

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF CALIFORNIA

3 HARTFORD CASUALTY INSURANCE
4 COMPANY,
5
6 Plaintiff,
7
8 v.
9 AMERICAN DAIRY AND FOOD CONSULTING
10 LABORATORIES, INC., and DOES 1
11 through 10, inclusive,
12
13 Defendants.

09-CV-00914-OWW-DLB
MEMORANDUM DECISION RE:
PLAINTIFF'S MOTION TO
DISMISS UNDER RULE 9(b) AND
12(b)(6)

14 AMERICAN DAIRY & FOOD CONSULTING
15 LABORATORIES, INC.,
16
17 Counter-Claimant,
18
19 v.
20 HARTFORD CASUALTY INSURANCE
21 COMPANY,
22
23 Counter-Defendant.

24 I. INTRODUCTION

25 Before the court is a motion to dismiss filed by Plaintiff
26 Hartford Casualty Insurance Company ("Hartford") pursuant to
27 Federal Rules of Civil Procedure 9(b) and 12(b)(6). The motion is
28 directed at two counterclaims asserted by Defendant American Dairy
& Food Consulting Laboratories, Inc. ("American Dairy"). The
following background facts are taken from Hartford's First Amended
Complaint ("FAC") and American Dairy's pleading which contains the
counterclaims at issue.¹

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¹ Although, in this motion, Hartford's FAC is not under attack, the allegations in the FAC are included in the background section to put American Dairy's counterclaims in context.

1 II. BACKGROUND

2 This case arises out of an insurance policy Hartford issued to
3 American Dairy. American Dairy sustained loss it believed was
4 covered by the policy and it submitted an insurance claim to
5 Hartford for over five million dollars. Hartford denied coverage.

6 A. The Parties

7 Hartford is an Indiana corporation with its principal place of
8 business in Hartford, Connecticut. American Dairy is a Colorado
9 corporation with its principal place of business in Denver,
10 Colorado. Diversity of citizenship is the alleged basis of subject
11 matter jurisdiction. (Doc. 6 at 1-2; Doc. 9 at 2.)

12 B. Hartford's FAC

13 Hartford initiated this lawsuit by complaint for declaratory
14 relief filed against American Dairy on May 22, 2009. Hartford then
15 filed its FAC for declaratory relief on May 27, 2009. Hartford
16 seeks a declaration that American Dairy's loss is not covered by
17 its insurance policy.

18 1. General Allegations

19 a. The Policy, Loss And Denial Of Coverage

20 In May 2007, American Dairy purchased a business insurance
21 policy ("Policy") from Hartford to insure against loss at two
22 properties ("Property") owned by American Dairy. On or around May
23 28, 2008, American Dairy notified Hartford that a loss attributable
24 to vandalism and theft occurred at the Property on May 14, 2008
25 ("Claim"). American Dairy provided Hartford with a "Sworn
26 Statement in Proof of Loss" and an "Addendum" claiming
27 \$5,642,299.00 in covered loss, less a \$5,000 deductible. (Doc. 6 at
28 2-3 & Ex. A.)

1 On February 24 and 25, 2009, Hartford examined, under oath,
2 Dr. Mali Reddy, the President of International Media and Cultures
3 ("IMAC") and American Dairy, Mrs. Syama Reddy, the Vice-President
4 of IMAC and American Dairy, and Mrs. Marlene Basta, Head of
5 Accounting and Administration of IMAC and American Dairy. American
6 Dairy is alleged to be wholly owned by IMAC. During the
7 examinations, Hartford allegedly learned that American Dairy never
8 operated on or otherwise occupied the Property. Accordingly,
9 Hartford denied coverage under an exclusion relating to "Vacancy."
10 (*Id.* at 3 & Ex. B.)

11 The Policy (Doc. 6, Ex. A) advises the insured: "Various
12 provisions in this policy restrict coverage. Read the entire
13 policy carefully to determine rights, duties, and what is and is
14 not covered." Section "E" of the Policy, entitled "PROPERTY LOSS
15 CONDITIONS," contains a subsection on vacancy which excludes
16 coverage for certain losses when the property is vacant.

17 8. Vacancy

18 a. Description of Terms

19 (1) As used in this Vacancy Condition, the
20 term building and the term vacant have
21 meanings set forth in Paragraphs (a) and (b)
22 below:

23 (a) When this policy is issued to a
24 tenant, and with respect to that tenant's
25 interest in Covered Property, building
26 means the unit or suite rented or leased
27 to the tenant. Such building is vacant
28 when it does not contain enough business
personal property to conduct customary
operations.

(b) When this policy is issued to the
owner or general lessee of a building,
building means the entire building. Such
building is vacant unless at least 31% of
its total square footage is:

1 (i) Rented to a lessee or sub-lessee and
2 used by the lessee or sub-lessee to
3 conduct its customary operations; and/or

4 (ii) Used by the building owner to
5 conduct customary operations.

6 (2) Buildings under construction or renovation
7 are not considered vacant.

8 b. Vacancy Provisions

9 If the building where physical loss or
10 physical damage occurs has been vacant for
11 more than 60 consecutive days before that
12 physical loss or physical damage occurs:

13 (1) We will not pay for any physical loss or
14 physical damage caused by any of the following
15 even if they are Covered Causes of Loss:

16 (a) Vandalism;

17 (b) Sprinkler leakage, unless you had
18 protected the system against freezing;

19 (c) Building glass breakage;

20 (d) Water damage;

21 (e) Theft; or

22 (f) Attempted theft.

23 (2) With respect to Covered Causes of Loss
24 other than those listed in b.(1)(a) through
25 b.(1)(f) above, we will reduce the amount we
26 would otherwise pay for the physical loss or
27 physical damage by 15%.

28 As stated in Hartford's letter denying coverage, which is
attached to Hartford's FAC, Hartford determined that American
Dairy's Property was vacant for Policy purposes. (Doc. 6, Ex. B.)
According to Hartford, for more than sixty (60) consecutive days
preceding the loss, at least 31% of the Property's total square
footage was not used by American Dairy or any lessee to conduct
customary operations. Hartford also determined that the Property
was not "under construction or renovation" under the Policy because

1 "no physical alteration of any kind or even basic maintenance had
2 been performed at the Property since American Dairy acquired it."
3 Given the Property's vacant status, the claimed loss on the
4 Property caused by vandalism and theft was not covered. (*Id.* at 4.)

5 Although Hartford expressly denied coverage pursuant to the
6 Vacancy Provisions, in Hartford's letter denying coverage, Hartford
7 stated that it "expressly reserve[d]" the "right to assert any
8 other policy terms, conditions, exclusions, exceptions, or legal
9 defenses to coverage that we might later learn may be applicable to
10 the claimed loss." (*Id.* at 4.) The letter also contains Hartford's
11 specific reservation to assert that the "Concealment,
12 Misrepresentation or Fraud" provision in the Policy permits
13 Hartford to void or rescind the Policy and/or deny the claim. (*Id.*
14 at 4-6.) This provision reads:

15 This policy is void in any case of fraud by you as it
16 relates to this policy at any time. It is also void if
17 you or any other insured, at any time, intentionally
18 conceal or misrepresent a material fact concerning:

- 19 1. This policy;
- 20 2. The Covered Property
- 21 3. Your interest in the Covered Property; or
- 22 4. A claim under this policy.

