

1  
2  
3  
4  
5  
6  
7  
8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
10

11 MILES HALL ,

12 Plaintiff,

13 vs.

14  
15 NATIONAL UNION FIRE INSURANCE  
16 CO. OF PITTSBURGH, PA, a corporation;  
17 ASSOCIATED UNDERWRITERS;  
18 UNITED TRUCKERS ASSOCIATION; and  
19 DOES 1 through 100, inclusive,

20 Defendant.

CASE NO. 08cv1195 JLS (LSP)

**ORDER (1) GRANTING  
DEFENDANTS' MOTION TO  
DISMISS THE FOURTH AND  
FIFTH CAUSE OF ACTION OF  
THE FAC; (2) DENYING  
DEFENDANTS' MOTION TO  
DISMISS THE SIXTH CAUSE OF  
ACTION OF THE FAC; (3)  
DENYING DEFENDANTS'  
MOTION TO STRIKE**

21 Plaintiffs filed a First Amended Complaint ("FAC") on April 20, 2009. Defendants now  
22 move the Court to dismiss the Fourth, Fifth and Sixth causes of action of the FAC pursuant to  
23 FRCP 12 (b)(6) for failure to state a claim. Defendants' also move to strike portions of the FAC  
24 pursuant to FRCP 12(f). For the reasons stated below, the Court **GRANTS** defendants' motion to  
25 dismiss the fourth and fifth causes of action of the FAC **WITHOUT PREJUDICE**. The Court  
26 **DENIES** defendants' motion to dismiss the sixth cause of action of the FAC. The Court further  
27 **DENIES** defendants' motion to strike.

28 **BACKGROUND**

On February 15, 2007, Robert Hall applied for an occupational accident insurance policy

1 using a form provided by Associated Underwriters, an insurance broker for the trucking industry,  
2 allegedly creating a temporary policy of insurance. (FAC ¶ 10 & Ex. 1.) Miles Hall (“plaintiff”),  
3 Robert Hall’s son, was designated as the sole beneficiary of the policy. (*Id.*) A few weeks later,  
4 on March 6, 2007, Robert Hall died in a trucking accident, and Plaintiff applied for the insurance  
5 benefits under the policy of temporary insurance. (FAC ¶ 11, 12.) However, National Union Fire  
6 Insurance Co. of Pittsburgh, the insurer, instead began making payments to Phyllis Benjamin, who  
7 Plaintiff alleges was the estranged wife of Robert Hall. (FAC ¶ 13.) Subsequently, National  
8 Union paid a \$50,000 lump sum to Plaintiff and has continued to pay \$250,000 in monthly  
9 installments to Benjamin. (FAC ¶ 13.) On November 15, 2007, plaintiff renewed his objection to  
10 payment of policy benefits to Benjamin and reserved his rights to receive payment of all benefits  
11 payable up to the \$1,000,000 limit of liability. (FAC ¶ 15.)

12 Plaintiff filed a lawsuit in San Diego County Superior Court against National Union,  
13 Associated Underwriters, and United Truckers Association (“Defendants”) on June 2, 2008, with  
14 causes of action for (1) declaratory relief; (2) intentional misrepresentation and concealment; (3)  
15 negligent misrepresentation; (4) unfair business practices; (5) breach of contract; and (6) breach of  
16 the duty of good faith and fair dealing. (Doc. No. 1.) The action was removed to this Court on  
17 July 3, 2008. (*Id.*)

18 On July 11, 2008, defendants filed their Answer to the Complaint. (Doc. No. 4.) Plaintiff  
19 filed a motion to amend the complaint pursuant to Federal Rule of Civil Procedure 15(a)(2) on  
20 November 24, 2008. (Doc. No. 14.) A response in opposition to this motion was filed by  
21 defendants on December 24, 2008, and plaintiff filed a reply on December 31, 2008 (Doc. Nos. 17  
22 & 18.) This Court granted Defendants’ request to amend the Complaint on April 13, 2009. (Doc.  
23 No. 23.) Plaintiff subsequently filed his First Amended Complaint (“FAC”) on April 20, 2009.  
24 (Doc. No. 27.) The FAC claimed (1) Declaratory Relief; (2) Breach of Contract; (3) Breach of the  
25 Duty of Good Faith and Fair Dealing; (4) Intentional Misrepresentation and Concealment; (5)  
26 Negligent Misrepresentations; (6) Violation of California Business and Professions Code § 17200  
27 et seq. (*Id.*)

