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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ROBERTA BRAFMAN,  
Plaintiff,

No. 2:11-cv-01627-MCE-GGH

v.

MEMORANDUM AND ORDER

NATIONWIDE MUTUAL INSURANCE  
COMPANY & ITS AFFILIATES,  
Defendant.

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Plaintiff Roberta Brafman ("Plaintiff") filed this action challenging Defendant Nationwide Mutual Insurance Company's ("Defendant") denial of insurance benefits allegedly owed to her under her homeowner's insurance policy. Presently before the Court is Defendant's Motion to Dismiss Plaintiff's Complaint as untimely. For the following reasons, Defendant's Motion is granted with leave to amend.<sup>1</sup>

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<sup>1</sup> Because oral argument will not be of material assistance, the Court orders this matter submitted on the briefs. E.D. Cal. Local Rule 78-230(h).

1 **BACKGROUND<sup>2</sup>**

2  
3 Plaintiff is the owner of a small ranch property located in  
4 Sacramento, California (the "Property"). Plaintiff has both a  
5 home (the "Dwelling") and a rental unit (the "Rental") on the  
6 Property. Plaintiff purchased insurance coverage on both  
7 structures via a Farm Policy of Insurance (the "Policy"), which  
8 included homeowner's insurance coverage. The Policy provided  
9 "all perils" coverage for the Property and the structures unless  
10 the cause of any claimed loss was otherwise excluded from  
11 coverage. Losses caused by "fungus" were specifically excluded  
12 under the terms of the Policy.

13 Plaintiff alleges, however, that Defendant induced her to  
14 purchase an additional endorsement to the Policy, namely a  
15 Limited Fungi or Bacteria Coverage Endorsement (the  
16 "Endorsement"). Plaintiff believed, based on Defendant's  
17 representations in the Endorsement and on her own reading of the  
18 Policy that the Endorsement extended coverage under the Policy to  
19 her buildings for losses caused by mold.

20 In August 2009, Plaintiff began to feel the effects of what  
21 turned out to be exposure to toxic mold in the Dwelling. The  
22 mold purportedly attacked Plaintiff's respiratory system, and she  
23 was subsequently hospitalized. On the way to the hospital,  
24 Plaintiff stopped breathing and had to be resuscitated.

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28 <sup>2</sup> Unless otherwise stated, the following facts are derived  
from Plaintiff's Complaint.

1 On September 1, 2009, Plaintiff made a claim under the  
2 Policy for structural damage and personal property loss to the  
3 Dwelling. Just over two months later, on November 5, 2009,  
4 Defendant denied Plaintiff's claim, asserting that the mold was  
5 caused by "dampness of atmosphere," which was not a covered cause  
6 of loss under the Policy or the Endorsement. Plaintiff  
7 nonetheless renewed her claim to Defendant on December 15, 2009.  
8 Defendant again denied Plaintiff's requested benefits on  
9 January 8, 2010.

10 Also in January 2010, Plaintiff became aware of separate  
11 mold problems in the Rental. She then made an independent claim  
12 on the Policy to Defendant pertaining to those losses. According  
13 to Plaintiff, she thereafter "became engaged in coverage issues  
14 with defendant respecting the mold burdening the rental and  
15 related claims from February, 2010 through the end of June,  
16 2010." Complaint, ¶ 38. Plaintiff alleges that "Defendant's bad  
17 faith conduct and resulting controversy in handling [the Rental]  
18 claim consumed the plaintiff's resources and attention for the  
19 next six months and had the effect of impeding the plaintiff's  
20 ability to pursue investigation of defendant's bad faith conduct  
21 in the mold loss claim to [the Dwelling]." Id., ¶ 52.

22 More specifically as to the Rental coverage dispute,  
23 Plaintiff expected that the full amount of damage to that  
24 building, approximately \$25,020, would be covered under the  
25 Policy.

