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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.

No. C 11-5193 CW

ORDER GRANTING
DIAMOND'S MOTION
TO DISMISS MARIN'S
SECOND AMENDED
COUNTERCLAIMS
(Docket No. 51)
AND GRANTING IN
PART, AND DENYING
IN PART, DIAMOND'S
MOTION TO STRIKE
MARIN'S AMENDED
AFFIRMATIVE
DEFENSES (Docket
No. 39)

AND ALL RELATED COUNTERCLAIMS

United States District Court
For the Northern District of California

Plaintiff Diamond State Insurance Company moves to dismiss Defendant Marin Mountain Bikes, Inc.'s second amended counterclaims (2ACC) or alternatively for summary judgment. The Court previously deemed Diamond's reply brief to its first motion to strike and to dismiss to be a motion to strike Marin's amended affirmative defenses. Marin opposes both motions. The Court previously stated that it would resolve both motions on the papers. Having considered the papers filed by the parties, the Court grants Diamond's motion to dismiss the 2ACC and grants in part Diamond's motion to strike the amended affirmative defenses and denies it in part.

BACKGROUND

I. Allegations in Marin's 2ACC

The following facts are taken from Marin's 2ACC, amended affirmative defenses and certain other documents of which the Court takes judicial notice.

From July 16, 2001 until July 16, 2002, Diamond provided liability insurance to Marin, which designs and makes bicycles, under liability policy number MFG0000379. 2ACC, Docket No. 47, ¶¶ 1-2. Marin alleges that it had also been insured by Diamond in prior years and that, each year, it "was told to complete an application for insurance and that such application was required by Diamond." Id. at ¶¶ 5, 7. Marin, however, does not state who said this. The policy was purportedly available to Marin through its membership in the National Bicycle Component Manufacturer's Association" (NBCMA) and each year "Marin was required to join the NBCMA to be eligible for the insurance" coverage. Id. at ¶¶ 3, 5. "The application for insurance bore the name of NBCMA on it and was provided" to Marin by Diversified Risk Insurance Broker (Diversified) "for completion." Id. at ¶ 5.

Marin alleges that it received a copy of the policy at "some point after July 16, 2001, and after the Policy took effect," that the policy consisted of "several sets of documents which numbered near 50 pages," and that "[b]uried in those documents was the Commercial General Liability Coverage Form." Id. at ¶ 9.

Section I, Coverage A of the policy, as described in this form, provides coverage for "bodily injury and property damage liability." Id. at ¶ 9, Ex. 3, Docket No. 47-3, 2. On the first page, it states in part,

1 1. Insuring Agreement

2 a. We will pay those sums that the insured
3 becomes legally obligated to pay as damages because
4 of "bodily injury" or "property damage" to which
5 this insurance applies. We will have the right and
6 duty to defend the insured against any "suit"
7 seeking those damages. However, we have no duty to
8 defend the insured against any "suit" seeking
9 damages for "bodily injury" or "property damage" to
10 which this insurance does not apply. . . .

11 b. This insurance applies to "bodily injury" or
12 "property damage" only if:

13 (1) The "bodily injury" or "property damage"
14 is caused by an "occurrence" that takes place
15 in the "coverage territory"; and

16 (2) The "bodily injury" or "property damage"
17 occurs during the policy period.

18 Id. The first page of the policy advises that certain "words and
19 phrases that appear in quotation marks have special meaning," and
20 directed readers to refer to "Section V--Definitions." Id. On
21 pages ten through thirteen, in Section V, the policy contains
22 definitions for a number of terms, including the following:

23 3. "Bodily injury" means bodily injury, sickness or
24 disease sustained by any person, including death
25 resulting from any of these at any time.

26 4. "Coverage territory" means:

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

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

 c. All parts of the world if:

 (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 . . .

18. "Suit" means a civil proceeding in which damages because of "bodily injury," "property damage" or "personal and advertising injury" to which this insurance applies are alleged. . . .

Id. at 11-14. The same "language was included in prior Diamond policies issued to Marin before 2001." Id. at ¶ 23.

The first page of the policy also advises, "The word 'insured' means any person or organization qualifying as such under Section II--Who Is An Insured." Id. at ¶ 9, Ex. 3, 2. Section II in turn specifies certain individuals and entities that qualify as an insured, including, for example, "Your 'employees' . . . but only for acts within the scope of their employment or while performing duties related to the conduct of your business." Id. at 8.

Marin further alleges that it believed that Diamond provided "foreign liability coverage" to Marin under the policy because "Diamond needed information about Marin's foreign sales and then based premium calculation on those foreign sales at a different rate than domestic sales." Id. at ¶ 9. Specifically, each year, "Diversified told Marin that Diamond required Marin to provide its domestic sales receipts and 'foreign sales' receipts." Id.

1 "Marin was told that Diamond based its premiums for the Policy in
2 part on these sales receipts and that different premium rates
3 applied to the foreign sales receipts than to the domestic
4 receipts." Id. Diamond periodically audited the sales receipts
5 as well. Id. Marin alleges that, before the issuance of the
6 instant policy and prior Diamond policies, Diversified provided
7 Marin with an "'Insurance Schedule' showing Diamond's coverage,
8 which always included 'Foreign Sales.'" Id. at ¶ 6. The
9 declarations pages of the policy show that a portion of the
10 premium was calculated based on Marin's "Manufacturing NOC/foreign
11 receipts." Id. at ¶ 7, Ex. 1, Docket No. 47-1, 3.¹ The
12 declarations page also listed as insured Marin International,
13 Marin Mountain Bikes GMBH (Germany) and Yamoto Bicycle Company,
14 which Marin alleges are "companies related to Marin that did
15 business overseas." Id. at ¶ 7 & Ex. 1, 2. Around the time that
16 the policy was issued in 2001, the National Insurance
17 Professionals Corp. (NIPC), on behalf of Diamond, also issued to
18 Marin a document entitled "Policy Changes," which referred to a
19 decrease in "the premium basis" for "Manufacturing NOC/foreign
20 receipts." Id. at ¶ 8, Ex. 2, 2.

21 Marin also alleges that the policy had an "Additional
22 Insured--Vendors" endorsement that listed ATB Sales Limited (ATB)
23 as an additional insured under the policy. Id. at ¶ 10, Ex. 1, 4.
24 In addition, Marin attached to the 2ACC an "Additional Insured--
25 Designated Person or Organization" endorsement that listed ATB as

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28 ¹ All citations to the record refer to the ECF page designation.

1 an additional insured. Id. at ¶ 12, Ex. 1, 6. ATB purchases
2 Marin's bicycles and then sells and distributes them in the United
3 Kingdom only, which Marin contends Diamond understood. Id. at
4 ¶¶ 10-11. The endorsement schedules listed ATB's United Kingdom
5 address. Id., Ex. 1, 4, 6. The first endorsement provided that
6 Section II, regarding who is an insured, was "amended to include
7 as an insured" ATB "but only with respect to 'bodily injury' or
8 'property damage' arising out of 'your products' . . . which are
9 distributed or sold in the regular course of the vendor's
10 business," subject to certain exclusions. Id., Ex. 1, 4. The
11 second endorsement provided that this section of the policy was
12 "amended to include an insured" ATB "but only with respect to
13 liability arising out of your operations or premises owned by or
14 rented to you." Id., Ex. 1, 6. Identical "ATB additional insured
15 endorsements" had been issued to Marin in previous years.

