UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

LENNAR MARE ISLAND, LLC, Plaintiff, v. STEADFAST INSURANCE COMPANY, Defendant. AND RELATED COUNTERCLAIMS	No. 2:12-cv-02182-KJM-KJN ORDER

The matter is before the court on the motions by Lennar Mare Island, LLC (LMI), and CH2M Hill Constructors, Inc. (CCI) to dismiss Steadfast Insurance Company's Second Amended Counterclaim (SACC). The court granted the parties' stipulated request for an expedited briefing schedule and the matter was submitted for decision without a hearing. As explained below, the motions are granted in part without leave to amend.

I. BACKGROUND

The court has summarized the factual and procedural background of this case in previous orders. *See, e.g.*, Order Oct. 16, 2015, at 1–7, ECF No. 306.[1] Because much of the

[1] For ease of reference, this order is reported at *Lennar Mare Island, LLC v. Steadfast Ins. Co.*, ___ F. Supp. 3d ___, 2015 WL 6123730 (E.D. Cal. Oct. 16, 2015).

SACC parallels its previous iteration, no detailed review is necessary. In summary, Steadfast alleges it issued two insurance policies covering LMI's and CCI's environmental cleanup efforts at the former Mare Island Naval Shipyard in Vallejo California: (1) the Remedial Stop Loss (RSL) Policy, now expired, which was meant to insure against cleanup costs incurred in the cleanup of certain known pollution conditions; and (2) the Environmental Liability Insurance (ELI) policy, which remains in effect and is meant to insure against cleanup costs incurred in the cleanup of previously unknown pollution conditions. *See* SACC ¶¶ 9–12.

In 2012, LMI filed a complaint in state court alleging Steadfast had not paid certain claims under the ELI Policy. *See* Not. Rem. Ex. A, ECF No. 1. Steadfast removed the case to this court and filed a counterclaim against both LMI and CCI. *See id.*; Countercl., ECF No. 5. At that time, Steadfast requested only a declaration of its rights under the RSL policy. *See* Countercl. at 5. In late 2014, Steadfast received discovery responses from CCI, which Steadfast believed proved CCI and LMI had committed fraud. *See generally* Mot. Am. Countercl., ECF No. 162. Steadfast requested leave to file an amended counterclaim, and the court granted the request several months later. *See* Order, ECF No. 290. LMI and CCI then moved to dismiss the amended counterclaim. *See* ECF Nos. 294, 297-1.

The court granted the motions to dismiss but allowed Steadfast leave to file the SACC so as to bring its pleading into compliance with the heightened requirements of Federal Rule of Civil Procedure 9(b). *See* Order Oct. 16, at 37. The court also allowed Steadfast to advance a claim for breach of the implied covenant of good faith and fair dealing. *See id.* The SACC alleges seven claims: (1) equitable accounting; (2) breach of the implied covenant of good faith and fair dealing; (3) restitution; (4) unjust enrichment; (5) negligent misrepresentation; (6) intentional misrepresentation; and (7) declaratory relief. Steadfast requests relief in the form of an accounting, restitution, cancellation of the ELI Policy, compensatory damages, punitive damages, a declaration of its rights under the RSL and ELI policies, and other appropriate relief. SACC at 38. Steadfast attaches copies of the RSL and ELI policies to its pleading. *See id.* App. A (RSL Policy); *id.* App. B (ELI Policy).

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II. LEGAL STANDARD

The court summarized the applicable legal standard in its previous order:

> "A defendant's counterclaims are held to the same pleading standard as a plaintiff's complaint." *First Serv. Networks, Inc. v. First Serv. Maint. Grp., Inc.*, No. 11-01897, 2012 WL 5878837, at *1 (D. Ariz. Nov. 21, 2012) (citing *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)). A party may move to dismiss a counterclaim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The motion may be granted only if the counterclaim lacks a "cognizable legal theory" or if its factual allegations do not support a cognizable legal theory. *Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir. 2013). The court assumes the counterclaim's factual allegations are true and draws reasonable inferences from them. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
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> A counterclaim need contain only a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), not "detailed factual allegations," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). But this rule demands more than unadorned accusations; "sufficient factual matter" must make the claim at least plausible. *Iqbal*, 556 U.S. at 678. In the same vein, conclusory or formulaic recitations of elements do not alone suffice. *Id.* (quoting *Twombly*, 550 U.S. at 555). Evaluation under Rule 12(b)(6) is a context-specific task drawing on "judicial experience and common sense." *Id.* at 679. And aside from the counterclaim, district courts have discretion to examine documents incorporated by reference, *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1160 (9th Cir. 2012); affirmative defenses based on the complaint's allegations, *Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1179 (9th Cir. 2013); and proper subjects of judicial notice, *W. Radio Servs. Co. v. Qwest Corp.*, 678 F.3d 970, 976 (9th Cir. 2012).
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> Federal Rule of Civil Procedure 9(b) imposes a heightened pleading standard on fraud allegations: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). "Fraud can be averred by specifically alleging fraud, or by alleging facts that necessarily constitute fraud (even if the word 'fraud' is not used)." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003). Although state law governs the substantive adequacy of the pleading here, Rule 9(b) nonetheless applies to any claims or allegations of fraud. *Id.* at 1103. If fraud is not an essential element of a particular claim, "only those allegations . . . which aver fraud are subject to Rule 9(b)'s heightened pleading standard." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). If an allegation does not meet the heightened pleading standard, it is disregarded. *Id.* Non-fraud allegations need satisfy only the standard of Rule 8. *Id.*
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> To meet the Rule 9(b) standard, a pleading must "'be specific enough to give defendants notice of the particular misconduct . . .

