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

BANK OF SOUTHERN CALIFORNIA,  
N.A., a California corporation;  
SOUTHERN CALIFORNIA BANCORP,  
a California corporation,  
  
Plaintiffs,  
  
v.  
  
EVEREST NATIONAL INSURANCE  
COMPANY, a corporation; DOES 1  
through 20, inclusive,  
  
Defendants.

Case No.: 22-CV-00737-GPC-RBB  
  
**ORDER GRANTING DEFENDANT  
EVEREST NATIONAL INSURANCE  
COMPANY’S MOTION TO DISMISS  
THE THIRD CAUSE OF ACTION  
AND WITH LEAVE TO AMEND**  
  
[Dkt. No. 3.]

Presently before the Court is Defendant’s motion to dismiss with prejudice the third cause of action for specific performance under Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 3.) Plaintiffs filed an opposition and Defendant replied. (Dkt. Nos. 6, 7.) For the reasons set forth below, the Court GRANTS Defendant’s motion to dismiss the third cause of action under Rule 12(b)(6) with prejudice but GRANTS Plaintiffs leave to file an amended complaint.

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## PROCEDURAL BACKGROUND

On April 25, 2022, Plaintiffs Bank of Southern California, N.A. (“SoCal Bank”) and Southern California Bancorp (“SoCal Bancorp”) (collectively “Plaintiffs”) filed a complaint in the Superior Court of the State of California for the County of San Diego against Defendant Everest National Insurance Company (“Defendant” or “Everest”). (Dkt. No. 1-2, Compl.) The complaint alleges four causes of action for (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) specific performance; and (4) declaratory relief. (*Id.*) Defendant removed the case to this Court on May 23, 2022. (*Id.*) On May 31, 2022, Defendant filed the instant motion to dismiss the third cause of action for specific performance which is fully briefed. (Dkt. Nos. 3, 6, 8.)

## FACTUAL BACKGROUND

### A. The Insurance Policy

According to the complaint, around July 1, 2018, Defendant issued a Directors & Officers Liability Insurance Policy No. 8100002727-181 (the “Policy”) to Plaintiffs with a policy period of July 1, 2018, to July 1, 2021. (Dkt. No. 1-2, Compl. ¶ 21.) The Policy is a claims-made policy with aggregate limits of \$11 million, which includes defense fees and costs. (Dkt. No. 1-2, Compl., Ex. A, Policy at 24.<sup>1</sup>) SoCal Bank is the named insured. (*Id.* at 24.) “Insured Person, either in singular or plural, means any past, present, or future director, member of the board of trustees, officer, Employee, honorary or advisory director, or honorary or advisory member of the board of trustees of the Company.” (*Id.*, Policy § 4 at 29.) Company includes SoCal Bank and any subsidiary in existence during the Policy Period which includes SoCal Bancorp. (*Id.*, Policy, § IV at 28.)

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<sup>1</sup> Page numbers are based on the CM/ECF pagination.

1           The Policy includes coverage, with a limit of \$5,000,000, for Insured Persons  
2 Liability, (Coverage A), Company Indemnification, (Coverage B), and a limit of  
3 \$4,000,000 for an additional Broad Form Company Liability Coverage (“BFCL”). (*Id.* at  
4 25.) Under Coverage A, “[t]he Insurer will pay on behalf of the Insured Persons, Loss  
5 resulting from Claims first made during the Policy Period or the Discovery Period against  
6 the Insured Persons for Wrongful Acts for which the Insured Persons are legally  
7 obligated to pay, except for Loss the Company pays as indemnification.” (*Id.*, Policy §  
8 1(A) at 26.) Under Coverage B, “[t]he Insurer will pay on behalf of the Company, Loss  
9 resulting from Claims first made during the Policy Period or the Discovery Period against  
10 the Insured Persons for Wrongful Acts for which the Company has agreed to or is legally  
11 permitted or required by law to indemnify the Insured Persons.” (*Id.*, Policy § 1(B).)  
12 Therefore, the Policy extends coverage to the SoCal Bank’s obligation to defend and  
13 indemnify its directors and officers as “Insured Persons” under Coverage B.

14           The Policy also includes an additional Broad Form Liability Coverage which  
15 provides that the “Insurer will pay on behalf of the Company, Loss resulting from Claims  
16 first made during the Policy Period or Discovery Period against the Company for which  
17 the Company is legally obligated to pay for Wrongful Acts.” (*Id.*, Policy at 72.)