16 "Prior to July 2001, Marin had at least one umbrella
17 insurance policy that specifically excluded by endorsement suits
18 brought anywhere outside the United States and Canada." Id. at
19 ¶ 13. Marin alleges that, for that policy, "Diversified
20 specifically brought the endorsement's exclusion to Marin's
21 attention," but that "Diversified never told Marin that [the
22 Diamond] policies did not provide defense coverage for actions
23 brought outside the United States." Id.

24 Marin contends on information and belief that Diamond, NICP,
25 Diversified and NBCMA have agreements "by which Diamond offers
26 insurance policies," such as the one at issue here, "to bicycle
27 manufacturers such as Marin." Id. at ¶ 4. Marin further alleges
28 on information and belief that there are "Agency Agreements by and

1 between Diamond, Diversified, and NICP pursuant to which
2 Diversified and NICP received commission payments for bringing
3 insureds such as Marin to Diamond." Id. Marin alleges, "Pursuant
4 to these and other agreements, at all times relevant, Diamond,
5 NICP, NBCMA and Diversified were agents, representatives and or
6 joint venturers in the placement of the Policy and at all times
7 were acting in the course and scope of such agency, representation
8 and/or joint venture." Id.

9 In April 2002, in the United Kingdom, Alan Ide suffered
10 serious injuries in an accident while riding a bicycle that was
11 designed and made by Marin. Id. at ¶ 1. Marin had originally
12 sold the bicycle in the United States to ATB pursuant to a 1999
13 written agreement between Marin and ATB. Id. at ¶ 1; see also id.
14 at ¶ 32 (alleging that Diamond learned through its investigation
15 that "Marin and ATB had entered into contracts for the sale of
16 Marin bicycles and parts to ATB and that those contracts had been
17 partially negotiated and executed in the United States."). Marin
18 first learned of the accident when Ide brought suit in the United
19 Kingdom against ATB, Marin and Fairly Bike Manufacturing Company,
20 which assembled the bicycle's components and is "a related company
21 to Marin." Id. at ¶ 15. Marin refers to this suit as the Ide
22 action. Id.

23 In his suit, Ide alleged that the handlebar of the bicycle he
24 was riding was defective and therefore broke, causing his
25 injuries. Id. at ¶ 16. The handlebar on Ide's bicycle was
26 designed in part, selected for use on the bicycle, and assembled
27 under the supervision of, Marin's Director of Product Development
28 who lived in the United States. Id. Although Marin "designed,

1 created specifications for, tested, and priced bicycles including
2 the model sold to Ide, in the United States," id. at ¶ 32(b), the
3 Director of Product Development carried out these activities
4 related to the handlebar while he was temporarily away for a short
5 time in China on Marin's business, id. at ¶ 16.

6 Upon learning of the Ide suit, Marin immediately notified
7 Diamond of it and demanded that Diamond provide a defense to Marin
8 and ATB. Id. at ¶ 15. Diamond refused to defend either company,
9 claiming it had no such duty under the policy. Id. In the letter
10 to Marin in which it denied a defense, which written after about a
11 year of investigation, Diamond relied solely on the ground that
12 the action was filed in England. Id. at ¶ 17. "At that time,
13 Diversified informed Marin that the Policy only covered suits
14 filed in the United States and that if suit were brought in the
15 United States then Diamond would provide a defense." Id. Marin
16 did not appear or defend the Ide action, and ATB appeared and
17 defended at its own expense. Id. at ¶ 15.

18 Ide was awarded judgment against ATB and Marin in the Ide
19 action. Id. at ¶ 18. ATB settled with Ide. Id. Then, in what
20 Marin refers to as the ATB action, ATB moved to recover from Marin
21 the amount of the settlement paid to Ide as well as the cost of
22 ATB's defense. Id. The parties agree that this action was
23 brought in the United Kingdom. See, e.g., Joint Case Management
24 Statement, Docket No. 23, 2. In the ATB action, ATB obtained
25 judgment against Marin for more than one and a half million
26 dollars, "which included both the settlement amount paid to Ide
27 and the defense costs incurred by ATB." 2ACC ¶ 18.

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1 On September 23, 2011, ATB filed a separate federal action
2 against Marin in the Northern District of California, seeking to
3 enforce the judgment in the ATB action against Marin. Id.; see
4 also Compl., Docket No. 1, ATB Sales Ltd. v. Marin Mtn. Bikes,
5 Inc., Case No. 11-4755 (N.D. Cal.).² Marin refers to this as the
6 enforcement action. 2ACC ¶ 19. Diamond was not named as a party
7 in the enforcement action. When ATB brought the enforcement
8 action, Marin again demanded that Diamond defend Marin. Id. at
9 ¶ 20. Diamond refused again. Id.

10 Marin and ATB agreed to a settlement of the enforcement
11 action in late 2011, shortly after Diamond brought the instant
12 action. Id. at ¶ 21. Marin alleges that, through the settlement,
13 it "incurred actual monetary damage from Diamond's refusal to
14 defend Marin under the Policy." Id.

15 II. Procedural history

16 On October 24, 2011, Diamond filed the instant suit against
17 ATB and Marin, seeking a declaratory judgment that it did not have
18 a duty to defend or indemnify Marin in connection with the United
19 Kingdom accident. Compl. ¶¶ 9-13.

20 On May 16, 2012, Marin filed its answer to Diamond's
21 complaint and alleged two affirmative defenses for estoppel and
22 concealment. Docket No. 30. At that time, Marin asserted two
23 counterclaims against Diamond for breach of the insurance contract
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26 ² The Court takes judicial notice of the complaint filed in
27 ATB Sales, but not of the truth of the matters asserted therein.
28 See Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746
(9th Cir. 2006); McMunigal v. Bloch, 2010 U.S. Dist. LEXIS 136086,
at *7 n.1 (N.D. Cal.).

1 and breach of the covenant of good faith and fair dealing. Docket
2 No. 30-1.

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

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

8 On June 25, 2012, Marin filed its opposition to Diamond's
9 motion. Docket No. 33. With its opposition, Marin submitted
10 proposed amended affirmative defenses. In the proposed
11 affirmative defenses, Marin omitted its affirmative defense for
12 concealment and added defenses of unclean hands and laches.

13 On July 2, 2012, Diamond filed its reply in support of its
14 motion to strike and to dismiss. Docket No. 34. In the reply,
15 Diamond argued that the proposed amended affirmative defenses were
16 defective.

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

20 On July 25, 2012, Diamond filed a second motion to dismiss or
21 strike Marin's amended counterclaims. Docket No. 36.

22 On September 10, 2012, the Court granted in part and denied
23 in part Diamond's first motion to dismiss and strike, and granted
24 Diamond's second motion in part. Docket No. 43. The Court
25 granted Marin leave to file its proposed amended affirmative
26 defenses, deemed Diamond's reply in support of its first motion to
27 strike and to dismiss to be a motion to strike the amended
28 affirmative defenses and set a briefing schedule for an opposition

1 and reply on the motion to strike. The Court also granted Marin
2 leave to file amended counterclaims and set a briefing schedule
3 for any motion to strike or dismiss the amended counterclaims.

