

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 HUDSON INSURANCE COMPANY, a )
4 Delaware Corporation, )

5 Plaintiff, )

6 vs. )

Case No.: 2:15-cv-00349-GMN-CWH

ORDER

7 JAMES MILLER, individually; ARTURO )
8 MONTES, individually; JESUS MONTES, )
9 individually; EFRAIN MEZA-MONTES, )
10 and JANE DOES 1-20, inclusive, )

11 Defendants. )

12 COLONIAL FREIGHT SYSTEMS, INC., )

13 Intervenor, )

14 Pending before the Court is a Motion to Dismiss (ECF No. 23), Countermotion for
15 Summary Judgment (ECF No. 33), and Motion to Strike (ECF No. 45) filed by Plaintiff
16 Hudson Insurance Company. Also pending before the Court is a Motion for Summary
17 Judgment (ECF No. 24) filed by Intervenor Colonial Freight Systems, Inc. Moreover, pending
18 before the Court is a Motion to Amend (ECF No. 26) filed by Defendant James Miller. All of
19 the instant motions have been fully briefed.

21 I. BACKGROUND

22 This case arises out of an automobile accident that occurred on August 3, 2013 in Las
23 Vegas, Nevada, involving Defendants James Miller, Arturo Miller, Jesus Montes, and Efrain
24 Meza-Montes. (Compl. ¶ 15, ECF No. 1). Although the parties dispute the legal implications
25 of the facts in this case, the following facts essential to the disposition of the instant motions are
undisputed.

1 Intervenor Colonial Freight Systems, Inc. (“Colonial”) “is engaged in the interstate  
2 transportation of commodities as a contract and common carrier under authority from the  
3 Interstate Commerce Commission.” (Lease Agreement at 1, ECF No. 24-2). On June 1, 2012,  
4 Defendant James Miller (“Miller”) entered into a Lease Agreement with Colonial, whereby  
5 Miller was an independent contractor and drove a leased truck on behalf of Colonial. (Dep.  
6 James Miller 12:4–13:24, ECF No. 24-3). As an independent contractor, Miller would call  
7 Colonial and ask if they had a load that Miller could accept, and if so, Miller could accept or  
8 decline the offered load. (Id. 35:18–36:1).

9 A few days before the accident at issue, Miller called Colonial and was informed that  
10 Colonial has a load for pickup in Rock Hill, South Carolina to be delivered in Las Vegas,  
11 Nevada. (Id. 36:2–14, 37:3–10). Miller accepted the load in Rock Hill, and delivered the load  
12 in Las Vegas on August 3, 2013. (Id. 39:3–7; 42:12–15). Sometime between 11:00 p.m. and  
13 11:30 p.m., Miller dropped off the loaded trailer at the destination in Las Vegas. (Id. 42:12–19).  
14 Miller proceeded to look for an empty trailer, and when he couldn’t find one, Miller asked  
15 the security guard at the destination if he could come back the next morning as soon as there  
16 was another trailer for him to pick up. (Id. 43:25–45:21). As Miller pulled out of the gate at the  
17 destination, he parked on the side of the road and called Colonial to let them know that he was  
18 empty, or driving his tractor without a trailer, and was headed to a truck stop. (Id. 45:22–  
19 46:10). During the call, Miller acknowledged that Colonial did not have a load for him to  
20 accept at that time and informed Colonial that he would call back the next morning to find out  
21 if there was a load available for him to accept. (Id. 47:16–49:4). At no time during the trip  
22 from Rock Hill to Las Vegas was Miller informed by Colonial that they would have a load for  
23 him to haul on his return trip back to the East Coast. (Id. 49:14–50:3).

24 After the call, Miller proceeded to drive his tractor to the TA Truck Stop in Las Vegas.  
25 (Id. 50:4–8). Miller intended to stay at the TA Truck Stop to rest until Colonial had another

1 load to return to the East Coast. (Id. 53:17–54:10). While Miller was en route to the TA Truck  
2 Stop, he rear-ended an automobile occupied by Defendants Arturo Miller, Jesus Montes, and  
3 Efrain Meza-Montes on Interstate 15. (Compl. ¶ 15; Dep. James Miller 54:15–55:21).  
4 Following the accident, Miller called Colonial to inform them that he had been involved in the  
5 accident. (Dep. James Miller 55:22–56:3). Shortly thereafter, an in-house attorney from  
6 Colonial called Miller and instructed him to not talk to the other driver involved in the accident,  
7 to take pictures at the accident scene, and to take video at the accident scene. (Id. 56:4–24). A  
8 few days after the accident, Miller picked up a load for Colonial and delivered it to the East  
9 Coast. (Id. 60:14–61:20).