28 On April 30, 2009, defendants filed the present motion to dismiss. (Doc. No. 33.) A

1 response in opposition to the motion was filed by Plaintiff on July 16, 2009. (Doc. No. 37.) A  
2 reply to the opposition was filed on July 23, 2009. (Doc. No. 39.) A hearing was set for July 30,  
3 2009. This was subsequently vacated and the Court took the matter under submission without oral  
4 argument pursuant to Local Civil Rule 7.1(d)(1).

## 5 **MOTION TO DISMISS PURSUANT TO RULE 12(B)(6)**

### 6 **I. Legal Standard**

7 Federal Rule of Civil Procedure 12(b)(6) permits courts to dismiss a complaint for two  
8 reasons: (1) lack of a cognizable legal theory or (2) pleading of insufficient facts under an  
9 adequate theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) (internal  
10 citation omitted). In reviewing a Rule 12(b)(6) motion to dismiss, the Court must assume the truth  
11 of all allegations of material fact and construe inferences in the light most favorable to the  
12 nonmoving party. *Cedars-Sinai Med. Ctr. v. Nat'l League of Postmasters of the U.S.*, 497 F.3d  
13 972, 975 (9th Cir. 2007). While the complaint need not contain detailed factual allegations, “a  
14 plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than  
15 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”  
16 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1964–65 (2007) (citing *Papasan v.*  
17 *Allain*, 478 U.S. 265, 286 (1986)). In other words, “conclusory allegations of law and  
18 unwarranted inferences are not sufficient to defeat a motion to dismiss.” *Associated Gen.*  
19 *Contractors of Am. v. Metro. Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998) (quoting *Pareto v.*  
20 *FDIC*, 139 F.3d 696, 699 (9th Cir. 1998)).

21 Where a motion to dismiss is granted, “leave to amend should be granted ‘unless the court  
22 determines that the allegation of other facts consistent with the challenged pleading could not  
23 possibly cure the deficiency.’” *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir.  
24 1992) (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir.  
25 1986)). In other words, where leave to amend would be futile, the Court may deny leave to  
26 amend. *See Desoto*, 957 F.2d at 658; *Schreiber*, 806 F.2d at 1401.

27 //

28 //

## II. Discussion

### A. Fourth and Fifth Causes of Action for Intentional/Negligent Misrepresentation

Defendant moves to dismiss plaintiff's fourth and fifth causes of action for intentional and negligent misrepresentation and concealment, respectively, pursuant to Rule 12(b)(6). Defendant primarily argues that plaintiff has failed to plead actual reliance by plaintiff himself on the alleged misrepresentations. For the reasons stated below, the Court agrees and grants defendant's motion to dismiss the fourth and fifth causes of action in plaintiff's FAC.

To adequately plead fraud in the complaint, plaintiff must assert: "1) a misrepresentation or actionable concealment of fact; 2) knowledge of falsity or the duty of disclosure; 3) intent to defraud or induce reliance; and 4) actual reliance by the plaintiff."<sup>1</sup> *Mega Life & Health Ins. Co. v. Superior Court*, 172 Cal. App. 4th 1522, 1530 (2009) (citing Cal. Civ. Code § 1709; *Small v. Fritz Cos., Inc.*, 30 Cal. 4th 167, 173 (2003)). "Actual reliance occurs when a misrepresentation is 'an immediate cause of a plaintiff's conduct, which alters his legal relations' and when absent such representation, he would not, in all reasonably possibility, have entered into the contract or other transaction." *Engalla et al. v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 976 (1997) (citations omitted). In this case, defendant correctly asserts that plaintiff cannot adequately plead actual reliance because the FAC contains no allegations that the misrepresentations were made to plaintiff. Therefore, plaintiff could not have acted in reliance upon them. To the contrary, any alleged misrepresentations were made to the policyholder alone during the application process. (See Mem. ISO MTD at 3-5.)

