

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

TRAVELERS PROPERTY CASUALTY  
COMPANY OF AMERICA, a  
Connecticut corporation,  
  
Plaintiff,

v.

MOUNTAIN MOVERS ENGINEERING  
COMPANY, INC., a California  
corporation; et al.,  
  
Defendants.

Case No.: 3:16-cv-02127-H-WVG

**ORDER GRANTING IN PART,  
DENYING IN PART, DEFENDANTS’  
MOTION FOR LEAVE TO FILE  
COUNTERCLAIMS**

[Doc. No. 41]

On April 3, 2017, Defendants Old Republic General Insurance Corporation (“ORGENCO”) and Pacific Building Group (“PBG”) (collectively, “Defendants”), filed a motion for leave to file counterclaims. (Doc. No. 41.) Defendants seek to assert claims against Travelers Property Casualty Company of America (“Plaintiff”), including both direct causes of action as judgment creditors and claims assigned to ORGENCO by Defendant Mountain Movers (“Mountain”). (Id.) On April 24, 2017, Plaintiff opposed Defendants’ motion. (Doc. No. 43.) Defendants filed a reply on April 26, 2017. (Doc. No. 44.)

///

///

1 **BACKGROUND**

2 The following facts are taken from the allegations in Defendants’ proposed  
3 counterclaims. (Doc. No. 41-1.) Defendant PBG was the general contractor hired to  
4 complete an improvement of real property located in Carlsbad, California (the “Carlsbad  
5 Property”). (Id. at ¶ 11.) PBG subsequently contracted Mountain to perform work in  
6 connection with the improvement. (Id. at ¶ 13.) As part of the agreement between PBG  
7 and Mountain, Mountain agreed to indemnify PBG for any claims arising from  
8 Mountain’s performance. (Id. at ¶ 14.) Mountain also agreed to reimburse PBG for any  
9 loss, including extra expenses and attorneys’ fees, related to Mountain’s failure to  
10 perform. (Id. at ¶ 15.) As part of its contractual obligations, Mountain obtained a  
11 commercial general liability insurance policy, No. DTE-CO-9323B76 (the “Traveler’s  
12 Policy”), from Plaintiff. (Id. at ¶ 16.)

13 On September 8, 2012, while working at the Carlsbad Property, Mountain  
14 damaged a sewer cleanout, causing a sewer backup and flooding an adjacent building.  
15 (Id. at ¶¶ 17-18.) Plaintiff was notified promptly of the damage but did not participate in,  
16 or fund, the repairs. (Id. at ¶ 20.) The total cost of the damage was \$141,880.61, of  
17 which ORGENCO paid \$131,880.61 (representing the cost minus a \$10,000 deductible).  
18 (Id. at 22.) Mountain agreed to reimburse PBG for the \$10,000 deductible. (Id. at ¶ 23.)

19 On October 8, 2012, Plaintiff informed Mountain that the Traveler’s Policy did not  
20 cover the September 8, 2012 damage because the policy included a Pollution Exclusion,  
21 as well as a Bacteria/Fungi Exclusion. (Id. at ¶ 24.) On October 19, 2012, Defendants  
22 submitted a claim to Plaintiff for the costs they incurred and were told that Plaintiff was  
23 in the process of investigating the claim. (Id. at ¶¶ 25-26.) On December 11, 2012,  
24 Plaintiff informed Defendants the Pollution Exclusion precluded coverage under the  
25 Traveler’s Policy because the accident involved sewage. (Id. at ¶ 27.)

26 Following the denial of coverage, Defendants filed suit in state court, seeking  
27 indemnification and reimbursement from Plaintiff and Mountain. (Id. at 28.) Mountain  
28 retained The Law Offices of Gregory Hout to defend it and, although Plaintiff agreed to

1 pay for Mountain’s defense, Plaintiff’s payments were late and sporadic. (Id. at ¶ 31.)  
2 Throughout the course of the litigation, Plaintiff repeatedly claimed that the September 8,  
3 2012 incident was excluded from coverage and refused Defendants’ settlement offers.  
4 (Id. at ¶¶ 36-41.)

5 On May 31, 2016, Defendants offered to settle with Mountain for a stipulated  
6 judgment of \$372,000 against Mountain in exchange for a covenant not to execute the  
7 judgment against Mountain. (Id. at ¶ 46.) Mountain reviewed the settlement offer and  
8 forwarded it to Plaintiff. (Id. at ¶ 48.) Plaintiff refused to fund the settlement offer and  
9 threatened to sue Mountain if it settled with Defendants. (Id. at ¶ 49.) On August 2,  
10 2016, Mountain entered into the Settlement Agreement with Defendants. (Id. at 34-44.)  
11 As part of the Agreement, Mountain also assigned all of its claims against Plaintiff to  
12 ORGENCO. (Id. at ¶ 52.)

13 On August 24, 2016, Plaintiff filed a complaint in federal court against Defendants  
14 alleging causes of action for (1) declaratory judgment that there was no duty to defend  
15 the underlying state court action, (2) declaratory judgment that there has been satisfaction  
16 of the duty to defend in the underlying action, (3) declaratory judgment that coverage was  
17 voided by an unauthorized settlement agreement; and (4) unjust enrichment. (Doc. No. 1  
18 ¶¶ 21-44.)

19 By the present motion, Defendants move pursuant to Federal Rule of Civil  
20 Procedure 15 for leave to file counterclaims against Plaintiff. Defendants’ proposed  
21 counterclaims allege eleven causes of action, including (1) a judgment creditor action  
22 pursuant to California Insurance Code Section 11580, (2) an action for breach of contract,  
23 (3) multiple actions for breach of the implied covenant of good faith and fair dealing, (4)  
24 a declaratory judgment action seeking to disqualify Plaintiff’s counsel, and (5) an action  
25 for punitive damages.

26 ///

27 ///

28 ///

1 **DISCUSSION**

2 **I. LEGAL STANDARDS FOR A MOTION TO AMEND PLEADINGS**

3 Federal Rule of Civil Procedure 15(a) allows a party leave to amend its pleading  
4 once as a matter of right within twenty-one days after service of a responsive pleading.  
5 Fed. R. Civ. P. 15(a). Thereafter, “a party may amend its pleading only with the  
6 opposing party’s written consent or the court’s leave. The court should freely give leave  
7 when justice so requires.” *Id.* In the Ninth Circuit, this policy is “applied with extreme  
8 liberality.” *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir.  
9 2001) (quoting *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.  
10 1990)).

11 “The court considers five factors in assessing the propriety of leave to amend—bad  
12 faith, undue delay, prejudice to the opposing party, futility of amendment, and whether  
13 the plaintiff has previously amended the complaint.” *United States v. Corinthian*  
14 *Colleges*, 655 F.3d 984, 995 (9th Cir. 2011) (citing *Johnson v. Buckley*, 356 F.3d 1067,  
15 1077 (9th Cir. 2004)); accord *In re W. States Wholesale Natural Gas Antitrust Litig.*, 715  
16 F.3d 716, 738 (9th Cir. 2013). The five factors do not share “equal weight” and “it is the  
17 consideration of prejudice to the opposing party that carries the greatest weight.”  
18 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). “Absent  
19 prejudice, or a strong showing of any of the remaining [] factors, there exists a  
20 presumption under Rule 15(a) in favor of granting leave to amend.” *Id.* The decision  
21 whether to grant leave to amend “is entrusted to the sound discretion of the trial court.”  
22 *Pisciotta v. Teledyne Indus.*, 91 F.3d 1326, 1331 (9th Cir. 1996).

23 **II. ANALYSIS**

24 **A. Prior Amendments, Undue Delay, Prejudice, and Bad Faith**

25 The present motion is the first time Defendants have sought to introduce  
26 counterclaims or amend their pleadings. (Doc. No. 41.) As such there are no prior  
27 amendments for the Court to weigh in deciding whether to grant leave to amend.  
28

1 Defendants did not unduly delay in filing their counterclaims. The Scheduling  
2 Order, entered on March 3, 2017, required the parties to bring any motions to amend the  
3 pleadings on or before April 3, 2017. (Doc. No. 40.) The present motion was filed on  
4 April 3, 2017 and, thus, complies with the Court’s scheduling order.

5 Plaintiff has not alleged any prejudice they would suffer if the Court granted  
6 Defendants’ motion. (See generally Doc. No. 43.) The case is still at a relatively early  
7 stage and discovery remains open. (See Doc. No. 40 ¶ 6.) As such, there is time for  
8 Plaintiff to prepare to respond to Defendants’ counterclaims. See e.g., Coleman v.  
9 Quaker Oats Co., 232 F.3d 1271, 1292 (9th Cir. 2000) (finding prejudice where plaintiff  
10 attempted to add a new theory at the summary judgment stage); City of Los Angeles v.  
11 San Pedro Boat Works, 635 F.3d 440, 454 (9th Cir. 2011) (affirming a finding of undue  
12 prejudice where plaintiff sought to amend complaint after five out of 6 key witnesses had  
13 been deposed).

14 The bad faith element looks at whether litigants’ amendments are driven by an  
15 improper motive, for example, “seeking to prolong the litigation by adding new but  
16 baseless legal theories.” Griggs v. Pace American Group, Inc., 170 F.3d 877, 881 (9th  
17 Cir. 1999). Plaintiff broadly alleges that Defendants are bringing their counterclaims for  
18 improper purposes but provides no specific details or factual support. (Doc. No. 43 at 6.)  
19 As such, the Court does not find Defendants counterclaims have been brought in bad  
20 faith.

### 21 **B. Futility of Amendment**

22 In opposing Defendants’ motion for leave to file counterclaims, Plaintiff relies  
23 primarily on the futility of amendment factor. Specifically, Plaintiff argues that  
24 Defendants’ proposed counterclaims would be futile because the stipulated judgment  
25 between Mountain and Defendants is unenforceable, Defendants have no viable assigned  
26 claims from Mountain, and Defendants have no standing to pursue the declaratory relief  
27 they seek. (Doc. No. 43 at 5-6.) In response, Defendants argue that Plaintiff’s opposition  
28 is inconsistent with previous legal positions, Mountain properly assigned its claims to

1 Defendants, and Defendants have standing to seek their proposed declaratory relief.  
2 (Doc. No. 44 at 3-8.)

3 1. Legal Standards for Futility

4 The Court may reject a motion for leave to amend if the proposed amendment  
5 would be futile. Carrico v. City & Cty. Of San Francisco, 656 F.3d 1002, 1008 (9th Cir.  
6 2011). A proposed amendment is futile where it would be subject to dismissal if allowed.  
7 Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1298 (9th Cir. 1998); see also Jones v.  
8 Community Redevelopment Agency of City of Los Angeles, 733 F.2d 646, 650 (9th Cir.  
9 1984) (denying leave to amend complaint where “proposed complaint would still fail to  
10 state a section 1983 claim”). “In assessing futility, the district court must apply the  
11 standard which applies to motions to dismiss under Fed. R. Civ. P. 12(b)(6).” F.D.I.C. v.  
12 Twin Development, LLC, 2012 WL 1831639, \*6 (S.D. Cal. May 18, 2012) (quoting  
13 Adorno v. Crowley Towing & Transp. Co., 443 F.3d 122, 126 (1st Cir. 2006)).

14 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal  
15 sufficiency of the pleadings and allows a court to dismiss a complaint if the plaintiff has  
16 failed to state a claim upon which relief can be granted. See Conservation Force v.  
17 Salazar, 646 F.3d 1240, 1241 (9th Cir. 2011). A complaint will survive a motion to  
18 dismiss if it contains “enough facts to state a claim to relief that is plausible on its face.”  
19 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). “A claim has facial plausibility  
20 when the plaintiff pleads factual content that allows the court to draw the reasonable  
21 inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556  
22 U.S. 662, 678 (2009). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic  
23 recitation of the elements of a cause of action will not do.’” Id. (quoting Twombly, 550  
24 U.S. at 555). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of  
25 ‘further factual enhancement.’” Id. (quoting Twombly, 550 U.S. at 557). Accordingly,  
26 dismissal for failure to state a claim is proper where the claim “lacks a cognizable legal  
27 theory or sufficient facts to support a cognizable legal theory.” Mendondo v. Centinela  
28 Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008).

1 In determining whether a plaintiff has adequately stated a claim for relief, a district  
2 court must accept as true all facts alleged in the complaint, and draw all reasonable  
3 inferences in favor of the plaintiff. See Retail Prop. Trust v. United Bhd. of Carpenters &  
4 Joiners of Am., 768 F.3d 938, 945 (9th Cir. 2014); In re Bill of Lading Transmission &  
5 Processing Sys. Patent Litig., 681 F.3d 1323, 1331 (Fed. Cir. 2012). But, a court need  
6 not accept “legal conclusions” as true. Iqbal, 556 U.S. at 678. Further, it is improper for  
7 a court to assume the plaintiff “can prove facts which it has not alleged or that the  
8 defendants have violated the . . . laws in ways that have not been alleged.” Associated  
9 Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526  
10 (1983).

## 11 2. California Insurance Code § 11580 Claim

12 California Insurance Code Section 11580 requires that insurance policies issued or  
13 delivered in California include a provision that “whenever judgment is secured against  
14 the insured in an action based on bodily injury, death, or property damage, the judgment  
15 creditor may sue the insurer on the policy, subject to its terms and limitations, to recover  
16 on the judgment.” Wright v. Fireman’s Fund Ins. Companies, 11 Cal.App.4th 998, 1015  
17 (1992). To establish a claim under § 11580, a third party claimant must prove:

18 1) it obtained a judgment for bodily injury, death, or property damage, 2) the  
19 judgment was against a person insured under a policy that insures against  
20 loss or damage resulting from liability for personal injury or insures against  
21 loss of or damage to property caused by a vehicle or draught animal, 3) the  
22 liability insurance policy was issued by the defendant insurer, 4) the policy  
23 covers the relief awarded in the judgment, 5) the policy either contains a  
24 clause that authorizes the claimant to bring an action directly against the  
25 insurer or the policy was issued or delivered in California and insures  
26 against loss or damage resulting from liability for personal injury or insures  
27 against loss of or damage to property caused by a vehicle or draught animal.  
28

1 Id. The only element at issue here is the first one. Plaintiff claims the stipulated  
2 judgment between Mountain and Defendants is void and cannot bind Plaintiff.

3 As a general rule, “a stipulated judgment between the insured and the injured  
4 claimant, without the consent of the insurer, is ineffective to impose liability upon the  
5 insurer.” Safeco Ins. Co. v. Superior Court, 71 Cal.App.4<sup>th</sup> 782, 787 (1999). However, as  
6 an exception to this rule, stipulated judgments may bind the insurer if the insurer  
7 “wrongfully refuses to defend” or unreasonably refuses to settle. Id. at 788; accord  
8 Wright v. Fireman’s Fund Ins. Companies, 11 Cal.App.4<sup>th</sup> 998 (1992) (collecting cases).  
9 Defendants’ allege that Plaintiff failed to promptly pay Mountain’s defense counsel and,  
10 at the time of settlement, Mountain had no assurances that Plaintiff would continue  
11 paying defense counsel. (Doc. No. 41-1 ¶ 45.) Furthermore, Defendants allege that  
12 Plaintiff refused to consider their settlement offers and maintained a “zero offer”  
13 settlement position throughout the course of litigation. (Id. at ¶¶ 42-44.) Accepting these  
14 facts as true, and drawing all reasonable inferences in Defendants’ favor, Defendants  
15 have adequately alleged that Plaintiff wrongfully refused to defend Mountain or  
16 unreasonably refused to settle. Iqbal, 556 U.S. at 678. As such, questions of fact remain  
17 as to whether the stipulated judgment is binding on Plaintiff.

18 Plaintiff also argues the stipulated judgment is unenforceable because the total  
19 judgment amount, \$372,000, includes costs and attorneys’ fees which should have been  
20 fixed by the court, but were not. Plaintiff argues that under California Civil Code § 1717,  
21 “[t]he reasonable attorney’s fees shall be fixed by the court, and shall be an element of  
22 the costs of suit.” (Doc. No. 43 at 10.) Plaintiff, however, cites no cases holding that a  
23 stipulated judgment is unenforceable because the parties’ included attorney’s fees in their  
24 settlement amount. Indeed, California Code of Civil Procedure § 1033.5(c)(5) provides  
25 precisely for such a situation: “[a]ttorney’s fees allowable as costs . . . shall be fixed  
26 either upon a noticed motion or upon entry of a default judgment, unless otherwise  
27 provided by stipulation of the parties.” Cal. Civ. C. Proc. §1033.5(c)(5). The fact that  
28 these additional costs increased the amount of the stipulated judgment does not, without

1 more, render it void. In their counterclaims, Defendants seek “all *or part of*” the  
2 stipulated judgment and Plaintiff may contest the actual amount of insured’s damages.  
3 See Wright v. Fireman’s Fund Ins. Companies, 11 Cal.App.4<sup>th</sup> 998, 1018 (1992) (“in a  
4 later suit against the insurer the reasonable settlement may be used as presumptive  
5 evidence of the insured’s liability on the underlying claim and the amount of such  
6 liability”). As such, Plaintiff has failed to prove futility.

7 Because Defendants have plead facts sufficient to make out a case under § 11580,  
8 the Court finds that amending the pleadings to allow their first cause of action would not  
9 be futile and grants their motion as to that cause of action.

### 10 3. Mountain’s Assigned Causes of Action

11 The remaining causes of action are brought by ORGENCO as an assignee of  
12 Mountain’s rights, which were assigned to ORGENCO as part of the stipulated judgment.  
13 (Doc. No. 41-1 ¶ 61.) These rights include “all rights [Mountain] may have against  
14 [Plaintiff] . . . including but not limited to the right to indemnity under the Travelers’  
15 insurance policies and the right to pursue a cause of action for breach of the implied  
16 covenant of good faith and fair dealings.” (Doc. No. 41-1 at 40.) In return for the  
17 assignment, as well as the stipulation to judgment, Defendants agreed not to execute the  
18 judgment against Mountain. (Id.) Plaintiff argues that none of Mountain’s assigned  
19 causes of action are enforceable because Mountain has suffered no damages in light of  
20 the covenant not to execute.

21 “California, as set forth both in case law and by statute, maintains a policy  
22 encouraging the free transferability of all types of property.” Essex Ins. Co. v. Five Star  
23 Dye House, Inc., 38 Cal.4<sup>th</sup> 1252, 1259 (2006) (“We start from the proposition that  
24 assignability is the rule.”) Accordingly, “[a]ctions for bad faith against an insurer have  
25 generally been held to be assignable, including claims for breach of the duty to defend.”  
26 Id. at 1263 (citations omitted). Plaintiff argues this general rule of assignability does not  
27 apply when the stipulated judgment includes a covenant not to execute. (Doc. No. 43 at  
28 12-13.) But as the Court explained in the previous section, where an insurer fails to

1 defend an insured, or unreasonably refuses to settle, Courts will enforce settlements not  
2 approved by the insurer regardless of whether they contain covenants not to enforce.  
3 Safeco Ins. Co. v. Superior Court, 71 Cal.App.4th at 787, 789 (“The insured’s remedy to  
4 protect himself from an excess judgment is to assign to the claimant his cause of action  
5 for bad faith refusal to settle in exchange for a covenant not to enforce the judgment  
6 against the insured’s personal assets.”) This analysis is not affected by the inclusion of  
7 non-recoverable fees in the stipulated judgment. “Although some damages potentially  
8 recoverable in a bad faith action, including damages for emotional distress and punitive  
9 damages, are not assignable, the cause of action itself remains freely assignable.” Essex  
10 Ins. Co., 38 Cal.4th at 1263.

11 As Defendants have adequately alleged that Mountain was entitled to assign its  
12 claims against Plaintiff, ORGENCO’s counterclaims are not futile, and the Court grants  
13 leave to file the second through the ninth causes of action.

#### 14 4. Declaratory Relief Claim

15 Defendants’ tenth cause of action seeks declaratory relief disqualifying Plaintiff’s  
16 counsel from working on any matter to which Mountain is a litigant or has an interest in,  
17 as well as equitably estopping Plaintiff from contesting the economic damages in the  
18 underlying state court action. (Doc. No. 41-1 at 27.) Plaintiff opposes this counterclaim  
19 on the grounds that Defendants lack standing to disqualify Plaintiff’s counsel or,  
20 alternatively, the issue should be raised through a motion to disqualify. (Doc. No. 43 at  
21 14-16.)

22 The Declaratory Judgment Act grants courts the power to “declare the rights and  
23 other legal relations of any interested party.” 28 U.S.C. § 2201. This power is  
24 discretionary and courts consider various prudential factors in deciding whether to  
25 exercise it. American States Ins. Co. v. Kearns, 15 F.3d 142, 144 (9th Cir. 1994) (“The  
26 statute gives discretion to courts in deciding whether to entertain declaratory  
27 judgments.”). These prudential factors include “concerns of judicial administration,  
28 comity, and fairness to the litigants.” Id. (quoting Chamberlain v. Allstate Ins. Co., 931

1 F.2d 1361, 1367 (9th Cir. 1991)). None of these factors weigh in favor of allowing  
2 Defendants to proceed with their declaratory judgment cause of action.

3 Courts “properly may refuse declaratory relief if the alternative remedy is better or  
4 more effective.” Federal Practice & Procedure § 2758 (collecting cases); accord Gov’t  
5 Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1223 n.5 (9th Cir. 1998) (en banc) (courts  
6 can consider “the availability and relative convenience of other remedies”). Here,  
7 Defendants have a superior remedy available: a motion to disqualify. Such a motion is  
8 regularly employed to disqualify attorneys. E.g., Ultimate Fitness Center, LLC v.  
9 Wilson, 2016 WL 6834001, \*6 (S.D. Cal. Nov. 21, 2016) (considering a motion to  
10 disqualify counsel who might be called as a witness); United States v. Hall Family Trust  
11 Dated June 8, 2001, 2017 WL 1135593, \*4 (S.D. Cal. March 27, 2017) (“if [the party]  
12 had any reason to believe he was not proper counsel, they should have raised the issue in  
13 a motion to disqualify”). Furthermore, a motion to disqualify squarely frames the issue  
14 for the Court and provides a timely resolution of an issue that affects the ongoing  
15 litigation. In contrast, an action seeking a declaratory judgment that an attorney should  
16 be disqualified likely will not be resolved until the case itself is resolved; at which point  
17 there is little point to disqualifying counsel.

18 In addition to being an inferior remedy, Defendants’ proposed declaratory relief  
19 raises concerns of comity. In addition to seeking to disqualify Plaintiff’s counsel in the  
20 federal court action, Defendants seek to disqualify counsel in the underlying state court  
21 action and equitably estop Plaintiff from contesting the economic damages in that case.  
22 (Doc. No. 41-1 ¶ 119-20.) Generally, federal courts disfavor interfering with state court  
23 proceedings. See Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716-17 (1996)  
24 (reviewing cases holding federal courts should refrain from hearing because they would  
25 interfere with pending state proceedings); Gov’t Employees Ins. Co., 133 F.3d at 1223  
26 n.5 (courts should consider “whether the use of a declaratory action will result in  
27 entanglement between the federal and state court systems”). This general principle is  
28 “out of deference to the paramount interests of another sovereign, and the concern is with

1 principles of comity and federalism. Quackenbush, 517 U.S. at 723. Defendants cite no  
2 authority showing that disqualifying counsel is an exception to the general rule and the  
3 Court can see no reason to deviate from the general principle of avoiding entanglement  
4 with state court proceedings.

5 Finally, Defendants have provided no reason to think it would be unfair to require  
6 they pursue their relief through a motion to disqualify, rather than a declaratory  
7 judgment. Indeed, if Defendants believe they are injured by Plaintiff’s counsel’s  
8 involvement in the matter, a motion to disqualify will be most likely to remedy the injury  
9 because it can be decided promptly, while the case is ongoing.

10 For the foregoing reasons, the Court finds that the various prudential factors weigh  
11 against allowing Defendants to pursue their declaratory judgment action. As such, the  
12 Court exercises its discretion and denies their motion to amend with regard to the  
13 proposed tenth cause of action. Wilton v. Seven Falls Co., 515 U.S. 277, 288 (1995).

#### 14 5. Punitive Damages Claim

15 Defendants’ last cause of action is styled as a cause of action for punitive damages.  
16 (Doc. No. 41-1 ¶¶122-27.) However, “[i]n California, it is settled there is no separate  
17 cause of action for punitive damages. Instead, a claim for punitive damages is merely an  
18 additional remedy that is dependent on a viable cause of action for an underlying tort.”  
19 569 East County Boulevard LLC v. Backcountry Against the Dump, Inc., 6 Cal.App.5th  
20 426, 429 n.3 (2016). Accordingly, the Court exercises its discretion and denies  
21 Defendants’ motion to amend with regard to the proposed eleventh cause of action.  
22 Defendants may seek any damages available by law under their other causes of action.

23 ///

24 ///

25 ///

26 ///

27 ///

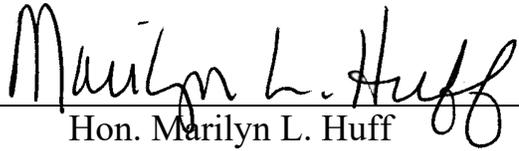
28 ///

1 **CONCLUSION**

2 For the foregoing reasons, the Court grants, in part, and denies, in part,  
3 Defendants' motion for leave to amend. (Doc. No. 41.) Defendants may file proposed  
4 counterclaims one through nine. The Court however, in its discretion, denies the motion  
5 with regards to counterclaims ten and eleven.

6 **IT IS SO ORDERED.**

7 DATED: May 3, 2017

8   
9 \_\_\_\_\_  
10 Hon. Marilyn L. Huff  
11 United States District Judge  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28