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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ARCH SPECIALTY INSURANCE
COMPANY,

Plaintiff,

v.

SKANDIA CONSTRUCTION SERVICES,
INC., et al.,

Defendants.

Case No. 10cv1764-BTM (BLM)

**ORDER RE MOTION TO DISMISS
AND MOTION TO STRIKE**

Pending are Plaintiff’s motion to dismiss certain counterclaims [doc. # 16] and Defendants’ motion to strike [doc. # 30]. For the reasons set forth below, Plaintiff’s motion to dismiss is **GRANTED** in part and **DENIED** in part, and Defendants’ motion to strike is **DENIED**.

I. BACKGROUND

A. Complaint

This case arises from an insurance policy issued by Plaintiff to Defendants related to an apartment construction project. The policy required Defendants to pay a \$750,000 deposit premium that was adjustable per a Premium Computation Endorsement. The Premium Computation Endorsement provides that the premium base be determined by the total costs of construction.

1 An audit conducted upon completion of the project determined that the actual total
2 construction costs were \$10,777,614 – almost \$3 million more than the estimated cost.
3 Pursuant to the formula set forth in the Premium Computation Endorsement, the final
4 earned premium was determined to be \$1,010,401, which exceeded the deposit premium
5 of \$750,000 by \$260,401. Plaintiff brings claims for breach of contract and unjust
6 enrichment to recover this difference.

7
8 **B. Counterclaims**

9 Defendants bring counterclaims against Plaintiff, Mark Conklin, and Continental
10 Commercial Insurance Brokers (CCI). Mr. Conklin is an employee of CCI. Defendants
11 assert that both Mr. Conklin and CCI are agents of Plaintiff and are Plaintiff's co-
12 conspirators.

13 Defendants allege that the insurance policy was purchased in reliance upon
14 representations by Mr. Conklin and CCI that any additional premium charged would be
15 based upon a computation of the total construction cost and total sales of the project.
16 Defendants assert that total sales of apartment units are projected to be \$16 million less
17 than anticipated and that the audit was flawed, in part, because of a failure to include the
18 total sales of the project as a factor in the final adjusted premium. Defendants bring nine
19 counterclaims, nearly all relating to Mr. Conklin and CCI's alleged misrepresentations
20 regarding how additional premium would be calculated.

21
22 **II. STANDARD**

23 To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must
24 meet the requirements of Rule 8(a)(2), which requires the pleader to make a "short and
25 plain statement of the claim." This motion should be granted only where a plaintiff's
26 complaint lacks a "cognizable legal theory" or sufficient facts to support a cognizable
27 legal theory. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). When
28 reviewing a motion to dismiss, the allegations of material fact in plaintiff's complaint are

1 taken as true and construed in the light most favorable to the plaintiff. See *Parks Sch. of*
2 *Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Although detailed factual
3 allegations are not required, factual allegations “must be enough to raise a right to relief
4 above the speculative level.” *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955,
5 1965 (2007). “A plaintiff’s obligation to prove the ‘grounds’ of his ‘entitle[ment] to relief’
6 requires more than labels and conclusions, and a formulaic recitation of the elements of
7 a cause of action will not do.” *Id.* “[W]here the well-pleaded facts do not permit the court
8 to infer more than the mere possibility of misconduct, the complaint has alleged - but it
9 has not show[n] that the pleader is entitled to relief.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937,
10 1950 (2009) (internal quotation marks omitted).

11 12 III. DISCUSSION

13 14 A. Arch’s Liability For Broker’s Actions

15 Plaintiff Arch Specialty Insurance Company (“Arch”) seeks dismissal of all of the
16 counterclaims brought against it on the ground that it cannot be held liable any acts or
17 omissions by the broker – Mr. Conklin and CCI. Defendants raise two independent
18 theories that would result in such liability: (1) Mr. Conklin and CCI were acting as Arch’s
19 agent; and (2) Arch was engaged in a civil conspiracy with Mr. Conklin and CCI¹.

20 21 1. Agency

22 Contrary to Plaintiff’s position that “the broker, is not – and under California law
23 could not be – Arch’s agent”, (mem. at 5-6), Mr. Conklin and CCI’s status as an insurance
24 broker does not end the inquiry as to whether they acted as Arch’s agent. Although there
25 is a presumption that an insurance broker does not work on behalf of the insurer, if this
26 presumption is rebutted, brokers may be found to have dual agency status. See Cal. Ins.

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28 ¹ As set forth below, the Court denies Defendants’ motion to strike Plaintiff’s argument regarding the sufficiency of the conspiracy allegation. The Court addresses both bases for imputing liability in this section.

1 Code § 1623; *Fraser-Yamor Agency, Inc. v. County of Del Norte*, 68 Cal. App. 3d 201,
2 213 (1st Dist. 1977) (“Although an insurance broker is ordinarily the agent of the insured
3 and not of the insurer, he may become the agent of the insurer as well as for the
4 insured.”).

5 However, Defendants do not allege the presence of any of the facts listed in §
6 1623(c) that would rebut the presumption that Mr. Conklin and CCI were acting as
7 brokers on behalf of Defendants or any other facts which would show that they were
8 acting on behalf of Arch. Instead, Defendants’ counterclaim states only that “Conklin was
9 acting as the agent for CCI, who was acting as the agent for Arch.” (Counterclaim ¶ 83)
10 This threadbare statement is insufficient to establish agency status. *See Ashcroft v.*
11 *Iqbal*, 129 S.Ct. 1937, 1954 (2009) (“The Federal Rules do not require courts to credit a
12 complaint’s conclusory statements without reference to its factual context.”). Defendants
13 appear to acknowledge this insufficiency, as their opposition includes speculation about
14 facts that may be revealed in discovery that could show that Mr. Conklin and CCI were
15 acting as agents of Arch. *See Opp.* at 5. The Court cannot, consistent with *Twombly*
16 and *Iqbal*, allow claims against Arch to proceed based on such speculation.

17

18 2. Conspiracy

19 Under California law, the elements of a conspiracy are “(1) the formation and
20 operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3)
21 the damages resulting from such act or acts.” *Wasco Prods., Inc. v. Southwall Techs.,*
22 *Inc.*, 435 F.3d 989, 991, 992 (9th Cir. 2006) (*citing Cellular Plus, Inc. v. Superior Court*,
23 14 Cal. App. 4th 1224, 1236, 18 Cal. Rptr. 2d 308 (1993)). As discussed below,
24 Defendants have adequately pled wrongful acts that include misrepresentations that the
25 total policy premium would be based on final sales of the project. Because total sales
26 appear to be less than what had been anticipated, damages result from the purported
27 misrepresentations. Thus, the question here is whether Defendants have properly pled
28 that Arch was a part of the conspiracy.

1 Although Defendants' counterclaims do not contain any reference to Arch's
2 participation in the formation of the conspiracy, there are specific allegations of Arch's
3 actions taken after formation and its knowledge of the purported unlawful acts of CCI and
4 Mr. Conklin. Defendants allege that the \$750,000 premium was paid to CCI and Arch
5 (Counterclaim ¶ 63), that Arch had failed to provide a full copy of the policy containing the
6 Premium Computation Endorsement for three months, (Counterclaim ¶ 67), that Arch
7 conducted the Audit that improperly failed to include total sales of the project as a factor
8 in the final adjusted premium (Counterclaim ¶ 71), and that Arch was informed of
9 Defendants' understanding that the final premium would be based on final total sales but
10 failed to take corrective action (Counterclaim ¶ ¶ 80-84). Because on a motion to dismiss
11 the Court must make every reasonable inference in favor of the plaintiff, *see Parks Sch.*
12 *of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995), the Court finds the above
13 allegations sufficient to show that Arch participated in the conspiracy. Even if Arch
14 entered the conspiracy after CCI and Mr. Conklin made the allegedly false and
15 misleading statements regarding how the final adjusted premium would be calculated, it
16 can still be held liable for their conspiratorial acts. *See Indus. Bldg. Materials, Inc. v.*
17 *Interchemical Corp.*, 437 F.2d 1336, 1343 (9th Cir. 1971) ("One who enters a conspiracy
18 late, with knowledge of what has gone before, and with the intent to pursue the same
19 objective, may be charged with preceding acts in furtherance of the conspiracy.").
20 Because Defendants sufficiently alleged that Arch was engaged in a civil conspiracy with
21 Mr. Conklin and CCI, Arch may be jointly liable for the acts of its co-conspirators.
22 Therefore, Plaintiff's motion to dismiss on the ground that Arch cannot be held liable for
23 the acts of Mr. Conklin and CCI is **DENIED**.

24

25 **B. Sufficiency Of Individual Causes Of Action**

26 Plaintiff also challenges the third, fourth, fifth, sixth, seventh, and eighth
27 counterclaims for failure to state a claim. Defendants agree to voluntarily dismiss the
28 seventh and eighth causes of action for bad faith action and breach of covenant of good

1 faith as to Arch only. These claims are **DISMISSED** without prejudice as to Arch. The
2 remaining counterclaims will be addressed in turn.

3
4 1. Fraudulent Inducement (Third Cause Of Action)

5 Plaintiff has moved to dismiss the fraudulent inducement counterclaim, arguing
6 that it is not pled with sufficient particularity to meet the standard of Fed. R. Civ. P. 9(b).
7 The Ninth Circuit has “interpreted Rule 9(b) to mean that the pleader must state the time,
8 place and specific content of the false representations as well as the identities of the
9 parties to the misrepresentation.” *Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388,
10 1392-93 (9th Cir. 1988). Averments of fraud must be accompanied by the “who, what,
11 when, where, and how” of the misconduct charged. *Cooper v. Pickett*, 137 F.3d 616, 627
12 (9th Cir. 1997).

13 Defendants’ counterclaim meets this standard. Defendants allege that Mr. Conklin
14 misrepresented that total sales of the project would be included in the final premium
15 calculation (Counterclaim ¶ 60) and that verbal misrepresentations were made during the
16 time period from shortly before January 26, 2006 until March 2006 (Counterclaim ¶¶ 58-
17 61) Taken together, these facts are sufficiently detailed to meet the requirements of Rule
18 9(b).² Plaintiff’s motion to dismiss this cause of action is **DENIED**.

19
20 2. Negligent Failure To Procure Insurance (Fourth Cause Of Action)

21 Plaintiff seeks dismissal of this cause of action because “it fails to allege any legal
22 duty that Arch had to Defendants and thereby fails to allege a necessary element of a
23 claim for negligence.” (Mem. at 11) However, because Defendants successfully allege

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25 ² Plaintiff’s additional argument that “[t]he plain language of the Policy . . . confirms
26 how the final earned premium was to be calculated and precludes Defendants’ cause of
27 action for fraudulent inducement” lacks merit. (Mem. at 10-11) Defendants do not bring a
28 breach of contract claim, but instead argue that they were induced into entering into a
contract based on false and misleading statements. Whether the terms of the contract
ultimately preclude use of total sales of the project as a factor in the final adjusted premium
is immaterial to whether Defendants were fraudulently induced to enter into the contract.
See *Lazar*, 12 Cal. 4th at 638 (“[T]he plaintiff’s claim [of fraudulent inducement] does not
depend upon whether the defendant’s promise is ultimately enforceable as a contract.”).

1 that Arch was a co-conspirator, they need not allege an independent duty owed by Arch,
2 as long as the complaint alleges an underlying civil wrong. See *Unruh v. Truck Ins.*
3 *Exch.*, 7 Cal. 3d 616, 631 (1972). Plaintiff does not challenge Defendants' contention
4 that CCI and Mr. Conklin owed a duty to Defendants to procure and maintain insurance
5 coverage or otherwise challenge the sufficiency of this cause of action. Thus, Arch's
6 motion to dismiss this cause of action on the sole ground that Arch did not owe an
7 independent duty to Defendants is **DENIED**. Challenges to the sufficiency of Defendants'
8 negligent failure to procure insurance claim may be raised in a motion for summary
9 judgment.

10
11 3. Rescission (Fifth Cause Of Action)

12 Plaintiff challenges Defendants' rescission claim in the fifth cause of action on two
13 main grounds. First, Plaintiff asserts that "Defendants have not pleaded the elements of
14 rescission" under Cal. Civ. Code § 1691. (Mem. at 12) This statute states that to effect a
15 rescission, a party must give notice of rescission and offer to restore the benefits
16 received under the contract. § 1691. However, when these requirements have not been
17 satisfied, "the service of a pleading in an action or proceeding that seeks relief based on
18 rescission shall be deemed to be such notice or offer or both." *Id.* (emphasis added).
19 Based on the plain language of the statute, Defendants claim for rescission cannot be
20 barred because of a purported failure to provide notice of rescission where, as here,
21 Plaintiff does not contend that any prejudice arose from this delay. *C.f.* Cal. Civ. Code §
22 1693. Moreover, Defendants need not offer to restore the benefits received under the
23 contract, where as here, Defendants contend they have nothing of benefit to return.
24 Contrary to Plaintiff's position, an offer of restoration is not a prerequisite to effect
25 rescission where a party claims that it received nothing of value under the contract. See
26 *Simmons v. Briggs*, 69 Cal. App. 447 (1924) ("If plaintiff received nothing under the
27 contract, no offer of restoration was necessary. ").

28 Second, Plaintiff argues that rescission is unavailable for a unilateral mistake of

1 fact caused by neglect of Defendants' "duty to examine the Policy to see that it was the
2 Policy that they intended to purchase." (Mem. at 13) In support of its argument, Plaintiff
3 relies on the following language from *Taff v. Atlas Assurance Co.*, 58 Cal. App. 2d 696,
4 703 (1943):

5 It is a general rule that the receipt of a policy and its acceptance by the insured
6 without an objection binds the insured as well as the insurer and [the insured]
7 cannot thereafter complain that he did not read it or know its terms. It is a duty of
8 the insured to read his policy.

9 This general rule is clearly subject to exceptions, as the *Taff* court noted that an
10 actionable mistake may lie if the insurer "took affirmative action to prevent such
11 examination," *id.* at 703, and other courts have found that misrepresentations of policy
12 provisions provide a reasonable excuse for the insured's failure to read the policy, see
13 *Laing v. Occidental Life Ins. Co.*, 244 Cal. App. 2d 811, 819 (2d Dist. 1966).

14 Here, Defendants allege that Mr. Conklin misrepresented that the total policy
15 premium would be based on the final sales of the project, that this statement was
16 consistent with Mr. Conklin and Defendants' prior course of business, and that Arch
17 delayed sending the policy to Defendants for three months in an effort to impede review
18 of its terms. At this stage of the proceedings, such allegations provide a sufficient excuse
19 for Defendants' failure to review the policy. Plaintiff's motion to dismiss Defendants claim
20 for rescission based on a unilateral mistake is **DENIED**.

21 4. Reformation (Sixth Cause Of Action)

22 Under Cal. Civ. Code § 3399, a contract may be reformed "[w]hen, through fraud
23 or a mutual mistake of the parties, or a mistake of one party, which the other at the time
24 knew or suspected, a written contract does not truly express the intention of the parties."
25 For the reasons set forth above, Defendants have stated a claim for fraudulent
26 misrepresentation, and their purported failure to review the policy does not preclude
27 Defendants from asserting an actionable mistake. Because Defendants have
28 successfully alleged a civil conspiracy, Arch may be held jointly liable for
misrepresentations made by Mr. Conklin and CCI. Therefore, Plaintiff's motion to dismiss

1 Defendants' claims for reformation is **DENIED**.

2

3 **C. Motion To Strike**

4 Defendants move to strike Plaintiff's argument that Defendants' conspiracy
5 allegations are insufficient. This motion is **DENIED**. Defendants, in their response to the
6 motion to dismiss, argued that Arch could be jointly liable for Mr. Conklin and CCI's
7 actions under a civil conspiracy theory. The portion of the reply brief devoted to the
8 sufficiency of Defendants' conspiracy allegations was in response to this argument.

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IV. CONCLUSION

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IT IS SO ORDERED.

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DATED: July 25, 2011

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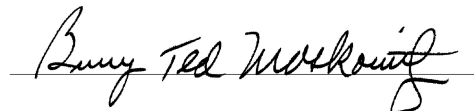
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Honorable Barry Ted Moskowitz
United States District Judge