California case law supports this holding. In *Mega Life & Health Insurance Co. v. Superior Court*, 172 Cal. App. 4th 1522, the court held that the husband of the deceased was a "stranger" to the medical insurance policy in that it "could not have caused *him* to 'alter his

---

<sup>1</sup> Defendant also cites *Mirkin et al v. Wasserman*, 5 Cal. 4th 1082, 1088 (1993) as authority for the proposition that a misrepresentation or concealment must be made directly to the plaintiff in order for plaintiff to rely on those misrepresentations. The *Mirkin* court rejects the "fraud-on-the-market" theory of pleading reliance, arguably finding that one must have "actually read or heard the alleged misrepresentations [to plead] a cause of action for deceit." *Id.* at 1089. The Court finds it unnecessary to discuss *Mirkin*, as the requirement of a plaintiff to plead actual reliance in asserting fraud or negligent misrepresentation is well settled and more properly illustrated by the other cases cited and discussed above.

1 position to his injury or risk.” *Id.* at 1530. Specifically, the husband plaintiff claimed that he had  
2 an individual claim for injury against the insurance company for allegedly failing to cover his  
3 wife’s medical bills. *Id.* at 1525-26. There was no dispute that, as successor in interest, plaintiff  
4 had a claim to receive the proceeds of the insurance plan as his wife was entitled to. *Id.* The issue  
5 was whether plaintiff could plead fraud or misrepresentation even though the misrepresentations  
6 were not made directly to the plaintiff, but rather to his wife. *Id.* at 1526. The court held that  
7 plaintiff did not have a cause of action because he could not plead actual reliance. *Id.* at 1530-31.  
8 Conversely, the alleged misrepresentations were made directly to his wife and, even assuming the  
9 husband encouraged his wife to enter the policy based on these misrepresentations, plaintiff  
10 himself “made no application for insurance and did not receive an allegedly deficient policy or  
11 coverage. He did *not* change his legal position to his detriment.” *Id.* at 1531.

12 Similarly, plaintiff in the present case was not a direct recipient of the misrepresentations,  
13 did not make an application for insurance, and did not actually receive an allegedly deficient  
14 policy or coverage. Accordingly, he did not actually rely on any of the alleged misrepresentations.  
15 Plaintiff contends that *Mega Life* is distinguishable from the present case because he is a named  
16 intended beneficiary to the policy. While this may be true, this does not negate the fact that he did  
17 not enter the policy in reliance on the alleged misrepresentations. In fact, unlike in *Mega Life*,  
18 where the husband played a role in the decision to enter the policy, the plaintiff in this case was  
19 not even aware of the policy until after it had been signed and executed. (*See* Mem. ISO MTD  
20 n.1.) Accordingly, plaintiff’s attempt to distinguish *Mega Life* is unpersuasive.

21 Defendants also cite *Conroy v. Regents of the Univ. of CA*, 45 Cal. 4th 1244 (2009), for the  
22 proposition that a third party cannot plead reliance on alleged misrepresentations made to another  
23 person. In *Conroy*, both plaintiff and her husband “executed separate agreements to donate their  
24 bodies to the UCI Willd Body Program.” *Id.* at 1247. Upon her husband’s death, plaintiff  
25 properly delivered the body to UCI. *Id.* at 1248. Plaintiff subsequently learned of mistreatment at  
26 the program and instituted an action in state court asserting various claims, including negligent  
27 misrepresentation, fraud and intentional deceit. *Id.* The trial court granted defendants’ motion for  
28 summary judgment, and the Supreme Court of California affirmed. *Id.* at 1256. The Supreme

1 Court asserted that plaintiff's claims failed for two reasons – first, because of lack of any false  
2 representations by defendants and, second, because plaintiff failed to meet the requirements of  
3 “actual reliance.” *Id.* Specifically, plaintiff could not plead reliance because the actual donor, the  
4 party who actually relied on any alleged misrepresentations when entering the contract or  
5 agreement, was the plaintiff's husband. “Plaintiff did not enter into an agreement with UCI  
6 regarding her husband's body, nor did [defendant's] representations cause her to alter her legal  
7 relations with UCI.” *Id.* at 1257.

8 Thus, both *Conroy* and *Mega Life* stand for the proposition that a third party, even an  
9 intended beneficiary, cannot claim reliance on an insurance policy or other agreement which he or  
10 she did not enter into based on misrepresentations made directly to the plaintiff. That is exactly  
11 the situation in this case.

