IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DANIEL DIAZ VILLALPANDO, Plaintiff, v. TRANSGUARD INSURANCE COMPANY OF AMERICA, EXEL DIRECT, INC., and DOES 1-100, Defendants.	C 13-4028 SC ORDER ON MOTIONS TO DISMISS

I. INTRODUCTION

Now before the Court are Defendants Transguard Insurance Company of America ("Transguard") and Exel Direct, Inc.'s ("Exel") (collectively "Defendants") motion to dismiss Plaintiff Daniel Diaz Villalpando's first amended complaint. ECF Nos. 14 ("FAC"). The motions are fully briefed,[1] and the Court finds them appropriate for decision without oral argument, Civ. L.R. 7-1(b). As explained

[1] ECF Nos. 18 ("Transguard MTD"), 27 ("Opp'n to Transguard"), 28 ("Exel MTD"), 31 ("Transguard Reply"), 39 ("Opp'n to Exel"), 45 ("Exel Reply"). Plaintiff also moves to file a sur-reply, ECF No. 49, which the Court GRANTS despite Exel's opposition, ECF No. 41. However, the sur-reply is non-dispositive because, as noted below, it involves factual disputes not appropriate for resolution on a motion to dismiss.

below, both motions are DENIED.

II. BACKGROUND

Plaintiff, a Mexican citizen residing in California, was seeking work as a truck driver in September 2008. FAC ¶ 13. On September 8, he met with Jim Dalpino, a representative of Exel. Id. Exel is an Ohio-based delivery service that hires drivers to deliver merchandise, mainly home appliances, to customers who purchase those items from stores that use Exel as a delivery provider. Id. At that meeting, Plaintiff and others who were looking for work as truck drivers talked with Mr. Dalpino for about ten minutes, after which Plaintiff was told that he had a job with Exel but would need to sign certain papers "confirming certain aspects of his work" as an independent contractor. Id.

At the time of the meeting, Plaintiff's English was not fluent, so Mr. Dalpino spoke to him in Spanish and explained that there were four conditions for the job. See id. ¶ 14. Plaintiff would have to (1) "agree to pay for the cost of renting a truck suitable to be used for this delivery service," (2) "pay for a second person to ride with him on deliveries," (3) "pay for liability insurance for the truck, as well as coverage for damage to the truck and any contents," and (4) "pay for insurance on himself and any person assisting him, which Plaintiff believed was workers compensation coverage." Id.

Upon being asked to read and sign certain legal documents, Plaintiff told Mr. Dalpino that he could not read or understand English documents and would need to have them in Spanish. Id. ¶ 16. He was told that no translated documents were available. Id.

Nevertheless, Mr. Dalpino instructed Plaintiff to sign a document called an "Equipment Lease Agreement," FAC Ex. 1, which included an "Exhibit C," a specific document related to Plaintiff's responsibility to obtain insurance. Mr. Dalpino apparently told Plaintiff to sign and initial a portion of Exhibit C, which he also told Plaintiff would confirm Plaintiff's purchase of worker's compensation insurance. Id. ¶ 15. Mr. Dalpino also signed and initialed that part of Exhibit C, which reads as follows: "Workers Compensation Coverage - Workers compensation coverage for the CONTRACTOR and for the CONTRACTOR's W2 Labor." Id.; Equipment Lease Agreement Ex. C. Mr. Dalpino also told Plaintiff he needed to backdate the form to September 3, 2008, which Plaintiff did. FAC ¶ 15. At that point, Plaintiff believed that he was buying workers compensation coverage. Id. Mr. Dalpino also instructed Plaintiff to sign an "Independent Truckman's Agreement," which was also backdated. FAC Ex. 2.[2] For all documents, Plaintiff relied on Mr. Dalpino's representations and statements as to Exel's employment requirements. Id. ¶ 16.

Exel provided insurance through Transguard, a multi-line insurance agency. Id. ¶¶ 8-9. Plaintiff alleges that Mr. Dalpino was acting on behalf of Transguard when he arranged for, sold, and confirmed the issuance of coverage on Transguard's behalf. Id. ¶ 9; ECF No. 40 ("Villalpando Decl.") ¶¶ 9-12. Plaintiff also alleges that Transguard and Exel were related through the National Association of Independent Truckers ("NAIT"), an "affiliation group" formed to market products and services -- in this case,

[2] Collectively, the Equipment Lease Agreement and Independent Truckman's Agreement are the "Agreements."

insurance -- to independent trucking companies. Id. ¶ 4. According to Plaintiff, Exel is a NAIT member, and Transguard provided its insurance coverage to Exel, via its agent, in that capacity. See id.

