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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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JULIA HADLEY,

NO. CIV. 09-414 WBS EFB

Plaintiff,

MEMORANDUM AND ORDER RE: MOTION
TO DISMISS

v.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a New Jersey
Corporation, and DOES 1 thru 50,
inclusive,

Defendants.

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I. Factual and Procedural Background

Plaintiff Julia Hadley brought this action against defendant The Prudential Insurance Company of America alleging violations of state law following defendant's rejection of her claim for dependent life benefits. Plaintiff alleges that she purchased a policy for dependent life benefits from defendant in 1991. (Compl. ¶ 1.) Her employer, the University of California ("UC Regents"), allegedly acted as the third-party administrator

1 for that policy and as defendant's agent. (Id. ¶ 4.)

2 In October 2005, plaintiff and her husband divorced.
3 Plaintiff thereafter inquired with UC Regents as to whether she
4 and her now ex-husband could qualify as legal domestic partners
5 for the purposes of benefits. (Id. ¶ 7.) In response, UC
6 Regents allegedly informed her that as long as she submitted a
7 Declaration of Domestic Partnership, she and her husband would
8 qualify as domestic partners. (Id.) According to plaintiff, UC
9 Regents, acting on behalf of defendant, further represented that
10 as qualified domestic partners, plaintiff would be paid \$200,000
11 under her dependent life benefits policy upon the death of her
12 ex-husband. (Id. ¶ 29.) Plaintiff subsequently continued to pay
13 the premiums on her policy and did not seek a new or different
14 dependent benefits policy. (Id. ¶ 8.)

15 Plaintiff's ex-husband died on February 6, 2007. (Id.)
16 She then made a claim for benefits under her policy, but, on
17 August 20, 2007, defendant responded that the policy was "null
18 and void" and declined to pay plaintiff benefits under the
19 policy. (Id. ¶¶ 16, 29.) Plaintiff subsequently filed her
20 Complaint on January 9, 2009, in the Sacramento County Superior
21 Court, asserting claims for breach of insurance contract, breach
22 of the implied covenant of good faith and fair dealing,
23 negligence, negligent misrepresentation, and negligent infliction
24 of emotional distress. Defendant removed the action to this
25 court on February 1, 2009, on the basis of diversity
26 jurisdiction. (See Notice of Removal (Docket. No. 2) 1:24-25.)

27 Pursuant to Federal Rule of Civil Procedure 12(b)(6),
28 defendant now moves to dismiss plaintiff's third claim for

1 negligence, fourth claim for negligent misrepresentation, and
2 fifth claim for negligent infliction of emotional distress.

3 II. Discussion

4 On a motion to dismiss, the court must accept the
5 allegations in the complaint as true and draw all reasonable
6 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416
7 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
8 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322
9 (1972). To survive a motion to dismiss, a plaintiff needs to
10 plead "only enough facts to state a claim to relief that is
11 plausible on its face." Bell Atl. Corp. v. Twombly, 127 S. Ct.
12 1955, 1974 (2007). Dismissal is appropriate, however, where the
13 plaintiff fails to state a claim supportable by a cognizable
14 legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696,
15 699 (9th Cir. 1990); see also Conley v. Gibson, 355 U.S. 41, 47
16 (1957), abrogated on other grounds by Twombly, 127 S. Ct. at 1968
17 (complaint must "give the defendant fair notice of what the
18 plaintiff's claim is and the grounds upon which it rests").

