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

MICHELLE BURRIS dba SIERRA)	
BROKERS REAL ESTATE, INC.,)	2:10-cv-01561-GEB-DAD
)	
Plaintiff,)	
)	<u>ORDER GRANTING DEFENDANT'S</u>
v.)	<u>MOTION TO DISMISS</u>
)	
AMERICAN SAFETY INDEMNITY)	
COMPANY, an Oklahoma)	
corporation, and DOES 1 through)	
20, inclusive,)	
)	
Defendants.)	
_____)	

Defendant American Safety Indemnity Company ("ASIC") moves for dismissal of Plaintiff Michelle Burris's ("Burris") Complaint, under Federal Rule of Civil Procedure 12(b)(6). The Complaint is comprised of breach of contract, breach of the implied covenant of good faith and fair dealing, negligence, and declaratory relief claims. Each claim concerns Burris's contention that ASIC has a duty to defend her against a third-party complaint that the County of Placer ("Placer County") filed against her in the Placer County Superior Court in California.

I. Legal Standard

A Rule 12(b)(6) dismissal motion tests the legal sufficiency of the claims alleged in the complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief

1” Fed. R. Civ. P. 8(a)(2). The complaint must “give the
2 defendant fair notice of what the [plaintiff’s] claim is and the grounds
3 upon which relief rests” Bell Atl. Corp. v. Twombly, 550 U.S.
4 544, 555 (2007).

5 Dismissal of a claim under Rule 12(b)(6) is appropriate only
6 where the complaint either 1) lacks a cognizable legal theory, or 2)
7 lacks factual allegations sufficient to support a cognizable legal
8 theory. Balistreri v. Pac. Police Dept., 901 F.2d 696, 699 (9th Cir.
9 1988). To avoid dismissal, a plaintiff must allege “only enough facts to
10 state a claim to relief that is plausible on its face.” Twombly, 550
11 U.S. at 547.

12 In deciding a Rule 12(b)(6) motion, the material allegations
13 of the complaint are accepted as true and all reasonable inferences are
14 drawn in favor of the plaintiff. See al-Kidd v. Ashcroft, 580 F.3d 949,
15 956 (9th Cir. 2009). However, conclusory statements and legal
16 conclusions are not entitled to a presumption of truth. See Ashcroft v.
17 Iqbal, 129 S. Ct. 1937, 1949-50 (2009); Twombly, 550 U.S. at 555. “In
18 sum, for a complaint to survive a motion to dismiss, the nonconclusory
19 ‘factual content,’ and reasonable inferences from that content, must be
20 plausibly suggestive of a claim entitling the plaintiff to relief.” Moss
21 v. United States Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009).

22 Since jurisdiction over this action is based on diversity,
23 “California law is the governing substantive law.” See Burns v. Int’l
24 Ins. Co., 929 F.2d 1422, 1424 (9th Cir. 1991) (“Where a federal court
25 has jurisdiction by virtue of diversity of citizenship of the parties,
26 the court must follow state law.”). Under California law governing
27 insurance coverage, “[a] duty to defend arises if facts alleged in the
28 [third-party] complaint, or other facts known to the insurer,

1 potentially could give rise to coverage under the policy.” Legacy Vulcan
2 Corp. v. Superior Court, 185 Cal. App. 4th 677, 692 (2010) (emphasis in
3 original). “The determination whether the insurer owes a duty to defend
4 usually is made in the first instance by comparing the allegations of
5 the [third-party] complaint with the terms of the policy. Facts
6 extrinsic to the complaint also give rise to a duty to defend when they
7 reveal a possibility that the claim may be covered by the policy.”
8 Montrose Chemical Corp. V. Superior Court, 6 Cal. 4th 287, 295 (1993)
9 (quotation and citation omitted).

