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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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ESTATE OF EMMA CARTLEDGE,  
Plaintiff,  
  
v.  
  
COLUMBIA CASUALTY COMPANY,  
Defendant,

NO. CIV. 2:11-2623 WBS GGH  
  
ORDER RE: MOTION TO DISMISS

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Plaintiff the Estate of Emma Cartledge, by and through her successor in interest, Kenny Cartledge, ("Cartledge") brought this action against defendant Columbia Casualty Company ("Columbia") alleging claims under California Insurance Code section 11580(b)(2) and for breach of the implied covenant of good faith and fair dealing. Defendant now moves to dismiss plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.

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1 I. Procedural and Factual Background

2 Sierra Manor Associates, Inc. ("Sierra Manor  
3 Associates") is a residential elder care facility that does  
4 business as Sierra Manor. (Mem. of P. & A. in Supp. of Mot. to  
5 Dismiss at 1.) Cartledge obtained a default judgment in state  
6 court ("the underlying state action") against Sierra Manor  
7 Associates, Inc., individually and doing business as Sierra  
8 Manor, in the amount of \$2,000,471.50 for claims arising from  
9 injuries allegedly sustained by Emma Cartledge while a resident  
10 at Sierra Manor. (Compl. at 2.) Sierra Manor Associates was the  
11 only defendant named in the underlying state action. (Id.)

12 Columbia issued a commercial liability policy to Attwal  
13 Enterprises, Inc. ("Attwal Enterprises"), a corporation that uses  
14 two fictitious business names--Sierra Manor and Woodson Lodge.  
15 (Id. at 3; Mem. of P. & A. in Supp. of Mot. to Dismiss at 1.)  
16 That policy was valid at the time of the acts under which the  
17 underlying state action arose. Sierra Manor Associates is not  
18 listed as an insured on the policy. (Miller Decl. ¶ 2; Ex. C.)  
19 Balwinder Attwal ("Mr. Attwal") is the CEO of both Attwal  
20 Enterprises and Sierra Manor Associates. (Pl.'s Opp'n to Def.'s  
21 Mot. to Dismiss at 2-3, Exs. 4, 5.)

22 Cartledge alleges that Columbia was aware of the  
23 underlying action, but did not participate in the underlying  
24 action and rejected Cartledge's offers to settle within policy  
25 limits. (Compl. at 3.)

26 Claiming that Sierra Manor Associates was an insured  
27 under the Columbia policy, Cartledge brought this action against  
28 Columbia as a judgment creditor seeking to collect on the default

1 judgment against Sierra Manor Associates and bringing a claim for  
2 breach of the implied covenant of good faith and fair dealing.

3 II. Judicial Notice

4 In general, a court may not consider items outside the  
5 pleadings when deciding a motion to dismiss, but it may consider  
6 items of which it can take judicial notice. Barron v. Reich, 13  
7 F.3d 1370, 1377 (9th Cir. 1994). A court may take judicial  
8 notice of facts "not subject to reasonable dispute" because they  
9 are either "(1) generally known within the territorial  
10 jurisdiction of the trial court or (2) capable of accurate and  
11 ready determination by resort to sources whose accuracy cannot  
12 reasonably be questioned." Fed. R. Evid. 201. Judicial notice  
13 may properly be taken of matters of public record outside the  
14 pleadings. See MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504  
15 (9th Cir. 1986).

16 Defendant has requested that the court take judicial  
17 notice of five items: (1) the Complaint in the underlying state  
18 action; (2) the Complaint in the instant action; (3) a copy of  
19 the California Secretary of State Business Entity Detail for  
20 Sierra Manor Associates; (4) a copy of the California Secretary  
21 of State Business Entity Detail for Attwal Enterprises; and (5)  
22 the insurance policy issued to Attwal Enterprises. (Req. for  
23 Judicial Notice (Docket No. 7-1).)

24 To the extent that defendant requests that the court  
25 take judicial notice that the Complaint in the underlying state  
26 action was filed, the request is granted. See  
27 Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136  
28 F.3d 1360, 1364 (9th Cir. 1998). However, the court will not

1 take judicial notice of any disputed facts contained in the  
2 document. See Lee, 250 F.3d at 690. As to item two, the court  
3 does not need to judicially notice the pleading in the current  
4 proceeding to consider it. Judicial notice of items three and  
5 four is appropriate as both are public records. The insurance  
6 policy, item five, is neither generally known and capable of  
7 accurate and unquestionable determination nor a public record.  
8 Because the insurance policy is not attached to the Complaint,  
9 the court will not judicially notice it.<sup>1</sup>