After Plaintiff joined Exel as an independent contractor, he was paid per delivery, and the cost of his insurance premiums was deducted from his paychecks. Id. ¶ 17. Transguard allegedly knew of this arrangement because it had arranged for Exel to negotiate its employees' insurance coverage. Id. Plaintiff adds that Transguard ratified this conduct by accepting payments for the insurance Plaintiff purchased through Exel, and also by paying benefits of such coverage. Id. At the time of his meeting with Mr. Dalpino, however, Plaintiff never obtained any copy of any evidence of insurance (including a copy of his policy), though sometime after that meeting, Plaintiff did receive a one-page document entitled "Evidence of Insurance." Id. ¶ 18 & Ex. 3. Throughout this time, based on Mr. Dalpino's statements and representations, Plaintiff believed he had purchased the requisite workers compensation insurance that Exel required. Id.

On October 17, 2010, while making a delivery for Exel, Plaintiff was badly injured when a refrigerator fell on top of him. Id. ¶ 20. He was knocked unconscious and airlifted to a hospital. Id. He suffered, among other things, "a concussion, sprains/strains of the arms, shoulders, neck and thoracic spine, including a cervical and lumbar radiculopathy, thus necessitating surgeries." Id. He spent several months undergoing rehabilitation and may require future surgeries. Id. While he recovered, Exel contacted Transguard to make a claim for him. Id. ¶ 22.

Transguard paid some of Plaintiff's bills, and also provided payments of $500 per week for 104 weeks, through October 2012. Id. However, after Plaintiff's doctors told him that he would not be able to return to work at Exel, Plaintiff contacted Transguard to ask for continuing disability benefits. Id. Transguard refused. Id. Transguard's representative told Plaintiff that in order to obtain continuing disability benefits, his policy required that he apply for Social Security benefits. Id.

Plaintiff was unaware of such a requirement and, in fact, had never been given a copy of his insurance policy until he asked for one after Transguard's refusal. Id. He has since discovered that Defendants contend that he did not purchase workers compensation insurance, but rather a different type of insurance that Plaintiff did not understand, the provisions of which Defendants concealed from him. Id. ¶ 25. Until that point Plaintiff believed he had purchased workers compensation insurance that would cover his total disability and medical expenses, an expectation he contends is verified by his weekly payments and the payments of his medical bills, which Plaintiff contends resulted in Transguard's ratification of Mr. Dalpino's and Exel's conduct for Transguard's benefit. Id.

In accordance with Transguard's representative's instructions, Plaintiff requested Social Security benefits -- which at that point he had thought were only for retirement, not pre-retirement disability. Id. ¶¶ 24-25. However, as a non-citizen, Plaintiff was not eligible for Social Security benefits because he did not have enough "credits."[3] Id. ¶ 26. Such credits are accumulated by

[3] Plaintiff states that his notification of ineligibility arrived

working in certain jobs for certain periods of time, and Plaintiff contends that for Social Security eligibility, he would have needed to work for ten years (forty work quarters) in eligible jobs. Id. ¶ 28.

After Plaintiff received that notice of ineligibility, Transguard informed Plaintiff via an email dated October 15, 2012, that Plaintiff's claim would be denied "not because he was totally disabled from working but because he was not 'approved for Social Security Disability . . . [and he did] not qualify for disability benefits because [he had] not worked long enough under Social Security.'" Id. ¶ 27 (alterations in the original). Plaintiff contends that Defendants had always known that he could not qualify for the insurance they sold him. Id. ¶ 28. He alleges that they hid this fact from him, telling him instead that he was purchasing workers compensation insurance that would apply if he was injured while working for Exel. Id. ¶¶ 28-30. In accordance with Plaintiff's beliefs and expectations about his insurance, he paid premiums for 202 weeks. Id. ¶ 29.

Based on these facts, Plaintiff alleges that Transguard's insurance benefit denial was improper because it renders his insurance coverage "illusory," since Plaintiff could never be covered under the plan given his lack of U.S. citizenship and Social Security credits. Id. ¶ 30. He also maintains that Defendants' position is an act of material non-disclosure under California insurance law, since they never told him that he would not be eligible for coverage under the plan he paid for. Id. ¶ 31.

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by letters dated September 12, 2002, but the Court assumes that this was a typo, given the narrative.

Plaintiff contends that Defendants' coverage position is also a prohibited type of post-claims underwriting, since Transguard determined after Plaintiff submitted a claim that he was never eligible for benefits and was never insured for workers compensation -- as opposed to a denial of coverage based on Plaintiff's not being disabled. See id. ¶ 32.

The gist of Plaintiff's complaint is that Defendants collaborated to sell insurance policies to people like Plaintiff who could not understand English when entering the insurance contracts, but were nevertheless tricked into entering them as a condition of their employment.[4] Id. ¶ 33. Based on these facts, Plaintiff asserts against Transguard causes of action for (1) breach of insurance contract; (2) declaratory relief, seeking a declaration that Plaintiff is disabled and entitled to benefits wrongfully withheld; and (3) breach of the implied covenant of good faith and fair dealing. Plaintiff asserts against both Transguard and Exel causes of action for (4) intentional misrepresentation and concealment, and (5) negligent misrepresentation. Defendants each move to dismiss.

III. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory."

[4] Indeed, Plaintiff contends that a vast majority of his delivery department colleagues were not U.S. citizens. FAC ¶ 32.

Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

Claims sounding in fraud are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), which requires that a plaintiff alleging fraud "must state with particularity the circumstances constituting fraud." See Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009). "To satisfy Rule 9(b), a pleading must identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about [the purportedly fraudulent] statement, and why it is false." United States ex rel Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1055 (9th Cir. 2011) (quotation marks and citations omitted).

IV. DISCUSSION

A. Transguard's Motion

i. Breach of Contract & Declaratory Relief

Transguard moves to dismiss Plaintiff's breach of contract and declaratory relief claims, arguing that: (1) Plaintiff does not identify any policy benefits to which he was entitled but that

Transguard refused to pay, (2) Plaintiff admits that Transguard paid the policy's temporary total disability benefits, and (3) the policy's provision relating to continuous total disability benefits is valid and enforceable. Transguard MTD at 10-11.

Transguard notes that Plaintiff's "Evidence of Insurance" form clearly states that none of Plaintiff's coverage is workers' compensation coverage, rendering continuing disability benefits unavailable to Plaintiff because he did not qualify for his own plan's coverage. See id. Transguard's point here is that because Plaintiff clearly does not satisfy the policy's coverage requirements for continuing disability benefits, and Transguard paid the benefits that were required of it, there is no breach. Id. Further, Transguard contends that Plaintiff has pleaded nothing that would create a plausible agency relationship between it and Exel -- e.g., that Mr. Dalpino was an agent for Transguard, or that Exel is a member of a trucking-industry affiliation group that offers its members insurance -- so any understanding Plaintiff had that he was purchasing workers' compensation insurance cannot be imputed to Transguard. Id. at 10-11.

On this latter point, Transguard cites Plaintiff's pleadings that Plaintiff's independent contractor arrangement was only with Exel, Mr. Dalpino signed documents only on Exel's behalf, and also to a state court action Plaintiff filed against Exel indicating that Exel was just one of Transguard's customers, not, for example, its agent. Id. at 11 (citing ECF No. 11-1 ("Transguard RJN") Ex. 1 ("State Compl.").[5] The Court finds that these are all factual

[5] The Court takes notice of Transguard's RJN under Federal Rule of Evidence 201, to the extent that the documents include public state court filings. The Court does not take notice of the truth of any

disputes not subject to determination on a Rule 12(b)(6) motion, since Plaintiff's pleadings, taken as true, are plausible and detailed enough to meet the requirements of Rules 8 and 9. To the extent that Transguard's motion depends on these arguments, it is DENIED.

Plaintiff contends that Transguard's legal arguments are misleading. He states that the Court should focus on the fact that Transguard denied Plaintiff's total disability benefits claim not on the basis of whether Plaintiff was disabled, but only because Plaintiff had not acquired enough credits to qualify for Social Security -- a condition Transguard allegedly knew that Plaintiff could not satisfy. See Opp'n at 6. This, according to Plaintiff, renders Transguard's coverage illusory and constitutes post-claim underwriting, so the Court should impose a coverage obligation on Transguard. Id.

Plaintiff first seeks to distinguish two of Transguard's cases: Miller v. Monumental Life Insurance Co., 502 F.3d 1245 (10th Cir. 2007) and Harvell v. Chater, 87 F.3d 371 (9th Cir. 1996). Transguard cited Miller in support of its statement that "many courts have found provisions [requiring Social Security disability qualification] such as that in Transguard's policy enforceable." Mot. at 12 (citing Miller, 502 F.3d at 1251). Transguard oversimplifies Miller. That case was a summary judgment decision in which a plaintiff had been awarded Social Security disability benefits but denied coverage under a plan that used Social Security benefits determinations as conditions precedent for continuous total disability coverage. See Miller, 502 F.3d at 1254-55. It

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fact alleged in the State Complaint.

was not a general approval of such clauses, or a case analyzing allegations at the motion to dismiss stage. However, the Court does not find Miller relevant to Plaintiff's argument either. Again, it was a case about whether a Social Security Administration ("SSA") decision satisfied a clause similar to the one challenged here -- it had nothing to do with whether inclusion of the clause was unlawful in some way. The same applies to Harvell, in which the Ninth Circuit reviewed a grant of summary judgment that was based on the district court's rejection of the plaintiff-appellant's constitutional challenge to an SSA denial of disability insurance benefits.

