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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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AIG SPECIALTY INSURANCE COMPANY,
f/k/a/ CHARTIS SPECIALTY
INSURANCE COMPANY, f/k/a/
AMERICAN INTERNATIONAL SPECIALTY
LINES INSURANCE COMPANY

Plaintiff,

v.

PHOENICIAN LLC and EVEREST
INDEMNITY INSURANCE COMPANY,

Defendants.

CIV. NO. 2:13-2578 WBS CKD

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS

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Plaintiff AIG Specialty Insurance Company brought this action against defendants Phoenician LLC ("Phoenician") and Everest Indemnity Insurance Company ("Everest"). Presently before the court is Everest's motion to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure Rule 12(b)(6).

1 I. Allegations of the First Amended Complaint

2 In 2001, Phoenician began developing a fifteen-unit
3 apartment complex in Roseville, California known as "The
4 Phoenician." (First Am. Compl. ¶ 4 (Docket No. 11).) The
5 apartments were later converted to condominiums. (Id.)
6 Phoenician took out two insurance policies on the property, a
7 primary policy from Everest and an excess policy from plaintiff.
8 (Id. ¶ 7.) Plaintiff's policy was subject to a \$2 million
9 retained limit per occurrence. (Id.)

10 Severe rainfall damaged several of the property's units
11 in October 2009. (Id. ¶ 13.) The Phoenician Homeowner
12 Association ("Association") tendered a claim to its insurer,
13 which denied coverage on the grounds that design and construction
14 defects caused the damage. (Id.) The Association contacted
15 Phoenician, which tendered a claim to Everest under its primary
16 policy. (Id.) Everest retained counsel to represent the matter.
17 (Id.) Thereafter, the Association hired a consultant who
18 conducted an investigation of the Phoenician property. (Id. at
19 14.) The consultant discovered further construction defects, and
20 to evaluate these issues, it conducted destructive testing on the
21 property between 2010 and 2012. (Id.) Plaintiff contends that
22 during this time, the Association informed Phoenician and Everest
23 about the destructive testing, but they declined to participate.
24 (Id.)

25 In September 2012, the Association provided notice to
26 Phoenician, pursuant to California's "Right to Repair Act," that
27 it planned to commence litigation regarding alleged construction
28 defects at The Phoenician. (Id. ¶ 15.) Plaintiff contends that,

1 by failing to acknowledge the claim in writing within fourteen
2 days after receipt, both Phoenician and Everest waived
3 Phoenician's right to avail itself of defenses and pre-litigation
4 remedies available under the Act. (Id. ¶ 16.) Having failed to
5 resolve the issues, on October 10, 2012, the Association filed a
6 lawsuit against Phoenician in Placer County Superior Court. (Id.
7 ¶ 17.) Arbitration of the Association's claims was set for
8 January 2014. (Id. ¶ 26.)

9 Plaintiff alleges that neither Phoenician nor Everest
10 advised it of the destructive testing, the Association's "Right
11 to Repair" notice, or the underlying lawsuit the Association
12 brought against Phoenician. (Id. ¶ 18.) Plaintiff further
13 alleges that it did not become aware of the underlying lawsuit
14 between the Association and Phoenician until late 2012, through a
15 communication from the Association's counsel. (Id. ¶ 19.)
16 Plaintiff contacted Everest and Klinedinst for Phoenician's
17 contact information and was allegedly misinformed by Everest that
18 Phoenician was defunct. (Id. ¶ 20.) Plaintiff's independent
19 investigation of the Secretary of State's corporation database
20 corroborated this information. (Id. ¶ 21.) However, plaintiff
21 later learned in October 2013 that Phoenician was not defunct and
22 had been in contact with Everest, Klinedinst, and the Association
23 during the period leading up to the lawsuit. (Id. ¶¶ 24-25.)
24 Plaintiff now alleges that by the time of this discovery, it was
25 unable to participate meaningfully in the arbitration process.
26 (Id. ¶¶ 25-26, 46.) The arbitrator nevertheless denied plaintiff
27 counsel's motion to continue the proceedings. (Id. ¶ 26.)