12 Further, plaintiff's reliance on *Shafer v. Berger et al.*, 107 Cal. App. 4th 54 (2003) and  
13 *Glenn K. Jackson, Inc. v. Richard Roe*, 273 F.3d 1192, 1200 (9th Cir. 2001), for the assertion that  
14 a third party beneficiary can sue an insurance company for negligent misrepresentation is  
15 misplaced. *Shafer* is inapposite to the present case because, in *Shafer*, the alleged  
16 misrepresentations were apparently made directly to the plaintiffs. *Shafer*, 107 Cal. App. 4th at 66  
17 (“After the Shafers [plaintiffs] obtained judgment against Truck's insureds, La Belle represented to  
18 the Shafers that Truck did not agree to provide indemnity for wilful acts.” (emphasis added)). In  
19 *Glenn K. Jackson*, the court noted that there was a class of people who can sue an auditor for  
20 negligent misrepresentation; namely, those persons who are “specifically intended beneficiaries of  
21 the audit report who are known to the auditor and for whose benefit it renders the audit report.”  
22 *Glenn K. Jackson*, 273 F.3d at 1200. The court went on to hold, however, that because the third  
23 party did not produce evidence that the auditor “intended to induce reliance on the audit report and  
24 that [the third party] did justifiably rely on the report to its detriment,” it could not recover on a  
25 theory of negligent misrepresentation. *Id.* at 1201. Thus, while this language regarding third party  
26 beneficiaries could arguably apply to an intended beneficiary of an insurance policy, it does not  
27 change the fact that plaintiff in this case did not adequately plead actual reliance on that policy to  
28 his detriment. Accordingly, *Glenn K. Jackson* does not affect this Court's ultimate holding that  
plaintiff has failed to plead actual reliance.

1 As a result, plaintiff's fourth and fifth cause of action for negligent misrepresentation and  
2 intentional misrepresentation and concealment fails. The Court grants defendants' motion to  
3 dismiss pursuant to Rule 12(b)(6) for these causes of action, with leave to amend.

4 B. Sixth Cause of Action for Violations of California Business & Professions Code

5 California's Unfair Competition Law includes "any unlawful, unfair or fraudulent business  
6 act or practice." Cal. Bus. & Prof. Code § 17200. Section 17200 is broad, borrowing from  
7 violations of other laws and making these violations independently actionable as an unfair  
8 competition claim. *See Cal-Tech Comms. Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th  
9 163 (1999). Section 17200 is limited to claims for injunctive relief or restitution. *Korea Supply*  
10 *Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1143-44 (2003).

11 Defendant first argues that plaintiff cannot recover under § 17200 because plaintiff already  
12 has an adequate remedy at law. Defendant claims that, "with respect to insurance policies and  
13 beneficiary rights, the beneficiary must plead, ... [that] plaintiff has no adequate remedy at law."  
14 (Opp. to MTD at 6, 7 (citing *Heighley v. J.C. Penny Life Ins. Co. et al.*, 257 F. Supp. 2d 1241,  
15 1259-60 (C.D. Cal. 2003); *Stewart v. Life Ins. Co. of N. Am.*, 388 F. Supp. 2d 1138, 1144 (E.D.  
16 Cal. 2005)).) Therefore, defendant asserts, because plaintiff also seeks monetary relief under his  
17 claims of breach of contract, declaratory relief, and breach of the implied covenant of good faith  
18 and fair dealings, he has adequate remedies at law to recover his alleged policy benefits. The  
19 Court disagrees. Plaintiff is not seeking monetary damages or restitution under § 17200. Rather,  
20 plaintiff is clearly seeking an injunction. (FAC ¶ 72.) Thus, while the breach of contract and  
21 breach of the implied covenant of good faith and fair dealings may provide plaintiff with monetary  
22 damages, it will not provide him with the injunction he is seeking under his § 17200 claim.