4 On September 11, 2012, Marin filed its amended answer, and on
5 September 17, 2012, it filed its 2ACC. Docket Nos. 45 and 47.

6 On October 1, 2012, Diamond filed its motion to dismiss
7 Marin's 2ACC. Docket No. 51. Diamond alternatively seeks summary
8 judgment on the counterclaims.

9 LEGAL STANDARDS

10 I. Motion to Dismiss

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

26 A heightened pleading standard applies to claims of fraud.
27 In all averments of fraud or mistake, the circumstances
28 constituting fraud or mistake shall be stated with particularity."

1 Fed. R. Civ. P. 9(b). The allegations must be "specific enough to
2 give defendants notice of the particular misconduct which is
3 alleged to constitute the fraud charged so that they can defend
4 against the charge and not just deny that they have done anything
5 wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985).
6 Statements of the time, place and nature of the alleged fraudulent
7 activities are sufficient, Wool v. Tandem Computers, Inc., 818
8 F.2d 1433, 1439 (9th Cir. 1987), provided the plaintiff sets forth
9 "what is false or misleading about a statement, and why it is
10 false." In re GlenFed, Inc., Sec. Litig., 42 F.3d 1541, 1548 (9th
11 Cir. 1994).

12 As a general rule, a court "may not consider any material
13 beyond the pleadings in ruling on a Rule 12(b)(6) motion." Branch
14 v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994). Federal Rule of
15 Procedure 12(d) provides that, when "matters outside the pleading
16 are presented to and not excluded by the court, the motion must be
17 treated as one for summary judgment under Rule 56." "However,
18 '[a] court may take judicial notice of "matters of public record"
19 without converting a motion to dismiss into a motion for summary
20 judgment,' as long as the facts noticed are not 'subject to
21 reasonable dispute.'" Intri-Plex Techs., Inc. v. Crest Group,
22 Inc., 499 F.3d 1048, 1052 (9th Cir. 2007) (quoting Lee v. City of
23 Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001)); see also Tellabs,
24 Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007)
25 (noting that "courts must consider the complaint in its entirety,
26 as well as other sources courts ordinarily examine when ruling on
27 Rule 12(b)(6) motions to dismiss, in particular, documents
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1 incorporated into the complaint by reference, and matters of which
2 a court may take judicial notice”).

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

13 II. Motion to Strike

14 Rule 12(f) provides that, on its own or on a motion from a
15 party, a “court may strike from a pleading an insufficient defense
16 or any redundant, immaterial, impertinent, or scandalous matter.”
17 Fed. R. Civ. P. 12(f). “The purposes of a Rule 12(f) motion is to
18 avoid spending time and money litigating spurious issues.” Barnes
19 v. AT&T Pension Benefit Plan -Nonbargained Program, 718 F. Supp.
20 2d 1167 (N.D. Cal. 2010) (citing Fantasy, Inc. v. Fogerty, 984
21 F.2d 1524, 1527 (9th Cir. 1993), reversed on other grounds, 510
22 U.S. 517 (1994)).

23 “The Ninth Circuit has long held that “[t]he key to
24 determining the sufficiency of pleading an affirmative defense is
25 whether it gives plaintiff fair notice of the defense.” Perez v.
26 Gordon & Wong Law Group, P.C., 2012 WL 1029425, at *6 (N.D. Cal.)
27 (quoting Wyshak v. City Nat. Bank, 607 F.2d 824, 827 (9th Cir.
28 1979)). In Wyshak, the Ninth Circuit applied the fair notice

1 pleading standard for complaints governed by Conley v. Gibson, 355
2 U.S. 41 (1957), to the pleading of affirmative defenses. See
3 Wyshak, 607 F.2d at 827 (citing Conley, 355 U.S. at 47-48).
4 Conley held that "a complaint should not be dismissed for failure
5 to state a claim unless it appears beyond doubt that the plaintiff
6 can prove no set of facts in support of his claim which would
7 entitle him to relief." 355 U.S. at 45-46 (footnote omitted).
8 However, the Supreme Court's decisions in Bell Atlantic Corp. v.
9 Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662
10 (2009), "departed from Conley and redefined the pleading
11 requirements under Rule 8." Perez, 2012 WL 1029425 at *6. "Under
12 Twombly and Iqbal, 'the pleading standard Rule 8 announces . . .
13 demands more than an unadorned, the-defendant-unlawfully-harmed-me
14 accusation.'" Id. (quoting Iqbal, 556 U.S. at 678). "Rather, 'in
15 order to give the defendant fair notice of what the . . . claim is
16 and the grounds upon which it rests,' Twombly, 550 U.S. at 554-55,
17 'a complaint must contain sufficient factual matter, accepted as
18 true, to state a claim to relief that is plausible on its face,
19 Iqbal, 556 U.S. at 678.'" Id. (internal quotation marks and
20 citations omitted).

21 Like other judges in this district who have considered the
22 question of what pleading standard applies to affirmative
23 defenses, this Court has recently held that "the heightened
24 pleading standard set forth in Twombly and Iqbal also applies to
25 affirmative defenses." Powertech Tech., Inc. v. Tessera, Inc.,
26 2012 WL 1746848 at *5 (N.D. Cal.). "'Applying the standard for
27 heightened pleading to affirmative defenses serves a valid purpose
28 in requiring at least some valid factual basis for pleading an

1 affirmative defense and not adding it to the case simply upon some
2 conjecture that it may somehow apply.'" Barnes, 718 F. Supp. 2d
3 at 1171-72 (quoting Hayne v. Green Ford Sales, Inc., 263 F.R.D.
4 647, 650 (D. Kan. 2009)). See also Dion v. Fulton Friedman &
5 Gullace LLP, 2012 WL 160221, at *2 (N.D. Cal.); Perez, 2012 WL
6 1029425, at *6; Bottoni v. Sallie Mae, Inc., 2011 WL 3678878, at
7 *2 (N.D. Cal.); J & J Sports Productions v. Mendoza-Govan, 2011 WL
8 1544886, at *1 (N.D. Cal.). If a defense is struck, "[i]n the
9 absence of prejudice to the opposing party, leave to amend should
10 be freely given." Wyshak, 607 F.2d at 826.

11 DISCUSSION

12 I. Motion to dismiss amended counterclaims or, in the
13 alternative, for summary judgment

14 Diamond moves to dismiss each of Marin's amended
15 counterclaims and, in the alternative, seeks summary judgment
16 against Marin on the amended counterclaims. Marin opposes the
17 motion in its entirety, objects to treating the motion as a motion
18 for summary judgment and asks that the motion be resolved as a
19 motion to dismiss. The Court declines to treat the motion as one
20 for summary judgment under Rule 56 and excludes all evidence
21 submitted by both parties, except items that it specifically notes
22 were incorporated into the pleading by reference or of which it
23 takes judicial notice.

