proportionate liability against CCL Contracting, (id. ¶¶ 79-81), and equitable contribution proportionate liability against Travelers, (id. ¶¶ 82-84).

Discussion A. Legal Standard as to Federal Rule of Civil Procedure 12(b)(6)

Civ. P. 12(b)(6). Dismissal under Rule 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. See Balistreri v. Pacifica Police

901 F.2d 696, 699 (9th Cir. 1990). Under Federal Rule of Civil Procedure

the . . . claim is and the groun Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). A complaint may survive a motion to dismiss only if, taking all well-pleaded

pl Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly,

content that allows the court to draw the reasonable inference that the defendant is liable

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Id.

Id. complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling

Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted). In reviewing a Rule 12(b)(6) motion, the Court accepts as true all facts alleged in the complaint, and draws all reasonable inferences in favor of the plaintiff. al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009).

the court determines that the allegation of other facts consistent with the challenged

DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992) (quoting Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, where leave to amend would be futile, the Court may deny leave to amend. See DeSoto, 957 F.2d at 658; Schreiber, 806 F.2d at 1401. B. Motions to Dismiss Counterclaims

1. Breach of Contract Claims

because they have failed to allege a breach. (Dkt. No. 32-1 at 11-23; Dkt. No. 33-1 at 12- 20. 2

In addition, Travelers failing to allege damages resulting from the breach. (Dkt. No. 32-1 at 11-12.) The Newlins and Quade filed a joint response arguing that they have sufficiently alleged breach of the contracts for failing to defend and indemnify the Newlins and as a result, they suffered damages. (Dkt. No. 46 at 11-25.)

2 Page numbers are based on the CM/ECF pagination.

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Under California law, the elements required for a cause of action for breach of c (1) the existence of the contract, (2) plaintiff's performance or excuse for

Oasis W. Realty, LLC v. Goldman, 51 Cal. 4th 811, 821 (2011).

Newlins as additional insured under the CCL policies. In fact, the counterclaim avers that Travelers agreed to defend the Newlins in the Hamadeh litigation and appointed defense counsel. ¶¶ 36-39; Dkt. No. 17,

45-48.) However, the parties diverge on whether there was a breach of the CCL contracts when ed to appoint independent Cumis counsel due to a conflict of interest.

Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 275 (1966) (emphasis omitted). an incentive to reserve a broad spectrum of coverage defenses in order to preserve its right to limit its obligation to indemnify to covered claims. By giving notice to its insured, an insurer may agree to defend a suit subject to a reservation of rights. In this manner, an insurer meets its obligation to furnish a defense without waiving its right to

Swanson v. State Farm Gen. Ins. Co., 219 Cal. App. 4th 1153, 1162 (2013) (internal citations and quotations omitted).

for liability under the policy, has the right to control defense and settlement of the third party action against its insured, and is . . . Id. (citation and internal quotations omitted).

However, California Civil Code section 2860 conflict of interest exists between the insurer and the insured. Section 2860 codified the opinion in San Diego Federal Credit Union v. Cumis Ins. Society, Inc., 162 Cal. App. 3d 358, 364 (1985) which held if a conflict of interest exists between an insurer and its

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insured, based on possible noncoverage under the insurance policy, the insured is entitled to retain its own independent counsel at the insurer's expense. Fed. Ins. Co. v. MBL, Inc., 219 Cal. App. 4th 29, 41 (2013) (citing Cumis Ins. Society, Inc., 162 Cal. App. 3d at 364). Section 2860 insured as set forth in Cumis James 3 Corp. v. Truck Ins. Exch., 91 Cal. App. 4th 1093, 1100 (2001). Section 2860 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). In addition,

a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage; however, when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist. No conflict of interest shall be deemed to exist as to allegations of punitive damages or be deemed to exist solely because an insured is sued for an amount in excess of the insurance policy limits. Cal. Civ. Code § 2860(b). The right to independent counsel does not exist in every case involving a conflict of interest nor does every reservation of rights entitle an insured to Cumis counsel. James 3 Corp., 91 Cal. App. 4th at 1101.