> so that they can defend against the charge and not just deny that they have done anything wrong.'" *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 558 (9th Cir. 2010) (quoting *Kearns*, 567 F.3d at 1124) (alteration in original). Normally this standard requires allegations of "the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Id.* (quoting *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004)) (quotation marks and alterations omitted).

Order Oct. 16, 2015, at 18–20.

III. DISCUSSION

The court first addresses LMI's and CCI's general argument that the SACC must be dismissed because Steadfast requested leave to amend in bad faith. Then the court turns to each of Steadfast's claims.

A. LMI's and CCI's Allegations of Bad Faith Amendment

In the court's order granting Steadfast leave to amend its counterclaim, the court "question[ed] Steadfast's early-case practice" and found "Steadfast should have been more diligent" in discovering the facts that supported its First Amended Counterclaim. Order Aug. 17, 2015, at 12, ECF No. 290. These facts, Steadfast argued, it had discovered first in late 2014 upon CCI's production of several million new pages of documents; before then Steadfast claimed to have harbored only suspicions and hunches. Despite Steadfast's questionable diligence, the court found "denial of Steadfast's motion would not satisfy the court's duty to ensure fundamental fairness in the litigation before it." *Id.* Steadfast was allowed leave to file an amended counterclaim. LMI's and CCI's current motions request the court revisit its decision. They argue Steadfast's bad faith is laid bare in the SACC, whose allegations in their view could not stem from any late-2014 production.

Federal district courts enjoy discretion in managing their dockets. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991); *Hamilton Copper & Steel Corp. v. Primary Steel, Inc.*, 898 F.2d 1428, 1429 (9th Cir. 1990). Within this discretion is the inherent power to dismiss claims, but dismissal is a harsh remedy reserved for only "extreme circumstances." *Hamilton*, 898 F.2d at 1429 (citation and quotation marks omitted). The circumstances of this case are not

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so extreme as to warrant dismissal of the SACC on grounds of bad faith, and dismissal would not serve fundamental fairness.

B. Accounting

An accounting claim is equitable in nature, designed to prevent unjust enrichment. *Civic W. Corp. v. Zila Indus., Inc.*, 66 Cal. App. 3d 1, 14 (1977). It is a proceeding in equity meant to obtain a judicial settlement of accounts; the court adjudicates the amount due, administers full relief and renders complete justice. *Flores v. EMC Mortgage Co.*, 997 F. Supp. 2d 1088, 1119–20 (E.D. Cal. 2014). To state a claim, Steadfast must allege (1) a relationship exists between itself, LMI, and CCI that requires an accounting; (2) LMI and CCI engaged in some misconduct; and (3) some balance of money is due to Steadfast that can only be ascertained by an accounting. *See Teselle v. McLoughlin*, 173 Cal. App. 4th 156, 179 (2009).

In addition, "[a] suit for an accounting will not lie where it appears from the complaint that none is necessary or that there is an adequate remedy at law." *Civic W. Corp.*, 66 Cal. App. 3d at 14 (internal quotation marks omitted); *see also Union Bank v. Super Ct.*, 31 Cal. App. 4th 573, 594 (1995) ("There is no right to an accounting where none is necessary."). If an accounting claim may be "folded into the fraud and breach of contract causes of action," then an accounting is unnecessary. *See Fleet v. Bank of Am. N.A.*, 229 Cal. App. 4th 1403, 1414 (2014) ("If the [plaintiffs] are maintaining that they overpaid [the defendant] . . . because of the fraudulent promise . . . the overpayment will constitute an element of their damages.").

Here, the counterclaim alleges in only conclusory terms that an accounting is necessary. *See* SACC ¶ 81 ("The only means to determine the amount by which Steadfast overpaid the true value of the policy benefits under the RSL and ELI Policies is by way of an accounting."). Moreover, the remedy Steadfast seeks is recoverable under its other claims at law. The claim for an accounting is therefore dismissed. In light of the late stage of this litigation, further leave to amend is denied. *See Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989) ("The district court's discretion to deny leave to amend is particularly broad where [the claimant] has previously amended the [pleading].").

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C. Restitution and Unjust Enrichment

The court construes Steadfast's claims for restitution and unjust enrichment as a single claim for restitution. *See Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) ("When a plaintiff alleges unjust enrichment, a court may 'construe the cause of action as a quasi-contract claim seeking restitution.'" (quoting *Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal. App. 4th 221 (2014))).

"Unjust enrichment and restitution are based on quasi-contract." *Grebow v. Mercury Ins. Co.*, 241 Cal. App. 4th 564, 580 (2015). "As a matter of law, an unjust enrichment claim does not lie where the parties have an enforceable express contract." *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1370 (2010). Therefore, to state a quasi-contract claim for restitution or unjust enrichment, Steadfast must plausibly allege the absence of any applicable and enforceable contract provisions, even if in the alternative. *See, e.g.*, *Longest v. Green Tree Servicing LLC*, 74 F. Supp. 3d 1289, 1302 (C.D. Cal. 2015). A review of the SACC reveals no allegation that the RSL and ELI policies are unenforceable or void, and no factual allegations support a theory of their unenforceability or voidness. Although Steadfast's opposition argues these claims are pleaded in the alternative, it identifies no allegations to support an alternative theory that no contractual remedy is available. *See* Opp'n CCI Mot. at 4; Opp'n LMI Mot. at 4–6.