24 A. Breach of contract

25 In the 2ACC, Marin alleges that Diamond owed a duty to defend
26 both Marin and ATB in the Ide action because "Ide alleged in a
27 'suit' that he suffered 'bodily injury' arising out of an
28 'occurrence' when the Bicycle broke while he was riding it in

1 April 2002 during the policy period.” 2ACC ¶ 24. Marin further
2 avers that the “accident took place in the ‘coverage territory’”
3 because it resulted from a product sold in the United States or
4 from activities of a person whose home was in the United States
5 but was away for a short time on its business. Id. In addition,
6 Marin alleges that subpart (c)(2) of the definition of coverage
7 territory cannot be reasonably read to apply to the duty to defend
8 an action otherwise covered because such an application would
9 “render the contractual promise to defend meaningless and
10 illusory.” Id. at ¶ 25. Marin also alleges that Diamond was
11 required to “defend or indemnify Marin in the ATB Action and
12 Enforcement Action, which were both actions seeking damages
13 against Marin.” Id. at ¶ 26.

14 As the Court has previously noted, California substantive
15 insurance law governs this diversity case. Freeman v. Allstate
16 Life Ins. Co., 253 F.3d 533, 536 (9th Cir. 2001). Under
17 California law, interpretation of an insurance policy and whether
18 it provides coverage is a question of law to be decided by the
19 court. Waller v. Truck Ins. Exchange, 11 Cal. 4th 1, 18 (1995).
20 “Words in an insurance policy are to be read in their plain and
21 ordinary sense,” and “[a]mbiguity cannot be based on a strained
22 instead of reasonable interpretation of a policy’s terms.” McKee
23 v. State Farm Fire & Cas. Co., 145 Cal. App. 3d 772, 776 (1983)
24 (internal quotation marks, citations and formatting omitted).
25 “Policies of insurance, like other contracts, must be read as a
26 whole with each part being read in conjunction with other portions
27 thereof.” Hartford Accident & Indemnity Co. v. Sequoia Ins. Co.,

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1 211 Cal. App. 3d 1285, 1298 (1989) (internal quotation marks and
2 citations omitted).

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

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

24 "The determination whether the insurer owes a duty to defend
25 usually is made in the first instance by comparing the allegations
26 of the complaint with the terms of the policy. Facts extrinsic to
27 the complaint also give rise to a duty to defend when they reveal
28 a possibility that the claim may be covered by the policy."

1 Horace Mann Ins., 4 Cal. 4th at 1081. The duty to defend is a
2 continuing one, arising on tender of defense and lasting until the
3 underlying lawsuit is concluded. Montrose Chem., 6 Cal. 4th at
4 295.

5 The Court previously held that, in its 1ACC, Marin had not
6 sufficiently plead that Diamond breached the duty to defend in
7 denying coverage to Marin. In defending the sufficiency of the
8 2ACC, Marin repeats many of the same arguments that the Court
9 already rejected in dismissing this counterclaim in the 1ACC.

10 Marin argues that subdivision (c)(2) of the definition of
11 coverage territory is not a venue clause, does not use the word
12 "venue" and cannot be construed to mean that Diamond has a duty to
13 defend only suits with a venue in the United States.³ However,
14 whether or not this provision can be properly titled a "venue
15 clause" is irrelevant. Instead, the proper inquiry is whether the
16 underlying lawsuits created a potential for indemnity under the
17 policy. The coverage terms of the policy provide that Marin has a
18 duty to defend suits seeking bodily injury, if the bodily injury
19 occurred during the coverage period and was the result of an

20 _____

21 ³ Marin also states that, "when Diamond refused to defend
22 Marin in the Ide Action in 2005, it did so only on the ground that
23 the occurrence, Ide's accident, took place in London and London
24 [w]as outside the coverage territory," and "Diamond did not deny
25 the claim in 2005 on the basis of the so called venue clause."
26 Opp. at 10. However, in the 2ACC, Marin has plead that "in 2005
27 Diamond sent a letter denying Marin a defense to the Ide Action on
28 the sole ground that the action occurred in England," 2ACC ¶ 17,
which is precisely the ground that Diamond advances here.
Further, even if Diamond had not relied on this ground in denying
coverage, if Marin suggests that Diamond thereby would have
relinquished this defense to coverage, California courts have
rejected any such rule of automatic waiver. See Waller, 11 Cal.
4th at 31-35; Cal. Dairies, Inc. v. RSUI Indem. Co., 2010 U.S.
Dist. LEXIS 37712, at *22-36 (E.D. Cal.).

1 occurrence that took place within the coverage territory. The
2 definition of coverage territory in turn encompasses the United
3 States, Puerto Rico and Canada, or "all other parts of the world"
4 if certain conditions are met, including that liability is
5 determined in a suit on the merits in the United States, Puerto
6 Rico or Canada or in a settlement to which Diamond agreed. The
7 possibility that these conditions would be met creates the duty to
8 defend, provided that other relevant conditions are met and no
9 exclusion is applicable.

10 As the Court held in its prior order, contrary to Marin's
11 contentions, this reading does not mean that Marin must first lose
12 a suit in the United States, Puerto Rico or Canada as a
13 precondition to trigger the duty to defend. Although Marin asks
14 the Court to reconsider its prior holding, Marin offers no basis
15 for reconsideration. The duty to defend is based on the potential
16 for coverage, not the certainty of coverage. If a suit had been
17 filed in the United States, Puerto Rico or Canada that created the
18 potential for meeting the other requirements set forth in the
19 policy, the duty to defend may have arisen, even if the insured
20 were ultimately not found to be responsible to pay damages.
21 Because the duty to defend is based on the possibility that a suit
22 may result in a covered claim under the policy and is broader than
23 the duty to indemnify for such claims, an insurer may owe a duty
24 to defend its insured in an action in which no duty to indemnify
25 ultimately arises, for example, if the insured prevails on the
26 underlying suit. See Montrose, 6 Cal. 4th at 299 (noting "the
27 rule that the insurer must defend in some lawsuits where liability
28 under the policy ultimately fails to materialize").

1 Here, because Ide and ATB initiated the first two suits in
2 the United Kingdom, not in the United States, Puerto Rico or
3 Canada, based on an occurrence that also took place in the United
4 Kingdom, there was no possibility that the litigation could result
5 in a "suit on the merits" in the United States, Puerto Rico or
6 Canada, and thus there was no potential for coverage and no duty
7 for Diamond to defend ATB or Marin in the suits.⁴

8 Marin also argues again that the limitation to occurrences
9 that took place within the coverage territory was an inconspicuous
10 exclusion and therefore unenforceable. Marin contends that
11 subdivision (c)(2) was inconspicuous because it was placed at the
12 end of the definition of coverage territory and was not clearly
13 labeled as an exclusion. As the Court noted in its prior order,
14 the territorial limitation appears in a grant of coverage and not
15 in an exclusion. As the California Court of Appeal has explained,

16 An insurance policy is written in two parts: the
17 insuring agreement defines the type of risks which are
18 covered, while the exclusions remove coverage for
19 certain risks which are initially within the insuring
20 clause. . . . Therefore, before even considering
21 exclusions, a court must examine the coverage provisions

21 ⁴ Diamond has moved to dismiss Marin's breach of contract
22 counterclaim in its entirety. In its opposition, Marin has
23 presented no argument that Diamond's denial of defense in the
24 enforcement action filed in the United States constituted a breach
25 of contract, and only refers to that action in addressing its
26 fraud claim. Accordingly, the Court grants Diamond's motion to
27 the extent that it seeks dismissal of the breach of contract claim
28 premised on the failure to provide a defense in the enforcement
action.

