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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ACE CAPITAL LTD., ET AL.,  
Plaintiffs,  
v.  
ePLANNING, INC. ET AL.,  
Defendants.

No. 2:12-cv-01511 JAM-AC

**ORDER GRANTING  
PLAINTIFFS' /COUNTERDEFENDANTS'  
MOTION TO DISMISS COUNTERCLAIM**

This matter is before the Court on Plaintiffs/Counter Defendants ACE Capital Limited, ACE Capital IV Limited, Ace Capital V Limited, and Brit UW Limited's (collectively "Underwriters") Motion to Dismiss (Doc. #100) Defendants/Counterclaimants Wood River, et al.'s (collectively "Wood River Defendants")<sup>1</sup> Counterclaim (Doc. #52). Wood River Defendants oppose the motion (Doc. #106) and Underwriters replied (Doc. #107).<sup>2</sup> For the following reasons, Underwriters'

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<sup>1</sup> All seventy-three Counterclaimants are identified in the counterclaim (Doc. #52) and in paragraphs 294 to 366 of the Complaint (Doc. #2).

<sup>2</sup> This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for January 23, 2013.

1 motion is granted.

2  
3 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

4 Underwriters filed a Complaint in Interpleader to determine  
5 the allocation of the remaining \$303,691.93 policy proceeds of  
6 the \$5,000,000 claims-made-and-reported policy ("E&O Policy")  
7 issued to ePlanning Securities, Inc., and ePlanning Advisors,  
8 Inc. (collectively "ePlanning"), which includes Jeffrey A. Guidi  
9 ("Guidi") (Doc. #2). Pursuant to an assignment by Guidi, the  
10 Wood River Defendants filed a counterclaim, asserting three  
11 causes of action against Underwriters: (1) declaratory relief;  
12 (2) breach of contract; and (3) breach of covenant of good faith  
13 and fair dealing. Countercl. ¶¶ 121-138.

14 A. The Underlying Actions and Assignment

15 Wood River Defendants filed the following four actions  
16 against ePlanning and Guidi (collectively "the Underlying  
17 Actions") for breach of their fiduciary duties and  
18 misrepresentation and/or omission of material facts to the Wood  
19 River Defendants in connection with selling tenancy-in-common  
20 interests in investments:

- 21 1. Wood River Capital Resources, LLC, et al. v.  
22 CapitalSource, Inc., et al., Shasta County Case No.  
168055 ("the Wood River Action");
- 23 2. Santa Clara Capital Resources, LLC, et al. v.  
24 CapitalSource, Inc., et al., Shasta County Case No.  
168250 ("the Santa Clara Action");
- 25 3. AREI Colonnade 1, LLC, et al. v. Meecorp Capital  
26 Markets, et al., Shasta County Case No. 168466 ("the  
Colonnade Action");
- 27 4. Spencer Capital Resources, LLC, et al. v.  
28 CapitalSource, Inc., et al., Shasta County Case No.  
168637 ("the Spencer Action").

1 Countercl. ¶¶ 80, 121-138.

2 The Wood River Defendants settled the Underlying Actions  
3 with Guidi and ePlanning, and as part of that settlement, Guidi  
4 assigned to the Wood River Defendants all of his claims and  
5 causes of actions against Underwriters under the E&O Policy. Id.  
6 at ¶ 117.

7 B. The E&O Policy

8 Underwriters issued the E&O Policy No. 146/LDUSA0700785, to  
9 ePlanning. Id. at ¶ 87. By contract endorsement, the E&O Policy  
10 was amended to change the policy number to B0509QA106007,  
11 effective September 15, 2007. Id. The policy period of the E&O  
12 Policy was September 1, 2007, to September 1, 2008. E&O Policy,  
13 Exhibit A to Complaint (Doc. #2), at 95. The declaration page of  
14 the E&O Policy provides that the policy is a claims-made-and-  
15 reported professional liability insurance policy. Id.

16 Pursuant to the E&O Policy's "Additional Wordings &  
17 Clauses," "Claim" is defined as follows:

18 Claim means:

- 19 (a) the following made or brought by the  
20 Broker/Dealer's or the Registered Investment  
21 Advisor's customer or client in such capacity:
- 22 (i) a written demand for monetary relief; or
  - 23 (ii) a civil or arbitration proceeding for  
24 monetary or nonmonetary relief, which is  
25 commenced by:
    - 26 1) service of a complaint or similar  
pleading; or
    - 27 2) receipt or filing of an arbitration  
demand or statement of claim; and
- 28 (b) complaints or inquiries made or brought by, on  
behalf of, or in the name or right of any  
governmental, quasi-governmental, regulatory or

1 self-regulatory entity, whether directly or  
2 indirectly, in any capacity other than in its  
3 capacity as a customer or client of the  
4 Broker/Dealer or the Registered Investment  
5 Advisor.