Contrary to Steadfast's argument in opposition, one who asserts a quasi-contract claim may not circumvent the preclusive effect of an enforceable contract provision simply by asserting the contract has expired. *See* Opp'n CCI Mot. at 3–4; Opp'n LMI Mot. at 3–4. Were this true, then any contract claim could be recast as an equitable claim for unjust enrichment immediately after its term, despite any relevant contract terms. Moreover, Steadfast has alerted the court to no behavior that falls outside the bounds of the RSL and ELI policies. It has described no unjustly conferred benefits it will be unable to obtain by a successful contract claim. The case it cites in support of its position is also readily distinguishable. *See* Opp'n CCI Mot. at 3–4 (citing *Lectrodryer v. SeoulBank*, 77 Cal. App. 4th 723, 726 (2000)). In *Lectrodryer* "[t]he focus of [the] case was on what happened to the proceeds of the sale . . . after the [contract]

expired." *Lectrodryer*, 77 Cal. App. 4th at 883. Steadfast's counterclaim, by contrast, focuses on the LMI's and CCI's actions during the policies' terms, not on CCI's unjust retention and use of money after the policy expired. Its claims unambiguously arise from alleged breaches of contract. *See also In re Checkmate Staffing, Inc.*, No. 04-01791, 2008 WL 8444825, at *7 (B.A.P. 9th Cir. Feb. 11, 2008) (distinguishing *Lectrodryer* because "it [was] significant that no contract existed between the affected parties" in that case).

The motion to dismiss is therefore granted without leave to amend, again in light of the litigation's late stage.

D. Breach of Contract

Steadfast alleges LMI and CCI breached the implied covenant of good faith and fair dealing. California law recognizes this implied covenant in every contract, including insurance policies. *Kransco v. Am. Empire Surplus Lines Ins. Co.*, 23 Cal. 4th 390, 400 (2000). More specifically, an insured's breach of the covenant of good faith and fair dealing is separately actionable as a contract claim. *Id.* at 408.

The covenant of good faith and fair dealing is a "supplement to the express contractual covenants." *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 36 (1995). Stated simply, one contracting party may not unfairly deprive another of the benefit of their agreement, even though his behavior technically complies with the contract's terms. *Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1153 (1990). But "the implied covenant does not trump an agreement's express language." *Steiner v. Thexton*, 48 Cal. 4th 411, 419 (2010) (emphasis omitted). It imposes no substantive duties beyond the contract's terms, *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 349–50 (2000), and does not vary express contract terms, *Carma Developers v. Marathon Dev.*, 2 Cal. 4th 342, 374 (1992). Therefore the parties to a contract may agree to allow conduct that would otherwise have been forbidden by an implied covenant of good faith and fair dealing. *Steiner*, 48 Cal. 4th at 419–20.

Here, Steadfast alleges LMI and CCI breached the implied covenant of good faith and fair dealing by (1) intentionally submitting claims for unknown pollution events under the RSL policy and known events under the ELI policy; (2) submitting claims that were unreasonable

in amount and kind; (3) submitting claims that they knew "did not arise out of governmental authority"; (4) submitting claims for which they affirmatively sought governmental authority; (5) prejudicing Steadfast's subrogation rights by releasing others from claims Steadfast could otherwise have brought; and (6) prejudicing Steadfast's rights by amending two other agreements related to the ELI and RSL policies and excluding Steadfast from negotiations about those amendments. *See* SACC ¶¶ 85–86.

These claims are in turn founded on Steadfast's more specific factual allegations. First, Steadfast alleges LMI and CCI misrepresented that some pollution events were "known" when they were actually "unknown," and vice versa, as part of their plan to secure additional payments from Steadfast. *See generally id.* ¶¶ 24–46. Second, Steadfast alleges LMI and CCI misrepresented that state and local authorities required them to undertake certain investigation and cleanup efforts, when in truth no such requirements existed. *See id.* ¶¶ 47–51. Other times LMI and CCI allegedly lobbied for the government to require certain efforts because the land would become more valuable but did not tell Steadfast what they had done. *See id.* ¶¶ 47, 48, 51. Third, Steadfast alleges CCI inflated and obfuscated quarterly reports of its expenses in an effort to secure payments Steadfast was not required to make under the RSL policy. *See generally id.* ¶¶ 58–63. Similarly, it alleges CCI intentionally performed unreasonable and unnecessary work, overstaffed its projects, withheld information, and frustrated Steadfast's auditing efforts. *See generally id.* Fourth, Steadfast alleges LMI and CCI made "other material misrepresentations and concealed critical information," essentially in an attempt to prevent Steadfast from discovering their other misrepresentations. *See generally id.* ¶¶ 53–57.

Finally, Steadfast alleges LMI and CCI prejudiced its contract rights by negotiating two other agreements without informing Steadfast or obtaining its consent. Steadfast claims LMI and CCI entered a mutual release with the Navy and the City of Vallejo in which LMI and CCI agreed to release one another, the Navy, and the City of Vallejo from any actions or claims arising out of the Mare Island project. *Id.* ¶¶ 70–74. This they did, alleges Steadfast, without Steadfast's knowledge or consent and in violation of their promises in the RSL and ELI policies not to prejudice Steadfast's subrogation rights of recovery against third parties. *See id.*

¶¶ 66–69. Steadfast also alleges LMI and CCI reached an agreement with the Navy and the City of Vallejo that (1) costs had surpassed a $114.3 million threshold, and therefore certain pollution conditions became the Navy's responsibility, and (2) any pollution conditions other than those identified on an agreed list were "unknown." *See id.* ¶¶ 76–77. Steadfast alleges it was excluded from these negotiations intentionally. *Id.* ¶ 77. It also claims the agreement expands its potential liability because it will be unable to recover reimbursements for costs that should have been paid by the Navy and it will be forced to pay for the cleanup of the newly agreed "unknown" conditions. *Id.*

These allegations "allow[ ] the court to draw the reasonable inference" that LMI and CCI are "liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. No RSL or ELI policy terms prohibit or permit the actions LMI and CCI allegedly undertook, but Steadfast was plausibly denied the benefits of the agreements it struck. This is true despite both policies' cancellation provisions, where the parties agreed Steadfast would be within its rights to cancel the RSL or ELI policies if it discovered material misrepresentations or fraud by LMI or CCI. *See* SACC App. A, at 13–14; *id.* App. B, at 22. As noted above, contracting parties may agree to allow conduct that would otherwise breach the implied covenant. *Steiner*, 48 Cal. 4th at 419–20. But the cancellation provisions do not allow LMI or CCI to shift unreasonable claims deceptively from one policy to another, to fabricate governmental authority, or to negotiate away Steadfast's contract rights.

Neither do the cancellation provisions conflict with imposition of the implied duties Steadfast alleges. At this stage, the court must construe the counterclaim's allegations and draw inferences in the light most favorable to Steadfast. *See, e.g.*, *Ass'n for L.A. Deputy Sheriffs v. Cty. of L.A.*, 648 F.3d 986, 991 (9th Cir. 2011). In that light, the cancellation provisions read not as limitations but as reservations of Steadfast's rights. *See, e.g.*, SACC App. A, at 13–14 (providing that the policy "may be canceled" if Steadfast discovers material misrepresentation or fraud by an insured).

Finally, despite LMI's arguments in opposition, the SACC adequately alleges LMI and CCI deprived Steadfast of subrogation rights under the RSL and ELI policies by releasing

claims against one another, the United States, and the City of Vallejo. The SACC also describes an intelligible claim that LMI and CCI deprived Steadfast of the benefit of its bargain by expanding Steadfast's potential liability under the ELI policy because Steadfast will be unable to recover reimbursements from the Navy and it will be forced to pay for cleanup of new "unknown" conditions. *Id.* ¶¶ 76–77.

The motions are denied as to Steadfast's claim for breach of contract.

E. Negligent and Intentional Misrepresentation

An insurer may pursue fraud claims against an insured, including for the submission of fraudulent insurance claims. *See generally Agric. Ins. Co. v. Super. Ct.*, 70 Cal. App. 4th 385 (1999). But tort and contract are distinct areas of law. *See Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 988 (2004). Therefore "[a] person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations." *Aas v. Super. Ct.*, 24 Cal. 4th 627, 643 (2000), *superseded by statute on other grounds as stated in Rosen v. State Farm Gen. Ins. Co.*, 30 Cal. 4th 1070, 1080 (2003). Only if a defendant's actions "violate a social policy that merits the imposition of tort remedies" will a tort claim be available. *Id.* (citation and quotation marks omitted). The court must therefore first determine whether Steadfast's claims for intentional and negligent misrepresentation "merely restate [LMI's and CCI's] contractual obligations" under the RSL and ELI policies. *Id.*

Steadfast alleges LMI and CCI "made material misrepresentations as to past or existing facts when they submitted false, deceptive and/or inflated claims and false information to Steadfast." *Id.* ¶¶ 98, 100. It alleges "[t]hese material misrepresentations include those misrepresentations detailed in Paragraphs 24 to 64." *Id.* ¶¶ 98, 100. Although Steadfast alleges LMI's and CCI's misrepresentations "include" those detailed in paragraphs 24 to 64 of the SACC—that is, LMI and CCI submitted claims under the wrong policy, fabricated governmental authority, submitted unreasonable claims, and prejudiced Steadfast's contract rights by negotiating agreements with third parties, *see supra* section II.D,—it does not allege any additional misrepresentations. Thus, the misrepresentations and mischaracterizations Steadfast relies on to allege fraud are the very same it relies on to support its contract claims. But for its

request for punitive damages, Steadfast seeks the same monetary relief with respect to both claims. *Compare* SACC ¶¶ 82–88 (contract claims), *with id.* ¶¶ 98, 100–03 (fraud claims), *and id.* at 38 (request for relief). The fraud claims restate the contract claims.

In some instances, however, parallel contract and tort claims may proceed. The California Supreme Court has found a contract party may pursue both contract claims and tort claims as long as the tort claims seek relief for "a defendant's affirmative misrepresentations on which a plaintiff relies and which expose a plaintiff to liability for personal damages independent of the plaintiff's economic loss." *Robinson Helicopter*, 34 Cal. 4th at 991.[2] But lest every contract breach dissolve into a tort, the California Supreme Court has emphasized the importance of a "cautious approach" that preserves the contracting parties' rights to limit their liability to the value of the promise and any exceptions they agree to impose. *Erlich*, 21 Cal. 4th at 553.

In *Robinson Helicopter*, the defendant (Dana) had agreed to sell the plaintiff (Robinson) a helicopter "sprag clutch," which functioned primarily as a safety mechanism. 34 Cal. 4th at 985. Dana was required to provide Robinson with certificates of the clutches' conformity with specific design parameters. *Id.* Dana's contract and warranties affirmed the clutches it shipped complied with those parameters. *See id.* at 985-86, 988. But this was not always true: for a little more than a year, Dana shipped clutches manufactured with different specifications, and these clutches failed at alarming rates. *Id.* at 985-86. Dana did not disclose to Robinson that it had shipped faulty clutches. *See id.* Some evidence also suggested a Dana employee had redacted documents to conceal the fact that the clutches did not comply with the certificates. *Id.* at 987 & n.4. When Robinson eventually learned of the misrepresentations and faulty shipments, it was forced to conduct costly investigations and replace the non-conforming parts at its own expense. *Id.* at 986–87. It was hampered in these efforts by Dana's months-long

[2] Tort remedies may also be available in other circumstances not relevant to this case. *See, e.g.*, *Erlich v. Menezes*, 21 Cal. 4th 543, 553–54 (1999) (aside from allegations of fraud or conversion, as are at issue here, tort remedies may be available when an insurer breaches the covenant of good faith and fair dealing; when "the means used to breach the contract are tortious, involving deceit or undue coercion"; or when "one party intentionally breaches the contract intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages.").

refusal to provide serial numbers for the non-conforming parts. *Id.* Dana also refused to compensate Robinson for the clutches' failures. *Id.* at 987.

In the ensuing litigation, Robinson alleged breaches of contract, breaches of warranty, and negligent and intentional misrepresentations. *Id.* After trial, the jury found the defendant had breached its contract, had breached its warranty obligations, and had made intentional misrepresentations. *Id.* It awarded both compensatory and punitive damages. *Id.*

On appeal, Dana argued the economic loss rule barred Robinson's claims for intentional misrepresentation and disallowed any punitive damages award. *Id.* at 988. The court of appeal agreed, finding Robinson had suffered only economic losses, but the California Supreme Court reversed. *Id.* It found the economic loss rule did not preclude a tort claim for fraud or intentional misrepresentation because the defendant's conduct was intentional, independent of the contract, and could have led to a helicopter crash and concomitant personal liability. *Id.* at 989–90. It emphasized the non-contract liability Robinson faced as a result of Dana's actions: "Dana's provision of faulty clutches exposed Robinson to liability for personal damages if a helicopter crashed and to disciplinary action by the FAA. Thus, Dana's fraud is a tort independent of the breach." *Id.* at 991.

Here, unlike in *Robinson Helicopter*, the court is not confronted with a defective product. No party has identified any potential for personal liability.[3] The SACC includes no hint of non-economic damages; other than punitive damages, Steadfast's tort claims seek the same compensatory remedies as its contract claim: the value of claims paid, the costs of claims adjusting, and the cost of unnecessary investigations. *See* SACC ¶¶ 82–88, 98, 100–03. The court has not been apprised of any public safety concern relevant to Steadfast's misrepresentation claims. The *Robinson Helicopter* court expressly limited its decision in this respect. *Id.* at 993 ("Our holding today is narrow in scope and limited to a defendant's affirmative misrepresentations on which a plaintiff relies and which expose a plaintiff to liability for personal

[3] Although this case involves toxic contaminants, Steadfast does not allege LMI's and CCI's conduct exposed the public to these contaminants or increased the risk of exposure; rather, as summarized above, Steadfast alleges LMI and CCI remediated pollution to a greater extent than necessary.

damages independent of the plaintiff's economic loss."); *see also id.* at 991 n.7 (distinguishing previous cases in which a defendant's actions had not "put people at risk"); *id.* at 988 (restating the rule that tort claims are unavailable unless the plaintiff alleges "harm above and beyond a broken contractual promise."). Similarly, a California appellate court has interpreted *Robinson Helicopter* to allow parallel fraud and contract claims only if the defendant's conduct was both intentional and "exposed the plaintiff to liability." *Cnty. of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 328 (2006). Steadfast has identified no "liability" it faces as a result of CCI's and LMI's conduct other than this lawsuit. Moreover, as in *Robinson Helicopter* and unlike here, *County of Santa Clara* involved a threat to public safety. *See id.* 310 (the plaintiffs alleged the defendants knew "about the dangers of lead for nearly a century but had engaged in a concerted effort to hide the dangers of Lead from the government and the public").

Federal courts have similarly expressed hesitation at expanding the rule of *Robinson Helicopter* when a plaintiff alleges only economic losses, when no personal liability could arise, and when no products liability claims are alleged. *See, e.g., Nada Pac. Corp. v. Power Eng'g & Mfg., Ltd.*, 73 F. Supp. 3d 1206, 1224–25 (N.D. Cal. 2014) (dismissing tort claims and noting the economic nature of any losses); *JMP Sec. LLP v. Altair Nanotechnologies Inc.*, 880 F. Supp. 2d 1029, 1043 (N.D. Cal. 2012) (expressing doubt *Robinson Helicopter* has any application outside products liability; noting the absence of independent personal liability); *United Guar. Mortgage Indem. Co. v. Countrywide Fin. Corp.*, 660 F. Supp. 2d 1163, 1182–83 (C.D. Cal. 2009) (same); *Multifamily Captive Grp., LLC v. Assurance Risk Managers, Inc.*, 629 F. Supp. 2d 1135, 1146 (E.D. Cal. 2009) ("[T]he damages plaintiffs seek are the same economic losses arising from the alleged breach of contract."); *In re Enron Corp.*, 367 B.R. 384, 405 (Bankr. S.D.N.Y. 2007) (only economic losses); *cf., e.g., NuCal Foods, Inc. v. Quality Egg LLC*, 918 F. Supp. 2d 1023, 1032 (E.D. Cal. 2013) (the defendants' misrepresentations allegedly exposed the plaintiffs to personal liability "for some of the 62,000 people who were sickened as a result of this [*salmonella enteritidis*] outbreak and to potential disciplinary action by government authorities . . . .").

The RSL and ELI policies' cancellation provisions create a further factual incongruity between this case and *Robinson Helicopter*. As noted above, both policies include provisions that suggest Steadfast considered the risk of fraud and misrepresentations by CCI and LMI. *See* SACC App. A, at 13–14; *id.* App. B, at 22. The *Robinson Helicopter* court, by contrast, reached its decision to allow parallel fraud and contract claims because although commercial entities could reasonably anticipate negligent product design or manufacture, they could not reasonably be expected to anticipate fraud in the sales themselves. *See* 34 Cal. 4th at 992–93. The court relied heavily on a law review article discussing fraud in the context of the Uniform Commercial Code. *See id.* at 993 (citing Steven C. Tourek, et al., *Bucking the "Trend": The Uniform Commercial Code, the Economic Loss Doctrine, and Common Law Causes of Action for Fraud and Misrepresentation*, 84 Iowa L. Rev. 875, 894 (1999)). Its reasoning therefore appears unlikely to apply equally to an insurance contract. *See Elrad v. United Life & Acc. Ins. Co.*, 624 F. Supp. 742, 744 (N.D. Ill. 1985) (an insurance contract is not a contract for the sale of "goods" to which the U.C.C. applies); *N. Am. Chem. Co. v. Super. Ct.*, 59 Cal. App. 4th 764, 780–81 (1997) (the U.C.C. and attendant exceptions to the economic loss doctrine have no application to contracts for the sale of services). Here, by contrast, the parties appear to have had fraud and misrepresentation in mind when they negotiated the RSL and ELI policies. *See also United Guar.*, 660 F. Supp. 2d at 1185 (dismissing a parallel tort claim because the parties were sophisticated entities who could and did negotiate remedies to handle misrepresentation and fraud).

The Ninth Circuit's memorandum disposition in *Kallitta Air, LLC v. Central Texas Airborne Systems, Inc.* is not to the contrary. *See* 315 F. App'x 603, 607 (9th Cir. 2008). In that case, the circuit court referred only briefly to *Robinson Helicopter* to support its conclusion that under California law, economic losses may be recoverable for negligent misrepresentation. *See id.* (citing *Robinson Helicopter*, 34 Cal. 4th at 991 & n.7). It expressed no broader interpretation of that case. For similar reasons, the Northern District court's decision in *Rejects Skate Magazine, Inc. v. Acutrack, Inc.* is unpersuasive. *See* No. 06-2590, 2006 WL 2458759, at *5 (N.D. Cal. Aug. 22, 2006) (dismissing a tort claim that "merely restate[d]" the plaintiffs' breach

of contract claim but allowing claims for personal injury, damage to other property, and emotional distress to proceed).

In sum, although Steadfast alleges LMI and CCI made affirmative misrepresentations, its theory of their tort liability is the same theory of their contract liability: (1) LMI and CCI had a duty not to falsely represent that unknown conditions were known or vice versa; (2) LMI and CCI had a duty not to misrepresent that their claims were required by governmental authority; (3) LMI and CCI had a duty not to misrepresent the nature of their claims so as to conceal their unreasonableness.

The claims for negligent and intentional misrepresentation are dismissed without leave to amend in light of the late stage of this litigation and Steadfast's previous amendments.

F. Declaratory Relief

Steadfast requests a declaration of its rights under the RSL and ELI policies. *See* SACC ¶¶ 104–06. Specifically, it requests a declaration whether (1) the insurance claims LMI and CCI assert in their pleadings are covered by the RSL and ELI policies; and (2) Steadfast is within its right to cancel the ELI policy under section VIII.D of that policy. *Id.* ¶ 105; *see also id.* App. B, at 22–23 (ELI policy section VIII.D, providing for cancellation among other reasons upon Steadfast's discovery of fraud or material misstatements by an insured).

LMI and CCI advance two arguments in favor of dismissing this claim. First, they argue Steadfast must not be allowed to amend this claim because it could have alleged similar claims in 2012 but did not. *See* LMI Mem. at 2; CCI Mem. at 6. As noted above, the court declines to impose this sanction.

Second, LMI argues the claim for declaratory relief "is based on the same fraud allegations that [Steadfast] still fails to plead adequately . . . ." *See* LMI Mem. at 2. The policy provides for cancellation upon Steadfast's discovery of "material misrepresentation or fraud." SACC App. B, at 22. Because the policy allows cancelation upon discovery of misrepresentations "or" fraud, the court infers the parties intended to allow cancellation in the face of both misrepresentations and full-fledged fraud in all its elements. *Iqbal*, 556 U.S. at 678 (inferences are to be drawn in favor of the non-moving party); *see also, e.g., United States v.*

1.377 Acres of Land, 352 F.3d 1259, 1265 (9th Cir. 2003) (contract interpretations that deprive words of meaning are to be avoided) (citing *Appalachian Ins. Co. v. McDonnell Douglas Corp.*, 214 Cal. App. 3d 1, 12 (1989)).

For the declaratory relief claim to survive, then, Steadfast need only allege LMI and CCI made some misrepresentation. For this reason the court does not reach LMI's arguments that Steadfast inadequately pleads its reliance and damages. *See* LMI Mem. at 16–17. In assuring itself the SACC adequately alleges at least one misrepresentation, the court considers many but not all of LMI's specific arguments below.

1. Building 688 Pits

LMI represented that costs incurred remediating pollution in "all ten pits" in Building 688 were eligible for coverage under the ELI Policy because the pollution conditions in question were unknown. *See* SACC ¶¶ 27–28. However, total petroleum hydrocarbon (TPH) contamination in those pits was listed as a "known pollution condition" in the RSL policy, and CCI had already conducted substantial work under the RSL policy at that site to remove TPH contamination with LMI's knowledge and approval. *Id.* To mask the discrepancy and to obtain additional coverage under the ELI policy, LMI "improperly" claimed the pits were contaminated with another pollutant, polychlorinated biphenyl (PCB). *See id.* ¶ 28. LMI also misrepresented that CCI had remediated previous pollution in the pits "for free." *Id.*

A misrepresentation is "a false representation, concealment, or nondisclosure." *Agric. Ins. Co.*, 70 Cal. App. 4th at 402 (citation and quotation marks omitted). California Civil Code section 1572 lists several acts that may establish a misrepresentation:

> 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
>
> 2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
>
> 3. The suppression of that which is true, by one having knowledge or belief of the fact;
>
> 4. A promise made without any intention of performing it; or,

/////

5. Any other act fitted to deceive.

Cal. Civ. Code § 1572. In addition, a plaintiff may ordinarily succeed in alleging fraud only by alleging the defendant misrepresented a fact, not an opinion. *Agric. Ins. Co.*, 70 Cal. App. 4th at 402. "A representation is one of opinion if it expresses only (a) the belief of the maker, without certainty, as to the existence of a fact; or (b) his judgment as to quality, value, authenticity, or other matters of judgment." *Id.* (citation and quotation marks omitted).

The court must view the SACC in the light most favorable to Steadfast. Because the SACC may reasonably be read to allege LMI misled Steadfast about the nature of contamination in the Building 688 pits, these allegations suffice to describe a misrepresentation for purposes of the declaratory relief claim.

LMI also argues these allegations are demonstrably false on the face of the ELI and RSL policies, which Steadfast attached to the SACC. *See* LMI Mem. at 19. The court need not assume an allegation is true if it is contradicted by documents attached to or cited in the SACC. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010); *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1071 (9th Cir. 2009). But the Ninth Circuit repeatedly phrases this rule using permissive language: the court is not "required" to assume contradicted allegations are true. *Daniels-Hall*, 629 F.3d at 998; *Paulsen*, 559 F.3d at 1071.

Here, LMI argues Steadfast falsely alleges "[t]he TPH contamination at the Building 688 Pits was listed as a 'known pollution condition' and scheduled under the RSL Policy." LMI Mem. at 19 (citing SACC ¶ 27). LMI cites the tables attached to the RSL policy's Scope of Work Endorsement, which are in turn attached as Appendix A to the SACC. *Id.* According to LMI, these tables reference Building 688 twice, but say nothing about the pits inside Building 688. *See id.* (citing SACC App. A, at 71, 78). Steadfast does not contradict this reading in its opposition brief. *See* Opp'n LMI Mot. at 16–18. But this motion and order are an inappropriate means for resolving this matter. The nature, location, sources, and extent of pollution conditions, along with whether those conditions are "known" or "unknown," are not simple matters, as the briefing on LMI's separately pending motion for partial summary judgment

illustrates. *See generally* Mem. P. & A. Partial Summ. J., ECF No. 187; Opp'n, ECF No. 193; Reply, ECF No. 228; Suppl. Opp'n, ECF No. 292; Suppl. Reply, ECF No. 299.

Finally, LMI argues it cannot be held responsible because the SACC alleges LMI merely passed along CCI's statements, rather than making its own. LMI Mem. at 16. The court disagrees. Viewed in the light most favorable to Steadfast, the SACC alleges LMI knew of and approved CCI's previous investigation, characterization, and remediation work for the Building 688 Pits under the RSL policy. SACC ¶ 28. It may reasonably be inferred from the SACC that LMI and CCI had similar interests and incentives, communicated regularly, and cooperated to make misleading statements. The SACC also alleges LMI made misleading statements about the nature of pollution in those pits. *See id.* ¶¶ 27–28.

Steadfast may proceed on this theory of misstatement.

2. Contamination at DOM 6

LMI submitted a "Confirmed Unknown" notice about TPH pollution at a location referred to as "DOM 6." SACC ¶ 29. But when LMI submitted this notice, it knew the TPH contamination resulted from known historical releases from fuel oil pipelines (FOPLs) and were therefore properly covered under the RSL policy. *Id.* LMI had also received confirmation from both CCI and a third-party contractor that the TPH contamination came from these FOPLs. *Id.* Nevertheless, LMI hired another contractor to prepare a report that the TPH could have come from some other source so it could claim the TPH was an unknown pollution condition. *Id.* To secure the payment of claims under the ELI policy, LMI prevented Steadfast from speaking to the first contractor in LMI's absence. *Id.* As a result, Steadfast mistakenly paid a claim under the ELI policy and incurred expenses investigating whether the pollution at DOM 6 was known or unknown. *Id.*

Steadfast also alleges LMI has taken opportunistic and inconsistent positions about the pollution at DOM 6. *See id.* ¶¶ 30–31. LMI and CCI have investigated and reported on contamination at DOM 6 for more than a decade, both in shallow and deep soil. *Id.* ¶ 31. But in late 2014, the San Francisco Bay Regional Water Quality Control Board (RWQCB) issued a "No Further Action" (NFA) letter about contamination at DOM 6. *Id.* ¶ 30. LMI did not disclose the

NFA letter to Steadfast, and when Steadfast learned about the letter in early 2015, LMI argued the RWQCB meant to address only shallow and not "deep TPH contamination at DOM 6." *Id.* But LMI had previously submitted claims for both shallow and deep contamination. *Id.* ¶ 31.

In response LMI argues these alleged misstatements are no more than assertions of its opinions about coverage and that it cannot be held responsible for the statements CCI and third-party contractors made. *See* LMI Mem. at 14–16. Again the court finds that in the light most favorable to Steadfast, the statements in question may reasonably be inferred to be LMI's own.

LMI also argues the allegations about the NFA letter are false and presents the court with the letter and the parties' correspondence about it. *See id.* at 19–20 (citing Werner Decl. Ex. 11, ECF No. 321-11 (NFA letter) and *id.* Ex. 12, ECF No. 321-12 (correspondence from Steadfast to LMI discussing the NFA letter)). LMI argues the NFA letter does not concern DOM 6, but rather three segments of fuel oil pipelines.[4] *See id.* at 20; LMI Reply at 10; Werner Decl. Ex. 11, at 12. Steadfast responds that the pipelines are adjacent to DOM 6. Opp'n LMI Mot. at 17. LMI replies that "adjacent to" does not mean "the same as." LMI Reply at 10. When read in Steadfast's favor and with the benefit of reasonable inferences, the SACC does not necessarily contradict the NFA letter. Pipelines can leak and contaminate adjacent territory. These allegations are therefore not "false," and may support Steadfast's case.

Steadfast may proceed on this theory of misstatement.

3. Building 84

LMI intended to demolish Building 84 but concealed this intent from Steadfast to obtain coverage for its cleanup efforts in the meantime. SACC ¶¶ 32–35. It may reasonably be inferred from the SACC that if Building 84 were demolished, LMI would not have been required to clean up pollution in that building. *See id.* ¶ 35. LMI also refused to give Steadfast

[4] LMI also argues it could not have concealed the NFA letter from Steadfast because the NFA letter is publicly available. *See* LMI Mem. at 19–20. This argument does not show Steadfast's allegation is false; Steadfast alleges it obtained the letter by a request made under the Freedom of Information Act. SACC ¶ 30.

information about its efforts to obtain offsets from the City of Vallejo if Building 84 were closed. *Id.* ¶¶ 32–33.

LMI argues the SACC does not explain how any of LMI's alleged statements were false or misleading. *See* LMI Mem. at 15. Its arguments are better understood as disagreements with Steadfast's allegations and requests for details unnecessary at the pleading stage. *See id.* (arguing remediation of Building 84 was necessary regardless of whether it was demolished and arguing Steadfast does not adequately explain why obtaining coverage for remediation of pollution in Building 84 before demolition resulted in "coverage for the demolition under the ELI Policy").

Steadfast may proceed on this theory of misstatement.

4. Contamination Events at Building 680

Steadfast alleges LMI and CCI knew PCB contamination in Building 680 "was so widespread that any surface or area was known to be contaminated," such that coverage under only the RSL policy was available. SACC ¶¶ 36–37. Yet both CCI and LMI requested coverage under the ELI policy and told Steadfast the contamination in Building 680 was unknown. *Id.*

LMI argues these statements were not misstatements of fact, but merely coverage positions. LMI Mem. at 16. Again, when read in Steadfast's favor, the SACC adequately alleges LMI knew pollution conditions in Building 680 were part of a "known" condition but represented to Steadfast they were not.

Steadfast may proceed under this theory of misstatement.

5. Building 386

Steadfast alleges CCI misled Steadfast about contamination in Building 386 by falsely describing old maps and figures as new, that is, by claiming it had only recently discovered certain pollution conditions when in fact those conditions were long understood to exist. *Id.* ¶¶ 38–39. Steadfast also alleges CCI submitted claims for tests of soil performed at depths between zero and five feet at this site, but in fact more than five feet of soil had already been removed from the site. *Id.* ¶ 39. Steadfast alleges CCI made these misrepresentations "with the knowledge and approval of LMI," as was LMI's "standard procedure." *Id.* ¶ 38. To evidence

LMI's knowledge and approval, Steadfast cites correspondence in which CCI told Steadfast that LMI would provide Steadfast with information about the purportedly unknown pollution condition after LMI received that information from CCI. *Id.*

LMI argues these allegations cannot suffice to make LMI responsible for CCI's alleged misrepresentations. LMI Mem. at 16. The court disagrees. At this stage, Steadfast's allegations are sufficient to allow LMI to defend against this claimed misrepresentation. And as the court has found above, a reasonable inference may be drawn that LMI and CCI worked in concert.

Steadfast may proceed on this theory of misrepresentation.

6. Building 46

Steadfast alleges LMI submitted a claim for pollution spilled from an underground oil pipe at Building 46. SACC ¶¶ 40–41. LMI claimed the condition was unknown because the pipe was not associated with nearby underground storage tanks. *Id.* ¶ 40. But LMI knew the pipe in question was in fact connected to the tanks. *Id.* LMI prevented Steadfast from discovering this fact by filling in and covering the hole it had used to find the pollution. *Id.* Steadfast discovered the misstatement when the San Francisco Bay RWQCB issued the NFA letter disclosing both that the pipe was connected to the tanks and that LMI's contractor had punctured the pipe and caused contamination to spill into the surrounding soil. *Id.* ¶ 41.

LMI argues the NFA letter Steadfast cites has since been corrected to reflect that the pollution conditions at Building 46 are not attributable to the underground tanks. *See* LMI Mem. at 20 (citing Werner Decl. Ex. 14, ECF No. 321-14). LMI cites another NFA letter about the underground tanks in question that finds "[n]o associated piping or contaminated soil" are associated with those tanks. *See id.* (citing Werner Decl. Ex. 13, ECF No. 321-13). LMI requests the court take judicial notice of the corrected and additional NFA letters. *See* Req. Judicial Not., ECF No. 320. Publicly available documents published on government websites may be subject to judicial notice. *See, e.g., Ellis v. J.P. Morgan Chase & Co.*, 950 F. Supp. 2d 1062, 1079 n.17 (N.D. Cal. 2013). But judicial notice does not establish the accuracy of a document's contents without further assurance those contents are subject to no reasonable dispute. *See, e.g., Cactus*

Corner, LLC v. U.S. Dep't of Agric., 346 F. Supp. 2d 1075, 1099 (E.D. Cal. 2004), *aff'd*, 450 F.3d 428 (9th Cir. 2006). The court declines to attribute persuasive force to the NFA letters LMI cites, particularly at this pleading stage.

Steadfast may proceed on this theory of misstatement.

IV. CONCLUSION

The motions to dismiss are GRANTED IN PART as follows:

(1) The claim for an accounting is DISMISSED without leave to amend;

(2) The claims for unjust enrichment and restitution are construed as a single claim for restitution and are DISMISSED without leave to amend;

(3) The claims of negligent and intentional misrepresentation are DISMISSED without leave to amend; and

(4) The motion is denied in all other respects.

This order resolves ECF Nos. 318, 322.

By previous order, discovery was stayed pending resolution of this motion. *See* Order Dec. 29, 2015, at 3, ECF No. 341. On the court's own motion and in the interest of the efficient resolution of this action, discovery remains stayed pending a forthcoming order on LMI's motions for partial summary judgment. The schedule for the remainder of this case will be set in that order.

SO ORDERED.

DATED: March 2, 2016.

UNITED STATES DISTRICT JUDGE