28 As a result of its late discovery of Phoenician's

1 status as an existing entity and the Association's action against
2 Phoenician, plaintiff now contends that it lacked adequate time
3 to investigate and discover facts directly relevant to its
4 defense. (Id. ¶ 25.) It also asserts its confusion over
5 Phoenician's status prevented it from contacting other parties
6 and insurers that might have contributed toward the settlement
7 amount. (Id. ¶ 46.)

8 Prior to the date set for arbitration, the Association
9 tendered a demand for settlement to Phoenician's counsel, who in
10 turn forwarded the correspondence to plaintiff and Everest. (Id.
11 ¶ 27.) The Association gave the parties two options. "Option A"
12 proposed a full settlement involving all three parties. (Id. ¶
13 28.) Everest would pay the remaining limits of its policy--
14 approximately \$1.8 million--in addition to a payment of \$200,000
15 by Phoenician, which would ostensibly trigger plaintiff's excess
16 coverage. (Id. ¶ 28.) "Option B" was a partial settlement,
17 proposing that Phoenician would sign a release from liability
18 with Everest in exchange for Everest's \$1.8 million payment.
19 (Id. ¶ 29.)

20 Plaintiff contends both of these options disregarded
21 its available defenses and erroneously presumed that the \$2
22 million combined disbursements from Phoenician and Everest would
23 trigger its excess policy. (Id. ¶ 30.) It declined to
24 participate in the proposed settlement on the basis that most of
25 the defects fell outside the scope of the coverage of its issued
26 policy; that, in the alternative, the defects were overvalued by
27 the Association and actually fell below the policy's retained
28 limit; and that the defects belonged to multiple occurrences such

1 that no single "occurrence" exceeded the \$2 million retained
2 limit. (Id. ¶¶ 32-36.)

3 On December 12, 2013, plaintiff filed its Complaint for
4 declaratory relief, seeking a declaration that it had no duty to
5 defend or indemnify Phoenician in connection with certain claims
6 brought by the Association and that the partial settlement
7 executed by Everest did not reduce or exhaust the retained limit
8 of its excess insurance policy. (Compl. (Docket No. 1).)

9 Despite plaintiff's protests, Everest and Phoenician
10 moved forward with "Option B" and entered into two separate
11 partial settlements with the Association for \$1,776,368.87 and
12 \$230,000, respectively. (First Am. Compl. ¶¶ 38-39.) Plaintiff
13 nevertheless agreed to assume Phoenician's defense subject to a
14 reservation of rights to seek reimbursement. Plaintiff,
15 Phoenician, and the Association reached a conditional joint
16 resolution one week prior to the January arbitration date. (Id.
17 ¶ 42.)

18 II. Procedural Background

19 Plaintiff filed its First Amended Complaint ("FAC") on
20 March 28, 2014, asserting claims for cost recovery against
21 Phoenician and Everest.¹ Default judgment was entered against
22 Phoenician for having failed to appear or answer plaintiff's
23 Complaint within the time allowed by law. (Clerk's Entry of
24 Default (Docket No. 21).) Against Everest, plaintiff seeks
25 reimbursement for sums it paid in the defense of Phoenician and
26 the January 2014 settlement with the Association. Plaintiff

27 ¹ Plaintiff's FAC does not state legal theories for such
28 recovery.

1 argues those sums were attributable to negligence and breach of
2 duty by Everest in the defense and settlement of the
3 Association's underlying claim. (Id. ¶ 54.) Everest now moves
4 to dismiss plaintiff's First Amended Complaint for failure to
5 state a claim upon which relief can be granted pursuant to Rule
6 12(b)(6). (Def.'s Mot. to Dismiss (Docket No. 28).)

7 III. Analysis

8 A. Legal Standard

9 On a motion to dismiss, the court must accept the
10 allegations in the complaint as true and draw all reasonable
11 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416
12 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
13 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322
14 (1972). To survive a motion to dismiss, a plaintiff needs to
15 plead "only enough facts to state a claim to relief that is
16 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S.
17 544, 570 (2007). This "plausibility standard," however, "asks
18 for more than a sheer possibility that a defendant has acted
19 unlawfully," and "where a complaint pleads facts that are
20 "'merely consistent with' a defendant's liability, it 'stops
21 short of the line between possibility and plausibility.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550
22 U.S. at 556-57).

