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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

BANK OF SACRAMENTO,  
a California corporation,

Case No. 09-00771-JAM-KJN

Plaintiff,

ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS

v.

STEWART TITLE GUARANTY COMPANY,  
a Texas corporation

Defendant.

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This matter comes before the Court on Defendant Stewart Title Guaranty Company's ("Defendant's") Motion to Dismiss (Doc. 54) Plaintiff Bank of Sacramento's ("Plaintiff's") Second Amended Complaint ("SAC") (Doc. 51) for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff

1 opposes the motion.<sup>1</sup> For the reasons set forth below, Defendant's  
2 motion is granted.

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5 FACTUAL AND PROCEDURAL BACKGROUND

6 The SAC alleges that in 2006 Plaintiff made a \$10.8 million  
7 loan made to R&B Land Investments, LLC ("R&B"), to fund the  
8 purchase of certain real property ("the property") in Dixon,  
9 California, from Andrews Dixon LLC ("Andrews Dixon"). Plaintiff  
10 received a deed of trust on the property as security for its  
11 loan, and purchased a lender's title insurance policy, Policy  
12 No. M-2229-000825979 ("the policy") from Defendant, dated July  
13 17, 2006. Plaintiff's title insurance policy from Defendant  
14 insured Plaintiff against loss or damage sustained by any defect  
15 in or lien or encumbrance on the title, unmarketability of the  
16 title, lack of right of access to and from the land, the  
17 invalidity or unenforceability of the lien of the insured  
18 mortgage upon the title, and the priority of any lien or  
19 encumbrance over the lien of the insured. The policy listed  
20 specific items that were excluded from coverage. It also  
21 contained a general exclusionary clause that excluded, among  
22 other items, any defects, liens or encumbrances not known to  
23 Defendant, and not recorded, but known to Plaintiff.  
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<sup>1</sup> This motion was determined suitable for decision without oral  
argument. E.D. Cal. L. R. 230(g).

1 R&B subsequently defaulted on the loan. Andrews Dixon then  
2 sued Plaintiff in early 2008. The suit alleged that Andrews  
3 Dixon's interest in the property was senior to Plaintiff's  
4 interest in the property, based on an unrecorded option  
5 agreement ("the option agreement") that Andrews Dixon and R&B  
6 executed prior to the close of escrow. In February 2008, Andrews  
7 Dixon also filed a lis pendens on the property. Based on R&B's  
8 default, Plaintiff foreclosed on the property and purchased it  
9 at the Trustee's sale with a credit bid. However, because of the  
10 lis pendens, Plaintiff was unable to sell the property.  
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12  
13 Plaintiff alleges that Defendant knew about the option  
14 agreement, and that the option agreement was mentioned in the  
15 policy. Plaintiff alleges that Defendant later fraudulently  
16 altered the policy to remove mention of the option agreement.  
17 Plaintiff tendered its defense to Defendant in the lawsuit and  
18 the accompanying lis pendens matter filed by Andrews Dixon,  
19 pursuant to the title insurance policy. Defendant agreed to  
20 represent Plaintiff with its panel counsel, and filed a motion  
21 to expunge the lis pendens in March 2008.  
22  
23

24 Though Defendant agreed to represent Plaintiff, numerous  
25 conflicts and disagreements regarding representation arose,  
26 including allegations that Defendant was improperly accessing  
27 attorney-client privileged information. A dispute arose over  
28 whether or not Plaintiff knew about the unrecorded option

1 agreement and whether Plaintiff had disclosed it to Defendant.  
2 Defendant later apologized for its conduct, and continued  
3 defending Plaintiff using its panel counsel. In August 2008, the  
4 motion to expunge the lis pendens was denied, with the Superior  
5 Court judge finding that Plaintiff knew about the option  
6 agreement, and was therefore not a bona fide purchaser. In March  
7 2009, Defendant informed Plaintiff that based on the Superior  
8 Court's findings, Defendant believed it had a conflict and would  
9 no longer use its panel counsel. New defense counsel was chosen  
10 by Plaintiff, and substituted in as counsel. Defendant continued  
11 to pay for the defense. In December 2009, a tentative settlement  
12 agreement was reached between Plaintiff and Andrews Dixon. The  
13 settlement was finalized and the option agreement was terminated  
14 and lis pendens removed in January 2010. Plaintiff then owned  
15 the title free and clear of encumbrances. Defendant paid \$2.1  
16 million to Andrews Dixon on Plaintiff's behalf to settle the  
17 litigation.  
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21           During the two years in which litigation was ongoing and  
22 the lis pendens was in place, Plaintiff was unable to sell the  
23 property. In 2008, Plaintiff had received two preliminary offers  
24 to buy the property, in the \$10.8 million range. In May 2008,  
25 the property was appraised as having a fair market value of \$9  
26 million. On November 25, 2009 the property was appraised to have  
27 a value of \$4.3 million. On February 16, 2010, Plaintiff sent a  
28