10 Pursuant to the Lease Agreement, Miller was required to maintain non-trucking liability  
11 or “bobtail” insurance. (Lease Agreement ¶ 10(a)). At the time of the accident at issue, Miller  
12 was the named insured on a Non-Trucking Automobile Liability Insurance policy (“Non-  
13 Trucking policy”) provided by Plaintiff Hudson Insurance Company (“Hudson”). (Ex. C to  
14 Compl., ECF No. 1). The pertinent portions of Non-Trucking policy are as follows:

15 This policy does not provide commercial trucking liability coverage  
16 for commercial operations that are intended to generate economic or  
17 commercial benefit. Instead, this policy supplements your  
18 commercial trucking liability coverage to provide Non-Trucking  
19 Liability Coverage. The Non-Trucking Liability Coverage provided  
20 by this policy expressly excludes coverage for any covered auto  
21 “while used to carry property in any business or en route for such  
22 purpose” or “while used in the business of anyone to whom the auto  
23 is rented” (See Section II - Liability Coverage, B. Exclusion 15).

24 \*\*\*

## 25 SECTION II – LIABILITY COVERAGE

### A. Coverage

We will pay all sums an insured legally must pay as damages because of bodily injury or property damage to which this insurance applies, caused by an accident and resulting from the ownership, maintenance or use of a covered auto.

1 \*\*\*

2 B. Exclusions

3 This insurance does not apply to any of the following:

4 \*\*\*

5 15. Business Purpose

6 Bodily injury or property damage arising from the use of a covered  
7 auto:

8 a. while used to carry property in any business or en route for such  
9 purpose

10 b. while used in the business of anyone to whom the covered auto is  
11 rented.

12 (Id.).

13 Hudson filed its Complaint in the instant action on February 27, 2015, seeking  
14 declaratory relief. (Compl. ¶¶ 24–27). Specifically, Hudson seeks the following declaration  
15 from the Court:

16 a. At the time of the subject motor vehicle accident, the tractor trailer  
17 driven by MILLER was in use and operation to carry out the  
18 business purposes of MILLER and Colonial Freight Systems, Inc.;

19 b. The Business Purpose Exclusion contained in the HUDSON  
20 Policy issued to MILLER is applicable to the facts and  
21 circumstances of the subject motor vehicle accident and precludes  
22 coverage for any damages claimed as a result thereof; and

23 c. HUDSON owes no duty to defend or indemnify MILLER as a  
24 result of the subject motor vehicle accident.

25 (Id. ¶ 26). On April 29, 2015, Miller filed an Answer, asserting the following counterclaims:  
(1) breach of contract; (2) bad faith; and (3) violation of NRS 686A.310. (Answer ¶¶ 21–42,  
ECF No. 11).

**II. CROSS-MOTIONS FOR SUMMARY JUDGMENT**

**A. Legal Standard**

The Federal Rules of Civil Procedure provide for summary adjudication when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

1 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant  
2 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that  
3 may affect the outcome of the case. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248  
4 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable  
5 jury to return a verdict for the nonmoving party. See *id.* “Summary judgment is inappropriate if  
6 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict  
7 in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th  
8 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A  
9 principal purpose of summary judgment is “to isolate and dispose of factually unsupported  
10 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

11 In determining summary judgment, a court applies a burden-shifting analysis. “When  
12 the party moving for summary judgment would bear the burden of proof at trial, it must come  
13 forward with evidence which would entitle it to a directed verdict if the evidence went  
14 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing  
15 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*  
16 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In  
17 contrast, when the nonmoving party bears the burden of proving the claim or defense, the  
18 moving party can meet its burden in two ways: (1) by presenting evidence to negate an  
19 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving  
20 party failed to make a showing sufficient to establish an element essential to that party’s case  
21 on which that party will bear the burden of proof at trial. See *Celotex Corp.*, 477 U.S. at 323–  
22 24. If the moving party fails to meet its initial burden, summary judgment must be denied and  
23 the court need not consider the nonmoving party’s evidence. See *Adickes v. S.H. Kress & Co.*,  
24 398 U.S. 144, 159–60 (1970).

