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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LINCOLN GENERAL INSURANCE
COMPANY,

NO. CIV. S-07-1015 LKK/EFB

Plaintiff,

v.

O R D E R

ACCESS CLAIMS ADMINISTRATORS,
INC., and DOES 1 through 75,
inclusive, et al.,

Defendants.

_____ /

This is an action brought by an insurance company, Lincoln
General Insurance Company ("Lincoln"), against its corporate claims
administrator, Access Claims Administrators ("Access"), over the
alleged mishandling of a claim arising from an automobile accident.
Pending before the court is defendant's motion for summary
judgment. The court resolves the motion upon the papers and after
oral argument.

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1 **I. FACTS¹**

2 Lincoln brought suit against Access, a claim administrator.
3 Compl. ¶¶ 1-2. Lincoln is an insurance company that writes
4 automobile policies in California and various other states.
5 Defendant's Statement of Undisputed Facts ("Def.'s SUF") ¶ 1.
6 Pursuant to a Claims Service Agreement between the parties, Access
7 administered claims for Lincoln's California nonstandard insurance
8 program. Def.'s SUF ¶ 2. Access, in its capacity as a claims
9 administrator, provided a number of services for Lincoln, including
10 investigating liability and negotiating claims through settlement
11 or final disposition and issuing all claim payments with funds
12 provided by Lincoln; preparing and filing all reports; and
13 coordinating, directing and managing litigation activity. Access'
14 Deposition Exhibit 1 In Support of Defendant's Motion for Summary
15 Judgment ("Claims Service Agreement") at 1-2. In the present
16 action, Lincoln alleges that Access mishandled a claim that arose
17 out of an automobile accident and a subsequent third-party personal
18 injury claim, which Lincoln eventually settled. The complaint
19 alleges three causes of action: (1) breach of contract, (2) breach
20 of good faith and fair dealing, and (3) fraud/intentional deceit.²

21 _____
22 ¹All facts are undisputed unless otherwise noted.

23 Each party has objected to various pieces of evidence tendered
24 by the other. Some of the evidence to which an objection has been
25 made is irrelevant to the court's analysis of the summary judgment
26 motion. To the extent that the evidence is relevant, the objections
are OVERRULED, except as discussed in note 19, *infra*.

²The original complaint also alleged causes of action for
negligence and negligent misrepresentation, which have since been
dismissed. See Order, Aug. 29, 2007.

1 **A. The Dias Claim**

2 On March 4, 2003, Manuel Coleman and his two daughters, Shyan
3 and Lanisha, were injured in an automobile accident with David and
4 Diana Dias ("the Diases"). Def.'s SUF ¶ 5. As a result of the
5 accident, Diana Dias was rendered a paraplegic, Lanisha Coleman
6 suffered neck and back injuries and Shyan Coleman sustained a head
7 injury. Def.'s SUF ¶ 7. At the time, Coleman was insured under a
8 Lincoln policy (the "policy"). Def.'s SUF ¶ 3. The policy had
9 bodily injury limits of \$15,000 per person and \$30,000 per
10 accident. Def.'s SUF ¶ 4. Coleman denied liability for the accident
11 because he was rear-ended by a hit-and-run vehicle. Def.'s SUF ¶
12 8. Coleman's daughters and the Diases filed claims under the
13 policy. Def.'s SUF ¶ 9. Pursuant to the Claims Service Agreement
14 between Access and Lincoln, Access was to handle the defense of the
15 Diases's lawsuit. Claims Service Agreement at 1, ¶ 4.

16 In January 2004, Access adjustor Tracy Eggers ("Eggers") was
17 handling the Dias' claim on behalf of Access. Def.'s SUF ¶ 15.
18 Eggers's notes indicate that he concluded that Coleman was 100
19 percent at fault for the accident. Deposition of Tracy Eggers
20 ("Eggers Depo.") at 70:5-72:25. Eggers set the bodily-injury
21 reserves for David and Diana Dias at the maximum policy limit of
22 \$15,000 per person and \$30,000 per accident. Id. at 32:15-17.
23 Although Eggers does not know the reason, an unknown employee of
24 Access reduced the reserves Eggers had set for the Diases to a
25 lower number. Id. at 89:10-90:22.

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1 **B. The Diases' Demand Letter**

2 Lincoln alleges that on October 8, 2003 the Dias' attorney,
3 Gary Dolinski, sent a letter to Eggers asking whether Coleman's
4 daughters were making a claim for injuries as a result of the car
5 accident with the Diases. Lincoln's Deposition Exhibit 8 In Support
6 of Plaintiff's Opposition to Defendant's Motion for Summary
7 Judgement. Dolinski wrote Eggers on several subsequent occasions,
8 following up on the issues raised in the October 8 letter and
9 complaining that no one had responded to him. Lincoln's Deposition
10 Exhibits 9, 10, 11 In Support of Plaintiff's Opposition to
11 Defendant's Motion for Summary Judgement; Deposition of Gary
12 Dolinski ("Dolinski Depo.") at 15-21.

13 On January 20, 2004, Dolinski prepared a time-limited joint
14 demand for the full \$30,000 policy limits for both Diana Dias and
15 David Dias. Def.'s SUF ¶ 10. The demand letter included a ten-day
16 deadline requiring a response by January 30, 2004. Def.'s SUF ¶ 11.
17 Access did not respond to the January 20 demand letter prior to
18 close of business on January 30, 2004. Access' Deposition Exhibits
19 138A, 139 In Support of Defendant's Motion for Summary Judgment;
20 Dolinski Depo. at 28:12-15. On January 30, 2004, Dolinski's firm
21 faxed two letters to Access discussing the time-limited settlement
22 demand ("the January 30 Letters"). Access' Deposition Ex. 138A,
23 139. The first letter was faxed in the afternoon, stating:

24 It is now 5:00 p.m. E.S.T., your time on the East Coast.
25 . . Access General and Lincoln General had (sic.) Until
today at 5:00 p.m., P.S.T., our time here in California.
26 . . Absent timely acceptance of the policy limits demand
today, Lincoln General will be responsible for the

1 entire verdict that my clients are awarded in this
2 case...Again, this demand expires **TODAY AT 5:00 P.M.**
3 **WEST COAST TIME.** Unless it is timely accepted as
instructed in my letter of January 20, the demand will
not be renewed again.

4 Access' Deposition Ex. 138A (emphasis in original). The second
5 letter was faxed after 5:00 P.M. Pacific Standard Time on the same
6 day. The second letter stated, "We are writing now to confirm that
7 since you did not accept the demand, the demand has expired. If
8 your understanding is other than above, please so advise me,
9 immediately." Access' Deposition Ex. 139.

10 Eggers has testified that although he was ill during part of
11 January 2004, he came to work for portions of each workday for that
12 month to keep abreast of claim-related mail. Def.'s SUF ¶ 16.
13 Eggers testified that he did not receive the demand letter or
14 follow-up correspondence. Eggers Depo. at 96:10-98:15. According
15 to Lincoln, a fax confirmation shows successful transmission of
16 both the demand letter to Access on January 20, 2004 and the first
17 of two letters sent on January 30, 2004. Access' Deposition Ex. 139
18 at D00479-480. Access, however, has tendered evidence that Dolinski
19 had no personal knowledge of the delivery of the demand letter or
20 January 30, 2004 letters and could not testify that the letters
21 were accurately faxed. Dolinski Depo. at 22:13-22, 29:18-24, 57:21-
22 58:13.

23 To buttress its contention that Access received the letters,
24 Lincoln offers evidence that the demand letter and the January 30,
25 2004 letters were produced by Access when Lincoln demanded Access'
26 claims file for the Dias claim and the subsequent Dias lawsuit.

1 Declaration of Brian P. Worthington, In Support of Plaintiff's
2 Opposition to Defendant's Motion for Summary Judgement
3 ("Worthington Decl.") ¶¶ 9-10. Access adjustor Sally Walsh also saw
4 the January 20 Demand Letter and the January 30 letters in Access'
5 claims file for the Dias claim sometime before the settlement of
6 the Dias lawsuit. Deposition of Sally Walsh ("Walsh Depo.") at
7 13:9-18:15. Finally, Lincoln notes that on February 10, 2004,
8 Eggers wrote Dolinski stating, "I apologize for any delay in
9 evaluating documents submitting by your office. I have been out of
10 the office with a series of illnesses . . . I expect to be able to
11 address your faxes and calls by the end of the week." Lincoln's
12 Deposition Exhibit 15 In Support of Plaintiff's Opposition to
13 Defendant's Motion for Summary Judgement.

14 **C. Access's Communications With the Diases's Counsel**

15 The Diases took the position that Lincoln, through Access,
16 "opened" the \$30,000 limit on the policy by failing to respond to
17 the demand letter.³ Def.'s SUF ¶ 19. On February 11, 2004, a lawyer
18 in Dolinski's firm, Joseph Carcione, wrote to Access that, "Because
19 no one at [Access] replied to Mr. Dolinski's policy limits demand
20 in a timely manner, California law provides that Lincoln General
21 will be responsible for whatever the verdict is that my clients are
22 awarded in this case." Lincoln's Deposition Exhibit 17 In Support

23
24 ³ The court understands the term "opened," to refer to a
25 situation when an insurance company may become liable for an amount
26 in excess of its policy limits arising from the insurer's breach
of its duty of good faith by failing to accept reasonable
settlement offers. See PPG Industries, Inc. v. Transamerica Ins.
Co., 20 Cal. 4th 310, 315 (1999).

1 of Plaintiff's Opposition to Defendant's Motion for Summary
2 Judgement. Eggers testified to having received this letter. Eggers
3 Depo. at 101:14-102:3. Even though Eggers received this letter, he
4 has no recollection of corresponding or attempting to contact
5 Dolinski or Carcione before May 20, 2004. Id. at 101:14-104:15.
6 Moreover, Eggers never told Dolinski that Access had not received
7 the January 20 Demand Letter. Dolsinki Depo. at 29:7-17.