1 demand letter to Defendant, demanding that Defendant pay it \$8.7  
2 million, as reimbursement for loss and damage covered under the  
3 policy. On February 27, 2010, Defendant denied the claim of loss  
4 and damage, based on the conditions and exclusions in paragraphs  
5 4(b), 6(b), 8(a) and 8(b) of the policy.  
6

7 Thus, the SAC now seeks to recover from Defendant the  
8 difference between what the property was worth in early 2008,  
9 and what it was worth in late 2009 at the end of the settlement  
10 proceedings and removal of the lis pendens.  
11

12 This matter was originally filed in Sacramento Superior  
13 Court on March 17, 2009, and was removed to this Court by  
14 Defendant on March 19, 2009. On March 18, 2009 Defendant brought  
15 a motion for declaratory relief (seeking an order that it had no  
16 duty to defend or indemnify Plaintiff because Plaintiff failed  
17 to disclose the option agreement), which it later voluntarily  
18 dismissed. Plaintiff then filed a First Amended Complaint  
19 ("FAC"), which alleged that Defendant breached the policy by  
20 failing to defend it with un-conflicted counsel. Defendant  
21 brought a motion to dismiss the FAC, which was ultimately  
22 rendered moot by a stay of the proceedings pending settlement of  
23 the underlying title dispute. After the settlement, Plaintiff  
24 filed the SAC, bringing the current claims for relief.  
25  
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27 Plaintiff seeks \$6.5 million for decline in market value of  
28 the property, an additional in \$300,000 in carrying costs and at

1 least \$1.9 million in prejudgment interest, based on the  
2 allegation that Defendant's failure to swiftly resolve the title  
3 issue resulted in economic damage.  
4

## 6 II. OPINION

### 7 A. Legal Standard

8 A party may move to dismiss an action for failure to state a  
9 claim upon which relief can be granted. Fed. R. Civ. P.  
10 12(b)(6). In considering a motion to dismiss, the court must  
11 accept the allegations in the complaint as true and draw all  
12 reasonable inferences in favor of the plaintiff. Scheur v.  
13 Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by  
14 Davis v. Schere, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S.  
15 319, 322 (1972). Assertions that are mere "legal conclusions,"  
16 however, are not entitled to the assumption of truth. Ashcroft  
17 v. Iqbal, 129 S.Ct. 1937, 1949-50 (2009) (citing Bell Atl. Corp.  
18 v. Twombly, 550 U.S. 544, 555 (2007)). To survive a motion to  
19 dismiss, a plaintiff needs to plead "enough facts to state a  
20 claim to relief that is plausible on its face." Bell Atl. Corp.  
21 v. Twombly, 550 U.S. 544, 555, 570 (2007). "Notwithstanding this  
22 deference, it is improper for a court to assume the plaintiff  
23 can prove fact which he or she has not alleged." Ozuna v. Home  
24 Capital Funding, 2009 WL 2496804, at \*1 (S.D. Cal. Aug. 13,  
25 2009). Dismissal is appropriate where the plaintiff fails to  
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1 state a claim supportable by a cognizable legal theory.

2 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
3 1990).

4  
5 Upon granting a motion to dismiss, a court has discretion to  
6 allow leave to amend the complaint. See Fed. R. Civ. Pro. 15(a).  
7 "Absent prejudice, or a strong showing of any [other relevant]  
8 factor[], there exists a presumption under Rule 15(a) in favor  
9 of granting leave to amend." Eminence Capital, L.L.C. v. Aspeon,  
10 Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (emphasis in  
11 original). "Dismissal with prejudice and without leave to amend  
12 is not appropriate unless . . . it is clear that the complaint  
13 could not be saved by amendment." Id.