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1 On March 4, 2010, however, Defendant explained it would pay  
2 \$7,041 for the portion of the claim covering loss due to mold  
3 from rain, but that it would not cover the remaining \$17,979  
4 because, as with the Dwelling claim, that portion of the Rental  
5 claim arose out of mold that had been caused by "dampness of  
6 atmosphere."

7       Eventually, in July 2010, after failing to reach a  
8 settlement with Defendant as to her Rental claim, Plaintiff  
9 returned her attention to her Dwelling claim. In August 2010,  
10 Plaintiff hired her own expert to evaluate the condition of the  
11 Dwelling. On October 14, 2010, Plaintiff's expert issued an  
12 investigative report finding that the cause of the mold was a  
13 failure/breakage of the hot water pipe delivery system, not  
14 "dampness of atmosphere." Over two months later, on December 23,  
15 2010, Plaintiff forwarded Defendant her expert's report and  
16 supporting documentation seeking to have Defendant revisit her  
17 claim. On January 6, 2011, Defendant reiterated its denial of  
18 Plaintiff's request for benefits.

19       Plaintiff's Policy includes a one-year limitations provision  
20 stating, "No one may bring a legal action against us under this  
21 Coverage Form unless...[t]he action is brought within 1 year  
22 after the date on which the direct physical loss or damage  
23 occurred." Complaint, Exh. A, p. 33-34. Each time Defendant  
24 denied coverage to Plaintiff, Defendant reminded Plaintiff in  
25 writing about this limitations provision.

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1 On May 12, 2011, Plaintiff initiated the instant action  
2 seeking to recover from Defendant pursuant to two claims for  
3 fraudulent inducement (First and Second Causes of Action), a  
4 claim for fraudulent and deceitful claims practices as to the  
5 Dwelling (Third Cause of Action), a claim for fraudulent and  
6 deceitful claims practices as to the Rental (Fourth Cause of  
7 Action), a claim for breach of the implied covenant of good faith  
8 and fair dealing (Fifth Cause of Action), and a claim for  
9 declaratory relief (Sixth Cause of Action). Defendant  
10 subsequently moved to dismiss each of Plaintiff's causes of  
11 action as time-barred.<sup>3</sup> Defendant's Motion is now GRANTED with  
12 leave to amend.

13  
14 **STANDARD**  
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16 On a motion to dismiss for failure to state a claim under  
17 Federal Rule of Civil Procedure 12(b)(6),<sup>4</sup> all allegations of  
18 material fact must be accepted as true and construed in the light  
19 most favorable to the nonmoving party. Cahill v. Liberty Mut.  
20 Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996).

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24 <sup>3</sup> The Court is also in receipt of Defendant's  
25 Objections/Motion to Strike a supplemental brief filed by  
26 Plaintiff. Plaintiff's supplemental filing did nothing to change  
27 this Court's decision and Defendant's Objections/Motion to Strike  
are overruled/denied as moot. the Court has read and considered  
all papers filed by the parties.

28 <sup>4</sup> All further references to "Rule" or "Rules" are to the  
Federal Rules of Civil Procedure unless otherwise noted.

1 Rule 8(a)(2) "requires only 'a short and plain statement of the  
2 claim showing that the pleader is entitled to relief,' in order  
3 to 'give the defendant fair notice of what the [...] claim is and  
4 the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly,  
5 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41,  
6 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to  
7 dismiss does not require detailed factual allegations. However,  
8 "a plaintiff's obligation to provide the grounds of his  
9 entitlement to relief requires more than labels and conclusions,  
10 and a formulaic recitation of the elements of a cause of action  
11 will not do." Id. (internal citations and quotations omitted).  
12 A court is not required to accept as true a "legal conclusion  
13 couched as a factual allegation." Ashcroft v. Iqbal, \_\_\_ U.S.  
14 \_\_\_, 129 S. Ct. 1937, 1950 (2009) (quoting Twombly, 550 U.S. at  
15 555). "Factual allegations must be enough to raise a right to  
16 relief above the speculative level." Twombly, 550 U.S. at 555  
17 (citing 5 Charles Alan Wright & Arthur R. Miller, Federal  
18 Practice and Procedure § 1216 (3d ed. 2004) (stating that the  
19 pleading must contain something more than "a statement of facts  
20 that merely creates a suspicion [of] a legally cognizable right  
21 of action.")).

22 If the court grants a motion to dismiss a complaint, it must  
23 then decide whether to grant leave to amend. The court should  
24 "freely give[]" leave to amend when there is no "undue delay, bad  
25 faith[,] dilatory motive on the part of the movant,...undue  
26 prejudice to the opposing party by virtue of...the amendment,  
27 [or] futility of the amendment...." Fed. R. Civ. P. 15(a)(2);  
28 Foman v. Davis, 371 U.S. 178, 182 (1962).

1 Generally, leave to amend is only denied when it is clear that  
2 the deficiencies of the complaint cannot be cured by amendment.  
3 DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir.  
4 1992).

### 6 ANALYSIS

8 According to Defendant, Plaintiff's claims are each barred  
9 by the one-year contractual limitations period included in the  
10 Policy. Private limitations provisions have "long been  
11 recognized as valid in California." C&H Foods Co. v. Hartford  
12 Ins. Co., 163 Cal. App. 3d 1055, 1064 (1984). Indeed, such  
13 covenants are "valid provision[s] of an insurance contract and  
14 cannot be ignored with impunity as long as the limitation is not  
15 so unreasonable as to show imposition or undue advantage." Id.  
16 (citing Fageol T. & C. Co. v. Pacific Indemnity Co., 18 Cal. 2d  
17 748, 753 (1941)). One year has been held to be a reasonable  
18 limitations period in California as well. Id.; Shugerman v.  
19 Allstate Ins. Co., 594 F. Supp. 2d 1131, 1135 (C.D. Cal. 2009);  
20 Spray, Gould & Bowers v. Associated Int'l Ins. Co., 71 Cal. App.  
21 4th 1260, 1267 (1999); see also California Insurance Code  
22 §§ 2070-71 (insurance policies providing fire coverage must  
23 contain at least a one-year limitations period). Since the  
24 Policy in this case contains clear language delineating a  
25 reasonable one-year limitations period and since Defendant  
26 advised Plaintiff of that one-year period in writing on multiple  
27 occasions, the Court now finds that the parties are bound by this  
28 provision to the extent it is applicable to Plaintiff's claims.

1 Contractual limitations provisions such as the one included  
2 in the Policy are applicable, however, only to claims actually  
3 brought "on the policy." Campanelli v. Allstate Life Ins. Co.,  
4 322 F.3d 1086, 1093 (9th Cir. 2003). The phrase "on the policy"  
5 is broadly construed to include those claims that are generally  
6 "grounded in a failure to pay benefits that are due under the  
7 policy." Id. at 1096 (citing Prieto v. State Farm Fire & Cas.  
8 Co., 225 Cal. App. 3d 1188, 1195 (1990)); see also Shugerman v.  
9 Allstate Ins. Co., 594 F. Supp. 2d 1131, 1135 (C.D. Cal. 2009)  
10 (internal citations and quotations omitted). Likewise, "[a]n  
11 action seeking damages recoverable under the policy for a risk  
12 insured under the policy' is 'on the policy' and covered by the  
13 one-year limitations period." Campanelli, 322 F.3d at 1086  
14 (quoting Jang v. State Farm Fire & Cas. Co., 80 Cal. App. 4th  
15 1291 (2000)).

16 Accordingly, under the facts of this case, then, "any claim  
17 that is on the policy must be brought within 12 months of the  
18 'inception of the loss' or it is time-barred." Campanelli,  
19 322 F.3d at 1093. Inception of loss is "that point in time when  
20 appreciable damage occurs and is or should be known to the  
21 insured, such that a reasonable insured would be aware that his  
22 notification duty under the policy has been triggered.'" Id.  
23 (citing Prudential-LMI Commercial Ins. v. Superior Court, 51 Cal.  
24 3d 674, 687 (1990)). The applicable limitations period is  
25 tolled, however, "from the time an insured gives notice of the  
26 damage to his insurer, pursuant to applicable policy notice  
27 provisions, until coverage is denied." Prudential-LMI Com. Ins.,  
28 51 Cal. 3d at 693.



1 Plaintiff here was aware of the damage to the Dwelling and  
2 the Rental, and thus inception of loss had occurred, in  
3 approximately August or September of 2009 and January of 2010,  
4 respectively. The one-year period would have begun to run for  
5 each claim on these respective dates. These limitations periods  
6 were tolled, however, through, at the latest, November 5, 2009,  
7 for Plaintiff's Dwelling claim and March 4, 2010, for Plaintiff's  
8 Rental claim, the dates Defendant denied Plaintiff benefits.  
9 Accordingly, the applicable one-year limitations periods covering  
10 each claim had run by the time Plaintiff initiated this action,  
11 over one year later, on May 12, 2011. Any of Plaintiff's claims  
12 that are "on the policy" are thus time-barred.<sup>5</sup>

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16 <sup>5</sup> In reaching this holding, the Court rejects Plaintiff's  
17 convoluted attempt to make an equitable estoppel argument. "An  
18 estoppel arises as a result of some conduct by the defendant,  
19 relied on by the plaintiff, which induces the belated filing of  
20 the action." Prudential-LMI Commercial Ins., 51 Cal. 3d at 690.  
21 Plaintiff appears to argue that Defendant should be estopped from  
22 relying on the contractual limitations period because Defendant  
23 induced Plaintiff to dispute the Rental claim and thus to turn  
24 her attention away from her Dwelling claim. According to  
25 Plaintiff, because she was distracted by the Rental claim, she  
26 had no time to continue investigation on the Dwelling claim and  
27 was thus unable to hire an independent investigator until the  
28 time for filing her Complaint had almost run. Plaintiff's  
argument is fatally flawed because, among other things, she has  
not alleged in her Complaint that Defendant attempted to induce  
her to forego investigation of her Dwelling claim, nor does she  
allege she relied on any statement by Defendant in waiting to  
file this action. Plaintiff provides no justifiable reason why,  
despite her immediate disagreement with Defendant's denial of her  
claims, she waited so many months to hire an expert investigator  
or why she could not have pursued legal relief as to either of  
her claims sooner. Accordingly, on the facts alleged, there is  
no basis on which to estop Defendant from asserting the  
contractual limitations provision as a defense.

1           **A.     Plaintiffs' First And Second Causes Of Action For**  
2           **Fraudulent Inducement**

3           Plaintiff's first and second causes of action for fraudulent  
4 inducement are not "on the policy," and thus are not barred by  
5 the one-year limitations provision. By way of these claims,  
6 Plaintiff asserts that Defendant fraudulently induced Plaintiff  
7 to purchase the Endorsement, and fraudulently represented to  
8 Plaintiff that in paying the additional premium for the  
9 Endorsement, the ranch dwellings would be covered for damages or  
10 losses caused by mold. As is clear from these allegations,  
11 Plaintiff's fraudulent inducement claims thus go to the accuracy  
12 and truthfulness of the discussion and negotiations of the  
13 parties prior to the contractual agreement and to intentional  
14 misrepresentations of material fact allegedly made by Defendant  
15 to Plaintiff and upon which Plaintiff relied in agreeing to enter  
16 the contract. See 48 Am. Jur. Proof of Facts 3d 329 § 1. These  
17 types of claims arising out of Defendant's actions in inducing  
18 Plaintiff to contract, as opposed to a failure to pay policy  
19 benefits, are not "on the policy." See Harlow v. American  
20 Equitable Assur. Co. of New York, 87 Cal. App. 28, 31-32 (1927);  
21 see also, Bankers Trust Co. v. Pac. Emp'rs Ins. Co., 282 F.2d  
22 106, 112-13 (9th Cir. 1960) ("action in tort for deceit in  
23 inducing the contract is not an action on the contract")  
24 (interpreting similar language in a Nevada contract).

25           Regardless, however, Plaintiff has failed to plead her  
26 fraudulent inducement claims with the particularity required  
27 under Federal Rule of Civil Procedure 9(b). See, e.g., Doyle v.  
28 Illinois Cent. R. Co., 2008 WL 4964774, \*3 (E.D. Cal.).

1 Rule 9(b) requires that "[i]n alleging fraud or mistake, a party  
2 must state with particularity the circumstances constituting  
3 fraud or mistake." "[T]o avoid dismissal for inadequacy under  
4 Rule 9(b), [the] complaint would need to state the time, place,  
5 and specific content of the false representations as well as the  
6 identities of the parties to the misrepresentation." Edwards v.  
7 Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2008) (internal  
8 citations and quotations omitted). While Plaintiff makes  
9 specific allegations as to the content of Defendant's allegedly  
10 false representations, she does not allege the time, place, or  
11 identities of the parties to the misrepresentation. Plaintiff's  
12 first and second causes of action for fraudulent inducement are  
13 thus dismissed with leave to amend for failure to state a claim.

14  
15 **B. Plaintiff's Third And Fourth Causes Of Action For**  
16 **Fraudulent And Deceitful Claims Practices And Fifth**  
17 **Cause Of Action For Breach Of The Implied Covenant Of**  
**Good Faith And Fair Dealing**

18 Plaintiff's third through fifth causes of action are "on the  
19 policy" and are thus time-barred. Intentional misrepresentation  
20 and misrepresentations that involve the "scope, competence and  
21 fairness of the investigations into the [Homeowner's] claim for  
22 covered loss under the policy" are considered on the policy.  
23 Campanelli, 322 F.3d at 1097. Likewise, as stated above, claims  
24 "grounded in a failure to pay benefits that are due under the  
25 policy" are "on the policy" as well. Id.

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1 Moreover, "on the policy" claims include breach of the implied  
2 covenant of good faith causes of action when based on the  
3 mishandling of a homeowner's claims and recovery of damages for  
4 the underpayment of claims. Id.; see also CBS Broad. Inc. v.  
5 Fireman's Fund Ins. Co., 70 Cal. App. 4th 1075, 1086 (1999)  
6 (holding action for breach of good faith and fair dealing was "on  
7 the policy"). "The fact that an insured seeks damages in  
8 addition to those covered by the policy will not render the cause  
9 of action 'off the policy.'" Campanelli, 322 F.3d at 1096-97.

10 In this case Plaintiff's fraudulent and deceitful claims  
11 practices causes of action arise out of Plaintiff's contention  
12 that Defendant wrongfully investigated and denied her claims.  
13 Plaintiff's breach of the implied covenant cause of action is  
14 likewise based upon allegations that Defendant failed to pay  
15 benefits as a result of its bad faith investigation and denial of  
16 benefits. Accordingly, these causes of action are grounded in  
17 Defendant's failure to pay benefits and its alleged mishandling  
18 of its investigation into Plaintiff's claims. Each cause of  
19 action is therefore "on the policy" and is consequently barred by  
20 the one-year limitations provision. Defendant's Motion to  
21 Dismiss Plaintiff's third and fourth causes of action for  
22 fraudulent and deceitful claims practices and fifth cause of  
23 action for breach of the implied covenant of good faith and fair  
24 dealing is thus granted with leave to amend.

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1 If no amended complaint is filed within said twenty (20)-day  
2 period, without further notice to the parties, those causes of  
3 action dismissed by virtue of this Order will be deemed dismissed  
4 with prejudice.

5 IT IS SO ORDERED.

6 Dated: November 2, 2011

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MORRISON C. ENGLAND, JR.  
10 UNITED STATES DISTRICT JUDGE  
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