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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

NATIONAL SURETY CORPORATION,

No. C-09-4898 EMC

Plaintiff,

v.

**ORDER GRANTING THIRD PARTY  
DEFENDANT’S MOTION TO DISMISS**

PACIFIC INTERNATIONAL VEGETABLE  
MARKETING, INC.,

**(Docket No. 19)**

Defendant.

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Plaintiff National Surety Corporation (“NSC”) initiated this lawsuit against Defendant Pacific International Vegetable Marketing, Inc. (“PIM”). Thereafter, PIM asserted a counterclaim against NSC and a third-party complaint against TWIW Insurance Services, LLC. Currently pending before the Court is TWIW’s motion to dismiss some but not all of the claims asserted in PIM’s third-party complaint. Having considered the parties’ briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **GRANTS** TWIW’s motion.

**I. FACTUAL & PROCEDURAL BACKGROUND**

In its third-party complaint, PIM alleges as follows.

On or about March 1, 2005, PIM entered into an Agricultural Marketing Agreement with A&A Farming. Under the Agreement, A&A hired PIM as its marketing agent for the sale of its crop. *See* Compl. ¶ 6; Compl., Ex. A (Agreement ¶ 2). The Agreement obligated A&A (1) to maintain comprehensive public liability insurance, including product liability insurance, with certain limits and (2) to name PIM as an additional insured under the insurance policies. *See* Compl. ¶ 7;

1 *see also* Compl., Ex. A (Agreement ¶ 13) (providing that “Grower shall furnish to Shipper a current  
2 certificate of insurance . . . evidencing that Grower has . . . comprehensive general public liability,  
3 including product liability, . . . Insurance throughout the time period of this contract with the  
4 following limits and naming Shipper as an additional insured”).

5 To effect its obligations under the Agreement, A&A directed TWIW – which is an agent  
6 authorized to sell insurance for and on behalf of NSC – to take all necessary steps to add PIM as an  
7 additional insured to the insurance policy issued by NSC to A&A. *See* Compl. ¶¶ 3, 8. TWIW  
8 subsequently delivered to PIM a Certificate of Liability Insurance, indicating that PIM was added to  
9 the NSC policy as an additional insured. *See* Compl. ¶ 8 & Ex. B.

10 Thereafter, in June 2006, several patrons of a Wendy’s restaurant in Ogden, Utah, became ill.  
11 It was later determined that the patrons had become sick as a result of contaminated lettuce grown  
12 by A&A and provided to Wendy’s by PIM. *See* Compl. ¶ 9.

13 In August 2006, some of the patrons filed suit against Wendy’s. Wendy’s then filed a third-  
14 party complaint against PIM. *See* Compl. ¶ 11. Beginning in October 2006, PIM tendered the  
15 defense of the claims to NSC on multiple occasions. NSC finally accepted the tender of defense in  
16 May 2007. *See* Compl. ¶¶ 12-13. However, a few months later, in October 2007, NSC advised PIM  
17 that it had reconsidered its position, based primarily on its conclusion that PIM was not  
18 appropriately named as an insured or additional insured under the policy. *See* Compl. ¶ 15. In 2008,  
19 additional lawsuits were filed based on the same underlying events, and, although PIM tendered the  
20 defenses of these claims as well to NSC, NSC refused. *See* Compl. ¶¶ 16-17.

21 Based on the above allegations, PIM has filed a third-party complaint against TWIW for its  
22 failure to obtain additional insured status for PIM on the NSC insurance policy. PIM has filed suit  
23 not only on its own behalf but also as assignee of any claim A&A may have against TWIW. *See*  
24 Compl. ¶ 20 (alleging that A&A transferred and assigned to PIM of A&A’s “rights, title and interest  
25 in and to all causes of action A&A had or may have had against TWIW for TWIW’s failure to  
26 secure the requisite endorsements naming PIM as an additional insured”). The following causes of  
27 action are asserted in the complaint: (1) breach of contract; (2) breach of the covenant of good faith  
28 and fair dealing; and (3) breach of fiduciary duty and “Other Tort Duties” (apparently, negligence,

1 misrepresentation, and breach of warranty). In the currently pending motion, TWIW argues that the  
2 claims for misrepresentation, breach of fiduciary duty, and breach of warranty should be dismissed.

3 **II. DISCUSSION**

4 A. Misrepresentation

5 In its third-party complaint, PIM asserts claims for both negligent and intentional  
6 misrepresentation. TWIW argues that the misrepresentation claims should be dismissed because (1)  
7 PIM has failed to allege with specificity the particulars about the misrepresentation (*i.e.*, the who,  
8 when, and where) and (2) PIM has failed to allege that TWIW knew that its representation was false  
9 at the time that it made the representation.

10 1. Specificity

11 The parties agree that Federal Rule of Civil Procedure 9(b) governs the misrepresentation  
12 claim. Under Rule 9(b), “[i]n alleging fraud or mistake, a party must state with particularity the  
13 circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). The Ninth Circuit has explained  
14 that

15 Rule 9(b) demands that, when averments of fraud are made, the  
16 circumstances constituting the alleged fraud “be ‘specific enough to  
17 give defendants notice of the particular misconduct . . . so that they  
18 can defend against the charge and not just deny that they have done  
19 anything wrong.’” Averments of fraud must be accompanied by ‘the  
20 who, what, when, where, and how’ of the misconduct charged.

19 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).

20 The Court agrees with PIM that it has alleged with specificity at least one misrepresentation  
21 based on an exhibit that is attached to its third-party complaint – *i.e.*, the Certificate of Liability  
22 Insurance that TWIW delivered to PIM. *See* Compl. ¶ 8 & Ex. B (Certificate of Liability Insurance).  
23 But this singular misrepresentation seems to have made to PIM alone, and not to A&A. *See* Compl.  
24 ¶ 8 (alleging that the Certificate of Liability Insurance was delivered to PIM); *see also* Opp’n at 3  
25 (arguing that the document “shows that Ms. Shiflet of TWIW sent the Certificate of Insurance to  
26 PIM in Salinas, California”). Therefore, to the extent the misrepresentation claims are based on  
27 misrepresentations made to A&A, and not PIM, there is a lack of specificity. In addition, the Court  
28 notes that, as pled, the complaint seems to reference more than just one misrepresentation. *See*

1 Compl. ¶¶ 35-36. At the hearing, however, PIM conceded that the above constituted the sole  
2 misrepresentation. This too needs to be clarified as the existing complaint lacks specificity. The  
3 Court therefore dismisses without prejudice the misrepresentation claims.

4 2. Knowledge of Falsity at Time Misrepresentation Made

5 As for the misrepresentations claims based on the sole alleged misrepresentation made to  
6 PIM, the Court dismisses without prejudice for an additional reason. As TWIW argues, PIM has  
7 failed to allege that TWIW knew that its representations were false at the time they were made. *See*  
8 Cal. Civ. Code § 1710 (defining deceit as, *inter alia*, “[t]he suggestion, as a fact, of that which is not  
9 true, by one who does not believe it to be true” and “[t]he assertion, as a fact, of that which is not  
10 true, by one who has no reasonable ground for believing it to be true”). PIM does not dispute that a  
11 claim for misrepresentation requires knowledge of falsity at the time of the misrepresentation. Its  
12 only contention is that it has satisfied this requirement by alleging that TWIW “misrepresent[ed] to  
13 A&A and PIM that PIM had insurance when it did not.” Compl. ¶ 35. Even if all reasonable  
14 inferences are to be made in PIM’s favor and the claim for negligent misrepresentation only requires  
15 that TWIW should have known the representation was false, the allegations do not give rise to a  
16 reasonable inference that TWIW knew or should have known at the time of its representations that  
17 PIM was not in fact insured.

18 B. Breach of Fiduciary Duty

19 In its third-party complaint, PIM seems to assert a claim for breach of fiduciary duty based  
20 on TWIW’s failure to obtain for A&A and PIM the additional insured status for PIM. In its motion  
21 to dismiss, TWIW argues that PIM has failed to state a claim for relief for breach of fiduciary duty  
22 (whether on behalf of itself or on behalf of A&A) because “California law has not clearly held that  
23 an insurance broker-insured relationship establishes a fiduciary duty.” Mot. at 5. TWIW relies  
24 primarily on *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Assocs., Inc.*, 115 Cal. App. 4th  
25 1145 (2004), in support of its argument.

26 As TWIW points out, in *Hydro-Mill*, the state appellate court did state that “it is unclear  
27 whether a fiduciary relationship exists between an insurance broker and an insured.” *Id.* at 1156.  
28 But, as Judge White of this District has noted, the *Hydro-Mill* court never held “as a matter of law

1 that insurance brokers never owe a fiduciary duty to their clients.” *Shemano-Krupp v. Mutual of*  
2 *Omaha Ins. Co.*, No. C 05-04693 JSW, 2008 U.S. Dist. LEXIS 70097, at \*22 (N.D. Cal. Sept. 15,  
3 2008). In fact, Judge White noted that, “in *Steadman v. McConnell*, 149 Cal. App. 2d 334, 338  
4 (1957), the court held that where an insurance agent was an expert in the field and the insured was a  
5 layman, there was a fiduciary relationship between the insurance agent and the insured.” *Id.* The  
6 Court therefore rejects TWIW’s position to the extent it argues that there may never be a cause of  
7 action for breach of fiduciary duty where a broker and insured are involved.

8           Nevertheless, both parties acknowledged at the hearing that there are no reported cases in  
9 California finding a fiduciary duty owed by an insurance agent to an insured who is not a consumer  
10 who presumably lacks expertise. The cases that have found such a fiduciary duty (not involving,  
11 *e.g.*, handling of funds) all involve relatively unsophisticated insureds. Finding a fiduciary duty in  
12 those circumstances comports with the general purpose in imposing fiduciary obligations -- where  
13 the fiduciary is in a superior position and can easily take advantage of the other party. *See City of*  
14 *Hope Nat’l Med. Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375, 389 (2008) (indicating that “fiduciary  
15 obligations . . . generally come into play when one party’s vulnerability is so substantial as to give  
16 rise to equitable concerns underlying the protection afforded by the law governing fiduciaries”). As  
17 pled in PIM’s third-party complaint, the claim should be dismissed because there are insufficient  
18 allegations that a fiduciary relationship existed between A&A/PIM and TWIW. There are no  
19 allegations, for example, that, similar to *Steadman*, A&A/PIM were unsophisticated business entities  
20 who were vulnerable to TWIW. The Court therefore dismisses without prejudice the claim for  
21 breach of fiduciary duty. The Court notes that this ruling has no effect on any claim for, *e.g.*,  
22 professional negligence. *Cf. Hydro-Mill*, 115 Cal. App. 4th at 1157-58 (noting that “[i]t is not clear  
23 in what respect the fiduciary duty owed by an independent insurance agent differs from the duty of  
24 due (reasonable) care” -- *i.e.*, the duty “to use reasonable care, diligence, and judgment in procuring  
25 the insurance requested by its client”).

26 C.     Breach of Warranty

27           In its third-party complaint, PIM did refer to an alleged tort committed by TWIW consisting  
28 of a breach of warranty. In its opposition brief, PIM has clarified that it does not object to dismissal

1 of the claim for breach of warranty “as used in the traditional, commercial sense” such as “warranty  
2 of a product.” Opp’n at 6. PIM explains that it meant to use the phrase “breach of warranty” only in  
3 context with its claims for, *e.g.*, misrepresentation. Because PIM has effectively stated that the  
4 breach-of-warranty claim is not independent of its claims for misrepresentation, and the Court has  
5 dismissed the misrepresentation claims, this claim is also dismissed.


6 **III. CONCLUSION**

7 For the foregoing reasons, TWIW’s motion to dismiss is granted. The claims for  
8 misrepresentation (including the breach-of-warranty claim) and the claim for fiduciary duty are  
9 dismissed without prejudice. Because PIM has stated that, at this juncture, it does not intend to  
10 amend its complaint, the Court orders that TWIW respond to the complaint by March 23, 2010.  
11 This ruling does not bar PIM from subsequently seeking leave to reassert a claim for  
12 misrepresentation or breach of fiduciary duty so long as it has a Rule 11 basis for believing that  
13 there is a factual basis for any such claim. In addition, this ruling does not bar PIM from exploring  
14 in discovery whether there was negligence on the part of TWIW in allegedly failing to obtain the  
15 insurance requested.

16 This order disposes of Docket No. 19.

17  
18 IT IS SO ORDERED.

19  
20 Dated: March 5, 2010

21   
22 EDWARD M. CHEN  
23 United States Magistrate Judge  
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