

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

3 CENTEX HOMES, a Nevada general )  
4 partnership, )

5 Plaintiff, )

6 vs. )

7 ZURICH AMERICAN INSURANCE )

8 COMPANY, an Illinois corporation; )

9 EVEREST NATIONAL INSURANCE )

COMPANY, a Delaware corporation; )

UNDERWRITERS AT LLOYDS LONDON, a)

10 London corporation; LEXINGTON )

11 INSURANCE COMPANY, a Delaware )

corporation; ADMIRAL INSURANCE )

12 COMPANY, a New Jersey corporation, )

13 Defendants. )

Case No.: 2:16-cv-01634-GMN-CWH

ORDER

14  
15 Pending before the Court is the Motion to Dismiss, (ECF No. 11), filed by Defendant  
16 Lexington Insurance Company (“Defendant”), which was joined by Defendant Zurich  
17 American Insurance Company, (ECF No. 19). Plaintiff Centex Homes (“Plaintiff”) filed a  
18 Response, (ECF No. 30), and Defendant filed a Reply, (ECF No. 31).<sup>1</sup> For the reasons  
19 discussed below, Defendant’s Motion to Dismiss is **DENIED in part and GRANTED in part.**

20 Also pending before the Court is Plaintiff’s Motion for Leave to Amend its Complaint,  
21 (ECF No. 16). For the reasons discussed below, Plaintiff’s Motion for Leave to Amend its  
22 Complaint is **GRANTED.**

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25 <sup>1</sup> Also pending before the Court is Plaintiff’s Motion for Leave to File Supplemental Points and Authorities, (ECF No. 44), to which Defendant filed a Response, (ECF No. 45), and Plaintiff filed a Reply, (ECF No. 44). For good cause appearing, Plaintiff’s Motion for Leave to File Supplemental Points and Authorities is **GRANTED.**

1 **I. BACKGROUND**

2 The instant dispute arises out of a state court action involving property damage from  
3 subcontractors that worked for Plaintiff to build a housing development (“the development”).  
4 On December 17, 2012, homeowners in the development filed a construction defect complaint  
5 alleging negligent engineering and construction on homes in the development. (*See* Compl. ¶  
6 45, ECF No. 1); *See Oliver and Emma J. Chapman, et al. v. Centex Homes*, Eighth Judicial  
7 Dist. Court, Clark County, Nevada case No. A-12-662609-D (“*Chapman* action”). Plaintiff  
8 alleges that the *Chapman* action seeks damages arising out of the work or ongoing operations  
9 of various subcontractors that were insured through Defendant. (*Id.* ¶ 46). As a result of the  
10 *Chapman* action, Plaintiff claims that it has incurred significant costs. (*Id.* ¶ 47).

11 Defendant issued insurance policies to the subcontractor Nevada Countertop  
12 (“subcontractor”) that worked on the development. (*Id.* ¶¶ 35–37). Defendant’s policies were  
13 endorsed to cover Plaintiff as an “additional insured” with respect to liability arising out of the  
14 subcontractor’s respective work. (*Id.* ¶ 38). Plaintiff alleges that the policies required  
15 Defendant to defend Plaintiff against all claims that create potential liability for covered  
16 property damage or bodily injury. (*Id.* ¶ 39). On July 26, 2011, Plaintiff tendered the defense  
17 and indemnity of the *Chapman* action to Defendant under the policies that were issued to the  
18 subcontractors. (*Id.* ¶ 60). Plaintiff claims that on October 24, 2011, Defendant improperly  
19 breached its duty to defend Plaintiff in the *Chapman* action under the insurance policies issued  
20 to the subcontractor. (*Id.* ¶¶ 61–62). Specifically, Plaintiff alleges that it was forced to spend  
21 significant time and money defending itself against the *Chapman* action because Defendant  
22 failed to meet its duty pursuant to the policies. (*Id.* ¶ 63).