18           The Policy further provides that “[i]t shall be the duty of the Insured and not the  
19 duty of the Insurer to defend Claims.” (Dkt. No. 1-2, Compl., Ex. A, Policy at 24; 36.)  
20 This is a duty to reimburse policy and not a duty to defend policy.

21           The Policy also provides, concerning the advancement of defense costs, that  
22 “[s]ubject to Section IX, the Insurer, if requested by the Insured, shall advance covered  
23 Defense Costs on a current basis, except when advancement of Defense Costs is  
24 prohibited by law or regulation. The Insured shall repay any advanced Defense Costs to  
25 the Insurer in the event it is established that the Insurer has no liability under this Policy  
26 for such Defense Costs.” (*Id.*, Policy § VIII(B)(1) at 36.) Section IX’s allocation  
27 provision states, “[t]he Insurer and the Insured agree to use their best efforts to reach a  
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1 proper allocation of Defense Costs. If the Insured and the Insurer cannot agree on an  
2 allocation: (1) no presumption as to allocation shall exist in any arbitration, suit or other  
3 proceeding; (2) the Insurer shall advance on a current basis Defense Costs which the  
4 Insurer believes to be covered under this Policy until a different allocation is negotiated,  
5 arbitrated or judicially determined . . . .” (*Id.*, Policy § IX(B).)

#### 6 **B. The Underlying *PacWest* Action**

7 During the Policy Period, on December 1, 2020, PacWest Bancorp (“PacWest”) and Pacific Western Bank (“PacWest Bank”) (collectively “PacWest”) filed a complaint  
8 in the Los Angeles County Superior Court against David I. Rainer, a former executive,  
9 for systematically and illegally raiding their employees and clients, (“*PacWest* Action”).  
10 (Dkt. No. 1-2, Compl., Ex. C at 195.) The operative third amended complaint filed on  
11 April 1, 2022 named David I. Rainer (“Rainer”), Richard Hernandez (“Hernandez”),  
12 Diana Remington Smithson (“Smithson”), SoCal Bank, SoCal Bancorp as defendants.  
13 (*Id.*) PacWest asserts that Rainer was aided and abetted in the wholesale assault on  
14 PacWest by his new employer SoCal Bank and its holding company, SoCal Bancorp as  
15 well as by former PacWest Bank Executive Vice President, Hernandez; and former  
16 PacWest Bank Senior Vice President, Regional Manager, Smithson, who both joined  
17 Rainer at SoCal Bank. (*Id.* at 196.) PacWest argues that because of Defendants’ actions,  
18 thirty PacWest Bank’s employees left PacWest Bank to join Rainer, Hernandez and  
19 Smithson (collectively “Individual Defendants”) at SoCal Bank, “bringing with them  
20 millions of dollars in client deposits and loans.” (*Id.*) Around December 2020, Rainer,  
21 Hernandez, and Smithson retained defense counsel at Kendall Brill & Kelly LLP  
22 (“KBK”) to defend against the allegations in the *PacWest* Action. (*Id.* ¶ 59.)

#### 24 **C. Everest’s Coverage Position**

25 Around June 2021, Plaintiffs timely tendered the *PacWest* Action to Everest. (*Id.* ¶  
26 60.) On June 17, 2021, ABA Insurance Services, Inc. (“ABA”), “expressly acting on  
27 behalf of Everest as claims administrator with respect to the Claim, acknowledged receipt  
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1 of the Claim” and agreed to reimburse defense costs of SoCal Bank under the Policy and  
2 consented to Plaintiffs’ retention of Jenner & Block as SoCal Bank’s defense counsel, but  
3 it stated at the same time that “a definitive coverage analysis is not possible until the  
4 allegations set form in the Claim have been fully resolved.” (*Id.* ¶ 62.)

5         Around July 2, 2021, SoCal Bank requested defense and indemnity from  
6 Defendant for the defense fees and costs it was incurring defending Rainer in the  
7 *PacWest* Action. (*Id.* ¶ 63.) On September 10, 2021, Everest denied coverage for  
8 Rainer’s defense on the basis that the breaches and tortious conduct alleged against him  
9 were not committed in the discharge of his duties while acting “solely in the capacity” as  
10 an Insured Person of SoCal Bank. (*Id.* ¶ 64.) Everest also stated that Rainer “allegedly  
11 committed the conduct complained of prior to even joining SoCal Bank as Chairman of  
12 the Board.” (*Id.*) On October 5, 2021, Plaintiffs requested Defendant to reconsider its  
13 position and provide a response by October 19, 2021. (*Id.* ¶ 66.)

