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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JAMES DAVIS, et al.,
Plaintiffs,
v.
SENTINEL INSURANCE COMPANY,
Defendant.

Case No.: 17-CV-1845 W (JLB)

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS WITH
LEAVE TO AMEND [DOC. 5]**

Pending before the Court is Defendant Sentinel Insurance Company’s motion to dismiss Plaintiffs’ fraud cause of action and punitive damage claim. Plaintiffs have filed a document titled “Certificate of Service of Plaintiffs’ Opposition to Defendant’s Motion to Dismiss”, which simply states in conclusory terms that Plaintiffs’ claims are sufficiently pled and, alternatively, requests leave to amend. (*Opp’n* [Doc. 6] 1:23–2:3.) The documents does not address any of the specific points raised by Sentinel.

The Court decides the matter on the papers submitted and without oral argument. See Civ.L.R. 7.1 (d.1). For the reasons stated below, the Court **GRANTS** Defendant’s motion to dismiss with leave to amend [Doc. 5].

1 **I. BACKGROUND**

2 In this insurance coverage dispute, Plaintiffs are suing Sentinel for (1) breach of
3 contract, (2) breach of the implied covenant of good faith, and (3) fraud. (*See Compl.*¹)
4 The fraud cause of action is based on Sentinel’s alleged failure to timely investigate and
5 pay Plaintiffs’ uninsured motorist claim. Plaintiffs also seek punitive damages.

6 Sentinel argues the fraud cause of action and request for punitive damages are
7 insufficiently pled. The Court agrees.

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9 **II. LEGAL STANDARD**

10 The court must dismiss a cause of action for failure to state a claim upon which
11 relief can be granted. Fed.R.Civ.P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)
12 tests the complaint’s sufficiency. See N. Star Int’l v. Ariz. Corp. Comm’n., 720 F.2d
13 578, 581 (9th Cir. 1983). All material allegations in the complaint, “even if doubtful in
14 fact,” are assumed to be true. Id. The court must assume the truth of all factual
15 allegations and must “construe them in light most favorable to the nonmoving party.”
16 Gompper v. VISX, Inc., 298 F.3d 893, 895 (9th Cir. 2002); see also Walleri v. Fed.
17 Home Loan Bank of Seattle, 83 F.3d 1575, 1580 (9th Cir. 1996).

18 As the Supreme Court has explained, “[w]hile a complaint attacked by a Rule
19 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s
20 obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels
21 and conclusions, and a formulaic recitation of the elements of a cause of action will not
22 do.” Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955, 1964 (2007). Instead, the allegations
23 in the complaint “must be enough to raise a right to relief above the speculative level.”
24 Id. at 1964-65. A complaint may be dismissed as a matter of law either for lack of a

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28 ¹ The Complaint is attached as Exhibit A to Sentinel’s Request for Judicial Notice [Doc. 1-4] filed in support of the Notice of Removal [Doc. 1].

1 cognizable legal theory or for insufficient facts under a cognizable theory. Robertson v.
2 Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984).

3 Generally, courts may not consider material outside the complaint when ruling on a
4 motion to dismiss. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542,
5 1555 n.19 (9th Cir. 1990). However, courts may consider documents specifically
6 identified in the complaint whose authenticity is not questioned by parties. Fecht v. Price
7 Co., 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (superseded by statutes on other grounds).
8 Moreover, courts may consider the full text of those documents, even when the complaint
9 quotes only selected portions. Id. The court may also consider material properly subject
10 to judicial notice without converting the motion into one for summary judgment. Barron
11 v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994).

12 13 **III. DISCUSSION**

14 **A. Plaintiffs have failed to allege claims for fraud and punitive damages.**

15 Sentinel argues Plaintiffs' fraud cause of action is insufficient under Federal Rule
16 of Civil Procedure Rule 9(b). The rule provides that "[i]n alleging fraud or mistake, a
17 party must state with particularity the circumstances constituting fraud or mistake.
18 Malice, intent, knowledge, and other conditions of a person's mind may be alleged
19 generally." Fed. R. Civ. P. 9(b). The rule applies to all causes of action based in fraud.
20 Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1102–5 (9th Cir. 2003). It requires "the
21 circumstances constituting the alleged fraud [to] be specific enough to give defendants
22 notice of the particular misconduct so that they can defend against the charge and not just
23 deny that they have done anything wrong." Id. at 1106 (internal citations and quotation
24 marks omitted). Thus, to survive a challenge based on Rule 9(b), a complaint must allege
25 the "who, what, when, where, and how" of the misrepresentation. Id. The complaint
26 must also explain why the representation complained of was false. Id.