The duty to provide Cumis insurance company.

The attorney, who typically has a long-standing relationship with the insurer and none with the insured (including little prospect of future work), may be forced to make numerous and varied decisions that could help one of his clients concerning insurance coverage and harm the other. [T]here has been

position, whether or not it coincides with what is best for the insured. Consequently, in order to eliminate the ethical dilemmas and temptations

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that arise along with conflict in joint representations, the insurer is required to provide its insured with independent counsel of the insured's choosing[.] Long v. Century Indem. Co., 163 Cal. App. 4th 1460, 1469-70 (2008) (citations and quotations omitted). An insured

Fed. Ins. Co., 219 Cal. App. 4th at 42 (quoting Blanchard v. State Farm Fire & Casualty Co., 2 Cal. App. 4th 345, 350 (1991)). have nothing to do with the issues being litigated in the underlying action, there is no

Id. (quoting Foremost Ins. Co. v. Wilks, 206 Cal. App. 3d 251, 261 (1988). There is no such entitlement, for example, where the coverage issue is independent of, or extrinsic to, the issues in the underlying

Id. (quoting Dynamic Concepts, Inc. v. Truck Ins. Exch., 61 Cal. App. 4th 999, 1006 (1998)); Gafcon, Inc. v. Ponsor & Assocs., 98 Cal. App. 4th 1388, 1421-22 (2002) when the basis for the reservation of rights is such as to cause assertion of factual or legal theories which undermine or are contrary to the positions to be asserted in the liability case that a conflict of interest sufficient to require

independent counsel, to be chosen by

It is established that a conflict does not arise when an insurer provides a general reservation of rights. Gafcon, Inc., 98 Cal. App. 4th at 1422; Fed. Ins. Co., 219 Cal. App. 4th 29 at 47 (a general reservation of rights-where the insurer does not reserve its right to deny coverage under a particular policy exclusion-does not give rise to a conflict of interest). Some examples of a conflict of interest requiring the insurer to provide independent counsel include: (1) where the insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by the insurer's retained counsel; the insurer has filed suit against the insured, whether or not the suit is related to the

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excess of policy limits without the insured's consent and leav[es] the insured exposed to claims by third the interests of both the insurer and the insured finds that his or her representation of the

James 3 Corp, 91 Cal. App. 4th at 1101 (emphasis in original) (internal quotation marks and citations omitted).

Dynamic Concepts, Inc., 61 Cal. App. 4th at 1007.

additional insured under the CCL policies and appointed counsel to defend them in the Hamadeh Litigation and as the insurer, it had the right to control their defense. (Dkt. No. 32-1 at 14-16; Dkt. No. 33-1 at 12-15.) Travelers further asserts that the Newlins and Quade have failed to allege facts to show the Newlins were entitled to independent counsel. (Dkt. No. 32-1 at 16-22; Dkt. No. 33-1 at 15-20.) In opposition, the Newlins and Quade argue that they alleged that Travelers breached its defense obligations by

right to independent counsel. First, they argue that Travelers failed to recognize their right to independent counsel based on the actual

issues. (Dkt. No. 46 at 11-

.) Second, they have alleged there was an actual conflict of interest because Travelers attempted to be on both sides of the dispute between the Newlins and CCL. (Dkt. No. 46 at 13- counterclaim/TPC ¶¶ 35-48; Dkt. No. 17 ¶ 44-55).) Third,

provision of ineffective defense counsel. (Dkt. No. 46 at 20-22 (citing Dkt. No. 16,

-46; Dkt - 55).)