14         On October 26, 2021, Plaintiffs tendered the request for defense and indemnity of  
15 Hernandez and Smithson under the Policy and requested that Defendants provide a  
16 response by November 10, 2021. (*Id.* ¶ 67.) On December 10, 2021, Everest reaffirmed  
17 that the claims against SoCal Bank “are covered” and repeated the contention that “a  
18 definitive coverage analysis is not possible until the allegations set form in the Claim  
19 have been fully resolved.” (*Id.* ¶ 68.) On December 16, 2021, Everest reaffirmed its  
20 denial of coverage for defense fees and costs incurred by SoCal Bank in the defense of  
21 Rainer, contending that Rainer has not requested Everest to “defend or indemnify” him  
22 and that the denial of coverage for Rainer did not rely on the fact that all of the alleged  
23 conduct took place before Rainer joined SoCal Bank. (*Id.* ¶ 69.) On December 30, 2021,  
24 Everest declined any coverage obligation owed to SoCal Bank in the defense of  
25 Hernandez and Smithson in the *PacWest* Action, arguing that the allegations of wrongful  
26 conduct “relate prominently to conduct allegedly engaged in” while the respective  
27 employees were still employed by PacWest.” (*Id.* ¶ 70.)  
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1 A mediation in the *PacWest* Action was scheduled on February 25, 2022. (*Id.* ¶¶  
2 73, 74.) On February 24, 2022, Everest maintained that it would contribute only a small  
3 percentage toward any settlement and expected Plaintiffs to fund the majority of any  
4 settlement. (*Id.* ¶ 73.) A settlement was not reached at the February 25, 2022 mediation.  
5 (*Id.* ¶ 75.) Plaintiffs agreed to defend and indemnify Rainer, Hernandez and Smithson in  
6 the *PacWest* Action since the claims include conduct while they were acting solely in  
7 their capacity of employees of So Cal. Bank. (*Id.* ¶ 76.) To date, Plaintiffs have paid  
8 more than \$400,000 in defense fees and costs toward the defense of the Individual  
9 Defendants in the *PacWest* Action and Defendants continue to refuse to reconsider its  
10 denial of a defense and of covered owed for the Insureds defense of the Individual  
11 Defendants. (*Id.* ¶ 77.)

## 12 DISCUSSION

### 13 A. Legal Standard on Federal Rule of Civil Procedure 12(b)(6)

14 Rule 12(b)(6) permits dismissal for “failure to state a claim upon which relief can  
15 be granted.” Fed. R. Civ. P. 12(b)(6). Dismissal under Rule 12(b)(6) is appropriate where  
16 the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable  
17 legal theory. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).  
18 Under Rule 8(a)(2), the plaintiff is required only to set forth a “short and plain statement  
19 of the claim showing that the pleader is entitled to relief,” and “give the defendant fair  
20 notice of what the ... claim is and the grounds upon which it rests.” *Bell Atlantic Corp. v.*  
21 *Twombly*, 550 U.S. 544, 555 (2007).

22 A complaint may survive a motion to dismiss only if, taking all well pleaded  
23 factual allegations as true, it contains enough facts to “state a claim to relief that is  
24 plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*,  
25 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content  
26 that allows the court to draw the reasonable inference that the defendant is liable for the  
27 misconduct alleged.” *Id.* “Threadbare recitals of the elements of a cause of action,  
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1 supported by mere conclusory statements, do not suffice.” *Id.* “In sum, for a complaint to  
2 survive a motion to dismiss, the non-conclusory factual content, and reasonable  
3 inferences from that content, must be plausibly suggestive of a claim entitling the  
4 plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009)  
5 (quotations omitted). In reviewing a Rule 12(b)(6) motion, the Court accepts as true all  
6 facts alleged in the complaint and draws all reasonable inferences in favor of the plaintiff.  
7 *al Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir. 2009).

8 Where a motion to dismiss is granted, leave to amend should be granted “ ‘unless  
9 the court determines that the allegation of other facts consistent with the challenged  
10 pleading could not possibly cure the deficiency.’ ” *DeSoto v. Yellow Freight Sys., Inc.*,  
11 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture*  
12 *Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, where leave to amend would  
13 be futile, the Court may deny leave to amend. *See DeSoto*, 957 F.2d at 658; *Schreiber*,  
14 806 F.2d at 1401.