23 Based on these allegations, Plaintiff alleges the following causes of action against  
24 Defendant: (1) breach of contract; (2) breach of implied duty of good faith and fair dealing; (3)  
25 violations of Nevada’s Unfair Claims Settlement Practices Action NRS § 686A.310; and (4)

1 declaratory relief. (*Id.* ¶¶ 68–89). In the instant motion, Defendant requests that the Court  
2 dismiss all of Plaintiff’s claims against Defendant, as well as the prayer for attorney’s fees and  
3 punitive damages. (Mot. to Dismiss 19:11–13, ECF No. 11).

## 4 **II. LEGAL STANDARD**

### 5 **A. Motion to Dismiss**

6 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon  
7 which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
8 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on  
9 which it rests, and although a court must take all factual allegations as true, legal conclusions  
10 couched as factual allegations are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule  
11 12(b)(6) requires “more than labels and conclusions, and a formulaic recitation of the elements  
12 of a cause of action will not do.” *Id.* “To survive a motion to dismiss, a complaint must contain  
13 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its  
14 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A  
15 claim has facial plausibility when the plaintiff pleads factual content that allows the court to  
16 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This  
17 standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* If  
18 the Court grants a motion to dismiss for failure to state a claim, leave to amend should be  
19 granted unless it is clear that the deficiencies of the complaint cannot be cured by amendment.  
20 *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

### 21 **B. Motion for Leave to Amend**

22 Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, a court should “freely”  
23 give leave to amend “when justice so requires,” and in the absence of a reason such as “undue  
24 delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure  
25 deficiencies by amendments previously allowed, undue prejudice to the opposing party by

1 virtue of allowance of the amendment, futility of the amendment, etc.” *Foman v. Davis*, 371  
2 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear that the  
3 deficiencies of the complaint cannot be cured by amendment. *See DeSoto v. Yellow Freight*  
4 *Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

### 5 **III. DISCUSSION**

#### 6 **A. Motion to Dismiss**

##### 7 **i. Breach of Contract**

8 In Nevada, to succeed on a claim for breach of contract a plaintiff must show: (1) the  
9 existence of a valid contract; (2) that the plaintiff performed or was excused from performance;  
10 (3) that the defendant breached the terms of the contract; and (4) that the plaintiff was damaged  
11 as a result of the breach. *See* Restatement (Second) of Contracts § 203 (2007); *see also Bernard*  
12 *v. Rockhill Dev. Co.*, 734 P.2d 1238, 1240 (Nev. 1987); *see also Brochu v. Foote Enterprises,*  
13 *Inc.*, No. 55963, 2012 WL 5991571 at \*5 (Nev. 2012) (“To prove a breach of contract, the  
14 plaintiff must show an existing valid agreement with the defendant, the defendant’s material  
15 breach, and damages.”).

16 Under Nevada law, “an insurer bears a duty to defend its insured whenever it ascertains  
17 facts which give rise to the potential of liability under the policy.” *United Nat’l Ins. Co. v.*  
18 *Frontier Ins. Co.*, 99 P.3d 1153, 1158 (Nev. 2004). “If there is any doubt about whether the  
19 duty to defend arises, this doubt must be resolved in favor of the insured.” *Id.* Additionally,  
20 “[w]hile clauses providing coverage are interpreted broadly so as to afford the greatest possible  
21 coverage to the insured, clauses excluding coverage are interpreted narrowly against the  
22 insurer.” *Nat’l Union Fire Ins. Co. of State of Pa. v. Reno’s Exec. Air, Inc.*, 682 P.2d 1380,  
23 1383 (Nev. 1984).

24 Plaintiff’s first cause of action alleges that it is covered under Defendant’s insurance  
25 policies as “additional insureds,” and that Plaintiff “performed all obligations owing under each

1 of the policies in connection with its tender of defense, and [Plaintiff] has satisfied all relevant  
2 conditions precedent.” (Compl. ¶¶ 35–39, 69, ECF No. 1).

3 Defendant claims that Plaintiff’s “complaint fails to go beyond labels and conclusions  
4 and instead only provides a formulaic recitation of the elements of a breach of contract action.”  
5 (Mot. to Dismiss 4:26–28). Moreover, Defendant avers that the insurance policies’ language  
6 demonstrates that Plaintiff’s breach of contract claim fails. (*See id.* 5:6). Specifically, the  
7 parties dispute whether or not the *Chapman* action involves construction defects from *ongoing*  
8 *operations* or *completed work* because the policies only cover *ongoing* construction. (*See id.*  
9 5:8–25); (*see also* Resp. 6:9–15, ECF No. 28) (emphasis added).