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On the first argument, there is a conflict of interest requiring independent counsel

and the outcome of that coverage issue can be controlled by the in James 4 Corp., 91 Cal. App. 4th at 1101. Here, the Newlins and Quade allege that Travelers reservation of rights included certain coverage issues. (See Dkt. No. 16, counterclaim/TPC ¶ 37;

claim/TPC ¶ 46.) While Travelers argue that there was no express reservation of rights, on a motion to dismiss, the Court must accept as true the allegations in the complaint and draw all reasonable inference in favor of the Plaintiff. See al-Kidd, 580 F.3d at 956. Here, the counterclaims sufficiently allege that Travelers reserved its right on certain coverage issues. However, the counterclaims fail to claim

James 3 Corp, 91 Cal. App. 4th at 1101, or that the reservation of rights are related to the issues in the underlying case, Fed. Ins. Co., 219 Cal. App. 4th at 42. Instead, the counterclaims allege a conflict of interest based on concerns of amongst all three law firms, giving the wrong impression to the jury, and, based on her

The counterclaims fail to allege that the reservation of rights asserted concerning coverage were related to the underlying litigation. 3

Therefore, Newlins and first argument concerning the right to independent counsel fails.

Second, the Newlins and Quade claim that there was a conflict of interest because Travelers attempted to be on both sides of the dispute between the Newlins and CCL. They maintain that Travelers would have been on both sides of the litigation between the Newlins and CCL because both are insureds under the same insurance policies and have

3 was not yet named as a cross-defendant in the Hamadeh Litigation. It was not until December 2017, when CCL was named as a cross-defendant when the Newlins filed their cross-complaint.

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adverse interests. (Dkt. No. 46 at 13-19.) Travelers respond that it was not on both sides of the Hamadeh Litigation and that it had no duty to pay for the prosecution of the cross- complaint against CCL. (Dkt. No. 49 at 5-6.)

The Newlins and Quade rely on the ruling in w v. Borad, 27 Cal. 2d 794, 798 (1946), the California Supreme Court held the insurer cannot control both sides of the litigation even if different counsel are assigned. Id. In that case the insurer represented both drivers in a car accident, and the nder the terms of the policy contracts, the insurers have undertaken to pay any judgment rendered in favor of either the plaintiff or the cross-complainant; they, therefore, have a pecuniary interest in effecting a balance between the litigants and so conducting the litigation that neither party recovers against the other. Id. at 798.

Travelers relies on the MBL, Inc. case where the federal government brought a CERCLA action against the property owners and lessees of a dry-cleaning facility suspected of causing soil and groundwater contamination to recover monitoring and remediation costs. MBL, Inc., 219 Cal. App. 4th at 33. The owners and lessees subsequently filed third-party actions against, among others, MBL, Inc., the supplier of dry-cleaning products, seeking indemnity, contribution, and declaratory relief. Id. MBL, Inc. then filed a cross-claim which named several additional cross-defendants. Id. at 35. The court determined that MBL, Inc. was not entitled to independent counsel even though the insurers simultaneously represented MBL, Inc. and some other third-party defendants and cross-defendants because the parties were no

Id. at 46-47. Travelers also cite to Centex case where a group of homeowners brought a construction defect action against a developer for work performed by various subcontractors. Centex, 237 Cal. App. 4th at 25-26. The developer then sued the subcontractors for indemnity, contribution, and repayment. Id. at 26. The court found that the insurer defending the developer and the subcontractors did not create an ethical conflict of interest requiring independent counsel. Id. at 31.

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While both sides present persuasive legal arguments, the allegations in the counterclaims do not support a conflict based on an insurer being on both sides of the litigation. Even though the Newlins and Quade cite to their counterclaims, (Dkt. No. 16, Newlins counterclaim/TPC ¶¶ 35- ¶¶ 44-57), to support the conflict alleged that Travelers sought to be on both sides of the litigation, (Dkt. No. 46 at 14), the allegations do not support such a conflict but describe the communications -coverage counsel and Travelers along with its appointed counsel where the concern at the time involved the inconvenience of having a third firm involved in the defense. -48;

-57.) -coverage counsel

counterclaim/TPC ¶ 41.) Therefore, the Court concludes that counterclaims fail to allege that an actual conflict of interest existed sufficient to warrant the appointment of Cumis counsel where the insurer represents both the plaintiff and defendant. See James 3 Corp., 91 Cal. App. 4th at 1101.