14  
15 Generally, the court may not consider material beyond the  
16 pleadings in ruling on a motion to dismiss for failure to state  
17 a claim. Sherman v. Stryker Corp., 2009 WL 2241664, at \*2 (C.D.  
18 Cal. Mar. 30, 2009) (internal citations omitted). There are two  
19 exceptions: when material is attached to the complaint or relied  
20 on by the complaint, or when the court takes judicial notice of  
21 matters of public record, provided the facts are not subject to  
22 reasonable dispute. Id. Here, both Plaintiff and Defendant have  
23 requested the Court take judicial notice of certain documents.  
24 Plaintiff attached a copy of the policy to the SAC, for the  
25 Court's consideration. Defendant requested judicial notice  
26 (Doc.55), of eight documents: the second amended complaint filed  
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1 by Andrews Dixon in the Superior Court of Solano County, the  
2 Superior Court's order after the hearing on the Andrews Dixon  
3 motion, the motion to expunge the lis pendens, the settlement  
4 agreement, the option agreement termination, two of Defendant's  
5 letters to Plaintiff, and one of Plaintiff's letters to  
6 Defendant. All of the documents are matters of public record or  
7 are relied on in the SAC. Accordingly, the Court will consider  
8 all documents as requested.  
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12 B. Claims for Relief

13 1. Breach of Contract

14 Plaintiff claims that Defendant breached the terms of the  
15 insurance policy in a number of ways, including failing to  
16 properly handle the claim against Plaintiff with reasonable  
17 diligence, using conflicting counsel to defend Plaintiff,  
18 providing an inadequate defense, fraudulently altering the  
19 policy, inappropriately gaining access to attorney-client  
20 privileged communications, failing to use reasonable diligence  
21 to remove the lis pendens, and filing an unmeritorious  
22 declaratory relief action against Plaintiff. Plaintiff alleges  
23 that it has performed all the conditions, covenants and  
24 agreements required of it under the policy.  
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27 "To state a claim for breach of contract, a plaintiff must  
28 allege the following essential elements: "(1) the existence of a

1 contract, (2) plaintiff's performance or excuse for  
2 nonperformance, (3) defendant's breach, and (4) the resulting  
3 damages to plaintiff." Westways World Travel v. AMR Corp., 182  
4 F. Supp. 2d 952, 963 (C.D. Cal. 2001) (quoting Reichert v.  
5 General Ins. Co. of America, 68 Cal. 2d 822, 830 (1968)).

6 Defendant argues that the SAC fails to allege a withholding  
7 of benefits due. As Defendant notes, the SAC does not and cannot  
8 allege that Defendant failed to pay Plaintiff's defense costs in  
9 the suit by Andrews Dixon. Further, Defendant paid to settle the  
10 Andrews Dixon suit on Plaintiff's behalf. Absent a withholding  
11 of benefits due under the insurance policy, a breach of contract  
12 claim against an insurer cannot stand. See Love v. Fire Ins.  
13 Exchange, 221 Cal. App. 3d 1136, 1151 n. 10 (1990).

14  
15  
16 An insurer is only obligated to indemnify an insured in a  
17 third party action where a judgment has been entered against the  
18 insured on a covered claim. See Buss v. Superior Court, 16 Cal.  
19 4th 35, 45-46 (1997). Likewise, an insured is not damaged by the  
20 insurers 'wrongful' failure to settle a claim unless the insured  
21 suffers a judgment in excess of the policy limits. Continental  
22 Ins. Co. v. Superior Court, 37 Cal. App. 4th 69, 85 n 11 (1995).

23  
24 Though the SAC alleges that Defendant delayed in responding to a  
25 request to attend a mediation, and rejected an earlier proposed  
26 settlement, this conduct does not amount to a breach of contract  
27 as there has been no adverse judgment against Plaintiff and no  
28 withholding of benefits.

1           The SAC also alleges that Defendant breached the contract  
2 because it breached provisions 8(a) and 8(b) of the policy.

3 Plaintiff argues that sections 8(a) and 8(b) must be read  
4 together, that section 8(a) imposes a "reasonable diligence"  
5 standard on the litigation discussed in 8(b).  
6

7           Interpretation of an insurance policy is a question of law  
8 and follows the general rules of contract interpretation. Waller  
9 v. Truck Ins. Exchange, Inc., 11 Cal.4th 1, 18 (Cal. 1995).

10 "The fundamental rules of contract interpretation are based on  
11 the premise that the interpretation of a contract must give  
12 effect to the 'mutual intention' of the parties." Id. Under  
13 statutory rules of contract interpretation, the mutual intention  
14 of the parties at the time the contract is formed governs  
15 interpretation. Cal. Civ. Code, § 1636. Such intent is to be  
16 inferred, if possible, solely from the written provisions of the  
17 contract. Id., § 1639. The "clear and explicit" meaning of  
18 these provisions, interpreted in their "ordinary and popular  
19 sense," controls judicial interpretation, unless "used by the  
20 parties in a technical sense or a special meaning is given to  
21 them by usage." Id., § 1644. "A policy provision will be  
22 considered ambiguous when it is capable of two or more  
23 constructions, both of which are reasonable. But language in a  
24 contract must be interpreted as a whole, and in the  
25 circumstances of the case, and cannot be found to be ambiguous  
26 in the abstract." Waller, supra 11 Cal.4th at p. 18.