1           If the moving party satisfies its initial burden, the burden then shifts to the opposing  
2 party to establish that a genuine issue of material fact exists. See *Matsushita Elec. Indus. Co. v.*  
3 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,  
4 the opposing party need not establish a material issue of fact conclusively in its favor. It is  
5 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the  
6 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*  
7 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid  
8 summary judgment by relying solely on conclusory allegations that are unsupported by factual  
9 data. See *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go  
10 beyond the assertions and allegations of the pleadings and set forth specific facts by producing  
11 competent evidence that shows a genuine issue for trial. See *Celotex Corp.*, 477 U.S. at 324.

12           At summary judgment, a court’s function is not to weigh the evidence and determine the  
13 truth but to determine whether there is a genuine issue for trial. See *Anderson*, 477 U.S. at 249.  
14 The evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn  
15 in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is  
16 not significantly probative, summary judgment may be granted. See *id.* at 249–50.

## 17           **B. Discussion**

18           In its Motion for Summary Judgment, Colonial seeks a finding that Hudson’s Non-  
19 Trucking policy provides coverage to Miller for the August 3, 2013 motor vehicle accident.  
20 (Mot. Summ. J. 30:11–13, ECF No. 24). On the other hand, in its Countermotion for Summary  
21 Judgment, Hudson seeks a finding that its Non-Trucking policy does not provide coverage to  
22 Miller for the August 3, 2013 motor vehicle accident because Miller was acting in the business  
23 of Colonial at the time of the accident and the Business Purpose Exclusion of the Non-Trucking  
24 policy precludes coverage. (Countermot. Summ. J. 26:18–27, ECF No. 33).

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1                   1. Choice of Law

2                   As a preliminary matter, the parties disagree over the choice of law in this case. (See  
3 Response to Mot. Summ. J. 10:3–11:8, ECF No. 32; Reply to Mot. Summ. J. 8:12–11:3, ECF  
4 No. 41). “Federal courts sitting in diversity must apply ‘the forum state’s choice of law rules to  
5 determine the controlling substantive law.’” *Fields v. Legacy Health Sys.*, 413 F.3d 943, 950  
6 (9th Cir. 2005) (quoting *Patton v. Cox*, 276 F.3d 493, 495 (9th Cir. 2002)). Nevada employs  
7 the “substantial relationship” test for determining what state’s law applies in a contract case.  
8 *Consol. Generator–Nevada, Inc. v. Cummins Engine Co., Inc.*, 971 P.2d 1251, 1253 (Nev.  
9 1998). Five factors govern this analysis: (1) the place of contracting; (2) the place of  
10 negotiation of the contract; (3) the place of performance; (4) the location of the subject matter  
11 of the contract; and (5) the domicile, residence, nationality, place of incorporation and place of  
12 business of the parties. *Id.* at 1253–54.

13                   Here, Hudson argues that under the “substantial relationship” test, North Carolina law  
14 applies in this case. (Response to Mot. Summ. J. 10:3–11:8). However, Colonial argues that  
15 Tennessee law applies. (Reply to Mot. Summ. J. 8:12–11:3). The Certificate of Non-Trucking  
16 Automobile Liability Insurance (“Certificate”) provided that coverage was in the name of  
17 Miller and provided a residential address on behalf of Miller located in North Carolina. (Ex. C  
18 to Compl., ECF No. 1). Moreover, the Certificate provided that coverage was afforded to a  
19 tractor registered in North Carolina. (*Id.*). Although Colonial, which is located in Tennessee,  
20 was the holder of the Certificate as the lessee/motor carrier, the Court finds that, because the  
21 subject matter of the insurance policy—the tractor leased by Miller—was registered and  
22 primarily located in North Carolina at the time of contracting and Miller, the insured, was  
23 domiciled in North Carolina, North Carolina law applies in this case pursuant to the  
24 “substantial relationship” test.

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1                   2. Ambiguity

2                   Under North Carolina law, the primary goal in interpreting an insurance policy is to  
3 discern the intent of the parties at the time the policy was issued. See *Woods v. Nationwide Mut.*  
4 *Ins. Co.*, 505, 246 S.E.2d 773, 777 (N.C. 1978); *Jamestown Mut. Ins. Co. v. Nationwide Mut.*  
5 *Ins. Co.*, 146 S.E.2d 410, 416 (N.C. 1966). If the terms of the policy are ““plain, unambiguous,  
6 and susceptible of only one reasonable construction, the courts will enforce the contract  
7 according to its terms.”” *Klein v. Avemco Ins. Co.*, 220 S.E.2d 595, 597 (N.C. 1975) (quoting  
8 *Walsh v. United Ins. Co.*, 144 S.E.2d 817, 820 (N.C. 1965)). ““If, however, the meaning of  
9 words or the effect of provisions is uncertain or capable of several reasonable interpretations,  
10 the doubts will be resolved against the insurance company and in favor of the policyholder.””  
11 *C.D. Spangler Constr. Co. v. Indus. Crankshaft & Eng ’g Co.*, 388 S.E.2d 557, 563 (N.C. 1990)  
12 (quoting *Woods*, 246 S.E.2d at 777).

13                   The parties dispute whether the phrase “in the business of” in the Business Purpose  
14 Exclusion is ambiguous. However, in *McLean Trucking Co. v. Occidental Fire & Cas. Co.* of  
15 N.C., 324 S.E.2d 633 (N.C. Ct. App. 1985), disc. review denied 330 S.E.2d 611 (N.C. 1985),  
16 the North Carolina Court of Appeals held, while analyzing a nearly identical business purpose  
17 exclusion, that the phrase “in the business of” is ambiguous. 324 S.E.2d at 636. Accordingly,  
18 because the policy is ambiguous, the Court could resolve this doubt against Hudson and find in  
19 favor of Miller. However, after finding that the phrase “in the business of” is ambiguous, the  
20 *McLean* court does not end its analysis.

21                   3. Application of the Business Purpose Exclusion

22                   Under North Carolina law, “the phrase ‘in the business of’ is best defined in the  
23 common law doctrine of respondeat superior.” *McLean*, 324 S.E.2d at 636. “[I]n order to  
24 predicate liability under this doctrine the employee would have to be within the scope of  
25



1 employment, furthering the business of the employer at the time of the accident, therefore, ‘in  
2 the business of’ the lessee.” Id. (citing *Passmore v. Smith*, 147 S.E.2d 238 (N.C. 1966)).

3 The primary inquiry in determining vicarious liability under the doctrine of respondeat  
4 superior is whether the principal retains the right to control and direct the details of the work.  
5 *Vaughn v. Dep’t of Human Res.*, 252 S.E.2d 792, 795 (N.C. 1979). Where an employer retains  
6 the right to control and direct the details of the work, the employee’s acts done in furtherance of  
7 the employer’s business may be said to have been done in the scope of employment, or in the  
8 context of this case, “in the business of” the employer. It is a general rule that an employee is  
9 not engaged “in the business of” the employer while driving to and from the place of  
10 employment. *McLean*, 324 S.E.2d at 637. However, where the employee is acting at the  
11 direction of, or in the performance of some duty owed to, the employer when making the trip,  
12 the employee may be said to be acting in the scope of employment. See *Powers v. Lady’s*  
13 *Funeral Home*, 295 S.E.2d 473 (N.C. 1982) (worker’s compensation case where employee  
14 injured while returning to his home while on-call; held injury compensable as occurring within  
15 course and scope of employment); *Evington v. Forbes*, 742 F.2d 834 (4th Cir. 1984) (applying  
16 North Carolina law and holding employee returning to work while on “call-back” status was  
17 acting within scope of employment).

18 Here, the Court finds that the facts, viewed in a light most favorable to Hudson,  
19 demonstrate that Miller was not furthering the business of Colonial at the time of the accident.<sup>1</sup>  
20 First, Miller had completed his load from Rock Hill, South Carolina to Las Vegas, Nevada  
21 before the accident occurred. (Dep. James Miller 39:3–7; 42:12–15). Second, at the time of the  
22 accident, Miller had not accepted another load from Colonial, was not under dispatch by  
23

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24 <sup>1</sup> In its Response to Colonial’s Motion for Summary Judgment and its Motion to Strike, Hudson makes many  
25 objections primarily related to evidence and argument regarding previous handling of claims by Hudson. (See  
Response 5:13–10:2; Mot. Strike, ECF No. 45). However, these arguments and the evidence to which Hudson  
objects are not relevant to the disposition of the instant motions or relied upon by the Court for such disposition.  
Accordingly, the Court denies Hudson’s Motion to Strike as moot.

1 Colonial, and was not on a “call back” status with Colonial. (Id. 47:16–49:4). Moreover, Miller  
2 was not obligated to accept a load by Colonial for his return trip to the East Coast. (Id. 53:17–  
3 54:10). Third, while Miller was headed to the TA Truck Stop to rest, he was not acting at the  
4 direction of Colonial. (Id. 45:22–46:10). Therefore, the Business Purpose Exception of the  
5 Non-Trucking policy does not apply to the August 3, 2013 motor vehicle accident.  
6 Accordingly, the Court finds that, because the Business Purpose Exception of the Non-  
7 Trucking policy does not apply, the Non-Trucking policy provides coverage to Miller for the  
8 August 3, 2013 motor vehicle accident, and the Court grants summary judgment against  
9 Hudson and in favor of Defendants as to Hudson’s declaratory relief claim.

### 10 **III. MOTION TO DISMISS**

#### 11 **A. Legal Standard**

12 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon  
13 which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
14 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on  
15 which it rests, and although a court must take all factual allegations as true, legal conclusions  
16 couched as a factual allegations are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule  
17 12(b)(6) requires “more than labels and conclusions, and a formulaic recitation of the elements  
18 of a cause of action will not do.” *Id.* “To survive a motion to dismiss, a complaint must contain  
19 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its  
20 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A  
21 claim has facial plausibility when the plaintiff pleads factual content that allows the court to  
22 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This  
23 standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

24 If the court grants a motion to dismiss for failure to state a claim, leave to amend should  
25 be granted unless it is clear that the deficiencies of the complaint cannot be cured by  
amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant

1 to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in  
2 the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the  
3 movant, repeated failure to cure deficiencies by amendments previously allowed, undue  
4 prejudice to the opposing party by virtue of allowance of the amendment, futility of the  
5 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

## 6 **B. Discussion**

7 In its Motion to Dismiss, Hudson argues that all of Miller’s counterclaims should be  
8 dismissed. (Mot. Dismiss 4:3–9, ECF No. 23). Accordingly, the Court addresses each  
9 counterclaim in turn under North Carolina law, as discussed above.

### 10 1. Breach of Contract

11 Under North Carolina law, “[t]he elements of a claim for breach of contract are (1)  
12 existence of a valid contract and (2) breach of the terms of that contract.” *Poor v. Hill*, 530  
13 S.E.2d 838, 843 (N.C. Ct. App. 2000). In his Counterclaim, Miller alleges that Hudson  
14 “entered into a binding written agreement with Miller to defend and indemnify him against  
15 liability arising from his operation of the vehicle during the time when he not under any  
16 direction or control of Colonial Freight Systems.” (Counterclaim ¶ 22, ECF No. 11).  
17 Moreover, Miller alleges that Hudson “has materially breached the contract of insurance by  
18 refusing to perform its obligation under that Policy.” (Id. ¶ 25).

19 Hudson argues that the Business Purpose Exception of the Non-Trucking policy applies  
20 to the accident at issue and precludes coverage under the Non-Trucking policy. (Mot. Dismiss  
21 10:1–18). For the reasons discussed above, the Court finds that the Business Purpose  
22 Exception does not apply to the accident at issue, and Miller has sufficiently pled a breach of  
23 contract counterclaim. Accordingly, the Court denies Hudson’s Motion to Dismiss as to this  
24 claim.

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1                   2. Bad Faith

2                   Under North Carolina law, the elements of an unfair settlement practice claim, also  
3 known as a bad faith claim, are: “(1) a refusal to pay after recognition of a valid claim, (2) bad  
4 faith, and (3) aggravating or outrageous conduct.” Lovell v. Nationwide Mut. Ins. Co., 424  
5 S.E.2d 181, 184 (N.C. Ct. App. 1993). “[B]ad faith means not based on honest disagreement or  
6 innocent mistake.” Lovell, 424 S.E.2d at 185.

7                   Here, Miller alleges that Hudson “denied Miller’s insurance claim for defense and  
8 indemnification,” “does not have a reasonable basis to deny Miller’s insurance claim for  
9 defense and indemnification,” and “knew or had reason to know that its denial of coverage was  
10 unreasonable.” (Counterclaim ¶¶ 32–34). Taking these allegations as true, the Court finds that  
11 Miller has sufficiently pled a bad faith claim. Accordingly, the Court denies Hudson’s Motion  
12 to Dismiss as to this claim.

13                   3. Violation of NRS 686A.310

14                   As discussed above, North Carolina law is the appropriate choice of law in this case.  
15 Therefore, the Court dismisses this claim because it is based upon Nevada statutory law.  
16 However, the Court finds that Miller could amend his Counterclaim to assert a similar claim  
17 under North Carolina statutory law and will grant Miller leave to do so. Accordingly, the Court  
18 grants Hudson’s Motion to Dismiss as to this claim.

19 **IV. MOTION TO AMEND**

20                   **A. Legal Standard**

21                   Rule 15(a)(2) of the Federal Rules of Civil Procedure permits courts to “freely give  
22 leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). The Ninth Circuit “ha[s]  
23 held that in dismissing for failure to state a claim under Rule 12(b)(6), ‘a district court should  
24 grant leave to amend even if no request to amend the pleading was made, unless it determines  
25 that the pleading could not possibly be cured by the allegation of other facts.’” Lopez v. Smith,

1 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting Doe v. United States, 58 F.3d 494, 497 (9th Cir.  
2 1995)).

### 3 **B. Discussion**

4 Miller seeks leave to amend his Counterclaim “to specify that he intends to seek punitive  
5 damages even though the same are assumed in a bad faith claim and claim for violation of  
6 N.R.S. 686A.310.” (Mot. Amend 3:22–25). As explained above, the Court dismisses Miller’s  
7 counterclaim for violation of NRS 686A.310. However, the Court grants Miller leave to amend  
8 his Counterclaim to assert a similar claim under North Carolina law. Moreover, the Court finds  
9 that amendment to specify that Miller intends to seek punitive damages would not be futile.  
10 Accordingly, the Court grants Miller’s Motion to Amend.

11 Miller shall file his amended counterclaim within fourteen (14) days of the date of this  
12 Order if he intends to assert a counterclaim under North Carolina statutory law that is similar to  
13 his now dismissed counterclaim for violation of NRS 686A.310. Moreover, Miller may further  
14 amend his Counterclaim to specify that he intends to seek punitive damages.

### 15 **V. CONCLUSION**

16 **IT IS HEREBY ORDERED** that Colonial’s Motion for Summary Judgment (ECF No.  
17 24) is **GRANTED**. Accordingly, the Court grants summary judgment against Hudson and in  
18 favor of Defendants as to Hudson’s declaratory relief claim. However, Miller’s counterclaims  
19 remain to be determined.

20 **IT IS FURTHER ORDERED** that Hudson’s Countermotion for Summary Judgment  
21 (ECF No. 33) is **DENIED**.

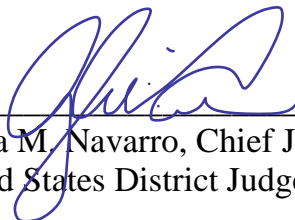
22 **IT IS FURTHER ORDERED** that Hudson’s Motion to Strike (ECF No. 45) is  
23 **DENIED as moot**.

1           **IT IS FURTHER ORDERED** that Hudson’s Motion to Dismiss (ECF No. 23) is  
2 **GRANTED in part** and **DENIED in part**. Specifically, Miller’s counterclaim for violation of  
3 NRS 686A.310 is dismissed with leave to amend.

4           **IT IS FURTHER ORDERED** that Miller’s Motion to Amend (ECF No. 26) is  
5 **GRANTED**. Accordingly, Miller shall file his amended counterclaim within fourteen (14)  
6 days of the date of this Order if he intends to assert a counterclaim under North Carolina  
7 statutory law that is similar to his now dismissed counterclaim for violation of NRS 686A.310.  
8 Moreover, Miller may further amend his Counterclaim to specify that he intends to seek  
9 punitive damages.

10           **DATED** this   14   day of April, 2016.

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Gloria M. Navarro, Chief Judge  
United States District Judge