### 15 **B. Third Cause of Action - Specific Performance**

16 Defendant moves to dismiss the cause of action for specific performance arguing it  
17 is not a valid cause of action under California law. (Dkt. No. 3-1 at 9.) Plaintiffs,  
18 however, contend, without providing binding or persuasive authority, that “under  
19 California law, specific performance is a viable cause of action when an insurer’s  
20 ongoing defense obligation is at issue.” (Dkt. No. 6 at 12.) They also claim, without any  
21 convincing legal authority<sup>2</sup>, that there is no bar on asserting specific performance as a  
22 cause of action where the predicate facts for breach of contract are sufficiently plead.  
23 (Dkt. No. 6 at 16.)

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27 <sup>2</sup> In fact, the one Ninth Circuit case they rely on does not support their position but instead references  
28 specific performance as a “well-recognized remedy.” (Dkt. No. 6 at 16 (citing *Goodyear Tire & Rubber*  
*Co. of Akron, Ohio v. Miller*, 22 F.2d 353, 355 (9th Cir. 1927).)

1           The third cause of action seeks specific performance alleging that Plaintiffs have  
2 been insured by Everest under the Policy, and that Everest has received adequate  
3 consideration for the Policy. (Dkt. No. 1-2, Compl. ¶¶ 101-02.) Plaintiffs assert that the  
4 Policy requires Everest to provide an immediate and contemporaneous reimbursement  
5 and to indemnify Plaintiffs for the fees and costs incurred in the defense of Individual  
6 Defendants in the *PacWest* Action and Everest has breached their contractual obligations  
7 by failing to do so. (*Id.* ¶¶ 103-05.) Plaintiffs further allege they will be irreparably  
8 harmed by Defendant’s failure to provide them timely and contemporaneous  
9 reimbursement of defense costs and fees of the Individual Defendants. (*Id.* ¶ 106.) As  
10 such, Plaintiffs contend that they “have no adequate remedy at law in that they will be  
11 deprived of the benefits defendants promised to provide by accepting the significant  
12 premiums under the Policy.” (*Id.*)

13           “Under the *Erie* doctrine, federal courts sitting in diversity apply state  
14 substantive law and federal procedural law.” *In re Cnty. of Orange*, 784 F.3d 520, 523-  
15 24 (9th Cir. 2015) (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427  
16 (1996)). Because the Court’s jurisdiction is based on diversity, California substantive  
17 law applies.

18           “[U]nder California law, specific performance is a remedy for breach of contract,  
19 not an independent claim.” *Griffin v. Green Tree Serv., LLC*, 166 F. Supp. 3d 1030, 1055  
20 (C.D. Cal. 2015); *see also Guidiville Rancheria of Calif. v. United States*, 5 F. Supp. 3d  
21 1142, 1159 (N.D. Cal. 2013) (“Specific performance is a contract remedy derivative of  
22 Plaintiffs’ breach of contract claim, rather than a separate cause of action”); *Gardner v.*  
23 *RSM & A Foreclosure Servs., LLC.*, No. 12-CV-2666-JAM-AC, 2013 WL 1129392, at  
24 \*4 (E.D. Cal. Mar. 18, 2013) (“insofar as [specific performance] has been pled as a  
25 distinct cause of action, it is dismissed with prejudice.”); *Wong v. Tai Jing*, 189 Cal. App.  
26 4th 1354, 1360 n. 2 (2010) (“specific performance and injunctive relief are equitable  
27 remedies and not causes of action for injuries.”). In *Griffin*, the district court granted the  
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1 defendants' request to dismiss with prejudice the specific performance claim because it is  
2 a remedy, not a cause of action. *Griffin*, 166 F. Supp. 3d at 1055. Because specific  
3 performance is a remedy, the *Griffin* court suggested that the plaintiff "may include a  
4 request for specific performance as a remedy in any restated breach of contract claim and  
5 in the prayer, but she may not replead a separate specific performance claim." *Id.*; see  
6 *Rogers v. Davis*, 28 Cal. App. 4th 1215, 1217 n. 2 (1994) ("Legally, plaintiffs had but  
7 one cause of action, for breach of contract. Specific performance and damages are  
8 simply alternative *remedies* for breach of contract").

9 In this case, Plaintiffs' third cause of action for specific performance is a remedy  
10 for breach of contract and not an independent cause of action. Plaintiffs do not provide  
11 any supportive legal authority to the contrary. Therefore, the Court GRANTS  
12 Defendant's motion to dismiss the third cause of action with prejudice. However,  
13 Plaintiffs may plead damages in the alternative. Fed. R. Civ. P. 8(a)(3) ("a demand for  
14 the relief sought, which may include relief in the alternative or different types of relief.");  
15 Fed. R. Civ. P. 8(d) (permitting alternative statements of a claim or defense). Thus, the  
16 Court GRANTS Plaintiffs leave to amend if they wish to allege specific performance as  
17 an alternative remedy to the breach of contract claim.