19 A. Negligence

20 In some circumstances, an insurance agent may assume a
21 special duty of care to an insured to provide accurate
22 information regarding the terms or adequacy of a policy's
23 coverage and may be held liable for negligence if that duty is
24 breached. See Paper Savers, Inc. v. Nacsa, 51 Cal. App. 4th
25 1090, 1097 (1996) (explaining that an insurance agent "may []
26 assume a greater duty toward his insured by misrepresenting the
27 policy's terms or extent of coverage"); Free v. Republic Ins.
28 Co., 8 Cal. App. 4th 1726, 1729-30 (1992) (holding that an

1 insurance agent and insurer could be held liable for negligence
2 for breaching a special duty of care that arose when the agent
3 elected to respond to the insured's specific inquiries as to the
4 adequacy of his coverage); Westrick v. State Farm Ins., 137 Cal.
5 App. 3d 685, 692 (1982) (explaining that an insurance agent could
6 be liable for negligence when, because the agent failed to
7 request more information following the insured's inquiry as to
8 the extent of coverage, the insured falsely believed his new
9 vehicle was automatically covered under his existing policy).

10 When an insurance agent breaches such a duty, the
11 insurer can be held vicariously liable for negligence if it
12 directed, authorized, or ratified the agent's conduct. Desai v.
13 Farmers Ins. Exch., 47 Cal. App. 4th 1110, 1118, 1121 (1996)
14 (citing Shultz Steel Co. v. Hartford Accident Indemnity Co., 187
15 Cal. App. 3d 513, 518-19 (1986)); see Free, 8 Cal. App. 4th at
16 1731 (noting that a plaintiff may need to show that the insurance
17 agent acted within the scope of its authority to hold the insurer
18 liable at trial). But cf. Sanchez v. Lindsey Morden Claims
19 Servs., Inc., 72 Cal. App. 4th 249, 254 (1999) (noting, in the
20 context of whether an insurance adjuster could be held liable for
21 negligence to an insured, that "negligence is not among the
22 theories of recovery generally available against insurers").

23 Here, plaintiff alleges that UC Regents responded to
24 her specific inquiry about her coverage under the dependent life
25 benefits policy and informed her that she and her ex-husband, as
26 recognized domestic partners, qualified for benefits under that
27 policy. (Compl. ¶ 7.) Nevertheless, plaintiff avers that no
28 attempt was made to determine whether she and her husband in fact

1 qualified as domestic partners (id. ¶ 23), and defendant
2 ultimately denied her claim for benefits under the policy (id. ¶
3 16).

4 The Complaint avers that UC Regents served as the
5 third-party administrator of the policy (id. ¶ 4), though the
6 policy itself references UC Regents as the policyholder (see id.
7 Ex. A).¹ Under California law, an employer that administers a
8 group insurance policy for the benefit of its employees acts as
9 the agent of the insurer, even when the policy names the employer
10 as the insured. Elfstrom v. New York Life Ins. Co., 67 Cal. 2d
11 503, 505, 512 (1967) (“We are convinced that the employer is the
12 agent of the insurer in performing the duties of administering
13 group insurance policies.”); see McCormick v. Sentinel Life Ins.
14 Co., 153 Cal. App. 3d 1030, 1041 (1984) (recognizing that a third
15 party that administers a policy for an insurer may qualify as the
16 insurer’s agent depending on the nature of its duties).

17 As alleged, UC Regents thus acted as defendant’s agent
18 when it responded to plaintiff’s coverage inquiry and assumed a
19 special duty to plaintiff that was then breached. Plaintiff’s
20 allegations are sufficient to state a claim for negligence
21 against defendant, and the court must accordingly deny
22 defendant’s motion to dismiss on these grounds.

23 B. Negligent Misrepresentation

24 Plaintiff asserts a claim for negligent
25 misrepresentation against defendant based upon UC Regents’
26 representations that plaintiff and her husband would qualify as

27
28 ¹ Plaintiff attached a copy of the dependent life
benefits policy to the Complaint. (See Compl. ¶ 4; id. Ex. A.)