6 Id. at 117.

7 Under the "General Conditions," in a section entitled  
8 "Notice of Claim," the E&O Policy provides the following:

9 NOTICE OF CLAIM:

10 If any Claim is first made against the Assured during  
11 the Policy Period, whether or not the alleged Damages  
12 fall within or in excess of the Deductible, the  
13 Assured shall give written notice to the Underwriters'  
14 representatives named in Item 9 of the Declarations as  
15 soon as possible, but in no event more than 60 days  
16 after the Claim is made.

17 Such written notice must contain complete details of  
18 the Claim, the exact date the Claim was first made,  
19 the location, the circumstances giving rise to such  
20 Claim, the identity of all Claimants and a full  
21 description of the nature and scope of the alleged  
22 Damages. The Assured must immediately forward every  
23 demand, notice, summons or other process received by  
24 it or its representative, upon receipt thereof, to  
25 Underwriters' representatives, as per Item 9 of the  
26 Declarations.

27 Id. at 106.

28 Finally, the E&O Policy describes the "Extended Reporting  
Period" in pertinent part as follows:

If the Underwriters cancel or refuse to renew this  
policy, the first Named Assured designated in Item 1  
of the Declarations shall have the right, in  
consideration of additional premium equal to the full  
annual Premium charged hereunder, to an extension of  
this policy, subject to its terms, conditions,  
exclusions, definitions and limitations, in respect of  
any Claim first made against an Assured and reported  
in writing to the Underwriters during the period of  
twelve (12) months after the cancellation or expiry  
date of this policy, but only if such Claim is for a  
Wrongful Act committed by an Assured in rendering or  
failing to render Professional Services subsequent to  
the Retroactive Date and prior to the cancellation  
date of this policy or the end of the Policy Period

1 stated in Item 2 of the Declarations, whichever is  
2 earlier.

3 Id. at 107.

## 5 II. OPINION

### 6 A. Legal Standard

7 A party may move to dismiss an action for failure to state  
8 a claim upon which relief can be granted pursuant to Federal  
9 Rule of Civil Procedure 12(b)(6). In considering a motion to  
10 dismiss, the court must accept the allegations in the complaint  
11 as true and draw all reasonable inferences in favor of the  
12 plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974),  
13 overruled on other grounds by Davis v. Scherer, 468 U.S. 183  
14 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). Assertions that  
15 are mere "legal conclusions," however, are not entitled to the  
16 assumption of truth. Ashcroft v. Iqbal, 556 U.S. 662, 678  
17 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555  
18 (2007)). To survive a motion to dismiss, a plaintiff needs to  
19 plead "enough facts to state a claim to relief that is plausible  
20 on its face." Twombly, 550 U.S. at 570. Dismissal is  
21 appropriate where the plaintiff fails to state a claim  
22 supportable by a cognizable legal theory. Balistreri v.  
23 Pacifica Police Department, 901 F.2d 696, 699 (9th Cir. 1990).

24 Upon granting a motion to dismiss for failure to state a  
25 claim, the court has discretion to allow leave to amend the  
26 complaint pursuant to Federal Rule of Civil Procedure 15(a).  
27 "Dismissal with prejudice and without leave to amend is not  
28 appropriate unless it is clear . . . that the complaint could

1 not be saved by amendment.” Eminence Capital, L.L.C. v. Aspeon,  
2 Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).

3 B. Judicial Notice

4 Underwriters request the Court to take judicial notice of  
5 four complaints filed in Shasta County Superior Court because  
6 the contents of these documents are alleged in the  
7 counterclaim in this action. Request for Judicial Notice  
8 (“RJN”), Doc. #100, Exs. A-D. Wood River Defendants do not  
9 oppose the request.

10 Courts may consider extrinsic evidence when “plaintiff’s  
11 claim depends on the contents of a document, the defendant  
12 attaches the document to its motion to dismiss, and the  
13 parties do not dispute the authenticity of the document.”  
14 Knieval v. ESPN, 393 F.3d 1069, 1076 (9th Cir. 2005).

