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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Dawn Young,

10 Plaintiff,

11 v.

12 Liberty Mutual Group, Inc.; et al.,

13 Defendants.

No. CV-12-2302-PHX-JAT

ORDER

14
15 Pending before the Court is Defendant Mike Dumas's Motion to Dismiss
16 Plaintiff's Complaint against him pursuant to Federal Rule of Civil Procedure 12(b)(6).
17 (Doc. 5).

18 **I. Background**

19 Plaintiff Dawn Young suffered an on-the-job injury and filed a claim with
20 Defendant Liberty Mutual Group, Inc. ("Liberty Mutual") for worker's compensation
21 benefits. Defendant Mike Dumas handled Ms. Young's worker's compensation claim as
22 Liberty Mutual's claims adjuster. Although she eventually received at least some of the
23 compensation to which she was entitled, Ms. Young experienced a great deal of difficulty
24 working with Liberty Mutual.

25 Ms. Young brought this action in Arizona state court alleging a breach of the duty
26 of good faith and fair dealing that resulted in wrongfully denied and unreasonably
27 delayed benefit payments. (Doc. 1-1). She named Liberty Mutual and Mike Dumas as
28 defendants, as well as several fictitious John Does and XYZ Corporations. (*Id.* at 2). Mr.

1 Dumas removed the action to this Court based on diversity of the parties. (Doc. 1).

2 The Complaint alleges three claims for relief. The first claim is alleged only
3 against Liberty Mutual for breach of the duty of good faith and fair dealing. (Doc. 1-1 at
4 8–10). The second claim is alleged only against Mr. Dumas for aiding and abetting
5 Liberty Mutual’s breach of the duty of good faith and fair dealing. (*Id.* at 10–11). The
6 third claim¹ alleges both Defendants are liable for punitive damages. (*Id.* at 11–12). The
7 Complaint alleges Liberty Mutual is vicariously liable for the acts of its employees or
8 agents such as Mr. Dumas, and that Liberty Mutual is directly liable for a breach of the
9 duty of good faith and fair dealing. (*Id.* at 3–4). As for Mr. Dumas, the Complaint
10 alleges only that he is “personally liable for his own acts and omissions insofar as he
11 aided and abetted Defendant LIBERTY MUTUAL in its violations of the Arizona
12 Worker’ [sic] Compensation Act and the duties of good faith and fair dealing owed to
13 Ms. Young.” (*Id.* at 4). The only factual allegations in the Complaint are that an
14 adequate investigation was not conducted and that Ms. Young’s claims for payment were
15 delayed and denied without any reasonable basis. (*Id.* at 6–7).

16 Mr. Dumas filed the present Rule 12(b)(6) Motion to Dismiss. (Doc. 5). Mr.
17 Dumas argues he should be dismissed from this lawsuit because his actions are the sole
18 basis for Plaintiff’s claims against Liberty Mutual, and he took those actions as Liberty
19 Mutual’s agent. Even if Liberty Mutual breached its duty of good faith and fair dealing
20 via Mr. Dumas’s actions, he argues, one actor performing one set of actions cannot
21 simultaneously form the basis for both primary and secondary liability. In other words,
22 Mr. Dumas argues one cannot aid and abet one’s self.

23 **II. Federal Pleading Requirements**

24 The Court may dismiss a complaint for failure to state a claim under Federal Rule
25 of Civil Procedure 12(b)(6) for two reasons: (1) lack of a cognizable legal theory; or

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27 ¹ In the Complaint, the three claims are labeled “First Claim,” “Second Claim,”
28 and “Fourth Claim.” (Doc. 1-1 at 8, 10, 11). Because there are only three claims, the
Court will refer to the claim labeled “Fourth Claim” as the third claim.

1 (2) insufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police*
2 *Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To survive a 12(b)(6) motion for failure to
3 state a claim, a complaint must meet the requirements of Federal Rule of Civil Procedure
4 8(a)(2). Rule 8(a)(2) requires a “short and plain statement of the claim showing that the
5 pleader is entitled to relief,” so that the defendant has “fair notice of what the . . . claim is
6 and the grounds upon which it rests.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
7 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

8 Although a complaint attacked for failure to state a claim does not need detailed
9 factual allegations, the pleader’s obligation to provide the grounds for relief requires
10 “more than labels and conclusions, and a formulaic recitation of the elements of a cause
11 of action will not do.” *Twombly*, 550 U.S. at 555 (internal citations omitted). Rule
12 8(a)(2) “requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief.
13 Without some factual allegation in the complaint, it is hard to see how a claimant could
14 satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but
15 also ‘grounds’ on which the claim rests.” *Id.* (citing 5 C. Wright & A. Miller, *Federal*
16 *Practice and Procedure* §1202, pp. 94, 95 (3d ed. 2004)). Thus, Rule 8’s pleading
17 standard demands more than “an unadorned, the-defendant-unlawfully-harmed-me
18 accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at
19 555).

20 In deciding a motion to dismiss under Rule 12(b)(6), the Court must construe the
21 facts alleged in the complaint in the light most favorable to the drafter of the complaint
22 and the Court must accept all well-pleaded factual allegations as true. *See Shwarz v.*
23 *United States*, 234 F.3d 428, 435 (9th Cir. 2000). Nonetheless, the Court does not have
24 to accept as true a legal conclusion couched as a factual allegation. *Papasan v. Allain*,
25 478 U.S. 265, 286 (1986).

26 **III. A Secondary Act is Required to Aid and Abet a Primary Act**

27 In her first claim, Plaintiff alleges Liberty Mutual breached its duty of good faith
28 and fair dealing via the actions of Mr. Dumas, who was acting as Liberty Mutual’s claims

1 adjuster. For purposes of this Motion, the Court accepts that allegation as true. Her
2 second claim alleges that Mr. Dumas, in his individual capacity, aided and abetted
3 Liberty Mutual in breaching its duty of good faith and fair dealing to Ms. Young. In
4 order to state a claim against Mr. Dumas, Plaintiff must allege facts sufficient to show
5 that Mr. Dumas, as an individual, met the legal elements of aiding and abetting.

6 As a federal court sitting in diversity, this Court is bound to apply Arizona
7 substantive law. *McClaran v. Plastic Indus.*, 97 F.3d 347, 356 (9th Cir.1996); *Kabatoff v.*
8 *Safeco Ins. Co. of Am.*, 627 F.2d 207, 209 (9th Cir.1980) (citing *Erie R.R. Co. v.*
9 *Tompkins*, 304 U.S. 64, 78 (1938)); *Yazzie v. Olney, Levy, Kaplan & Tenner*, 593 F.2d
10 100, 103 n. 4 (9th Cir.1979). “Arizona recognizes aiding and abetting as embodied in
11 Restatement [(Second) of Torts] § 876(b), that a person who aids and abets a tortfeasor is
12 himself liable for the resulting harm to a third person.” *Wells Fargo Bank v. Ariz.*
13 *Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12,
14 23 (Ariz. 2002). In order for there to be harm to a “third person,” there must be at least
15 two tortfeasors. *See* Restatement (Second) of Torts § 876 cmt. a (1977) (“Whenever two
16 or more persons commit tortious acts in concert, each becomes subject to liability for the
17 acts of the others, as well as for his own acts.”); *see also Gibson-Jones v. Berkel & Co.*
18 *Contractors, Inc.*, 2008 WL 782568 (N.D. Cal. 2008) (“[A] single actor (as a matter of
19 legal tautology) cannot aid and abet (or conspire with) itself.”).

20 The Complaint alleges two “persons” are tortfeasors: Liberty Mutual and Mr.
21 Dumas. The only factual allegations in the Complaint are that an adequate investigation
22 was not conducted and that Ms. Young’s claims for payment were delayed and denied
23 without any reasonable basis. (Doc. 1-1 at 6–7). Taken as true, these facts could amount
24 to a breach of the duty of good faith and fair dealing, which is a “tortious act.” *See*
25 Restatement (Second) of Torts § 876 cmt. a. Plaintiff explicitly alleges this tortious act
26 was committed by Liberty Mutual—not by Mr. Dumas. (Doc. 1-1 at 8) (first claim for
27 relief alleged only against Liberty Mutual); (Doc. 11 at 2) (“The only cause of action
28 alleged against Dumas is for *aiding and abetting* Liberty Mutual’s breach of the duty of

1 good faith and fair dealing.”). In order for Mr. Dumas and Liberty Mutual to have
2 committed “tortious *acts* in concert,” there must be some factual allegation showing a
3 separate tortious act was committed by Mr. Dumas. Because the Complaint alleges no
4 such facts, Plaintiff has failed to state a claim against Mr. Dumas.

5 In her Response, Plaintiff relies on *Morrow v. Boston Mutual Life Insurance*
6 *Company*, CIV. 06-2635PHXSMM, 2007 WL 3287585 (D. Ariz. Nov. 5, 2007), for the
7 proposition that an insurer’s agent may be held liable for aiding and abetting the insurer.
8 Although *Morrow* supports that proposition, that proposition does not support Plaintiff’s
9 claim against Mr. Dumas. The plaintiff in *Morrow* was receiving monthly disability
10 payments from his insurer. *Id.* at *1. The *Morrow* plaintiff claimed his insurer
11 committed the tort of bad faith by purposefully hiring a biased medical examiner as part
12 of a “claim termination scheme.” *Id.* The *Morrow* plaintiff alleged the medical examiner
13 committed the tort of aiding and abetting “by providing a biased and unsubstantiated
14 opinion” of the plaintiff’s health. *Id.* at *5. Thus, in *Morrow*, there were two tortious
15 acts alleged: (1) purposefully hiring a biased examiner in bad faith; and (2) aiding and
16 abetting the bad faith by providing a biased and unsubstantiated medical opinion. Each
17 act was alleged against a different defendant. Here, Plaintiff alleges only one tortious act:
18 failing, in bad faith, to conduct an adequate investigation and make timely benefits
19 payments.

20 Plaintiff additionally relies on *Warner v. Southwest Desert Images, LLC*, 180 P.3d
21 986 (Ariz. Ct. App. 2008), for the proposition that an agent is not excused from
22 responsibility for a tort merely because he is acting on behalf of his employer. Again,
23 that proposition does not support Plaintiff’s claim against Mr. Dumas. In *Warner*, a pest
24 control company’s employee sprayed chemicals that caused injury to the plaintiff. *Id.* at
25 991. On summary judgment, the trial court found the employee was negligent and the
26 pest control company was vicariously liable under *respondeat superior*. *Id.* The issue of
27 damages went to trial. Before the end of the trial, the trial court entered a directed verdict
28 in favor of the employee on the basis that the company was clearly liable for the

1 employee's actions. *Id.* at 991–92. The Arizona Court of Appeals reversed the trial
2 court's directed verdict against the employee, holding that *respondeat superior* liability is
3 joint and several. *Id.* at 992; *see* Ariz. Rev. Stat. § 12-2506(D)(2); Restatement (Third) of
4 Agency § 7.01 (2006). Unlike *respondeat superior*, which is a theory of vicarious
5 liability, aiding and abetting is a theory of secondary liability. The *Warner* plaintiff
6 claimed both the employer and the employee were liable for the employee's negligence.
7 Plaintiff here claims only Liberty Mutual is liable for breach of the duty of good faith and
8 fair dealing. Plaintiff's separate aiding and abetting claim against Mr. Dumas requires
9 Plaintiff to allege Mr. Dumas took separate action "in concert" with the actions giving
10 rise to Plaintiff's claim against Liberty Mutual. Plaintiff alleges no such action.

11 Finally, Plaintiff alleges Liberty Mutual has a "non-delegable duty of good faith
12 and fair dealing," (Doc. 1-1 at 3–4), and suggests that "under Arizona law it is unlikely
13 that Dumas *could* commit violations of the duty of good faith and fair dealing." (Doc. 11
14 at 3) (emphasis in original). It is true that, under Arizona law, an insurance carrier may
15 not "escape liability" by delegating its duty of good faith and fair dealing to another.
16 *Walter v. Simmons*, 818 P.2d 214, 223 (Ariz. Ct. App. 1991). However, it does not
17 follow that Mr. Dumas must have committed the separate tort of aiding and abetting
18 merely because he was the agent through which Liberty Mutual breached its duty.
19 Indeed, Plaintiff argues that "[w]ithout Dumas's inadequate investigation and his refusal
20 to make the required payments, Liberty Mutual would not have" committed a tort against
21 Plaintiff. (Doc. 11 at 4). Thus, under Arizona law, Mr. Dumas and Liberty Mutual were
22 acting as a single legal entity. *See, e.g., Perry v. Apache Junction Elementary Sch. Dist.*
23 *No. 43 Bd. of Trustees*, 514 P.2d 514, 517 (Ariz. Ct. App. 1973) ("[A]gents and
24 employees of a corporation cannot conspire with their corporate principal or employer
25 when acting in their official capacities on behalf of the corporation and not as individuals
26 for their individual advantage."). Accordingly, because Plaintiff has failed to allege Mr.
27 Dumas took any actions in his individual capacity "in concert" with the actions giving
28 rise to Plaintiff's claim against Liberty Mutual, her aiding and abetting claim against Mr.

1 Dumas will be dismissed.

2 Alternatively, Plaintiff has failed to allege facts sufficient to satisfy the elements
3 of aiding and abetting. In Arizona, “a person who aids and abets a tortfeasor is himself
4 liable for the resulting harm to a third person” when three elements are met: (1) the
5 primary tortfeasor commits a tort that causes injury to the plaintiff; (2) the defendant
6 knows that the primary tortfeasor’s conduct constitutes a breach of duty; and (3) the
7 defendant substantially assists or encourages the primary tortfeasor in the achievement of
8 the breach. *Wells Fargo*, 38 P.3d at 23. Because Plaintiff’s claim for breach of the duty
9 of good faith and fair dealing is based entirely on Mr. Dumas’s conduct—not Liberty
10 Mutual’s—Mr. Dumas could not have known that the primary tortfeasor’s conduct
11 constituted a breach of duty. Mr. Dumas could not have known about conduct that did
12 not exist.

13 **IV. Punitive Damages Require an Underlying Tort**

14 Plaintiff alleges Liberty Mutual and Mr. Dumas are liable for punitive damages.
15 (Doc. 1-1 at 11–12). Mr. Dumas argues that he cannot be liable for punitive damages if,
16 as the Court has found, Plaintiff has not adequately alleged a tort against him. (Doc. 5 at
17 6–7). Plaintiff does not dispute this contention.

18 In Arizona, “before a jury may award punitive damages there must be evidence of
19 an ‘evil mind’ and aggravated and outrageous conduct.” *Linthicum v. Nationwide Life*
20 *Ins. Co.*, 723 P.2d 675, 680 (Ariz. 1986). Punitive damages require evidence of
21 “‘something more’ than the conduct necessary to establish the tort.” *Rawlings v.*
22 *Apodaca*, 726 P.2d 565, 577 (Ariz. 1986). Here, the only “conduct” alleged is against
23 Liberty Mutual. Mr. Dumas cannot be liable for punitive damages unless he committed
24 an underlying tort. Because Plaintiff has not adequately alleged a tort against Mr.
25 Dumas, her claim for punitive damages against him must be dismissed as well.

26 **V. Conclusion**

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Based on the foregoing,

IT IS ORDERED that Defendant Mike Dumas’s Motion to Dismiss (Doc. 5) is granted.

Dated this 6th day of March, 2013.



James A. Teilborg
Senior United States District Judge