

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

**THE RAISIN BARGAINING
ASSOCIATION, et al.,**

Plaintiff,

v.

**HARTFORD CASUALTY INSURANCE
CO., et al.,**

Defendants.

1:10-cv-00370-OWW-DLB

MEMORANDUM DECISION ON
DEFENDANT'S MOTION TO DISMISS
(Docs. 7,8)

I. INTRODUCTION.

On January 27, 2010, the Raisin Bargaining Association ("RBA"), Glen S. Goto, and Monte Schutz ("Plaintiffs") filed a complaint in the Superior Court of California, County of Fresno, against Hartford Casualty Insurance Company ("Defendant") alleging various state causes of action. (Doc. 1, Ex. B). Defendant removed Plaintiffs' action pursuant to 28 U.S.C. § 1441(b) on the basis of diversity jurisdiction. (Doc. 1).

Defendant filed a motion to dismiss Plaintiffs' complaint on March 5, 2010. (Docs. 7, 8).¹ Plaintiffs filed opposition to

¹ Docket number 7 is Defendant's motion to dismiss, and docket number 8 is the memorandum in support thereof. Citations in this order to the "Motion to Dismiss" refer to Defendant's memorandum.

1 Defendant's motion to dismiss on April 30, 2010. (Doc. 10).

2 **II. FACTUAL BACKGROUND.**

3 Plaintiff RBA is a nonprofit California cooperative
4 association. (Complaint at 1). Plaintiffs Glen Goto and Monte
5 Schutz are and were, at all times relevant to this action, members
6 of the Board of Directors of RBA. (Complaint at 2).

7 Plaintiffs entered into contracts for insurance with Defendant
8 whereby Defendant agreed to insure Plaintiffs against various
9 claims brought against Plaintiffs for actions taken in RBA's
10 business capacity. (Complaint at 1, 3). The insurance policies
11 relevant to this action encompass coverage periods from at least
12 2005 to the present and obligate Defendant to provide defense and
13 indemnity for covered claims made against RBA. (Complaint at 1-3).

14 Beginning in or about January 2007, Richard Garabedian
15 ("Garabedian"), through counsel, sent several letters threatening
16 litigation and demanding almost \$900,000.00 to settle a dispute
17 between RBA, Goto, and Schutz concerning the RBA Board of
18 Director's decision not to recommend Garabedian to the Secretary of
19 the U.S. Department of Agriculture ("USDA") for appointment to the
20 RBA's reserved seats on the Raisin Administrative Committee of the
21 USDA. (Complaint at 3). On or about March 2, 2007, Garabedian
22 filed a complaint against Plaintiffs alleging defamation, slander,
23 and breach of the common law Fair Procedure Doctrine in Fresno
24 County Superior Court. (Complaint at 3).

25 In response to the Garabedian complaint, on or about April 4,
26 2007, Plaintiff's filed an Anti-SLAPP motion against Garabedian.
27 (Complaint at 4). On November 8, 2007, the Superior Court granted
28 Plaintiffs' Anti-SLAPP motion and struck Garabedian's entire

1 complaint. (Complaint at 5).

2 The complaint alleges that upon receipt of Garabedian's
3 complaint in March 2007, Plaintiffs immediately tendered the
4 complaint to Defendant. (Complaint at 5). On or about March 19,
5 2007, Plaintiffs received a letter from Defendant agreeing, without
6 any reservations, to defend and provide indemnity to Plaintiffs.
7 (Complaint at 5). Plaintiffs met with Defendant's counsel,
8 attorneys Gordon Park and Mohammed Mandegary, who
9 "suggested/recommended" to Defendant that Plaintiff's counsel, the
10 law firm of Campagne, Campagne, & Lerner, remain working on
11 defending against the Garabedian complaint until resolution of an
12 Anti-SLAPP motion. (Complaint at 5). The complaint alleges that
13 Park and Mandegary promised they would recommend to Defendant that
14 it should reimburse Plaintiffs for the fees incurred in defending
15 the Garabedian complaint. (Complaint at 5). Plaintiffs allege
16 that they "performed all of the Anti-SLAPP work and expected to be
17 reimbursed" by Defendant. (Complaint at 5). Defendant paid
18 Plaintiffs' invoices from March 2007 through September 2007 after
19 taking additional write downs at the expense of Plaintiffs.
20 (Complaint at 5). Defendant reimbursed Plaintiffs \$38,891.42.
21 (Complaint at 5).

22 On or about November 12, 2009, Defendant sent Plaintiffs a
23 document entitled "Case Summary." (Complaint at 6). The Case
24 Summary refused full payment of legal fees incurred by Plaintiffs.
25 (Complaint at 6). Plaintiffs allege that the Case Summary set
26 forth an incorrect account of the defense provided in connection
27 with the Garabedian complaint. (Complaint at 6). The Case Summary
28 asserts that Defendant paid a total of \$69,366.48 in legal fees.