24 When ruling on a motion to dismiss, a court may
25 generally not consider materials other than the facts alleged in
26 the plaintiff's complaint. See Anderson v. Angelone, 86 F.3d
27 932, 934 (9th Cir. 1996). Both plaintiff and Everest attached
28 voluminous exhibits to their briefings. (See Docket Nos. 34,

1 37.) Constrained by Rule 12(b)(6), in ruling on Everest's
2 motion, the court intends only to rely on plaintiff's FAC.

3 B. Plaintiff's Theories for Recovery

4 1. Equitable Subrogation

5 "In the insurance context, [equitable subrogation]
6 permits the paying insurer to be placed in the shoes of the
7 insured and to pursue recovery from third parties responsible to
8 the insured for the loss for which the insurer was liable and
9 paid." Fireman's Funds Ins. Co. v. Maryland Casualty Co., 21
10 Cal. App. 4th 1586, 1596 (4th Dist. 1994). There are six
11 elements essential to an equitable subrogation claim:

12
13 (1) the insured has suffered a loss for which the
14 party to be charged is liable, either because the
15 latter is a wrongdoer whose act or omission caused the
16 loss or because he is legally responsible to the
17 insured for the loss caused by the wrongdoer; (2) the
18 insurer, in whole or in part, has compensated the
19 insured for the same loss for which the party to be
20 charged is liable; (3) the insured has an existing,
21 assignable cause of action against the party to be
22 charged, which action the insured could have asserted
23 for his own benefit had he not been compensated for
24 his loss by the insurer; (4) the insurer has suffered
25 damages caused by the act or omission upon which the
26 liability of the party to be charged depends; (5)
27 justice requires that the loss should be entirely
28 shifted from the insurer to the party to be charged .
. . . ; and (6) the insurer's damages are in a stated
sum, usually the amount it has paid to its insured,
assuming the payment was not voluntary and was
reasonable.

25 Id. (quoting Troost v. Estate of DeBoer, 155 Cal. App. 3d 289,
26 294 (4th Dist. 1984)).

27 As it presently stands, plaintiff's FAC does not
28 plausibly support the inference that Phoenician has an existing

1 assignable cause of action against Everest, the third element of
2 an equitable subrogation claim. According to the FAC, the
3 Association delivered written notice to Phoenician of its intent
4 to commence litigation under California's "Right to Repair" Act.
5 (First Am. Compl. ¶ 16.) Plaintiff alleges that neither
6 Phoenician nor Everest acknowledged notice of the Association's
7 filing within fourteen days after receipt and "[a]s a result,
8 Phoenician and Everest--without notifying or consulting AIG
9 Specialty--waived Phoenician's right to avail itself of defenses
10 and remedies to which it was entitled under the Act." (Id.)

11 California's Right to Repair Act requires that
12 homeowners serve notice on building owners before commencing
13 litigation. See Cal. Civ. Code § 910. The Act gives builders
14 the opportunity to receive notice and cure a defect in order to
15 resolve the matter in a nonadversarial manner. See McCaffrey
16 Grp., Inc. v. Superior Court, 224 Cal. App. 4th 1330, 1350 (4th
17 Dist. 2014). It is unclear how Everest, Phoenician's insurer,
18 could have waived Phoenician's ability to proceed under the Act.
19 According to plaintiff, Phoenician failed to respond to the
20 Homeowner's notice and waived its own right. These facts thus
21 fail to give rise to a discernible cause of action by Phoenician
22 against Everest.

23 Additionally, plaintiff alleges Everest made no serious
24 attempt to contact Phoenician or to secure the cooperation of the
25 company's managing member or agent. (Id. ¶ 18.) But plaintiff
26 also states that "Phoenician took no active role at all in the
27 defense of the Association's claims" and "did little or nothing
28 to monitor, direct, or participate in the defense that was being

1 provided by Everest; and it provided no meaningful assistance to
2 Klinedinst, or to other defense counsel Everest appointed.”

3 (Id.) If Phoenician made it itself unavailable to Everest, then
4 it is not apparent it would have an “existing, assignable cause
5 of action” against Everest for failing to involve it. See
6 Fireman’s Funds Ins., 21 Cal. App. 4th at 1596.

7 Plaintiff’s FAC fails to allege a plausible assignable
8 cause of action between Phoenician and Everest. Therefore,
9 plaintiff has failed to sufficiently plead a claim for equitable
10 subrogation. See Twombly, 550 U.S. at 570.

11 2. Duty of Good Faith and Fair Dealing

12 Because of an insurer’s contractual relationship with
13 the insured, the insurer owes the insured an implied duty of good
14 faith and fair dealing that is part of any contract. See
15 Commercial Union Assurance Cos. v. Safeway Stores, Inc., 164 Cal.
16 Rptr 709, 711 (1980). An excess and primary insurer share no
17 such relationship. See id. at 1041. In Transit Casualty Co. v.
18 Spink Corp., 94 Cal. App. 3d 124 (3d. Dist. 1979), a California
19 Court of Appeal recognized a duty of good faith and fair dealing
20 between primary and excess insurers untethered to any contractual
21 relationship. Id. at 131. Spink, however, was effectively
22 overruled less than a year later by the California Supreme Court,
23 which held an excess insurer’s cause of action against a primary
24 insurer for refusal to settle is limited to a claim for equitable
25 subrogation. See Commercial Union, 164 Cal. Rptr. at 712; Spink,
26 94 Cal. App. 3d at 131. Everest and plaintiff did not enter into
27 a contract with each other, and thus the covenant of good and
28 fair dealing does not apply to their dispute. See Commercial

1 Union, 164 Cal. Rptr. at 712.

2 3. Collusive Settlement

3 Plaintiff's claim against Everest based on a theory of
4 "collusive settlement" is essentially an extension of its direct-
5 duty theory. Plaintiff advances its "collusive settlement"
6 theory in reliance on Kaiser Foundation Hospitals v. North Star
7 Reinsurance Corp., 90 Cal. App. 3d 786, (2d Dist. 1979). In
8 Kaiser, the insured colluded with its primary insurer by
9 assigning dates of loss on malpractice claims to the wrong policy
10 years in an attempt to trigger the excess insurer's coverage.
11 Id. at 789. This strategy placed the excess insurer "at the
12 mercy of the insured and primary carrier." Id. at 792. The
13 California Court of Appeal noted that both Kaiser and the primary
14 insurer owed a duty of good faith and fair dealing to the excess
15 insurer. Id. at 792.

16 However, the court in Kaiser went on to qualify this
17 conclusion, noting that "while we have held that the parties'
18 relationships are governed by the implied covenant of good faith
19 and fair dealing rather than by unilateral fiats of [the insured
20 and the primary insurer], we make no attempt to define precisely
21 what rights and duties that entails in a case such as this." Id.
22 at 794. The Kaiser court's recognition of a duty between the
23 primary and excess insurer was also later dismissed as dictum by
24 the Court of Appeal in Fireman's Fund, because the only parties
25 to the appeal in Kaiser were the insured and the excess insurer.
26 Fireman's Fund, 21 Cal. App. 4th at 1602. The opinion's language
27 regarding duties mutually owed between insurers was unnecessary
28 to the ruling. See id.

1 Kaiser thus does not assist plaintiff any more than
2 Spink. Any recognition by the Kaiser court of an extra-
3 contractual duty between the primary and excess insurers was
4 dictum later called into question by Commerical Union and
5 Fireman's. See Commercial Union, 164 Cal. Rptr. at 712;
6 Fireman's Fund, 21 Cal. App. 4th at 1602.

7 4. Negligent Undertaking

8 As a general rule, one has no duty to aid another. See
9 Williams v. California, 192 Cal. Rptr. 233, 235 (1983). Under
10 certain circumstances, one has liability to third persons for
11 physical harm caused when one negligently performs an undertaking
12 to another. Restatement (Second) of Torts § 324A. California
13 has adopted the negligent undertaking or "Good Samaritan" rule
14 from the Restatement (Second). Artiglio v. Corning Inc., 76 Cal.
15 Rptr. 479, 483 (1998). "[I]t is settled law that one who, having
16 no initial duty to do so, undertakes to come to the aid of
17 another . . . has a duty to exercise care in performance and is
18 liable if (a) his failure to exercise care increases the risk of
19 such harm, or (b) the harm is suffered because of the other's
20 reliance upon the undertaking." Id. (quoting Williams, 192 Cal.
21 Rptr. at 235-36) (internal quotation marks omitted).

22 Recovery on a negligent undertaking theory "requires
23 proof of each of the well-known elements of any negligence cause
24 of action, viz., duty, breach of duty, proximate cause, and
25 damages." Artiglio, 76 Cal. Rptr. at 479. The actor's actual
26 assumption of an undertaking provides a basis for finding that a
27 duty to perform existed between the actor and third party. Id.
28 A negligence claim on this theory requires a showing that

1
2 (1) the actor undertook, gratuitously or for
3 consideration, to render services to another; (2) the
4 services rendered were of a kind the actor should have
5 recognized as necessary for the protection of third
6 persons; (3) the actor failed to exercise reasonable
7 care in the performance of the undertaking; (4) the
8 actor's failure to exercise reasonable care resulted
9 in physical harm to the third persons; and (5) either
10 (a) the actor's carelessness increased the risk of
11 such harm, or (b) the actor undertook to perform a
12 duty that the other owed to the third persons, or (c)
13 the harm was suffered because either the other or the
14 third persons relied on the actor's undertaking.

15
16 Paz v. California, 93 Cal. Rptr. 2d 703, 709 (2000). Whether an
17 actor's alleged actions, if proven, would constitute an
18 undertaking is generally a question of law. Artiglio, 76 Cal.
19 Rptr. 2d at 484. However, in some cases there may be factual
20 questions depending on the nature and extent of the act
21 undertaken. Id.

22 Plaintiff's FAC does not plausibly support an inference
23 that Everest specifically undertook performance of a service to
24 it that Everest should have recognized was necessary for
25 plaintiff's protection. Plaintiff alleges Everest incorrectly
26 advised it that Phoenician was defunct and that its last known
27 point of contact was through an individual named Larry John.

28 (First Am. Compl. ¶ 20.) Merely "advising" Phoenician, whether
or not Everest was aware the information was incorrect, did not
amount to an undertaking of a service for the protection of
plaintiff. Everest never "held itself out as undertaking an
obligation" to ensure the information it provided was accurate.
See Rappenecker v. United States, 509 F. Supp. 1018, 1021 (N.D.

1 Cal. 1981) (concluding the government never held itself out to
2 give warnings as part of its long-range radio navigations service
3 in such a way as to constitute an undertaking). To that end,
4 Everest's actions did not constitute an undertaking sufficiently
5 within the meaning of section 324A. See Artiglio, 18 Cal. 4th at
6 615.

7 Additionally, only a minority of courts have extended
8 the negligent undertaking basis for tort liability to disputes
9 involving only economic harm, and California does not appear to
10 be one of them. See Felton v. Schaeffer, 229 Cal. App. 3d 229,
11 238 (4th Dist. 1991) (concluding that because plaintiff's claim
12 did not involve physical damage it was outside the ambit of
13 negligent undertaking). "Courts in a large number of
14 jurisdictions have read the references to 'physical harm' in §
15 323 and § 324A of the Restatement as affirmatively precluding
16 recovery for economic losses in such cases," while a smaller
17 number of courts have held that pure economic losses are
18 recoverable in such cases. Shaefer v. Indymac Mortg. Servs., 731
19 F.3d 98, 104-05 (1st Cir. 2013); see also Love v. United States,
20 915 F.2d 1242, 1248 (9th Cir. 1989) (interpreting Montana tort
21 law but noting that "'good samaritan' cases have typically arisen
22 where the negligently performed service is related to safety" and
23 emphasizing that under the Restatement the tortfeasor is subject
24 to the other for physical harm resulting from his failure to
25 exercise reasonable care); Shaner v. United States, 976 F.2d 990,
26 994 (6th Cir. 1992) ("Recovery under the Good Samaritan Doctrine
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1 is limited to physical harm.”).²

2 Plaintiff fails to allege that Everest undertook a
3 service for its protection. Even if the FAC contained such
4 allegations, plaintiff would not have a claim for pure economic
5 harm under California law. Therefore, plaintiff’s claim based on
6 a theory of negligent undertaking must fail.

7 5. Negligent Misrepresentation

8 To state a claim for negligent misrepresentation, a
9 plaintiff must allege: (1) a misrepresentation of a past or
10 existing material fact; (2) without reasonable ground for
11 believing it to be true; (3) intent to induce reliance; (4)
12 justifiable reliance; and (5) resulting damage. Glenn K. Jackson
13 Inc. v. Roe, 273 F.3d 1192, 1201 n.2 (9th Cir. 2001); Apollo
14

15 ² Neither of the cases plaintiff cites in its Opposition
16 in support of extending section 324A to economic harm are
17 helpful, as they both involved personal injury. (See Pl.’s Opp’n
18 at 32 n.23) FNS Mortgage Service Corp. v. Pacific General Group,
19 Inc., 24 Cal. App. 4th 1564 (3d Dist. 1994), involved physical
20 harm to consumers due to defective pipes and Hanberry v. Hearts
21 Corp., 276 Cal. App. 2d 680 (4th Dist 1969), was a slip-and-fall
22 case. In Cooper v. State Farm, 177 Cal. App. 4th 876 (4th Dist.
23 2009), a case involving economic harm, the Court of Appeal
24 suggested the plaintiff could proceed on either a contract or
25 negligent undertaking theory against a defendant insurer that
26 destroyed evidence despite an express promise to retain it.
27 However, Cooper was not a straightforward application of section
28 324A. The duty the Court of Appeal identified arose from the
defendant’s express promise to the plaintiff to preserve evidence
and the plaintiff’s reliance thereon. Id. at 884.

24 Additionally, in its Surreply, plaintiff cites J’Aire Corp
25 v. Gregory, 157 Cal. Rptr. 407, 410 (1979) for the proposition
26 that economic harm standing alone is recoverable where the
27 parties share a special relationship. (See Pl.’s Surreply at
28 11:15 n.11.) This authority is inapposite, because plaintiff’s
FAC fails to support a plausible inference that Everest and
plaintiff shared a special relationship.

1 Capital Fund, LLC v. Roth Capital Partners, LLC, 158 Cal. App.
2 4th 226, 243 (2d Dist. 2007).

3 Plaintiff alleges Everest represented that Phoenician
4 was defunct and that its last known point of contact was through
5 Larry John who no longer associated with the company. (First Am.
6 Compl. ¶ 20.) These allegations are insufficient to support a
7 plausible inference that the person plaintiff spoke to at Everest
8 lacked a reasonable ground for believing this information to be
9 true or intended to induce plaintiff's reliance--the second and
10 third elements of a claim for negligent misrepresentation. Facts
11 that are "merely consistent" with a defendant's liability are
12 insufficient to allege a plausible claim for relief. See Iqbal,
13 556 U.S. at 678 (2009).³

14 IT IS THEREFORE ORDERED that Everest's motion to
15 dismiss be, and the same hereby is, GRANTED.

16 Plaintiff has twenty days from the date this Order is
17 signed to file an amended complaint, if it can do so consistent
18 with this Order.

19 Dated: September 24, 2014

20 
21 **WILLIAM B. SHUBB**
22 **UNITED STATES DISTRICT JUDGE**

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³ In its Opposition, plaintiff raises new allegations in
27 support of this claim. (See Pl.'s Opp'n at 5:23-6:8, 7:5-10.)
28 The court will not consider those new allegations as they were
absent from the FAC. See Anderson, 86 F.3d at 934.