### 10 III. Discussion

11 On a motion to dismiss, the court must accept the  
12 allegations in the complaint as true and draw all reasonable  
13 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416  
14 U.S. 232, 236 (1974), overruled on other grounds by Davis v.  
15 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322  
16 (1972). "To survive a motion to dismiss, a complaint must  
17 contain sufficient factual matter, accepted as true, to 'state a  
18 claim to relief that is plausible on its face.'" Ashcroft v.  
19 Iqbal, 556 U.S. 662, ---, 129 S. Ct. 1937, 1949 (2009) (quoting  
20 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Under  
21 this "plausibility standard," "[w]here a complaint pleads facts  
22 that are 'merely consistent with' a defendant's liability, it  
23 'stops short of the line between possibility and plausibility of  
24 entitlement to relief.'" Id. at 1949 (quoting Twombly, 550 U.S.  
25 at 556-57).

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27 <sup>1</sup> As the court does not consider any matters outside the  
28 pleadings that are not properly subject to judicial notice, the  
court declines to treat the motion to dismiss as a motion for  
summary judgment under Federal Rule of Civil Procedure 12(d).

1           A.    Insurance Code section 11580(b)(2)

2           Under California Insurance Code section 11580,  
3 "whenever judgment is secured against the insured . . . in an  
4 action based upon bodily injury, death, or property damage . . .  
5 an action may be brought against the insurer on the policy and  
6 subject to its terms and limitations, by such judgment creditor  
7 to recover on the judgment." Cal. Ins. Code § 11580(b)(2). "The  
8 judgment creditor's right to sue is not derivative or dependent  
9 upon any assignment from the insured." Shafer v. Berger, Kahn,  
10 Shafton, Moss, Figler, Simon & Gladstone, 107 Cal. App. 4th 54,  
11 68 (2d Dist. 2003) (quoting Croskey et al., Cal. Practice Guide:  
12 Insurance Litigation ¶ 15:1039 (The Rutter Group 2002)). In  
13 order to state a claim under section 11580(b)(2), a complaint  
14 must include allegations that a plaintiff (1) obtained a judgment  
15 for injury (2) against a party who is insured by an insurance  
16 policy that (3) would cover the injury. Garamendi v. Golden  
17 Eagle Ins. Co., 16 Cal. App. 4th 694, 710 (1st Dist. 2004)  
18 (quoting Wright v. Fireman's Fund Ins. Cos., 11 Cal. App. 4th  
19 998, 1015 (4th Dist. 1992)). At issue in this case is whether  
20 plaintiff can be said to have obtained a judgment against a party  
21 insured by Columbia.

22           The Columbia policy was issued to Attwal Enterprises  
23 dba Sierra Manor. In the underlying action, the only named  
24 defendant was "Sierra Manor Associates, Inc., individually and  
25 doing business as Sierra Manor."<sup>2</sup> Plaintiff claims that because

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27           <sup>2</sup> In its Complaint, plaintiff assures the court that the  
28 state court's opinion may be amended to include Attwal  
Enterprises as a named defendant. It is true that California  
Civil Code section 187 permits a court to go back and alter its

1 Sierra Manor Associates also does business under the fictional  
2 name "Sierra Manor," Sierra Manor Associates should be considered  
3 as an insured under the Columbia policy. A fictional business  
4 name, or dba, however, "does not create a separate legal  
5 identity." Pinkerton's Inc. v. Superior Ct. of Orange Cty., 49  
6 Cal. App. 4th 1342, 1348 (4th Dist. 1996). Rather, the  
7 designation "dba" is "merely descriptive of the person or  
8 corporation who does business under some other name." Providence  
9 Wash. Ins. Co. v. Valley Forge Ins. Co., 42 Cal. App. 4th 1194,  
10 1200 (1st Dist. 1996) (quoting Duval v. Midwest Auto City, Inc.,  
11 425 F. Supp. 1381, 1387 (D. Neb. 1977), affd. 578 F.2d 721 (8th  
12 Cir. 1978)). Further, because an "insured" must be a legal  
13 person, Sierra Manor the dba could never be an insured party  
14 under any policy. Providence, 42 Cal. App. 4th at 1200 (citing  
15 Cal. Ins. Code § 151). The inclusion of the words "dba Sierra  
16 Manor" in the Columbia policy did nothing to change "the risks  
17 undertaken"--the insured remained Attwal Enterprises. Id. at  
18 1201 (citing Carlson v. Doekson Gross, Inc., 372 N.W.2d 902, 906  
19 (N.D. 1985)).