15 Accordingly, the Court GRANTS Underwriters’ request for  
16 judicial notice pursuant to Federal Rule of Evidence 201.

17 C. Discussion

18 Underwriters argue that the Wood River Defendants’  
19 counterclaim should be dismissed because the underlying claims  
20 were not made during the policy period and because the Wood  
21 River Defendants fail to allege that the underlying claims were  
22 reported to Underwriters. Relying on Schwartz v. State Farm  
23 Fire & Casualty Co., 88 Cal.App.4th 1329 (2001), Wood River  
24 Defendants’ argue that Underwriters had a duty not to favor the  
25 interests of one insured over another and had a further duty not  
26 to exhaust its policy limits in a manner that would leave its  
27 insured exposed to additional claims falling within the scope of  
28 coverage. Opp. at 4.

1 Under a claims-made-and-reported policy, such as the policy  
2 here, "an insurer provides coverage for any loss resulting from  
3 claims *made* during the policy period." World Health & Educ.  
4 Found. v. Carolina Cas. Ins. Co., 612 F. Supp. 2d 1089, 1094 n.1  
5 (N.D. Cal. 2009) (citing Burns v. Int'l Ins. Co., 929 F.2d 1422,  
6 1424 (9th Cir. 1991)) (emphasis in original). Therefore, timely  
7 reporting of a claim is the event triggering coverage. KPFF,  
8 Inc. v. California Union Ins. Co., 56 Cal.App.4th 963, 972  
9 (1997). "Though the coverage of a claims-made-and-reported  
10 policy is limited, the insuring agreement is still subject to  
11 the same principles of interpretation as other insurance  
12 policies." Id. at 973.

13 Here, the parties agree that the Wood River Defendants as  
14 assignees stand in the insured's shoes and are subject to any  
15 defenses the insurer had against the insured. See Woolett v.  
16 Am. Employers Ins. Co., 77 Cal.App.3d 619, 625 (1978). However,  
17 they disagree on whether this case is governed by Schwartz. In  
18 Schwartz, the insurer paid out the full benefits of the policy  
19 in a manner that favored one insured to the detriment of a  
20 second insured for the same benefits, even though it knew that  
21 the plaintiffs would have competing claims on the limited funds  
22 once their primary insurance was exhausted. 88 Cal.App.4th at  
23 1333-34. The court held that "an insurer that pays the full  
24 limits of its policy may be liable for breach of the implied  
25 covenant, if improper claims handling causes detriment to the  
26 insured." Id. at 1339. Moreover, the Schwartz court  
27 distinguished cases where no breach of contract and no breach of  
28 the covenant occurred because there was no coverage or no

1 insurable interest. Id. (citing Love v. Fire Ins. Exch., 221  
2 Cal.App.3d 1136, 1151-52 (1990) (holding that no benefits were  
3 due because the claim was time barred)).

4 Here, unlike in Schwartz, there is no covered or  
5 potentially covered claim. The four underlying claims mentioned  
6 in Wood River Defendants' counterclaim were filed after the  
7 expiration of the policy and therefore could not have been  
8 timely reported. The policy period was September 1, 2007, to  
9 September 1, 2008. E&O Policy at 95. The earliest underlying  
10 action was filed on December 23, 2009, more than one year after  
11 the policy expired. Wood River Action, Ex. A to RJN, at 1. Even  
12 if the insured had purchased an Extended Reporting Period for  
13 the E&O Policy, which would extend the period for covered claims  
14 for twelve months after the policy expired, i.e. to September 1,  
15 2009, in this case, the earliest underlying action would still  
16 fall at least two months outside the policy period. Therefore,  
17 because there is no potential coverage, Wood River Defendants'  
18 reliance on Schwartz is misplaced.

19 Further, as Underwriters contend, an insurer cannot be held  
20 liable on a bad faith claim for doing what is expressly permitted  
21 in the agreement. Solomon v. N. Am. Life & Cas. Ins. Co., 151  
22 F.3d 1132, 1137 (9th Cir. 1998). Here, the policy obligated  
23 Underwriters to pay prior covered claims and defense costs but  
24 were not required to pay claim expenses in excess of the policy  
25 limit. See E&O Policy at 106. Therefore, the payments for  
26 other covered claims and defense costs cannot support the Wood  
27 River Defendants' assigned claims for breach of contract or bad  
28 faith.