Third, the Newlins and Quade argue that they have alleged a conflict of interest based on selection of ineffective defense counsel. proposed counsel failed on three instances in preparing a notice of association of counsel.

- counterclaim/TPC ¶¶ 49-55.) They also allege that the proposed defense counsel did not understand their ethical duties as insurer-appointed defense counsel. (Dkt. No. 16,

- -57.) Travelers opposes.

The Newlins and Quade fail to provide any legal authority that typographical errors in a notice of association of counsel that there was a conflict of interest demonstrate incompetent counsel for purposes of a

duty to defend includes hiring competent counsel J.B. Aguerre, Inc. v. American Guarantee & Liab.

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Ins. Co., 59 Cal. App. 4th 6, 14 (1997); see also Gray Cary Ware & Freidenrich v. Vigilant Ins. Co., 114 Cal. App. 4th this duty [to defend] includes providing competent counsel and paying all reasonable and necessary costs. J.B. Aguerre keep[ing] abreast of the progress and status of the litigation in order that it may act intelligently and in good faith on settlemen Id. Here the allegation that there was an actual conflict of interest to warrant the appointment of independent counsel and failure to acknowledge a conflict are not persuasive or supported.

breach of contract claim for failing to sufficiently allege a breach of the contracts. 2. Damages Travelers also argues that the Newlins have not alleged they have been damaged

-1 at 11-12.) In fact, the counterclaim alleges they have not suffered any damages by the purported breach because AIG fully defended them in the Hamadeh Litigation by paying over $1.5 million in attorneys fees and $900,000 to settle the Hamadeh Litigation. The Newlins respond that Travelers refused

defense as provided by that counsel. (Dkt. No. 46 at 23-24.) As a result of the breach and failure to recognize the right to Cumis counsel, Travelers has forfeited its ability to take advantage of the section 2860(c) rate cap and accordingly, the Newlins incurred economic loss in the amount of the difference between the section 2860(c) rates paid by AIG and the value of reasonable attorne Quade. Under California law, a breach of contract claim requires a showing of appreciable and actual damage. Aguilera v. Pirelli Armstrong Tire Corp., 223 F.3d 1010, 1015 (9th Cir. 2000) (citing Patent Scaffolding Co. v. William Simpson Const. Co., 256 Cal. App. 2d 506, 511

. A claim for nominal damages, speculative harm, or fear of future harm,

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without a showing of actual damages, does not suffice. Aguilera, 223 F.3d at 1015; Ruiz v. Gap, Inc., 622 F. Supp. 2d 908, 917 (N.D. Cal. 2009). It is also the rule that an insured is entitled to only a single full defense, Safeco Ins. Co. of America v. Parks, 170 Cal. App. 4th 992, 1004 (2009), and an insurer that has borne the responsibility and cost of that defense is itself entitled to a sharing or contribution by the other responsible insurers, see Continental Cas. Co. v. Zurich Ins. Co., 57 Cal. 2d 27, 37 (1961); Fireman's Fund Ins Co. v. Maryland Casualty Co., 65 Cal. App. 4th 1279, 1289, 1295 (1998). The measure of damages for any breach of the duty