23 According to Hartford, American Dairy may have made material
24 misrepresentations in the application for the Policy "by indicating
25 that American Dairy had been engaged in dairy operations at the
26 Property" as "several answers on the application . . . represent
27 that there had been . . . ongoing dairy production at the
28 Property." American Dairy may have also "concealed and/or
misrepresented the occurrence of the loss" and may have "materially

1 overstated the amount of the loss with respect to its claim for
2 extra expenses sustained due to vandalism, the loss of business
3 income, business personal property, and the extent of repairs
4 necessary to repair the vandalism damage." (*Id.* at 5-6.)
5 Accordingly, in its letter denying coverage, Hartford specifically
6 reserved its right to void or rescind the Policy and/or deny the
7 claim under the Concealment, Misrepresentation or Fraud provision.
8 (*Id.* at 4-6.)

9 2. Hartford's Claims In The FAC

10 Hartford's FAC asserts two claims for declaratory relief.
11 Hartford's first claim for declaratory relief requests a
12 declaration that, by virtue of the Vacancy Provisions, the Claim is
13 not covered by the Policy and Hartford owes nothing to American
14 Dairy for the Claim. (Doc. 6 at 5-6.) Hartford's second claim for
15 declaratory relief relates to its reservation of rights. Hartford
16 alleges that, in its letter denying coverage, it reserved the right
17 to rescind or void the Policy and/or to deny the Claim based on
18 alternate grounds contained in the Policy. Hartford requests a
19 declaration that it is entitled to "void or rescind the Policy
20 and/or to deny the Claim based on these alternate grounds." (Doc.
21 6 at 6-7.)

22 C. American Dairy's Counter-Complaint

23 After Hartford denied the Claim and filed its FAC, on July 24,
24 2009, American Dairy filed an answer (Doc. 8) and a separate
25 document (Doc. 9) asserting four counterclaims against Hartford for
26 breach of written contract, breach of the implied covenant of good
27 faith and fair dealing, "negligent misrepresentation," and
28 "reformation/unilateral mistake." American Dairy's counterclaims

1 for negligent misrepresentation and reformation/unilateral mistake
2 are the only counterclaims at issue in this motion.

3 1. General Allegations In The Counter-Complaint

4 a. American Dairy's Prior Relationship With Hartford

5 According to American Dairy, before it purchased the Policy
6 from Hartford, American Dairy established a relationship with
7 Hartford's authorized agent, Renaissance Insurance Group, LLC and
8 specifically "J. Helzer" who became familiar with American Dairy's
9 insurance needs and requirements. At all materials times,
10 Renaissance and Helzer were allegedly acting on behalf of their
11 disclosed principal, Hartford. (Doc. 9 at 2.)

12 b. Hartford's Knowledge Regarding American Dairy's
13 Future Use Of The Property And Assurance Of Coverage

14 According to American Dairy, Hartford knew that American Dairy
15 intended to acquire the Property for its "future manufacturing and
16 processing activities." At the time American Dairy purchased the
17 Property, Hartford was aware that "substantial renovation and
18 modifications" to the Property "would be necessary before any
19 manufacturing and processing of dairy products could occur." (*Id.*
20 at 3.) American Dairy informed Hartford that it would take time to
21 obtain proper permits from government authorities for the
22 renovation/construction that it had planned. American Dairy was
23 assured that the Policy would provide it with complete coverage.

24 As alleged:

25 8. In connection with AMERICAN DAIRY's efforts to make
26 sure it had adequate and proper insurance in place on THE
27 PROPERTY, AMERICAN DAIRY contacted Renaissance Insurance
28 Group, LLC and J. Helzer and explained AMERICAN DAIRY's
needs for insurance to be in place and in effect from the
date of AMERICAN DAIRY's purchase of THE PROPERTY.
Thereafter, with the advice, recommendation and
assistance of HARTFORD's authorized and appointed agent,

1 AMERICAN DAIRY purchased a written commercial property
2 policy, number 34SBA UI6658 from HARTFORD with the
3 understanding that it would provide full and complete
4 coverage for losses that might be sustained to THE
5 PROPERTY, including losses resulting from theft or
6 vandalism.

7
8 9. At the time the written policy was purchased from
9 HARTFORD, AMERICAN DAIRY made it clear that it would take
10 some time to obtain proper permits from the governing
11 authorities to allow for the needed renovations and
12 construction to modify THE PROPERTY for the anticipated
13 manufacturing and processing operations on THE PROPERTY.
14 HARTFORD's authorized and appointed representatives and
15 agents repeatedly assured AMERICAN DAIRY that the policy
16 purchased from HARTFORD would provide full and complete
17 coverage to AMERICAN DAIRY for losses that might be
18 sustained to THE PROPERTY, notwithstanding the fact that
19 no manufacturing or processing activities were ongoing,
20 and notwithstanding the fact that the construction or
21 renovation efforts might be delayed during the time in
22 which AMERICAN DAIRY was required to wait for the proper
23 permits to be issued by the governmental authorities. At
24 no time prior to the loss which occurred in May 2008, did
25 anyone from HARTFORD ever advise or alert AMERICAN DAIRY
26 to the fact that there was a limitation in the policy
27 which HARTFORD would contend applied to preclude coverage
28 for losses caused by theft or vandalism if THE PROPERTY
was not used for manufacturing and/or processing purposes
for a period of more than 60 consecutive days. Moreover,
based on the representations made by HARTFORD and its
authorized and appointed agents and representatives,
AMERICAN DAIRY reasonably believed that no such
limitation existed within the policy and would have
expected the HARTFORD representative and appointed agents
to alert AMERICAN DAIRY to any such limitation in light
of the information AMERICAN DAIRY disclosed to HARTFORD
and its representatives and appointed agents about its
insurance needs.

10. During the course of AMERICAN DAIRY's efforts to
purchase insurance from HARTFORD, AMERICAN DAIRY relied
on HARTFORD's appointed and authorized agents and
representatives, including having such representatives
complete the appropriate insurance application forms.
Specifically, the authorized HARTFORD representatives and
agents filled out the applicable insurance application
form without specifically seeking AMERICAN DAIRY's input,
and simply submitted the application to AMERICAN DAIRY
without receiving substantial input from AMERICAN DAIRY.

(*Id.* at 3-4.) After Hartford issued the Policy and before it
expired, Hartford conducted an on-site inspection of the Property.

1 c. Hartford Inspects The Property

2 While the Policy was in effect, Hartford arranged for and
3 inspected the Property on April 9, 2008. During the investigation,
4 American Dairy discussed its efforts to obtain the necessary
5 permits for its continued renovation and construction activities.
6 During the inspection, Hartford did not indicate that the Property
7 was vacant or that a condition on the Property would limit
8 coverage.