8 Eggers wrote to Carcione on May 20, 2004 requesting
9 documentation of the Dias' injuries. Eggers Depo. at 104:20-23.
10 In that letter, Eggers did not ask Carcione to clarify what he was
11 referring to in his February 11, 2004 letter when he stated that
12 no one at Access had timely replied to Dolinski's Demand Letter.
13 Id. at 104:24-107:6. Access has been unable to produce or locate
14 a copy of this May 20, 2004 letter. Worthington Decl. ¶ 11.

15 Eggers wrote Dolinski's firm another letter on July 8, 2004
16 seeking the "status as to demand packages for [Dolinski's]
17 clients." Lincoln's Deposition Ex. 16 In Support of Pl.'s Opp'n to
18 Def.'s Mot. for Summ. J. This letter does not mention that Access
19 had never received a policy limits demand from Dolinski's firm. Id.

20 **D. Dias Litigation**

21 Although the Diases's attorney purportedly sent the demand
22 letter to Access on January 20, 2004, Lincoln claims it first heard
23 about the claim at the end of January, 2005, a year later. Kirk
24 Decl. ¶¶ 2-3; see also Def.'s SUF ¶ 37.

25 Per the Claims Service Agreement between Lincoln and Access,
26 Access was required to "coordinate, direct and manage litigation

1 activity" to Access. Claims Service Agreement at 1, ¶ 4. In
2 addition, Access was responsible for "assigning defense" to an
3 attorney chosen from an approved legal counsel list subject to
4 Lincoln's control. Access maintains that they properly retained
5 California lawyers for Lincoln. They hired Attorney James Haigh to
6 provide an opinion for Lincoln as to whether the policy limits had
7 opened. Def.'s SUF ¶ 40. Lincoln used Haigh's brief in the Second
8 Mediation, to argue that the policy limits had not opened. Def.'s
9 SUF ¶ 41. In addition, Access hired law firm Tharpe & Howell to
10 defend Coleman. Def.'s SUF ¶ 42.

11 Lincoln chose not to continue with any counsel provided by
12 Access and instead retained attorney Clark Burnham to evaluate
13 Lincoln's exposure in the Dias lawsuit. Plaintiff's Statement of
14 Undisputed Facts ("Pl.'s SUF") ¶ 38. Burnham advised Lincoln that
15 a "probability" exists that they "would face an excess exposure"
16 and stated "this is a case you want to settle." Deposition of Clark
17 Burnham ("Burnham Depo.") at 66:5-18, 68:6-14. Lincoln wrote Access
18 on January 25, 2005 maintaining that because of "Access' poor or
19 improper handling of the [Dias] claim" they expected to be
20 "reimbursed all funds above the policy limits." Lincoln's
21 Deposition Exhibit 54 In Support of Plaintiff's Opposition to
22 Defendant's Motion for Summary Judgement at 3. Lincoln wrote Access
23 again on February 2, 2005 noting that they expected Access to
24 control the litigation in the Dias matter and asking "What specific
25 amount, if any, does Access plan on having available for settlement
26 purposes on the 7th?... It is the position of Lincoln that any

1 extra contractual exposure is the responsibility of Access and/or
2 Access' E&O carrier." Id. at 1.

3 The Dias eventually demanded \$10 million to settle their
4 claim. Def.'s SUF ¶ 20. Lincoln sent letters prior to the
5 mediation of the Dias claim demanding Access' attendance, that they
6 be "prepared to resolve this case" and "seeking [Access'] input."
7 Lincoln's Deposition Exhibits 82, 93 In Support of Plaintiff's
8 Opposition to Defendant's Motion for Summary Judgment. Lincoln has
9 tendered evidence that despite its request, Access provided no
10 defense strategy to Lincoln and Access representatives attended the
11 Dias mediation with no authority to offer any money toward
12 settlement. Kirk Depo. at 94:19-95:24; Deposition of Jerry Morris
13 ("Morris Depo.") at 51:10-52:16. Lincoln asserts that Access
14 offered nothing towards the settlement of the Dias lawsuit beyond
15 "help with regards to the defenses to be used in the upcoming
16 trial." Deposition of Michael Meadows (Meadows Depo.") at 213:20-
17 25.

18 The Dias lawsuit was mediated on March 10, 2004, with both
19 representatives from Access and Lincoln present, and again on March
20 28, 2004, with only Lincoln's representatives in attendance. Def.'s
21 SUF ¶¶ 27, 29. Lincoln claims to have excluded Access from the
22 second mediation because "Access was not willing to offer money
23 toward any settlement, and because Lincoln had already asked for
24 Access' input on settlement strategy but had received no response."
25 Pl.'s SUF ¶ 47.

26 Lincoln settled the Dias claim on March 30, 2005 for \$3.8

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million, to "mitigate its exposure and protect its insured from personal liability." Declaration of Tim Kirk In Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment Lincoln ("Kirk Decl.") ¶ 9. Access contends that it was not consulted about this settlement. Def.'s SUF ¶ 32.

F. The Diasas' Products Liability Lawsuit

On March 3, 2005, the Diasas filed a products liability lawsuit (the "Products Lawsuit") against Billings Chevrolet-Geo, Inc., General Motors Corp., and Les Schwab Tire Centers of California, Inc. Tuff County, Inc. was later added as a defendant to the products liability suit. The lawsuit sought damages for the injuries sustained by the Diasas as a result of the auto accident with the Colemans. Def.'s SUF ¶¶ 45, 47. Lincoln chose not to pursue any claims against the defendants in the products liability lawsuit. Def.'s SUF ¶ 49. The products lawsuit settled out of court for an undisclosed amount.⁴ Def.'s SUF ¶ 48.

G. Lincoln's Reinsurance

Lincoln is a party to several reinsurance agreements, through which it has received \$498,000 from Kingsway Reinsurance Corporation of Barbados and \$1,890,000 under a clash reinsurance agreement with Kingsway and Chubb Reinsurance, Inc. Def.'s SUF ¶¶

⁴Pursuant to the court's order and the July 1, 2008 protective order in this case, the amount of the settlement of the Diasas' products liability suit has been sealed.

1 50-51. Lincoln also had a separate Loss Portfolio Transfer
2 Agreement ("LPTA") with Kingsway. Def.'s SUF ¶ 52. Access and
3 Lincoln dispute whether Lincoln received any reimbursement for the
4 Dias settlement or the costs of defending Coleman under the LPTA.
5 See Declaration of Gary Orndorff In Support of Pl.'s Opp'n to Mot.
6 for Summ. J. ("Orndorff Decl.") ¶¶ 2-6; Orndorff Depo. at 40:13-
7 41:6. Access has tendered evidence, however, that "100 percent" of
8 whatever recovery Lincoln is awarded in the instant suit would go
9 to its reinsurers under either the reinsurance agreement, the clash
10 reinsurance agreement, or the LPTA. Orndorff Depo. at 40:13-41:6.

11 **II. SUMMARY JUDGMENT STANDARD UNDER FEDERAL RULE OF CIVIL**
12 **PROCEDURE 56**

13 Summary judgment is appropriate when it is demonstrated
14 that there exists no genuine issue as to any material fact,
15 and that the moving party is entitled to judgment as a matter
16 of law. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co.,
17 398 U.S. 144, 157 (1970); Poller v. Columbia Broadcast System,
18 368 U.S. 464, 467 (1962); Jung v. FMC Corp., 755 F.2d 708, 710
19 (9th Cir. 1985); Loehr v. Ventura County Community College
20 Dist., 743 F.2d 1310, 1313 (9th Cir. 1984).

21 Under summary judgment practice, the moving party
22 [A]lways bears the initial responsibility of
23 informing the district court of the basis for its
24 motion, and identifying those portions of "the
25 pleadings, depositions, answers to interrogatories,
26 and admissions on file, together with the
affidavits, if any," which it believes demonstrate
the absence of a genuine issue of material fact.

1 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here
2 the nonmoving party will bear the burden of proof at trial on
3 a dispositive issue, a summary judgment motion may properly be
4 made in reliance solely on the 'pleadings, depositions,
5 answers to interrogatories, and admissions on file.'" Id.
6 Indeed, summary judgment should be entered, after adequate
7 time for discovery and upon motion, against a party who fails
8 to make a showing sufficient to establish the existence of an
9 element essential to that party's case, and on which that
10 party will bear the burden of proof at trial. Id. at 322.
11 "[A] complete failure of proof concerning an essential element
12 of the nonmoving party's case necessarily renders all other
13 facts immaterial." Id. In such a circumstance, summary
14 judgment should be granted, "so long as whatever is before the
15 district court demonstrates that the standard for entry of
16 summary judgment, as set forth in Rule 56(c), is satisfied."
17 Id. at 323.

18 If the moving party meets its initial responsibility, the
19 burden then shifts to the opposing party to establish that a
20 genuine issue as to any material fact actually does exist.
21 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S.
22 574, 586 (1986); First Nat'l Bank of Arizona v. Cities Serv.
23 Co., 391 U.S. 253, 288-89 (1968); Ruffin v. County of Los
24 Angeles, 607 F.2d 1276, 1280 (9th Cir. 1979), cert. denied,
25 455 U.S. 951 (1980).

26 ////

1 In attempting to establish the existence of this factual
2 dispute, the opposing party may not rely upon the denials of
3 its pleadings, but is required to tender evidence of specific
4 facts in the form of affidavits, and/or admissible discovery
5 material, in support of its contention that the dispute
6 exists. Rule 56(e); Matsushita, 475 U.S. at 586 n. 11; First
7 Nat'l Bank, 391 U.S. at 289; Strong v. France, 474 F.2d 747,
8 749 (9th Cir. 1973). The opposing party must demonstrate that
9 the fact in contention is material, i.e., a fact that might
10 affect the outcome of the suit under the governing law,
11 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986);
12 T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809
13 F.2d 626, 630 (9th Cir. 1987), and that the dispute is
14 genuine, i.e., the evidence is such that a reasonable jury
15 could return a verdict for the nonmoving party, Anderson, 242
16 U.S. 248-49; Wool v. Tandem Computers, Inc., 818 F.2d 1433,
17 1436 (9th Cir. 1987).

18 In the endeavor to establish the existence of a factual
19 dispute, the opposing party need not establish a material
20 issue of fact conclusively in its favor. It is sufficient that
21 "the claimed factual dispute be shown to require a jury or
22 judge to resolve the parties' differing versions of the truth
23 at trial." First Nat'l Bank, 391 U.S. at 290; T.W. Elec.
24 Serv., 809 F.2d at 631. Thus, the "purpose of summary judgment
25 is to 'pierce the pleadings and to assess the proof in order
26 to see whether there is a genuine need for trial.'"

1 Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)
2 advisory committee's note on 1963 amendments); International
3 Union of Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401,
4 1405 (9th Cir. 1985).

5 In resolving the summary judgment motion, the court
6 examines the pleadings, depositions, answers to
7 interrogatories, and admissions on file, together with the
8 affidavits, if any. Rule 56(c); Poller, 368 U.S. at 468; SEC
9 v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982). The
10 evidence of the opposing party is to be believed, Anderson,
11 477 U.S. at 255, and all reasonable inferences that may be
12 drawn from the facts placed before the court must be drawn in
13 favor of the opposing party, Matsushita, 475 U.S. at 587
14 (citing United States v. Diebold, Inc., 369 U.S. 654, 655
15 (1962) (per curiam)); Abramson v. University of Hawaii, 594
16 F.2d 202, 208 (9th Cir. 1979). Nevertheless, inferences are
17 not drawn out of the air, and it is the opposing party's
18 obligation to produce a factual predicate from which the
19 inference may be drawn. Richards v. Nielsen Freight Lines, 602
20 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898,
21 902 (9th Cir. 1987).

22 Finally, to demonstrate a genuine issue, the opposing
23 party "must do more than simply show that there is some
24 metaphysical doubt as to the material facts. . . . Where the
25 record taken as a whole could not lead a rational trier of
26 fact to find for the nonmoving party, there is no 'genuine

1 issue for trial.'" Matsushita, 475 U.S. at 587 (citation
2 omitted).

3 **III. ANALYSIS**

4 Access has brought a motion for summary judgment against
5 Lincoln for the remaining three causes of action: (1) breach
6 of contract, (2) breach of good faith and fair dealing, and
7 (3) fraud/intentional deceit. The court considers each in
8 turn.

9 **A. Breach of Contract**

10 A cause of action for breach of contract includes four
11 elements: that a contract exists between the parties, that the
12 plaintiff performed his contractual duties or was excused from
13 nonperformance, that the defendant breached those contractual
14 duties, and that plaintiff's damages were a result of the
15 breach. Reichert v. General Ins. Co., 68 Cal.2d 822, 830
16 (1968); First Commercial Mortgage Co. v. Reece, 89 Cal.
17 App.4th 731, 745 (2001). Here, the parties appear not to
18 dispute that a contract existed between them and that Lincoln
19 fully performed under the contract. Instead, the dispute
20 centers on whether Access breached and, if so, whether Lincoln
21 suffered damages as a result.

22 Lincoln has alleged that Access breached the Claims
23 Agreement in two ways:

24 a)By failing to properly investigate
25 liability, damages and coverages;
26 evaluate, negotiate claims through
settlement or final disposition; and issue

1 all claim payments with funds provided by
2 Lincoln General; and

3 b)By failing to properly prepare and file
4 all reports and handle all claims in
5 accordance with established claims
6 procedures and California Department of
7 Insurance guidelines.⁵

8 Compl. ¶ 21. The court considers each allegation in turn.

9 **1. Access' Failure to Respond to the Diases' Demand**
10 **Letter**

11 **a. Evidence of Breach**

12 The pertinent provision of the contract between Lincoln
13 and Access requires that Access "Investigate liability,
14 damages and coverages, evaluate, negotiate claims through
15 settlement or final disposition. . ." Claims Service Agreement
16 at 1, ¶ 1. The crux of Lincoln's first allegation for breach
17 of contract is that Access failed to respond, in any way, to
18 the Diases' January 20, 2004 Demand Letter and that failure
19 constituted a breach of this provision of the contract, as
20 well as exposed Lincoln to a claim for "bad faith liability"
21 brought by Coleman.

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25 ⁵ Plaintiff also alleged that defendant breached the contract
26 "by failing to properly coordinate, direct and manage litigation
activity." Compl. ¶ 21(c). In its opposition to defendant's motion,
plaintiff does not address this ground for its breach of contract
claim. The court therefore assumes that it has abandoned this
ground for the claim.

1 Under California law⁶, "[i]f contractual language is clear
2 and explicit, it governs." Bank of the West v. Superior Court,
3 2 Cal. 4th 1254, 1264 (1992). Contracts should be interpreted
4 by their plain language, unless doing so would result in an
5 absurd construction. Cal. Civ. Code § 1638. The entire
6 contract should be read together as a whole, giving effect to
7 every part. Id. § 1641. When a contract has been reduced to
8 writing, the intent of the parties should be ascertained by
9 the writing alone. Id. § 1639.

10 Lincoln has tendered some evidence from which a jury
11 could find that Access breached the contract by failing to
12 respond to the Diales' January 20, 2004 Demand Letter.
13 Preliminarily, there is some evidence that Access in fact
14 received the demand letter. First, Lincoln notes that there
15 are fax confirmations for the January 20 letter and for the
16 first of the two follow-up letters faxed on January 30, 2004.
17 Access Deposition Ex. 139 at D00479-480. The fax confirmations
18 could lead a reasonable factfinder to believe that they were
19 received by Access' office. Second, in January 2005, when an
20 agent of Lincoln's was conducting an audit of Access' files,
21 he saw the Demand Letter and the two January 30, 2004 follow-
22 up letters in the Dias claim file. Kirk Decl. ¶¶ 2-3. Access
23

24 ⁶ As the court explained in its August 29, 2007 order,
25 California law applies to all disputes arising from the
26 relationship between Access and Lincoln, unless the construction
or interpretation of the contract were at issue, in which case
Pennsylvania law would apply.

1 adjustor Sally Walsh also saw the three letters in the Access
2 claims file sometime before the Dias lawsuit settled. In
3 addition, the three letters were in the documents Access
4 produced because of this lawsuit, when Lincoln demanded
5 Access' file from the Dias claim. Worthington Decl. ¶¶ 9-10.

6 Third, Lincoln notes that on February 10, 2004, Access
7 claims agent Tracy Eggers sent a fax to the Dias' attorney,
8 stating that he had been sick and apologizing for the "delay
9 in evaluating documents submitted by your office," and saying
10 he would "address your faxes" that week. Lincoln Deposition
11 Ex. 15. Lincoln notes that the next day, Carcione sent a
12 letter to Eggers stating that the latter had failed to reply
13 to the Demand Letter. Lincoln's Deposition Ex. 17. Despite
14 alleging never to have received the Demand Letter, there is
15 nothing to indicate that Eggers called or wrote to the Dias'
16 attorneys to say he had never received it. Indeed, neither of
17 the two subsequent letters sent by Eggers, on May 20, 2004 and
18 July 8, 2004, mentioned that Access had never received the
19 Demand Letter. Eggers Depo. at 101-105; Lincoln's Deposition
20 Ex. 16. Lincoln states that a reasonable juror could infer
21 from this that Eggers had received the demand letter, because
22 he otherwise would have indicated to Carcione that he had not
23 received it.

24 Access, however, has tendered evidence that it never
25 received the Diales' demand letter and therefore did not
26 breach the contract by failing to act on it. To support this,

1 Access cites the deposition of Tracy Eggers, who testified in
2 his deposition that, "I can't remember seeing [the demand
3 letter] any time before [the morning of May 8, 2008] and I can
4 pretty much say I didn't see it before the 10th [of February,
5 2004] because it's not noted that there was a demand on the
6 policy." Eggers Depo. at 96:1-9. Eggers testified that he also
7 had no recollection of ever seeing the follow-up letters of
8 January 30, 2004 prior to the morning of the deposition on May
9 8, 2008. Eggers Depo. at 96:15-97:11.

10 In addition, Access argues that the Diasas' attorney "had
11 no personal knowledge of the delivery of the demand letter or
12 the follow-up correspondence [and] had no evidence Access
13 Claims received the TLD or follow up correspondence," because
14 the attorney himself had not faxed the letters. Def.'s Mot.
15 Summ. J. at 11:24-12:1.

16 With the evidence provided by Lincoln and the deposition
17 of Tracy Eggers tendered by Access, it is clear that there
18 remains disputed facts as to whether the Demand Letter was
19 received by Access. A reasonable factfinder could credit
20 Eggers' testimony, that he did not receive the Demand Letter,
21 and thus, this is fundamentally a question of credibility
22 left to the factfinder. On the other hand, a reasonable jury
23 could find that there is sufficient circumstantial evidence
24 that Access did receive the January 20, 2004 and January 30,
25 2004 letters, including the fax confirmations, the fact that
26 these letters were later seen in Access' file, and that Eggers

1 appeared unfazed by Carcione's reference to them in February
2 2004. Moreover, the fact that the Dias'es' attorney himself did
3 not fax the letters does not alone warrant a grant of summary
4 judgment in Access's favor; a reasonable jury could find that
5 the fax confirmations were adequate evidence of the faxes
6 having been sent. The evidence tendered is sufficient to
7 permit a jury to draw reasonable inferences in Lincoln's
8 favor. See Matsushita, 475 U.S. at 587; Diebold, 369 U.S. at
9 655; Abramson, 594 F.2d at 208.

10 **b. Evidence of Damages**

11 Lincoln also has tendered evidence that this alleged
12 breach exposed Lincoln to "bad faith liability," constituting
13 damages for the breach of contract claim. In its relationship
14 to the insured, an insurer has a duty to accept a reasonable
15 settlement demand within the policy limits as part of the
16 covenant of good faith and fair dealing intrinsic to that
17 contractual relationship. Commercial Union Assur. Cos. v.
18 Safeway Stores, Inc., 26 Cal. 3d 912, 916-17 (1980); Comunale
19 v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 659 (1958).

20 Failure to do this risks subjecting the insurer to a "bad
21 faith" claim. Crisci v. Security Ins. Co., 66 Cal. 2d 425, 430
22 (1967); Comunale, 50 Cal. 2d at 659. Once the insurer's "bad
23 faith" has been established, the insurer must pay portions of
24 the judgment exceeding those expressed in the policy limits.⁷

25
26 ⁷Were the Dias'es to obtain a judgment against Coleman in
excess of the policy limits, the Dias'es could then recover on

1 PPG Industries, Inc. v. Transamerica Ins. Co., 20 Cal. 4th
2 310, 315 (1999); Commercial Union, 26 Cal. 3d at 916-17.

3 Ignoring a policy-limits demand letter, without exploring
4 the details of the offer in any way, constitutes bad faith by
5 an insurer. Allen v. Allstate Ins. Co., 656 F.2d 487, 490 (9th
6 Cir. 1981) (applying California law). Even if the settlement
7 offer is unclear, an insurer may act in bad faith by failing
8 to seek clarification of the uncertainty. Betts v. Allstate
9 Ins. Co., 154 Cal. App. 3d 688, 708 (1984). Similarly, an
10 insurer may act in bad faith if it fails to investigate a
11 claim against the insured, so that it may evaluate the
12 reasonableness of a settlement offer. Id. at 707; Egan v.
13 Mutual of Omaha Ins. Co., 24 Cal.3d 809, 818 (1979).

14 Here, Lincoln has tendered evidence that would permit a
15 reasonable jury to find that Access's failure to timely
16 respond to the demand letter or at least seek clarification of
17 any uncertainty, exposed Lincoln to bad faith liability in
18 excess of the policy limits. As described above, Lincoln has
19 tendered evidence that the demand letter was sent to Access on
20 January 20, 2004 seeking a settlement totaling \$30,000 and
21 requesting a response no later than January 30, 2004. Def.'s
22 SUF ¶¶ 10, 11. There is evidence that Access received these
23

24 _____
24 Coleman's bad faith liability claim against Lincoln, by becoming
25 a judgment-creditor and third-party beneficiary to Coleman's
26 insurance policy by operation of law. Hand v. Farmers Ins. Exch.,
23 Cal. App. 4th 1847, 1858-59 (1994); Murphy v. Allstate Ins. Co.,
17 Cal. 3d 937, 942-44 (1976).

1 letters but did not respond to them. Lincoln has tendered
2 evidence that a reasonable insurer "would have recognized that
3 such letters [demand letter and follow-up letters of January
4 30, 2004] created the potential to open the policy limits
5 unless there was a timely and correct response." Lincoln's
6 Deposition Exhibit 250 (Report of Lincoln's Claims-Handling
7 Expert) In Support of Pl.'s Opp. to Def.'s Mot. for Summ. J.
8 at 11.

9 Access is incorrect in asserting that the law does not
10 support a finding of bad faith in such situation. The
11 California courts have been clear that bad faith liability
12 exists to induce an insurer to protect the insured's financial
13 interests with the same diligence as it would its own; the
14 insurer's conduct need not be grossly irresponsible or
15 unreasonable to trigger bad faith liability. See, e.g., Betts,
16 154 Cal. App. 3d at 707; Comunale, 50 Cal. 2d at 659. Given
17 this, a jury could reasonably find that if Lincoln's evidence
18 is credited, Access' action or inaction exposed Lincoln to bad
19 faith liability in excess of the policy limits.

20 Moreover, the court cannot agree with Access's
21 suggestion that the settlement demand was unreasonable as a
22 matter of law, because it was excessive for Diana Dias, it was
23 unsupported with the Diasas' medical records, it did not
24 release liens for the medical bills or attorneys' fees, and
25 because it left no consideration for the claims of the Coleman
26 daughters. See Def.'s Mot. for Summ. J. at 27. The

1 reasonableness of a settlement offer is to be evaluated in
2 light of the victim's injuries and the probable liability of
3 the insured. Johnson v. Cal. State Auto Assn., 15 Cal. 3d 9,
4 16 (1975). Here, there is evidence that Diana Dias was left a
5 paraplegic by the accident, Def.'s SUF ¶ 7, and that Access
6 concluded that Coleman was 100 percent liable for the
7 accident. Eggers' Depo. 70:5-72:25. Access now asserts that
8 the demand was unreasonable because the Coleman policy was a
9 \$15,000/\$30,000 policy. This contention fails in light of
10 Access's failure to respond at all, much less its failure to
11 seek clarification. See Betts, 154 Cal. App. 3d at 708.
12 Moreover, given the circumstances, it is likely that the
13 Diases would have argued the husband's loss of consortium,
14 thus satisfying the reasonableness of their demand. These
15 facts alone could lead a jury to reasonably conclude that
16 Access's failure to respond to a settlement offer of \$30,000
17 was unreasonable. Summary judgment is therefore inappropriate
18 as to this portion of the plaintiff's claim of breach of
19 contract.

20 **2. Access' Failure to Comply With Applicable Claims-**
21 **Handling Statutes and Regulations**

22 Lincoln's second ground for its breach of contract claim
23 is its allegation that Access breached the Claims Agreement by
24 failing to handle the Dias claim in compliance with applicable
25 claims-handling statutes and regulations. See Compl. ¶ 21. The
26 Claims Agreement required Access to "[p]repare and file all

1 reports and handle all claims in accordance with established
2 claims procedures and state guidelines, assuring compliance
3 with the Fair Claims Practice Act, California Insurance Frauds
4 Prevention Act and all other applicable statutes and
5 regulations."⁸ Claims Service Agreement at 1, ¶ 2.

6 **a. Violation of California Regulations**

7 Lincoln alleges first that Access violated the California
8 Insurance Regulations, thereby violating the contract.
9 Specifically, Lincoln alleges that Access failed to comply
10 with the following regulation:

11 Upon receiving any communication from a claimant,
12 regarding a claim, that reasonably suggests that a
13 response is expected, every licensee shall
14 immediately, but in no event more than fifteen (15)
calendar days after receipt of that communication,
furnish the claimant with a complete response based
on the facts as then known by the licensee.

15 10 CCR § 2695.5(b) (2005). Lincoln asserts that Access violated
16 this regulation by not responding to the Diases' demand letter
17 within fifteen days of its receipt. As described above,
18 Lincoln has tendered sufficient evidence that Access received
19 the demand letter and failed to respond to it. Nevertheless,
20 Lincoln has not shown how Access's failure to respond to it
21 within fifteen calendar days caused any damages to Lincoln.
22 Lincoln's theory of the case is that the policy limits were

24 ⁸Although elsewhere in its briefing, Access argues that the
25 choice of law provision in the contract requires application of
26 Pennsylvania law, it does not argue that relevant California
statutory and regulatory requirements were not integrated into the
contract via this provision.

1 opened by Access's failure to respond to the demand letter
2 within ten days, as set forth in the letter; as such, Access's
3 violation of the deadlines set forth by this regulation did
4 not cause the harm that Lincoln purports to have suffered.
5 Consequently, defendant's motion is granted as to this aspect
6 of Lincoln's cause of action.⁹

7 **b. Violation of Insurance Code**

8 Lincoln also alleges that Access violated California's
9 statute barring unfair methods of competition and unfair and
10 deceptive acts or practices in the business of insurance,
11 specifically by,

12 (h) Knowingly committing or performing with
13 such frequency as to indicate a general
14 business practice any of the following unfair
15 claims settlement practices: . . .

16 (5) Not attempting in good faith to effectuate
17 prompt, fair, and equitable settlements of
18 claims in which liability has become reasonably
19 clear.

20 CAL. INS. CODE § 790.03. Lincoln alleges that after Access had
21 determined that Coleman (the insured's) liability to the
22 Diases had become reasonably clear, Access, as Lincoln's
23 agent, failed to effectuate in good faith a prompt, fair, and
24 reasonable settlement.

25 Access first argues that Lincoln's reliance on this
26 statute is inappropriate, as the statute does not authorize a

⁹Of course, if Access were to assert that the ten day demand was unreasonable, the fifteen days required by the regulation would become relevant. Access has not made such a claim.

1 private right of action. See Tricor Cal., Inc. v. Sup. Ct. Los
2 Angeles County, 220 Cal. App. 880 (1990). This argument is
3 unpersuasive. Lincoln has not brought a cause of action under
4 the statute but rather alleges that the statute's requirements
5 were integrated into the contract and that, by violating them,
6 Access breached the contract. This is a viable theory to
7 support a breach of contract cause of action. See, e.g.,
8 Moradi-Shalal v. Fireman's Fund Ins. Cos., 46 Cal. 3d 287,
9 304-305 (1988).

10 Access also argues that Lincoln cannot show that Access
11 violated the statute. The court disagrees. Lincoln has
12 tendered evidence that would permit a reasonable jury to
13 conclude that Access had determined that Coleman was
14 "reasonably clear[ly]" liable to the Diases and that Access
15 did not act in good faith to effectuate a "prompt, fair, and
16 equitable settlement." See CAL. INS. CODE § 790.03(h)(5). The
17 notes of Access's claims representative, Tracey Eggers,
18 indicate that he concluded that Coleman was 100 percent at
19 fault for the accident. Eggers Depo. at 70:5-72:25. Although
20 Access argues that Eggers' testimony is equivocal in this
21 regard, it is undisputed that the notation "Named insured is
22 100 percent liable for all damages in accident" appeared in
23 Eggers' notes in the claim file. Id. at 70:9-16. A jury could
24 reasonably conclude that this is adequate evidence that Access
25 had determined that it was reasonably clear that Coleman was
26 liable for the accident. Additionally, as explained above, a

1 reasonable jury could also conclude that Access acted
2 improperly by failing to respond to the Dias' demand letter
3 and, in so doing, obviated Lincoln's opportunity to settle the
4 claim "prompt[ly], fair[ly], and equitabl[y]." See CAL. INS.
5 CODE § 790.03(h) (5).

6 In sum, as Lincoln's agent in the claims handling
7 process, Access was responsible for addressing the Dias
8 settlement proposal on behalf of Lincoln. See Claims Service
9 Agreement at 1 ¶ 1. Lincoln has tendered evidence that
10 Access's conduct was such that a reasonable jury could
11 conclude it violated Insurance Code § 790.03, thereby
12 violating the terms of the contract. As discussed above,
13 Lincoln has also tendered evidence that this mishandling
14 caused its damages. Access's motion is therefore denied as to
15 this aspect of Lincoln's breach of contract claim.

16 **c. Violation of "Established Claims Procedures"**

17 Finally, Lincoln has alleged that Access violated
18 "established claims procedures" in its handling of the Dias
19 settlement demand. It appears that the contract did not set
20 forth claims procedures distinct from those established by
21 regulation and statute. See Claims Service Agreement at 1 ¶ 2;
22 2 ¶ 17; Appendix B. Although the Claims Services Agreement
23 purported to integrate practices and procedures set forth in
24 an "Administrator's Claim Manual," it appears that that manual
25 was never included in the contract, perhaps unintentionally.
26 See Claims Service Agreement 2 ¶ 17, App. B. Because there is

1 no evidence tendered to the court as to what additional claims
2 procedures the contract required of Access apart from those
3 set by California law, the court grants defendant's motion to
4 the extent that plaintiff's breach of contract claim relies on
5 an allegation that Access failed to comply with such
6 additional claims procedures.

7 **B. Breach of Covenant of Good Faith and Fair Dealing**

8 There is implied in every contract a covenant of good
9 faith and fair dealing that neither party will act in a way to
10 compromise the rights of the other to receive the benefits of
11 the contract. Merritt v. J. A. Stafford Co., 68 Cal. 2d 619
12 (1968); Brown v. Superior Court of Los Angeles County, 34 Cal.
13 2d 59, 564 (1949). The covenant imposes on each party not only
14 the duty to avoid acting in a way that compromises the
15 performance of the contract, but also the duty to do
16 everything that the contract assumes they will do to bring
17 about its purpose. Harm v. Frasher, 181 Cal. App. 2d 405, 417
18 (1960). The covenant exists to protect the "purposes and
19 express terms of the contract" and not a general public policy
20 interest unrelated to the agreement. Foley v. Interactive Data
21 Corp., 47 Cal.3d 654, 690 (1988).

22 Though there appears to be a split of authority, the
23 majority of courts hold that a breach of the covenant occurs
24 when a party engages in objectively unreasonable conduct,
25 "regardless of the actor's motive." Carma Developers (Cal.),
26 Inc. v. Marathon Development California, Inc., 2 Cal. 4th 342,

1 373 (1992); see also Neal v. Farmers Ins. Exchange, 21 Cal. 3d
2 910, 922 n. 5 (1978); Badie v. Bank of America, 67 Cal.
3 App.4th 779, 796 (1998); Lazar v. Hertz Corp., 143 Cal. App.
4 3d 128, 141 (1983). Deliberately dishonest conduct is not
5 required for the covenant to be breached, nor is it required
6 that a specific term of the contract be breached. Carma
7 Developers, 2 Cal.4th at 373.

8 Additionally, "bad faith may be overt or may consist of
9 inaction, and fair dealing may require more than honesty."
10 R.J. Kuhl Corporation v. John L. Sullivan, 13 Cal. App. 4th
11 1589, 1602 (1993), citing Rest. 2d Contracts § 205, com. d. In
12 R.J. Kuhl, a real estate brokerage sued their client and a
13 third party buyer for breach of contract due to failure to pay
14 a commission. Id. The buyer had engaged in a side real estate
15 transaction with a third party which resulted in him gaining
16 an unfair economic advantage. Id. The trial court ruled in
17 favor of the brokerage, and the appeals court affirmed,
18 holding that the client's obligation to pay the commission was
19 subject to the covenant of good faith and fair dealing. Id. at
20 1593. The appeals court noted the following examples of bad
21 faith that have been recognized by the courts: "evasion of the
22 spirit of the bargain, lack of diligence and slacking off,
23 willful rendering of imperfect performance, abuse of a power
24 to specify terms, and interference with or failure to
25 cooperate in the other party's performance." Id. at 1602. The
26 court held that although the defendant honestly believed he

1 was permitted to avoid paying commission to his broker, it was
2 objectively unreasonable conduct, thereby breaching the
3 covenant. Id. at 1604.

4 Access argues that other courts have held that a breach
5 of the good faith covenant requires scienter:

6 [that]... demonstrates a failure or refusal to
7 discharge contractual responsibilities, prompted not
8 by an honest mistake, but rather by a conscious and
9 deliberate act, which unfairly frustrates the agreed
common purposes and disappoints the reasonable
expectations of the other party...

10 Careau & Co. v. Security Pacific Business Credit, Inc., 222

11 Cal. App. 3d 1371, 1395 (1990). This rule has been followed by
12 some federal district courts. See Houque v. City of Holtville,
13 2008 WL 1925249 at *4 (S.D. Cal. Apr. 30, 2008); Nava v.
14 Virtualbank, 2008 WL 2873406 (E.D. Cal. July 16, 2008).

15 However, it appears to be the minority position in California
16 and is contradicted by the California Supreme Court's

17 holdings. See Carma Developers, 2 Cal. 4th at 373 ("Nor is it
18 necessary that the party's conduct be dishonest. . . . the
19 covenant of good faith can be breached for objectively
20 unreasonable conduct, regardless of the actor's motive.");

21 Neal, 21 Cal. 3d at 922 n. 5 ("The terms 'good faith' and 'bad
22 faith' as used in this context . . . are not meant to connote
23 the absence or presence of positive misconduct of a malicious
24 or immoral nature."). The court therefore declines to follow
25 the Careau court.

26 ////

1 Plaintiff alleges nine instances of breach of the
2 covenant of good faith and fair dealing:

- 3 a) failing to timely and properly respond to Ms.
4 Dias' policy limit demand letter;
- 5 b) failing to request an extension of time to
6 properly respond to Ms. Dias' policy limit demand
7 letter;
- 8 c) failing to institute and establish adequate
9 policies and procedures to ensure proper response to
10 policy limit demands when claim handlers were sick
11 on leave;
- 12 d) failing to properly instruct and supervise claim
13 handlers in the proper steps to take in such
14 circumstances;
- 15 e) failing to notify Lincoln General of the Dias
16 claim even though Access considered the claim to
17 encompass high exposure;
- 18 f) failing to pay the policy limits into the
19 appropriate Court;
- 20 g) failing to notify Lincoln General immediately
21 upon learning that Ms. Dias' counsel intended to
22 proceed with negotiations without regard to the
23 policy limits;
- 24 h) failing to obtain legal counsel to adequately
25 represent the interests of Lincoln General;
- 26 i) failing to secure a court decision regarding the
legal efficiency of Ms. Dias' alleged demand beyond
the policy limits.

17 Compl. ¶ 27. In its opposition to defendant's motion, Lincoln
18 condenses these nine alleged breaches into two general
19 categories: Access' failure to act with diligence in its
20 discretionary power to handle claims by (1) failing to report
21 to Lincoln that its conduct exposed Lincoln to bad-faith
22 liability; and (2) respond to the demand letter or otherwise
23 handle the Dias Claim appropriately. Pl.'s Opp'n to Mot. for
24 Summ. J. at 20-23. The court considers each of these in turn.

25 ////

26 ////

1 **1. Access' Failure to Inform Lincoln that Access**
2 **Exposed Lincoln to Bad-Faith Liability**

3 Lincoln contends that if Access's failure to respond to
4 the demand letter is found to not have breached a term of the
5 contract, Access nevertheless breached the covenant of good
6 faith and fair dealing by failing to inform Lincoln that
7 Access's conduct may have exposed Lincoln to bad faith
8 liability.

9 Access responds to this with several arguments. First, it
10 argues that the evidence is insufficient to permit a
11 reasonable fact-finder to conclude that Access received the
12 demand letter. As explained above, there is adequate evidence
13 tendered to permit this conclusion.

14 Second, Access asserts that its reporting duties, as
15 outlined in the Claims Agreement § 1 and Appendix A to the
16 Agreement, do not require Access to disclose to Lincoln
17 allegations of bad faith claims handling. This is
18 unpersuasive, as the covenant of good faith and fair dealing
19 encompasses discretion vested in a party beyond that which is
20 expressly delineated by the contract's terms. The California
21 courts have rejected an interpretation of the covenant that
22 would limit it to breaches of the contract itself. See Harm,
23 181 Cal. App. 2d at 417. Here, the contract vested Access with
24 the responsibility, broadly, to handle claims against Lincoln
25 and investigate the latter's liability with regard to claims.
26 Claims Service Agreement at 1 ¶ 1. The purpose of this

1 arrangement was for Access to act in a manner that fairly
2 limited Lincoln's exposure to liability. By failing to inform
3 Lincoln that Access had received but not timely responded to a
4 request for settlement of the Dias' claim, a jury could
5 reasonably find that Access acted in a way that impeded
6 Lincoln's purpose in entering the contract, notwithstanding
7 that there was not an explicit reporting requirement contained
8 in the contract.

9 Third, Access argues essentially that it was Lincoln's
10 own lack of diligence that caused any damages it suffered,
11 because Lincoln had "full and frequent access to information
12 regarding all claims, including the Dias claim" per the Claims
13 Service Agreement. Mot. for Summ. J. at 16. This appears to
14 the court to be an argument of comparative fault, which would
15 not bar plaintiff's recovery for defendant's breach of the
16 covenant. See *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 828-29
17 (1975). Regardless, Lincoln has tendered unrefuted evidence
18 that the purpose of the audit was not to inform itself of
19 particular development in specific cases, but to "review best
20 practices [and] . . . trends." Kirk Depo. at 67:5-20. In this
21 light, a reasonable factfinder could conclude that Access's
22 failure to inform Lincoln of its non-response to the demand
23 letter caused Lincoln's damages, notwithstanding Lincoln's
24 authority to audit the file.

25 Finally, Access argues that it did not cause any of
26 Lincoln's damages because Lincoln knew of the Dias claim three

1 months before the Dias trial and failed to take any action,
2 such as filing for declaratory judgment or an interpleader
3 action, in the Dias suit. Though Lincoln does not contest the
4 fact that it knew about the Dias claim at least three months
5 before the start of trial, it argues that an interpleader or
6 declaratory relief could not have been filed and completed in
7 that time. Lincoln argues if they had been told about the Dias
8 claim at an earlier date, not only could they have filed
9 appropriate litigation, but they also would have been able to
10 better evaluate whether to involve themselves in the Dias'
11 subsequent products liability lawsuit.

12 Like the defendant's previous argument, this does not
13 appear to present a complete defense to Access's potential
14 breach of the covenant of good faith and fair dealing. Even if
15 a jury were to find that Lincoln was remiss in not filing an
16 interpleader action or for declaratory relief, there is no
17 certainty that either of these efforts would have been
18 successful. Moreover, as Lincoln observes, even if Lincoln
19 filed an interpleader action, it still was exposed to
20 liability in excess of the policy limits and would still have
21 had to defend Coleman in the Dias suit. See Mt. Hawley Ins.
22 Co. v. Fed. Sav. & Loan Ins. Corp., 695 F. Supp. 469, 474
23 (C.D. Cal. 1987).

24 Defendant's motion for summary judgment is therefore
25 denied as to plaintiff's claim for breach of the covenant of
26 good faith and fair dealing to the extent described above.

1 **2. Access' Failure to Handle the Dias Claim**
2 **Appropriately**

3 The Claims Service Agreement established a relationship
4 between Access and Lincoln by which the former was responsible
5 for handling all claims against the latter for the implied
6 purpose of limiting Lincoln's liability. As explained in the
7 previous section, Access's failure to respond to the demand
8 letter could be found to violate the covenant of good faith
9 and fair dealing, as doing so exposed Lincoln to excess
10 liability, undermining Lincoln's very interest in entering the
11 contract.

12 Moreover, Lincoln has tendered evidence that Access
13 mishandled the Dias claim in other ways. Lincoln's claims-
14 handling expert described the condition of the Dias file up
15 until January of 2004, when the Demand Letter wa sallegedly
16 sent to Access:

17 We are not 10 months into the claim and no real
18 investigation has been done and no one at Access
19 demonstrates an awareness of this or a concern that
20 they have a liability case involving a negligence free
21 passenger in the other vehicle who was made a
22 paraplegic in the accident at issue. This is totally
23 unacceptable conduct and fails to conform to Industry
24 Custom and Practice and for the Standard of Care to
25 which Mr. Coleman and Lincoln are entitled to expect.

22 Lincoln's Depo. Ex. 250 at 9. There is evidence in the record
23 that the Dias' attorney tried to contact Eggers on numerous
24 occasions and his correspondence was not replied to.

25 Lincoln's Deposition Exhibits 9, 10, 11 In Support of Pl.'s
26 Opp'n to Def.'s Mot. for Summ. J.; Dolinski Depo. at 15:6-

1 21:14. Were a jury to credit this evidence, it could
2 reasonably find that it constituted a breach of the covenant
3 of good faith and fair dealing. See R.J. Kuhl, 13 Cal. App.
4 4th at 1602 (breach of the covenant includes "lack of
5 diligence and slacking off").

6 In sum, Lincoln has presented evidence that would permit
7 a jury to reasonably conclude that Access breached the
8 covenant of good faith and fair dealing by its poor handling
9 of the Dias claim and its failure to inform Lincoln of its
10 potential exposure as a result. For this reason, Access'
11 motion for summary judgment on the breach of the implied
12 covenant of good faith and fair dealing claim is denied.

13 **C. Fraudulent Concealment**

14 In its final cause of action, Lincoln alleges that Access
15 fraudulently failed to disclose the following from Lincoln: 1)
16 that Access had not timely responded to the demand letter or
17 sought an extension and that the Dias consequently sought a
18 settlement in excess of the policy limits; 2) that it did not
19 have adequate procedures when a claims handler was out sick;
20 3) that the Dias had made a claim against Lincoln and that
21 Access had not set a "proper" reserve amount for the claim; 4)
22 that it had not paid policy limits "to the appropriate court"
23 nor secured "a court decision regarding the legal efficiency
24 of Ms. Dias'" claim; and 5) that it did not retain counsel to
25 adequately represent Lincoln's interests.

26 ////

1 In order to succeed on a claim for fraud, the plaintiff
2 must show "(a) misrepresentation (false representation,
3 concealment or nondisclosure); (b) knowledge of falsity (or
4 'scienter'); (c) intent to defraud, i.e., to induce reliance;
5 (d) justifiable reliance, and (e) resulting damages." Agosta
6 v. Astor, 120 Cal. App. 4th 596, 603 (2004).¹⁰

7 Access challenges the viability of Lincoln's claim on several
8 grounds, which the court considers in turn.¹¹

9 First, Access argues that there is insufficient evidence
10 that the demand letter was received. As explained above, the
11 evidence tendered is sufficient to create a genuine issue of
12 material fact on this issue.

13 Second, Access takes issue with Lincoln's allegation that
14 Access concealed from Lincoln that it had failed "to establish
15 a proper reserve even though Access considered the (Dias)
16 claim to encompass high exposure." Compl. ¶ 37(e). Access
17
18

19 ¹⁰Access raises for the first time in its reply brief on the
20 argument that Pennsylvania law applies to Lincoln's claim for
21 fraudulent concealment. It is not proper for the court to consider
22 new arguments raised in a reply. Von Brimer v. Whirlpool Corp., 536
23 F.2d 838, 846 (9th Cir. 1976). Furthermore, the court held in its
24 August 29, 2007 order that California substantive law applies to
25 all disputes arising out of Lincoln's and Access's relationship,
26 with the narrow exception of questions of the interpretation or
construction of their contract.

24 ¹¹In its reply brief, Access raised for the first time the
25 arguments that there is no evidence of intentional concealment or
26 actual reliance. Again, it is improper for the court to rely on
arguments that were not timely raised. Von Brimer, 536 F.2d at
846.

1 argues that it had no authority to set the reserve values
2 above the policy limits.

3 A reserve is a sum of money set aside to pay a claim,
4 with the purpose of guarding against insurer insolvency. The
5 Supreme Court has explained,

6 The term "reserve" or "reserves" has a special meaning
7 in the law of insurance. While its scope varies under
8 different laws, in general it means a sum of money,
9 variously computed or estimated, which, with accretions
10 from interest, is set aside -- "reserved" -- as a fund
with which to mature or liquidate, either by payment or
reinsurance with other companies, future unaccrued and
contingent claims, and claims accrued, but contingent
and indefinite as to amount or time of payment.

11 Maryland Casualty Co. v. United States, 251 U.S. 342, 350
12 (1920). The reserve value, therefore, should accurately
13 reflect the insurer's potential loss on a claim. See, e.g.,
14 Shade Foods, Inc. v. Innovative Product Sales and Marketing,
15 Inc., 78 Cal. App. 4th 847, 883 (2000).

16 Here, Access argues that it had no authority to set the
17 reserve on the Dias claim at a value greater than the policy
18 limits. See Claims Service Agreement at 1 ¶ 5 ("The
19 Administrator shall . . . [e]stablish initial reserves and
20 adjust them accordingly for potential exposure, considering
21 value and liability. . . . The Administrator will have no . .
22 . reserve authority in excess of the limit of liability on the
23 insurance policy which is triggered by the claim."). This
24 apparently misunderstands Lincoln's theory of the claim, which
25 is that Access set the reserves lower than the policy limits,
26 for the purpose of concealing Lincoln's potential exposure for

1 the claim and, allegedly, Access's claim mishandling. See
2 Eggers Depo. at 89:10-90:22 (claims file reflects that someone
3 set the reserve at lower than the \$30,000 policy limit, after
4 Eggers had set it at \$30,000). The evidence tendered suffices
5 to create a genuine issue of material fact on this issue.

6 Third, Access contends that even if it did mishandle the
7 Dias claim, it had no duty to disclose this to Lincoln and
8 therefore cannot be liable for fraudulent concealment. Under
9 California law, a defendant can only be liable for fraudulent
10 concealment where it had a legal duty to disclose the
11 concealed fact. Buckland v. Threshold Enter, Ltd., 155 Cal.
12 App. 4th 798, 807 (2007); Lingsch v. Savage, 213 Cal. App. 2d
13 729, 735 (1963). Access, however, had a statutory duty to send
14 a copy of the claims file to Lincoln as soon as it was aware
15 that the claim had the potential to exceed the policy limits.
16 Cal. Ins. Code § 769.83(g). This statutory duty was expressly
17 integrated into the Claims Service Agreement.¹² Claims Service
18 Agreement at 2 ¶ 19. Consequently, as a matter of law, Access
19 had a duty to disclose the Dias claim to Lincoln and, as soon
20 as it was aware of Lincoln's potential bad faith liability, to
21 forward a copy of the claim file, which would alert Lincoln as

22
23 ¹²Despite Access's characterization to the contrary, neither
24 the deposition of Timothy Kirk nor his e-mail correspondence to
25 Access (Depo. Ex. 54) suggest that Insurance Code § 769.83(g)'s
26 reporting requirements were not integrated into the contract. On
the contrary, the evidence Access cites indicated Mr. Kirk's
displeasure with Access that this reporting had not been done. See
Kirk Depo. vol. 1 54:3-17, 63:4-64:6; Depo. Ex. 54 at 2-3.

1 to Access's handling of the claim. Access' motion therefore
2 fails in this regard.

3 Fourth, Access argues that if it mishandled the Dias
4 claim, it did not have a separate duty to disclose this to
5 Lincoln, as there is no legal duty for an actor to disclose
6 its intentional tort. See LiMandri v. Judkins, 52 Cal. App.
7 4th 326, 339 (1997) (holding that the same conduct could not
8 be a basis for both a claim for intentional interference with
9 prospective economic advantage and intentional interference
10 with contract). This seems entirely inapplicable to the
11 instant case. Lincoln's fraudulent concealment claim does not
12 allege that Access improperly failed to disclose that it
13 intended to commit a tort, but that, *inter alia*, it failed to
14 disclose its inadequate claims handling procedures and its
15 mismanagement of the Dias claim. Access' argument is
16 therefore unavailing.

17 Fifth, Access argues that Lincoln became aware of the
18 Dias claim in January 2005 and could have filed an
19 interpleader action or for a declaratory judgment prior to
20 trial. As explained above, this may be true but offers no
21 grounds on which to grant summary judgment in Access' favor.

22 Finally, Access asserts that Lincoln's claim must fail to
23 the extent that it alleges that Access failed to obtain legal
24 counsel to represent Lincoln's interests. See Compl. ¶ 37(h);
25 Claims Service Agreement at 1 ¶ 4 ("The Administrator shall .
26 . . coordinate, direct and manage litigation activity,

1 assigning defense to approved legal counsel subject to
2 Client's control.") The undisputed evidence establishes that
3 Access did obtain legal counsel for Lincoln. Def.'s SUF ¶¶
4 40-43. There is also evidence that Lincoln was not displeased
5 with the representation provided by counsel obtained through
6 Access. See Kirk Depo. vol. 2 at 233, 237. Lincoln's theory
7 instead appears to be that Access fraudulently concealed the
8 fact that it had obtained inadequate counsel for Lincoln.
9 Lincoln rests this theory on its contention that Access's
10 delay in notifying Lincoln of its exposure in the Dias suit
11 inhibited Lincoln from "evaluat[ing] the case against [other]
12 defendants and pursu[ing] other options." Pl.'s Opp'n to
13 Def.'s Mot. for Summ. J. at 25. This is not evidence of the
14 inadequacy of the counsel obtained by Access for Lincoln, but
15 rather relates to Lincoln's allegation of Access' underlying
16 mismanagement of the Dias claim and the alleged effect it had
17 on Lincoln's litigation position with regards to that claim.
18 Access' motion is therefore granted on subpart (g) of
19 Lincoln's claim of fraudulent concealment.

20 **D. Effect of Lincoln's Settlement, Rather Than Adjudication**
21 **of Liability, on Access's Obligation to Indemnify**

22 Access argues that Lincoln cannot recover against it

23 ////

24 ////

25 ////

26 ////

1 on any of its causes of action because a party that settles
2 cannot later seek indemnification, since there has been no
3 determination of legal liability.¹³ The court disagrees.

4 California has long applied the rule that when there is
5 an agreement to indemnify for liability, the party seeking
6 indemnification need not wait for judgment against it, but may
7 be indemnified for payments made in satisfaction of a
8 settlement. See Mabie & Mintz v. B & E. Installers, 25 Cal.
9 App. 3d 491 (1972); Pac. Tel & Tel. Co. v. Pac. Gas & Elec.
10 Co., 170 Cal. App. 2d 387 (1959); cf. Crawford v. Weather
11 Shield Mfg., Inc., 44 Cal. 4th 541, 559 (2008) ("One can only
12 indemnify against 'claims for damages' that have been resolved
13 against the indemnities, i.e., those as to which the
14 indemnitee has actually sustained liability or paid damages."
15 (emphasis added)). In order to be indemnified, "[w]hen the
16 indemnitee settles without trial, the indemnitee must show the
17 liability is covered by the contract, that liability existed,
18 and the extent thereof." Mel Clayton Ford v. Ford Motor Co.
19 104 Cal. App. 4th 46, 54 (2002) (citing Peter Cully & Assoc.
20 v. Sup. Court, 10 Cal. App. 4th 1484 (1992)). The settlement
21 amount constitutes a "volunteer" payment only when the
22

23 ¹³Access contends that this is true under both California and
24 Pennsylvania law, although urges the court to apply the latter.
25 In its August 29, 2007 order, the court determined that
26 Pennsylvania law only applies to the interpretation or construction
of the contract's terms, but not to any other dispute arising out
of the parties' relationship. Order, Aug. 27, 2007, at 12-15.
California law regarding indemnification therefore applies here.

1 indemnitor shows that the indemnitee unreasonably paid too
2 much in the settlement, id. at 58; see also Pac. Tel. & Tel.,
3 170 Cal. App. 2d at 392, or otherwise entered into the
4 settlement in bad faith.¹⁴ Peter Cully & Assoc., 10 Cal. App.
5 4th at 1497 ("The settlement is presumptive evidence of
6 liability of the indemnities and of the amount of liability,
7 but it may be overcome by proof from the indemnitor that the
8 settlement was unreasonable (e.g., unreasonable in amount,
9 entered collusively or in bad faith, or entered by an
10 indemnitee not reasonable in the belief that he or she had an
11 interest to protect)."). The court declines to follow New
12 Hampshire Indemnity Co. v. Professional Claim Services, Inc.,
13 No. D051230, 2008 WL 5115084 (Cal. Ct. App. Dec. 5, 2008), to
14 the extent it reached a contrary holding, as its holding
15 appears inconsistent with the great weight of authority of the
16 California courts and, in any event, according to the
17 California Rules of Court is not intended to carry
18 precedential force. See Cal. Rule of Court 8.1115.

19 Access misconstrues the holding of Safeco Ins. Co. v.
20 Superior Court, 71 Cal. App. 4th 782 (1999), in its attempt to

21
22 ¹⁴Access' argument that Lincoln's payment was voluntary to the
23 extent that it exceeded the difference between the Diases'
24 settlement demand and the amount the Diases later received from the
25 defendants to the Diases' product liability suit holds no force.
26 Lincoln's settlement with the Diases occurred in May 2005 whereas
the defendants to the other suits settled in November 2005 and
February 2007. See Access' Deposition Exh. B-C. Although the
amount of these settlements may be evidence of the reasonableness
of Lincoln's settlement, it does not establish the unreasonableness
of the settlement value as a matter of law.

1 convince the court that there must be a judgment entered
2 against the indemnitee before indemnification can be sought.
3 In Safeco, the court confronted a claim by an insured against
4 its insurer for refusal to settle his claim. Id. at 788-89.
5 The court held that if an insurance company refuses to settle,
6 the insured (or the party to whom the insured has assigned his
7 rights) may only bring an action for bad faith refusal to
8 settle after a judgment has been rendered in excess of the
9 policy limits. Id. The court explained that this is based on
10 the logic that if the insurer refuses to settle and then
11 secures a judgment below the settlement offer, the insured has
12 no claim for "bad faith." Id. This holding has no bearing on
13 the case at bar, where Lincoln is not alleged to have refused
14 in bad faith to settle Coleman's claim, and it certainly does
15 not stand for the broad proposition that an "insured being
16 provided a defense does not have a bad faith claim prior to
17 excess judgment," as Access purports. See Def.'s Brief In
18 Support of Mot. for Summ. J. at 29-30.

19 In its reply brief, Access also argues that Lincoln
20 cannot seek indemnity for settling the Dias claim, because the
21 Dias claim was brought against Coleman, not Lincoln. As such,
22 Access argues, there is no evidence of Lincoln's liability to
23 the Diases, sufficient to trigger Lincoln's duty to settle.
24 Even assuming this argument was timely raised, it is wholly
25 unpersuasive. Lincoln was not a mere bystander in the action
26 brought by the Diases against Lincoln's insured. As explained

1 supra, Lincoln would be liable for at least some portion of
2 the judgment obtained against Coleman, particularly where the
3 mishandling of the Diases' settlement offer had opened the
4 policy limits. See Traveler's Cas. & Sur. Co. v. Sup. Court,
5 126 Cal. App. 4th 1131 (2005). Moreover, as Coleman's
6 insurer, Lincoln had a legal duty to make a reasonable effort
7 to settle the Diases' claim against him. See e.g., Lehto v.
8 Allstate Ins. Co., 31 Cal. App. 4th 60, 67-68 (1994) ("the
9 implied obligation of good faith and fair dealing requires the
10 insurer to settle in an appropriate case although the express
11 terms of the policy do not impose such a duty" (citation
12 omitted)); Cancino v. Farmers Ins. Group, 80 Cal. App. 3d 335,
13 340 (1978) (as part of the covenant of good faith and fair
14 dealing with the insured, an insurer must make a good faith
15 effort to settle a claim against the insured within the policy
16 limits). In other words, to the extent that Access is arguing
17 that Lincoln's settlement was unreasonable because it did not
18 have a legal interest to protect, see Peter Cully & Assoc., 10
19 Cal. App. 4th at 1497, Access is plainly wrong.

20 Indemnification is also triggered when the indemnitor
21 failed to discharge its duty to provide a defense to the
22 indemnitees. Although Access attempts to draw a distinction
23 between an indemnitor's duty to indemnify and its duty to
24 defend the indemnitee, California law conceives of these
25 duties as intimately related. By statute, a contractual
26 promise to indemnify includes the promise to reimburse the

1 indemnatee for the costs of its defense. Cal. Civ. Code §
2 2778(3). Furthermore, when the indemnatee requests it, the
3 indemnitor must provide the defense. Id. § 2778(4). The
4 indemnitor's refusal to do so is conclusive in an
5 indemnification action against it. Id. § 2778(5); see also
6 Crawford, 44 Cal. 4th at 555-57; Pac. Tel. & Tel., 170 Cal.
7 App. 2d at 392. In that situation, the settling party is
8 entitled to indemnification, so long as it has made a good
9 faith settlement. Pac. Tel. & Tel., 170 Cal. App. 2d at 392.
10 In contrast, if the indemnitor offers a defense but is not
11 allowed by the indemnatee to control the defense, this is not
12 a bar to the latter's indemnification. See Cal. Civ. Code §
13 2778(6).

14 Here, the contract between Lincoln and Access contained
15 an indemnification provision by which each party agreed to
16 indemnify the other for "all claims, loss, liability, costs,
17 damages and reasonable attorney's fees incurred . . . as the
18 direct or indirect result of any misconduct, instructions,
19 error or omission of the other" Claims Service
20 Agreement at 3, Section III. The contract also provided that
21 Access would "coordinate, direct and manage litigation
22 activity" and "negotiate claims through settlement." Id. at 1
23 ¶¶ 1, 4.

24 As explained thoroughly *supra*, Lincoln has tendered
25 evidence that through the handling of the Dias claim, Lincoln
26 was exposed to liability in excess of the Coleman policy

1 limits. It is also undisputed that Access determined Coleman
2 to be 100 percent at fault for the Dias'es' damages. In light
3 of this evidence, Access has not borne its burden to show that
4 the settlement into which Lincoln entered was unreasonable or
5 otherwise in bad faith. See Pac. Tel. & Tel., 170 Cal. App. 2d
6 at 392; Peter Cully & Assoc., 10 Cal. App. 4th at 1497; see
7 also 39A California Jurisprudence 3d § 543 (question of
8 reasonableness of an insurer's settlement is typically a
9 question of fact best entrusted to a jury, collecting cases).

10 Additionally, there is evidence that Access did not
11 discharge its duty to Lincoln to provide a defense to the Dias
12 suit. The evidence is equivocal in this regard, but certainly
13 sufficient to defeat Access's motion. On one hand, as
14 described *supra*, Access did provide Lincoln legal counsel for
15 Lincoln and Lincoln was not displeased with the representation
16 provided by counsel obtained through Access. See Def.'s SUF
17 ¶¶ 40-43; Kirk Depo. vol. 2 at 233, 237. There is also some
18 evidence that Lincoln barred Access from participating in
19 portions of the settlement negotiations. Kirk Depo. vol. 2 at
20 245:6-17. On the other hand, Lincoln has tendered evidence
21 that Access participated in only a limited fashion in the
22 settlement negotiations. See Morris Depo. at 51:4-16; Kirk
23 Depo. vol. 1 at 94:19-95:24; Kirk Depo. vol. 2 at 245:6-17;
24 Burnham Depo. at 182:8-22. A factfinder could thus reasonably
25 conclude that Access did not discharge its duty to provide a
26 defense to Lincoln when requested, and therefore that Lincoln

1 is entitled to indemnification so long as its settlement was
2 reasonable. See Cal. Civ. Code § 2778.

3 **E. Lincoln's Reimbursement for Its Losses**

4 Finally, Access contends that Lincoln has been reimbursed
5 for its losses related to the Dias claim and therefore cannot
6 recover against Access. The court does not agree.

7 **1. Lincoln's Reinsurance Agreements**

8 The parties do not dispute that Lincoln's reinsurers
9 possess subrogation rights in a recovery against Access, and
10 that these rights exist both by operation of law and expressly
11 through Lincoln's contracts with its reinsurers. See
12 Progressive West Ins. Co. v. Sup. Court, 135 Cal. App. 4th
13 263, 272 (2005). It is also undisputed that Lincoln has been
14 reimbursed via its reinsurance agreements for a total of
15 \$2,388,000. It seeks damages for this amount (and more, since
16 it seeks to recover the entire \$3,800,000 settlement and other
17 damages), but Lincoln claims that this would not constitute
18 double recovery because the \$2,388,000 will be repaid to the
19 reinsurers. The dispositive issue, therefore, is whether
20 Lincoln has the right to sue in its own name for the purpose
21 of enforcing its reinsurers subrogation rights.

22 California courts have held that a party that has been
23 fully compensated may nevertheless seek recovery from the
24 responsible party if it does so to enforce an insurer's
25
26

1 subrogation rights.¹⁵ Anhauser-Busch, Inc. v. Starley, 28 Cal.
2 2d 347, 351-52 (1946); Greene v. M & S Lumber Co., 108 Cal.
3 App. 2d 6, 11 (1951); Lebet v. Cappobaicho, 38 Cal. App. 2d
4 771 (1940); see also Progressive West Ins. Co., 135 Cal. App.
5 4th at 273 (when insurer has subrogation right, it can either
6 interplead itself into the suit brought by the insured against
7 the wrongful third party "or wait to seek reimbursement under
8 the language of its policy from the insured to the extent that
9 the insured recovers money from the third party").¹⁶

10 Although the collateral source rule has been held
11 inapplicable to actions for breach of contract, Plut v.
12 Fireman's Fund Ins. Co., 85 Cal. App. 4th 98, 107-109 (2001),
13 that exception seem inappropriate here. In Plut, the court
14 held that plaintiff could not receive a damages award for
15 breach of contract against his insurance company when he had
16 already received more than the amount of damages he sought
17 from his settlement with the defendant in a separate, but
18 factually related, suit. 85 Cal. App. 4th at 107-109. To hold

19
20 ¹⁵Access asserts in its reply that the question of who is the
21 real party in interest in the instant action for recovery of the
22 reinsurance payments is resolved by the choice of law provisions
23 in the reinsurance contracts. Access has cited no authority for
24 this proposition nor has the court discovered any. Access's
25 position is particularly confused since, in its motion, Access
26 relied on California law and expressed to the court that "it is not
necessary for this Court to analyze choice of law" on this issue.
Mot. for Summ. J. at 31 n. 9.

25 ¹⁶Lincoln also cites Employers Mut. Liab. Ins. Co. v. Tutor-
26 Saliba Corp., 17 Cal. 4th 632, 639 (1999), for this rule. That
case appears inapplicable, as its holding was based on California's
workers compensation statute.

1 otherwise would permit the plaintiff double recovery, which
2 the court considered antithetical to the purpose of a damage
3 award for breach of contract, which is to make the plaintiff
4 whole. Id.

5 Here, that concern is not present. The agreement between
6 Lincoln and its reinsurers (the clash reinsurance agreement)
7 required Lincoln to seek reimbursement "on account of claims
8 and settlements involving reinsurance hereunder" and to
9 enforce this right for the purpose of reimbursing the
10 reinsurers.¹⁷ Depo. Exhibit 77 In Support of Pl.'s Opp. to Mot.
11 for Summ. J. at 8. Similarly, in its Quota Share
12 Reimbursement Agreement with Kingsway Reinsurance Corporation,
13 Lincoln agreed to reimburse Kingsway for any recovery Lincoln
14 obtained, "in proportion to [the parties'] respective interest
15 in the loss." Depo. Exhibit 121 In Support of Pl.'s Opp. to
16 Mot. for Summ. J. at 11. Consequently, since California law
17 permits the insured to seek recovery on behalf of its insurer
18 in the insured's name, see, e.g., Lebet, 38 Cal. App. 2d at
19 773, and if Lincoln is required to reimburse its reinsurers
20 for any recovery it obtains, Lincoln should not be barred from
21 recovering an amount at least equal to that which it has
22 received by its reinsurers.

23
24 ¹⁷Although Access observes that this agreement is governed by
25 Illinois law and if Illinois law in fact applies, see note 12
26 *supra*, Access offers no authority under Illinois law that would bar
the reinsurers from assigning their rights to recovery to Lincoln,
as it appears was done here.

1 **2. Lincoln's Loss Portfolio Transfer Agreement**

2 Access argues that Lincoln cannot recover because it has
3 already been reimbursed for its losses under a Loss Portfolio
4 Transfer Agreement (LPTA), a type of reinsurance agreement,
5 with Kingsway Reinsurance Corporation. Lincoln disputes that
6 it has been reimbursed under the LPTA.

7 Access has tendered deposition testimony from Lincoln's
8 Chief Financial Officer, Gary Orndorff, to establish that
9 Lincoln has been fully reimbursed through the LPTA for its
10 settlement with the Dases and the costs of defending
11 Coleman.¹⁸ In his deposition, however, Orndorff did not
12 testify that Lincoln had in fact received reimbursement under
13 the LPTA for the Dias settlement and costs of defending that
14 suit. See Orndorff Depo. at 36:13-21. In fact, he
15 specifically stated that he was not aware of the amount that
16 Lincoln was reimbursed under the LPTA for the Dias settlement
17 and defense expenses related to that suit. Id. Later in the
18 deposition, Orndorff responded to questions about
19 reimbursement of Lincoln's reinsurers were Lincoln to recover
20 in the instant suit and Orndorff confirmed that any recovery
21 would go entirely to Lincoln's reinsurers, under either the
22 reinsurance agreements discussed *supra* or the LPTA. Id. at

23

24

25 ¹⁸Access has not tendered the LPTA because it did not obtain
26 it in discovery. See Access's Ex parte Application to Reopen Time
to File Discovery Motions, Oct. 10, 2008.

1 40:16-41:6. Orndorff has since declared that Lincoln has not
2 been reimbursed under the LPTA.¹⁹ Orndorff Decl. ¶ 3.


3 In light of the evidence tendered, the court is not
4 persuaded that Lincoln has been reimbursed through the LPTA
5 for its settlement payment and costs for defending against the
6 Dias suit. Orndorff's deposition testimony alone does not
7 establish this as his testimony may be understood to describe
8 generally the reinsurance agreements Lincoln has entered in
9 relation to both the Dias suit and the instant suit. The
10 inferences Access has drawn from the deposition testimony are
11 contradicted by Orndorff's subsequent declaration. Taken
12 together, the court cannot conclude that there is no genuine
13 issue of material fact that Lincoln has been fully reimbursed
14 for the recovery it seeks.²⁰

15 **IV. CONCLUSION**

16 For the reasons stated herein, defendant's motion is
17 GRANTED IN PART as described *supra*. It is DENIED in all other
18 respects.

19 IT IS SO ORDERED

20 DATED: January 22, 2009.

21 
22 LAWRENCE K. KARLTON
23 SENIOR JUDGE
24 UNITED STATES DISTRICT COURT

23 ¹⁹Orndorff's additional statements describing the contents of
24 the LPTA are inadmissible under the best evidence rule. See Fed.
R. of Evid. 1002.

25 ²⁰Even if it were, as the court explained *supra*, there appears
26 no legal impediment to Lincoln seeking recovery from Access for the
purpose of vindicating its reinsurers' interests.