20 Nor is the court swayed by plaintiff's contention that  
21 the real insured under the Columbia policy is Mr. Attwal himself.  
22 It is true that courts have held that when individuals who run

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24 own judgment to "impose liability under a judgment upon the alter  
25 ego who has had control of the litigation," Alexander v. Abbey of  
26 the Chimes, 104 Cal. App. 3d 39, 45 (1st Dist. 1980), where  
27 "amendment is merely inserting the correct name of the real  
28 defendant, such that adding a party to a judgment after the fact  
does not present due process concerns," Katzir's Floor & Home  
Design, Inc. v. M-MLS.com, 394 F.3d 1143, 1148 (9th Cir. 2004).  
Such an argument, however, has no place in this proceeding.  
Simply put, this court would have no jurisdiction to alter the  
separate judgment of another court.

1 sole proprietorships take out insurance policies under fictitious  
2 business names, the individuals themselves are the insureds.  
3 See, e.g., O'Hanlon v. Hartford Ins. Accident & Indem. Co., 639  
4 F.2d 1019, 1024 (3d Cir. 1981); cf. Ball v. Steadfast-BLK, 196  
5 Cal. App. 4th 694, 701-02 (3d Dist. 2011) (lien listing fictional  
6 business name as claimant could be foreclosed by sole proprietor  
7 who operated under the fictional business name). Such cases are  
8 not on point here.

9           First, Mr. Attwal runs Attwal Enterprises as a  
10 corporation with a legal identity separate from his own, not as a  
11 sole proprietorship. Second, this is not a case where a policy  
12 was taken out under a fictional business name only, forcing the  
13 court to examine facts external to the insurance policy in order  
14 to determine the identity of the insured. Instead, the named  
15 insured is Attwal Enterprises, an insurable corporation.

16           This analysis is not inconsistent with the holding in  
17 Goss v. Security Insurance Company of California, 113 Cal. App.  
18 577 (1st Dist. 1931). In that case, three individuals conducted  
19 business under the fictional business name "Pacific Motor  
20 Company," but did not create a separate legal identity for their  
21 business. Goss, 113 Cal. App. at 579. The three men took out an  
22 insurance policy under the fictional name Pacific Motor Company.  
23 Id. When a judgment was entered against the men, doing business  
24 as Pacific Motor Company, the insurance company denied coverage,  
25 claiming that while it had insured Pacific Motor Company as a  
26 corporation, the judgment was against a partnership. Id. at  
27 579-80.

28           The court rejected the insurance company's argument,

1 noting that as Pacific Motor Company never had any "corporate  
2 life," under the insurance company's reasoning it would never be  
3 required to pay out anything under the policy in question. Id.  
4 at 580. Instead, the court looked to the intention of the  
5 parties in entering the insurance contract. In view of the fact  
6 that the insurance company accepted premiums from the men and  
7 that there was never any Pacific Motor Company that could have  
8 been insured, the court found that the parties' intentions had  
9 been to insure the owners of the garage against liability. The  
10 insurance company, therefore, was required to provide coverage  
11 for the judgment against the individuals. Id. at 580-81.

12           Unlike in Goss, there is no fear that the policy here  
13 is one under which Columbia could never be liable. The Columbia  
14 policy insures a valid legal entity, Attwal Enterprises.  
15 Plaintiff claims in its Opposition that the parties intended to  
16 insure both Attwal Enterprises and Sierra Manor Associates and  
17 that "a premium was obviously paid to cover Sierra Manor under  
18 the policy in question." (Pl.'s Mem. of P. & A. in Opp. at 5-6.)  
19 In support of such conclusory statements, all that the Complaint  
20 alleges is that the Columbia policy "refers" to the address of  
21 the residential elderly care facility at which Emma Cartledge was  
22 injured. (Compl. at 3.) That fact alone is insufficient to  
23 state a plausible claim of entitlement to relief. Iqbal, 129 S.  
24 Ct. at 1949.

25           Plaintiff argues alternatively that court should  
26 disregard the corporate form and treat Mr. Attwal, Sierra Manor  
27 Associates, and Attwal Enterprises as one entity. In support,  
28 plaintiff only states in its Opposition that Mr. Attwal is the



1 CEO of both corporations and suggests that further discovery  
2 "may" reveal other facts that would support application of the  
3 alter ego doctrine or piercing the corporate veil. (Pl.'s Mem.  
4 of P. & A. in Opp. at 6-7.) The Complaint, however, is devoid of  
5 factual allegations that would be necessary to support such an  
6 argument.

7 Further, in the absence of inequitable conduct on the  
8 part of the insurer, parties may not use the alter ego doctrine  
9 to re-write an insurance policy to add insureds. U.S. Fire Ins.  
10 Co. v. Nat'l Union Fire Ins. Co., 107 Cal. App. 3d 456, 472  
11 (1980). Nor can piercing the corporate veil be used to increase  
12 an insurer's contractual obligations under an insurance contract  
13 with a corporation. GBTI, Inc. v. Ins. Co. of State of Penn.,  
14 No. CV 09-1173, 2011 WL 1332165, at \*6 (E.D. Cal. Apr. 5, 2011)  
15 (citing Am. Home Ins. Co. v. Travelers Indem., 122 Cal. App. 3d  
16 951, 966-67 (1981)). The Complaint contains no allegations that  
17 Columbia played any role in any abuse of corporate privileges Mr.  
18 Attwal "may" have engaged in. The Complaint, therefore, does not  
19 allege facts that would support holding Columbia liable under an  
20 alter ego theory or through piercing the corporate veil.