The parties' present dispute, given Plaintiff's arguments, turns on whether Transguard's inclusion of the Social Security requirement in the policy, knowing Plaintiff would be ineligible, renders the policy unlawful in some way. Plaintiff's argument, unlike those in Miller or Harvell, is that the requirement's inclusion in Plaintiff's policy was a calculated choice: people like Plaintiff are unlikely to qualify for Social Security disability benefits, given the credit requirement, so insurance companies like Transguard have virtually no obligations for continuous disability coverage, and they shoulder no virtually risk. See Opp'n at 7-12.[6]

a. "Illusory" Agreements

In California, insurance policies may not provide illusory coverage. See Md. Casualty Co. v. Reeder, 221 Cal. App. 3d 961,

[6] Plaintiff also asks the Court to find the policy in question ambiguous or inconspicuous. The Court declines to do so on a motion to dismiss, especially when the policy itself is not in evidence. These issues can be resolved at a later date.

977 (Cal. Ct. App. 1990). An illusory promise is a promise under which the promisor assumes no obligation, as when the promise is conditioned on something a promisor knows will not occur or is wholly under the promisor's control. See Asmus v. Pac. Bell, 23 Cal. 4th 1, 15-16 (Cal. 2000).

Plaintiff argues that Transguard's policy was illusory because, while Plaintiff paid premiums for more than 200 weeks, Transguard had no obligation to pay total disability benefits because Transguard knew that Plaintiff could not have been eligible for Social Security prerequisite. See Opp'n at 8. Therefore Plaintiff concludes that Transguard's coverage was illusory. Id.

Transguard disagrees. It argues that it had no knowledge of Plaintiff's Social Security situation; that neither it or its agents had any duty to determine whether Plaintiff's policy was adequate to meet Exel's requirements (and that it cannot be liable for its agents' negligence in failing to recommend adequate coverage); and that, in any event, Plaintiff obtained the benefits to which he was entitled, in the form of temporary disability benefits and medical benefits. See Transguard Reply at 4-6.

The Court does not find the disputed terms illusory on their face: they are conditional, so whether Transguard had an obligation depends on whether it knew Plaintiff would not be eligible for Social Security benefits or whether it controlled that eligibility. See Asmus, 20 Cal. 4th at 15-16. Since the latter clearly does not apply -- SSA makes those determinations -- Transguard would need to have known of Plaintiff's Social Security ineligibility at the time it made the contract with Plaintiff. See FAC ¶ 30.

Plaintiff has alleged that Mr. Dalpino was acting as an agent

for Transguard, and that through this mutually beneficial relationship, Transguard knew about Plaintiff's ineligibility for Social Security benefits. See id. ¶¶ 7, 9, 12, 30. Transguard contends that it is not liable for its agents' negligence in failing to recommend adequate or proper insurance coverage, Reply at 5 (citing Shultz Steel Co. v. Hartford Ac. & Indemnity Co., 187 Cal. App. 3d 513, 518-19 (Cal. Ct. App. 1984), and they are not wrong about that, but Plaintiff has alleged intentional torts, not negligence, on Mr. Dalpino's part.

Further, Transguard's citation to Fagundes v. American International Adjustment Co., 2 Cal. App. 4th 1310 (Cal. Ct. App. 1990), is inapposite. The plaintiff in Fagundes, who had been in a car accident, argued that his insurance policy's coverage was illusory because both he and the other driver had $15,000 Uninsured/Under-Insured Motorist ("UM/UIM") benefits plans. Id. at 1313-14. This meant that after all parties' claims were processed, the plaintiff obtained no sum whatsoever. Id. at 1314. The court held that this was not an illusory contract: the plaintiff chose the lowest coverage amount and the insurance company paid it -- the fact that plaintiff had apparently chosen a sub-optimal plan did not render the plan's coverage illusory. Unlike the plan in Fagundes, Plaintiff has alleged that Transguard knew it would not have to pay benefits under part of the plan.

Plaintiff's pleadings suggest that Transguard knew that it would not have to pay Plaintiff's total disability benefits, which at this stage indicates that Plaintiff has adequately pled that the insurance agreement is illusory. Further, this is plausible in the context of Plaintiff's allegations: if Transguard had a working

relationship with Exel of the type Plaintiff alleges, and Transguard knew about Exel's contractors' general ineligibility for Social Security benefits, it could accept Exel contractors' premium payments but be fairly secure in the knowledge that it would not incur any obligation to pay certain benefits. Transguard's motion to dismiss fails on this point.

b. Post-Claim Underwriting

Plaintiff also argues that Transguard has unlawfully engaged in prohibited "postclaims underwriting." Under California Insurance Code section 10384, postclaims underwriting of health and disability policies is defined as "the rescinding, canceling, or limiting of a policy or certificate due to the insurer's failure to complete medical underwriting and resolve all reasonable questions arising from written information submitted on or with an application before issuing the policy or certificate." Plaintiff contends that Transguard's refusal to provide benefits based on Plaintiff's ineligibility for Social Security amounts to a postclaim determination that Plaintiff was neither eligible for benefits nor insured for workers' compensation or any disability coverage. FAC ¶¶ 31-32. Plaintiff also alleges that Transguard made this coverage decision despite knowing that he and many other Exel employees would be ineligible for coverage due to the Social Security clause in their contracts. Id.

Transguard argues that it did not rescind, cancel, or limit its policy due to a failure to resolve reasonable questions arising from Plaintiff's written information. Reply at 6. It maintains that it merely complied with the terms of the agreement, which requires as a condition precedent Plaintiff's proof of a Social

Security Disability Award. Id. Transguard also contends that Plaintiff's authority, Hailey v. California Physicians' Service, 158 Cal. App. 4th 452, 465-66 (Cal. Ct. App. 2007), is inapposite because it concerned the California Health and Safety Code's provision on postclaims underwriting, not the California Insurance Code's.

The Court is not convinced. Plaintiff has alleged that Transguard and Exel were both on notice that many of Exel's insured employees, who were instructed to purchase Transguard's insurance, would be ineligible for benefits under the plans because they were also ineligible for Social Security. Taking Plaintiff's allegations as true, Transguard's rescinding, canceling, or limiting its policy without having resolved the reasonable question of whether its insureds could ever obtain benefits amounts to postclaims underwriting. Regarding Hailey, the Court does not see much appreciable difference between that case's reasoning on postclaims underwriting or the California Health and Safety Code's definition of the term.[7] The policy Hailey discusses regarding the prohibition on postclaims underwriting is consonant with Plaintiff's claims here: the point of prohibiting such practices is to prevent insureds from having to pay premiums and operate under the assumption that they are insured, only to learn after submitting a claim that they are not, in fact, insured. 158 Cal. App. 4th at 465. Taking Plaintiff's allegations as true,

[7] Specifically, the Health and Safety Code reads: "For purposes of this section, 'postclaims underwriting' means the rescinding, canceling, or limiting of a plan contract due to the plan's failure to complete medical underwriting and resolve all reasonable questions arising from written information submitted on or with an application before issuing the plan contract."

Transguard knew or should have known at the time Plaintiff obtained his policy that, due to Plaintiff's circumstances and Transguard's relationship with Exel, it was likely that Plaintiff would not in fact be insured.

Plaintiff has sufficiently alleged, for the purposes of surviving a Rule 12(b)(6) motion, that Transguard's actions are impermissible under the California Insurance Code's provisions on postclaims underwriting.

ii. Breach of the Covenant of Good Faith and Fair Dealing

Plaintiff contends that Transguard's conduct constitutes a breach of the implied covenant of good faith and fair dealing. In the insurance context, the implied covenant requires the insurer to refrain from injuring its insured's right to receive the benefits of the insurance agreement. Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 818 (Cal. 1979). An insurer tortiously breaches the implied covenant when it engages in unreasonable conduct in connection with an insured's claim, placing its own interests above those of its insureds. Century Sur. Co. v. Polisso, 139 Cal. App. 4th 922, 949 (Cal. Ct. App 2006) (citing Egan, 24 Cal. 3d at 818). A claim under the implied covenant requires that (1) benefits under the policy have been withheld, and (2) the reason for withholding benefits was unreasonable or without proper cause. Id. (citing Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 920 (Cal. 1978)). The issue of reasonableness is normally a question of fact. Chateau Chamberay Homeowners Ass'n v. Assoc. Int'l Ins. Co., 90 Cal. App. 4th 335, 347 (Cal. Ct. App. 2001).

According to Plaintiff, Transguard's failures to investigate

Plaintiff's entitlement to benefits and to give Plaintiff's interests equal consideration to its own constitute breaches of good faith and fair dealing. FAC ¶¶ 47-48. Plaintiff also cites its arguments that the policy's coverage is illusory to contend Transguard acted in bad faith. See Opp'n at 12-13. Transguard argues that it is Plaintiff's fault that he did not buy workers' compensation coverage, that any misrepresentation or coercion was due to Exel's behavior, and that Transguard had no duty to investigate Plaintiff's ability to obtain the benefits he sought. Transguard Reply at 7.

The Court finds that Plaintiff has pled a claim for breach of the implied covenant. According to Plaintiff's complaint, Transguard's agent with Exel sold Plaintiff the insurance, and Transguard knew of Plaintiff's probable inability to obtain coverage under the plan it sold. Under these circumstances, Plaintiff has adequately alleged that Transguard deprived Plaintiff of his benefits without proper cause, and that Transguard put its own interests in obtaining premiums above Plaintiff's interest in obtaining coverage or understanding the limitations of his plan.

iii. Fraud and Negligent Misrepresentation

Plaintiff alleges that both Defendants' conduct and Transguard's denial of total disability benefits constitutes intentional misrepresentation and concealment, as well as negligent misrepresentation. The elements of an intentional fraud claim are: "(1) a representation of material fact by defendant, (2) with knowledge, actual or virtual, of the true facts, (3) to a party actually or permissively ignorant of the truth, (4) with the intention, actual or virtual, that the other party act upon it, and

(5) the other party was induced to act." Cedars Sinai Med. Ctr. v. Mid-W. Nat. Life Ins. Co., 118 F. Supp. 2d 1002, 1012 (C.D. Cal. 2000) (citing San Diego Mun. Credit Union v. Smith, 176 Cal. App. 3d 919, 923 (Cal. Ct. App. 1986)). The elements of a negligent misrepresentation cause of action differ only with respect to the requisite state of mind. Id.; JMP Sec. LLP v. Altair Nanotechnologies Inc., 880 F. Supp. 2d 1029, 1042 (N.D. Cal. 2012).

Plaintiff contends that Transguard (partly through its agent Mr. Dalpino) and Exel arranged to sell insurance to unsophisticated persons like himself, knowing that Plaintiff and others would pay premiums on insurance plans that Defendants were aware would not pay certain benefits. See FAC ¶¶ 14, 28-29, 33-34, 53. This, according to Plaintiff, constitutes promissory fraud. In any event, Plaintiff claims, Transguard and Exel's representations to him about his insurance policy were made without reasonable inquiry or belief in their truth, misleading him into paying for insurance despite being ineligible for benefits. Transguard argues that it is implausible for Mr. Dalpino to have been its agent, and for Transguard to have known that Plaintiff would not qualify for continuous total disability benefits. Transguard Reply at 7. The Court disagrees. At this point, Plaintiff's pleadings are sufficiently detailed and plausible to survive a Rule 12(b)(6) motion.

B. Exel's Motion

Both the Equipment Lease Agreement and the Independent Truckman's Agreement contain arbitration provisions, which are identical. The relevant parts of the arbitration provision read:

> Except as set forth below, CONTRACTOR agrees to submit to final and binding arbitration any and all claims and causes of action which CONTRACTOR may have against the COMPANY . . . . Similarly, COMPANY and its subsidiaries agree to submit to final and binding arbitration any and all claims and causes of action which they may have against CONTRACTOR . . . . This arbitration provision includes all tort claims and all claims based on an alleged violation of statute or public policy. , . The legal basis for this arbitration provision is the state laws governing arbitration in the state in which CONTRACTOR performs services under this Agreement . . . It is agreed that no class action or consolidated class actions will be available under the arbitration procedure. NOTE: This arbitration provision constitutes a waiver of CONTRACTOR'S right to a jury trial.

Equipment Lease Agreement ¶ 17; Independent Truckman's Agreement ¶ 16.

Exel contends that all of Plaintiff's tort claims against it are subject to mandatory arbitration, regardless of Plaintiff's contention that he could not read the operative contracts. See Exel MTD at 4-5. Exel therefore asks the Court to dismiss Plaintiff's claims, id. at 6 (citing cases supporting a district court's ability to dismiss a case when all of the relevant claims are arbitrable), or to stay the case and compel arbitration.

Plaintiff argues, among other things, that he did not knowingly and voluntarily agree to submit to arbitration and to relinquish his right to a jury trial, because he could not understand or read English at the time he signed the Agreements.

In response, Exel begins with a threshold factual argument that Plaintiff understood written and spoken English when he was recruited by Exel. See Reply at 2-3; ECF Nos. 46 ("Dalpino Decl.") & 47 ("Gutierrez Decl."). This factual dispute is inappropriate for resolution at this time, and the Court declines to address it. The only factual contentions properly before the Court are those in

the FAC, and the Court must take them as true at this time.[8]

Since the crux of this dispute is not the invalidity of the contract as a whole, but rather the arbitration provision itself, the Court must decide whether the arbitration provision is invalid and unenforceable under section 2 of the FAA. Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1264 (9th Cir. 2006) (en banc). While agreements to arbitrate are valid, irrevocable, and enforceable as a matter of federal law, state law nonetheless governs issues concerning the validity, revocability, and enforceability of contracts generally. Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987). As such, generally applicable contract defenses may be asserted to invalidate arbitration agreements without contravening the FAA. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996). Plaintiffs need not specifically challenge arbitration clauses in their complaints. See Bridge Fund Capital Corp. v. Fastbucks Franchise Corp., 622 F.3d 996, 998 (9th Cir. 2010). Rather, "as long as the plaintiff's challenge to the validity of an arbitration clause is a distinct question from the validity of the contract as a whole, the question of arbitrability is for the court to decide." Id.

i. Exemption

As a threshold matter, Plaintiff contends that the FAA exempts him from its arbitration requirements, because the FAA specifically exempts from its coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in

[8] Plaintiff moved for leave to file a sur-reply, ECF No. 49, which the Court GRANTS. However, Plaintiff's brief only concerns factual issues surrounding his ability to speak English at the time he entered the Agreements. The Court therefore declines to address the issues Plaintiff raises at this time.

foreign or interstate commerce." 9 U.S.C. § 1; see also Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (transportation workers engaged in interstate commerce are exempt from the FAA). In support of his argument that he is a transportation worker, Plaintiff cites Veliz v. Cintas Corp., No. C 03-1180 SBA, 2004 WL 2452851, at *5 (N.D. Cal. Apr. 5, 2004), in which the court applied an eight-factor test to determine whether the plaintiff counted as a "transportation worker" subject to FAA exemption. The Court finds that case, as well as Circuit City, inapposite. The FAA provision in question concerns employment contracts, and Plaintiff has pled that he is an independent contractor. See 9 U.S.C. § 1 (referencing "contracts of employment"). According to the Ninth Circuit, the issue of whether a party is an independent contractor is a "highly factual" question. Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1141 (9th Cir. 2001).

Based on Plaintiff's allegations, the Court cannot find at this point that he is exempt from the FAA. The Ninth Circuit has indicated that the distinction between independent contractors and employees is both highly factual and material for further analysis of FAA exemption, see Harden, 249 F.3d at 1141, so the Court cannot assume at this point (as Plaintiff appears to have done, given his lack of briefing on the matter) that independent contractors and employees alike are potentially exempt from the FAA. See Opp'n at 7-9. Further, the Agreements indicate that the relationship between Plaintiff and Exel is "not an employer-employee relationship." See Independent Truckman's Agreement ¶ 9.

Under these circumstances, and considering that the § 1 exclusion is to be both interpreted narrowly, Circuit City, 532

U.S. at 106, and understood to favor arbitration, Volt Info Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989), the Court declines to find at this time that Plaintiff is exempt from the FAA. Since the Court finds that the FAA governs this dispute, Plaintiff's allegation that Exel's motion should be denied because it does not cite California arbitration law is inapposite.

ii. Capacity and Unconscionability

Plaintiff also argues he lacked capacity to agree to the arbitration clause in the Agreements. Opp'n to Exel at 6-7. However, it is not clear from Plaintiff's brief or declarations whether he contends that he specifically lacked capacity to enter the arbitration clause, as opposed to the Agreements as a whole. See id.

The rule in California is that "when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents . . . ." AGI West Linn of Appian Grp. Investors DE LLC v. Eves, 217 Cal. App. 4th 156, 162 n.6 (Cal. Ct. App. 2013). Even if a plaintiff is illiterate, however, he still has the responsibility to have a contract read to him if he does not understand it. See Hutchins v. TNT/Reddaway Truck Line, Inc., 939 F. Supp. 721, 724 (N.D. Cal. 1996). Based on Plaintiff's irregular allegations as to exactly how much of the Agreements he understood, the Court is not persuaded that Plaintiff lacked capacity to enter just one particular clause of the Agreements. The question of whether Plaintiff had capacity goes to the formation of the entire contact, which would be an issue for the arbitrator, as opposed to the

question of the arbitration clause, which is for the Court. Bridge Fund, 622 F.3d at 998. The Court rejects Plaintiff's capacity argument, finding Plaintiff's contentions on this issue more suited for an unconscionability argument.

"To defeat an arbitration clause, the litigant must show both procedural and substantive unconscionability, although 'the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'" Bridge Fund, 622 F.3d at 1004 (quoting Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 114 (Cal. 2000)).

"Procedural unconscionability involves oppression or surprise due to unequal bargaining power, while substantive unconscionability focuses on overly harsh or one-sided results." Id. (internal quotations and citations omitted). Under California law, contracts of adhesion, "or at least terms over which a party of lesser bargaining power had no opportunity to negotiate," are treated as procedurally unconscionable "to at least some degree." Id.

First, as to procedural unconscionability, Plaintiff alleges that his English was poor at the time he signed the Agreements, and that at least as to some of the Agreements' terms, Mr. Dalpino either affirmatively misled him or omitted material facts about the Agreements. Since the Agreements are also form contracts drafted by an entity with far more bargaining power than Plaintiff, the Court finds that Plaintiff has established procedural unconscionability. See Armendariz, 24 Cal. 4th at 114 (employment contract that was "imposed on employees as a condition of

employment" with "no opportunity to negotiate" was adhesive). Since the procedural unconscionability here seems high, the Court also finds that Plaintiff need only make a minimal showing of the arbitration clause's substantive unconscionability to render it unenforceable. Bridge Fund, 622 F.3d at 1004.

Second, Plaintiff argues that the arbitration clause is substantively unconscionable because Exel's conduct regarding the arbitration clause is highly oppressive, and the clause did not fall within his reasonable expectations (given Mr. Dalpino's misrepresentations and Plaintiff's own lack of understanding surrounding the Agreements). Exel contends that because the arbitration clause is bilateral -- both parties are equally subject to it -- and also conspicuous and easily understandable, it cannot be substantively unconscionable. See Exel Reply at 9-10.

The Court finds that the arbitration clause has the requisite "modicum of bilaterality" here. Armendariz, 24 Cal. 4th at 117. The clause requires both party to submit all employment-related claims to arbitration, and it does not limit either side's relief or otherwise suggest that Plaintiff is more disadvantaged than Exel here.[9] See id. However, Plaintiff argues that the arbitration clause is contrary to his reasonable expectations as the weaker or "adhering" party. Opp'n to Exel at 12-13 (citing Bruni v. Didion,

[9] The class action prohibition would appear to violate California law, per Ninth Circuit precedent, but it is not currently at issue in this case, so the Court does not examine it at this time. See Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 986-87 (9th Cir. 2007). Further, the clause's language about Plaintiff waiving his right to a jury trial could indicate that the provision is not fully bilateral, though the fact that both parties commit to arbitration (thereby waiving Exel's jury trial right), and the Court's interpretation of the clause in favor of arbitration, suggest that the waiver provision does not weigh heavily for or against unconscionability.

160 Cal. App. 4th 1272, 1290-91 (Cal. Ct. App. 2008); Lima v. Gateway, Inc., 886 F. Supp. 2d 1170, 1183 (C.D. Cal. 2012) (citing Bruni)). The California Supreme Court noted the relevance of "reasonable expectations" in substantive unconscionability cases as follows:

> Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or "adhering" party will not be enforced against him. The second -- a principle of equity applicable to all contracts generally -- is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or "unconscionable."

Graham v. Scissor-Tail, Inc., 623 P.2d 165 (Cal. 1981) (in bank). Later cases have referred to both the "reasonable expectations" and "oppressive" limitations as being aspects of unconscionability. Armendariz, 24 Cal. 4th at 113 (citing A&M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, 486-87 (Cal. Ct. App. 1982)).

Part of a court's consideration of a party's reasonable expectations also appears to involve whether the party had adequate notice of the arbitration clause, and whether the party would expect the clause to appear based on whether the party is familiar with the type of contract at issue. See Scissor-Tail, 623 P.2d at 165 (finding that a contract of adhesion was not contrary to a party's expectations because he had entered "literally thousands" of such contracts); Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc., 89 Cal. App. 4th 1042, 1057 (Cal. Ct. App. 2001) (finding similarly); see also Fred Briggs Distrib. Co. v. Cal. Cooler, Inc., 2 F.3d 1156 (9th Cir. 1993) (same). This consideration also concerns what reasonable consumers would expect

about the arbitration clause's scope -- for example, whether an arbitration clause included in a warranty would relate only to the warranty, as opposed to including every possible dispute between the parties. See Bruni, 160 Cal. App. 4th at 1294-95.

The issue of what Plaintiff's reasonable expectations were, relative to this arbitration clause, is not purely a legal question -- it involves facts. The Court finds that Plaintiff has alleged enough to avoid dismissal based on the arbitration clause. The contract is adhesive, Plaintiff is a manual laborer who was not fluent (or even literate) in English at the time he entered the Agreements, and Mr. Dalpino allegedly misled him as to the Agreements. Further, the essence of Plaintiff's complaint is that both Transguard and Exel worked to take advantage of his situation as a non-English-speaking non-citizen, using their superior bargaining powers to ensure that Plaintiff would later be disadvantaged in certain ways.

At some point, the facts may indicate otherwise, but at this stage the Court finds that the slight substantive unconscionability factors, considered alongside the strong procedural unconscionability in this case, favor rejecting Exel's motion to dismiss based on the arbitration clause. See Bridge Fund, 622 F.3d at 1004 (unconscionability analysis is a sliding scale). Accordingly, Exel's motion to dismiss Plaintiff's FAC based on the arbitration clause is DENIED, and its motion to compel arbitration is DENIED for the same reasons. Exel may raise the issue of arbitration in a later motion, but Plaintiff's allegations are enough for his causes of action against Exel to survive at this point.

V. CONCLUSION

As explained above, Defendants Transguard Insurance Company of America and Exel Direct Inc.'s motions to dismiss Plaintiff Daniel Diaz Villalpando's first amended complaint are DENIED.

IT IS SO ORDERED.

Dated: February 13, 2014

UNITED STATES DISTRICT JUDGE