27 Moreover, insurance coverage is "interpreted broadly so as to  
28 afford the greatest possible protection to the insured,

1 [whereas] exclusionary clauses are interpreted narrowly against  
2 the insurer." MacKinnon v. Track Ins. Exch., 31 Cal. 4th 635,  
3 648 (Cal. 2003). An exclusionary clause must be "conspicuous,  
4 plain and clear" to be enforceable. De May v. Interinsurance  
5 Exch. of the Auto. Club of S. Cal., 32 Cal. App. 4th 1133, 1137  
6 (Cal. 1995). As the California Supreme Court explained, "An  
7 insurer cannot escape its basic duty to insure by means of an  
8 exclusionary clause that is unclear . . . The burden rests on  
9 the insurer to phrase exceptions in clear and unmistakable  
10 language." State Farm Mut. Auto Ins. Co. v. Jacober, 10 Cal. 3d  
11 193, 202 (Cal. 1973).

12  
13  
14 Here, the limitations on liability presented in sections  
15 8(a) and 8(b) are not ambiguous. The Court agrees with  
16 Defendant's analysis that once litigation has begun, section  
17 8(b) limits liability, and Defendant is only liable if an  
18 adverse judgment is issued against Plaintiff. As alleged in the  
19 SAC, there was no adverse judgment. The litigation led to a  
20 settlement, which was fully funded by Defendant and resulted in  
21 Plaintiff obtaining clear marketable title to the property.  
22 Accordingly, under section 8(b), Plaintiff cannot maintain its  
23 breach of contract claim premised on a breach of the 8(a)  
24 reasonable diligence provision.  
25  
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27 Even if this Court were to agree that Plaintiff has  
28 properly pled a breach of contract claim, Defendant contends

1 that its motion to dismiss must still be granted because the  
2 damages alleged by Plaintiff are not cognizable economic  
3 damages. This Court agrees. "Damages are an essential element of  
4 a breach of contract cause of action, and without them  
5 plaintiff's cause of action cannot survive." Hood v. Hartford  
6 Life and Acc. Ins. Co., 2009 WL 453115, at \*3 (E.D. Cal. Feb.  
7 23, 2009). Plaintiff argues that it suffered damages in the form  
8 of the decline in market value of the property. Plaintiff  
9 contends that such damages are proper, but cites no California  
10 case law that supports its contention that a lender's title  
11 insurance policy insures against diminution in value of property  
12 caused by market decline. Defendant cites California case law  
13 that presents analogous scenarios, which this Court finds  
14 persuasive. In both cases cited by Defendant, decline in market  
15 value was not considered a compensable damage. See Safeco Ins.  
16 Co. of Am. v. J&D Painting, 17 Cal. App. 4th 1199, 1204 (1993)  
17 (rejecting insured's claim against painting company for damages  
18 based on the diminution in the market value of his property and  
19 his inability to sell the property during the time it took to  
20 make repairs on the house following the painting company's  
21 alleged negligence, because such damages are not proximately  
22 caused by the alleged negligence); Lick Mill Creek Apartment v.  
23 Chi. Title Ins. Co., 231, Cal. App. 3d 1654 ,1661-62 (1991)  
24 (finding that defects which impair the market value of the  
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1 property rather than the marketability of the title to the land  
2 do not constitute a compensable loss under a title insurance  
3 policy.)

4  
5 Lastly, Plaintiff in its opposition brief raised a new  
6 theory not alleged in the SAC: that it suffered damages as a  
7 result of the settlement, because it was "forced" to give up  
8 valuable counterclaims against Andrews Dixon. As an initial  
9 matter, the Court will not consider this new theory, as it was  
10 not raised in the SAC. "Raising a completely new theory of  
11 liability, with only attenuated connection to the complaint, in  
12 a brief in opposition to a motion to dismiss does not grant  
13 Defendant fair notice of Plaintiffs' claim or grounds upon which  
14 is rests." Provencio v .Vasquez, 258 F.R.D. 626, 639 (E.D. Cal.  
15 2009). Second, these new allegations do not serve as a basis for  
16 allowing further amendment of the SAC. The SAC alleges that  
17 Plaintiff was represented by counsel of its own choosing at the  
18 settlement proceedings and in the nine months proceeding  
19 settlement, that Plaintiff never asserted counterclaims, that  
20 plaintiff had the opportunity to confer with counsel regarding  
21 the settlement terms, and that it to voluntarily agreed to  
22 mutual release of claims.  
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26 Given that Plaintiff has not alleged a claim for breach of  
27 contract and Plaintiff has thus far amended this claim twice,  
28 this Court finds that further amendment would be futile.

