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

ROBERT M. JAFFE, individually and as
Trustee of the Robert M. Jaffe Trust, dated
10/08/1990,

Plaintiff,

v.

MICHAEL DEMICH, et al.,

Defendants.

Case No.: 16-CV-0245 W (BGS)

**ORDER DENYING MOTION FOR
LEAVE TO AMEND THE
COMPLAINT [DOC 33]**

Plaintiff Robert Jaffe requests leave to amend the First Amended Complaint (“FAC”). Defendants Michael Demich and Michael A. Demich Construction, Inc. (collectively “Demich”) oppose.

The Court decides the matter on the papers submitted and without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons discussed below, the Court **DENIES** the motion [Doc. 33].

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1 **I. BACKGROUND**

2 In 2009, Plaintiff Robert Jaffe entered into an informal agreement with Defendant
3 Michael Demich, under which Demich would perform work on Jaffe’s property in
4 Escondido, California, in exchange for a fee. (*FAC* [Doc. 4] ¶ 6.) Specifically, Demich
5 was charged with improving “an appurtenant easement in the form of an access road
6 adjacent to [Jaffe’s] property and adjacent to the property of neighbor Robert Bradshaw”
7 and two other neighboring properties owned by Corbett and Wymbs. (*Id.*) Demich
8 entered into subcontracts with Joe’s Paving Company (“Joe’s Paving”) to assist with the
9 work. (*Id.* ¶ 7.) Jaffe alleges the contract with Joe’s Paving “specified that Joe’s
10 Paving’s billings for work would include the costs for Joe’s Paving to obtain and
11 maintain liability insurance for the work to be performed.” (*Id.*) Jaffe also alleges he
12 paid Demich to be added as an additional insured under Demich’s general liability policy,
13 and that Jaffe continued payments on the policy from 2009 through the conclusion of the
14 work in 2012. (*Id.*)

15 From 2011 through 2013, Jaffe was involved in litigation against his neighbors
16 Bradshaw, Corbett, and Wymbs, during which Jaffe claims he paid \$580,000 in litigation
17 costs. (*FAC* ¶ 17.) Jaffe alleges that his “liability for these damages arose, not as a result
18 of any actual fault on his part, but solely by operation of law, arising from the actions of
19 defendants and his agents as to the damage they caused to the neighbors’ property.” (*Id.*
20 ¶ 13.) Accordingly, Jaffe alleges he is entitled to indemnity from Defendants for: (1) the
21 damages paid to Bradshaw, Corbett, and Wymbs; (2) legal costs incurred in defending
22 the underlying action; and (3) loss of value to his property resulting from the Superior
23 Court’s Judgment in the underlying matter. (*Id.* ¶¶ 18–20.)

24 While Jaffe concedes that no written contract existed between Demich and himself
25 for general contractor services, he alleges a written contract existed for general liability
26 insurance payments on Demich’s policy issued by AIX Specialty Insurance Co. (“AIX”),
27 under which Jaffe was named an additional insured. (*Plf.’s Reply* [Doc. 35] 2:11–14.)
28 Jaffe contends a Certificate of Insurance issued on September 1, 2009 (the “Certificate”)

1 by Target Financial & Insurance Services (“Target Financial”) constitutes the written
2 contract confirming Defendants’ promise to provide liability insurance coverage. (*Id.*
3 2:14–19, 4:2–15.) Accordingly, Jaffe alleges AIX’s denial of his insurance claim for
4 coverage for the underlying litigation constituted a breach of the written contract between
5 Jaffe and Demich. (*Id.* 4:18–26.) He now seeks to amend the FAC to add a cause of
6 action for breach of contract based on the Certificate. (*P&A* [Doc. 33] 2:11–12.)

7 8 **II. LEGAL STANDARD**

9 Federal Rule of Civil Procedure 15(a) provides that after a responsive pleading has
10 been served, a party may amend its complaint only with leave of court, and leave “shall
11 be freely given when justice so requires.” Fed. R. Civ. P. 15(a). Granting leave to amend
12 rests in the sound discretion of the district court. Pisciotta v. Teledyne Industries, Inc., 91
13 F.3d 1326, 1331 (9th Cir. 1996). Although the rule should be interpreted with extreme
14 liberality, leave to amend is not to be granted automatically. Jackson v. Bank of Hawaii,
15 902 F.2d 1385, 1387 (9th Cir. 1990) (citations omitted). Five factors are taken into
16 account to assess the propriety of a motion for leave to amend: (1) bad faith, (2) undue
17 delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether the
18 plaintiff has previously amended the complaint. Johnson v. Buckley, 356 F.3d 1067,
19 1077 (9th Cir. 2004).

20 In assessing whether a proposed amendment should be permitted, the court’s
21 limited role is identical to its role in assessing a 12(b)(6) motion to dismiss for failure to
22 state a claim, namely to assess the legal feasibility of the complaint, not to weigh
23 evidence or resolve the disputed facts of the case. See e.g., Luce v. Dalton, 166 F.R.D.
24 457 (S.D. Cal. 1996). It follows that, when determining the legal feasibility of a
25 proposed amendment, “[t]he Court must accept as true the complaint’s material
26 allegations and any reasonable inferences that may be drawn from them.” Chavez v.
27 Immigration Naturalization Service, 17 F.Supp.2d 1141 , 1143 (S.D. Cal. 1998), citing
28 Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995) (“We

1 take all allegations of material fact as true and construe them in the light most favorable
2 to the nonmoving party.”).

3 Here, Demich argues the motion to amend should be denied because the proposed
4 amendment has been proffered in bad faith, is untimely, and because it would be futile.
5 (*Opp.* [Doc. 34] 3:22–7:1.) Because the Court agrees that the amendment would be
6 futile, the remaining arguments will not be addressed.

7 8 **III. DISCUSSION**

9 To successfully plead a breach of contract claim in California, Jaffe must allege
10 facts demonstrating: (1) the existence of a contract; (2) Jaffe’s performance of all
11 contractual obligations; (3) Demich’s breach; and (4) that Jaffe suffered damages from
12 the breach. See Maxwell v. Dolezal, 231 Cal.App. 4th 93, 98 (2014). Under California
13 law, the interpretation of a written contract is a question of law. Citri-Lite Co. v. Cott
14 Beverages, Inc., 721 F.Supp.2d 912, 922 (E.D. Cal. 2010). So too is the question of
15 whether a contract is sufficiently definite. Hynix Semiconductor Inc. v. Rambus Inc.,
16 441 F.Supp.2d 1066, 1073 (N.D. Cal. 2006).

17 Here, Jaffe’s reply clarifies that the proposed breach of written contract claim is
18 premised on the theory that the Certificate constitutes the written contract in which
19 Demich agreed to provide insurance to Jaffe:

20 Plaintiff’s breach of written contract claim . . . is based on the Defendants’
21 promise to provide liability insurance coverage to Plaintiff. The claim is
22 premised on the law of agency and on the Certificate provided to Plaintiff. It
23 is the Certificate which constitutes the written promise by Defendants,
through their agent, to provide insurance coverage to Plaintiff.

24 (*Reply* 4:1–6.) But the Certificate’s terms do not support Jaffe’s claim that it is a written
25 contract. Printed at the top of the Certificate is the following statement:

26 **THIS CERTIFICATE IS ISSUED AS A MATTER OF**
27 **INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE**
28 **CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT**

1 **AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY**
2 **THE POLICIES BELOW.**

3 (*See Robberson Dec.* [Doc. 33-1], *Exhibit C* [Doc. 33-3] at 1, emphasis in original.) The
4 second page of the Certificate then includes the following “Disclaimer”:

5 The Certificate of Insurance on the reserve side of this form does not
6 constitute a contract between the issuing insurer(s), authorized representative
7 or producer, and the certificate holder, nor does it affirmatively or negatively
8 amend, extend or alter the coverage afforded by the policies listed thereon.

8 (*Id.* at 2.)

9 Aside from the above terms, the Certificate also fails to include the essential
10 elements of a contract. For example, assuming the document can be interpreted—at
11 best—as requiring Demich to name Jaffee as an additional insured under Demich’s
12 policy, the document fails to identify any consideration flowing to Demich. “[S]ufficient
13 cause or consideration” is an essential element of a contract under California Civil Code
14 § 1550.

15 Because the Certificate is not a written contract between Demich and Jaffe, the
16 proposed amendment would be futile.

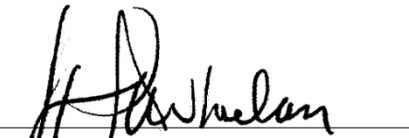
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18 **IV. CONCLUSION & ORDER**

19 For the reasons stated above, Plaintiff’s motion for leave to amend is **DENIED**
20 [Doc. 33].

21 **IT IS SO ORDERED.**

22 **IT IS SO ORDERED.**

23 Dated: March 30, 2017

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25 
26 Hon. Thomas J. Whelan
27 United States District Judge
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