27 Here, Plaintiffs' fraud cause of action completely omits any attempt to detail the
28 who, when and where. Additionally, many of the "whats" (i.e., the fraudulent

1 statements) are nothing more than statements regarding Sentinel’s contractual
2 obligations, such as that Sentinel “will provide coverage for UM/UIM claims.” (*Compl.*
3 ¶ 9.) Those alleged representations are insufficient because the Complaint fails to
4 provide any facts suggesting that the representations were false when made. See Smith v.
5 Allstate Insurance Co., 160 F.Supp.2d 1150, 1154 (S.D. Cal. 2001). Other alleged false
6 representations relate to matters of opinion, such as that “SENTINEL is a ‘great’
7 insurance company unlike some of its competitors.” (*Compl.* ¶ 9.) “Representations of
8 opinion are ordinarily not actionable for fraud because they contain judgments of quality,
9 value, authenticity, or other matters of judgment. [Citation omitted.]” Smith, at 1154.
10 For these reasons, Plaintiffs’ fraud cause of action fails to comply with Rule 9(b) and thus
11 must be dismissed.

12 Similarly, the Complaint is devoid of any allegations indicating that Sentinel is
13 entitled to punitive damages. To assert a claim for punitive damages, Plaintiffs must
14 plead allegations supporting an inference that Sentinel acted with fraud, oppression or
15 malice. Smith v. Superior Court, 10 Cal.App.4th 1033 (1992). Here, Plaintiffs
16 essentially allege that after Plaintiff James Davis was involved in an accident with a
17 drunk driver, they submitted a UM/UIM claim to Sentinel. (*Compl.* ¶¶ 11, 12.) Plaintiffs
18 allege that despite their demand that Sentinel cooperate in getting the matter to
19 arbitration, it conducted no discovery and did not engage in any timely investigation, and
20 from February to December 2016 did nothing to advance resolution of Plaintiffs’ claims.
21 (*Id.* ¶ 12.) Plaintiffs also allege that Sentinel’s settlement offers were far lower than the
22 amount ultimately awarded by an arbitrator. (*Id.* ¶ 24.) These allegations are insufficient
23 to support a claim that Sentinel acted with fraud, oppression or malice. Accordingly the
24 Court will also grant the motion with respect to Plaintiffs’ punitive damage claim.

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26 **B. Plaintiffs are entitled to leave to amend.**

27 Sentinel argues Plaintiffs should not be given leave to amend the Complaint,
28 arguing leave would be futile because the allegations in the Complaint contradict any

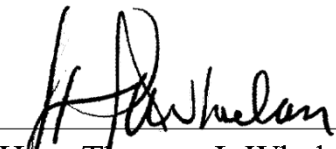
1 fraud or punitive damage claim based on the theory that Sentinel never intended to
2 perform under the policy. (*Reply* [Doc. 8] 3:18–28.) Even if Sentinel was correct, it does
3 not preclude Plaintiffs from raising an alternative fraud theory, i.e., one not based on
4 Sentinel’s failure to perform its contractual obligations. Because Federal Rule of Civil
5 Procedure 15(a) requires that leave to amend be freely given, the Court must grant
6 Plaintiffs leave to amend.

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8 **IV. CONCLUSION & ORDER**

9 For the foregoing reasons, the Court **GRANTS WITH LEAVE TO AMEND**
10 Sentinel’s motion to dismiss [Doc. 6] the fraud cause of action and punitive damage
11 claim. To the extent Plaintiffs intend to file an amended complaint, it must be filed on or
12 before **March 26, 2017**.

13 **IT IS SO ORDERED.**

14 Dated: March 14, 2018

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17 Hon. Thomas J. Whelan
18 United States District Judge
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