1 (Complaint at 6). The Case Summary also indicated that Defendant
2 intended to collect the attorneys' fees awarded by the Superior
3 Court in connection with Plaintiffs successful Anti-SLAPP motion.
4 (Complaint at 6). Plaintiffs sent Defendant a written response to
5 Defendant's Case Summary on December 16, 2009. (Complaint at 7).
6 Upon receipt of Plaintiff's response, Defendant asked Plaintiff to
7 forward a copy of the Case Summary. (Complaint at 8).

8 The total amount of fees and costs for work performed by
9 Plaintiffs' counsel from January 2007 through September 2007 was
10 \$77,056.81. (Complaint at 5). According to the FAC, none of the
11 work performed by Plaintiffs' counsel was duplicative of the work
12 performed by Defendant's counsel. (Complaint at 6). Plaintiffs
13 allege that Defendant's actions were taken in bad faith, and that
14 Defendant had actual knowledge that its conduct constituted bad
15 faith. (Complaint at 7).

16 Plaintiffs allege they have incurred costs and attorney's fees
17 as a result of Defendant's actions. (Complaint at 7). Plaintiffs
18 also contend they have suffered great emotional distress as a
19 result fo Defendant's conduct. (Complaint at 7). Plaintiffs
20 contend that Defendant owes Plaintiffs \$38,165.33, plus 10% APR as
21 well as punitive damages and attorneys' fees incurred in the
22 prosecution of the instant law suit. (Complaint at 5).

23 **III. LEGAL STANDARD.**

24 Dismissal under Rule 12(b)(6) is appropriate where the
25 complaint lacks sufficient facts to support a cognizable legal
26 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th
27 Cir.1990). To sufficiently state a claim to relief and survive a
28 12(b) (6) motion, the pleading "does not need detailed factual

1 allegations" but the "[f]actual allegations must be enough to raise
2 a right to relief above the speculative level." *Bell Atl. Corp. v.*
3 *Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).
4 Mere "labels and conclusions" or a "formulaic recitation of the
5 elements of a cause of action will not do." *Id.* Rather, there must
6 be "enough facts to state a claim to relief that is plausible on
7 its face." *Id.* at 570. In other words, the "complaint must contain
8 sufficient factual matter, accepted as true, to state a claim to
9 relief that is plausible on its face." *Ashcroft v. Iqbal*, --- U.S.
10 ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal
11 quotation marks omitted).

12 The Ninth Circuit has summarized the governing standard, in
13 light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint to
14 survive a motion to dismiss, the nonconclusory factual content, and
15 reasonable inferences from that content, must be plausibly
16 suggestive of a claim entitling the plaintiff to relief." *Moss v.*
17 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.2009) (internal
18 quotation marks omitted). Apart from factual insufficiency, a
19 complaint is also subject to dismissal under Rule 12(b)(6) where it
20 lacks a cognizable legal theory, *Balistreri*, 901 F.2d at 699, or
21 where the allegations on their face "show that relief is barred"
22 for some legal reason, *Jones v. Bock*, 549 U.S. 199, 215, 127 S.Ct.
23 910, 166 L.Ed.2d 798 (2007).

24 In deciding whether to grant a motion to dismiss, the court
25 must accept as true all "well-pleaded factual allegations" in the
26 pleading under attack. *Iqbal*, 129 S.Ct. at 1950. A court is not,
27 however, "required to accept as true allegations that are merely
28 conclusory, unwarranted deductions of fact, or unreasonable

1 inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988
2 (9th Cir.2001). "When ruling on a Rule 12(b)(6) motion to dismiss,
3 if a district court considers evidence outside the pleadings, it
4 must normally convert the 12(b)(6) motion into a Rule 56 motion for
5 summary judgment, and it must give the nonmoving party an
6 opportunity to respond." *United States v. Ritchie*, 342 F.3d 903,
7 907 (9th Cir. 2003). "A court may, however, consider certain
8 materials-documents attached to the complaint, documents
9 incorporated by reference in the complaint, or matters of judicial
10 notice-without converting the motion to dismiss into a motion for
11 summary judgment." *Id.* at 908.

12 **IV. Discussion**

13 **A. Plaintiffs' Breach of Contract Claim**

14 A claim for breach of contract under California law requires:
15 1) the existence of the contract; 2) plaintiff's performance or
16 excuse for nonperformance of the contract; 3) defendant's breach of
17 the contract; and 4) resulting damages. *E.g. Armstrong Petrol.*
18 *Corp. V. Tri Valley Oil & Gas Co.*, 116 Cal. App. 4th 1375, 1391 n.
19 6 (Cal. Ct. App. 2004). In order to determine whether a plaintiff
20 has stated a claim for breach of contract, a court must compare the
21 allegations of the complaint with the terms of the contract. *See,*
22 *e.g., Waller v. Truck Ins. Exchange, Inc.*, 11 Cal. 4th 1, 5 (Cal.
23 1995).