26 Further, the enforcement action did not seek to determine the
27 insured's responsibility to pay damages for the occurrence, but
28 instead merely sought recognition of a foreign judgment against
Marin for those damages. See Compl., ATB Sales, Case No. 11-4755,
¶¶ 16-25. Accordingly, the enforcement action likewise did not
create the potential for coverage under the policy.

1 to determine whether a claim falls within the potential
2 ambit of the insurance. . . . This is significant for
3 two reasons. First, when an occurrence is clearly not
4 included within the coverage afforded by the insuring
5 clause, it need not also be specifically excluded. . . .
6 Second, although exclusions are construed narrowly and
must be proven by the insurer, the burden is on the
insured to bring the claim within the basic scope of
coverage, and (unlike exclusions) courts will not
indulge in a forced construction of the policy's
insuring clause to bring a claim within the policy's
coverage.

7 Collin v. American Empire Ins. Co., 21 Cal. App. 4th 787, 802-803
8 (1994) (internal quotation marks and formatting omitted). In
9 these terms, Diamond did not withdraw coverage that had already
10 been granted; instead, Diamond granted coverage that encompassed a
11 specified set of risks, which did not include occurrences that
12 took place in the United Kingdom unless Marin's responsibility to
13 pay damages was determined in a suit on the merits in the United
14 States, Puerto Rico or Canada and certain other conditions were
15 met. Thus, because this definition means that the occurrence was
16 not encompassed within the coverage afforded by the insuring
17 clause, it need not also be included in a clear and conspicuous
18 exclusion. Further, the first page of the policy specifically
19 advised that words in quotation marks had special meanings
20 contained in the definitions section of the policy. "Coverage
21 territory" appeared in quotation marks in the coverage provision
22 and thus a reasonable insured would have known that this phrase
23 had a particular definition that should be consulted. The
24 definition was not printed in smaller text than the other
25 provisions in the policy.

26 Marin argues that the policy "gives the impression" that
27 "foreign claims" were covered for several reasons, including that
28 the policy used the phrase "all parts of the world" in the

1 definition of coverage territory. Opp. at 15-16. However, the
2 fact that the policy did not provide unlimited worldwide coverage
3 was disclosed on the first page, which specifies that it covered
4 only occurrences that took place in the coverage territory. If
5 the coverage territory included the entire world without
6 limitation, there would be no reason for Diamond to specify a
7 coverage territory. Further, the phrase "all parts of the world"
8 is immediately followed by the word "if" and the limitations on
9 that coverage.

10 In the 2ACC, Marin also conclusorily states that the
11 thirteen-page policy form itself was "buried" amid fifty pages of
12 documents. 2ACC ¶ 9. However, Marin cannot escape the coverage
13 terms by suggesting that it did not read the policy itself or that
14 it should not be expected to have done so. See Hallmark Ins. Co.
15 v. Superior Court, 201 Cal. App. 3d 1014, 1019 (1988) ("A
16 reasonable person will read the coverage provisions of an
17 insurance policy to ascertain the scope of what is covered.");
18 Taff v. Atlas Assurance Co., 58 Cal. App. 2d 696, 703 (1943) ("It
19 is a general rule that the receipt of a policy and its acceptance
20 by the insured without an objection binds the insured as well as
21 the insurer and he cannot thereafter complain that he did not read
22 it or know its terms. It is a duty of the insured to read his
23 policy.").

24 Marin also contends that Diamond gave "the impression" it
25 "would defend foreign claims like Ide's" because it calculated the
26 premiums charged to Marin under the policy based on "differing
27 rates" for "Marin's domestic and international sales." Opp. at
28 16. However, the premium rate charged for international sales is

1 significantly smaller than that charged for domestic sales. Id.
2 at ¶ 7, Ex. 1, 3. Thus, this reasonably reflects that the risk of
3 a covered claim arising out of a product sold abroad is smaller
4 than one sold in the United States, and does not suggest that the
5 coverage for such products is coextensive.

6 In addition, Marin argues that Diamond should have plainly
7 stated that the "insurance does not apply to any liability arising
8 out of any occurrence taking place outside of the United States of
9 America, its territories or possessions, Puerto Rico or Canada"
10 and that its failure to state this "clearly and prominently"
11 rendered the definition ambiguous. Opp. at 15, 17. This,
12 however, is not an accurate statement of the coverage that is
13 clearly and unambiguously provided in the policy. The policy is
14 plain that coverage is provided for occurrences that take place
15 outside of these areas, if certain conditions are met.

16 Finally, Marin argues that the application of this definition
17 to ATB would render the coverage illusory. The Court has already
18 considered and rejected this argument and Marin offers no reason
19 to reconsider that conclusion. As the Court previously held,
20 Marin's allegations, accepted as true, do not establish that the
21 possibility of utilizing the coverage was a nullity rather than
22 merely remote. Further, Marin's argument that the additional
23 insured endorsements for ATB did not themselves mention the
24 geographic limitation is unavailing. The endorsements modified
25 the portion of the policy that defined who is an insured, but did
26 not change the terms of the coverage that was provided to those
27 who qualified as an insured.

28

1 Because Marin has not properly plead that Diamond breached
2 its duty to defend either ATB or Marin, the Court GRANTS Diamond's
3 motion to dismiss Marin's amended counterclaim for breach of
4 contract. Because the Court has previously granted leave to amend
5 to remedy these deficiencies in the September 10, 2012 order and
6 Marin has been unable to do so, this dismissal is without leave to
7 amend.

8 B. Breach of implied covenant of good faith and fair dealing

9 Because the Court finds that Marin has not properly alleged
10 that Diamond breached its contract with Marin by refusing to
11 defend it or ATB in the United Kingdom actions, the Court also
12 grants Diamond's motion to dismiss Marin's amended counterclaim
13 for breach of the implied covenant of good faith and fair dealing.
14 "California law is clear, that without a breach of the insurance
15 contract, there can be no breach of the implied covenant of good
16 faith and fair dealing." Manzarek v. St. Paul Fire & Marine Ins.
17 Co., 519 F.3d 1025, 1034 (9th Cir. 2008) (citing Waller v. Truck
18 Ins. Exch., Inc., 11 Cal. 4th 1, 35-36 (1995)). Because the Court
19 has previously granted leave to amend this counterclaim, this
20 dismissal is without leave to amend.