9 11. After the policy was issued, and during the time in
10 which the policy was in effect, HARTFORD advised AMERICAN
11 DAIRY that it intended to conduct an on-site inspection
12 of THE PROPERTY for the express purpose of helping
13 AMERICAN DAIRY avoid property losses. HARTFORD advised
14 that it intended to review 'common things that cause such
15 losses and identifying controls that could help reduce
16 the potential for occurrence.' As a result, HARTFORD
17 arranged for an inspection to occur on April 9, 2008 at
18 THE PROPERTY by HARTFORD's representative, Adam Bromhead.

19 12. Prior to conducting the April 9, 2008 inspection,
20 HARTFORD advised that it intended to discuss the
21 operations conducted in the buildings, and describe
22 regular and preventive maintenance practices for the
23 buildings and equipment.

24 13. . . . At no time during the April 9, 2008 inspection
25 did the HARTFORD representative indicate that there were
26 any noticed problems at THE PROPERTY. . . . At no time
27 during the inspection did Mr. Bromhead suggest or
28 indicate in any way that the condition of, or AMERICAN
DAIRY's use of the pro9perty [sic], impacted or impaired
AMERICAN DAIRY's scope of coverage under the HARTFORD
policy.

 14. During the April 9, 2008 inspection, representatives
from AMERICAN DAIRY fully and completely responded to all
questions posed of them by Mr. Bromhead, including the
details of AMERICAN DAIRY's efforts to obtain necessary
permits to allow for the continued renovation and
construction activities to THE PROPERTY. At no time
during the inspection did Mr. Bromhead ever indicate that
he thought THE PROPERTY was vacant or that any condition
of THE PROPERTY increased the risk of potential loss
because of vandalism or theft. At no time during the
inspection did Mr. Bromhead indicate that because of any
condition of THE PROPERTY coverage might be limited in
any way if a loss occurred because of theft or vandalism.

1 At no time during the meeting did Mr. Bromhead indicate
2 that AMERICAN DAIRY should increase its activities at THE
3 PROPERTY in order to reduce the potential losses from
4 vandalism or burglary, or otherwise undertake any effort
5 to make sure that its coverage was maximized during the
6 time in which AMERICAN DAIRY was waiting for its permits
7 to be approved.

8 15. Based on HARTFORD expressly and specifically
9 advising AMERICAN DAIRY, in advance of the April 9, 2008
10 meeting, that HARTFORD was conducting the inspection for
11 the purpose of helping AMERICAN DAIRY avoid property
12 losses and reduce potential for such losses, AMERICAN
13 DAIRY relied on HARTFORD to alert AMERICA[N] DAIRY to
14 potential losses that might exist due to the condition
15 and use of its property as of the time of the inspection.
16 In addition, AMERICAN DAIRY relied on and expected
17 HARTFORD to help AMERICAN DAIRY, including alerting
18 AMERICAN DAIRY to any potential coverage problems that
19 might exist due to the condition or the use of THE
20 PROPERTY at the time of the April 9, 2008 inspection.

21 16. Based on the representations HARTFORD made prior to,
22 and during the April 9, 2008 [] inspection, AMERICAN
23 DAIRY expected that if there were any problems in the
24 condition or manner in which THE PROPERTY was being
25 operated and/or used at the time of the inspection,
26 HARTFORD would have alerted AMERICAN DAIRY to the
27 situation so that AMERICAN DAIRY could do what was
28 necessary to protect THE PROPERTY from potential losses
and otherwise secure coverage under the HARTFORD policy.

(*Id.* at 4-5.)

After the inspection, Mr. Bromhead reported that the
inspection went well and Hartford sent American Dairy a renewal
policy for the Property.

17. Following the April 9, 2008 inspection, Mr. Bromhead
called AMERICAN DAIRY and confirmed that the inspection
had gone well and that HARTFORD would be sending a
renewal policy extending coverage for the following year.
At no time during this telephone conversation did Mr.
Bromhead indicate that there was any potential loss
exposure or that AMERICAN DAIRY's current condition,
operations and use of THE PROPERTY created any increased
risk or coverage problems under the HARTFORD policy.

18. A few days after the April 16, 2008 telephone
conversation from Mr. Bromhead, AMERICAN DAIRY received
a renewal policy from HARTFORD confirming coverage being
extended for the policy period May 23, 2008 through May
23, 2009. The renewal policy was dated April 18, 2008.

1 (Id. at 6.) Subsequently, Hartford issued a notice of cancellation
2 indicating that the renewal policy would be cancelled effective
3 July 12, 2008, for the stated reason that the Property was vacant.

4 (Id.)

5 d. Hartford Cancels The Renewal Policy, Coverage
6 Remains In Effect And Theft And Vandalism Occurs

7 On April 21, 2008, American Dairy received Hartford's notice
8 of cancellation regarding the renewal policy. Even though Hartford
9 based its cancellation decision on the Property's vacancy, Hartford
10 did not indicate whether this vacancy status also impacted American
11 Dairy's then existing coverage which remained in effect until July
12 12, 2008. American Dairy believed it was still fully covered.

13 20. Notwithstanding HARTFORD's representation that the
14 inspection went well, and that it was agreeable to
15 renewing AMERICAN DAIRY's policy for the following year,
16 on April 21, 2008 AMERICAN DAIRY received a notice of
17 cancellation indicating that the renewal policy was being
18 canceled which would become effective July 12, 2008. The
19 reason stated for the cancellation was that both
20 buildings on THE PROPERTY were vacant. This notice did
21 not indicate or suggest that the fact that the buildings
22 might be vacant would in any way impair AMERICAN DAIRY's
23 right to obtain benefits from any covered losses, such as
24 burglary or vandalism.

25 21. Upon receiving the April 21, 2008 notice of
26 cancellation, AMERICAN DAIRY was confused and did not
27 understand why HARTFORD would issue such a notice, based
28 on the statements made during the April 9, 2008
inspection, and the discussions following said
inspection.

29 22. Thereafter, AMERICAN DAIRY contacted HARTFORD's
30 authorized representative and agent, Renaissance
31 Insurance Group, LLC and specifically J. Helzer who
32 indicated that he did not agree with HARTFORD's
33 determination that the buildings were vacant, but that he
34 would undertake efforts to secure replacement insurance
35 coverage. In accordance with the information contained
36 within the notice of cancellation, Renaissance Insurance
37 Group, LLC and specifically J. Helzer, assured AMERICAN
38 DAIRY that THE PROPERTY would continue to be fully and
completely insured with HARTFORD until July 12, 2008. At
no time prior to the loss of May 2008, did anyone from

1 HARTFORD, or its representatives or authorized agents,
2 advise or otherwise alert AMERICAN DAIRY to the fact that
3 HARTFORD's determination that THE PROPERTY was vacant
4 could significantly impair the coverage provided under
5 the policy.