23 Defendant further alleges that plaintiff has not plead an adequate basis for seeking  
24 injunctive relief in the FAC. Again, the Court disagrees. Plaintiff has sufficiently plead an  
25 ongoing need for injunctive relief. Plaintiff has not only asserted that the "unlawful practices  
26 alleged above are continuing in nature and are widespread practices," plaintiff has supported this  
27 statement with factual allegations. Specifically, plaintiff has alleged that defendants continuously  
28 issue applications for insurance using language that is designed to induce entities to purchase the  
insurance believing they are receiving benefits different from what they are in fact receiving.

1 Defendants then deny “benefits based on language concealed, mislabeled, and not disclosed in the  
2 application.” (FAC ¶¶ 63-68.) These factual contentions adequately support plaintiff’s request  
3 that “an injunction be issued against Defendants, and each of them, to enjoin them from continuing  
4 to engage in the unlawful conduct.” (FAC ¶ 72.)

5 Defendants’ third argument that plaintiff has no standing to bring a § 17200 claim also  
6 fails. Defendant asserts that “[f]ollowing passage of Proposition 64, to have standing to bring suit  
7 under the Unfair Competition Act, a plaintiff must make a twofold showing, [sic] he or she must  
8 demonstrate an injury in fact and a loss of money that is directly caused by the alleged unfair  
9 competition claimed.” (Mem. ISO MTD at 11 (citations omitted).) The Court finds that plaintiff  
10 has adequately plead both injury in fact and loss of money. The FAC alleges that plaintiff himself  
11 was injured and lost money as a result of the unfair business practices because defendants failed to  
12 pay him policy benefits that were owed to him under the policy, and further alleges that defendants  
13 are continuing to engage in unfair business practices in their applications for insurance as provided  
14 to other possible purchasers. These allegations are sufficient to support plaintiff’s standing to  
15 bring a § 17200 claim.

16 Next, defendant argues that “Plaintiff is not permitted to usurp jurisdictional authority  
17 vested in state’s regulatory agencies or to impose regulatory requirements on foreign corporate  
18 entities.” (Mem. ISO MTD at 12 (citing *Employee Serv. Assoc. v. Stafford Gray, as Ins. Commr.*,  
19 243 Cal. App. 2d. 817 (1996).) Specifically, defendant claims that plaintiff’s allegations concern  
20 licensing and corporation formation issues, which are reserved to state agencies, not persons in  
21 plaintiff’s position. The Court finds this argument to be baseless. The FAC does not implicate  
22 these issues and therefore the usurpation of state regulatory authority is irrelevant.

23 Defendants’ sixth argument<sup>2</sup> is that certain allegations fall within the scope of the Unfair  
24 Insurance Practices Act, and that “[r]e-casting Unfair Insurance Practices Act allegations[] under  
25 the guise of a section 17200 claim is not permitted under *Moradi-Shalal* and properly ordered  
26 dismissed.” (Mem. ISO MTD at 13 (citations omitted).) However, defendants offer no further  
27 basis for its bald conclusion that the allegations asserted as a violation of § 17200 actually fall

---

28 <sup>2</sup> The Court has already addressed defendants’ fifth argument, which is that plaintiff has no cognizable remedy afforded under § 17200 (restitution or injunction).



1 under certain provisions of the Unfair Insurance Practices Act.<sup>3</sup> The FAC certainly does not  
2 explicitly indicate that this is so. Accordingly, without further explanation by defendants, this  
3 argument fails.

4 Defendants' final argument is that the Unfair Competition claim must fail because the  
5 "borrowed laws" which were allegedly violated, resulting in unfair competition, fail. The  
6 "borrowed laws" plaintiff claims were violated are Insurance Code §§ 780 and 781 and the  
7 Consumer Legal Remedies Act §§ 1770(9), (14), (16), and (19). Defendants cite *Cal-Tech*  
8 *Comms. Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163 (1999) and *Smith v. State*  
9 *Farm Mutual Auto Ins. Co.*, 93 Cal. App. 4th 700, 718 (2001) as their authority for stating that, if  
10 the underlying violations fail, as does the overall unfair competition claim. However, in reading  
11 these cases, it is clear that a § 17200 Unfair Competition claim can be predicated on either  
12 unlawful *or* unfair practices. Therefore, it is irrelevant whether the specific statutes named in the  
13 complaint were violated, so long as the other alleged acts were "unfair." *See Cal-Tech*, 20 Cal. 4th  
14 at 180; *State Farm Mutual*, 93 Cal. App. 4th at 718-19. The Court, therefore, declines to address  
15 the specific statutes cited in the FAC. The remaining alleged acts are sufficient to support  
16 plaintiffs' claim against defendants for a violation of California's Business and Professions Code  
17 § 17200.