1 domestic partners under the policy. (Compl. ¶ 29.) The elements
2 of negligent misrepresentation under California law are: "1) the
3 misrepresentation of a past or existing material fact, 2) without
4 reasonable ground for believing it to be true, 3) with intent to
5 induce another's reliance on the fact misrepresented, 4)
6 justifiable reliance on the misrepresentation, and 5) resulting
7 damage." Apollo Capital Fund, LLC v. Roth Capital Partners, LLC,
8 158 Cal. App. 4th 226, 243 (2007) (citing Shamsian v. Atl.
9 Richfield. Co., 107 Cal. App. 4th 967, 983 (2003)). A principal
10 may be held liable for the negligent misrepresentation of an
11 agent. See Furla v. Jon Douglas Co., 65 Cal. App. 4th 1069, 1078
12 (1998).

13 Defendant contends that plaintiff's claim of negligent
14 misrepresentation must satisfy the heightened pleading
15 requirements of Federal Rule of Civil Procedure 9(b). (Mot.
16 Dismiss 5:16-26.) Rule 9(b) provides that, "[i]n alleging fraud
17 or mistake, a party must state with particularity the
18 circumstances constituting fraud or mistake." The Ninth Circuit
19 has held that a party need only comply with Rule 9(b) when that
20 party has specifically alleged fraud or alleged "facts that
21 necessarily constitute fraud." Vess v. Ciba-Geigy Corp. USA, 317
22 F.3d 1097, 1105 (9th Cir. 2003). For the purposes of this
23 analysis, "the 'indispensable elements of a fraud claim [under
24 California law] include a false representation, knowledge of its
25 falsity, intent to defraud, justifiable reliance, and damages.'" Id.
26 (quoting Moore v. Brewster, 96 F.3d 1240, 1245 (9th Cir.
27 1996)).

28 Other courts have explicitly held that a party need not

1 comply with the standards of Rule 9(b) when pleading a claim of
2 negligent misrepresentation. See Tricontinental Indust., Ltd. v.
3 PricewaterhouseCoopers, LLP, 475 F.3d 824, 839 n.9 (7th Cir.
4 2007); General Elec. Capital Corp. v. Posey, 415 F.3d 391, 396-97
5 (5th Cir. 2007); Forte Capital Partners v. Harris Cramer, No.
6 07-1237, 2007 WL 1430052, at *8 (N.D. Cal. May 14, 2007). But
7 see U.S. Concord, Inc. v. Harris Graphics Corp., 757 F. Supp.
8 1053, 1058 (N.D. Cal. 1991) (applying Rule 9(b)'s requirements to
9 a claim for negligent misrepresentation because it was based on
10 the same factual allegations as the plaintiff's claim for fraud).

11 Here, plaintiff's claim of negligent misrepresentation
12 does not specifically allege fraud because, "[i]n contrast to
13 fraud, negligent misrepresentation does not require knowledge of
14 falsity." Apollo Capital, LLC, 158 Cal. App. 4th at 243.²

15 Plaintiff's factual allegations also do not necessarily
16 constitute fraudulent conduct. Plaintiff avers that UC Regents,
17 as defendant's agent, represented to plaintiff that she and her
18 ex-husband qualified as domestic partners under her dependent
19 life benefits policy. (Compl. ¶ 29.) She alleges that there

21 ² The court acknowledges that California law treats
22 negligent misrepresentation as a species of fraud in some
23 contexts. See Cont'l Airlines, Inc. v. McDonnell Douglas Corp.,
24 216 Cal. App. 3d 388, 404 (1989) (holding that negligent
25 misrepresentation falls within the meaning of "fraud" as used in
26 California's statutory prohibition on exculpatory clauses in
27 contracts). But see Ventura County Nat'l Bank v. Macker, 49 Cal.
28 App. 4th 1528, 1531 (1996) (providing that negligent
misrepresentation is a form of negligence rather than fraud for
statute of limitations purposes). Nevertheless, the
categorization of the tort of negligent misrepresentation in
these state statutory contexts does not affect the court's
analysis. For purposes of Rule 9(b), fraud under California law
consists of "the indispensable elements" identified by the Ninth
Circuit. See Vess, 317 F.3d at 1105.

