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

EL CAJON LUXURY CARS, INC. dba Bob
Baker Lexus, a California Corporation,

Plaintiff,

vs.

TOKIO MARINE & NICHIDO FIRE
INSURANCE CO., LTD.,

Defendant.

CASE NO. 11CV1248 JLS (MDD)

**ORDER DENYING MOTION TO
DISMISS SECOND AMENDED
COMPLAINT**

(ECF No. 26)

Presently before the Court is Defendant Tokio Marine and Nichido Fire Insurance Co., Ltd.’s (“Defendant” or “Tokio Marine”) Motion to Dismiss Second Amended Complaint. (MTD, ECF No. 26) Also before the Court are Plaintiff El Cajon Luxury Cars, Inc., dba Bob Baker Lexus’s (“Plaintiff” or “Bob Baker Lexus”) response in opposition, (Resp. in Opp’n, ECF No. 17), and Defendant’s reply, (Reply in Supp., ECF No. 18). The hearing set for the motion on June 7, 2012, was vacated, and the matter taken under submission on the papers. Having considered the parties’ arguments and the law, the Court **DENIES** Defendant’s motion to dismiss.

This Order incorporates the factual and procedural history as set forth in this Court’s prior Orders dismissing Plaintiff’s complaint, (Order, Nov. 8, 2011, at 1–2, ECF No. 13), and first amended complaint (“FAC”), (Order, Mar. 6, 2012, at 1–2, ECF No. 22). After granting Defendant’s motion to dismiss a second time, the Court allowed Plaintiff one final opportunity to amend its complaint in light of a theory of liability raised for the first time at oral

1 argument—namely, that Bob Baker Lexus had notice of a dangerous problem with the subject
2 vehicle, and yet negligently rented the vehicle to another customer. (Order, Mar. 6, 2012, at 8,
3 ECF No. 22) And so, Plaintiff filed its Second Amended Complaint (“SAC”) on March 20, 2012,
4 (SAC, ECF No. 23), and the instant motion to dismiss soon followed, (MTD, ECF No. 26).

5 The Court has twice held that the claim for negligent “maintenance, care and servicing” of
6 the subject vehicle asserted in the underlying action is unambiguously within the scope of the
7 Tokio Marine insurance policy, but that the Completed Operations exclusion applies to exclude
8 coverage over that claim. The Court does not disturb that holding here. Instead, the Court focuses
9 on whether some other theory of liability—one that has not yet been alleged in the underlying
10 action but that conceivably *could* be alleged¹—is covered by the insurance policy.

11 Plaintiff’s SAC mirrors the FAC, but adds allegations pertaining to this alternative theory
12 of liability. Specifically, Bob Baker Lexus alleges that a prior renter experienced an unintended
13 acceleration event in the subject vehicle and alerted a receptionist about the problem upon
14 returning the vehicle, but the receptionist failed to properly document the complaint. As a result,
15 the car remained in the loaner fleet and Bob Baker Lexus loaned the vehicle to another
16 customer—Mr. Saylor, of the underlying action—despite the reported problem. (SAC
17 ¶¶ 17a–19a,² ECF No. 23) In giving Bob Baker Lexus a final opportunity to amend its complaint,
18 the Court previously commented that “[t]his theory of liability does not arise out of Plaintiff’s
19 ‘work’ on the vehicle, and is not tied to any product liability–based claim.” (Order, Mar. 6, 2012,
20 at 8, ECF No. 22)

21 At the heart of the instant motion to dismiss is whether, under this new theory of liability, a
22 receptionist’s duties qualify as “work or operations” that would fall under the Completed
23 Operations exclusion. In order to rely on an exclusion to deny that it has a duty to defend, Tokio

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25 ¹ “[T]he insured is entitled to a defense if the underlying complaint alleges the insured’s
26 liability for damages *potentially* covered under the policy, or if the complaint might be amended to
27 give rise to a liability that would be covered under the policy.” *Montrose Chem. Corp. v. Super. Ct.*,
28 861 P.2d 1153, 1160 (Cal. 1993).

² In adding these new allegations to its complaint, Bob Baker Lexus inadvertently failed to
change the paragraph numbering for the remainder of the complaint. As a result, there are two
paragraphs numbered 17 through 20 in the SAC. This Order cites to the first set of paragraphs 17
through 20 as 17a through 20a, and the second set as 17b through 20b.

1 Marine must provide conclusive evidence that the exclusion applies, *Atl. Mut. Ins. Co. v. J. Lamb,*
2 *Inc.*, 123 Cal. Rptr. 2d 256, 272 (2002), and the Court strictly construes the exclusionary clause in
3 favor of the insured, *N. Am. Building Maint., Inc. v. Fireman’s Fund Ins.*, 40 Cal. Rptr. 3d 468,
4 479 (Cal. Ct. App. 2006).

5 The Completed Operations exclusion provides that the Tokio Marine insurance policy does
6 not apply to claims arising out of Bob Baker Lexus’s “work” after that work has been completed
7 or abandoned, and goes on to explain that “work” means:

8 a. Work or operations performed by [Bob Baker Lexus] or on [Bob Baker
9 Lexus’s] behalf; and

10 b. Materials, parts or equipment furnished in connection with such work or
11 operations.

12 [Bob Baker Lexus’s] work includes warranties or representations made at any
13 time with respect to the fitness, quality, durability or performance of any of the
14 items included in paragraph a. or b. above.

15 (Ex. 5 at 41,³ ECF No. 23-1) As the Court has noted previously, this definition of “work” is
16 identical to the definition in the Completed Operations exclusion at issue in *Baker v. National*
17 *Interstate Insurance Co.*, 103 Cal. Rptr. 3d 565 (Cal. Ct. App. 2010). There, the California Court
18 of Appeals found that the term “work” includes “a person’s services performed in return for
19 payment of money,” ultimately holding that a company’s “inspection services” fell within the
20 Completed Operations exclusion. *Id.* at 581. Thus, under *Baker*, “[w]hen a person provides a
21 service for a customer, for payment from that customer, the person is ‘working’ or otherwise
22 ‘performing an operation’ in the context of his or her business activities.” *Id.*

23 According to Tokio Marine, the receptionist’s failure to properly document a customer’s
24 complaint about a rental vehicle⁴ constitutes “work or operations” because “[t]here is no limitation

26 ³ All pin cites in citations to the exhibits to the SAC utilize the page numbers assigned by
27 CM/ECF.

28 ⁴ Throughout the motion to dismiss, Tokio Marine recharacterizes Plaintiff’s allegations
pertaining to the receptionist’s negligence as a “failure to request maintenance” rather than as a
“failure to properly document a complaint,” as the SAC more accurately alleges. Thus, even assuming

1 in the [Completed Operations] exclusion or basis to assert that ‘work’ or ‘work or operations’ must
2 be physical ‘maintenance.’” (MTD 9, ECF No. 26) Tokio Marine asserts that “work or
3 operations” “include[s] the duties of a Bob Baker Lexus receptionist assigned to receive loaner
4 cars and any duties of Bob Baker Lexus to provide proper maintenance procedures, including
5 procedures addressing or reporting renter complaints.” (*Id.* at 11)⁵

6 Although it is a close call, considering Plaintiff’s allegations in light of the principles for
7 interpreting insurance contract exclusions and limiting the allegations of the SAC to Bob Baker
8 Lexus’s loaner car operations, the Court finds that Bob Baker Lexus has alleged a theory of
9 liability that might be covered by Tokio Marine’s insurance policy. Bob Baker Lexus provides to
10 its customers a “courtesy loaner vehicle through a rental car program known as the Lexus
11 Customer Convenience System (‘LCCS’).” (SAC ¶ 5, ECF No. 23) And pursuant to its courtesy
12 loaner car operations, Bob Baker Lexus alleges that its receptionists have a duty to “properly
13 document” any complaints that come in regarding the loaner vehicles so that the vehicle will not

14 that Tokio Marine is correct that a failure to request maintenance would fall within the Completed
15 Operations exclusion because “a failure to request maintenance would be part and parcel of the
16 ‘maintenance, care and servicing’ of the Rental Vehicle,” (MTD 9, ECF No. 26), the Court’s analysis
17 focuses on the allegations of the complaint, rather than on Tokio Marine’s recharacterization of those
18 allegations. And because the Court has already foreclosed any theory of liability arising out of
19 Plaintiff’s maintenance operations, the Court interprets the SAC’s theory of liability as being limited
20 to the loaner car operations—specifically, the receptionist’s failure to report a complaint, which
21 resulted in the car remaining in the loaner fleet such that it was loaned to a subsequent customer.

22 ⁵ Tokio Marine bolsters this argument by analogy to case law interpreting insurance contracts
23 with Professional Services exclusions, which generally exclude coverage for claims arising out of the
24 rendering or failure to render professional services. Interpreting such policies and exclusions,
25 California courts have held that the “crucial factor” in determining whether the exclusion applies is
26 “whether the injuries occurred *during the performance of professional services.*” *N. Ins. Co. v. Super*
27 *Ct.*, 154 Cal. Rptr. 198, 200 (Cal. Ct. App. 1979) (finding the Professional Services exclusion
28 applicable where the harm resulted from a clerical employee’s administrative error); *see also Food*
Pro Internat., Inc. v. Farmers Ins. Exchange, 89 Cal. Rptr. 3d 1, 13 (Cal. Ct. App. 2008) (“[T]he act
that precipitated the injury need not have been one of professional malpractice, as long as the plaintiff
was injured in the performance of the professional service.”). And so here, by analogy, Tokio Marine
argues that the receptionist’s negligent failure to properly document the complaint “do[es] not alter
the duty owed by Bob Baker Lexus to its renters, thus [the receptionist’s] errors are within the
exclusion.” (Reply in Supp. 6, ECF No. 29)

The Court appreciates the parallel Tokio Marine attempts to draw between the Professional
Services exclusion and the Completed Operations exclusion at issue here, but ultimately finds the
analogy unconvincing. Moreover, this argument appears inconsistent with Tokio Marine’s assertion
that the receptionist’s duties in and of themselves constitute “work or operations.” If the receptionist’s
duties in and of themselves fit within the Completed Operations exclusion, then Tokio Marine would
not need to rely by analogy on these Professional Services exclusion cases in order to avoid coverage.

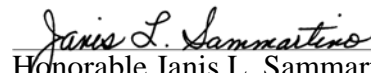
1 subsequently be loaned to another customer without remedying the reported defect. (*See id.* ¶ 20)

2 Though Tokio Marine emphatically characterizes the receptionist’s duties as “work,” the
3 Court cannot find that Tokio Marine has carried its burden to conclusively demonstrate that the
4 exclusion applies to this newly asserted potential theory of liability. Nothing in the SAC suggests
5 that customers are required to pay for Bob Baker Lexus’s loaner car services; indeed, a more
6 reasonable inference is that this service is provided as a “courtesy” to customers who leave their
7 personal vehicles with Bob Baker Lexus for maintenance services. *Cf. Baker*, 103 Cal. Rptr. 3d at
8 581. Thus, interpreted in the context of this business model, a “layperson policyholder might
9 reasonably interpret the exclusion’s language,” *id.*—specifically, the term “work”—to mean the
10 work performed in the service or maintenance of the vehicles, and not a receptionist’s work in
11 tracking customer complaints on loaner vehicles. As such, Tokio Marine’s motion to dismiss is
12 **DENIED.**

13 The Court emphasizes, however, that it makes no comment on whether—assuming this
14 theory is eventually asserted in the underlying action—it necessarily falls outside the Completed
15 Operations exclusion. For purposes of this motion, and in the context of the broad duty to defend,
16 the Court merely holds that Bob Baker Lexus has successfully alleged a theory of liability
17 sufficient to withstand a motion to dismiss.

18 **IT IS SO ORDERED.**

19 DATED: September 10, 2012

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21 Honorable Janis L. Sammartino
22 United States District Judge
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