Emerald Bay Community Ass n v. Golden Eagle Ins. Corp., 130 Cal. App. 4th 1078, 1088-89 (2005). Here, the Newlins allege they incurred economic loss in the amount of the difference between the section 2860(c) rates paid by AIG and the value of reasonable

counterclaim/TPC ¶ on June 10, 2020, the Newlins assigned to Quade all their rights under the legal services agreement between Newlins and Quade to recover unpaid excess fees from CCL and/or Travelers. (Dkt. No. 1 ¶ 17.) Therefore, the Newlins cannot Quade. Nonetheless, the Newlins further argue that they are still entitled to seek damages for emotional distre indemnity obligations. (Dkt. No. 46 at 25.) However, the traditional rule is that emotional distress damages are not recoverable on a breach of contract claim. See Wynn v. Monterey Club, 111 Cal. App. 3d 789, 799 (1980). Moreover, the cases the Newlins cite to support emotional distress damages concern breach of the implied covenant of good faith and fair dealing, not a breach of contract claim. (Dkt. No. 46 at 25.) Accordingly, because the Newlin have not alleged damages to support an alleged breach by Travelers, the Court

for breach of contract.

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While Travelers did not move to dismiss contract claim based on damages, Quade, in the joint opposition, argues that it suffered damages, by means of assignment from the Newlins, in the amount of the difference between the section 2860(c) rates paid by AIG and the reasonable rates the Newlins became legally responsible for to Quade. (Dkt. No. 46 at 25.) Travelers, in reply, argues that while an insurer may not take advantage of the rate cap in section 2860 if it did not meet its duty to

in this case, because Travelers , it did not forfeit the benefits of section 2860. Travelers raises an issue of fact that is not amenable to determination on a motion to dismiss. Therefore, the Court concludes that Quade has sufficiently alleged damages.

3. Breach of the Covenant of Good Faith and Fair Dealing

Travelers also moves to dismiss the counterclaim for breach of the covenant of good faith and fair dealing filed by the Newlins. (Dkt. No. 32-1 at 23-24.) The Newlins oppose. (Dkt. No. 46 at 28-29.)

every insurance contract. Anguiano v. Allstate Ins. Co., 209 F.3d 1167, 1169 (9th Cir. 2000) (per curiam) (citing PPG Indus., Inc. v. Transamerica Ins. Co., 20 Cal. 4th 310, 312 (1999)). Anguiano, 209 F.3d at

Egan v. Mutual of Omaha Ins. Co., 24 Cal.3d 809, 818 (1979). A breach of covenant of good faith and fair dealing cannot survive absent any coverage under an insurance policy. Waller v. Truck Ins. Exchange, Inc., 11 Cal. 4th 1, 36 (1995); Cybernet Ventures, Inc. v. Hartford Ins. Co. of the Midwest, 850, 853 (9th Cir. 2006) (quoting Brizuela v. Calfarm Ins. Co., 116 Cal. App. 4th 578, 594 (2004) A claim for breach of the covenant of good

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faith and fair dealing cannot be maintained where a party is barred from bringing a claim for breach of contract. Here, the breach of the covenant of good faith and fair dealing stems from

due to a conflict of interest. Because

inability to plausibly allege a breach of the contract, the claim for breach of the covenant of good faith and fair dealing also fails. See Park Townsend LLC v. Clarendon America Ins. Co., 916 F. Supp. 2d 1045, 1057 (N.D. Cal. 2013) (dismissing breach of the implied

right to independent counsel due to a conflict of interest which the complaint failed to set forth). Accordingly, the Court GRANT miss the counterclaim for breach of the implied covenant of good faith and fair dealing. 4. -Equitable Subrogation-Waiver- Estoppel Travelers moves to dismiss the third cause of action initially arguing that because it relies on the same facts as the breach of contract claim, this claim also fails. (Dkt. No. 33-1 at 20-22.) Additionally, Travelers argues that the third cause of action is a hodgepodge of ambiguous claims that fails to state a claim and contends that Quade has failed to allege facts to support the elements of equitable subrogation and equitable indemnity. (Id.) In response, Quade merely recites arguments concerning the breach of contract claim without explaining whether the counterclaim alleges claims for indemnity, equitable

subrogation, waiver and estoppel. (Dkt. No. 46 at 29-30.) -Equitable Subrogation- ¶¶ 77-81.) The

counsel based on its reservation of rights and, as such, T rate cap in section 2860. (Id.