1 Accordingly, Defendant's motion to dismiss this claim is GRANTED  
2 WITH PREJUDICE.

3 2. Breach of the Covenant of Good Faith and Fair Dealing

4 Plaintiff alleges that Defendant through its actions  
5 discussed above breached the covenant of good faith and fair  
6 dealing.  
7

8 "Generally, every contract imposes upon each party a duty  
9 of good faith and fair dealing in its performance and its  
10 enforcement." Pagtalunan v. Reunion Mortgage Inc., 2009 WL  
11 961995, at \*2 (N.D. Cal. April 8, 2009). Additionally, "The  
12 covenant 'cannot impose substantive duties or limits on the  
13 contracting parties beyond those incorporated in the specific  
14 terms of their agreement.' Coyotzi v. Countrywide Financial  
15 Corporation, 2009 W.L. 2985497, \*7 (E.D. Cal. Sept. 16, 2009)  
16 (quoting Agosta v. Astor, 120 Cal.App.4th 596, 607 (2004))  
17 (internal citations omitted.)  
18

19 To establish breach of the covenant of good faith,  
20 Plaintiff must show that (1) benefits due under the policy were  
21 withheld; and (2) the reason for withholding benefits was  
22 unreasonable or without proper cause. Hergenroeder v. Travelers  
23 Property Ca. Ins. Co., 249 F.R.D. 595, 615 (E.D. Cal. 2008)  
24 (citing Love v. Fire Ins. Exchange, 221 Cal. App. 3d 1136, 1151  
25 (1990). "Where benefits are fully and promptly paid, no action  
26 lies for breach of the implied covenant no matter how hostile or  
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28

1 egregious the insurer's conduct toward the insured may have been  
2 prior to such payment. . . absent an actual withholding of  
3 benefits due there is not breach of contract and likewise no  
4 breach of the insurer's implied covenant." Id. citing Love, 221  
5 Cal. App. at 1151-52.  
6

7 Taking the allegations of the complaint in the light most  
8 favorable, as the Court is required to do, the SAC nonetheless  
9 fails to plead a claim for breach of the covenant of good faith  
10 and fair dealing. Here, Defendant promptly accepted Plaintiff's  
11 tender of its defense, paid for Plaintiff's defense, proceeded  
12 with litigation, and ultimately reached a settlement favorable  
13 to and with no objection from Plaintiff.  
14

15 Though the SAC alleges that at various points in the  
16 litigation Defendant questioned whether it had to defend and  
17 indemnify Plaintiff, questioned Plaintiff as to Plaintiff's  
18 knowledge of the option agreement, and altered the policy (an  
19 allegation that Defendant denies), the SAC does not allege that  
20 benefits were actually withheld. Plaintiff did not suffer an  
21 adverse judgment and Defendant fully funded the settlement with  
22 Andrews Dixon to clear the title for Plaintiff. While Plaintiff  
23 contends that it contributed to or helped "fund" the settlement  
24 by waiving any claims it may have had against Andrews Dixon,  
25 there is no allegation in the SAC that Plaintiff actually paid  
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1 any money or contributed anything of actual value toward the  
2 settlement.

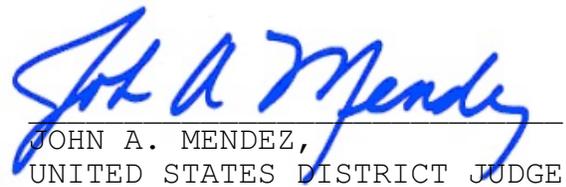
3 Accordingly, Plaintiff has failed to plead a claim for  
4 breach of the covenant of good faith and fair dealing. Plaintiff  
5 has already amended the complaint twice, and the Court finds  
6 that further amendment would be futile. Thus, Defendant's motion  
7 to dismiss this claim is GRANTED WITH PREJUDICE.  
8

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10  
11 III. ORDER

12 For the reasons set forth above, Defendant's Motion to  
13 Dismiss is GRANTED. The SAC is dismissed, with prejudice.  
14

15 IT IS SO ORDERED.  
16

17 Dated: September 27, 2010

18   
19 JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE