

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DIAMOND STATE INSURANCE COMPANY,

Plaintiff,

v.

MARIN MOUNTAIN BIKES, INC.; and
ATB SALES LIMITED,

Defendants.

AND ALL RELATED COUNTERCLAIMS

No. C 11-5193 CW

ORDER GRANTING IN
PART, AND DENYING
IN PART, DIAMOND'S
FIRST MOTION TO
DISMISS AND TO
STRIKE (Docket No.
32), GRANTING
MARIN MOUNTAIN
BIKES LEAVE TO
FILE ITS PROPOSED
AMENDED
AFFIRMATIVE
DEFENSES, DEEMING
REPLY BRIEF A
MOTION TO STRIKE
THE AMENDED
AFFIRMATIVE
DEFENSES, GRANTING
DIAMOND'S SECOND
MOTION TO STRIKE
AND DISMISS
(Docket No. 36),
AND RESETTING
DEADLINE TO HEAR
CASE DISPOSITIVE
MOTIONS

Plaintiff Diamond State Insurance Company first moves to strike Defendant Marin Mountain Bikes, Inc.'s affirmative defenses and to dismiss Marin's counterclaims or require a more definite statement. Marin opposes Diamond's first motion to the extent that it seeks to prevent Marin from amending its affirmative defenses and counterclaims, but does not otherwise oppose the motion. In a second motion, Diamond also moves to strike or dismiss Marin's first amended counterclaims (1ACC). Marin opposes

1 Diamond's second motion. Having considered the papers filed by
2 the parties on both motions and the parties' arguments at the
3 hearing on the second motion, the Court GRANTS Diamond's first
4 motion in part and DENIES it in part, and GRANTS Diamond's second
5 motion.

6 BACKGROUND

7 The following facts are taken from Marin's 1ACC and from
8 certain other documents of which the Court takes judicial notice.¹

9 At all times relevant to this action, Diamond provided
10 liability insurance to Marin, which designs and makes bicycles.

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13 ¹ With each of its motions, Diamond has filed a request for
14 judicial notice. In the first request for judicial notice (1RJN),
15 Diamond seeks judicial notice of five exhibits. In the second
16 request for judicial notice (2RJN), Diamond seeks judicial notice
of ten exhibits, the first five of which are identical to the five
exhibits attached to the 1RJN. Because the 2RJN encompasses the
1RJN, the Court will address the 2RJN only.

17 In the 2RJN, Diamond requests that the Court take judicial
18 notice of various documents filed in this action and in other
19 related actions filed in the Northern District of California and
20 in the United Kingdom. Marin opposes the request, arguing that
Diamond improperly asks the Court to take judicial notice of the
facts asserted in the documents and not simply of the fact that
these documents were filed.

21 Exhibits A, B, C, D, F, G and H to the 2RJN are documents
22 that the parties have filed in the instant case. These documents
are part of the record of the instant case and, as such, judicial
notice is not required.

23 Exhibits E, I and J consist of documents filed in other
24 cases. The Court takes judicial notice of the existence of these
25 documents, as well as of other documents filed in the docket of
ATB Sales Ltd. v. Marin Mtn. Bikes, Inc., Case No. 11-4755 (N.D.
26 Cal.), but declines to take judicial notice of the truth of the
27 matters asserted in these documents. See, e.g., McMunigal v.
28 Bloch, 2010 U.S. Dist. LEXIS 136086, *2 n.1 (N.D. Cal.) (granting
judicial notice of documents filed in another lawsuit for purposes
of noticing the existence of the lawsuit, claims made in the
lawsuit, and that various documents were filed, but not for the
truth of the matters asserted therein).

1 1ACC ¶¶ 1-2. The parties agree that the insurance policy states
2 in part, at Section 1, Coverage A for bodily injury and property
3 damage liability,

4 1. Insuring Agreement

5 a. We will pay those sums that the insured
6 becomes legally obligated to pay as damages because
7 of "bodily injury" or "property damage" to which
8 this insurance applies. We will have the right and
duty to defend the insured against any "suit"
seeking those damages.

9 b. This insurance applies to "bodily injury"
10 . . . only if:

11 (1) The "bodily injury" . . . is caused by an
12 "occurrence" that takes place in the "coverage
territory"; and

13 (2) The "bodily injury" . . . occurs during
14 the policy period. . .

15 1ACC ¶ 11; Compl. ¶ 8; Answer ¶ 8. In the 1ACC, Marin alleges
16 that the above language appeared on the first page of the insuring
17 agreement. 1ACC ¶ 34. The parties also agree that the following
18 definitions are contained in the policy:

19 3. "Bodily injury" means bodily injury, sickness or
disease sustained by any person . . .

20 4. "Coverage territory" means:

21 a. The United States of America (including its
22 territories and possessions), Puerto Rico and
Canada;

23 b. International waters or airspace, provided
24 that the injury or damage does not occur in the
25 course of travel or transportation to or from any
place not included in a. above; or

26 c. All parts of the world if:

27 (1) The injury or damage arises out of:
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(a) Goods or products made or sold by you in the territory described in a. above; or

(b) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; and

(2) The insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in a. above or in a settlement we agree to.

. . .

13. "Occurrence" means an accident . . . 1ACC ¶ 11; Compl. ¶ 8; Answer ¶ 8.² "Suit" is also defined as "a civil proceeding in which damages because of 'bodily injury' . . . are alleged." 1ACC ¶ 11. In the 1ACC, Marin alleges that section c(2) of the definition of coverage territory appears on the eleventh page of the insuring policy. Id. at ¶ 34.

Marin sells bicycles to ATB Sales Limited (ATB), a company that distributes Marin's bicycles in the United Kingdom only. Id. at ¶¶ 1, 3. "Diamond issued an 'Additional Insured-Vendors' endorsement to the Policy naming ATB as an additional insured under the Policy and promising to provide liability coverage to ATB 'with respect to liability arising out of your operations or premises owned by or rented to you.'" 1ACC ¶ 3. See also id. at

² Diamond's complaint and Marin's answer contain more complete policy language than the 1ACC, from which certain words appear to have been removed for the sake of brevity. Cf. 1ACC ¶ 11 with Compl. ¶ 8 and Answer ¶ 8. The Court recites the longer policy language here for ease of reading only. Any differences between the language in the complaint and answer and the 1ACC are not material to the outcome of the instant motions. Further, the longer policy language is subject to judicial notice, because it is not subject to reasonable dispute and it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" by these parties, namely their own complaint and answer. Fed. R. Evid. 201(b).

1 ¶ 35 (alleging that the “endorsement stated that the who is an
2 insured provision of the Policy was ‘amended to include’” ATB “‘as
3 an insured but only with respect to liability arising out of your
4 operations or premises owned by or rented to you.’”). In the
5 endorsement, Diamond “promised to cover ATB for, among other
6 things, “‘[b]odily injury’ . . . arising out of ‘your products’
7 . . . which are distributed or sold in the regular course of the
8 vendor’s business. . . .” Id. at ¶ 4. The endorsement schedule
9 listed ATB’s United Kingdom address. Id. at ¶ 3. Marin alleges
10 that ATB distributes Marin bikes only in the United Kingdom and
11 Diamond understood this at all times relevant. Id. at ¶¶ 3-4.

12 In April 2002 in the United Kingdom, Alan Ide suffered
13 serious injuries in an accident while riding a bicycle that was
14 designed and made by Marin. Id. at ¶ 1. Marin had originally
15 sold the bicycle in the United States to ATB pursuant to a 1999
16 written agreement between Marin and ATB. Id. at ¶ 1. Marin first
17 learned of the accident when Ide brought suit in the United
18 Kingdom against ATB, Marin and Fairly Bike Manufacturing Company,
19 which assembled the bicycle’s components. Id. at ¶¶ 5. Marin
20 refers to this suit as the “Ide action.” Id.

21 In his suit, Ide alleged that the handlebar of the bicycle he
22 was riding was defective and therefore broke, causing his
23 injuries. Id. at ¶ 6. The handlebar on Ide’s bicycle was
24 designed in part, selected for use on the bicycle, and assembled
25 under the supervision of, Marin’s Director of Product Development
26 who lived in the United States. Id. The Director of Product
27 Development carried out these activities, which Ide argued made
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1 Marin liable for his injuries, while he was temporarily away for a
2 short time in China on Marin's business. Id.

3 Upon learning of the Ide suit, Marin immediately notified
4 Diamond of it and demanded that Diamond provide a defense to Marin
5 and ATB. Id. at ¶ 5. Diamond refused to defend either, claiming
6 it had no such duty under the policy. Id. Marin did not appear
7 and defend the Ide action, and ATB did appear and defend at its
8 own expense. Id.

9 Ide was awarded judgment against ATB and Marin in the Ide
10 action. Id. at ¶ 7. ATB settled with Ide. Id. Then, in what
11 Marin refers to as the ATB action, ATB moved to recover from Marin
12 the amount of the settlement paid to Ide as well as the cost of
13 ATB's defense. Id. The parties agree that this action was
14 brought in the United Kingdom. See, e.g., Joint Case Management
15 Statement, Docket No. 23, 2; see also 2RJN, Ex. E, Ex. 1
16 (complaint filed in the ATB action). In the ATB action, ATB
17 obtained judgment against Marin for more than one and a half
18 million dollars. 1ACC ¶ 7.

19 On September 23, 2011, ATB filed a separate federal action
20 against Marin in the Northern District of California, seeking to
21 enforce the foreign judgment against Marin. Compl., Docket No. 1,
22 ATB Sales Ltd. v. Marin Mtn. Bikes, Inc., Case No. 11-4755 (N.D.
23 Cal.). Marin refers to this as the enforcement action. 1ACC ¶ 8.
24 Diamond was not named as a party in the enforcement action. When
25 ATB brought the enforcement action, Marin again demanded that
26 Diamond defend Marin. Id. Diamond refused again. Id.

27 On October 24, 2011, Diamond filed the instant suit against
28 ATB and Marin, seeking a declaratory judgment that it did not have

1 a duty to defend or indemnify Marin in connection with the United
2 Kingdom accident. Compl. ¶¶ 9-13.

3 Marin and ATB agreed to a settlement of the enforcement
4 action in late 2011. Id. On May 2, 2012, ATB and Marin filed a
5 notice of settlement in the enforcement action. Case No. 11-4755,
6 Docket No. 15. The parties subsequently filed a stipulation for
7 dismissal of ATB's claims with prejudice. Case No. 11-4755,
8 Docket Nos. 16, 17.

9 At a case management conference in the instant action on May
10 2, 2012, the Court set May 30, 2012 as the deadline to add
11 additional parties or claims. Docket No. 28.

12 On May 16, 2012, Marin filed its answer to Diamond's
13 complaint and asserted two counterclaims against Diamond for
14 breach of the insurance contract and breach of the covenant of
15 good faith and fair dealing. Docket No. 30.

16 On May 18, 2012, Diamond voluntarily dismissed its claims
17 against ATB in the current case. Docket No. 31.

18 On June 11, 2012, Diamond filed its first motion to strike
19 Marin's affirmative defenses and to dismiss its counterclaims or
20 for a more definite statement. Docket No. 32.

21 On June 25, 2012, Marin filed its opposition to Diamond's
22 motion. Docket No. 33. With its opposition, Marin submitted
23 proposed amended affirmative defenses.

24 On July 2, 2012, Diamond filed its reply in support of its
25 motion to strike and to dismiss. Docket No. 34. In the reply,
26 Diamond argued that the proposed amended affirmative defenses were
27 defective.

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1 Later on July 2, 2012, Marin filed amended counterclaims for
2 breach of the insurance contract, tortious breach of the covenant
3 of good faith and fair dealing, and fraud. Docket No. 35.

4 On July 25, 2012, the Clerk issued a notice, stating that the
5 Court, on its own motion, took Diamond's first motion to strike
6 and to dismiss under submission on the papers.

7 Later on July 25, 2012, Diamond filed a second motion to
8 dismiss or strike Marin's amended counterclaims. Docket No. 36.
9 The Court held a hearing on Diamond's second motion on August 30,
10 2012.

11 LEGAL STANDARD

12 I. Motion to Dismiss

13 A complaint must contain a "short and plain statement of the
14 claim showing that the pleader is entitled to relief." Fed. R.
15 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to
16 state a claim, dismissal is appropriate only when the complaint
17 does not give the defendant fair notice of a legally cognizable
18 claim and the grounds on which it rests. Bell Atl. Corp. v.
19 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
20 complaint is sufficient to state a claim, the court will take all
21 material allegations as true and construe them in the light most
22 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
23 896, 898 (9th Cir. 1986). However, this principle is inapplicable
24 to legal conclusions; "threadbare recitals of the elements of a
25 cause of action, supported by mere conclusory statements," are not
26 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
27 (citing Twombly, 550 U.S. at 555).

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1 When granting a motion to dismiss, the court is generally
2 required to grant the plaintiff leave to amend, even if no request
3 to amend the pleading was made, unless amendment would be futile.
4 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
5 F.2d 242, 246-47 (9th Cir. 1990). In determining whether
6 amendment would be futile, the court examines whether the
7 complaint could be amended to cure the defect requiring dismissal
8 "without contradicting any of the allegations of [the] original
9 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
10 Cir. 1990).

11 II. Motion to Strike

12 Pursuant to Federal Rule of Civil Procedure 12(f), the court
13 may strike from a pleading "any redundant, immaterial, impertinent
14 or scandalous matter." The purpose of a Rule 12(f) motion is to
15 avoid spending time and money litigating spurious issues.
16 Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993),
17 rev'd on other grounds, 510 U.S. 517 (1994). Matter is immaterial
18 if it has no essential or important relationship to the claim for
19 relief plead. Id. Matter is impertinent if it does not pertain
20 and is not necessary to the issues in question in the case. Id.
21 "Superfluous historical allegations are a proper subject of a
22 motion to strike." Id. Motions to strike are disfavored because
23 they are often used as delaying tactics and because of the limited
24 importance of pleadings in federal practice. Bureerong v. Uvawas,
25 922 F. Supp. 1450, 1478 (C.D. Cal. 1996). They should not be
26 granted unless it is clear that the matter to be stricken could
27 have no possible bearing on the subject matter of the litigation.
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1 Colaprico v. Sun Microsystems, Inc., 758 F. Supp. 1335, 1339 (N.D.
2 Cal. 1991).

3 DISCUSSION

4 I. Motion to strike affirmative defenses

5 Diamond seeks to strike Marin's affirmative defenses. Marin
6 does not oppose the request that its affirmative defenses be
7 stricken, but requests leave to file its proposed amended
8 affirmative defenses. If a defense is stricken, "[i]n the absence
9 of prejudice to the opposing party, leave to amend should be
10 freely given." Wyshak v. City Nat'l Bank, 607 F.2d 824, 826 (9th
11 Cir. 1979). Diamond does not contend that it would be prejudiced
12 by allowing Marin to amend the affirmative defenses. Instead, it
13 replies that the proposed amended affirmative defenses are still
14 defective and that leave to amend should not be granted.

15 In its motion, Diamond did not argue that leave to amend the
16 affirmative defenses should be denied or that any possible
17 amendment would be futile as a matter of law. Because Diamond
18 attacks the proposed amendments in its reply brief, Marin did not
19 have an opportunity to respond its arguments or to defend the
20 sufficiency thereof.

21 Accordingly, the Court GRANTS Diamond's motion to strike the
22 original affirmative defenses. The Court further GRANTS Marin
23 leave to file its proposed amended affirmative defenses, and DEEMS
24 Diamond's reply brief to be a motion to strike the amended
25 affirmative defenses. Within two weeks of the date of this Order,
26 Marin may file a response to Diamond's motion to strike the
27 amended affirmative defenses, in a single brief of fifteen pages.
28 Within one week thereafter, Diamond may file a reply in further

1 support of the motion to strike the amended affirmative defenses,
2 contained in a brief of eight pages or less.

3 II. Motions to dismiss or strike counterclaims

4 A. Marin's original counterclaims

5 Diamond seeks dismissal of Marin's original counterclaims and
6 asks that the Court deny Marin leave to amend. Marin does not
7 oppose dismissal of its original counterclaims, but does oppose
8 Diamond's request that it not be permitted to amend the
9 counterclaims.

10 Marin asserts that it does not need leave of the Court to
11 amend its counterclaims and that it may do so as a matter of
12 right. Rule 15(a)(1) provides,

13 A party may amend its pleading once as a matter of
14 course within: . . . if the pleading is one to which a
15 responsive pleading is required, 21 days after service
16 of a responsive pleading or 21 days after service of a
17 motion under Rule 12(b), (e), or (f), whichever is
18 earlier.

19 Federal Rule of Civil Procedure 15(a)(1)(B). A counterclaim is a
20 pleading to which a responsive pleading is required. See Federal
21 Rule of Civil Procedure 12(a)(1)(B).

22 Marin has not previously amended its counterclaims or any
23 other pleading. Thus, it was permitted to amend its pleading as a
24 matter of right within twenty-one days of the date on which
25 Diamond filed its motion under Rule 12(b), (e), and (f), or by
26 July 2, 2012. Marin did so. Because Marin filed its amended
27 counterclaims as a matter of right, Diamond's first motion to
28 dismiss the original counterclaims and that Marin not be granted
leave to amend is DENIED AS MOOT.

1 In its second motion to dismiss or strike, Diamond suggests
2 in a footnote that the amended counterclaims exceeded the breadth
3 of amendments permissible as a matter of right because Marin did
4 not assert a fraud counterclaim in its original answer and added
5 it into the 1ACC, for the first time, after the deadline to assert
6 new claims had passed. Diamond, however, did not move to strike
7 the fraud counterclaim on this basis and only moved to dismiss the
8 fraud counterclaim under Federal Rules of Civil Procedure 8(a),
9 9(b) and 12(b)(6). See Mot. at 1. In the relevant footnote,
10 Diamond stated that it "notes that Marin's filing of this new
11 fraud cause of action violates" the scheduling order. Mot. at 19,
12 n.6. Because Diamond did not move on this basis or put Marin on
13 notice that it was doing so, the Court does not reach the merits
14 of this argument.

15 B. Marin's 1ACC

16 In its second motion to dismiss or strike, Diamond moves to
17 dismiss all three of Marin's amended counterclaims. It also moves
18 to strike portions of the second counterclaim as immaterial.

19 1. Breach of contract

20 In the 1ACC, Marin alleges Diamond owed a duty to defend both
21 Marin and ATB in the Ide action, because "Ide alleged in a 'suit'
22 that he suffered 'bodily injury' arising out of an 'occurrence'
23 when the Bicycle broke when he was riding it in in April 2002
24 during the policy period," the product was sold in the United
25 States and the injury arose from activities of the Director of
26 Product Development while he was temporarily away from the United
27 States on Marin's business. 1ACC ¶¶ 1, 6, 12. Marin also avers
28 that provision (c)(2) of the definition of coverage territory does

1 not apply to the duty to defend, because such an application
2 "would render the contractual promise to defend meaningless and
3 illusory." Id. at ¶ 13. Marin further alleges that Diamond
4 breached the duty to defend by failing to "defend or indemnify"
5 Marin and ATB in the Ide action and failing to "defend or
6 indemnify" Marin in the ATB and enforcement actions. Id. at ¶ 14.

7 Diamond moves to dismiss this claim on the basis that Marin
8 has not plead that provision (c)(2) of the definition of coverage
9 territory was met. Diamond repudiates any suggestion that it also
10 seeks to dismiss this claim on the basis that Marin has not
11 properly alleged that either subpart of provision (c)(1) of this
12 definition was met. Reply at 4 n.9.³ Diamond argues that Marin
13 has not, and cannot, plead that the Ide and ATB actions, which
14 addressed the merits of Ide's claims against ATB and ATB's claims
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17 ³ In its motion, Diamond argued that Marin had not met either
18 subpart of (c)(1). Even if Diamond had not disclaimed this
19 argument, the Court would have rejected it. Diamond first
20 disputed the factual accuracy of Marin's allegations that the bike
21 was sold in the United States. Mot. at 10, n.1. An evidentiary
22 argument such as this is improper for a motion to dismiss and the
23 Court disregards it.

24 Second, Diamond contended, "According to the appellate
25 opinion in the Ide Action, Ide claimed there was a 'defect in the
26 handlebar because it had insufficient strength to withstand the
27 loads imposed upon it in ordinary use as a mountain bike.'" Mot.
28 at 11, n.1 (quoting RJN Ex. I ¶ 10). Diamond also asserted that
Marin did not allege that the selection of this handlebar "was
made during the alleged trip to China." Id. However, Marin did
make such an allegation. See 1ACC ¶ 6 ("The handlebar on Ide's
Bicycle was designed in part, selected for use on the Bicycle, and
assembled under the supervision of, Marin's Director of Product
Development who lived in the United States. Marin's Director of
Product Development did all of those things--design work on the
allegedly defective handlebar and oversight of the assembly of
Marin bicycles--while he was temporarily away for a short time in
China on Marin's business.").

1 against Marin respectively, created a potential for a judgment on
2 the merits in the United States of America, Puerto Rico or Canada,
3 because both were filed in the United Kingdom. Diamond further
4 contends that the enforcement action filed in the Northern
5 District of California cannot satisfy this requirement. Diamond
6 also argues that the additional insured coverage is not rendered
7 illusory by such a restriction because, although ATB may
8 exclusively distribute bicycles in the United Kingdom, it could
9 still be sued in the United States. Finally, Diamond argues that
10 Marin improperly seeks damages beyond its own expenses incurred in
11 defending the Ide and ATB actions and that it did not incur any
12 such expenses.

13 Marin responds that provision (c)(2) is not a venue clause,
14 that Diamond's construction would require that "Marin is required
15 to lose in Court on the merits of a covered claim before Diamond
16 State is required to defend," which is illogical. Marin also
17 contends that this subsection is deceptive, buried deep within the
18 policy and void. Marin further argues that the subsection is
19 ambiguous and cannot be applied to ATB. Finally, Marin contends
20 that it sufficiently plead a basis for damages.

21 California substantive insurance law governs this diversity
22 case. Freeman v. Allstate Life Ins. Co., 253 F.3d 533, 536 (9th
23 Cir. 2001). Under California law, interpretation of an insurance
24 policy and whether it provides coverage is a question of law to be
25 decided by the court. Waller v. Truck Ins. Exchange, 11 Cal. 4th
26 1, 18 (1995).

27 An insurance carrier "owes a broad duty to defend its insured
28 against claims that create a potential for indemnity." Horace

1 Mann Ins. Co. v. Barbara B., 4 Cal. 4th 1076, 1081 (1993); see
2 also Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 275 (1966) ("We
3 point out that the carrier must defend a suit which potentially
4 seeks damages within the coverage of the policy."). "Implicit in
5 this rule is the principle that the duty to defend is broader than
6 the duty to indemnify; an insurer may owe a duty to defend its
7 insured in an action in which no damages ultimately are awarded."
8 Horace Mann Ins., 4 Cal. 4th at 1081. However, the duty to defend
9 is not unlimited; it is measured by the nature and kinds of risks
10 covered by the policy. Waller, 11 Cal. 4th at 19.

11 The burden is on the insured to establish the existence of a
12 potential for coverage. Montrose Chem. Corp. v. Super. Ct., 6
13 Cal. 4th 287, 300 (1993). Any doubt as to whether the facts
14 establish the existence of the defense duty must be resolved in
15 the insured's favor. Id. at 299-200. Once the insured meets its
16 burden, the insurer must establish the absence of any such
17 potential for coverage. Id. Thus, "the insured need only show
18 that the underlying claim may fall within policy coverage; the
19 insurer must prove that it cannot." Id.

20 "The determination whether the insurer owes a duty to defend
21 usually is made in the first instance by comparing the allegations
22 of the complaint with the terms of the policy. Facts extrinsic to
23 the complaint also give rise to a duty to defend when they reveal
24 a possibility that the claim may be covered by the policy."
25 Horace Mann Ins., 4 Cal. 4th at 1081. The duty to defend is a
26 continuing one, arising on tender of defense and lasting until the
27 underlying lawsuit is concluded. Montrose Chem., 6 Cal. 4th at
28 295.

1 Based on the allegations in the lACC and the relevant policy
2 language, the Court finds that Marin has not properly plead that
3 Diamond breached its duty to defend in denying coverage to Marin.
4 Provision 1(b)(1) sets forth that the policy covers occurrences
5 that take place within the coverage territory. The definition of
6 coverage territory in turn sets forth that the policy covers any
7 occurrence that takes place within the United States, Puerto Rico
8 or Canada, or "all other parts of the world" if certain conditions
9 are met, including that liability is determined in a suit on the
10 merits in the United States, Puerto Rico or Canada or in a
11 settlement to which Diamond agreed.

12 This reading does not require that Marin first lose a suit in
13 the United States, Puerto Rico or Canada before the duty to defend
14 is triggered, as it contends. As explained above, the duty to
15 defend is based on the potential for coverage, not the certainty
16 of coverage. If a suit had been filed in the United States,
17 Puerto Rico or Canada that created the potential for meeting the
18 other requirements set forth in the policy, the duty to defend may
19 have arisen. The insurer cannot wait until coverage is a
20 certainty before it is required to defend. Here, however, because
21 Ide and ATB initiated suits in the United Kingdom, not in the
22 United States, Puerto Rico or Canada, based on an occurrence that
23 also took place in the United Kingdom, there was no possibility
24 that the litigation could result in a "suit on the merits" in the
25 United States, Puerto Rico or Canada, and thus the possibility of
26 coverage was eliminated.

27 The Court also does not find that Marin has adequately plead
28 that the territorial limitation was an inconspicuous exclusion and

1 therefore unenforceable. The territorial limitation appears in
2 the grant of coverage and not in an exclusion, a significant
3 distinction. As the California Court of Appeal has explained,

4 An insurance policy is written in two parts: the
5 insuring agreement defines the type of risks which are
6 covered, while the exclusions remove coverage for
7 certain risks which are initially within the insuring
8 clause. . . . Therefore, before even considering
9 exclusions, a court must examine the coverage provisions
10 to determine whether a claim falls within the potential
11 ambit of the insurance. . . . This is significant for
12 two reasons. First, when an occurrence is clearly not
13 included within the coverage afforded by the insuring
14 clause, it need not also be specifically excluded. . . .
15 Second, although exclusions are construed narrowly and
16 must be proven by the insurer, the burden is on the
17 insured to bring the claim within the basic scope of
18 coverage, and (unlike exclusions) courts will not
19 indulge in a forced construction of the policy's
20 insuring clause to bring a claim within the policy's
21 coverage.

22 Collin v. American Empire Ins. Co., 21 Cal. App. 4th 787, 802-803
23 (1994) (internal quotation marks and formatting omitted). Thus,
24 because this definition is part of the insuring agreement and not
25 part of an exclusion, the burden of proof is on Marin to establish
26 that its claim falls within the scope of coverage. According to
27 Marin's description of the policy in the 1ACC, the fact that there
28 was a territorial limitation to the insurance coverage was
disclosed on the first page of the agreement, which stated that
the coverage was restricted to instances in which "The 'bodily
injury' or 'property damage' is caused by an 'occurrence' that
takes place in the 'coverage territory.'" 1ACC ¶¶ 11, 34. Thus,
the insured was on notice that the policy did not provide
unlimited worldwide coverage. Further, although Marin argues its
contention is supported by its allegations that the font of the
definition text was small and that the language was obscured by

1 the fact that the coverage premiums took into account domestic and
2 international sales, neither of these allegations is made in the
3 1ACC itself but are asserted without citation only in the
4 opposition brief. Finally, the Court does not find that, as Marin
5 urges, the policy suggested that it covered all international
6 claims because it contained an "all parts of the world" coverage
7 provision. The only policy language quoted in the 1ACC that uses
8 these words is the coverage territory definition itself, which
9 immediately follows these words with the word "if" and sets forth
10 the limitations on that coverage. Thus, although the policy did
11 provide that it covered certain claims related to events that took
12 place in "all parts of the world," it set forth restrictions on
13 such coverage.

14 Marin also contends that the coverage limitation, if applied
15 to ATB, would render the additional-insured endorsement issued to
16 it illusory. An insurance policy is illusory only if it provides
17 no coverage or benefit to the insured. See Maryland Cas. Co. v.
18 Reeder, 221 Cal. App. 3d 961, 978 (1990); see also Sdr Co. v. Fed.
19 Ins. Co., 196 Cal. App. 3d 1433, 1437 (1987) ("the law does not
20 countenance such a nullity, for to do so would disappoint the
21 reasonable expectations of the insured, violate the general rules
22 of construing insurance contracts and most particularly
23 exclusions, in favor of the insured"). Marin alleges that ATB
24 only distributes Marin bikes in the United Kingdom, which Diamond
25 knew, and that the additional-insured endorsement provided ATB
26 with coverage for "'[b]odily injury' . . . arising out of 'your
27 products' . . . which are distributed or sold in the regular course
28 of the vendor's business. . . ." 1ACC ¶¶ 3-4. Marin argues that

1 limiting coverage for ATB only to suits brought in the United
2 States, Puerto Rico and Canada renders the endorsement illusory
3 because ATB did not do business in any of these countries and as
4 such no litigant could ever obtain jurisdiction over it in these
5 countries. Diamond responds that it would not be "absolutely
6 impossible" for ATB to use the coverage as Marin contends, because
7 lack of personal jurisdiction is merely a defense that ATB could
8 choose to assert or waive and that, if ATB chose to assert this
9 defense, Diamond would be obliged to provide such a defense.
10 Further, it is not impossible that ATB could be sued in United
11 States, Puerto Rico and Canada. For example, an American tourist
12 might travel to the United Kingdom, get injured while using a
13 Marin bicycle there and then choose to sue ATB in the United
14 States after returning home. Marin's allegations, accepted as
15 true, do not establish that the possibility of utilizing the
16 coverage was a nullity rather than merely remote. Accordingly,
17 the definition of coverage territory does not render the
18 additional-insured endorsement illusory and Marin did not properly
19 plead that Diamond breached the duty to defend in denying coverage
20 to ATB.

21 Because Marin has not properly plead that Diamond breached
22 its duty to defend either ATB or Marin, the Court GRANTS Diamond's
23 motion to dismiss Marin's first amended counterclaim. The Court
24 also grants Marin leave to amend to remedy the deficiencies
25 discussed above if it can truthfully do so.

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1 2. Breach of the Implied Covenant of Good Faith and Fair
2 Dealing

3 Because the Court finds that Marin has not properly alleged
4 that Diamond breached its contract with Marin by refusing to
5 defend it or ATB in the United Kingdom actions, the Court also
6 grants Diamond's motion to dismiss Marin's claim for breach of the
7 implied covenant of good faith and fair dealing. "California law
8 is clear, that without a breach of the insurance contract, there
9 can be no breach of the implied covenant of good faith and fair
10 dealing." Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d
11 1025, 1034 (9th Cir. 2008) (citing Waller v. Truck Ins. Exch.,
12 Inc., 11 Cal. 4th 1, 35-36 (1995)). Marin may reassert this claim
13 if it amends the breach of contract claim as discussed above.

14 Because the Court dismisses this claim, it does not reach
15 Diamond's request to strike as immaterial Marin's allegation
16 related to "other wrongful, illegal conduct including violation of
17 law and regulations by which Defendant is bound."

18 3. Fraud

19 Diamond seeks to dismiss the fraud counterclaim on the basis
20 that Marin impermissibly seeks to turn its breach of contract
21 counterclaim into a tort claim. "The 'rule in California is that
22 no tort cause of action will lie where the breach of duty is
23 nothing more than a violation of a promise which undermines the
24 expectations of the parties to an agreement.'" Antonick v. Elec.
25 Arts Inc., 2011 U.S. Dist. LEXIS 109735 (N.D. Cal.) (quoting
26 Oracle USA, Inc. v. XL Global Servs., Inc., 2009 U.S. Dist. LEXIS
27 59999, at *4 (N.D. Cal.)). Here, almost all of Marin's fraud
28 allegations center on purported false representations that Diamond
made in the insurance contract itself. See, e.g., 1ACC ¶ 36

1 ("Diamond's interpretation of the Policy, that Diamond's duty to
2 defend the insured is conditioned on there first being a
3 determination of the insured's liability to pay damages for the
4 alleged bodily injury, renders the promise of such coverage so
5 illusory as to be a fraud on the insureds.") (emphasis omitted);
6 ¶ 39 ("At all times relevant, Plaintiff Marin relied on Diamond's
7 representation in Policy [sic], that Diamond would provide Marin
8 and ATB a defense to 'suits' alleging 'bodily injury' arising out
9 of an 'occurrence' such as the Ide Action.").

10 Marin responds that it made allegations of misconduct that go
11 beyond Diamond's breach of the policy. It points to two specific
12 paragraphs in support of this argument. First, it points to
13 paragraph twenty-one, which appears in the breach of covenant
14 claim and is incorporated by reference into the fraud claim. In
15 this paragraph, Marin alleges that Diamond engaged in misconduct
16 including "unreasonable delays in acting upon Marin's and ATB's
17 claims" and "unreasonable and improper investigation and handling
18 of Marin's and ATB's claims." 1ACC ¶ 21(c),(d). However, in this
19 paragraph, Marin has not alleged any specific misrepresentations
20 made by Diamond, other than those it alleges appeared in the
21 policy itself.

22 Second, Marin states in its opposition that, in paragraph 35
23 of the 1ACC, it plead that "at the issuance of the Additional
24 Insured Endorsement, Diamond State misrepresented that it would
25 provide a defense to ATB in any action alleging bodily injury
26 against ATB." Opp. at 21. However, to the extent that Marin
27 suggests that Diamond made this misrepresentation somewhere other
28 than in the policy endorsement itself, this does not reflect what

1 is alleged in paragraph 35 of the 1ACC. In that paragraph, Marin
2 alleged that "the Additional Insured endorsement . . . was
3 provided to ATB per an understanding with Marin, and also appeared
4 to be a representation that Diamond would defend ATB in any action
5 alleging bodily injury against ATB." 1ACC ¶ 35. This alleges
6 only a violation of a promise purportedly made the contract
7 itself.

8 Accordingly, the Court GRANTS Diamond's motion to dismiss the
9 fraud counterclaim. Marin is granted leave to amend to assert
10 actionable fraudulent representations about the coverage that
11 would be provided for ATB made outside of the policy language
12 itself.

13 CONCLUSION

14 For the reasons set forth above, the Court GRANTS in part
15 Diamond's first motion to strike and to dismiss and DENIES it in
16 part (Docket No. 32). The Court also GRANTS Diamond's second
17 motion to dismiss or strike (Docket No. 36).

18 The Court GRANTS Marin leave to file its proposed amended
19 answer. Marin shall file its amended answer in the docket within
20 three days of the date of this Order.

21 The Court DEEMS Diamond's reply brief to its first motion to
22 strike and to dismiss (Docket No. 34) to be a motion to strike the
23 amended affirmative defenses. Within two weeks of the date of
24 this Order, Marin may file a response to Diamond's motion to
25 strike the amended affirmative defenses, in a single brief of
26 fifteen pages. Within one week thereafter, Diamond may file a
27 reply in further support of the motion to strike the amended
28 affirmative defenses, contained in a brief of eight pages or less.


1 The Court will resolve the motion to strike the amended
2 affirmative defenses on the papers.

3 If Marin intends to file amended counterclaims, it shall do
4 so within seven days of the date of this Order. Marin may only
5 remedy the deficiencies identified above as to the counterclaims
6 for breach of contract, tortious breach of the covenant of good
7 faith and fair dealing, and fraud, and may not assert new
8 counterclaims. If Marin files amended counterclaims, Diamond
9 shall respond to them within fourteen days after they are filed.
10 If Diamond moves to dismiss or strike the amended counterclaims,
11 Marin shall respond to the motion within fourteen days after it is
12 filed. Diamond's reply, if necessary, shall be due seven days
13 thereafter. Any motion to dismiss or strike will be decided on
14 the papers.

15 The Court RESETS the deadline to hear dispositive motions for
16 Thursday, December 13, 2012 at 2:00 p.m. and notes that the dates
17 for the pretrial conference and two-day jury trial may need to be
18 continued.

19 IT IS SO ORDERED.

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21 Dated: 9/10/2012



CLAUDIA WILKEN
United States District Judge

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