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their rights under the legal services agreement with Quade. (Id.)

doctrines each pertain to the allocation of costs when there is more than one potentially responsible insurance company. Transcontinental Ins. Co. v. Ins. Co. of the State of Penn., 148 Cal. App. 4th 1296, 1303 (2007) (citation omitted). coverage or

n to pursue a full recovery from another insurer who was primarily responsible for the loss. Casualty Co., 65 Cal. App. 4th 1279, 1295 (1998). hand, applies to apportion costs among insurers that share the same level of liability on the same risk as to the same insured. Id. the form of an insurer's right to be put in the position of the insured in order to pursue recovery from third parties legally responsible to the insured for a loss which the insurer has both insured and paid. Id. at 1305. By their description, a claim for equitable subrogation and equitable contribution are brought by the insurers. Here, Quade is not an insurer and has also not paid out any monies. Therefore, the Court concludes that the third cause of action fails to state a claim.

C. Motions to Dismiss Third Party Complaints filed by the Newlins, Quade, and AIG CCL moves to dismiss the third party complaints filed by the Newlins, Quade and AIG claiming that the complaints violate the rule against claim splitting because the same exact claim is pending in state court. (Dkt. Nos. 50-52.) AIG filed an opposition. (Dkt.

(Dkt. Nos. 61, 62.) CCL filed a joint reply to the oppositions. (Dkt. No. 70.) third party complaint against CCL alleges one cause of action for breach of contract of the Santa Fe Irrigation District Contract and the Property Owners

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refusing to indemnify the NEWLINS Counterclaim/TPC ¶ 58.)

recover unpaid excess fees from CCL, alleges breach of contract. (Dkt. No. ¶¶ 65-72.) Because AIG paid for the defense of the Newlins in the Hamadeh Litigation, complaint against CCL asserts equitable subrogation-express contractual indemnity; equitable subrogation-contractual promise to

procure primary coverage; and equitable contribution-proportionate liability. (Dkt. No. 14 -64; 65-69; 79-81.) In state court, the pending cross-complaint filed by the Newlins on December 7, 2017 against CCL alleges breach of contract and negligence. (Dkt. No. 51-2 RJN 4

, Cross-Complaint ¶¶ 58-76; 83-92). The breach of

and the Property Owners Contract by failing to timely accept the tender letter for defense and indemnity. (Id. ¶¶ 70-73.) The cross-complaint also seeks damages for express indemnity, equitable indemnity, total indemnity, comparative equitable indemnity, contribution, apportionment, and declaratory relief. (Id. ¶¶ 127-156.) No party disputes that the claims in the state and federal court cases are nearly identical. CCL argues that the third party complaint filed by the Newlins should be dismissed under the doctrine of claim splitting because there is already a pending cross-complaint in state court with the same claim being alleged against CCL in this case. (Dkt. No. 50-1.) As to

4 Nos. 50-2, 51-2; 52-2.) Under Federal Rule of Evidence 201, the Court may take judicial notice of filings in other courts. Accordingly, the Court GRANTS requests for judicial notice. See Reyna Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n. 6 (9th Cir. 2006); United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc. notice of proceedings in other courts, both within and without the federal judicial system, if those proceedin

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Quade and AIG, CCL argues that their third party complaints allege the same primary rights for recovery as the pending state court action based on the alleged breach of the same contracts related to the same property arising from the Hamadeh Litigation as the

third party complaint. (Dkt. Nos. 51-1; 52-1.) CCL contends that any judgment in this case would necessarily impair a judgment in the pending state court action as it would adjudicate the same rights and obligations under the same contracts. (Dkt. No. 51-1 at 5; Dkt. No. 52-1 at 5.) Moreover, because Quade, as the assignee, and AIG, as the subrogee, both stand in the shoes of the assignor and subrogor, they stand in privity with CCL. (Dkt. No. 51-1 at 6-7; Dkt. No. 52-1 at 6-7.) In response, the Newlins, Quade and AIG do not dispute that claim splitting bars the third party complaints as there is a pending state law cross-complaint with the same claim; instead they argue that the

ising the

third party complaints against CCL Contracting in the event the Newlins dismiss their pending state cross-complaint against CCL Contracting without prejudice. at 16; see also Dkt. Nos. 61, 62.) CCL moves to dismiss relying on the claim splitting analysis provided in Adams v. California Dep't of