24 Interpretation of an insurance policy is a question of law.
25 *Id.* As the California Supreme Court stated in *Waller*,

26 The fundamental rules of contract interpretation are
27 based on the premise that the interpretation of a
28 contract must give effect to the "mutual intention" of
the parties."Under statutory rules of contract
interpretation, the mutual intention of the parties at

1 the time the contract is formed governs interpretation.
2 Such intent is to be inferred, if possible, solely from
3 the written provisions of the contract. The 'clear and
4 explicit' meaning of these provisions, interpreted in
5 their 'ordinary and popular sense,' unless 'used by the
6 parties in a technical sense or a special meaning is
7 given to them by usage', controls judicial
8 interpretation. " A policy provision will be considered
9 ambiguous when it is capable of two or more
10 constructions, both of which are reasonable. But
11 language in a contract must be interpreted as a whole,
12 and in the circumstances of the case, and cannot be found
13 to be ambiguous in the abstract. Courts will not strain
14 to create an ambiguity where none exists.

11 Cal. 4th at 18-19 (citations omitted).

10 The provisions of the insurance contract central to this
11 dispute are contained in the "Business Liability Coverage Form"
12 found at pages 59 through 70 of Exhibit A to the complaint.²
13 Section A(1)(a) of the Business Liability Coverage Form provides,
14 in pertinent part:

15 We will pay those sums that the insured becomes legally
16 obligated to pay as damages because of "bodily injury",
17 "property damage", or "personal and advertising injury"
18 to which this insurance applies. We will have the right
19 and duty to defend the insured against any "suit" seeking
20 those damages....No other obligation or liability to pay
21 sums or perform acts or services is covered unless
22 explicitly provided for under Coverage Extension-
23 Supplementary Payments.

20 (Complaint, Ex. A at 59). Section E(2)(d), entitled "Obligations
21 at the Insured's Own Cost" provides:

22 No Insured will, except at that insured's own cost,
23 voluntarily make any payment, assume any obligation, or
24 incur any expense, other than for first aid, without our
25 consent.

24 (Complaint, Ex. A at 66).

25 ///

26 _____
27 ² The original page numbers for Exhibit A are illegible. Page citations to
28 Exhibit A contained within this order correspond to the pagination of the PDF
document contained on the CM/ECF docket.

1 Section A(1)(a) confers on Defendant the right to control
2 defense of a claim, and section E(2)(d) establishes that, unless
3 Defendant consents to an expenditure, Defendant is not liable for
4 voluntary payments made by Plaintiffs in defense of a covered
5 claim. See, e.g., *Jamestown Builders v. General Star Indem. Co.*,
6 77 Cal. App. 4th 341, 346 (Cal. Ct. App. 1999) (discussing no-
7 voluntary-payment provisions). Unless the complaint alleges facts
8 sufficient to support a reasonable inference that Defendant
9 consented to Plaintiffs' payments to its private counsel,
10 Plaintiffs cannot state a claim for breach of contract. See *id.*

11 Defendant contends that Plaintiffs' breach of contract claim
12 is barred as a matter of law, citing *Truck Ins. Exch. v. Unigard*
13 *Ins. Co.*, 79 Cal. App. 4th 966, 976-77, 980 (2000) and *Faust v. The*
14 *Travelers*, 55 F.3d 471, 472 (9th Cir. 1995) for the proposition
15 that "where...a policy contains a clear provision prohibiting
16 voluntary payments, a carrier is not liable for voluntarily
17 incurred defense costs." (Motion to Dismiss at 8).³ Both *Unigard*
18 and *Faust* recite the well settled rule that no-voluntary-payments
19 provisions are enforceable under California law. *Unigard*, 79 Cal.
20 *App. 4th 977*; *Faust*, 55 F.3d at 472; accord *Jamestown Builders*, 77
21 Cal. App. 4th at 346; *Belz v. Clarendon America Ins. Co.*, 158 Cal.
22 *App. 4th 615, 627* (Cal. Ct. App. 2007); *Low v. Golden Eagle Ins.*

23
24 ³ Defendant asserts three arguments in support of its motion to dismiss
25 Plaintiffs' breach of contract claim: (1) Defendant is not liable for fees
26 incurred pre-law suit; (2) Defendant is not liable for fees incurred pre-tender;
27 and (3) Defendant is not liable for voluntary payments made by Plaintiff without
28 Defendant's consent. (Motion to Dismiss at 5-8). Defendant's first and second
contentions are not grounds for dismissal of Plaintiff's contract action.
Assuming Defendant's first and second arguments are correct, the complaint may
still state a claim for breach of contract with respect to costs incurred after
Plaintiffs tendered defense of the Garabedian complaint to Defendant.

