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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TRAVELERS CASUALTY AND
SURETY COMPANY OF AMERICA,
a Connecticut corporation,

NO. CIV. S-07-2493 LKK/DAD

Plaintiff,

v.

O R D E R

SIDNEY B. DUNMORE, an
individual; SID DUNMORE
TRUST DATED FEBRUARY 28,
2003, a California trust;
SIDNEY B. DUNMORE, Trustee
for Sid Dunmore Trust Dated
February 28, 2003; DHI
DEVELOPMENT, a California
corporation,

Defendants.

_____ /

This case concerns various disputes arising out of plaintiff and counter-defendant Travelers Casualty and Surety Company of America's ("Travelers") guarantee of performance bonds for certain home construction projects of defendant and counter-plaintiff Sidney B. Dunmore ("Dunmore"). At issue in the instant motion is Travelers' motion to dismiss, to strike, and for a more definite

1 statement of Dunmore's counterclaims. For the reasons discussed
2 below, Traveler's motion is granted in part. Dunmore is granted
3 limited leave to file an amended counterclaim.

4 I. BACKGROUND

5 A. Factual Background

6 Dunmore was engaged in home construction. He, and various
7 trusts and businesses associated with him, entered into an
8 agreement with Travelers, wherein Travelers agreed to guaranty
9 performance bonds issued by defendants pursuant to several
10 construction contracts, subject to defendants' promise to indemnify
11 plaintiff with respect to these guarantees. As part of these bond
12 agreements, the parties negotiated a Limited Liability and Net
13 Worth Rider ("Rider"), which is the primary subject of the dispute
14 addressed in this order. The relevant language in the Rider states
15 that,

16 Except as provided herein, it is agreed and
17 understood that in any and all demands, actions, legal
18 proceedings or claims brought by company for
19 indemnification, the joint and several liability of
20 Sidney B. Dunmore and the Sid Dunmore Trust Dated
February 28, 2003, hereinafter referred to as "Dunmore
Limited Liability Indemnitors," to Company shall not
exceed the sum of \$1,500,000.00 ("Dunmore Liability
Limit").

21 PROVIDED HOWEVER, that Operating Entity at all
22 times shall maintain its Tangible Net Worth at a level
23 not less than \$25,000,000 ("the Minimum Net Worth"). In
24 the event Operating Entity's Tangible Net Worth at any
25 time falls below the Minimum Net Worth, then, as to all
26 Bonds whenever executed, the Dunmore Liability Limit
shall not apply, and the Dunmore Limited Liability
Indemnitors shall be liable to the Company under the
Agreements as if this Rider had never been executed.

Second Amended Counter-Claim ("SACC"), Doc. No. 211 at 55 (Jan. 3,

1 2011) (emphasis added). The Rider is less than one page long. Id.

2 Dunmore, however, alleges that prior to signing the Rider,
3 representatives of Travelers orally communicated to Dunmore's
4 broker, Joe Weber, that Travelers would limit Dunmore's personal
5 liability under the indemnity agreement to \$1,500,000.00 provided
6 that "at the time the bonds were issued" Dunmore Homes maintained
7 a net worth of \$25,000,000.00. Id. at 17 (Jan. 03, 2011). He
8 further alleges that Travelers made these oral representations in
9 order to induce Dunmore to continue to use Travelers' bonds, pay
10 an increased bond premium, and sign a document that "did not
11 contain the agreed upon terms." Id. at 20.

12 Subsequent to the issue of these bonds, Dunmore Homes' net
13 worth dropped below \$25,000,000. Pursuant to the Rider, Travelers
14 seeks in this action to recover from Dunmore. Dunmore challenges
15 the validity of the Rider due to Travelers' alleged oral
16 representations prior to the signing of the document.

17 **B. Procedural History**

18 On November 19, 2007, Travelers filed a complaint seeking
19 recovery against defendants for claims arising out of the indemnity
20 agreement. Dunmore then filed an answer and counter-claims, seeking
21 punitive damages. On December 15, 2010, this court granted
22 Travelers' motion to dismiss the counterclaims and motion for a
23 more definite statement, and gave Dunmore leave to amend his
24 counter-claims. The court instructed Dunmore that he may add
25 counter-claims entitling him to punitive damages but cautioned him
26 not to re-plead insufficient counterclaims or to falsely plead.