10 Neither party disputes the existence of a valid contract. Because a valid contract exists  
11 and Plaintiff alleges that the contract was breached, Plaintiff has met the first and second  
12 requirements for a breach of contract claim. Additionally, Plaintiff claims that Defendant  
13 “failed to discharge [its] contractual duties to defend [Plaintiff] against the *Chapman* action.  
14 More particularly, Defendant[ ]: (1) breached [its] contracts by failing to promptly respond to  
15 [Plaintiff’s] tenders; and (2) breached [its] contracts by refusing to defend [Plaintiff].” (Compl.  
16 ¶ 70, ECF No. 1). Based on this allegation, Plaintiff sufficiently alleges the third requirement  
17 for breach of contract. Lastly, Plaintiff contends that “[a]s a direct and proximate result of  
18 Defendant[’s] conduct as alleged in [the] Complaint, [Plaintiff] has been damaged in an amount  
19 to be proven at trial.” (*Id.* ¶ 71). Accordingly, Plaintiff meets the fourth requirement in alleging  
20 damages and therefore has sufficiently pled the elements for a breach of contract claim.

21 As to the alleged ongoing defects, Plaintiff asserts that “the allegations in *Chapman* are  
22 broad enough to include both kinds of property damage – damage that may have occurred  
23 during Nevada Countertop’s operations and property damage that may have begun after those  
24  
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1 operations were completed.” (Resp. 15:19–22).<sup>2</sup> Because Plaintiff sufficiently alleges that the  
2 *Chapman* action involves ongoing operations covered by the policies, the Court denies  
3 Defendant’s Motion to Dismiss the breach of contract claim.

4 **ii. Breach of the Implied Covenant of Good Faith and Fair Dealing**

5 Nevada has “adopt[ed] the rule that allows recovery of consequential damages where  
6 there has been a showing of bad faith by the insurer.” *U.S. Fidelity & Guar. Co. v. Peterson*,  
7 540 P.2d 1070, 1071 (Nev. 1975). “Where an insurer fails to deal fairly and in good faith with  
8 its insured by refusing without proper cause to compensate its insured for a loss covered by the  
9 policy[,] such conduct may give rise to a cause of action in tort for breach of an implied  
10 covenant of good faith and fair dealing.” *Id.* “The duty violated arises not from the terms of the  
11 insurance contract but is a duty imposed by law, the violation of which is a tort.” *Id.* “To  
12 establish a prima facie case of bad-faith refusal to pay an insurance claim, the plaintiff must  
13 establish that the insurer had no reasonable basis for disputing coverage, and that the insurer  
14 knew or recklessly disregarded the fact that there was no reasonable basis for disputing  
15 coverage.” *Powers v. United Servs. Auto. Ass’n*, 962 P.2d 596, 603 (Nev. 1998), *opinion*  
16 *modified on denial of reh’g*, 979 P.2d 1286 (Nev. 1999).

17 Plaintiff’s second cause of action alleges that Defendant owes Plaintiff “a duty of good  
18 faith and fair dealing, obligating Defendant[ ] to put [Plaintiff’s] interests equal with or ahead  
19 of [its] own interests and to do nothing to deprive [Plaintiff] of policy benefits.” (Compl. ¶ 73).  
20 Plaintiff’s Complaint asserts that Defendant has “deprived [Plaintiff] of its rights and benefits  
21 under [its] policies.” (*Id.* ¶ 76). Moreover, Plaintiff claims that as a result of this deprivation,  
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23 2 Plaintiff contends that the California Court of Appeals “considered and rejected the very argument that is the  
24 crux of [Defendant’s] motion: That construction defect claims are inherently ‘completed operations.’” (Reply  
25 1:26–28, ECF No. 47). The Court notes, however, that the Nevada Supreme Court has not addressed the issue of  
Nevada State Law raised in the California Court of Appeals case provided by Plaintiff. (*See* Ex. 1 to Mot. for  
Leave to File Suppl. P. & A., ECF No. 44-1); (*see also* Resp. 1:27–28, ECF No. 45). Moreover, at this point in  
the proceedings, Plaintiff sufficiently alleges that the *Chapman* action involves ongoing operations covered by  
Defendant’s policies.

1 Defendant failed to “discharge contractual duties without reasonable grounds for good cause”  
2 instead of honoring its obligations under the policies. (*Id.* ¶ 74).

3 Defendant argues that Plaintiff’s “allegations fall short of plausibly stating a claim for  
4 bad faith, given they are completely devoid of a single fact which would suggest any knowing  
5 or unreasonable denial of benefits by” Defendant. (Mot. to Dismiss 15:17–19). However,  
6 Plaintiff explains that Defendant did not deal fairly with Plaintiff because it failed “to respond  
7 to [Plaintiff’s] tenders in a timely fashion, or at all” and delayed coverage decisions. (Compl.  
8 ¶ 76). Because Plaintiff alleges that Defendant failed to meet its duty by refusing without  
9 proper cause to compensate Plaintiff for the loss allegedly covered by the policies, Plaintiff has  
10 sufficiently pled its breach of the implied covenant of good faith and fair dealing claim.

11 Moreover, Plaintiff contends that Defendant’s deprivation of benefits is intentional in  
12 order to enhance Defendant’s own profits despite Defendant’s alleged knowledge that “this  
13 behavior violates the rights of” Plaintiff. (*Id.*). Plaintiff alleges that “Defendant[ ] acted in a  
14 deliberate and concerted fashion to achieve this self-serving economic objective” and, as such,  
15 “recklessly disregards [Plaintiff’s] economic and property rights.” (*Id.*). Essentially, Plaintiff  
16 alleges that Defendant recklessly disregarded the fact that there was no reasonable basis for  
17 disputing coverage. This further bolsters Plaintiff’s claim for breach of the implied covenant of  
18 good faith and fair dealing. As such, the Court denies the Motion to Dismiss Plaintiff’s second  
19 cause of action.

20 **iii. Violations of Nevada’s Unfair Claims Settlement Practices Action**

21 Plaintiff’s third cause of action alleges violations under the Unfair Claims Practices  
22 Action (“UCPA”) under Nevada Revised Statute (“NRS”) § 686A.310(1)(b)–(f). (Compl. ¶¶  
23 81–83). NRS § 686A.310 specifies certain unfair practices by insurance companies and  
24 provides a cause of action for an insured to enforce these provisions against an insurer. *See*  
25 NRS § 686A.310; *Hart v. Prudential*, 848 F. Supp. 900, 903 (D. Nev. 1994). “Unlike a cause

1 of action for bad faith, the provisions of NRS § 686A.310 address the manner in which an  
2 insurer handles an insured’s claim whether or not the claim is denied.” *Zurich Am. Ins. Co. v.*  
3 *Coeur Rochester, Inc.*, 720 F. Supp. 2d 1223, 1236 (D. Nev. 2010).

4 Plaintiff alleges that Defendant engaged in the following unfair practices under NRS  
5 § 686A.310: (1) Defendant failed to acknowledge and act reasonably promptly upon  
6 communications with respect to claims arising under insurance policies; (2) Defendant failed to  
7 implement reasonable standards for the prompt investigation and processing of claims under  
8 insurance policies; (3) Defendant failed to affirm or deny coverage of claims within a  
9 reasonable time after proof of loss requirements were completed and submitted by the insured;  
10 (4) Defendant failed to effectuate prompt, fair, and equitable settlements of claims in which  
11 liability of the insurer has become reasonably clear; and (5) Defendant compelled insureds to  
12 institute litigation to recover amounts due under an insurance policy by offering substantially  
13 less than the amounts ultimately recovered in actions brought by such insureds when the  
14 insureds have made claims for amounts reasonably similar to the amounts ultimately recovered.  
15 (Compl. ¶ 82); *see* NRS § 686A.310(1)(b)–(f).

16 Defendant argues that Plaintiff’s “unfair claim practices claim fails because [Plaintiff]  
17 has not alleged facts supporting the claim, but merely that it suffered damages as a result of all  
18 [D]efendant[’s] violations of ‘one or more’” of NRS § 686A.310(1) subsections (b) through (f).  
19 (Mot. to Dismiss 16:3–5). Moreover, Defendant contends that Plaintiff “does not allege any  
20 facts as to how [Defendant] violated the Act beyond parroting the statutory language.” (*See id.*  
21 16:16–17).

22 First, Plaintiff claims that “Defendant[ ] delayed responding to [Plaintiff’s] tenders and  
23 ignored [Plaintiff’s] numerous requests.” (Compl. ¶ 80). Plaintiff explains that it tendered the  
24 defense of the *Chapman* action on July 26, 2011, and it was not until October 24, 2011, that  
25 Defendant denied the request under the subcontractor’s policy. (Compl. ¶¶ 60–61). Under



1 Nevada’s Administrative Code, “[e]very insurer shall acknowledge the receipt of a claim notice  
2 within 20 working days after receipt of the claim notice unless payment of the claim is made  
3 within that time.” Nev. Admin. Code (“NAC”) § 686A.665. Moreover, an insurer should make  
4 a decision of the acceptance or denial within thirty days, or notify the insured that more time is  
5 required. NAC § 686A.675. Because Defendant did not respond within the twenty-day window  
6 or deny within the thirty-day window, Plaintiff has provided sufficient factual allegations  
7 regarding Defendant’s failure to “act reasonably promptly upon communications with respect  
8 to claims.” NRS § 686A.310(1)(b).

9         Second, Plaintiff alleges that “Defendant[ ] delayed rendering coverage decisions in  
10 conscious disregard of the risk that these delays would jeopardize [Plaintiff’s] ability to  
11 adequately defend itself against the *Chapman* action, and would jeopardize [Plaintiff’s] ability  
12 to settle those matters.” (Compl. ¶ 76). This allegation successfully pleads that Defendant  
13 failed “to adopt and implement reasonable standards for the prompt investigation and  
14 processing of claims arising under insurance policies.” NRS § 686A.310(1)(c). Plaintiff has  
15 alleged unreasonable standards for prompt investigation based on Defendant’s delay in  
16 rendering a decision. Moreover, these allegations also support a claim that Defendant failed to  
17 “affirm or deny coverage of claims within a reasonable time after proof of loss requirements  
18 have been completed and submitted by the insured.” NRS § 686A.310(1)(d). As such, Plaintiff  
19 has sufficiently pled its first three allegations under the UCPA.

20         Turning to the fourth allegation, Plaintiff avers that Defendant is “fully aware of [its]  
21 duty to defend additional insureds, like [Plaintiff], against claims alleging potential liability  
22 arising out of the work of their named insureds[,]” and by neglecting its duty, Defendant  
23 jeopardized Plaintiff’s ability to settle matters in the *Chapman* action. (Compl. ¶¶ 75–80).  
24 Therefore, Plaintiff has adequately pled that Defendant failed “to effectuate prompt, fair and  
25

1 equitable settlements of claims in which liability of the insurer has become reasonably clear.”  
2 NRS § 686A.310(1)(e).

3 Lastly, Plaintiff contends that because Defendant refused to assist in its defense, Plaintiff  
4 was compelled to litigate the matter. (Compl. ¶ 80). However, this allegation is insufficient to  
5 plead a claim under NRS § 686A.310(1)(f). Plaintiff has failed to provide factual allegations  
6 beyond a conclusory assertion that it was compelled “to institute litigation to recover amounts  
7 due under an insurance policy by offering substantially less than the amounts ultimately  
8 recovered in actions brought by such insureds, when the insureds have made claims for  
9 amounts reasonably similar to the amounts ultimately recovered.” NRS § 686A.310(1)(f).  
10 Accordingly, Plaintiff’s last allegation under the UCPA fails.

11 For these reasons, the Motion to Dismiss Plaintiff’s alleged violations under the UCPA  
12 for NRS § 686A.310(1)(b)–(e) is denied. However, the Court grants the Motion to Dismiss  
13 Plaintiff’s claim under NRS § 686A.310(1)(f) for Plaintiff’s fifth allegation.

#### 14 **iv. Declaratory Relief**

15 Indeed, declaratory relief is not a cause of action, but a remedy that may be afforded to a  
16 party after it has sufficiently established and proven its claims. *See Sands v. Wynn Las Vegas,*  
17 *LLC*, No. 210-CV-00297-RLH-PAL, 2010 WL 2348633 (D. Nev. June 9, 2010); *see also*  
18 *Freeto v. Litton Loan Servicing LP*, No. 3:09-CV-00754-LRH, 2011 WL 112183, at \*3 (D.  
19 Nev. Jan. 12, 2011).

20 Even though declaratory relief is a remedy, the Court denies Defendant’s Motion to  
21 Dismiss because Plaintiff’s claims are still before the Court. *See Sands v. Wynn Las Vegas,*  
22 *LLC*, No. 210-CV-00297-RLH-PAL, 2010 WL 2348633, (D. Nev. June 9, 2010) (finding “the  
23 Court is not required to dismiss” a claim for declaratory relief “under the law cited by Wynn or  
24 any other law of which the Court is aware.”). Thus, if Plaintiff succeeds on these claims it may  
25 very well be entitled to the declaratory relief it seeks. Given this fact, the Court sees no reason

1 to dismiss Plaintiff’s claims for declaratory relief. Accordingly, the Court will interpret  
2 Plaintiff’s claim for declaratory relief as a request for a remedy rather than a separate cause of  
3 action, and Defendant’s Motion to Dismiss this claim is denied on this basis.

4 **v. Prayer for Attorney’s Fees and Punitive Damages**

5 In the instant Motion, Defendant also seeks to strike or dismiss Plaintiff’s prayer for  
6 attorney’s fees and punitive damages. (Mot. to Dismiss 19:11–13, ECF No. 11). Federal Rule  
7 of Civil Procedure 12(f) provides that the Court may strike “any redundant, immaterial,  
8 impertinent, or scandalous matter.” Additionally, a motion to strike properly may be directed at  
9 damages which are not recoverable as a matter of law, as such allegations would be immaterial  
10 to the action. *See Flynn v. Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP.*,  
11 No. 3:09-CV-00422-PMP, 2010 WL 4339368, at \*12 (D. Nev. Oct. 15, 2010). However, when  
12 the defendant challenges the sufficiency of the factual allegations supporting damages, the  
13 motion should be made pursuant to Federal Rule of Civil Procedure 12(b)(6), rather than Rule  
14 12(f). *Paul v. Gomez*, 190 F.R.D. 402, 404 (W.D.Va.2000); *see Flynn*, No. 3:09-CV-00422-  
15 PMP, 2010 WL 4339368 (D. Nev. Oct. 15, 2010). The Court will first address the argument  
16 for attorney’s fees and then address the argument for punitive damages.

17 **a. Attorney’s Fees**

18 Under the “American Rule,” litigants generally must pay their own attorney’s fees in  
19 absence of a rule, statute, or contract authorizing such an award. *See Alyeska Pipeline Co. v.*  
20 *Wilderness Soc’y*, 421 U.S. 240, 247 (1975); *see also MRO Commc’ns, Inc. v. Am. Tel. & Tel.*  
21 *Co.*, 197 F.3d 1276, 1280–81 (9th Cir. 1999). Nonetheless, the decision to award attorney’s  
22 fees is left to the sound discretion of the district court. *See Flamingo Realty, Inc. v. Midwest*  
23 *Dev., Inc.*, 879 P.2d 69, 73 (Nev. 1994); *see also Jiangmen Kinwai Furniture Decoration Co.*  
24 *Ltd v. Int’l Mkt. Centers, Inc.*, No. 215-CV-1419J-CM-PAL, 2016 WL 6637699 (D. Nev. Nov.  
25 8, 2016). Moreover, contrary to the American Rule, under Nevada law, attorney’s fees are

1 available only when “authorized by rule, statute, or contract.” *Flamingo Realty, Inc.*, 879 P.2d  
2 at 73; NRS § 18.010.

3 Here, Plaintiff seeks attorney’s fees for all four causes of action. The Court finds that it  
4 is too early in the litigation to determine whether or not Plaintiff would be entitled to attorney’s  
5 fees in this action. *See Weisshaar v. Sierra Pac. Power Co.*, No. 3:11-CV-0360-LRH-WGC,  
6 2011 WL 6400281, at 1 (D. Nev. Dec. 20, 2011) (denying a motion to strike attorney’s fees  
7 after denying a motion to dismiss and reviewing the pleadings because it was too early in the  
8 litigation process to determine if attorney’s fees were appropriate). Therefore, the Court shall  
9 also deny the motion to dismiss attorney’s fees.

10 **b. Punitive Damages**

11 In Nevada, punitive damages may only be awarded “where it is proven by clear and  
12 convincing evidence that the defendant has been guilty of oppression, fraud or malice, express  
13 or implied.” NRS § 42.005(1). “‘Oppression’ means despicable conduct that subjects a person  
14 to cruel and unjust hardship with conscious disregard of the rights of the person.” NRS  
15 § 42.001(4). “‘Fraud’ means an intentional misrepresentation, deception or concealment of a  
16 material fact known to the person with the intent to deprive another person of his or her rights  
17 or property or to otherwise injure another person.” NRS § 42.001(2). “‘Malice, express or  
18 implied’ means conduct which is intended to injure a person or despicable conduct which is  
19 engaged in with a conscious disregard of the rights or safety of others.” NRS § 42.001(3).  
20 “‘Conscious disregard’ means the knowledge of the probable harmful consequences of a  
21 wrongful act and a willful and deliberate failure to act to avoid those consequences.” NRS  
22 § 42.001(1). “[Conscious disregard] plainly requires evidence that a defendant acted with a  
23 culpable state of mind. . . . [A]t a minimum, [it] must exceed mere recklessness or gross  
24 negligence.” *Countrywide Home Loans, Inc. v. Thitchener*, 192 P.3d 243, 255 (Nev. 2008).

1 Here, Plaintiff seeks punitive damages for the second and third causes of action.  
2 Moreover, both the second and third causes of action give rise to potential punitive damages.  
3 *See Pioneer Chlor Alkali Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 863 F.  
4 Supp. 1237, 1246 (D. Nev. 1994) (“[A]n award of punitive damages is possible for a violation  
5 of NRS [§] 686A.310.”); *see also Guar. Nat. Ins. Co. v. Potter*, 912 P.2d 267, 273 (Nev. 1996)  
6 (showing that bad faith claims may give rise to punitive damages).

7 Plaintiff’s Complaint alleges that Defendant’s conduct “is part of a pattern of unfair  
8 claims practices intentionally engaged in by Defendant[ ] to enhance unfairly their own profits  
9 by avoiding contractual obligations and ignoring the contractual rights and economic interests  
10 of [Plaintiff] and other additional insureds.” (Compl. ¶ 77). The practices that Plaintiff  
11 specifically lists are: “(1) failing to respond promptly to tenders from additional insureds; (2)  
12 wrongfully denying additional insureds coverage owed under policies; and (3) refusing to  
13 supply a full defense to additional insureds as required by law and instead trying to limit  
14 coverage obligations to funding only a small fraction of the additional insured’s defense.” (*Id.*).  
15 Further, Plaintiff claims that Defendant’s “conduct as alleged in [the] Complaint is despicable  
16 and has been carried out in willful and conscious disregard of [Plaintiff’s] rights and economic  
17 interests, and is malicious, fraudulent and oppressive.” (Compl. ¶ 79). Plaintiff’s statements  
18 sufficiently plead oppression based on the alleged unjust hardship placed on Plaintiff when  
19 Defendant did not assist in its defense. (Compl. ¶ 78). The Court finds that the Complaint  
20 provides sufficient factual basis to support a claim for punitive damages in relation to the  
21 surviving second and third causes of action. Therefore, Defendant’s Motion to Dismiss  
22 Plaintiff’s punitive damages is denied. For these reasons, the Court denies in part and grants in  
23 part Defendant’s Motion to Dismiss.  
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1           **B. Motion for Leave to Amend**

2           Under Federal Rule of Civil Procedure 15(a), “a party may amend its pleading once as a  
3 matter of course . . . before being served with a responsive pleading.” Except for amendments  
4 made “of course” or pursuant to stipulation, leave of court is required to amend a pleading.  
5 Fed.R.Civ.P. 15(a). “Absent prejudice, or a strong showing of any of the remaining *Foman*  
6 factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend.”  
7 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.2003).

8           Here, Plaintiff requests leave to file its first amended complaint to name Steadfast  
9 Insurance Company (“Steadfast”) as a defendant. (Mot. for Leave to Amend ‘MTA’ 1:22–23,  
10 ECF No. 16). Plaintiff’s current Complaint alleges that Zurich American Insurance (“Zurich”) issued insurance policies to Atrium Door & Window Company (“Atrium”). (Compl. ¶¶ 20 -24).  
11 However, Zurich advised Plaintiff “that one of the policies it issued to Atrium has exhausted  
12 and that Steadfast . . . issued an excess umbrella policy to Atrium that has now been triggered.”  
13 (MTA 2:17–19). Because Plaintiff believes that Steadfast is the proper insuring entity, Plaintiff  
14 seeks Leave to Amend its Complaint to include Steadfast.  
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16           The Court does not find that Steadfast will be unduly prejudiced by this amendment  
17 because there has been no discovery or early case conference in this action, and Steadfast is  
18 aware of the action. (*See* Odia Decl. ¶ 4, Ex. 2 to MTA, ECF No. 16-2); (*see also* MTA 4:5–  
19 11). Indeed, “Steadfast’s counsel had indicated that Steadfast does not oppose this  
20 amendment.” (*See* MTA 3:13–14); (*see also* Odia Decl. ¶ 4, Ex. 2 to MTA, ECF No. 16-2).  
21 Further, this amendment is not sought in bad faith. The purpose of the Amended Complaint is  
22 to include the proper insurance entity in the instant action. Additionally, because this is  
23 Plaintiff’s first request to file an Amended Complaint, there have been no repeated failures to  
24 cure deficiencies.  
25

1 For these reasons, the Court grants Plaintiff's Motion to Amend its Complaint for the  
2 purposes of adding the missing insurance entity, Steadfast, as a defendant in the instant action.  
3 Moreover, because Plaintiff can foreseeably allege additional facts for its fifth allegation under  
4 the UCPA cause of action, Plaintiff may further amend its complaint regarding this claim. *See*  
5 *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). Plaintiff shall file its amended complaint  
6 within fourteen days of the date of this Order.

7 **IV. CONCLUSION**

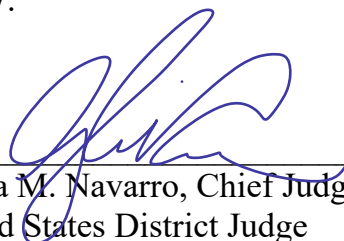
8 **IT IS HEREBY ORDERED** that the Motion to Dismiss, (ECF No. 11), is **DENIED in**  
9 **part and GRANTED in part**. Plaintiff's cause of action under NRS § 686A.310(1)(f) is  
10 dismissed without prejudice and all other claims survive.

11 **IT IS FURTHER ORDERED** that the Motion for Leave to Amend Plaintiff's  
12 Complaint, (ECF No. 16), is **GRANTED**.

13 **IT IS FURTHER ORDERED** that Plaintiffs' Motion for Leave to File Supplemental  
14 Points and Authorities, (ECF No. 44), is **GRANTED**.

15 **IT IS FURTHER ORDERED** that Plaintiff shall file its amended complaint fourteen  
16 days following the issuance of this Order.

17 **DATED** this 29 day of September, 2017.

18  
19  
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21 \_\_\_\_\_  
22 Gloria M. Navarro, Chief Judge  
23 United States District Judge  
24  
25