1 Co., 110 Cal. App. 4th 1532, 1544 (Cal. Ct. App. 2003). However,
2 enforcement of a no-voluntary-payments clause is premised on an
3 insurer's lack of consent to a given expenditure. See *Belz*, 158
4 Cal. App. 4th at 628.

5 The complaint contains the following allegations concerning
6 issue of Defendant's consent:

7 20. Plaintiffs...met with [Defendant's] Counsel, who
8 suggested/recommended to Defendant that Plaintiffs'
9 counsel...remain working on defending against the
Garabedian Complaint until the conclusion of the Anti-
SLAPP motion.

10 21. Acknowledging the Plaintiffs' Counsel's experience
11 with Anti-SLAPP motions, [Defendant's counsel] then
12 promised they would recommend to Defendant that it should
reimburse the Plaintiffs for their fees for defending
against Garabedian's Complaint.

13 (Complaint at 5). The complaint also alleges that Defendant
14 reimbursed Plaintiffs \$38,891.42. (Complaint at 5).

15 Plaintiffs' allegations that (1) Defendant's counsel stated
16 they would "recommend/suggest" to Defendant that Plaintiffs'
17 counsel continue working on the Anti-SLAPP motion; (2) Defendant's
18 counsel "promised they would recommend" to Defendant that
19 Plaintiffs be reimbursed; and (3) Defendant partially reimbursed
20 Plaintiffs for fees paid to Plaintiffs' private counsel, taken
21 together, are sufficient to support a reasonable inference that
22 Defendant consented to and paid at least some of Plaintiffs'
23 payments to Plaintiffs' private counsel based on alleged
24 representations of Defendant's disclosed agent/attorney that
25 Plaintiffs' attorneys work on the Anti-SLAPP motion for which
26 Defendant's attorney would recommend payments. To the extent
27 Defendant consented to Plaintiffs' expenditures, Defendant's
28 failure to reimburse Plaintiffs for such expenditures may

1 constitute a breach of Defendant's contractual duty to defend.
2 However, the complaint is ambiguous as to the extent and nature of
3 Defendant's obligation. Plaintiffs' allegation that Defendant's
4 attorneys stated they would "recommend" that Plaintiff's private
5 counsel be reimbursed is insufficient to bind Defendant.
6 Plaintiffs' breach of contract claim must be DIMISSED, without
7 prejudice.

8 **B. Tortious Breach of Implied Covenant of Good Faith and Fair**
9 **Dealing⁴**

10 California law provides that "every contract imposes upon each
11 party a duty of good faith and fair dealing in its performance and
12 its enforcement." *E.g. Jonathan Neil & Assoc., Inc. v. Jones*, 33
13 Cal. 4th 917, 937 (Cal. 2004). The precise nature and extent of
14 the duty imposed by the implied covenant of good faith depends on
15 the purpose underlying a contract. *Id.* The implied covenant of
16 good faith and fair dealing cannot impose substantive duties beyond
17 those incorporated in the specific terms of a contract. *Guz v.*
18 *Bechtel National, Inc.*, 24 Cal. 4th 317, 349 (Cal. 2000). Although
19 breach of a specific provision of the contract is not a necessary
20 prerequisite to a claim for breach of the implied covenant of good
21 faith and fair dealing, *Schwartz v. State Farm Fire & Casualty Co.*,
22 88 Cal. App. 4th 1329, 1339 (Cal. Ct. App. 2001), there can be no

23
24 ⁴ Plaintiff asserts two claims for breach of the implied covenant; an ordinary
25 breach and a "tortious" breach. California law does not recognize Plaintiffs'
26 distinction; either the refusal to defend is an ordinary breach compensable
27 pursuant to contract remedies, or the refusal is an unreasonable action
28 compensable pursuant to tort remedies. See *Amato*, 53 Cal. App. 4th at 831; but
see *Jones*, 33 Cal. 4th at 940-41 (insurer's breach of the covenant of good faith
and fair dealing did not "sound in tort" where tort remedies were unnecessary to
protect insured's interests). Plaintiffs' claim for ordinary breach of the
implied covenant is subsumed within Plaintiffs' breach of contract claim and the
stand-alone claim is therefore DISMISSED with prejudice.

1 breach of the implied covenant with respect to benefits that are
2 not due under an insurance policy, *Brehm v. 21st Century Ins. Co.*,
3 166 Cal. App. 4th 1225, 1235 (Cal. Ct. App. 2008) (citing *Waller*,
4 11 Cal.4th at 36).

