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**United States District Court
Central District of California**

10 JAMES DICKEY, INC.,

11 Plaintiff,

12 v.

13 ALTERRA AMERICA INSURANCE

14 COMPANY; MARKEL

15 CORPORATION; and DOES 1–20,

16 inclusive,

17 Defendants.

Case No. 5:15-cv-00963-ODW-DTB

ORDER GRANTING

DEFENDANTS' MOTIONS TO

DISMISS [16, 8] AND DENYING

DEFENDANT ALTERRA AMERICA

INSURANCE COMPANY'S

MOTION TO STRIKE [7]

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I. INTRODUCTION

20 Pending before the Court is Defendant Markel Corporation's ("Markel")
21 Motion to Dismiss the First, Second, and Third Causes of Action of Plaintiff James
22 Dickey's ("Dickey") Complaint against Markel. (ECF No. 16.) Markel contends that
23 it is not a signatory to the subject insurance policy, and is therefore not liable for its
24 breach. Also pending before the Court is Defendant Alterra America Insurance
25 Company's ("Alterra") Motion to Dismiss the Second Cause of Action of Plaintiff
26 Dickey's Complaint against Alterra, and Motion to Strike Certain Portions of Plaintiff
27 Dickey's Complaint. (ECF Nos. 8, 7.) Alterra contends that Dickey has failed to
28 allege acts sufficient to constitute bad faith, and that a cause of action for breach of the

1 implied covenant of good faith cannot stand. For the reasons discussed below, the
2 Court **GRANTS** Defendants Markel’s and Alterra’s Motions to Dismiss with leave to
3 amend and **DENIES AS MOOT** Alterra’s Motion to Strike.¹

4 **II. FACTUAL BACKGROUND**

5 On March 23, 2015, Dickey filed the instant action in the San Bernardino
6 Superior Court, alleging that Defendants, in bad faith, withheld insurance benefits
7 owed for Dickey’s stolen tools and thereby breached their contract. (Compl. ¶¶ 11,
8 19, 26.) Specifically, Dickey alleges that on October 1, 2013, Defendants issued an
9 inland marine insurance policy to Dickey, which provided coverage for his truck and
10 tools. (*Id.* ¶¶ 1, 5, 7, 8.) On April 4, 2014, Dickey’s truck and tools were stolen. (*Id.*
11 ¶ 9.) Although his truck was later found and declared a total loss, his tools were never
12 recovered. (*Id.*)

13 Dickey further alleges that although Defendants paid for the total loss of his
14 truck, they withheld and continue to withhold payment for the tools despite the loss
15 being “clearly covered” under the policy. (*Id.* ¶ 10.) Dickey alleges that he provided
16 Defendants with inventories, receipts, price lists, and estimates from the tool
17 manufacturer confirming the replacement costs of the tools. (*Id.* ¶ 11.)

18 Dickey additionally alleges that Defendants breached the implied covenant of
19 good faith and fair dealing by failing to pay promptly for Dickey’s stolen tools and by
20 failing to do various acts in violation of the California Code of Regulations and
21 California Insurance Code. (*Id.* ¶¶ 11, 14(a)–(g).)

22 On May 18, 2015, Alterra moved to dismiss the second cause of action (i.e. bad
23 faith claim) and moved to strike portions of the complaint.² (ECF Nos. 7 and 8.) On
24 May 29, 2015, Dickey opposed Alterra’s Motions (ECF Nos. 13, 14) and Alterra
25 replied on June 8, 2015 (ECF Nos. 19, 20). On June 5, 2015, Markel moved to
26 dismiss the first, second and third causes of action. (ECF No. 16.) Dickey untimely

27 ¹ After carefully considering the papers filed in support of and in opposition to the Motion, the Court
28 deems the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15.

² Alterra filed an amended Motion to Strike on May 19, 2015. (ECF No. 9.)

1 opposed on August 18, 2015. (ECF No. 25.) On August 25, 2015, Markel replied.
2 (ECF No. 27.) Both Markel and Altera’s Motions are now before the Court for
3 consideration.

4 III. LEGAL STANDARDS

5 A court may dismiss a complaint under Rule 12(b)(6) for lack of a cognizable
6 legal theory or insufficient facts pleaded to support an otherwise cognizable legal
7 theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). To
8 survive a dismissal motion, a complaint need only satisfy the minimal notice pleading
9 requirements of Rule 8(a)(2)—a short and plain statement of the claim. *Porter v.*
10 *Jones*, 319 F.3d 483, 494 (9th Cir. 2003). The factual “allegations must be enough to
11 raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550
12 U.S. 544, 555 (2007). That is, the complaint must “contain sufficient factual matter,
13 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v.*
14 *Iqbal*, 556 U.S. 662, 678 (2009).

15 The determination whether a complaint satisfies the plausibility standard is a
16 “context-specific task that requires the reviewing court to draw on its judicial
17 experience and common sense.” *Id.* at 679. A court is generally limited to the
18 pleadings and must construe all “factual allegations set forth in the complaint . . . as
19 true and . . . in the light most favorable” to the plaintiff. *Lee v. City of L.A.*, 250 F.3d
20 668, 688 (9th Cir. 2001). But a court need not blindly accept conclusory allegations,
21 unwarranted deductions of fact, and unreasonable inferences. *Sprewell v. Golden*
22 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

23 Furthermore, a court should freely give leave to amend a complaint that has
24 been dismissed. Fed. R. Civ. P. 15(a). But a court may deny leave to amend when
25 “the court determines that the allegation of other facts consistent with the challenged
26 pleading could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well*
27 *Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986); *see Lopez v. Smith*, 203 F.3d
28 1122, 1127 (9th Cir. 2000).

1 **IV. DISCUSSION**

2 **A. Markel’s Motion to Dismiss**

3 As an initial matter, Dickey did not oppose Markel’s Motion until August 18,
4 2015, more than six weeks after opposing papers were due.³ See Local Rule 7-9.
5 Dickey alleges that he did not receive any prior electronic or written notice of the
6 Motion until Markel’s counsel informed him of it on Friday, August 14, 2015. (Opp’n
7 2.)⁴ This argument is in contradiction to Markel’s moving papers, which indicate that
8 a Local Rule 7-3 conference occurred on May 14, 2015 (ECF No. 16) and an
9 electronic notice of the motion was emailed to Mr. Bradford T. Child, Dickey’s
10 attorney (ECF No. 16-6). Further, Dickey has opposed two other motions (Alterra’s
11 Motions to Dismiss and Strike), and would have been put on notice of Markel’s
12 Motion when reviewing the docket. Dickey provides no other reason for failing to file
13 a timely opposition, and therefore the Court may decline to consider Dickey’s late-
14 filed opposition. See Local Rule 7-12 (“The Court may decline to consider any
15 memorandum or other document not filed within the deadline set by order or local
16 rule.”) Notwithstanding, as explained further below, considering Dickey’s opposition
17 does not change the Court’s decision to grant Markel’s Motion.

18 Markel argues that the Complaint fails to state a claim against Markel because it
19 is not a signatory to the insurance contract. (Mot. 6.) To support this proposition,
20 Markel provides the contested insurance contract in its moving papers. Although
21 exhibits outside the complaint are generally not considered at the motion to dismiss
22 stage, the Ninth Circuit has established that documents referred to in a complaint may
23 be considered for the purposes of evaluating such a motion. *Branch v. Tunnell*, 14
24 F.3d, 449, 453 (9th Cir. 1994), *overruled on other grounds by Galbraith v. Cty. of*
25 *Santa Clara*, 307 F.3d, 1119 (9th Cir. 2002). In this case, the Complaint exclusively
26 relies upon the provisions of the insurance agreement and Dickey does not contest the

27 ³ The hearing date for the Motion was July 20, 2015. (See ECF No. 17.)

28 ⁴ As used in this section, the term “Mot.” will refer to No. ECF 16, the term “Opp’n” will refer to
No. ECF 25, and the term “Reply” will refer to ECF No. 27.

1 authenticity of the agreement presented by Markel. Therefore, the Court may
2 appropriately consider the insurance policy for purposes of this motion.

3 Generally, documents accompanying a policy are not necessarily part of that
4 policy. *Elliott v. Geico Indemnity Co.*, 231 Cal. App. 4th 789, 798 (2014). The
5 subject insurance policy refers to Markel in two places: 1) On a “welcome letter” and
6 2) As a service mark appearing on the first three pages of the policy. (Hellencamp
7 Decl. Ex. 1, pp. 1–3.) Excluding the welcome letter, which is not alleged as part of
8 the policy, nor is necessarily so by default, the only references to Markel are three
9 watermarks. (*Id.*) In contrast, Alterra is mentioned by name several times throughout
10 the policy. (*Id.*) There is no reason to believe that three watermarks make one a
11 signatory to a contract, absent additional corroborating signs.

12 Dickey argues that even if Markel is not a signatory to the contract, it acted as
13 an agent or in a similar capacity to Alterra, and therefore held liable for breach of the
14 contract. (Opp’n 5.) Markel replies that Dickey did not allege that Markel acted as an
15 agent or in a similar capacity to Alterra, but only that Doe defendants did so. (Reply
16 6.) In fact, the only reference to an agent in Dickey’s complaint is where Dickey
17 alleges that Doe defendants were agents and employees of Markel and Alterra.
18 (Compl. ¶ 6.) Therefore, if Dickey contends there was an agent or similar relationship
19 between Markel and Alterra, then Dickey must specifically so allege.

20 Dickey further argues that Markel may be liable because it ratified and
21 approved the conduct of Alterra. (Opp’n 6.) Dickey offers no other facts beyond its
22 conclusory statement that Markel ratified conduct to support the conclusion. *Iqbal*,
23 556 U.S. at 664 (“A court considering a motion to dismiss may begin by identifying
24 allegations that, because they are mere conclusions, are not entitled to the assumption
25 of truth. While legal conclusions can provide the complaint’s framework, they must be
26 supported by factual allegations.”) Therefore, the Court finds that Markel is not a
27 suitable party to Dickey’s breach of contract claim, and **GRANTS** Markel’s Motion to
28 Dismiss as to all causes of action, with leave to amend.

1 **B. ALTERRA’S MOTION TO DISMISS**

2 Alterra contends that Dickey fails to state facts sufficient to allege a claim for
3 bad faith. (Mot. 1, 2.)⁵ Specifically, Alterra argues that the facts supporting the claim
4 for bad faith are conclusory and cannot stand by themselves. (Mot. 6, 7.) To
5 successfully plead bad faith, plaintiff must allege facts demonstrating conduct beyond
6 that of negligence. *Raisin Bargaining Ass’n v. Hartford Cas. Ins. Co.*, 715 F. Supp.
7 2d 1079, 1087–1088 (E.D. Cal. 2010). Dickey alleges that Alterra withheld and
8 continues to withhold payments for Dickey’s stolen tools and that Alterra failed to
9 perform any investigation into the claim. (Opp’n 6.) These allegations do not rise to
10 the level intent required to claim bad faith. Bad faith requires, at a minimum, the
11 unreasonable withholding of payments under a policy. *Neal v. Farmers Inc. Exch.*, 32
12 Cal. 3d 910, 920 (1978). Although failure to investigate a claim thoroughly, as
13 alleged by Dickey, is grounds for a bad faith action, *Egan v. Mutual of Omaha Ins.*
14 *Co.*, 24 Cal. 3d 809, 819 (1979), Dickey fails to provide any facts to support this
15 conclusory allegation. Indeed, Dickey’s Complaint states that Dickey received
16 payment for his truck, which contradicts Dickey’s claim by showing that some
17 payment was provided. (Compl. ¶ 10.)

18 Additionally, Dickey makes several claims based on alleged violations of the
19 California Code of Regulations and California Insurance Code. (Mot. 7, 8). These
20 include, but are not limited to, failing to perform necessary, proper, and or timely
21 investigation, and failing to tender payment to plaintiff within the required time
22 period. (Opp’n 3, 4.) While Alterra admits that violations of these Codes do not in
23 themselves give rise to a private cause of action, Dickey argues that the violations
24 show actions taken by Alterra, which provide evidence of bad faith. (Mot. 7, 8; Opp’n
25 7.) The Court disagrees.

26 Mere recitation of the California Code of Regulations and Insurance Code, and
27

28 ⁵ As used in this section, the term “Mot.” will refer to No. ECF 8 and the term “Opp’n” will refer to No. ECF 13.

1 claims that a defendant violated the codes, are largely legal conclusions framed as
2 factual allegations. *Auto. Ass'n.*, 84 Cal. App. 4th 715, 723 (2001). As such, they are
3 insufficient to allege a claim of bad faith without further supporting factual
4 allegations. Therefore, the Court finds that Dickey does not allege facts sufficient to
5 plead a claim for “Tortious Breach of the Implied Covenant of Good Faith and Fair
6 Dealing,” and **GRANTS** Alterra’s Motion to Dismiss as to the second cause of action,
7 with leave to amend.

8 **C. ALTERRA’S MOTION TO STRIKE**

9 Alterra’s Motion to Strike is largely dependent on its Motion to Dismiss. As
10 explained above, Alterra contends that Dickey’s claim for bad faith is unsupported
11 and should therefore be dismissed. In its Motion to Strike, Alterra argues that if the
12 claim for bad faith is dismissed, the Court should also strike the portion of Dickey’s
13 complaint seeking punitive damages. Because Dickey still has an opportunity to
14 amend his Complaint and properly allege a claim for bad faith, the Court at this time
15 **DENIES AS MOOT** Alterra’s Motion to Strike.

16 **V. CONCLUSION**

17 For the reasons discussed above, the Court **GRANTS** Markel’s Motion to
18 Dismiss and Alterra’s Motion to Dismiss with leave to amend. (ECF Nos. 16, 8.)
19 Further, the Court **DENIES AS MOOT** Defendant Alterra’s Motion to Strike. (ECF
20 No. 7.) Plaintiff shall file a first amended complaint by September 29, 2015.

21
22 **IT IS SO ORDERED.**

23
24 September 16, 2015

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27 **OTIS D. WRIGHT, II**
28 **UNITED STATES DISTRICT JUDGE**