1 Order, Doc. No. 210 at 22 (Dec. 15, 2010). On January 3, 2011
2 Dunmore filed his SACC. In it, he pled five causes of action. These
3 were (1) fraud, (2) promise without intent to perform, (3) unjust
4 enrichment, (4) breach of implied covenants, and (5) abuse of
5 process. Dunmore subsequently withdrew his abuse of process claim.
6 Presently before the court are Travelers' motion to dismiss
7 Dunmore's first, second, and third causes of action, pursuant to
8 Rule 12(b) and Rule 9(b); and rule 12(f) motions to strike
9 allegations of overpayment in the first cause of action, and the
10 fourth cause of action in its entirety.¹

11 II. STANDARDS

12 A. Fed. R. Civ. P. 12(b)(6) Motion to Dismiss

13 A Fed. R. Civ. P. 12(b)(6) motion challenges a complaint's
14 compliance with the pleading requirements provided by the Federal
15 Rules. Under Federal Rule of Civil Procedure 8(a)(2), a pleading
16 must contain a "short and plain statement of the claim showing that
17 the pleader is entitled to relief." The complaint must give
18 defendant "fair notice of what the claim is and the grounds upon
19 which it rests." Bell Atlantic v. Twombly, 550 U.S. 544, 555
20 (2007) (internal quotation and modification omitted).

21 To meet this requirement, the complaint must be supported by
22 factual allegations. Ashcroft v. Iqbal, ___ U.S. ___, ___, 129 S.

23
24 ¹ The court does not consider Travelers' motion for a more
25 definite statement because Travelers requested that the court not
26 consider the pages of its memorandum that addressed this argument
after the court informed Travelers that it failed to comply with
this court's rule on page limits.

1 Ct. 1937, 1950 (2009). "While legal conclusions can provide the
2 framework of a complaint," neither legal conclusions nor conclusory
3 statements are themselves sufficient, and such statements are not
4 entitled to a presumption of truth. Id. at 1949-50. Iqbal and
5 Twombly therefore prescribe a two step process for evaluation of
6 motions to dismiss. The court first identifies the non-conclusory
7 factual allegations, and the court then determines whether these
8 allegations, taken as true and construed in the light most
9 favorable to the plaintiff, "plausibly give rise to an entitlement
10 to relief." Id.; Erickson v. Pardus, 551 U.S. 89 (2007).

11 "Plausibility," as it is used in Twombly and Iqbal, does not
12 refer to the likelihood that a pleader will succeed in proving the
13 allegations. Instead, it refers to whether the non-conclusory
14 factual allegations, when assumed to be true, "allow[] the court
15 to draw the reasonable inference that the defendant is liable for
16 the misconduct alleged." Iqbal, 129 S.Ct. at 1949. "The
17 plausibility standard is not akin to a 'probability requirement,'
18 but it asks for more than a sheer possibility that a defendant has
19 acted unlawfully." Id. (quoting Twombly, 550 U.S. at 557). A
20 complaint may fail to show a right to relief either by lacking a
21 cognizable legal theory or by lacking sufficient facts alleged
22 under a cognizable legal theory. Balistreri v. Pacifica Police
23 Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

24 **B. Fed. R. Civ. P. 12(f) Motion to Strike**

25 Rule 12(f) authorizes the court to order stricken from any
26 pleading "any redundant, immaterial, impertinent, or scandalous

1 matter." A party may bring on a motion to strike within 21 days
2 after the filing of the pleading under attack. The court, however,
3 may make appropriate orders to strike under the rule at any time
4 on its own initiative. Thus, the court may consider and grant an
5 untimely motion to strike where it seems proper to do so. See 5A
6 Wright and Miller, Federal Practice and Procedure: Civil 2d 1380.

7 A matter is immaterial if it "has no essential or important
8 relationship to the claim for relief or the defenses being
9 pleaded." Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir.
10 1993), *rev'd on other grounds* by 510 U.S. 517 (1994). A matter is
11 impertinent if it consists of statements that do not pertain to and
12 are not necessary to the issues in question. Id. Redundant matter
13 is defined as allegations that "constitute a needless repetition
14 of other averments or are foreign to the issue." Thornton v.
15 Solutionone Cleaning Concepts, Inc., No. 06-1455, 2007 WL 210586
16 (E.D. Cal. Jan. 26, 2007), citing Wilkerson v. Butler, 229 F.R.D.
17 166, 170 (E.D. Cal. 2005).

18 Motions to strike are generally viewed with disfavor, and will
19 usually be denied unless the allegations in the pleading have no
20 possible relation to the controversy, and may cause prejudice to
21 one of the parties. See 5A C. Wright & A. Miller, Federal Practice
22 and Procedure: Civil 2d 1380; see also Hanna v. Lane, 610 F. Supp.
23 32, 34 (N.D. Ill. 1985). However, granting a motion to strike may
24 be proper if it will make trial less complicated or eliminate
25 serious risks of prejudice to the moving party, delay, or confusion
26 of the issues. Fantasy, 984 F.2d at 1527-28.