Health Servs., 487 F.3d 684 (9th Cir. 2007) overruled on other grounds by Taylor v. Sturgell, 553 U.S. 880, 904 (2008). Under the doctrine, generally have no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same Id. at 688 (quotation and citation omitted). Borrowing from the test for claim prelusion, the court

[and] examine whether the causes of action and relief sought, as well as the parties or privies to the action, are

Id. After weighing the equities of the case, the district court may exercise its discretion to dismiss a duplicative later-filed action, to stay that action pending resolution of the previously filed action, to enjoin the parties from proceeding with it, or to consolidate both actions. Id.

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However, Adams Claim splitting applies only to duplicative cases involving concurrent jurisdiction within federal court, 5 and does not apply in this case, involving concurrent jurisdiction between state and federal court. See Colorado River Water Conservation Dist. v. United States, 424 U.S.

as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . As between federal district courts, . . . though no prec (internal citations omitted); Noel v. Hall, 341 F.3d 1148, 1159 (9th Cir. 2003) even identical federal and state court litigation may proceed simultaneously, limited only

; Chromologic LLC v. Yang, Case No. SACV 13-01575 JVS(CWx), 2013 WL 12125537, at *3 (C.D. Cal. May 9, 2013) (claim-splitting did not apply to case involving similar claims in federal and state court as claim-splitting is aimed at duplicative litigation within federal courts). In Kanciper v. Suffolk County Soc. for the Prevention of Cruelty to Animals, Inc., 722 F.3d 88, 92-93 (2d Cir 2013), the district court dismissed the complaint under claim splitting based on the fact that the plaintiff had a pending state court case involving the same facts. Id. at 89. The Second Circuit recognized that under the Ninth Circuit case of Adams maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant id. at 92 (citation omitted); however, the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction Id. (citing Colorado River Water, 424 U.S. at 817). The court noted that the appropriate analysis to determine whether a stay or

5 cases cited by the opposition arguing that those cases all involved two federal cases, not a state and federal case.

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dismissal was warranted on an allegedly duplicative federal claim with a state court parallel proceeding is under Colorado River. Id. at 93. Similarly, in Wyles v. Sussman, 661 Fed. App x 548, 552 (10th Cir. 2016), during the pendency of a state court complaint, the plaintiff filed a complaint in federal court asserting nearly identical claims. Id. at 549. The district court dismissed the complaint under the claim splitting doctrine. Id. The Tenth Circuit held that the district court erred in dismissing based on claim-splitting because it applies only when both complaints are in federal court. Id. at 552. Therefore, because claim splitting under Adams does not apply to this case

s to dismiss the third party complaints filed by the Newlins, Quade and AIG as legally unsupported. D. Leave to Amend

counterclaims, in the even the Court grants dismissal on their claims, they seek leave to file an amended counterclaim. (Dkt. No. 46 at 13 n.2; 19 n.4; 31 n.5.) Because the Newlins and Quade may cure the deficiencies noted in the order, and an amendment would not be futile est for leave to file an amended counterclaim. See DeSoto, 957 F.2d at 658; Schreiber, 806 F.2d at 1401.

Conclusion Based on the above the Court GRANTS motions to dismiss the counterclaims filed by the Newlins and Quade. In addition, the Cou motions to dismiss the third party complaints filed by the Newlins, Quade and AIG. The ////////////////

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Newlins and Quade may file amended counterclaims on or before November 20, 2020. The hearing set on November 6, 2020 shall be vacated. IT IS SO ORDERED. Dated: November 2, 2020