21 C. Fraud

22 In its fraud counterclaim, Marin alleges that Diamond or its
23 purported agents represented to Marin, or led it to believe, that
24 "the Policy would provide a defense to actions brought against
25 Marin in foreign countries where Marin bikes were sold and used."
26 2ACC ¶ 45. As the basis for its claim, Marin points to the
27 following representations made "[p]rior to the inception of [the]
28 Policy in July 2001" by "Diamond and/or its agents":

1 (1) they "informed Marin that Diamond calculated
2 premiums for the liability policy, in part, on foreign
3 sales and applied a different rate for Marin's foreign
4 sales";

5 (2) they "informed Marin that its related international
6 companies . . . were all covered under the liability and
7 product liability coverage portions of the Policy";

8 (3) they "informed Marin that its distributor in the
9 United Kingdom, ATB, was covered under both the
10 Commercial Liability and Product Liability coverage
11 portions of the Policy, and more specifically, that
12 Diamond's policies prior to 2001 were amended to
13 include" ATB "as an insured 'with respect to liability
14 arising out of your operations or premises owned by or
15 rented to you'";

16 (4) they "distinguished at least one prior umbrella
17 liability policy from the Diamond policies, including
18 the Policy, by pointing out that umbrella liability
19 policy did not provide coverage for suits brought in
20 foreign countries"; and

21 (5) they "represented in Diamond policies prior to 2001
22 that Diamond would defend Marin against any 'suit'
23 alleging 'bodily injury' arising out of an 'occurrence'
24 that took place within the 'coverage territory' (e.g.
25 'coverage territory' refers to the place the
26 'occurrence' causing the 'bodily injury' occurs) and
27 that 'coverage territory,' included 'all other parts of
28 the world' if the alleged injury arose out the sale of
Marin's products in the United States or out of the
activities of a person whose home is in the United
States but who was away for a short time on Marin's
business."

19 Id. at 45(1)-(5). Marin further alleges that "all the
20 communications in the years prior to the issuance of the Policy,
21 as well as in the application process for the Policy prior to
22 July, 2001" together led it to "believe that it was covered for
23 the defense of suits that might be brought against it (and/or its
24 related companies and distributors) in foreign countries where
25 Marin products were distributed," that it did not know that
26 Diamond would take a contrary position and that it had "purchased
27 the Policy, paid premiums and distributed bikes in the United
28

1 Kingdom reasonably believing that it had coverage for actions such
2 as the Ide Action under the Policy." Id. at ¶¶ 46-48.

3 Marin pleads that the fraud counterclaim is brought "only as
4 an alternative theory of liability to" the breach of contract and
5 breach of covenant claims and that, if "it is determined that the
6 Policy obligates Diamond to defend Marin in the alleged actions
7 arising out of the Ide matter, then this cause of action would not
8 apply." 2ACC ¶ 44.

9 Diamond moves to dismiss this counterclaim on a number of
10 bases. First, Diamond contends that Marin's new allegations are
11 not sufficiently plead under Federal Rule of Civil Procedure 9(b)
12 and violate the Court's prior order granting Marin leave to amend
13 this claim.

14 In the order resolving Diamond's earlier motions, the Court
15 found that "almost all of Marin's fraud allegations center on
16 purported false representations that Diamond made in the insurance
17 contract itself," which could not support a fraud counterclaim.
18 Docket No. 43, 20. In its opposition, Marin had argued that not
19 all of the false representations were in the insurance contract
20 because "'at the issuance of the Additional Insured Endorsement,
21 Diamond State misrepresented that it would provide a defense to
22 ATB in any action alleging bodily injury against ATB.'" Id. at 21
23 (quoting Opp. at 21). However, no such allegation was made in the
24 counterclaims themselves. Thus, the Court dismissed the
25 counterclaim and granted Marin "leave to amend to assert
26 actionable fraudulent representations about the coverage that
27 would be provided for ATB made outside of the policy language
28 itself." Id. at 22. At the hearing on that motion, the Court

1 also warned Marin that, in amending its counterclaims, it would
2 need to satisfy the requirements of Rule 9(b). Docket No. 49, 17.

3 Diamond is correct that many of the new allegations that
4 Marin has added to this counterclaim are not limited to
5 misrepresentations made outside the terms of the policy about
6 coverage that would be provided for ATB. Marin has attempted to
7 add allegations of such misrepresentations about the coverage that
8 would be provided for Marin itself, instead of for ATB. In
9 addition, Marin has attempted to evade the Court's earlier ruling
10 that it cannot maintain a tort counterclaim premised on
11 misrepresentations made in the subject policy itself, by pleading
12 instead that Diamond made misrepresentations by including in
13 earlier policies the identical provisions that were in the subject
14 policy. See 2ACC ¶¶ 23, 45(e) (quoting the policy's coverage
15 provisions and definitions for certain terms, including "suit" and
16 "coverage territory," and stating that this "language was also
17 included in prior Diamond policies issued to Marin before 2001).
18 However, this continues to fail to allege conduct that goes beyond
19 a breach of the policy.

20 Further, as Diamond argues, many of the new allegations do
21 not meet the requirements of Rule 9(b). For example, Marin
22 contends that, before the issuance of the relevant policy and its
23 predecessors, Diversified gave Marin "an 'Insurance Schedule'
24 showing Diamond's coverage, which always included 'Foreign
25 Sales.'" 2ACC ¶ 6. Marin repeatedly claims that it was misled by
26 all communications in the years prior to the issuance of the
27 policy. See, e.g., id. at ¶¶ 14, 46. However, Marin does not,
28 among other things, attach these schedules or allege what the

1 schedules said about foreign sales or how these statements were
2 misleading.

3 Diamond also argues that the fraud counterclaim is barred by
4 the parol evidence rule. Diamond avers that the policy agreement
5 appears on its face to be a complete expression of the parties'
6 agreement and that Marin may not allege that Diamond made promises
7 about coverage that vary from the plain language of the policy.
8 Marin does not dispute that the policy is an integrated agreement
9 or that Marin may not introduce parol evidence to contradict its
10 provisions. Instead, Marin contends that the representations
11 allegedly made by Diamond or its agents about the duty to defend
12 did not contradict the policy's provisions.

13 The parol evidence rule establishes that "the terms contained
14 in an integrated written agreement may not be contradicted by
15 prior or contemporaneous agreements" and "necessarily bars
16 consideration of extrinsic evidence of prior or contemporaneous
17 negotiations or agreements at variance with the written
18 agreement." Casa Herrera, Inc. v. Beydoun, 32 Cal. 4th 336, 344
19 (2004). There is a limited exception for fraud to the parol
20 evidence rule. Cal. Code of Civ. Proc. § 1856(g). However, the
21 fraud exception does not apply where the allegedly fraudulent oral
22 promises contradict or vary the written terms of a written
23 agreement. See Brinderson-Newberg Joint Venture v. Pac. Erectors,
24 Inc., 971 F.2d 272, 281 (9th Cir. 1992) (citing Price v. Wells
25 Fargo Bank, 213 Cal. App. 3d 465, 484 (1989)); see also Bank of
26 Am. Assn. v. Pendergrass, 4 Cal. 2d 258, 263 (1935) (to be
27 admissible, parol evidence "must tend to establish some
28 independent fact or representation, some fraud in the procurement

1 of the instrument or some breach of confidence concerning its use,
2 and not a promise directly at variance with the promise of the
3 writing").

