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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

TROY AND PAULA BURLEY AND PAUL)	3:15-cv-00272-HDM-WGC
ACKERMAN AND JUDY ACKERMAN AS)	
TRUSTEES OF THE ACKERMAN FAMILY)	
TRUST, et al.,)	ORDER
)	
Plaintiffs,)	
)	
)	
vs.)	
)	
NATIONAL UNION FIRE INSURANCE)	
COMPANY OF PITTSBURGH PA, a)	
subsidiary of AMERICAN)	
INTERNATIONAL GROUP, INC., and)	
DOES 1 through 100, inclusive,)	
)	
Defendants.)	
)	

23 Before the court is defendant National Union Fire Insurance
24 Company of Pittsburgh, PA's ("National Union") motion to dismiss all
25 causes of action in the plaintiffs' second amended complaint pursuant
26 to Federal Rule Civil Procedure 12(b)(6) as well as the claims/prayer
27 for attorney's fees and punitive damages under Rule 12(f). (ECF No.
28 31). Plaintiffs responded (ECF No. 32) and defendant replied (ECF No.

1 34). Also before the court is plaintiffs' request for judicial notice
2 in support of their response to the motion to dismiss. (ECF No. 35).

3 **I. Request for Judicial Notice**

4 A district court may take judicial notice of any fact not subject
5 to reasonable dispute in that it is capable of accurate and ready
6 determination by resort to sources whose accuracy cannot reasonably
7 be questioned. FED. R. EVID. 201(b). This includes public records of
8 judicial proceedings that are not subject to reasonable dispute when
9 those proceedings relate to matters at issue. *Harris v. Cty. of*
10 *Orange*, 682 F.3d 1126, 1131-32 (9th Cir. 2012); *Holder v. Holder*, 305
11 F.3d 854, 866 (9th Cir. 2002); *Lee v. City of Los Angeles*, 250 F.3d
12 668, 689-91 (9th Cir. 2001).

13 Plaintiffs request that the court take judicial notice of the May
14 10, 2016 order from the Nevada Court of Appeals affirming the state
15 court judgment in favor of Troy and Paula Burley, et al. (ECF No. 35,
16 Ex. 1). Defendant has not filed an objection and the time for
17 objecting has expired. Accordingly, the court takes judicial notice
18 of this public record.

19 **II. Motion to Dismiss**

20 In considering a motion to dismiss under Federal Rule of Civil
21 Procedure 12(b)(6), the court must accept as true all material
22 allegations in the complaint as well as all reasonable inferences that
23 may be drawn from such allegations. *W. Ctr. for Journalism v.*
24 *Cederquist*, 235 F.3d 1153, 1154 (9th Cir. 2000). The allegations of
25 the complaint also must be construed in the light most favorable to
26 the nonmoving party. *Shwarz v. United States*, 234 F.3d 428, 435 (9th
27 Cir. 2000).

28 The court need not, however, accept as true those allegations

1 that (1) contradict matters properly subject to judicial notice; (2)
2 are conclusory allegations of law, mere legal conclusions, unwarranted
3 deductions of fact, or unreasonable inferences; (3) are contradicted
4 by documents referred to in the complaint; or (4) are internally
5 inconsistent. *Shwarz*, 234 F.3d at 435; *Pareto v. F.D.I.C.*, 139 F.3d
6 696, 699 (9th Cir. 1998); *Clegg v. Cult Awareness Network*, 18 F.3d
7 752, 754-55 (9th Cir. 1994); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th
8 Cir. 1994), *rev'd on other grounds by Galbraith v. Cty. of Santa*
9 *Clara*, 307 F.3d 1119 (9th Cir. 2002); *W. Mining Council v. Watt*, 643
10 F.2d 618, 624 (9th Cir. 1981); *Response Oncology, Inc. v. MetraHealth*
11 *Ins. Co.*, 978 F. Supp. 1052, 1058 (S.D. Fla. 1997).

12 The purpose of a motion to dismiss under Federal Rule of Civil
13 Procedure 12(b)(6) is to test the legal sufficiency of the complaint.
14 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The court can
15 grant the motion only if it is certain that the plaintiff will not be
16 entitled to relief under any set of facts that could be proven under
17 the allegations of the complaint. *Cahill v. Liberty Mut. Ins. Co.*,
18 80 F.3d 336, 338 (9th Cir. 1996).

19 **A. Analysis**

20 On February 17, 2016, plaintiffs amended their complaint. (ECF
21 No. 30). The second amended complaint alleges four causes of action:
22 (1) declaratory relief; (2) satisfaction and enforcement of judgment;
23 (3) breach of duty of good faith and fair dealing; and (4) breach of
24 Nevada insurance laws/statutory bad faith. Defendant moves to dismiss
25 all causes of action, arguing that the plaintiffs have failed to cure
26 the deficiencies noted by the court in the February 5, 2016 order.

27 **1. Declaratory Relief and Satisfaction and Enforcement of**
28 **Judgment**

1 The defendant, as it did in the first motion to dismiss,
2 maintains that the claims for declaratory relief and satisfaction and
3 enforcement of judgment is premature because it was being appealed.
4 The record reflects the Nevada Court of Appeals affirmed the state
5 court judgment in favor of the plaintiffs on May 10, 2016. (ECF No.
6 35, Ex. 1). As defendant asserts no other basis for dismissal of
7 these claims, the court denies the defendant's motion to dismiss
8 plaintiffs' claims for declaratory relief and satisfaction and
9 enforcement of judgment.

10 **2. Breach of Good Faith and Fair Dealing**

11 Defendant argues that plaintiffs have not adequately shown that
12 they have standing to sue for the breach of the covenant of good faith
13 and fair dealing. Plaintiffs argue that since the applicable
14 insurance policy has not been provided, the court cannot make any
15 factual or legal determinations relating to plaintiffs' claims under
16 said policies. As the applicable insurance policy is not part of the
17 record, the court will deny defendant's motion to dismiss plaintiffs'
18 breach of the covenant of good faith and fair dealing claim, without
19 prejudice to renew in a motion for summary judgment at the close of
20 discovery.

21 **3. Breach of Nevada Insurance Laws/Statutory Bad Faith**

22 Defendant argues that plaintiffs have not shown that they have
23 standing to sue for unfair claims practices and have pled sufficient
24 facts to state a claim for unfair claims practices. Plaintiffs
25 contend that they have standing to sue for unfair claims practices "on
26 the basis of judicial assignment issued and granted by the State
27 Court." (ECF No. 32 at 15). However, plaintiffs acknowledge that the
28 judicial assignment only concerns the "right to pursue the Judgment

1 against National Union Fire.” (*Id.*).

2 It is well established that third party claimants have no private
3 cause of action under NRS 686A.310. *Tweet v. Webster*, 614 F. Supp.
4 1190, 1195 (D. Nev. 1985); *Crystal Bay Gen. Improvement Dist. v. Aetna*
5 *Casualty & Surety Co.*, 713 F. Supp. 1371, 1376 (D. Nev. 1989) (holding
6 that NRS 686A.310 creates no cause of action for a third party
7 claimant against an insurer). As such, plaintiffs have failed to show
8 they have standing to sue for unfair claims practices. Therefore, the
9 court grants defendant’s motion to dismiss plaintiffs’ statutory bad
10 faith claims.

11 **4. Punitive Damages and Attorney’s Fees**

12 Defendant argues that plaintiffs’ claim and prayer for punitive
13 damages should be dismissed because the only basis for recovery is
14 based on causes of action that fail. The court has denied the motion
15 to dismiss the breach of the covenant of good faith and fair dealing
16 claim. Therefore, the court denies the defendant’s motion to dismiss
17 plaintiffs’ prayer for punitive damages, without prejudice to renew
18 in a motion for summary judgment at the close of discovery.

19 Defendant further argues that plaintiffs’ claim for attorney’s
20 fees should be dismissed because plaintiffs cannot plead a basis for
21 the recovery of attorney’s fees. In response, plaintiffs contend that
22 the state court awarded them \$228,696.12 in attorney’s fees and costs
23 in the underlying state court action and that the applicable insurance
24 policy contains one or more provisions that provide for attorney’s
25 fees and costs to the insured as a prevailing party forced to enforce
26 the terms of the policy. (ECF No. 30 at 6). As the applicable
27 insurance policy is not part of the record, the court will deny
28 without prejudice defendant’s request to strike plaintiffs’ claim for

1 attorney's fees, to renew in a motion for summary judgment at the
2 close of discovery.

3 **III. Conclusion**

4 In accordance with the foregoing, defendant's motion to dismiss
5 (ECF No. 31) is **GRANTED in part and DENIED in part.**

6 IT IS SO ORDERED.

7 DATED: This 22nd day of August, 2016.

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UNITED STATES DISTRICT JUDGE