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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ELAINE FOSMIRE,

Plaintiff,

v.

PROGRESSIVE MAX INSURANCE
COMPANY, et al.,

Defendants.

CASE NO. C10-5291JLR

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS

This matter comes before the court on Defendants' motion to dismiss (Dkt. # 34).
Having considered the motion, as well as all submissions filed in support and opposition,
and deeming oral argument unnecessary, the court GRANTS in part and DENIES in part
the motion to dismiss (Dkt. # 34).

I. BACKGROUND

Plaintiff Elaine Fosmire, on behalf of herself and as a proposed class
representative, brings suit against Defendants Progressive Max Insurance Company

1 (“Progressive Max”), Progressive Casualty Insurance Company (“Progressive Casualty”),
2 Progressive Direct Insurance Company (“Progressive Direct”), and Progressive
3 Corporation. (Compl. (Dkt. # 1) at 1.) Ms. Fosmire seeks specific performance or
4 damages, as well as declaratory and injunctive relief, in connection with underinsured
5 and/or uninsured motorist (“UIM”) coverage contained in automobile insurance policies
6 sold by Defendants.¹ (*Id.* ¶¶ 1.1-1.2.) At the core of her complaint, Ms. Fosmire alleges
7 that Defendants failed to compensate her and other similarly-situated policyholders for
8 diminished value loss under the UIM coverage of Progressive policies. (*Id.* ¶¶ 1.3-1.5.)

9 On June 5, 2007, Ms. Fosmire’s 2007 Mazda was damaged in a collision with an
10 uninsured motorist. (*Id.* ¶ 4.1.) Ms. Fosmire was insured by Progressive Max, and her
11 insurance policy included UIM coverage for physical damage. (*Id.* ¶ 4.2; *see* Glade Decl.
12 (Dkt. # 35) ¶¶ 2-3 & Exs. A-B.) Progressive Max paid for repairs to Ms. Fosmire’s
13 vehicle. (Compl. ¶ 4.4.) After the repairs were completed, Ms. Fosmire had her vehicle
14 inspected for diminished value loss and made a demand for diminished value loss, but
15 was advised that diminished value loss was not covered under her policy. (*Id.*)

16 By this lawsuit, Ms. Fosmire seeks to recover for diminished value loss to her
17 vehicle. She alleges that Defendants have not fully inspected her vehicle for diminished
18 value loss, have not fully compensated her for diminished value loss, and have not
19 informed her about diminished value loss and her right to recover it. (*Id.*) Ms. Fosmire

20
21 ¹ In her complaint, Ms. Fosmire refers collectively all Defendants in this action as
22 “PROGRESSIVE” or “Defendants,” without specifying the actions of individual Defendants.
(Compl. at 1.)

1 asserts claims for breach of contract (Count I), declaratory relief (Count II), and
2 injunctive relief (Count III). (*Id.* ¶¶ 7.1-7.26.)

3 II. ANALYSIS

4 A. Motion to Dismiss Breach of Contract Claims

5 In Count I of her complaint, Ms. Fosmire brings a cause of action for breach of
6 contract. (Compl. ¶¶ 7.1-7.7.) She asserts that Defendants breached the terms of the
7 UIM coverage contained in Progressive insurance policies by not advising policyholders
8 of their right to recover for diminished value loss and by not compensating policyholder
9 for diminished value loss. (*Id.* ¶¶ 7.5.) Additionally, as part of the same cause of action,
10 Ms. Fosmire asserts that Defendants mischaracterized coverage by improperly paying
11 UIM claims under collision or comprehensive coverage. (*Id.* ¶ 7.6.)

12 Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendants move to dismiss
13 Ms. Fosmire's claims against Progressive Casualty, Progressive Direct, and Progressive
14 Corporation on the theory that Ms. Fosmire does not have standing to sue these entities.
15 (Mot. at 9-17.) Defendants also move to dismiss Ms. Fosmire's mischaracterization
16 claims, arguing that she does not have standing to assert these claims on behalf of
17 unnamed members of the proposed class because Defendants did not mischaracterize Ms.
18 Fosmire's own claim. (*Id.* at 15-17.)

19 1. Rule 12(b)(1) Legal Standard

20 Rule 12(b)(1) permits the court to dismiss a claim for lack of subject matter
21 jurisdiction based on standing. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136,
22 1140 (9th Cir. 2003). A jurisdictional challenge under this provision may be made on the

1 face of the pleadings or by presenting extrinsic evidence. *Id.* at 1139. When resolving
2 jurisdiction depends on the merits of a case, the court may not resolve genuinely disputed
3 facts. *Id.* Instead, the court must assume the truth of the allegations in a complaint unless
4 controverted by undisputed facts in the record. *Id.* At this stage of pleading, the non-
5 moving party need only show that the facts alleged, if proved, would confer standing. *Id.*
6 at 1140 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998)).

7 2. Article III Standing

8 Article III of the United States Constitution limits the jurisdiction of the federal
9 courts to actual cases and controversies. *Whitmore v. Arkansas*, 495 U.S. 149, 154-55
10 (1990). This requires the person invoking the jurisdiction of the court to establish the
11 requisite standing to sue. As a general matter, to demonstrate standing under Article III,
12 a plaintiff must show that (1) she suffered an injury in fact; (2) the injury is fairly
13 traceable to the defendant's conduct; and (3) it is likely that the injury will be redressed
14 by a favorable decision of the court. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*,
15 528 U.S. 167, 180-81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61
16 (1992); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 607 F.3d
17 1178, 1183 (9th Cir. 2010). Even in a class action, "constitutional standing requirements
18 [must be] satisfied before proceeding to the merits." *Bates v. United Parcel Serv., Inc.*,
19 511 F.3d 974, 985 (9th Cir. 2007) (en banc). "It is well settled that "[a]t least one named
20 plaintiff must satisfy the actual injury component of standing in order to seek relief on
21 behalf of himself or the class.'" *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 1000
22 n.7 (9th Cir. 2006).

1 3. Progressive Casualty, Progressive Direct, and Progressive Corporation

2 Defendants argue that the court, in accordance with the reasoning of *Hovenkotter*
3 *v. Safeco Corp.*, No. C09-218JLR, 2009 WL 6698629 (W.D. Wash. Aug. 3, 2009), and
4 *Shin v. Esurance Ins. Co.*, No. C08-5626RBL, 2009 WL 688586 (W.D. Wash. Mar. 13,
5 2009), should dismiss Ms. Fosmire’s breach of contract claims against Progressive
6 Casualty, Progressive Corporation, and Progressive Direct because Ms. Fosmire
7 contracted for insurance with Progressive Max alone. (Mot. at 10-13.) Ms. Fosmire
8 concedes that she “is in strict privity of contract only with Progressive Max.” (Resp.
9 (Dkt. # 38) at 5.) Nevertheless, Ms. Fosmire contends that she has sufficiently alleged
10 injuries traceable to all Defendants so as to confer standing, asserting that her injury was
11 caused by Defendants as inter-related entities acting to promote their common unity of
12 interest. (*Id.* (citing *Martin v. Twin City Fire Ins. Co.*, No. C08-5651RJB, 2009 WL
13 902072 (W.D. Wash. Mar. 31, 2009).)

14 Here, Ms. Fosmire must allege facts sufficient to support a finding that she has
15 suffered an injury in fact that is fairly traceable to the conduct of Progressive Casualty,
16 Progressive Corporation, and Progressive Direct. *Lujan*, 504 U.S. at 560. Having
17 reviewed the complaint, as well as the materials submitted by the parties, and assuming
18 the truth of the allegations in the complaint, except where contradicted by undisputed
19 facts, the court finds Ms. Fosmire has not made a sufficient showing to demonstrate
20 standing as to Progressive Casualty, Progressive Corporation, and Progressive Direct. It
21 is undisputed that Ms. Fosmire is not in contractual privity with Progressive Casualty,
22 Progressive Corporation, or Progressive Direct. Progressive Max is clearly identified as

1 the underwriter of Ms. Fosmire’s policy and is the entity with whom Ms. Fosmire
2 contracted. (Glade Decl. Ex. B at 2.) Ms. Fosmire’s arguments to overcome these
3 undisputed facts do not demonstrate that the actions of Progressive Casualty, Progressive
4 Corporation, and Progressive Direct injured her in a personal or individualized way.
5 First, Ms. Fosmire’s allegation that Progressive Casualty “processes, adjusts and sets the
6 claims adjusting policies for payment of diminished value on UIM claims for all the
7 Progressive family of companies, including [Progressive Max]” (Compl. ¶ 1.8) is
8 insufficient to confer standing on Ms. Fosmire based on her claims for breach of the
9 insurance policy she entered into with Progressive Max. *See Hovenkotter*, 2009 WL
10 6698629, *3-4; *cf. Shin*, 2009 WL 688586, at *5. Second, even accepting that
11 Progressive Direct drafted Ms. Fosmire’s insurance policy, the policy is with Progressive
12 Max, not Progressive Direct. Likewise, the denial of coverage letters identify
13 Progressive Max as the underwriter, and Ms. Fosmire does not explain how Progressive
14 letterhead is sufficient to confer standing where there is no question that her policy is
15 with Progressive Max. Third, even accepting that Defendants share “common leadership,
16 pooling interests and management,” the court does not find this sufficient without more.
17 The *Shin* court rejected a similar argument, refusing “to embrace the notion that all
18 related companies may be haled into court for the actions of one . . . of those inter-
19 related, but distinct, companies merely because they have agreed on common practices.”
20 *Shin*, 2009 WL 688586, at *5. Therefore, the court grants Defendants’ motion to dismiss
21 Ms. Fosmire’s claims against Progressive Casualty, Progressive Corporation, and
22 Progressive Direct without prejudice.

1 4. Mischaracterization Claims

2 Defendants next move to dismiss Ms. Fosmire’s mischaracterization claims under
3 Rule 12(b)(1). (Mot. at 15-17.) As part of her cause of action for breach of contract, Ms.
4 Fosmire alleges:

5 PROGRESSIVE also breached the express provisions of its contracts with
6 certain members of the Class by paying their UIM or hit-and-run claims
7 under its collision or comprehensive coverage.

8 (Compl. ¶ 7.6.) Defendants contend that these mischaracterization claims should be
9 dismissed because Ms. Fosmire does not allege that Defendants mischaracterized her own
10 claim and thus does not have standing to assert such mischaracterization claims. Ms.
11 Fosmire responds that Defendants’ argument is premature. (Resp. at 8.) As she views it,
12 the question is one of typicality under Federal Rule of Civil Procedure 23(a), which
13 should be reserved for consideration as part of a motion for class certification. Ms.
14 Fosmire argues she will be able to represent a class as to both the mischaracterization
15 claims and the non-mischaracterization because all of the claims arise from the same
16 alleged wrongful conduct. (*Id.* at 10.)

17 Standing in class actions is a threshold matter that “is satisfied if at least one
18 named plaintiff meets the requirements.” *Bates*, 511 F.3d at 985; *see Armstrong v. Davis*,
19 275 F.3d 849, 860 (9th Cir. 2001). Courts in this district have expressed mixed views
20 regarding whether to reserve inquiry into a named plaintiff’s standing to bring a claim on
21 behalf of other members of the proposed class where the named plaintiff has not suffered
22 the injury that forms the basis of the claim. *Compare Martin*, 2009 WL 902072, at *2
(reserving question until class certification), *with Shin*, 2009 WL 688586, at *4

1 (dismissing mischaracterization claims on motion to dismiss because named plaintiff did
2 not have standing); *see also Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 555-56 (W.D.
3 Wash. 2008). Though the issue may be appropriately reserved in some cases, the court
4 finds that there is no reason to delay consideration of the issue here. Progressive Max did
5 not mischaracterize Ms. Fosmire’s insurance claim, and the misrepresentation claims in
6 the complaint neither arise from the same conduct as Ms. Fosmire’s own claims
7 regarding diminished value loss nor involve the same legal theories. The *Shin* court,
8 confronted with an analogous situation, concluded that a proposed class representative
9 may not “assert a litany of claims against a defendant merely because the plaintiff has
10 standing for one such claim.” *Shin*, 2009 WL 688586, at *4. Just as in *Shin*, so too here:
11 Ms. Fosmire does not have standing to bring misrepresentation claims merely because
12 she has standing to assert distinct breach of contract claims regarding diminished value
13 loss. The court grants Defendants’ motion to dismiss Ms. Fosmire’s misrepresentation
14 claims without prejudice.

15 **B. Motion to Dismiss Counts II and III**

16 1. Rule 12(b)(6) Legal Standard

17 When considering a motion to dismiss under Rule 12(b)(6), the court construes
18 the complaint in the light most favorable to the non-moving party. *Livid Holdings Ltd.*
19 *v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must
20 accept all well-pleaded facts as true and draw all reasonable inferences in favor of the
21 plaintiff. *Wylar Summit P’ship v. Turner Broad. Sys.*, 135 F.3d 658, 661 (9th Cir. 1998).
22 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,

1 | accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v.*
2 | *Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550
3 | U.S. 544, 570 (2007)). Dismissal under Rule 12(b)(6) can be based on the lack of a
4 | cognizable legal theory or the absence of sufficient facts alleged under a cognizable
5 | legal theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

6 | 2. Count II: Declaratory Judgment

7 | Ms. Fosmire requests a declaratory judgment in Count II of her complaint.

8 | (Comp. ¶¶ 7.16-7.17.) Defendants move to dismiss this count on the basis that it seeks
9 | the same relief as that sought in Ms. Fosmire’s cause of action for breach of contract.

10 | (Mot. at 18-20.) To maintain a claim under the Declaratory Judgment Act, “a plaintiff
11 | must establish standing by showing ‘that there is a substantial controversy, between
12 | parties having adverse interest, of sufficient immediacy and reality to warrant issuance of
13 | a declaratory judgment.’” *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 658 (9th
14 | Cir. 2002); *see also Aydin Corp. v. Union of India*, 940 F.2d 527, 529 (9th Cir. 1991).

15 | Requests for declaratory judgment orders that merely impose the remedies provided for
16 | in other claims are duplicative and may be dismissed on that basis. *Swartz v. KPMG*
17 | *LLP*, 476 F.3d 756, 766 (9th Cir. 2007) (adopting the opinion of *Swartz v. KPMG LLP*,
18 | 401 F. Supp. 2d 1146, 1154-55 (W.D. Wash. 2004)).

19 | Here, the court finds that Count II is duplicative of Ms. Fosmire’s breach of
20 | contract claims and must be dismissed. *Hovenkotter*, 2009 WL 6698629, at *6. Pursuant
21 | to Count II, Ms. Fosmire “seeks an order declaring that Defendants are obligated under
22 | the UIM policy provisions to notify policyholders of their diminished value losses, to

1 readjust Plaintiff's and Class Members' claims for diminished value loss, and to reverse
2 all consequences of having paid hit-and-run claims under the collision or comprehensive
3 provisions." (Resp. at 13.) In *Hovenkotter*, the court, confronted with an identical cause
4 of action for declaratory relief, dismissed the claim as duplicative of the plaintiff's breach
5 of contract claims. *Hovenkotter*, 2009 WL 6698629, at *6. The same result is
6 appropriate here. Resolution of Ms. Fosmire's other claims will already determine
7 whether the remedies sought in her declaratory judgment claim should be imposed.
8 Accordingly, the court dismisses Count II. *See id.*

9 3. Count III: Injunction

10 In Count III, Ms. Fosmire seeks an injunction. (Compl. ¶¶ 7.18-7.26.) Defendants
11 move to dismiss this claim on the basis that an injunction is a remedy, not an independent
12 cause of action, and that Count III improperly seeks monetary relief. (Mot. at 20.)
13 Defendants acknowledge, however, that this court denied an analogous request in
14 *Hovenkotter*. (*Id.* at 20 n.3.) The court declines to dismiss Count III. *See Hovenkotter*,
15 2009 WL 6698629, at *6-7; *Martin*, 2009 WL 902072, at *2.

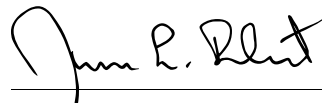
16 **C. Motion for Discovery**

17 In her response, Ms. Fosmire moves for leave to conduct pre-certification
18 discovery to amend her complaint to add additional facts and/or to join additional
19 plaintiffs. (Resp. at 10.) The court declines to resolve Ms. Fosmire's request in this
20 order, but will issue a preliminary scheduling order in conjunction with this order. Ms.
21 Fosmire may proceed in accordance with the preliminary scheduling order and may move
22 to amend her complaint, if and when appropriate.

1 **III. CONCLUSION**

2 In light of the foregoing, the court GRANTS in part and DENIES in part the
3 motion to dismiss (Dkt. # 34). The court DISMISSES Ms. Fosmire's claims against
4 Progressive Casualty, Progressive Corporation, and Progressive Direct, and DISMISSES
5 Count II.

6 Dated this 31st day of August, 2010.

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8 JAMES L. ROBART
9 United States District Judge

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