1 fair dealing.² The first three counter-claims are all slight
2 permutations of a single fraud claim. Specifically, they all
3 apparently depend upon the alleged oral communications of
4 Travelers' agents concerning the nature of the Rider. Accordingly,
5 the court will first address Dunmore's fraud claims and will then
6 address his final counter-claim.

7 **A. Fraud Counter-Claims**

8 While Dunmore's counter-complaint contains 146 paragraphs of
9 factual allegations, it appears to the court that all of his fraud
10 claims depend upon the alleged verbal representations made to
11 Dunmore and/or his agents concerning the nature of the indemnity
12 agreement. Counsel for Dunmore confirmed this understanding at oral
13 argument. Specifically, Dunmore contends that these agents
14 misrepresented to him that the indemnity agreement limited his
15 personal liability to \$1,500,000.00 so long as Dunmore Homes
16 maintained a net worth of \$25,000,000.00 at the time the bonds were
17 issued. The terms of the written agreement, however, clearly
18 provide that the liability limit only applies so long as Dunmore
19 Homes maintained a net worth of \$25,000,000 at all times relevant
20 to the Rider. The Rider further states that, "In the event that the
21 [Dunmore Homes'] [n]et [w]orth at any time falls below
22 [\$25,000,000.00], then, as to all [b]onds whenever executed, the
23 Dunmore Liability Limit shall not apply and the Dunmore Limited
24 Liability Indemnitors shall be liable as if this Rider had never

25 ² As noted, Dunmore has withdrawn his fifth counter-claim for
26 abuse of process.

1 been executed." Dunmore contends that the verbal representations
2 induced him to sign the Rider, which caused him significant
3 injury.³

4 The elements of a claim for intentional misrepresentation
5 under California law are (1) misrepresentation (a false
6 representation, concealment or nondisclosure), (2) knowledge of
7 falsity, (3) intent to defraud (to induce reliance), (4)
8 justifiable reliance, and (5) resulting damage. Agosta v. Astor,
9 120 Cal. App. 4th 596, 603 (2004). Ordinarily, the decision of
10 whether reliance is justifiable is a question for the trier of
11 fact. Alliance Mortgage Co. v. Rothwell, 10 Cal.4th 1226, 1239
12 (1995). However, where oral representations conflict with the terms
13 of a subsequent written agreement, a party cannot justifiably rely
14 on such oral statements as a matter of law. See Dias v. Nationwide
15 Life Ins., 700 F. Supp. 2d 1204, 1216-17 (E.D. Cal. 2010)
16 (describing California law on this issue with respect to insurance
17 policies); see also Bank of the West v. Valley Nat. Bank of Az.,
18 41 F.3d 471, 477 (9th Cir. 1994) ("[T]he clear and explicit
19 language of the contract prevented justifiable reliance.").

20 Under California law, "an insured is under a duty to read his
21 insurance policy, and the insured will be charged with constructive
22 knowledge of policy provisions which are plain, clear, and
23

24 ³ Dunmore also argues in his opposition that the Rider is
25 fraudulent because its illusory in that it lacks consideration.
26 Absence of consideration is clearly a defense to contract, however
it cannot sustain a claim for fraud; a fraud claim requires a
misrepresentation.

1 conspicuous." Id. at 1216 (citing Spray, Gould & Bowers v.
2 Associated Internat. Ins. Co., 71 Cal. App. 4th 1260, 1272 (1999);
3 Hadland v. NN Investors Life Ins. Co., 24 Cal. App. 4th 1578, 1586
4 (1994). Such knowledge or constructive knowledge defeats the
5 element of justifiable reliance where "the misrepresentations are
6 not inconsistent with the terms of an insurance policy." Dias, 700
7 F. Supp. 2d at 1216-17.

8 As the court discussed in its order on Dunmore's previous
9 answer and counter-claims, California law provides special
10 protection to insureds due to the unique public policy concerns in
11 the relationship between the insurer and insured. See Order, Doc.
12 No. 201, at 12 (internal citations omitted). The court further
13 recognized that California law has not extended these special
14 protections to surety contracts because parties enter surety
15 contracts for commercial purposes rather than the non-commercial
16 purpose of protection against calamity that drives parties to enter
17 insurance contracts. Id. at 13 (internal citations omitted).
18 California law further recognized that insurance contracts differ
19 from surety contracts in that the insured faces a unique economic
20 dilemma when its insurer breaches because the insured cannot
21 typically seek recourse in the marketplace. Id. at 14 (citations
22 omitted). The court then applied the reasoning from the well-
23 established California law on surety and insurance contracts, to
24 conclude that indemnity agreements also do not deserve the special
25 protections available in insurance contracts. Id. at 15-18.