4 Marin contends that the alleged prior representations that
5 the policy would require Diamond to defend actions brought against
6 Marin in foreign countries, without regard to the limitations
7 provided in subdivision (c)(2) of the definition of coverage
8 territory, do not conflict with the terms of the policy. Although
9 Marin does not explain its argument in detail, it appears again to
10 rely on its argument that this provision cannot apply to the duty
11 to defend and applies only to the duty to indemnify. However, as
12 addressed above, this subdivision does apply to the duty to
13 defend. Thus, Marin's allegations, which it offers to show that
14 Diamond was to defend it in actions brought in foreign courts,
15 without meeting the requirements of subdivision (c)(2), do
16 contradict and vary the terms of the policy, and thus are barred
17 by the parol evidence rule.

18 Diamond also argues that Marin has not alleged sufficiently
19 under Rule 8(a) or Rule 9(b) that the claimed misconduct of
20 Diversified or any of the other purported agents can be attributed
21 to Diamond as its agent or joint venturer. Marin defends that it
22 has alleged properly that Diversified acted as Diamond's agent.
23 Marin does not address or defend its conclusory allegation that
24 Diversified was its joint venturer and does not dispute that Rule
25 9(b) applies to its allegations about the agency relationship for
26 the purposes of this fraud claim.

27 "An agent is one who 'act[s] on the principal's behalf and
28 subject to the principal's control.'" United States v. Bonds, 608

1 F.3d 495, 506 (9th Cir. 2010) (quoting Restatement (Third) of
2 Agency § 1.01). "To form an agency relationship, both the
3 principal and the agent must manifest assent to the principal's
4 right to control the agent." Id.

5 Marin has not alleged sufficiently that Diversified and Marin
6 had an agency relationship. It has alleged simply that
7 Diversified was Diamond's agent and that they had an agency
8 agreement pursuant to which Diversified received commission
9 payments for bringing insureds to Diamond. 2ACC ¶ 4. Marin has
10 made only conclusory allegations, or allegations founded "upon
11 information and belief," without providing any factual basis upon
12 which its "information and belief" is based. See Neubronner v.
13 Milken, 6 F.3d 666, 672 (9th Cir. 1993) (affirming the dismissal
14 of a complaint for lack of particularity under Rule 9(b) because
15 "a plaintiff who makes allegations on information and belief must
16 state the factual basis for the belief"); see also Papasan v.
17 Allain, 478 U.S. 265, 286, (1986) (when resolving a motion to
18 dismiss, courts "are not bound to accept as true a legal
19 conclusion couched as a factual allegation"). Such factual
20 allegations are particularly important because "an insurance
21 broker is generally an agent of the insured and not of the
22 insurer" and has no authority to bind the insurance company.
23 Marsh & McLennan of Cal., Inc. v. City of Los Angeles, 62 Cal.
24 App. 3d 108, 117-18 (1976) (citations omitted) (explaining the
25 difference between insurance agents and brokers); see also Osborn
26 v. Ozlin, 310 U.S. 53, 60-61 (1940) (explaining that, unlike an
27 insurance agent, a broker "is an independent middleman, not tied
28

1 to a particular company," even though "both are paid by
2 commission").

3 Marin asserts in its opposition that an agency relationship
4 "can be created by ratification, particularly where the
5 principal--Diamond--accepts the benefits of the acts of the
6 purported agent." Opp. at 22. However, Marin did not refer to
7 ratification in the 2ACC itself and did not allege facts necessary
8 to support such a theory. See, e.g., Reusche v. California
9 Pacific Title Ins. Co., 231 Cal. App. 2d 731, 737 (1965) (to be
10 held to have ratified the unauthorized acts of an agent, a
11 principal must have been "apprised of all facts surrounding a
12 transaction," or have been "ignorant of the facts" due to its
13 "own failure to investigate" under circumstances that were "such
14 as to put a reasonable man on inquiry").

15 Accordingly, for these reasons, the Court GRANTS Diamond's
16 motion to dismiss Marin's amended counterclaim for fraud. Because
17 the Court has previously granted leave to amend to remedy these
18 deficiencies in the September 10, 2012 order and Marin has been
19 unable to do so, this dismissal is without leave to amend.

20 II. Motion to strike amended affirmative defenses

21 Diamond argues that each of Marin's asserted amended
22 affirmative defenses--for estoppel, unclean hands and laches--is
23 insufficiently plead and does not meet the plausibility standards
24 set forth in Twombly. The parties agree that Marin's estoppel and
25 unclean hands affirmative defenses are subject to the Rule 9(b)
26 heightened pleading standard.

27

28

1 A. Estoppel

2 "A valid claim for equitable estoppel requires: (a) a
3 representation or concealment of material facts; (b) made with
4 knowledge, actual or virtual, of the facts; (c) to a party
5 ignorant, actually and permissibly, of the truth; (d) with the
6 intention, actual or virtual, that the ignorant party act on it;
7 and (e) that party was induced to act on it." Simmons v. Ghaderi,
8 44 Cal. 4th 570, 584 (2008) (citing 13 Witkin Summ. Cal. Law
9 Equity § 191).

10 In its estoppel defense, Marin alleges that "the conditions
11 for coverage were met" and "Diamond State had a duty to defend
12 Defendant in the Ide Action and the ATB Action as both arose from
13 the same incident in which Ide was allegedly injured," and a duty
14 to defend ATB in the Ide action. Amended Answer, Docket No. 45,
15 ¶¶ 20, 26. It further avers that "Diamond State made
16 representations of fact to Defendant, including within the Policy
17 itself, that Diamond State would defend Defendant in an action
18 such as that brought by Ide" and that, in "reasonable reliance on
19 these representations and to its detriment, Defendant paid
20 premiums on the Policy, sold its bikes through ATB, and incurred
21 attorneys' fees and other defense costs." Id. at ¶¶ 21-22. Marin
22 alleges that Diamond wrongfully denied a defense to both Marin and
23 ATB, either knowingly or because it failed to conduct a full
24 investigation into the Ide action and the conditions for coverage
25 under the policy. Id. at ¶¶ 23-25. Purportedly as "a legal and
26 proximate result of the wrongful denial of the defense of the Ide
27 claim by Diamond State, Defendant was not defended in the Ide case
28 and a judgment was taken against Defendant." Id. at ¶ 26.

1 Diamond argues that Marin's allegations regarding
2 "representations of fact" do not comply with Rule 9(b) because
3 Marin has alleged only generally that factual representations were
4 made without stating what they were, who made them, when they were
5 made or how they were false. In its opposition, Marin responds
6 that it made "particular allegations about Diamond's misleading
7 misrepresentation," but cites only to the conclusory allegation
8 that Diamond "made representations of fact to Defendant, including
9 within the Policy itself." Opp. at 3 (citing Amended Answer
10 ¶ 21). However, Marin points to no specific representations made
11 in the policy or elsewhere in support of this claim. Thus, Marin
12 has not alleged sufficiently that Diamond made "a representation
13 or concealment of material facts." Simmons, 44 Cal. 4th at 584.