21 B. Breach of Implied Covenant of Good Faith and Fair  
22 Dealing

23 An insurer's duty of good faith and fair dealing arises  
24 from the insurance contract and runs to the insured. Kransco v.  
25 Am. Empire Surplus Lines Ins. Co., 23 Cal. 4th 39, 400-01 (2000);  
26 Murphy v. Allstate Ins. Co., 17 Cal. 3d 937, 944 (1976). A  
27 judgment creditor may bring claims for breach of the implied  
28 covenant in two situations. First, the creditor may bring claims

1 assigned to it by the insured. Murphy, 17 Cal. at 942. Second,  
2 Hand v. Farmers Insurance Exchange, 23 Cal. App. 4th 1847,  
3 provides that under California Insurance Code section 11580, in  
4 some circumstances, a judgment creditor is properly considered to  
5 be a third party beneficiary of an insurance contract who is owed  
6 certain duties under the implied covenant of good faith and fair  
7 dealing and may sue the insurer for breach of these duties. Hand  
8 v. Farmers Ins. Exch., 23 Cal. App. 4th 1847, 1857 (2d Dist.  
9 1994). Such a cause of action, however, only lies where the  
10 benefits of a duty under the implied covenant run in favor of the  
11 judgment creditor. Diamond Woodworks, Inc. v. Argonaut Ins. Co.,  
12 109 Cal. App. 4th 1020, 1044 (4th Dist. 2003), overruled on other  
13 grounds by Simon v. San Paolo U.S. Holding Co., Inc., 35 Cal. 4th  
14 1159 (2005) (quoting Hand, 23 Cal. App. 4th at 1857).

15 Plaintiff alleges that Columbia breached duties that  
16 ran in favor of plaintiff in two ways. First, plaintiff alleges  
17 that Columbia refused to settle within policy limits when there  
18 was a substantial likelihood of recovery in excess of those  
19 limits. Second, plaintiff alleges that Columbia failed to have  
20 default set aside in the underlying action. As there are no  
21 allegations that plaintiff has been assigned any claims for  
22 breach of the implied covenant of good faith and fair dealing,  
23 plaintiff must show that it has standing under Hand as a third  
24 party beneficiary.

25 As an initial point, as discussed above plaintiff has  
26 not obtained a judgment against Attwal Enterprises and,  
27 therefore, has not become a third-party beneficiary of the policy  
28 issued to Attwal Enterprises who is able to bring a claim for

1 breach of good faith and fair dealing under Hand. See Hand, 23  
2 Cal. App. 4th at 1858 ("once having secured a final judgment for  
3 damages, the plaintiff becomes a third party beneficiary of the  
4 policy"). In addition, both of the duties that plaintiff alleges  
5 were breached are designed to protect insureds from potential  
6 claimants, not to protect potential claimants. The duty to  
7 settle protects "the insured from exposure to liability in excess  
8 of the coverage as a result of the insurer's gamble--on which  
9 only the insured might lose." Murphy, 17 Cal. 3d at 941 (citing  
10 Shapero v. Allstate Ins. Co., 14 Cal. App. 3d 433 (1971)). It is  
11 not a duty that benefits a judgment creditor. Ham v. Cont'l Ins.  
12 Co., No. 08-1551, 2009 WL 513474, at \*3 (N.D. Cal Mar. 2, 2009).  
13 The duty to defend, which protects insureds by giving them the  
14 right to "call on the insurer's superior resources for the  
15 defense of third party claims," Montrose Chem. Corp. v. Superior  
16 Ct., 6 Cal. 4th 287, 295 (1993), likewise runs only to the  
17 insured, not to third party claimants. San Diego Housing Comm'n  
18 v. Indus. Idemn. Co., 95 Cal. App. 4th 669, 962 (4th Dist. 2002).  
19 Accordingly, plaintiff fails to adequately plead a claim against  
20 defendant for breach of the implied covenant of good faith and  
21 fair dealing.

22 IT IS THEREFORE ORDERED that Columbia Casualty's motion  
23 to dismiss be, and the same hereby is, GRANTED.

24 Plaintiff has twenty days from the date of this Order  
25 to file an amended complaint, if it can do so consistent with  
26 this Order.

1 DATED: November 22, 2011

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WILLIAM B. SHUBB  
UNITED STATES DISTRICT JUDGE