26 For these reasons, the court determines that the California

1 Supreme Court, if presented with this question of justifiable
2 reliance in the context of an indemnity agreement, would likely
3 determine that indemnity contracts are at least subject to the same
4 standards of constructive knowledge as are insurance contracts.
5 This is especially so as applied to the instant case where the
6 Rider was less than a page long and signed by both Dunmore, a
7 sophisticated businessman, and his lawyer. Most insurance contracts
8 are significantly longer than the Rider at issue here and also many
9 insureds are not nearly as sophisticated as Dunmore nor do they
10 benefit from the advice of counsel when entering an insurance
11 contract. Thus, Dunmore's fraud-based counter-claims fail to state
12 a claim upon which relief might be granted because he has failed
13 to allege facts from which the court could infer justifiable
14 reliance. Specifically, his allegations demonstrate constructive
15 knowledge of the terms of the Rider and, thus, it was unreasonable
16 for him to rely upon the alleged representations of Travelers'
17 representatives that contradict those terms.⁴

18 **B. Offset and Breach of the Covenant of Good Faith and Fair**
19 **Dealing Counter-Claim**

20 Travelers also asserts that Dunmore's fourth cause of action
21 for offset and breach of the implied covenant of good faith and
22

23 ⁴ Dunmore's fraud claims also fail to meet the heightened
24 pleading standard of Fed. R. Civ. P. 9(b). He failed to plead the
25 date, location, manner, and speaker of the alleged
26 misrepresentations. Further, he failed to demonstrate that he is
entitled to limited discovery in order to meet the heightened
pleading standard. See Neubronner v. Milken, 6 F.3d 666, 671 (9th
Cir. 1993).

1 fair dealing should be stricken as redundant to Dunmore's eighth
2 affirmative defense, pursuant to Fed. R. Civ. P. 12(f). Motion,
3 Doc. No. 212-1 at 27 (Jan. 18, 2011). Travelers contends that the
4 claim has complete identity with Dunmore's eighth affirmative
5 defense and, consequently, that the claim serves no useful purpose.
6 Id. at 28-30. Dunmore's eighth affirmative defense states that
7 "Defendants have sustained damages as a result of Plaintiff's
8 breaches of the subject contract and such damages serve as an
9 offset to any recovery by Plaintiff herein." SACC, Doc. No. 211 at
10 12 (Jan. 3, 2011). This court thoroughly addressed this matter in
11 its prior order dated December 15, 2010. Order, Doc. No. 210 at 18-
12 20 (Dec. 20, 2011). As stated in the prior order, this court finds
13 that Dunmore's counter-complaint seeks costs and fees in addition
14 to those that will offset any monies owed to plaintiff. The fourth
15 cause of action is not redundant and Travelers motion is denied.⁵

16 **IV. CONCLUSION**

17 For the foregoing reasons, the court orders as follows:
18

19 ⁵ There appears significant confusion as to the nature of
20 Dunmore's fourth counter-claim. The court construes the claim as
21 a claim for breach of the covenant of good faith and fair dealing
22 of which offset is one type of relief sought. Travelers argues for
23 the first time in reply that Dunmore failed to provide a more
24 definite statement, as the court previously ordered, as to the
25 facts from which the court can infer that he has would be entitled
26 to special damages, injunctive relief, and consequential damages.
Thereby, Travelers argues, the only relief Dunmore could seek for
his counter-claim of breach of the covenant is offset, which is
redundant to his affirmative defense. The court cannot consider
such an argument first raised in reply. Nor is it apparent that the
court would grant the motion to strike if it did consider the late
argument. For this reason, the court sees no reason to reconsider
its prior ruling on Travelers' identical motion.

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(1) Traveler's motion to dismiss Dunmore's First, Second, Third, and Fifth Counter-Claims (Doc. No. 212) is GRANTED. These Counter-Claims are DISMISSED WITH PREJUDICE. Dunmore is not granted leave to amend these claims as amendment would be futile.

(2) Travelers' motion to strike (Doc. No. 212) Dunmore's Fourth Counter-Claim is DENIED.

(3) Travelers' motion for a more definite statement (Doc. No. 212) is DENIED AS MOOT.

IT IS SO ORDERED.

DATED: March 1, 2011.


LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT