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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 MICHELLE L. MORIARTY, as  
12 Successor-In-Interest to Heron D.  
13 Moriarty, Decedent, on Behalf of  
14 the Estate of Heron D. Moriarty,  
and on Behalf of the Class,

Plaintiff,

v.

16 AMERICAN GENERAL LIFE  
17 INSURANCE COMPANY, et al.,

18 Defendants.  
19

Case No.: 3:17-cv-1709-BTM-  
WVG

**ORDER GRANTING BAYSIDE  
INSURANCE ASSOCIATES,  
INC.'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT AND  
STRIKING ITS OBJECTIONS**

**[ECF Nos. 100, 105-1]**

20 Before the Court is Defendant Bayside Insurance Associates, Inc.'s  
21 ("Bayside") motion for summary judgment (ECF No. 100 ("MSJ")). For the reasons  
22 discussed below, Bayside's motion, which the Court interprets as a motion for  
23 partial summary judgment, is **GRANTED**.

24 **I. BACKGROUND**

25 In September 2012, Bayside, an insurance brokerage firm, procured a term  
26 life insurance policy for the decedent, Heron D. Moriarty ("Mr. Moriarty"), with  
27 American General Life Insurance Company (American General). (ECF No. 18  
28

1 (“FAC”), ¶ 15; MSJ, 5:12–13; *id.* at Exh. 3, 94:6–23.) Mr. Moriarty had an automatic  
2 payment schedule set up with American General for his premium payments. (MSJ,  
3 6:11–12; *id.* at Exh. 3, 95:10–17, 97:3–5.) On the 20th day of each month,  
4 American General would deduct the monthly premium from his bank account.  
5 (MSJ, 6:11–12; *id.* at Exh. 3, 95:10–17, 97:3–5.) On March 24, 2016, American  
6 General was unable to process Mr. Moriarty’s automatic monthly payment because  
7 the associated bank account had been closed. (FAC ¶ 27; MSJ, 6:14–19.)

8 On April 25, 2016, Plaintiff, Mr. Moriarty’s wife, emailed Bayside agent Jiman  
9 Kim the following: “Hello! Can you please give me the information on our life  
10 insurance. I need to pay it before it expires. I didn’t realize it was connected to an  
11 account we closed.” (MSJ, Exh. 7.) Mr. Kim responded the next day explaining  
12 he was “trying to have a team follow up on status with [American General].” (*Id.*)  
13 He also sent Plaintiff information about the policy and American General’s direct  
14 phone number. (*Id.*) Plaintiff emailed Mr. Kim back on April 27, 2016 asking if it  
15 was too late. (*Id.* at Exh. 8.) There was no subsequent response from Mr. Kim or  
16 Bayside about this inquiry.

17 No further payments were made on Mr. Moriarty’s policy before May 22,  
18 2016, when American General terminated the policy. (FAC, ¶¶ 29–30; MSJ, Exh.  
19 10; ECF No. 101-1 (“Pl.’s Decl.”), ¶ 19) The policy was terminated as of the date  
20 of the lapsed payment: March 20, 2016. (FAC, ¶¶ 29–30; MSJ, Exh. 10.)

21 Mr. Moriarty passed away on May 31, 2016. (MSJ, Exh. 1, p. 70.) Plaintiff  
22 submitted a claim on Mr. Moriarty’s life insurance policy on June 22, 2016. (*Id.* at  
23 Exh. 1, p. 73.) American General denied the claim on July 6, 2016 stating the  
24 policy had terminated as of March 20, 2016. (ECF No. 101 (“Pl.’s Opp.”), Exh. B,  
25 p. 54)

26 Plaintiff, individually, on behalf of Mr. Moriarty’s estate, and on behalf of the  
27 proposed class, sued Bayside and American General for various claims arising  
28 from these events. She sued Bayside for negligence under theories of

1 professional negligence and negligent misrepresentation. (FAC, ¶ 96.) Plaintiff  
2 also included Bayside as a defendant in her Cal. Bus. & Prof. Code § 17200 claim  
3 but did not intend to do so. (See ECF No. 100-2 (“Byer Decl.”), ¶ 3.) Bayside  
4 moves for summary judgment, which Plaintiff opposes.

## 5 II. STANDARD

6 Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil  
7 Procedure if the moving party demonstrates the absence of a genuine issue of  
8 material fact and entitlement to judgment as a matter of law. *Celotex Corp. v.*  
9 *Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under the governing  
10 substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby,*  
11 *Inc.*, 477 U.S. 242, 248 (1986); *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir.  
12 1997). A dispute is genuine if a reasonable jury could return a verdict for the  
13 nonmoving party. *Anderson*, 477 U.S. at 248.

14 A party seeking summary judgment always bears the initial burden of  
15 establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at  
16 323. The moving party can satisfy this burden in two ways: (1) by presenting  
17 evidence that negates an essential element of the nonmoving party’s case; or (2)  
18 by demonstrating that the nonmoving party failed to establish an essential element  
19 of the nonmoving party’s case on which the nonmoving party bears the burden of  
20 proving at trial. *Id.* at 322–23. Once the moving party establishes the absence of  
21 genuine issues of material fact, the burden shifts to the nonmoving party to set  
22 forth facts showing that a genuine issue of disputed fact remains. *Celotex*, 477  
23 U.S. at 314. When ruling on a summary judgment motion, the court must view all  
24 inferences drawn from the underlying facts in the light most favorable to the  
25 nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.  
26 574, 587 (1986).

## 27 III. ANALYSIS

28 Plaintiff presents two theories of negligence against Bayside: professional

1 negligence and negligent misrepresentation. (FAC, ¶ 96.) Bayside moves for  
2 summary judgment on only the professional negligence theory. In one footnote of  
3 its reply brief, Bayside asserts that it did not need to move for summary judgment  
4 on negligent misrepresentation because Plaintiff never properly raised this claim  
5 in the complaint since “[i]nserting the words ‘negligent misrepresentation’ into an  
6 allegation [of negligence] is insufficient to create an entirely separate[] claim for  
7 relief.” (ECF No. 105, 7:25–28.) While negligent misrepresentation is “a separate  
8 and distinct tort,” *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 407 (1992), Bayside  
9 chose not to move under Federal Rule of Civil Procedure 8 to dismiss the complaint  
10 as a shotgun pleading or under Rule 12 for a more definite statement. Summary  
11 judgment is not the proper stage to address the question of shotgun pleadings.  
12 Plaintiff’s negligent misrepresentation claim against Bayside still stands because  
13 Bayside failed to address it in its motion, so the Court interprets Bayside’s motion  
14 as one for *partial* summary judgment.

15 With respect to professional negligence, Bayside asserts that it owed no duty  
16 to Plaintiff. The existence of a duty is a question of law that is proper for the Court  
17 to determine on summary judgment. *Hayes v. Cty. of San Diego*, 736 F.3d 1223,  
18 1232 (9th Cir. 2013); *Parsons v. Crown Disposal Co.*, 15 Cal. 4th 456, 465 (1997).  
19 To succeed on a claim of professional negligence, Plaintiff must show that Bayside  
20 owed “the duty of the professional to use such skill, prudence, and diligence as  
21 other members of his profession commonly possess and exercise.” *Paul v. Patton*,  
22 235 Cal. App. 4th 1088, 1095 (2015) (internal quotation marks and citation  
23 omitted).

24 In general, a broker holds “limited duty” to its clients “to use reasonable care,  
25 diligence, and judgment in *procuring* the insurance requested by an insured.” *Pac.*  
26 *Rim Mechanical Contractors, Inc. v. Aon Risk Ins. Servs. W., Inc.*, 203 Cal. App.  
27 4th 1278, 1283 (2012). A broker may also assume a “special duty” either “by  
28 express agreement or by the agent holding himself out to be more than an ‘ordinary

1 agent.” *Paper Savers, Inc. v. Nacsa*, 51 Cal. App. 4th 1090, 1096 (1996) (citation  
2 omitted).

3 Plaintiff does not allege that Bayside negligently procured Mr. Moriarty’s  
4 policy. Instead, Plaintiff argues that Bayside “assumed a general and special duty  
5 of care to investigate the status of the Policy and its potential forfeiture and to fully  
6 and promptly communicate to Plaintiff . . . what actions and steps could and should  
7 be taken to avoid termination of the Policy.” (FAC, ¶ 103.) The Court thus  
8 considers only whether Bayside *assumed* the “broad duty to assist in the  
9 preservation of coverage,” (Pl.’s Opp., 6:20–21). See *Pac. Rim Mechanical*  
10 *Contractors, Inc. v. Aon Risk Ins. Servs. W., Inc.*, 203 Cal. App. 4th 1278, 1283  
11 (2012).

12 The facts do not support that Bayside owed such a duty either out of an  
13 express agreement or through its assertion of additional expertise. Accordingly,  
14 this claim must be analyzed as a negligent undertaking. This theory of liability  
15 requires the same elements as any negligence claim: duty, breach, causation, and  
16 damages. *Paz v. State of Cal.*, 22 Cal. 4th 550, 559 (2000) (citing Restatement  
17 2d of Torts §324A). “[O]ne who undertakes to aid another is under a duty to  
18 exercise due care in acting and is liable if the failure to do so increases the risk of  
19 harm or if the harm is suffered because the other relied on the undertaking.” *Id.* at  
20 558–59 (citation omitted). Mr. Kim’s email to Plaintiff indicates that Bayside only  
21 undertook to check on the status of the policy with American General. It did not  
22 undertake to advise Plaintiff as to the steps she needed to take to avoid  
23 termination. In fact, Bayside gave Plaintiff the information she needed to pay the  
24 premium. All she had to do was call American General.

25 Nevertheless, in a negligent undertaking claim, the plaintiff’s recovery is  
26 limited to personal injury and property damage. *State Ready Mix, Inc. v. Moffatt &*  
27 *Nichol*, 232 Cal. App. 4th 1227, 1235 (2015); see also *Paz*, 22 Cal. 4th at 558–59.  
28 Even if Bayside voluntarily assumed a duty to Plaintiff through Mr. Kim’s email,

1 Plaintiff would be barred from recovery because she seeks only economic  
2 damages. (FAC ¶ 105.) Bayside’s motion for partial summary judgment is  
3 **GRANTED**.

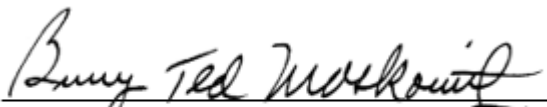
4 Under this Court’s civil chambers rules, “objections to evidence submitted in  
5 support of an opposition must be contained within the reply brief” and “[a]ny  
6 separately filed objections shall be stricken and will not be considered by the  
7 Court.” Bayside submitted objections to Plaintiff’s evidence in a separate filing  
8 rather than in its reply brief. (ECF No. 105-1.) Those objections are accordingly  
9 **STRICKEN** for failure to comply with this Court’s civil chambers rules.

10 **IV. CONCLUSION**

11 The Court **GRANTS** Bayside’s motion for partial summary judgment and  
12 **DISMISSES** Bayside from the Cal. Bus. & Prof. Code § 17200 claim based on  
13 Jeffrey Byer’s unopposed declaration that Plaintiff’s counsel erroneously included  
14 Bayside as a defendant therein. (MSJ, 5:25–28; Byer’s Decl., ¶ 3.) Plaintiff’s  
15 negligent misrepresentation claim against Bayside still stands. Bayside’s  
16 objections to Plaintiff’s evidence (ECF No. 105-1) are **STRICKEN**.

17 **IT IS SO ORDERED.**

18 Dated: March 27, 2020

19   
20 Honorable Barry Ted Moskowitz  
21 United States District Judge  
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