5 Under California law, an insurer's unreasonable refusal to
6 defend an insured is considered a breach of the implied covenant of
7 good faith and fair dealing and is actionable as a tort. *See, e.g.*,
8 *Amato*, 53 Cal. App. 4th at 831. Once an insured has established an
9 unreasonable breach of the implied covenant of good faith and fair
10 dealing, the tort remedies available vary depending on the
11 egregiousness of the insurer's conduct. *See Tibbs*, 755 F.2d at
12 1375 (distinguishing remedies available in the context of ordinary
13 bad faith action from remedies available where insured establishes
14 malice or oppression).⁵ In order to plead a claim for tortious
15 breach of the implied covenant of good faith and fair dealing, a
16 complaint must allege facts which demonstrate a failure or refusal
17 to discharge contractual responsibilities "prompted not by an
18 honest mistake, bad judgment, or negligence, but rather by a
19 conscious and deliberate act, which unfairly frustrates the agreed
20 common purposes and disappoints the reasonable expectations of the
21 other party." *Careau & Co. v. Security Pacific Business Credit,*
22 *Inc.*, 222 Cal. App. 3d 1371, 1395 (Cal. Ct. App. 1990). Refusal to
23 defend, without more, does not constitute a breach of the implied
24 covenant. *E.g. Tibbs v. Great American Ins. Co.*, 755 F.2d 1370,
25

26
27 ⁵ Plaintiffs' claim for tortious breach includes allegations that Defendant acted
28 with either malice, fraud, or oppression. (Complaint at 12-13). Because the
complaint is insufficient to allege bad faith, *a fortiori*, the complaint does not
state sufficient facts to allege malice, fraud, or oppression.

1 1375 (9th Cir. 1985) (citation omitted); accord *Campbell v. Superior*
2 *Court*, 44 Cal. App. 4th 1308,1319-1320 (Cal. Ct. App. 1996) (only
3 unreasonable breach of duty to defend constitutes a tort); *Amato v.*
4 *Mercury Cas. Co.*, 53 Cal. App. 4th 825, 831 (1997) (same).

5 Plaintiffs contend that "implicit in [Defendant's] obligations
6 to act fairly and in good faith toward Plaintiffs was their [sic]
7 duty to promptly and adequately reimburse Plaintiff as agreed."
8 (Complaint at 10). Defendant contends that the following facts
9 evince Defendant's bad faith:

10 24. Subsequent to [Defendant's] payment of the \$38,891.42
11 to Plaintiffs...[Defendant] sent a "Case Summary" to the
12 Plaintiffs refusing full payment evincing [Defendant's]
13 bad faith tactics...This "Case Summary" sets forth an
14 incorrect account of the 'Defense' provided....First,
15 Defendant Hartford incorrectly states that the
16 Plaintiff's law firm continued working on the case at the
17 request of the RBA with the understanding it would not be
18 paid by [Defendant]. (Complaint at 6).

19 25. In addition, [Defendant] improperly asserts in the
20 "Case Summary" that it has paid a total of \$69,366.48 in
21 legal fees to the Plaintiffs. Yet, the RBA has received
22 only \$38,891.42...(Complaint at 6).

23 26. Further, despite the fact that [Defendant]
24 acknowledges in its "Case Summary" that it will be filing
25 a claim...to collect the attorneys' fees that were
26 awarded by the court following...the successful Anti-
27 SLAPP motion, it still fails/refuses in bad faith to pay
28 the remainder owed to Plaintiffs. (Complaint at 6).

29 28. [Defendant] was put on notice of its bad faith
30 tactics on July 30, 2007, when Plaintiffs' counsel sent
31 Ms. Menezes a letter setting forth [Defendant's] duties
32 and obligations...The letter cited case authority for
33 this proposition.⁶ (Complaint at 7).

34 32. [Defendant]...[requested] that Plaintiffs send
35 [Defendant] a copy of its very own letter, which should
36 have been in its file...This is further evidence of
37 [Defendant's] bad faith and delay tactics...(Complaint at
38 8).

⁶ All three of the case citations contained in Plaintiffs' counsel's July 20 letter were incorrect.

1 The statement Plaintiffs complain of in paragraph 24 of the
2 complaint does not evince bad faith. The Case Summary simply
3 demonstrates a difference of opinion between Defendant and
4 Plaintiffs with respect to the amount due pursuant to the purported
5 arraignment between Defendant's counsel and Plaintiffs' private
6 counsel. Given the equivocal allegations underlying the alleged
7 arrangement, the opinion expressed in the Case Summary is not so
8 unreasonable as to demonstrate bad faith.⁷

9 The Case Summary's accounting of funds paid in defense of the
10 Garabedian complaint is also insufficient to demonstrate bad faith.
11 *Jones*, 33 Cal.4 th at 938 ("billing dispute does not, by itself,
12 deny the insured the benefits of the insurance policy") (citation
13 omitted). The disparity between the amount of reimbursement
14 Plaintiffs received and the total amount of defense costs state in
15 the Case Summary is attributable to the fact that, in addition to
16 reimbursing Plaintiffs, Defendant also retained and paid its own
17 counsel. (Complaint at 5). Nor is the fact that Defendant
18 intended to recover attorneys' fees from Garabedian's estate
19 indicative of bad faith. It is undisputed that Defendant paid
20 attorneys' fees in connection with the Anti-SLAPP motion.
21 (Complaint at 5) (discussing reimbursement amounts paid by
22 Defendant). Finally, neither Defendant's disagreement with
23 Plaintiffs' July 30 letter nor Defendant's request for a copy of

24
25 ⁷ Plaintiffs allege merely that (1) Defendant's counsel stated they would
26 "recommend/suggest" to Defendant that Plaintiffs' counsel continue working on the
27 Anti-SLAPP motion; and (2) Defendant's counsel "promised they would recommend"
28 to Defendant that Plaintiffs be reimbursed. (Complaint at 5). Plaintiffs'
allegations give no indication of whether Defendant's counsel's statement
regarding reimbursement applied to future work, work already completed, or both.
Nor does the statement suggest Defendant would accept the recommendation or that
it had committed to pay for work on the Anti-SLAPP motion.

1 the Case Summary from Plaintiffs is sufficient to transform what
2 appears to be, at most, and ordinary breach of a contract term,
3 into a breach of the duty of good faith and fair dealing. *E.g.*
4 *Careau*, 222 Cal. App. 3d at 1395 (claim for breach of the implied
5 covenant requires more than allegations of bad judgement or
6 negligence). Plaintiffs' claim for tortious breach of the implied
7 covenant of good faith and fair dealing is DISMISSED, without
8 prejudice. Plaintiffs will be given an opportunity to re-plead a
9 single claim for breach of the implied covenant of good faith and
10 fair dealing.

11 **D. Plaintiffs' Waiver/Estoppel Claim**

12 Waiver and estoppel are distinct concepts. Waiver exists when
13 an insurer intentionally relinquishes a known right. *E.g. State*
14 *Farm Fire & Casualty Co. v. Jioras*, 24 Cal. App. 4th 1619, 1628 n.7
15 (Cal. Ct. App. 1994). Estoppel is applicable where one party
16 detrimentally relies on the conduct or statements of another. *E.g.*
17 *Waller*, 11 Cal. 4th at 33.

18 Defendant cites *Manneck v. Lawyers Title Ins. Corp.*, 28 Cal.
19 App. 4th 1294, 1303 (Cal. Ct. App. 1994) for the proposition that
20 "coverage under the insurance policy cannot be created by waiver or
21 estoppel." (Motion to Dismiss at 10). In *Manneck*, the California
22 Court of Appeal explained that:

23 The rule is well established that the doctrines of
24 implied waiver and of estoppel, based upon the conduct
25 or action of the insurer, are not available to bring
26 within the coverage of a policy *risks not covered by*
27 *its terms*, or risks expressly excluded therefrom and
28 the application of the doctrines in this respect is
therefore to be distinguished from the waiver of, or
estoppel to assert, grounds of forfeiture.

28 Cal. App. 4th at 1303 (citation omitted) (emphasis added).

1 Accordingly, Plaintiffs' waiver/estoppel claim is DISMISSED, with
2 prejudice.⁸

3 **E. Plaintiff's Quasi-Contract Claim**

4 California courts turn to the legal fiction of "quasi-
5 contract" to prevent unjust enrichment. *Earhart v. William Low*
6 *Co.*, 25 Cal.3d 503, 515 n.10 (Cal. 1979). The precise nature of
7 Plaintiffs' quasi-contract claim is unclear, as Plaintiffs' fail to
8 allege facts sufficient to establish that Defendant ever consented
9 to have Plaintiffs' private counsel conduct work on Defendant's
10 behalf. To the extent Plaintiffs' quasi-contract claim is based on
11 the insurance agreement, "it is well settled that an action based
12 on an implied-in-fact or quasi-contract cannot lie where there
13 exists between the parties a valid express contract covering the
14 same subject matter." *E.g. Lance Camper Manufacturing Corp. v.*
15 *Republic Indemnity Co.*, 44 Cal. App. 4th 194, 203 (Cal. Ct. App.
16 1996); *accord Eisenberg v. Alameda Newspapers, Inc.*, 74 Cal. App.
17 4th 1359, 1387 (Cal. Ct. App. 1999) (citing *Shapiro v. Wells Fargo*
18 *Realty Advisors* 152 Cal. App. 3d 467, 482 (1984)); *Wal-Noon Corp.*
19 *v. Hill*, 45 Cal. App. 3d 605, 613 (1975)). Plaintiffs' quasi-
20 contract action is DISMISSED without prejudice.

21 **F. Plaintiffs' Quantum Meruit Claim**

22 Quantum meruit is a quasi-contractual claim which rests upon
23 the equitable theory that a contract to pay for services rendered
24 is implied by law for reasons of justice. *E.g. Hedging Concepts,*
25 *Inc. v. First Alliance Mortgage Co.*, 41 Cal. App. 4th 1410, 1419
26

27
28 ⁸ At oral argument, Plaintiffs' counsel conceded that dismissal with prejudice
is appropriate for this claim.

1 (Cal. Ct. App. 1996).⁹ The complaint does not allege facts
2 sufficient to establish that Defendant consented to the services
3 provided by Plaintiffs' private counsel. Further, the extent to
4 which Defendant received services for which it did not pay is
5 unclear, as its is undisputed that Defendant reimbursed
6 Plaintiffs a substantial amount. Plaintiffs' quantum meruit
7 claim is DISMISSED without prejudice.

8 **G. Breach of Oral Contract Claim**

9 Plaintiffs' claim for breach of oral contract fails to state
10 facts sufficient to support a plausible inference that any oral
11 contract was entered into by Plaintiffs and Defendant.
12 Plaintiffs' allegations are inherently implausible, as the
13 complaint states that "prior to the occurrence of the actions
14 giving rise to [the Garabedian complaint]...Defendant agreed to
15 accept defense of the [Garabedian complaint]." (Complaint at
16 16). Plaintiff's oral contract claim is DISMISSED without
17 prejudice.

18 **H. Negligence Claim**

19 A claim for negligence requires a plaintiff to plead duty,
20 breach, causation, and damages. *See, e.g., Ortega v. Kmart Corp.*,
21 26 Cal.4th 1200, 1205 (Cal. 2001). Plaintiffs advance the
22 following allegations in support of their negligence claim:

23 73. At all times relevant, the conduct of Defendant was
24 negligent and constituted breach of their duties,
25 including, but not limited to, statutory duties, common
26 law duties, and other duties mandated by law.
27 Defendant, and their agents, represented that they were
28 experts and held themselves out as having superior

27 ⁹ Plaintiffs rely on the same authorities in opposition to the motions to dismiss
28 the quasi-contract, oral contract, and quantum meruit claims. Plaintiffs'
authorities discuss the general rule that oral contracts may be enforceable.

1 training education, and knowledge in the insurance
2 industry. In view of the relationship between the
3 parties and the representations of Defendant and their
4 agents, Plaintiff relied totally on Defendant to
5 timely, fairly, and adequately reimburse Plaintiffs
6 under the terms of the contracts of insurance.
7 (Complaint at 17).

8 74. Defendant failed to reimburse Plaintiffs as
9 agreed. Because of [Defendant's] failure to comply
10 with the agreement, and Plaintiffs' reliance thereon,
11 Plaintiffs were forced to pay counsel to defend them in
12 the underlying suit without the promised reimbursement.
13 (Complaint at 17).

14 75. [Defendant] had, and has, a duty to Plaintiffs, and
15 all other respective insureds, to act at all times with
16 due and reasonable care...Defendant failed to do so.
17 (Complaint at 17).

18 76. [Defendant] breached its duty by failing to act in
19 a manner consistent with the standard of care required
20 by...law...(Complaint at 17).

21 77. As a direct and proximate result of Defendant's
22 negligence, Plaintiffs have suffered
23 damages...(Complaint at 17).

24 Plaintiffs' allegations are insufficient to establish a duty
25 independent of the insurance contract. Further, Plaintiffs'
26 conclusory allegation regarding Defendant's status as an
27 insurance "expert" is not related to the breach of duty
28 Plaintiffs allege. Rather, the breach of duty alleged by
29 Plaintiffs is failure to comply with a duty imposed by a contract
30 term. Negligence based on a insurer's breach of a contract term
31 is not a cognizable cause of action under California law.
32 *Sanchez v. Lindsey Morden Claims Services, Inc.*, 72 Cal. App. 4th
33 249, 254 (Cal. Ct. App. 1999); see also *Guz*, 24 Cal.4th at 349-
34 350 (contract does not impose substantive duties beyond those
35 incorporated into the specific terms of an agreement).

1 Plaintiffs negligence claim is DISMISSED with prejudice.¹⁰

2 **I. State Law Statutory Claims**

3 Plaintiffs attempt to assert claims for relief "on behalf of
4 the public" in connection with Defendant's alleged violation of
5 California Business and Professions Code section 17200 *et seq.*,
6 Title 10, California Code of Regulations section 2695.7, and
7 California Insurance Code section 780. (Complaint at 18).

8 Defendant correctly points out that California law does not
9 provide a private right of action for violations of California
10 Insurance Code section 780 or the attendant regulations. (Motion
11 to Dismiss at 14-15). "Neither the California Insurance Code nor
12 regulations adopted under its authority provide a private right
13 of action." *Rattan v. United Servs. Auto. Ass'n*, 84 Cal. App.
14 4th 715, 724 (Cal. Ct. App. 2001). In order to state a claim
15 under California Business and Professions Code section 17200 *et*
16 *seq.* based on an insurer's conduct, a plaintiff must allege
17 something more than a mere violation of the California Insurance
18 Code.¹¹ *See, e.g., Burdick v. Union Sec. Ins. Co.*, 2009 U.S.
19 Dist. LEXIS 121768 (C.D. Cal. Dec. 9, 2009) (collecting cases in
20 which California courts sustained claims against insurance
21 companies pursuant to section 17200). Plaintiffs' conclusory
22 allegations of fraud and misconduct are insufficient to meet

23
24
25 ¹⁰ At oral argument, Plaintiffs' counsel conceded that dismissal with prejudice
is appropriate for this claim.

26 ¹¹ Defendant cites *Textron Financial Corp. v. National Union Fire Ins. Co.*, 118
27 Cal. App. 4th 1061, 1070-71 (Cal. Ct. App. 2004) in support of its motion to
dismiss Plaintiffs' section 17200 claim. Defendant fails to acknowledge that the
28 holding in *Textron* was subsequently disapproved of in several cases. Counsel has
a duty to acknowledge adverse authority. *See Fed. R. Civ. P. 11.*

1 federal pleading requirements. *Iqbal*, 129 S.Ct. at 1949.
2 Plaintiffs' statutory claims are DISMISSED with prejudice.¹²

3 **J. Reformation Claim**

4 "Reformation may be had for a mutual mistake or for the
5 mistake of one party which the other knew or suspected, but in
6 either situation the purpose of the remedy is to make the written
7 contract truly express the intention of the parties." *E.g.*
8 *Lemoge Electric v. County of San Mateo*, 46 Cal. 2d 659, (Cal.
9 1956); *Alderson v. Ins. Co. of N. Am.*, 223 Cal. App. 3d 397, 412
10 (Cal. Ct. App. 1990). An insurance policy may be reformed to
11 limit or exclude coverage if such was the intention of the
12 parties. *Alderson*, 223 Cal. App. 3d at 412.

13 Initially, Plaintiffs' reformation claim must be dismissed
14 because Plaintiffs conclusory allegations of mutual mistake and
15 "false representations" are not supported by any facts stated in
16 the complaint. (Complaint at 20). More importantly, however,
17 Plaintiffs claim for reformation must be dismissed because it is
18 predicated on the assumption that the written agreement between
19 Plaintiffs and Defendant does not require Defendant to reimburse
20 Plaintiffs for costs incurred in defense of an authorized claim.
21 (Complaint at 20). As discussed above in section IV(A), the
22 plain language of the contract is sufficient to establish
23 Defendant's duty to reimburse Plaintiffs for expenditures
24 consented to by Defendant. Further, it is undisputed that
25 Defendant did in fact reimburse Plaintiffs some of the funds paid
26

27
28 ¹² At oral argument, Plaintiffs' counsel conceded that dismissal with prejudice
is appropriate for this claim.

1 in connection with defense of the Garabedian complaint.
2 (Complaint at 5). The instant action is not about whether the
3 contract creates a duty to reimburse Plaintiffs for authorized
4 expenditures; rather, the dispute between Plaintiffs and
5 Defendant concerns *when* this duty arose, and which of Plaintiffs'
6 expenditures were actually authorized. Accordingly, reformation
7 is unnecessary, and Plaintiffs' claim must be DISMISSED with
8 prejudice.¹³

9 **V. CONCLUSION**

10 For the reasons stated, IT IS ORDERED:

- 11 1) Plaintiffs' breach of contract claim and claim for
12 declaratory relief are DISMISSED, without prejudice;
- 13 2) Plaintiffs' claim for breach of the implied covenant of
14 good faith and fair dealing is DISMISSED, with prejudice;
- 15 3) Plaintiffs' claim for tortious breach of the implied
16 covenant of good faith and fair dealing is DISMISSED,
17 without prejudice;
- 18 4) Plaintiffs' claim for waiver/estoppel is DISMISSED, with
19 prejudice;
- 20 5) Plaintiffs' quasi-contract claim is DISMISSED, without
21 prejudice;
- 22 6) Plaintiffs' quantum meruit claim is DISMISSED, without
23 prejudice;
- 24 7) Plaintiffs' claim for negligence is DISMISSED, with
25 prejudice;

26
27
28 ¹³ At oral argument, Plaintiffs' counsel conceded that dismissal with prejudice
is appropriate for this claim.

