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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHARBEL ELKHOUEIRY,)
)
Plaintiff,)
)
v.)
)
LARRY N. SCHROEDER;)
SUSAN L. SCHROEDER;)
GAINNEY CORPORATION;)
GAINNEY TRANSPORTATION)
SERVICE, INC.; NATIONAL)
AMERICAN INSURANCE)
COMPANY; F.A. RICHARD &)
ASSOCIATES; MANDEVILLE)
CLAIMS; DOES 1 TO 10,)
inclusive,)
)
Defendants.)
_____)

Case No. EDCV 08-1067-VAP
(OPx)
**[Motion filed on September
15, 2008]**
**ORDER GRANTING MOTION TO
DISMISS WITH LEAVE TO AMEND**

The Motion to Dismiss ("Motion") filed by Defendants
F.A. Richard & Associates, Inc., and Mandeville Claims
(collectively referred to here as "FARA" or "Defendant"¹)
came before the Court for hearing on October 27, 2008.
After reviewing and considering all papers filed in

¹F. A. Richard & Associates claims that it was
improperly sued as "Mandeville Claims" and refers to both
entities collectively as "FARA." (Mot. 1.)

1 support of the Motion, as well as the arguments advanced
2 by counsel at the hearing,² the Court GRANTS Defendant's
3 Motion to Dismiss with leave to amend; Plaintiff may file
4 an amended complaint no later than 4:00 p.m. on Friday,
5 October 31, 2008.

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8 **I. BACKGROUND**

8 **A. Facts**

9 Accepting all the facts in the Complaint ("Compl.")
10 of plaintiff Charbel Elkhoeiry ("Plaintiff") as true,
11 Plaintiff was injured in a collision in Ohio by
12 defendants Larry and Susan Schroeder ("the Schroeders")
13 who were driving a "2005 Freight Columbia," a "tractor/
14 trailer vehicle." (Compl. ¶¶ 1, 5, 8.) Defendants
15 Gainey Corporation and Gainey Transportation Services,
16 Inc. ("the Gainey entities") "were the agents, services
17 [sic], and employees" of the Schroeders. (Compl. ¶ 2.)
18 Plaintiff does not allege the role played by defendant
19 National American Insurance Company.

20
21 Plaintiff also brings a claim against movant F.A.
22 Richard & Associates, Inc., and Mandeville Claims
23 (collectively referred to here as "FARA" or
24 "Defendant"³). (Compl. ¶¶ 1, 3.) Plaintiff sues FARA as

25 _____
26 ²Plaintiff's counsel did not file opposition to the
Motion nor appear at the hearing on the Motion.

27 ³F. A. Richard & Associates claims that it was
28 (continued...)

1 "insurers and/or adjusting companies and indemnitees"
2 although Plaintiff fails to name the insured individuals
3 or entities. (Compl. ¶ 3.)
4

5 Plaintiff is a citizen of California; the Schroeders
6 are citizens of Missouri; the Gainey entities are
7 citizens of Michigan; FARA is a citizen of Louisiana; the
8 citizenship of National American Insurance Company is not
9 alleged; the collision occurred in Ohio. (Compl. ¶¶ 1,
10 5, 8.)
11

12 **B. Procedural History**

13 Plaintiff filed suit with this Court on August 7,
14 2008. Defendant FARA filed a Motion to Dismiss ("Mot.")
15 pursuant to Fed. R. Civ. P. 12(b)(6) on September 15,
16 2008. Plaintiff filed no opposition to the Motion and
17 did not appear at the October 27, 2008 hearing.⁴
18

19 **II. LEGAL STANDARD**

20 Under Rule 12(b)(6), a party may bring a motion to
21 dismiss for failure to state a claim upon which relief
22 can be granted. As a general matter, the Federal Rules
23

24 ³(...continued)
25 improperly sued as "Mandeville Claims" and refers to both
26 entities collectively as "FARA." (Mot. 1.)

27 ⁴ At the hearing, counsel for FARA stated that he
28 spoke with Plaintiff's counsel twice regarding the Motion
and that Plaintiff's counsel did not indicate interest in
amending her complaint.

1 require only that a plaintiff provide "'a short and plain
2 statement of the claim' that will give the defendant fair
3 notice of what the plaintiff's claim is and the grounds
4 upon which it rests." Conley v. Gibson, 355 U.S. 41, 47
5 (1957) (quoting Fed. R. Civ. P. 8(a)(2)); Bell Atlantic
6 Corp. v. Twombly, 550 U.S. ___, 127 S. Ct. 1955, 1964
7 (2007). In addition, the Court must accept all material
8 allegations in the complaint -- as well as any reasonable
9 inferences to be drawn from them -- as true. See Doe v.
10 United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC
11 Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096
12 (9th Cir. 2005).

13
14 "While a complaint attacked by a Rule 12(b)(6)
15 motion to dismiss does not need detailed factual
16 allegations, a plaintiff's obligation to provide the
17 'grounds' of his 'entitlement to relief' requires more
18 than labels and conclusions, and a formulaic recitation
19 of the elements of a cause of action will not do." Bell
20 Atlantic, 127 S. Ct. at 1964-65 (citations omitted).
21 Rather, the allegations in the complaint "must be enough
22 to raise a right to relief above the speculative level."
23 Id. at 1965.

24
25 This Motion is unopposed. Under Local Rule 7-9, a
26 party must file opposition papers no later than 14 days
27 before the date designated for the hearing of the motion.

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1 Failure to do so, under Local Rule 7-12, may result in a
2 finding that the party has consented to granting the
3 motion. Despite Plaintiff's failure to file Opposition,
4 the Court considers the merits of Defendant's Motion to
5 Dismiss.

6 7 **III. DISCUSSION**

8 **A. Plaintiff Fails to State a Claim on Which Relief** 9 **Can Be Granted**

10 Plaintiff seeks recovery against FARA based on FARA's
11 status as the "insurer[]" of unnamed individuals or
12 entities "and/or adjusting compan[y] and indemnitee[]"
13 for the same. (Compl. ¶ 3.) Plaintiff also alleges that
14 FARA is a "necessary part[y]." (Compl. ¶ 3.)

15
16 Defendant FARA asserts that Plaintiff's claim should
17 be dismissed (1) because Plaintiff "does not allege any
18 relationship, event, or transaction that would give rise
19 to a claim;" (2) because "[n]othing in the complaint
20 explains why FARA is a necessary party to the lawsuit";
21 and (3) because direct suit by an injured person against
22 an insurer is improper. (Mot. 3.)

23 24 **1. Failure to Allege a Connection Between FARA and** 25 **the Collision**

26 Defendant's first argument is convincing.
27 Plaintiff's Complaint fails to comply with Fed. R. Civ.

1 P. 8(a)(2) because it fails to allege any connection
2 between FARA and Plaintiff's injury. (See Compl. ¶¶ 2-3,
3 5, 8); see Fed. R. Civ. P. 8(a)(2). The Complaint as
4 written does not clearly state whether Defendant is an
5 insurer, a claims adjustor, or both; the Complaint does
6 not state who or what was insured or which claims were
7 adjusted and how those actions are connected with
8 Plaintiff's injuries. The Complaint as written fails to
9 state a claim on which relief can be granted.

10

11 **2. Failure to Allege Facts under which FARA would**
12 **be a Necessary Party**

13 Defendant's second argument is also persuasive. As
14 the Complaint fails to allege a connection between FARA
15 and the accident, the Complaint also does not explain why
16 FARA has the kind of connection to the collision
17 sufficient to make FARA a necessary party. See Fed. R.
18 Civ. P. 19.

19

20 **3. Direct Suit by Injured Person Against Insurer**
21 **May be Permissible**

22 Defendant's third argument, that Plaintiff's suit
23 against FARA is improper because no judgment has been
24 obtained against an insured, is unpersuasive because it
25 assumes that FARA is the insurer for some entity named in
26 the Complaint or otherwise connected to the collision on

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1 which Plaintiff brings suit. This is not established by
2 the Complaint, as discussed above.

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4 As the Complaint in its current form alleges no
5 connection between FARA and the collision, however, the
6 Court GRANTS defendant FARA's Motion.

7
8 **B. The Court Grants Plaintiff Leave to Amend the**
9 **Complaint no later than 4:00 Friday, October 31, 2008**

10 "Dismissal without leave to amend is improper
11 unless it is clear that the complaint could not be saved
12 by any amendment." Polich v. Burlington Northern, Inc.,
13 942 F.2d 1467, 1472 (9th Cir. 1991). Plaintiff has
14 failed to oppose this Motion, let alone set forth any
15 facts which she could add to state a claim against the
16 moving Defendant. See In re Silicon Graphics Inc. Sec.
17 Litig., 183 F.3d 970, 991 (9th Cir. 1999) (citing In re
18 VeriFone Sec. Litig., 11 F.3d 865, 872 (9th Cir. 1993))
19 (dismissing without leave to amend when plaintiffs failed
20 to allege additional facts which might cure defects in
21 complaint). Nevertheless, as the Ninth Circuit strongly
22 favors allowing amendment, see Royal Ins. Co. of America
23 v. Southwest Marine, 194 F.3d 1009, 1016 (9th Cir. 1999)
24 (quoting Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir.
25 1994)), in the interests of justice, the Court will
26 permit Plaintiff a short period of time in which to amend

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1 her claims against the moving Defendant.⁵ If an Amended
2 Complaint is not timely filed, the moving Defendant will
3 be dismissed from this action.

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5 **IV. CONCLUSION**

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7 For the reasons stated above, the Court GRANTS FARA's
8 Motion WITH leave to amend.

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10 Dated: October 28, 2008

Virginia A. Phillips

VIRGINIA A. PHILLIPS
United States District Judge

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25 ⁵Providing a short window in which to file an amended
26 Complaint is appropriate because Plaintiff did not: (1)
27 request leave to amend; (2) file any opposition to the
28 Motion; (3) appear at the hearing on the Motion. At the
hearing on October 27, 2008, Defendant's counsel
represented to the Court that he met and conferred with
Plaintiff's counsel twice in an attempt to avoid this
Motion. On both occasions, Plaintiff's counsel was
uninterested in filing a First Amended Complaint.