14 Marin argues that any lack of particularity in its estoppel
15 defense does not justify striking it because Marin has provided
16 Diamond with sufficient notice of the defense "through its initial
17 pleadings, amended pleadings, limited settlement discussion, and
18 extensive discovery responses." Opp. at 4. However, as discussed
19 above, Marin's amended counterclaims likewise do not provide
20 sufficient notice of any purported fraudulent statements. In
21 addition, even if such discovery responses or information provided
22 during settlement discussions could provide notice sufficient to
23 fulfill this requirement, Marin offers no supporting argument or
24 examples as to how these actually did provide further notice
25 beyond what was plead in this amended answer or the pleadings
26 already dismissed above.

27 Accordingly, the Court grants Diamond's motion to strike the
28 affirmative defense of estoppel.

1 B. Unclean hands

2 The affirmative defense of unclean hands is based on the
3 equitable maxim, "One who comes into equity must come with clean
4 hands." 13 Witkin Summ. Cal. Law Equity § 9. The principle
5 serves to close "the doors of a court of equity to one tainted
6 with inequitableness or bad faith relative to the matter in which
7 he seeks relief, however improper may have been the behavior of
8 the defendant." Precision Instrument Mfg. Co. v. Auto. Maint.
9 Mach. Co., 324 U.S. 806, 814 (1945). "Thus while equity does not
10 demand that its suitors shall have led blameless lives . . . as to
11 other matters, it does require that they shall have acted fairly
12 and without fraud or deceit as to the controversy in issue." Id.
13 at 814-15 (internal quotation marks and citations omitted).

14 In its unclean hands defense, Marin incorporates by reference
15 the allegations that it made in support of its estoppel defense.
16 Amended Answer ¶ 29. It further alleges that "Diamond State's
17 unreasonable and bad faith refusal to defend Defendant" and its
18 "misrepresentations of the coverage provided in its policy and/or
19 its inadequate and incomplete investigation of the Defendant's
20 claims, and/or its subsequent bad faith denial of a defense to the
21 Ide claim, constitute inequitable conduct." Id. at ¶¶ 30-31.

22 Diamond again argues that Marin has not sufficiently alleged
23 what its purported misrepresentations were. Marin responds that
24 it satisfied Rule 9(b) by incorporating its estoppel allegations
25 by reference. However, the estoppel defense contained only
26 conclusory allegations about misrepresentations that did not
27 satisfy the requirements of Rule 9(b); thus, the allegations made
28 in that defense also cannot support a finding that the

1 misrepresentations were properly plead in this affirmative
2 defense.

3 Diamond also contends that Marin's other references to an
4 "inadequate and incomplete investigation" of the claim and "bad
5 faith denial" thereof are inadequately plead because they are
6 devoid of any factual content that would, for example, explain how
7 the investigation was inadequate or how the denial was in bad
8 faith. Marin responds that the plausibility standard requires
9 only "sufficient factual content to provide notice of the claim"
10 and that its allegations do so. Opp. at 5. However, as Diamond
11 points out, Marin provides insufficient factual content in support
12 of these allegations and alleges only that "Diamond State either
13 failed to conduct a full investigation into the Ide Action and the
14 conditions for coverage under the Policy or it conducted an
15 investigation and knew it owed Defendant a defense under the
16 Policy" and denied the claim in bad faith. Amended Answer ¶ 24.
17 Marin argues that this is sufficient because it provides Diamond
18 with notice that it "will need to review the adequacy and
19 completeness of its investigation." Opp. at 5. Notably, the
20 allegation does not provide even this notice, as it alternatively
21 argues that a complete investigation was done. Further, as
22 explained above, fair notice requires more than simply pointing to
23 the general subject matter of the defense. Instead, fair notice
24 requires "sufficient factual matter, accepted as true," beyond
25 simply conclusory statements, to state the elements of a defense.

26 Accordingly, the Court grants Diamond's motion to strike
27 Marin's unclean hands defense.

28

1 C. Laches

2 "The defense of laches requires unreasonable delay plus
3 either acquiescence in the act about which plaintiff complains or
4 prejudice to the defendant resulting from the delay." Pacific
5 Hills Homeowners Assn. v. Prun, 160 Cal. App. 4th 1557, 1564-1565
6 (2008) (internal quotation marks and citations omitted). The
7 parties dispute whether Marin alleges sufficiently unreasonable
8 delay or prejudice.

9 As to delay, Marin alleges that it tendered the defense of
10 the Ide action to Diamond in 2005 when that suit was brought and
11 gave Diamond prompt notice of the ATB and enforcement actions, and
12 that Diamond unreasonably delayed in making a determination of no
13 coverage and bringing this action for declaratory relief. Amended
14 Answer ¶¶ 15, 36. In the motion to strike, Diamond did not attack
15 the sufficiency of Marin's allegations of unreasonable delay. In
16 its reply, Diamond argues for the first time that it brought this
17 action before Marin settled the enforcement action and that Marin
18 knew its position as early as 2005. "The district court need not
19 consider arguments raised for the first time in a reply brief."

20 Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007); see also
21 United States v. Anderson, 472 F.3d 662, 668 (9th Cir. 2006)
22 ("Issues raised for the first time in an appellant's reply brief
23 are generally deemed waived."). Further, that this case was
24 brought before a settlement was reached in the enforcement action
25 or that Marin knew of Diamond's position does not necessarily mean
26 that Diamond did not delay unreasonably in bringing this suit.

27 Marin further alleges that "Diamond State's delay in bringing
28 this action caused unreasonable prejudice and damage to Defendant

1 including, but not limited to, attorneys' fees, settlement
2 amounts, and other related costs associated with the ATB
3 settlement that Defendant would have avoided had Diamond State
4 brought this action in a timely manner." Amended Answer ¶ 37.
5 Diamond argues that this allegation does not meet the plausibility
6 standard because, even if Diamond had disclaimed or brought this
7 suit earlier, Marin would still have had to incur these expenses.
8 Marin responds, "While it is possible that Marin may have incurred
9 some of these expenses if Diamond had brought this action sooner,
10 it is not implausible that Marin would have spent less time and
11 money on attorney's fees and related costs analyzing and
12 addressing coverage issues during those actions if Diamond had
13 acted sooner." Opp. at 6. The Court cannot conclude as a matter
14 of law that Marin did not incur any such additional costs that it
15 could have avoided had Diamond brought this action sooner.

16 Accordingly, Diamond's motion to strike Marin's laches
17 affirmative defense is DENIED.

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CONCLUSION

For the reasons set forth above, the Court GRANTS Diamond's motion to dismiss Marin's 2ACC (Docket No. 51). The Court also GRANTS IN PART and DENIES IN PART Diamond's motion to strike Marin's amended affirmative defenses (Docket No. 39). Because the Court has previously granted Marin leave to amend to remedy the deficiencies in its counterclaims and affirmative defenses and it has been unable to do so, the Court dismisses the counterclaims and strikes the estoppel and unclean hands affirmative defenses without granting Marin leave to amend.

IT IS SO ORDERED.

Dated: 12/21/2012



CLAUDIA WILKEN
United States District Judge