18 Alternatively, Defendant argues that even if specific performance was a cause of  
19 action, it fails as a matter of law because Plaintiffs have other adequate remedies at law.  
20 (Dkt. No. 3-1 at 11.) It contends that if Plaintiffs prevail on the breach of contract claim,  
21 they are then entitled to recover the costs and fees expended by Plaintiffs in defending the  
22 Individual Defendants in the *PacWest* Action which is the same remedy as what is sought  
23 for specific performance. Nonetheless, Defendant acknowledge that if Plaintiffs prevail  
24 on the breach of contract claim, and if the damages do not compensate them for the  
25 breach, "specific performance under the Policy would be available as a remedy." (*Id.* at  
26 12.) Plaintiffs disagree arguing that the insurer has a duty to advance defense costs on a  
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1 “current basis” as the fees are being incurred and provide a “service.”<sup>3</sup> (Dkt. No. 6 at 17-  
2 18.) They argue that a future lump sum payment to satisfy its duty to reimburse would  
3 eviscerate the “service” to be provided by Everest. (*Id.* at 18.)

4 “The availability of the remedy of specific performance” requires the following:  
5 “[a] showing by plaintiff of (1) the inadequacy of his legal remedy; (2) an underlying  
6 contract that is both reasonable and supported by adequate consideration; (3) the  
7 existence of a mutuality of remedies; (4) contractual terms which are sufficiently definite  
8 to enable the court to know what it is to enforce; and (5) a substantial similarity of the  
9 requested performance to that promised in the contract.” *Tamarind Lithography*  
10 *Workshop, Inc. v. Sanders*, 143 Cal. App. 3d 571, 575 (1983).

11 At the pleading stage, the Court looks at only if Plaintiff has sufficiently alleged  
12 the requirements for specific performance. *See JPMorgan Chase Bank, N.A. v.*  
13 *Paramount Residential Mortg. Grp., Inc.*, Case No. EDCV 13–00471–JGB (SPx), 2013  
14 WL 12133894, at \*5 (C.D. Cal. May 30, 2013) (denying motion to strike request for  
15 specific performance explaining that at “the pleading stage, the Court is not in a position  
16 to determine whether an adequate remedy at law exists.”). While Defendant argues that  
17 specific performance fails as a matter of law, it also agrees that specific performance can  
18 be plead in the alternative.

19 Because the Court grants dismissal of specific performance as a cause of action,  
20 and has granted Plaintiffs leave to amend, the Court DENIES Defendant’s alternative  
21 argument that specific performance fails as a matter of law as moot.

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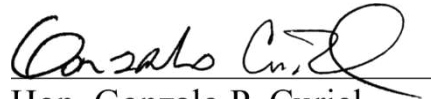
22  
23 <sup>3</sup> Plaintiffs’ argument that Defendant is providing a “service” relies on caselaw concerning a duty to  
24 defend, and not a duty to reimburse. (Dkt. No. 6 at 12.) However, precedent makes clear that a duty to  
25 defend and a duty to reimburse are separate and distinct. *See Gon v. First State Ins. Co.*, 871 F.2d 863,  
26 867-68 (9th Cir. 1989) (noting distinction between duty to defend and duty to pay defense expenses);  
27 *Crawford v. Weather Shield Mfg. Inc.*, 44 Cal. 4th 541, 557-58 (2008) (duty to defend is “distinct and  
28 separate from contractual obligation to pay an indemnitee’s defense costs”). Plaintiffs have not shown  
that a duty to reimburse is a “service” provided by the insurer. Moreover, Plaintiffs’ reliance on Couch  
on Insurance 3d, § 202:37 addresses fee reimbursement for independent counsel under a duty to defend  
policy and is also not supportive of their position.

**CONCLUSION**

Based on the above, the Court GRANTS Defendant’s motion to dismiss the third cause of action for specific performance with prejudice and GRANTS Plaintiffs leave to file an amended complaint to add specific performance as an alternative remedy for the breach of contract cause of action. Plaintiffs may file an amended complaint within 7 days of the Court’s Order. If Plaintiffs do not file an amended complaint, Defendant shall file an answer within 21 days of the Court’s order. The hearing date set on August 26, 2022 shall be vacated.

**IT IS SO ORDERED.**

Dated: August 23, 2022

  
Hon. Gonzalo P. Curiel  
United States District Judge

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