10 “The insured has the burden of establishing that a claim,
11 unless specifically excluded, is within basic coverage, while the
12 insurer has the burden of establishing that a specific exclusion
13 applies.” Minkler v. Safeco Ins. Co. of Am., 49 Cal. 4th 315, 322
14 (2010). “Courts may not rewrite the [policy] or force a conclusion to
15 exact liability where none was contemplated.” Legarra v. Federated Mut.
16 Ins. Co., 35 Cal. App. 4th 1472, 1480 (1995) (quotation and citation
17 omitted).

18 **II. Background**

19 Placer County alleges in the third-party complaint against
20 Burris the following claims: violation of the Subdivision Map Act,
21 violation of the Placer County Code, violation of Section 17200 of the
22 California Business and Professions Code, Fraud-Intentional
23 Misrepresentation, Fraud-Concealment, Conspiracy, Breach of Fiduciary
24 Duty, and Declaratory Relief. (Pl.’s Compl. Ex. 2.) Each claim is based
25 on the allegation that Burris “was a real estate developer in the
26 business of buying, parceling, selling and developing raw land.” Id. Ex.
27 7, ¶ 12.).

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1 shows on its face that the injury complained of is not only not covered
2 by, but is excluded from, the policy." California Ins. Guarantee Assn.
3 v. Wood, 217 Cal. App. 3d 944, 947-48 (1990) (quotations and citations
4 omitted). "An insurer can exclude coverage by language which is
5 conspicuous, plain and clear." Id. at 948.

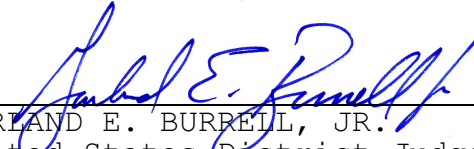
6 ASIC argues, inter alia, that Burris cannot avoid Exclusion K
7 by relying on allegations in the third-party lawsuit concerning her use
8 of her real estate broker license as the basis for her contention that
9 a potential for coverage exists. Both Placer County's original and first
10 amended third-party complaints allege that "Burris, at all times . . .
11 was a real estate developer in the business of buying, parceling,
12 selling and developing raw land." (Pl.'s Compl. Ex. 2, ¶ 12; Ex. 7, ¶
13 12.) The exhibits attached to Burris's Complaint against ASIC also
14 indicate that Placer County's claims against Burris are "based on or
15 arising out of, or in connection with the activities of [Burris] as a
16 . . . property developer." Id. Ex. 1, at 27. For example, a letter from
17 Burris's counsel to ASIC states that ASIC's denial of coverage was
18 improper because of "ASIC's attempt to draw a bright line between Ms.
19 Burris alleged activities [sic] as a real estate developer/'subdivider'
20 and her well documented activity as a [real estate broker]." Id. Ex. 5.

21 ASIC has shown that these exhibits and Placer County's
22 allegations against Burris are within Exclusion K since they are "based
23 on or arising out of, or in connection with the activities of [Burris]
24 as a . . . property developer." Id. Ex. 1, at 27. See generally Century
25 Transit Sys., Inc. v. Am. Empire Surplus Lines Ins., 42 Cal. App. 4th
26 121, 128 (1996) (stating when an exclusion applies plaintiff "cannot
27 rely upon the allegations of negligence to create a potential for
28 coverage."); Van Ness v. Blue Cross of California, 87 Cal. App. 4th 364,

1 373-74 (2001) (stating exclusions "remove coverage for certain risks
2 which initially fall within the insuring clause").

3 Since Burris's Complaint against ASIC does not plausibly show
4 that ASIC was required to defend her against Placer County's lawsuit,
5 ASIC's motion to dismiss Burris's Complaint is granted. However, Burris
6 is granted fourteen (14) days from the date on which this order is filed
7 to file an amended Complaint addressing the deficiencies in her
8 Complaint. Further, Plaintiff is notified that this action may be
9 dismissed with prejudice under Federal Rule of Civil Procedure 41(b) if
10 Plaintiff fails to file an amended complaint within the prescribed time
11 period.

12 Dated: January 4, 2011

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16 GARLAND E. BURRELL, JR.
17 United States District Judge
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