6 23. In fact, based on the notice of cancellation
7 indicating that coverage would remain in effect until
8 July 12, 2008, the representations made by HARTFORD both
9 before and during the April 9, 2008 inspection, and the
10 representations and promises made to AMERICAN DAIRY by
11 HARTFORD's authorized agents and representatives
12 following the inspection, AMERICAN DAIRY believed that it
13 had full and complete coverage for losses that might be
14 sustained to THE PROPERTY including losses resulting from
15 theft or vandalism.

16 (Id. at 6-7.) While the Policy was still in effect, theft and
17 vandalism occurred on the Property. In early to mid May 2008,
18 American Dairy discovered that the Property suffered "substantial
19 and catastrophic damages as a result of . . . criminal activities
20 (theft and vandalism) by third parties." (Id. at 7.)

21 e. American Dairy Tenders The Claim

22 American Dairy tendered its Claim to Hartford and, initially,
23 Hartford indicated it would pay on the Claim. Upon a further
24 "investigation," however, Hartford denied coverage. American Dairy
25 faults Hartford for not advising it about a potential lack of
26 coverage and questions its "result-oriented" investigation.

27 26. After tendering the claim to HARTFORD, HARTFORD
28 initially indicated that the loss would be fully covered
and paid. In addition, on July 1, 2008 HARTFORD stated,
in writing, that it needed no further information from
AMERICAN DAIRY to proceed with the claim.

29 27. However, HARTFORD subsequently commenced further
30 investigation which, and on information and belief,
31 AMERICAN DAIRY alleges that the investigation was
32 designed for the purpose of creating a basis to avoid
33 paying the claim.

34 28. Under the terms of the written policy, number 34SBA
35 UI6658, HARTFORD agreed to pay for losses to THE PROPERTY
36 such as losses resulting from burglary and vandalism. At
37 no time prior to the May 2008 loss did anyone from
38

1 HARTFORD, or its representatives or authorized agents,
2 specifically inform or advise AMERICAN DAIRY that if the
3 governmental authorities delayed in providing necessary
4 permits, it could have a negative impact on or otherwise
5 impair their ability to receive insurance benefits should
6 AMERICAN DAIRY suffer a loss from burglary or vandalism.
7 In fact, AMERICAN DAIRY believed that its efforts in
8 obtaining the permits from the governmental authorities
9 was part of their efforts to renovate and modify the
10 buildings in accordance with their anticipated
11 manufacturing and processing operations. Indeed, at no
12 time prior to the May 2008 loss did anyone from HARTFORD
13 or its representatives and authorized agents, ever advise
14 AMERICAN DAIRY that its renovation and modification
15 efforts would not include the time and effort during
16 which AMERICAN DAIRY sought and was waiting to receive
17 necessary permits from the governing authorities.

18

19 30. Rather than provide AMERICAN DAIRY with the
20 insurance benefits to which it was entitled on a timely
21 basis following the May 2008 theft and vandalism loss,
22 HARTFORD engaged in activities designed to deprive
23 AMERICAN DAIRY of receiving full, complete and timely
24 benefits. HARTFORD's activities in 'investigating' the
25 claim fell below the insurance industry standards for the
26 proper handling and adjustment of claims by, among other
27 things, misrepresenting the facts, policy provisions and
28 circumstances of HARTFORD's investigation, with the
intent and purpose of depriving AMERICAN DAIRY of the
full and complete benefits to which it was entitled;
failing to timely and substantively respond to
communications and inquiries received from AMERICAN DAIRY
regarding its claim for benefits; deliberately refusing
to treat AMERICAN DAIRY's interests at least equal to
HARTFORD's interests during the handling and adjustment
of its claim; deliberately disregarding information
AMERICAN DAIRY provided to HARTFORD in its efforts to
wrongfully deprive AMERICAN DAIRY of the benefits to
which it was entitled; deliberately failing and refusing
to conduct a fair, objective and full investigation of
the facts and circumstances and instead engaging in a
result-oriented handling of the claim with the intent to
deny and deprive AMERICAN DAIRY of the full, complete and
timely benefits to which HARTFORD knew were due and owing
to AMERICAN DAIRY under policy number 34SBA UI6658; and
deliberately disregarding information which established
AMERICAN DAIRY's rights to receive payment under policy
number 34SBA UI6658 for the May 2008 loss it sustained.

(*Id.* at 8-9.) After the Claim was denied, and after Hartford filed
its FAC, American Dairy filed its answer and counterclaims against

1 Hartford.

2 2. American Dairy's Counterclaims

3 American Dairy's counterclaims are based on different
4 assumptions as to the Policy's coverage of the Claim. The first
5 counterclaim for breach of contract assumes that the Claim is, in
6 fact, covered under the Policy. Hartford is allegedly
7 "contractually required" under the Policy "to pay for the losses
8 sustained" to the Property but has failed to do so. (*Id.* at 9.)
9 Similarly, the second counterclaim also assumes that the Claim is
10 covered by the Policy. In its second counterclaim, American Dairy
11 alleges that Hartford breached the implied covenant by, among other
12 things, "denying AMERICAN DAIRY'S claim without proper cause or
13 legitimate basis, with the intended and specific purpose of harming
14 AMERICAN DAIRY and depriving AMERICAN DAIRY of the benefits to
15 which HARTFORD knew were due and owing to AMERICAN DAIRY." (*Id.* at
16 11.) In contrast, the third counterclaim for negligent
17 misrepresentation and the fourth counterclaim for
18 reformation/unilateral mistake do not assume the Claim is covered
19 by the Policy.

20 a. Negligent Misrepresentation

21 At the outset of its Negligent Misrepresentation counterclaim,
22 American Dairy incorporates all its preceding allegations and then
23 asserts that "if for any reason" the Policy "did not provide" it
24 with "the expected and represented insurance protection," the
25 "failure to obtain a policy which would cover such circumstances is
26 a direct result of the misrepresentation of Hartford and its
27 authorized and appointed agents and representatives." (*Id.* at 13.)

28 In several paragraphs, American Dairy then explains how, both

1 before and after American Dairy purchased the Policy,
2 "representations" were made by Hartford's appointed and authorized
3 agents and representatives, and American Dairy relied upon these
4 representations to its detriment.

5 52. HARTFORD's authorized and appointed representatives
6 and agents knew, or in the exercise of due and reasonable
7 care, should have known that AMERICAN DAIRY desired and
8 expected an insurance policy which would provide coverage
9 sufficient to protect them in the event they suffered a
10 loss from burglary or vandalism during the time in which
11 they were waiting to obtain the required permits from the
12 governmental authorities.

13 53. Through the representations and conduct of
14 HARTFORD's authorized and appointed agents and
15 representatives, AMERICAN DAIRY purchased policies and
16 paid premiums to HARTFORD in good faith and belief that
17 it was obtaining adequate commercial property insurance
18 to protect it in the event of a loss such as what
19 occurred in May 2008.

20 54. AMERICAN DAIRY believed that the representations of
21 HARTFORD's authorized and appointed agents and
22 representatives were true, and in reliance thereon,
23 AMERICAN DAIRY purchased its insurance policies from
24 HARTFORD.

25 55. Had AMERICAN DAIRY known the true facts, to wit,
26 that the policies and insurance they were purchasing from
27 HARTFORD might have limited property loss protection in
28 the event of vandalism or burglary, while AMERICAN DAIRY
was waiting to obtain the necessary permits from the
governmental authorities, they would have undertaken
additional actions and efforts to make sure that losses
resulting from burglary or vandalism would be adequately
and properly insured.

56. AMERICAN DAIRY reasonably and justifiably relied on
the representations, promises and statements made by
HARTFORD and its authorized representatives and agents
because HARTFORD and its authorized representatives and
agents represented that they had superior knowledge and
were in a superior position to provide expert advice and
recommendations to AMERICAN DAIRY.

57. Based upon the representations, promises and
statements made by HARTFORD and its authorized
representatives and agents, AMERICAN DAIRY was induced to
purchase policies from HARTFORD and pay the required
premiums, reasonably believing that the coverage being
purchased would provide full and complete coverage for

1 AMERICAN DAIRY in the event of loss, such as vandalism
2 and burglary, even though AMERICAN DAIRY's property may
3 not have been being used in the anticipated manufacturing
4 processing operations for an extended period of time
5 (more than 60 days) while their renovation and
6 construction activities were the subject of delays
7 pending receiving proper permits from the governmental
8 authorities. Had AMERICAN DAIRY known the true facts,
9 and/or known that actions could have been taken to
10 eliminate the impairment of coverage purportedly caused
11 by the vacancy condition of the policy, AMERICAN DAIRY
12 would have taken such action to make sure that full and
13 complete coverage was available for all potential losses
14 that might occur, including but not limited to vandalism
15 and burglary.

16 58. In addition, after the policy was issued, and based
17 on the representations and promises made in advance of
18 and during the April 9, 200[8] inspection, AMERICAN DAIRY
19 was lead to believe that if AMERICAN DAIRY's current use
20 and/or operation of THE PROPERTY increased the risk of
21 loss or otherwise created a problem for coverage,
22 HARTFORD would have clearly and explicitly alerted and
23 advised AMERICAN DAIRY of the problem and provided
24 AMERICAN DAIRY with advice as to how best to address the
25 problem. As a result AMERICAN DAIRY relied on HARTFORD to
26 advise and make recommendations to AMERICAN DAIRY, and
27 when HARTFORD failed to do so, AMERICAN DAIRY reasonably
28 believed no problem existed.

(*Id.* at 13-15.) As a result of this "conduct of HARTFORD,"
American Dairy has been damaged. (*Id.* at 15.)

b. Reformation/Unilateral Mistake

At the outset of its fourth counterclaim for
reformation/unilateral mistake American Dairy incorporates all
previous allegations. American Dairy then asserts that any lack of
coverage is due to a unilateral mistake:

61. To the extent it is determined that the HARTFORD
policy does not provide coverage for AMERICAN DAIRY's May
2008 loss, it fails to reflect the true intent and
agreement of the parties which is the result of a
unilateral mistake on the part of AMERICAN DAIRY in that
it was unaware that the terms of the policy, as written,
did not correctly express the terms intended and agreed
to by the parties and as confirmed and agreed to by
HARTFORD's authorized agents and representatives.

62. AMERICAN DAIRY reasonably believed and expected that

1 the HARTFORD policy would contain complete coverage for
2 property losses, such as burglary and vandalism losses,
3 notwithstanding the fact that AMERICAN DAIRY's
4 manufacturing and processing operations were delayed
5 pending the required modifications and renovations to THE
6 PROPERTY, and notwithstanding the fact that its
7 renovation and modification efforts might be delayed for
8 a period of more than 60 days pending obtaining necessary
9 permits from the governmental authorities.

10 (Id. at 15.) American Dairy also asserts that Hartford was aware
11 of "the unilateral mistake":

12 63. HARTFORD, and/or its authorized agents and
13 representatives knew of the unilateral mistake at the
14 time the HARTFORD policy was negotiated because it knew
15 that the renovation and construction activities would
16 take longer than 60 days to complete, and were in fact
17 taking longer than 60 days to commence because of the
18 need to obtain required permits from the governmental
19 authorities.

20 (Id. at 16.) To date, Hartford has "refused" to pay American Dairy
21 despite "what the true intentions of the parties were when AMERICAN
22 DAIRY purchased insurance from HARTFORD." (Id.) In its prayer for
23 relief, American Dairy requests a reformation of the Policy to
24 provide coverage for the Claim:

25 6. To the extent the Court finds that the express terms
26 of the policy do not provide coverage for the May 2008
27 loss, [American Dairy prays] for an order that the policy
28 be reformed to provide such coverage in accordance with
the representations made by HARTFORD and/or its
authorized representatives and agents that the policy
would provide coverage for losses, including vandalism
and burglary losses, notwithstanding the fact that
ongoing operations had been delayed more than 60 days and
that AMERICAN DAIRY's renovation and modification efforts
were being delayed pending receiving the required permits
from the governmental authorities[.]

(Id.) American Dairy does not plead any claim for mutual mistake.

D. Hartford's motion

On September 8, 2009, Hartford filed a motion to dismiss
American Dairy's counterclaims for negligent misrepresentation and
reformation/unilateral mistake, and no others. Hartford argues

1 that these two counterclaims are not pled with the specificity
2 required by Rule 9(b) and therefore must be dismissed for failure
3 to state a claim under Rule 12(b)(6). Hartford also argues that
4 the fourth counterclaim for reformation/unilateral mistake, which
5 is premised on a lack of coverage under the Policy, is not properly
6 pled in the alternative and thus contradicts American Dairy's claim
7 for breach of contract, which is premised on the existence of
8 coverage.

9 In its opposition brief, American Dairy argues that both
10 counterclaims are sufficiently pled. In addition, American Dairy
11 contends that its counterclaim for reformation/unilateral mistake
12 should be construed as pled in the alternative. In the event that
13 Hartford's motion has merit, American Dairy requests leave to amend
14 to correct any deficiency or inconsistency in its pleading. At
15 oral argument on the motion, American Dairy offered to amend its
16 pleading to address the issues raised in Hartford's briefing.
17 American Dairy was given until December 24, 2009, to file an
18 amended pleading and neither party reached the substance of the
19 motion at oral argument.

20 III. STANDARDS OF DECISION

21 A. Rule 12(b)(6)

22 Dismissal under Rule 12(b)(6) is appropriate where the
23 complaint lacks sufficient facts to support a cognizable legal
24 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th
25 Cir. 1990). To sufficiently state a claim to relief and survive a
26 12(b)(6) motion, the pleading "does not need detailed factual
27 allegations" but the "[f]actual allegations must be enough to raise
28 a right to relief above the speculative level." *Bell Atl. Corp. v.*

1 *Twombly*, 550 U.S. 544, 555 (2007). Mere "labels and conclusions"
2 or a "formulaic recitation of the elements of a cause of action
3 will not do." *Id.* Rather, there must be "enough facts to state a
4 claim to relief that is plausible on its face." *Id.* at 570. In
5 other words, "[t]o survive a motion to dismiss, a complaint [or
6 counter-complaint] must contain sufficient factual matter, accepted
7 as true, to state a claim to relief that is plausible on its face."
8 *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1949 (2009)
9 (internal quotation marks omitted). The Ninth Circuit has
10 summarized the governing standard, in light of *Twombly* and *Iqbal*,
11 as follows: "In sum, for a [pleading] to survive a motion to
12 dismiss, the non-conclusory factual content, and reasonable
13 inferences from that content, must be plausibly suggestive of a
14 claim entitling the plaintiff to relief." *Moss v. U.S. Secret*
15 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks
16 omitted).²

17 In deciding whether to grant a motion to dismiss, the court
18 must accept as true all "well-pleaded factual allegations" in the
19 pleading under attack. *Iqbal*, 129 S. Ct. at 1950. A court is not,
20 however, "required to accept as true allegations that are merely
21 conclusory, unwarranted deductions of fact, or unreasonable
22 inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988
23

24 ² Apart from factual insufficiency, a complaint or
25 counter-complaint is also subject dismissal under Rule 12(b)(6)
26 where it lacks a cognizable legal theory, *Balistreri*, 901 F.2d at
27 699, or where the allegations on their face "show that relief is
28 barred" for some legal reason. *Jones v. Bock*, 549 U.S. 199, 215
(2007); see also *Groten v. California*, 251 F.3d 844, 851 (9th Cir.
2001).

1 (9th Cir. 2001); see, e.g., *Doe I v. Wal-Mart Stores, Inc.*, 572
2 F.3d 677, 683 (9th Cir. 2009). Nor is a court required to "accept
3 as true allegations that contradict matters properly subject to
4 judicial notice or by exhibit." *Sprewell*, 266 F.3d at 988. In a
5 motion to dismiss, "[a] court may . . . consider certain
6 materials-documents attached to the complaint, documents
7 incorporated by reference in the complaint, or matters of judicial
8 notice-without converting the motion to dismiss into a motion for
9 summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th
10 Cir. 2003).

11 B. Rule 9(b)

12 In terms of factual sufficiency, Rule 9(b), when it applies,
13 imposes an even higher pleading standard than facial plausibility.

14 Rule 9(b) states:

15 In alleging fraud or mistake, a party must state with
16 particularity the circumstances constituting fraud or
17 mistake. Malice, intent, knowledge, and other conditions
of a person's mind may be alleged generally.

18 "To comply with Rule 9(b), allegations of fraud must be specific
19 enough to give defendants notice of the particular misconduct which
20 is alleged to constitute the fraud." *Swartz v. KMPG LLP*, 476 F.3d
21 756, 764 (9th Cir. 2007) (internal quotation marks omitted). Rule
22 9(b) "requires . . . an account of the time, place, and specific
23 content of the false representations as well as the identities of
24 the parties to the misrepresentations." *Id.* (internal quotation
25 marks omitted). The "[a]llegations of fraud must be accompanied by
26 the who, what, when, where, and how of the misconduct charged."
27 *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009).
28 "[A] plaintiff must set forth more than the neutral facts necessary
to identify the transaction. The plaintiff must set forth what is

1 false or misleading about a statement, and why it is false." *Vess*
2 *v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)
3 (emphasis removed).

4 Rule 9(b) also "provides for greater particularity in all
5 averments of . . . mistake." *Swierkiewicz v. Sorema N.A.*, 534 U.S.
6 506, 513 (2002). General allegations of mistake are not
7 sufficient. *N.Y., New Haven, & Hartford R.R. Co. v. New England*
8 *Forwarding Co.*, 119 F. Supp. 380, 382 (D.R.I. 1953). The pleading
9 must set forth enough facts to apprise the adversary of the
10 particular "circumstances constituting" the claimed mistake. Fed.
11 R. Civ. P. 9(b). Particulars such as the precise nature of the
12 misunderstanding, when the mistake occurred, and which
13 individual(s) made the mistake, have been required. See, e.g.,
14 *Mills v. Everest Reinsurance Co.*, 410 F. Supp. 2d 243, 248
15 (S.D.N.Y. 2006).

16 When a claim for fraud or mistake is insufficiently pled under
17 Rule 9(b), the claim is treated as being subject to dismissal under
18 Rule 12(b)(6) for failure to state a claim upon which relief can be
19 granted. See *Vess*, 317 F.3d at 1107-08.

20 C. Rule 8(d)

21 Under federal pleading rules, a party may plead claims in the
22 alternative. See Fed. R. Civ. P. 8(d)(2). While parties "need not
23 use particular words to plead in the alternative, they must use a
24 formulation from which it can be reasonably inferred that this is
25 what they [are] doing." *Holman v. Indiana*, 211 F.3d 399, 407 (7th
26 Cir. 2000). Under Rule 8(d)(3), a party can plead "as many
27 separate claims" as it has "regardless of consistency" between
28 them. Fed. R. Civ. P. 8(d)(3).

1 Although a party is authorized to assert alternative and
2 inconsistent claims, Rule 8(d)'s liberality "has its limits."
3 *Total Coverage, Inc. v. Cendant Settlement Servs. Group, Inc.*, 252
4 F. App'x 123, 126 (9th Cir. 2007). For example, if a pled claim is
5 internally inconsistent with itself, the inconsistencies may cancel
6 each other out and render the claim subject to dismissal for
7 failure to state a claim. See, e.g., *Maloney v. Scottsdale Ins.*
8 *Co.*, 256 F. App'x 29, 31-32 (9th Cir. 2007). While Rule 8 gives
9 the pleader some leeway, "no authority is known . . . which permits
10 blowing hot and cold in the same cause of action." *Steiner v.*
11 *Twentieth Century-Fox Film Corp.*, 140 F. Supp. 906, 908 (S.D. Cal.
12 1953).

13 IV. DISCUSSION AND ANALYSIS

14 A. Negligent Misrepresentation Claim

15 Numerous courts in the Ninth Circuit have recognized, and the
16 parties do not dispute, that a claim for negligent
17 misrepresentation is subject to Rule 9(b). See *United Gaur.*
18 *Mortgage Indem. Co. v. Countrywide Fin. Corp.*, ___ F. Supp. 2d. ___,
19 2009 WL 3199844, at *10 (C.D. Cal. Oct. 5, 2009); *Phillips v.*
20 *Mortgage Elec. Registration Sys.*, No. 1:09-CV-01028-OWW-SMS, 2009
21 WL 3233865, at *6 (E.D. Cal. Oct. 2, 2009); *Meridian Project Sys.,*
22 *Inc. v. Hardin Constr. Co., LLC*, 404 F. Supp. 2d 1214, 1219 (E.D.
23 Cal. 2005); *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d
24 1101, 1141 (C.D. Cal. 2003). "Under California law, negligent
25 misrepresentation is a species of actual fraud." *Lorenz v. Sauer*,
26 807 F.2d 1509, 1511-12 (9th Cir. 1987); see also *Kolodge v. Boyd*,
27 88 Cal. App. 4th 349, 372 (2001).

28 Applying Rule 9(b), Hartford argues that American Dairy's

1 counterclaim for negligent misrepresentation is insufficiently
2 pled. Hartford contends that American Dairy fails to identify the
3 necessary details such as the "who, what, when, and where" of the
4 misconduct. According to Hartford, American Dairy has not
5 specifically identified the person who made the alleged
6 misrepresentations, who heard them, the content of the
7 misrepresentations, why they are false, and when the
8 misrepresentations (other than the April 9, 2008) occurred.

9 The allegations asserted in the negligent misrepresentation
10 claim do, in fact, lack sufficient detail. American Dairy's
11 counterclaim reads in part:

12 53. Through the *representations and conduct of*
13 *HARTFORD's authorized and appointed agents and*
14 *representatives*, AMERICAN DAIRY purchased policies and
15 paid premiums to HARTFORD in good faith and belief that
16 it was obtaining adequate commercial property insurance
17 to protect it in the event of a loss such as what
18 occurred in May 2008.

19

20 56. AMERICAN DAIRY reasonably and justifiably relied on
21 the *representations, promises and statements made by*
22 *HARTFORD and its authorized representatives and agents*
23 *because HARTFORD and its authorized representatives and*
24 *agents* represented that they had superior knowledge and
25 were in a superior position to provide expert advice and
26 recommendations to AMERICAN DAIRY.

27 57. Based upon the *representations, promises and*
28 *statements made by HARTFORD and its authorized*
29 *representatives and agents*, AMERICAN DAIRY was induced to
30 purchase policies from HARTFORD and pay the required
31 premiums . . .

32 58. In addition, after the policy was issued, and based
33 on the *representations and promises made in advance of*
34 *and during the April 9, 200[8] inspection*, AMERICAN DAIRY
35 was lead to believe that if AMERICAN DAIRY's current use
36 and/or operation of THE PROPERTY increased the risk of
37 loss or otherwise created a problem for coverage,
38 HARTFORD would have clearly and explicitly alerted and

1 advised AMERICAN DAIRY of the problem . . .

2 While American Dairy repeatedly pleads that "representations"
3 were made by "authorized" and "appointed" "agents" and
4 "representatives" American Dairy fails to specify the *content* of
5 the representations it is suing over, the identity of the agents
6 and representatives, *when* the representations were made (except for
7 the April 2008 representation), *what* precisely is *false* or
8 *inaccurate* about the representations and *why*. Because American
9 Dairy's counterclaim for negligent misrepresentation fails to
10 specify the necessary particular facts, it is insufficiently pled
11 under Rule 9(b). See *Kearns*, 567 F.3d at 1126 (concluding that
12 allegations of misrepresentation did not meet 9(b)'s requirements
13 because "the particular circumstances surrounding such
14 representations" were not provided, including the "who, what, when,
15 where, and how of the misconduct alleged"); *Vess*, 317 F.3d at 1106-
16 07 (concluding that allegations of a fraudulent conspiracy claim
17 failed to meet Rule 9(b)'s requirement because they did "not
18 provide the particulars of when, where, or how").

19 In opposition to the motion, American Dairy points to various
20 allegations it "incorporated by reference" into its negligent
21 misrepresentation claim which, according to American Dairy, provide
22 the necessary specificity. These incorporated allegations mention
23 the names of individuals such as "J. Helzer" and "Adam Bromhead"
24 who were "agents" and/or "representatives" of Hartford. These
25 allegations also describe some representations that were made. For
26 example, American Dairy points to paragraph 9 which states
27 "HARTFORD'S authorized and appointed representatives and agents
28

1 repeatedly assured AMERICAN DAIRY that the policy purchased from
2 HARTFORD would provide full and complete coverage to AMERICAN DAIRY
3 for losses that might be sustained to THE PROPERTY, notwithstanding
4 the fact that no manufacturing or processing activities were
5 ongoing." (Doc. 9 at 3.)³ These incorporated allegations also
6 provide some dates and time-frames such as "at the time the policy
7 was purchased" and "in advance of the April 9, 2008, meeting." (*Id.*
8 at 3, 5.)

9 It is true that American Dairy's pleading contains some names,
10 dates and time-frames, and the nature of some representations. As
11 Hartford notes in reply, however, American Dairy fails to "link"
12 these allegations together and specify who said what to whom and
13 when. Alleging the names of X and Y, a few dates, and the content
14 of some representations is not the same thing as alleging that X
15 and Y made representations, when they did so, and what they each
16 said.

17
18 ³ American Dairy also points to certain paragraphs which
19 American Dairy suggests contain negligent misrepresentations but,
20 in reality, these paragraphs concern alleged non-disclosure or
21 concealment by Hartford, *i.e.*, Hartford's failure to speak up about
22 a lack of coverage due to the vacant status of the Property. A
23 negligent misrepresentation claim is distinct from a fraud claim
24 based on non-disclosure or concealment. A negligent
25 misrepresentation claim requires an "assertion" of that which is
26 not true without a reasonable basis for believing it was true.
27 *Conroy v. Regents of the Univ. of Cal.*, 45 Cal. 4th 1244, 1255
28 (2009); see also *Wilson v. Century 21 Great W. Realty*, 15 Cal. App.
4th 298, 306 (1993) (negligent misrepresentation requires a
"positive assertion" or "assertion" of fact, and "[a]n implied
assertion or representation is not enough") (internal citation and
quotation marks omitted); *In re Daisy Sys. Corp.*, 97 F.3d 1171,
1181 (9th Cir. 1996).

1 Even though American Dairy incorporates all its prior
2 allegations in its negligent misrepresentation claim, American
3 Dairy's pleading fails to specify which particular
4 "representations" it is relying upon to support its negligent
5 misrepresentation claim, the parties to these particular
6 representations, when these particular representations were made,
7 and what about these representations is false and why. American
8 Dairy's indiscriminate incorporation by reference of all its prior
9 allegations shifts the burden to the court to try to find the
10 elements of a coherent claim and leaves doubt about which
11 particular misrepresentations form the basis for the negligent
12 misrepresentation claim.

13 Various matters are asserted in American Dairy's pleading
14 that, arguably, could be considered a "representation," and it is
15 not clear whether American Dairy intends to rely upon them in
16 support of its negligent misrepresentation claim. For example,
17 American Dairy incorporates by reference, in its negligent
18 misrepresentation claim, the prior allegation that Hartford
19 "advised" American Dairy that Hartford "intended to conduct an on-
20 site inspection of the" Property for the "express purpose" of
21 "helping" to avoid "property losses." (Doc. 9 at 4, 13.) Even
22 though, by virtue of the incorporation, this conduct by Hartford is
23 part of the negligent misrepresentation claim, it is not clear
24 whether American Dairy considers this a "representation," what the
25 "representation" is and why it constitutes a negligent
26 misrepresentation. Hartford is not required to read between the
27 lines and attempt to ascertain what particular representations are
28

1 included in American Dairy's negligent misrepresentation claim.
2 Under Rule 9(b), the pleader, American Dairy, is obligated to spell
3 it out.