1 were no reasonable grounds for believing the accuracy of this
2 representation at the time UC Regents made it. (Id. ¶ 30.)
3 Plaintiff does not allege, however, that defendant or UC Regents
4 knowingly provided false information about plaintiff's policy or
5 made the representation with the intent to defraud. Plaintiff's
6 allegations are therefore not subject to the heightened pleading
7 requirements of Rule 9(b). See Vess, 317 F.3d at 1105 (holding
8 that a plaintiff's allegation that the defendant negligently
9 failed to disclose information with knowledge of its materiality
10 did not have to satisfy the heightened requirements of Rule
11 9(b)).

12 Under the more liberal pleading standards of Rule 8(a),
13 plaintiff's allegations are sufficient to "give the defendant
14 fair notice of what the plaintiff's claim is and the grounds upon
15 which it rests." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513
16 (2002) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). The
17 allegations indicate that plaintiff's claim is based upon UC
18 Regents' statements, made as defendant's agent, to plaintiff in
19 response to her inquiries concerning the coverage of her policy.
20 Accordingly, the court must deny defendant's motion to dismiss
21 plaintiff's claim for negligent misrepresentation.

22 C. Negligent Infliction of Emotional Distress

23 The tort of negligent infliction of emotional distress
24 (NIED) is not an independent tort under California law. Cramer
25 v. Consol. Freightways, Inc., 209 F.3d 1122, 1133 (9th Cir. 2000)
26 (citing Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965
27 (1993)). NIED is a form of negligence to which the standard
28 elements of duty, breach, causation, and damages apply. Hillblom

1 v. County of Fresno, 539 F. Supp. 2d 1192, 1209 (E.D. Cal. 2008)
2 (O'Neill, J.) (citing Huggins v. Longs Drug Stores Cal., Inc., 6
3 Cal. 4th 124, 129 (1993)). To assert an NIED claim, a plaintiff
4 must suffer "serious" emotional distress. Tuttle v. Chase Ins.
5 Life & Annuity Co., No. 07-3637, 2007 WL 2790359, at *3 (N.D.
6 Cal. Sept. 20, 2007) (citing Burgess v. Superior Court, 43 Cal.
7 App. 4th 1064, 1073 (1992)).


8 Under California law, NIED claims may be categorized as
9 "bystander" or "direct victim" claims based on the source of the
10 duty owed by the defendant. "Direct victim" claims "arise[] from
11 the breach of a duty that is assumed by the defendant or imposed
12 on the defendant as a matter of law, or that arises out of the
13 defendant's preexisting relationship with the plaintiff."
14 Huggins, 6 Cal. 4th at 129 (citations omitted); see Fluharty v.
15 Fluharty, 59 Cal. App. 4th 484, 493 (1997) ("As a direct victim,
16 a party may recover strictly emotional distress damages, i.e.,
17 absent physical injury or impact, where a duty arising from a
18 preexisting relationship is negligently breached." (citing
19 Burgess, 43 Cal. App. 4th at 1074)).

20 Here, plaintiff adequately alleges that defendant
21 directly owed her a duty of care. Plaintiff's negligence
22 allegations encompass the breach of a special duty created by
23 defendant's agent UC Regents' response to inquiries concerning
24 plaintiff's policy. According to plaintiff, she suffered
25 significant emotional distress, including sleeplessness, anxiety,
26 and physical distress, as a result of defendant's conduct.
27 (Compl. ¶ 36.) The Complaint therefore states a claim for NIED,
28 and accordingly, the court must deny defendant's motion to

1 dismiss plaintiff's fifth claim for relief.

2 IT IS THEREFORE ORDERED that defendant's motion to
3 dismiss be, and the same hereby is, DENIED.

4 DATED: April 1, 2009

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6 WILLIAM B. SHUBB
7 UNITED STATES DISTRICT JUDGE
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