

1 **WO**

2
3
4
5
6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 HM Hotel Properties, an Arizona Limited
Liability Company,

No. CV12-0548 PHX-DGC

10 Plaintiff,

ORDER

11 vs.

12 Peerless Indemnity Insurance Company;
13 and Does 1 - 50, inclusive,

14 Defendants.

15 Defendant Peerless Indemnity Insurance Company (“Peerless”), formerly known
16 as Colorado Casualty Insurance Company, moves to dismiss claims three through seven
17 of Plaintiff HM Hotel Properties’ complaint for failure to state claims pursuant to
18 Rule 12(b)(6). Doc. 8. Plaintiff has responded, Defendant has replied, and the parties
19 have not requested oral argument. Docs. 13, 14. For the reasons stated below, the Court
20 will grant the motion.

21 **I. Background.**

22 This action was originally commenced in the Superior Court for Maricopa County.
23 Doc. 3. Defendant removed the case to this Court. Doc. 3. The complaint alleges the
24 following facts, which are assumed true for purposes of the motion.

25 Plaintiff entered into an insurance contract with Defendant. Doc. 1 ¶ 7. Plaintiff
26 paid Defendant an annual premium in exchange for coverage of its properties against
27 damage caused by storms, including hail and wind. Doc. 1 ¶ 8. At all relevant times, the
28 Plaintiff’s insurance policy was in effect. Doc. 1 ¶ 12. In selling and collecting

1 premiums under the policy, Defendant represented to the Plaintiff that it would provide
2 full and comprehensive coverage for storm damage in accordance with the policy terms.
3 Doc. 1 ¶ 10.

4 On or about October 5, 2010, high winds and hail severely damaged Plaintiff's
5 property, including damage to roofs, siding, and other components. Doc. 1 ¶¶ 14-15. On
6 or about May 11, 2011, Plaintiff filed a claim for this storm-related damage. Doc. 1 ¶ 16.
7 On or about May 17, 2011, an engineering company, retained by Defendant to inspect the
8 property, reported only minimal wind and hail damage, leading to Defendant's offer to
9 settle the claim for \$0. Doc. 1 ¶ 17. On or about November 14, 2011, after Plaintiff
10 retained counsel, Defendant used Absolute Adjusting to perform another inspection.
11 Doc. 1 ¶ 18. Based on that damage report, Defendant sent a check to Plaintiff's counsel
12 for \$39,587.41, after depreciation. Doc. 1 ¶ 19.

13 Plaintiff alleges seven counts: (1) breach of contract; (2) breach of the implied
14 covenant of good faith and fair dealing; (3) intentional infliction of emotional distress;
15 (4) negligent infliction of emotional distress; (5) fraud; (6) negligent misrepresentation;
16 and (7) declaratory relief.

17 **II. Legal Standard.**

18 When analyzing a complaint for failure to state a claim to relief under
19 Rule 12(b)(6), the well-pled factual allegations “are taken as true and construed in the
20 light most favorable to the nonmoving party.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067
21 (9th Cir. 2009) (citation omitted). Legal conclusions couched as factual allegations “are
22 not entitled to the assumption of truth,” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009),
23 and therefore “are insufficient to defeat a motion to dismiss for failure to state a claim,”
24 *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010) (citation omitted). To avoid
25 a Rule 12(b)(6) dismissal, the complaint must plead “enough facts to state a claim to
26 relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
27 This plausibility standard “is not akin to a ‘probability requirement,’ but it asks for more
28 than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 129 S. Ct. at 1949

1 (quoting *Twombly*, 550 U.S. at 556). “[W]here the well-pleaded facts do not permit the
2 court to infer more than the mere possibility of misconduct, the complaint has alleged –
3 but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’” *Id.* at 1950 (quoting
4 Fed. R. Civ. P. 8(a)(2)).

5 The court may not assume that Plaintiff can prove facts different from those
6 alleged in the complaint. *See Associated Gen. Contractors of Cal. v. Cal. State Council*
7 *of Carpenters*, 459 U.S. 519, 526 (1983); *Jack Russell Terrier Network of N. Cal. v. Am.*
8 *Kennel Club, Inc.*, 407 F.3d 1027, 1035 (9th Cir. 2005). Similarly, “conclusory
9 allegations of law and unwarranted inferences are not sufficient to defeat a motion to
10 dismiss.” *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998); *see also Iqbal*, 129
11 S. Ct. at 1949 (“Threadbare recitals of the elements of a cause of action, supported by
12 mere conclusory statements, do not suffice.”) (citation omitted). “Rule 8 marks a notable
13 and generous departure from the hyper-technical, code-pleading regime of a prior era, but
14 it does not unlock the doors of discovery for a plaintiff armed with nothing more than
15 conclusions.” *Iqbal*, 129 S. Ct. at 1950.

16 **III. Analysis.**

17 **A. Counts 3 & 4 – Intentional & Negligent Infliction of Emotional** 18 **Distress.**

19 **1. Corporate Entity’s Capacity for Emotional Distress.**

20 A plaintiff alleging intentional infliction of emotional distress in Arizona must
21 demonstrate three elements: (1) the defendant’s conduct was extreme and outrageous;
22 (2) the defendant intended to cause emotional distress or “recklessly disregarded the near
23 certainty” that his conduct would produce such distress; and (3) the defendant’s conduct
24 actually caused severe emotional distress. *Bodett v. Coxcom, Inc.*, 366 F.3d 736, 746 (9th
25 Cir. 2004); *Ford v. Revlon*, 153 Ariz. 38, 734 P.2d 580, 585 (1987). Negligent infliction
26 of emotional distress requires an additional showing of physical injury or “substantial,
27 long-term emotional disturbances.” *See Pierce v. Casas Adobes Baptist Church*, 162
28 Ariz. 269, 272, 782 P.2d 1162 (Ariz. 1989); *Monaco v. HealthPartners of S. Arizona*, 196

1 Ariz. 299, 303, 995 P.2d 735 (Ariz. Ct. App. 1999).

2 Plaintiff – a limited liability company – alleges it suffered extreme emotional
3 distress and mental suffering resulting from Defendant’s breach of a material term in the
4 insurance policy to provide Plaintiff coverage for hail and wind damage. Doc 1 ¶¶ 37-39.
5 Defendant contends that, as a limited liability company, Plaintiff is incapable of emotion
6 and therefore also incapable of suffering. Doc. 8 at 5. The issue of whether corporations
7 or limited liability companies can recover damages for intentional infliction emotion
8 distress (“IIED”) is one of first impression in Arizona.

9 When confronted with an issue of first impression, Arizona courts look to
10 decisions from other jurisdictions that have considered the issue. *See, e.g., Midas Muffler*
11 *Shop v. Ellison*, 650 P.2d 496, 499 (Ariz. Ct. App. 1982) (stating that because tort of
12 IIED in debtor-creditor situation was issue of first impression in Arizona, “an
13 examination of decisions from other jurisdictions which have considered the precise
14 question . . . is instructive”); *Pankratz v. Willis*, 744 P.2d 1182, 1189 (Ariz. Ct. App.
15 1987) (relying on cases from other jurisdictions “that have squarely faced the issue” and
16 concluding that unilateral separation of child from parent can be extreme and outrageous
17 conduct); *Edwards v. American Home Assurance Co.*, 361 F.2d 622, 625-26 (9th Cir.
18 1966) (stating that because there appeared to be no Arizona case precisely on issue,
19 “cases from other jurisdictions which have considered related problems may provide
20 some guidelines, as they would to an Arizona court considering for the first time the
21 problem here presented”); *Cretens v. State Farm Fire & Cas. Co.*, 60 F. Supp.2d 982,
22 987 (D. Ariz. 1999) (finding that New Jersey law on issue in question was persuasive
23 authority and citing *Takahashi v. Loomis Armored Car Serv.*, 625 F.2d 314, 316 (9th Cir.
24 1980) for proposition that, in absence of controlling state law, federal court may look to
25 well-reasoned decisions from other jurisdictions).

26 Multiple federal courts, each applying state law, have found that a corporate
27 plaintiff cannot suffer emotional distress because “a corporation lacks the cognizant
28 ability to experience emotions.” *FDIC v. Hulsley*, 22 F.3d 1472, 1489 (10th Cir. 1994)

1 (applying Oklahoma law); *see, e.g., Nicor Intern. Corp. v. El Paso Corp.*, 292 F.Supp.2d
2 1357, 1378 (S.D. Fla. 2003) (“corporation is incapable of suffering any emotional
3 distress”); *Earth Scientists (Petro Services) Ltd. v. U.S. Fidelity & Guar. Co.*, 619 F.
4 Supp. 1465, 1474 (D. Kan. 1985) (holding corporations could not recover for the tort of
5 outrage based on inability to suffer emotionally); *Wilson v. Colonial Penn Life Ins. Co.*,
6 454 F. Supp. 1208, 1213 n.9 (D. Minn. 1978) (applying Minnesota law to bad faith and
7 IIED claims) (“Certainly, the plaintiff National City Bank of Minneapolis is incapable of
8 suffering emotional distress.”).

9 Plaintiff cites no authority to contradict Defendant’s position or support its own.
10 Absent Arizona precedent extending emotional distress damages to corporate entities, the
11 Court declines to do so and adopts the general rule, recognized by the above cited cases.

12 Plaintiff suggests that a distinction should be made between limited liability
13 companies and corporations. Doc. 13 at 4. The courts which have addressed this issue,
14 however, have not distinguished between the two types of entities. *Interphase Garment*
15 *Solutions, LLC v. Fox Television Stations, INC.*, 566 F. Supp.2d 460, 466
16 (D. Md. 2008) (LLC cannot claim IIED) (citing *Husley*, 22 F.3d at 1489); *Barreca v.*
17 *Nickolas*, 683 N.W.2d 111, 124 (Iowa 2004) (“as a limited liability company, certainly
18 cannot suffer emotional distress; such would stretch the bounds of the legal fiction of
19 corporate personhood too far”).

20 The Court concludes that Plaintiff has failed to state a claim for intentional or
21 negligent infliction of emotional distress because, as a corporate entity, it cannot
22 experience emotional distress.

23 **2. Request to Amend Complaint.**

24 Plaintiff requests leave to amend its complaint to join individual members of the limited
25 liability company as additional plaintiffs in the event the Court finds that a limited
26 liability company cannot seek damages for emotional distress. Doc. 14 at 4-5.
27 Defendant correctly asserts that Plaintiff’s request does not comply with LRCiv 15.1
28 because it fails to attach a copy of the proposed amended pleading. The request for leave

1 to amend is denied.

2 **C. Counts 5 & 6 – Fraud & Negligent Misrepresentation.**

3 Defendant contends that the fraud and negligent misrepresentation claims are not
4 pled with sufficient particularity. Rule 9(b) requires a party alleging fraud to “state with
5 particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). The
6 complaint “must state the time, place, and specific content of the false representations as
7 well as the identities of the parties to the misrepresentation.” *Schreiber Distrib. Co. v.*
8 *Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986) (citations omitted). A
9 complaint of fraud must specify “the who, what, when, where, and how” of the alleged
10 misconduct. *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1106 (9th Cir. 2003).

11 **1. Fraud.**

12 Plaintiff’s fraud claim fails for lack of particularity. While Plaintiff alleges
13 generally that “Defendant made numerous misrepresentations to Plaintiff, both orally and
14 in writing,” Plaintiff’s complaint does not provide the dates, speaker, or content of the
15 misrepresentations. Doc. 1 ¶ 45. Plaintiff correctly states the law as it regards the
16 availability of a fraud claim when a promise is made with no intent to perform,
17 Doc. 1 at 6 (citing *Caldwell v. Tilford*, 90 Ariz. 202, 205, 367 P.2d 239, 241 (1961)), but
18 the complaint lacks specific facts to support that allegation.

19 **2. Negligent Misrepresentation.**

20 The Rule 9(b) standard also applies to negligent misrepresentation. *Gould v.*
21 *Marshall & Isley Bank*, No. CV11–1299–PHX–DGC. 2012 WL 827115, at *5 n.2
22 (D. Ariz. March 12, 2012) (citing *Sweeney v. Darricarrere*, No. 2:09–cv–00266 JWS,
23 2009 WL 2132696, at * 12 n. 109 (D. Ariz. July 14, 2009) (“It is well established in the
24 Ninth Circuit that both claims for fraud and negligent misrepresentation must meet Rule
25 9(b)’s particularity requirements.”) (quoting *Neilson v. Union Bank of Cal., N.A.*, 290
26 F.Supp.2d 1101, 1141 (C.D.Cal.2003) (internal quotations omitted)).

27 Plaintiff’s negligent misrepresentation allegation likewise fails to meet the
28 particularity standard of Rule 9(b). The complaint states only legal conclusions regarding

1 “false representations as to past and present material facts.” Doc. 1 ¶ 50-54. The “who,
2 what, when, where, and how” of the misrepresentations are not provided. *Vess*, 317 F.3d
3 at 1106.

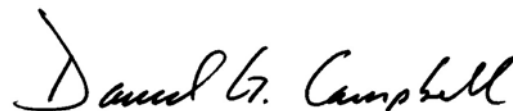
4 **D. Count 7 – Declaratory Relief.**

5 The United States Supreme Court has “repeatedly characterized the Declaratory
6 Judgment Act as ‘an enabling Act, which confers a discretion on the courts rather than an
7 absolute right upon the litigant.’” *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995)
8 (quoting *Public Serv. Comm’n of Utah v. Wycoff Co.*, 344 U.S. 237, 241 (1952)); see also
9 *Green v. Mansour*, 474 U.S. 64, 72 (1985); *Cardinal Chemical Co. v. Morton Int’l, Inc.*,
10 508 U.S. 83, 95 n.17 (1993). “[W]hen deciding whether to hear claims under the
11 Declaratory Judgment Act, district courts should ‘avoid needless determination of state
12 law issues’ and ‘should avoid duplicative litigation.’” *Madrid v. Concho Elementary*
13 *School Dist. No. 6 of Apache County*, 439 Fed. App’x 566, 567 (9th Cir. 2011) (quoting
14 *Am. Cas. Co. of Reading, Pa. v. Krieger*, 181 F.3d 113, 1118 (9th Cir. 1999). Further,
15 when the claim is merely a derivative of the included contract claim, the district court
16 may read the declaratory relief claim as part of the breach of contract claim. *Id.*

17 Here, as in *Madrid*, the declaratory judgment claim is nothing more than a
18 duplication of the breach of contract claim contained in count one of the Complaint.
19 Doc. 1 ¶ 1-31. The claim is therefore dismissed as duplicative.

20 **IT IS ORDERED** that Defendant’s motion to dismiss (Doc. 8) is **granted** as
21 stated above.

22 Dated this 18th day of June, 2012.

23
24 

25 _____
26 David G. Campbell
27 United States District Judge
28