18 For the reasons stated above, defendants' arguments are without merit and the Court denies  
19 defendant's motion to dismiss the sixth cause of action pursuant to Rule 12(b)(6).

#### 20 **MOTION TO STRIKE PURSUANT TO RULE 12(F)**

21 Defendants also move the Court to strike the "temporary insurance" allegations in the  
22 General Allegations and First, Second, and Third Causes of Actions in the FAC. (Mem. ISO MTD  
23 at 4, 15-17.)

#### 24 **I. Legal Standard**

25 Under FRCP 12(f), a court "may order stricken from any pleading any insufficient defense  
26 or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. Proc. 12(f). A  
27 Rule 12(f) motion may also be used to "strike any part of the prayer for relief when the damages

---

28 <sup>3</sup> Specifically, defendants contend that the alleged acts fall within the scope of Cal. Ins. Code  
§§ 790.03(h)(1), (3), (8), (9), (13), the Unfair Insurances Practices Act.

sought are not recoverable as a matter of law.” *Bureerong v. Uvewas*, 922 F.Supp. 1450, 1479 n.34 (C.D.Cal. 1996). However, “motions to strike pursuant to Rule 12(f) are disfavored.” *Estate of Migliaccio v. Midland Nat’l Life Ins. Co.*, 436 F.Supp. 2d 1095, 1100 (C.D.Cal. 2006). Thus, “[i]f there is any doubt as to whether the allegations might be an issue in the actions, courts will deny the motion.” *In re TheMart.com, Inc.*, 114 F.Supp. 2d 955, 965 (C.D.Cal. 2000).

## II. Discussion

In the FAC, plaintiff alleges that the deceased (alleged) policy holder was covered under a policy of Temporary Insurance which designated plaintiff as his beneficiary upon his death. (FAC ¶¶ 17, 22, 28.) In support of defendants’ motion to strike the temporary insurance policy allegations, defendants have lodged as exhibit A to their motion to strike a copy of a “group policy.” Essentially, defendants rely on this policy to support their contention that there was no possibility of the existence of a temporary insurance policy because the final policy was already bound prior to the policyholder’s death. (Mem. ISO Mot. at 16.) This copy of the policy was not attached to plaintiff’s complaint, but has only been brought before the court by defendants as an attachment to their motion to strike. Thus, in order for the court to consider the document, the doctrine of incorporation by reference must be met.

The Ninth Circuit has set out when a doctrine may be incorporated by reference when it is attached to a *motion to dismiss* under FRCP Rule 12(b)(6), but not attached to the FAC. *See Knievel v. ESPN*, 393 F.2d 1068, 1076 (9th Cir. 2005). Plaintiff asserts, however, that its “research has not identified any cases which have held that the doctrine of incorporation by reference is applicable to a defendant’s *motion to strike* under FRCP 12(f).” (Opp. to MTD at 10 (emphasis added).) Defendants do not attempt to contest this and do not provide the Court with any authority that the Court may properly consider the attached policy as it is referred to in the motion to strike under the incorporation by reference doctrine. Without the Court being able to refer to the document, defendants’ motion to strike fails. Accordingly, the Court denies defendants’ motion to strike pursuant to Rule 12(f).

//

//

//

1 **CONCLUSION**

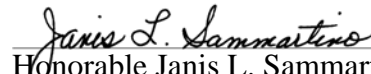
2 For the reasons stated below, the Court **GRANTS** defendants' motion to dismiss the fourth  
3 and fifth causes of action of the FAC **WITHOUT PREJUDICE**. Plaintiff **SHALL FILE** any  
4 amendment to the FAC within 30 days of this Order being electronically docketed.

5 The Court **DENIES** defendants' motion to dismiss the sixth cause of action of the FAC.

6 The Court further **DENIES** defendants' motion to strike.

7  
8 IT IS SO ORDERED.

9  
10 DATED: December 8, 2009

11   
12 Honorable Janis L. Sammartino  
13 United States District Judge  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28