4 American Dairy has not sufficiently specified the particular
5 representations that form the basis of its negligent
6 misrepresentation claim, the parties to these representations, when
7 these representations were made, what precisely is false or
8 inaccurate about these representations and why. Because American
9 Dairy's counterclaim for negligent misrepresentation fails to
10 specify the necessary particulars, it is DISMISSED WITH LEAVE TO
11 AMEND.

12 B. Reformation/Unilateral Mistake Claim

13 Like the claim for negligent misrepresentation, Hartford
14 argues that American Dairy's counterclaim for
15 reformation/unilateral mistake also is devoid of the necessary
16 particulars. The reformation/unilateral mistake claim alleges, in
17 part:

18 62. AMERICAN DAIRY reasonably believed and expected that
19 the HARTFORD policy would contain complete coverage for
20 property losses, such as burglary and vandalism losses,
21 notwithstanding the fact that AMERICAN DAIRY's
22 manufacturing and processing operations were delayed
23 pending the required modifications and renovations to THE
24 PROPERTY, and notwithstanding the fact that its
25 renovation and modification efforts might be delayed for
26 a period of more than 60 days pending obtaining necessary
27 permits from the governmental authorities.

28 63. HARTFORD, and/or its authorized agents and
representatives knew of the unilateral mistake at the
time the HARTFORD policy was negotiated because it knew
that the renovation and construction activities would
take longer than 60 days to complete, and were in fact
taking longer than 60 days to commence because of the
need to obtain required permits from the governmental
authorities.

1 On close examination, American Dairy's counterclaim does not
2 specifically state what exactly constitutes "the unilateral
3 mistake." Nevertheless, reading the two paragraphs together, a
4 plausible interpretation of the pleading is that American Dairy
5 alleges that "the unilateral mistake" was a belief that it was
6 purchasing a policy that would provide coverage for losses, like
7 the one it suffered, even if its Property remained under
8 construction or renovation for more than sixty (60) days (i.e.,
9 despite its vacant status). But neither in its pleading nor in its
10 opposition brief does American Dairy squarely state or confirm that
11 this is "the unilateral mistake" at issue. Another paragraph in
12 the reformation/unilateral mistake claim, paragraph 61, suggests
13 that the "mistake" involves an "unaware[ness]" that the Policy "as
14 written" contradicted "the terms" "intended and agreed to by the
15 parties." (Doc. 9 at 15.) However, these "terms" are not described
16 in the pleading. The nature of the unilateral mistake is not
17 specifically defined.

18 Even assuming, *arguendo*, that American Dairy's pleading
19 sufficiently identifies the nature of the unilateral mistake at
20 issue, its pleading is still insufficient under Rule 9(b).
21 American Dairy does not specify the circumstances of the unilateral
22 mistake such as who at American Dairy made the mistake, when the
23 mistake was made, and how the mistake occurred. American Dairy's
24 incorporation by reference of all its prior allegations does not
25 cure these deficiencies.

26 American Dairy's counterclaim for reformation/unilateral
27 mistake is not pled with the requisite specificity under Rule 9(b).
28

1 This claim is DISMISSED WITH LEAVE TO AMEND.

2 In addition to its Rule 9(b) argument, Hartford contends that
3 American Dairy's counterclaim fails because it is not properly pled
4 in the alternative. Hartford notes that, at the outset of the
5 counterclaim for reformation/unilateral mistake, American Dairy
6 "incorporates by reference" all previous allegations in its
7 pleading. These incorporated allegations include the allegation
8 that there is coverage under the Policy. This is in direct
9 conflict with the premise in American Dairy's claim for
10 reformation/unilateral mistake that there is no coverage. These
11 allegations cannot be reconciled. Hartford argues that the
12 contradiction or inconsistency created by American Dairy's
13 incorporation by reference pleading strategy, and American Dairy's
14 associated failure to properly plead in the alternative, renders
15 American Dairy's counterclaim for reformation/unilateral mistake
16 subject to dismissal for failure to state a claim. In opposition,
17 American Dairy argues that the pleading should be construed as
18 asserting a reformation/unilateral mistake claim in the
19 alternative.

20 Hartford's argument is unpersuasive. It has ignored or
21 overlooked key language in the pleading. The reformation/unilateral
22 mistake claim starts off with the incorporation by reference
23 allegation:

24 60. Counter-Claimant incorporates by reference its
25 allegations set forth in paragraphs 1 through 59,
inclusive, of the Counter-Claim.

26 However, the next sentence includes a significant modifier:

27 61. *To the extent it is determined that the HARTFORD*

1 *policy does not provide coverage for AMERICAN DAIRY's May*
2 *2008 loss, it fails to reflect the true intent and*
3 *agreement of the parties which is the result of a*
4 *unilateral mistake on the part of AMERICAN DAIRY.*

5 (Doc. 9 at 15.) By alleging "to the extent it is determined" that
6 the Policy "does not provide coverage," American Dairy expresses
7 that it is pleading its reformation/unilateral mistake claim in an
8 alternative, even if inconsistent way, which is expressly permitted
9 by Rule 8(d) (2).

10 American Dairy's claim for breach of contract and, to some
11 extent, its claim for breach of the implied covenant of good faith
12 and fair dealing, is premised on the assertion that the Policy
13 provides coverage. The "to the extent" language in the
14 reformation/unilateral mistake claim represents a "formulation from
15 which it can be reasonably inferred," *Holman*, 211 F.3d at 407, that
16 American Dairy is pleading this claim alternatively or
17 hypothetically - in the event the Policy does not provide coverage,
18 American Dairy pleads a claim for reformation/unilateral mistake.
19 See 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice &*
20 *Procedure* § 1282 (3d ed. 2004) (generally an alternative claim is
21 drafted in the form of "either-or" and a hypothetical claim is in
22 the form of "if-then"). Because this language appears *after* the
23 incorporation by reference allegation, not before it, American
24 Dairy's claim is not internally inconsistent.

25 Hartford's argument that this claim is not properly pled in
26 the alternative is not persuasive and does not provide a separate
27 basis for dismissal. The motion to dismiss on this ground is
28 DENIED.

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V. CONCLUSION

For the reasons stated:

1. Hartford's motion to dismiss American Dairy's counterclaims for negligent misrepresentation and reformation/unilateral mistake on the grounds that these counterclaims are not pled with the particularity required under Rule 9(b) is GRANTED, and these counterclaims are DISMISSED WITH LEAVE TO AMEND.

2. Hartford's motion to dismiss American Dairy's counterclaim for reformation/unilateral mistake on the ground that this counterclaim is not properly pled in the alternative is DENIED.

Defendant has until December 24, 2009, to file an amended pleading. If an amended pleading is timely filed, Plaintiff's responsive pleading is due by January 25, 2010.

Plaintiff shall submit a form of order consistent with this Memorandum Decision within five (5) days following electronic service of this decision.

IT IS SO ORDERED.

Dated: November 25, 2009

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE