JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CASE NO.: CV 15-07635 SJO (GJSx) **DATE:** February 2, 2016

TITLE: Cove Partners, LLC v. XL Specialty Insurance Co.

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz	Not Present
Courtroom Clerk	Court Reporter
COUNSEL PRESENT FOR PLAINTIFF:	**COUNSEL PRESENT FOR DEFENDANT:**
Not Present	Not Present

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PROCEEDINGS (in chambers): ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PURSUANT TO Rules 12(b)(6) AND 9(b) [Docket No. 17].

This matter is before the Court on Defendant XL Specialty Insurance Co.'s ("XL" or "Defendant") Motion to Dismiss Pursuant to Rules 12(b)(6) and (9)(b) ("Motion"), filed on December 7, 2015. Plaintiff Cove Partners, LLC ("Cove" or "Plaintiff") opposed the Motion ("Opposition") on January 4, 2016, and XL replied ("Reply") on January 11, 2016. The Court found this matter suitable for disposition without oral argument and vacated the hearing scheduled for January 25, 2016. *See* Fed. R. Civ. P. 78(b). For the following reasons, the Court **GRANTS** XL's Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

In this insurance dispute, Cove "seeks compensatory and punitive damages for breach of the implied covenant of good faith and fair dealing found in every insurance contract, as well as for fraud in the inducement and fraud. It also seeks compensatory damages for breach of the insurance contract, as well as reformation and declaratory judgment." (First Am. Compl. ("FAC") ¶ 1, ECF No. 16.) In support of these claims, Cove alleges the following in its FAC.

Cove is a "limited liability company formed in the laws of the State of Delaware, with its principal place of business in Los Angeles, California." (FAC ¶ 5.) Cove has two members, one of whom is "an individual and a resident of California, identified as the beneficiary under the policy at issue." (FAC ¶ 5.) "The other member is BN Three Corporation, which has its principal place of business in California and is formed and in good standing under the laws of the state of California." (FAC ¶ 5.) XL is an insurance company incorporated in the State of Delaware with its principal place of business in the State of Connecticut. (FAC ¶ 6.)

Cove paid a premium of $310,000.00 for an insurance policy entitled "Cove Partners Management Liability Reimbursement Insurance" (the "Policy"), with XL as the insurer. (FAC ¶ 10; Decl. James

Goldman in Supp. Mot. ("Goldman Decl."), Ex. A ("Policy"), ECF No. 17.)[1] The Policy contains a limit of liability insurance in the amount of $10 million in the aggregate, including defense expenses. (FAC ¶ 10; Policy 4.) The policy period ("Policy Period") runs between June 18, 2008 and June 18, 2011. (FAC ¶ 16; Policy 4.) The Policy specifies that "[t]he Insurer shall pay on behalf of the Insured Persons Loss resulting from a Claim first made against the Insured Persons during the Policy Period or, if applicable, the Optional Extension Period, for a **Wrongful Act** except for Loss which the Company is permitted or required to pay on behalf of the Injured Persons." (FAC ¶ 11; Policy § I(A) (emphasis added).) The Policy further provides that "[t]he Insurer shall pay on behalf of the Company Loss . . . which the Company is required or is permitted to pay as indemnification to the Insured Persons resulting from a Claim first made against the Insured Persons during the Policy Period or, if applicable, the Optional Extension Period, for a Wrongful Act; or resulting from a Claim first made against the Company; or during the Policy Period, or, if applicable, the Optional Extension Period, for a Wrongful Act." (Policy § I(B).)

[1] Although Cove attached copies of both the Policy and the Application to its original complaint and references both documents as "Exhibits" in its FAC, (FAC ¶¶ 10), Cove did not in fact attach copies of either document to the FAC. XL submits copies of both the Policy and the Application as part of its Motion (*see* Policy; Goldman Decl., Ex. B ("Appl.")). The Court considers both the Policy and the Application as part of the FAC for purposes of the instant Motion, for although a court in ruling on a motion to dismiss generally may not "consider[] evidence outside the pleadings . . . [a] court may, however, consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (holding that a court may consider "other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"). "Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *Ritchie*, 342 F.3d at 908. Where, as here, Cove's claim for breach of contract alleges the existence of a contract, "[t]he defendant may offer such a document, and the district court may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss . . ." *Id.* (noting that "[t]he doctrine of incorporation by reference may apply, for example, when a plaintiff's claim about insurance coverage is based on the contents of a coverage plan . . . or when a plaintiff's claim about stock fraud is based on the contents of SEC filings . . . ." (internal citations omitted)). Moreover, because Cove extensively references the Policy and the Application in the FAC, the Court finds consideration of these documents appropriate in the instant Motion. (FAC ¶ 24-33, 60, 64.)

The Policy defines a number of these terms, and sets forth provisions for the insured providing notice of claims and for circumstances under which the insurer shall not be liable to the insured. (*See generally* FAC ¶¶ 12-14; Policy.) In particular, the Policy specifies that "[a]ll **Claims** arising from the same **Interrelated Wrongful Acts** shall be deemed to constitute a single **Claim** and shall be deemed to have been made at the earliest of the time at which the earliest such **Claim** is made or deemed to have been made pursuant to GENERAL CONDITIONS (A)(1) above or GENERAL CONDITIONS (A)(2)**,** if applicable." (Policy § VI(B) (emphasis in original).) The Policy defines "Claim," in relevant part, as "any civil proceeding in a court of law or equity, or arbitration . . ." (Policy § II(C).) The Policy defines "Interrelated Wrongful Acts" as "any **Wrongful Act** based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any of the same or related facts, series of related facts, circumstances, situations, transactions or events. (Policy § II(K).) "Wrongful Act" is defined to include, among other things, "Professional Service Wrongful Act[s]," a term which was amended to include the services of "Trustee" and "Executor." (Policy §§ II(aa), II(S), Goldman Decl., Ex. A at 17 ("Professional Services Endorsement").) The Policy also contains a "Prior and Pending Litigation Exclusion" providing that XL

> shall not be liable to make any payment for **Loss** in connection with any **Claim** made against an **Insured** . . . based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any fact, circumstance, situation, transaction, event, **Wrongful Act** underlying or alleged in any prior and/or pending litigation or administrative or regulatory proceeding or arbitration which was brought prior to the Pending and Prior Litigation Date set forth in ITEM 6 of the Declarations . . .

(Policy § III(C) (emphasis in original).)

Cove further alleges that the application leading to the Policy (the "Application") became part of the Policy. (FAC ¶ 10.) Question 7 of the Application requested that Cove disclose any prior claims that would fall within the scope of the proposed insurance coverage. (FAC ¶ 17; Appl. 39.) In the Application, Cove disclosed a "host of 'New York Related Cases/Actions'" that "would fall within the scope of the proposed insurance" and noted that Cove "sought coverage for '**all liabi[ility] associated with being executor and trustee**.'" (FAC ¶ 17; Appl., Attachment A, Kotick Entity Summary.) During the negotiations, "XL did not provide draft Declarations seeking to exclude the New York Related Cases/Actions" or attempt to restrict the coverage for "'all liab[ility] associated with being executor and trustee.'" (FAC ¶ 18.)

Cove advised XL prior to the issuance of the Policy that if its principal was "'sued over the administration of his father's estate, e.g. by his father's wife, he would expect this policy to respond,'" for in order to take out "a policy premium of the size, 'the policy has to cover the landscape.'" (FAC ¶ 19.) Cove further "reiterated that the Policy 'protects him from claims for negligence for beneficiaries, which in many cases could be folks that would be picked up under the Family Exclusion. . . The effect would be to strip away the coverage granted.'" (FAC ¶ 19.) Based on this "explicit statement that a very purpose of the policy was to provide coverage in the

event of any claims by any beneficiaries of the estate administered by Cove Partners' principal, XL 'agreed to remove the Family Exclusion'" and at no time indicated that coverage could be voided by later Declarations or interpretation of a separate part of the Policy such as "Interrelated Acts." (FAC ¶ 19.)

There are three claims for coverage at issue in this action. XL refers to these claims collectively as the "Shvachko Claims." (Mot. 6.) First, Cove seeks coverage for a November 5, 2009 Petition ("November 2009 Petition"), filed in the Surrogate's Court of the State of New York, "in which Cove Partners' principal was sued for, among other things, an award of money damages 'in an amount no less than $2.5 million plus an award of punitive damages in the sum of $5 million.'" (FAC ¶ 20.) The November 2009 Petition also "sought other relief against the principal in his capacity of Executor of his father's estate." (FAC ¶ 20.) On December 3, 2009, Cove provided XL with "Notice of the November 2009 Petition." (FAC ¶ 21.) On February 26, 2010,[2] XL denied coverage for the November 2009 Petition under the Policy and requested additional information. (FAC ¶ 22.) On April 2, 2010, Cove provided XL the requested information and objected to the untimeliness of XL's response. (FAC ¶ 23.) On April 19, 2010, XL responded to the additional information, and denied coverage for the November 2009 Petition. (FAC ¶ 24; Mot. 6., ECF No. 17.) On January 7, 2011, Cove wrote to XL, requesting that XL reconsider its denial of coverage. (FAC ¶ 25.)

Second, Cove seeks coverage for Verified Objections dated September 14, 2009 ("September 2009 Objections"), also filed in the Surrogate's Court of the State of New York. (FAC ¶ 24.) On March 1, 2011, XL denied coverage for the November 2009 Petition and reaffirmed its denial of coverage for the September 2009 Objections. (FAC ¶ 26; Mot. 6.) On June 1, 2011, Cove wrote again to XL and requested that the coverage issue be re-examined. (FAC ¶ 27.)

Third, Cove seeks coverage for a "Summons With Notice" and corresponding Notice of Inquest ("2010 Action"), which Cove tendered to XL and requested coverage on June 3, 2011. (FAC ¶ 28.) On June 16, 2011, Cove "provided a final request for coverage for any subsequently resulting claims related to the claims made during the Policy period," but XL denied coverage for the claims on July 7, 2011. (FAC ¶¶ 29-30.) Cove alleges that on July 15, 2011, XL acknowledged that the matters raised in the June 16, 2011 letter were potential claims. (FAC ¶ 31.)

In its decision to enter into the insurance contract, Cove relied on XL's representations or conduct, including: (1) "agreeing that the Policy would cover 'all liab[ility] associated with being executor and trustee;'" (2) agreeing to excise the Family Exclusion so as to provide coverage in the event of a claim by the insured's principal's step-mother; and (3) failing to address the prior act exclusion date during the negotiations that led to the Policy. (FAC ¶¶ 46-48.)

II. DISCUSSION

[2] Although the Complaint states that XL responded to Cove's notice on February 26, 20010, the Court interprets this distant date to be February 26, 2010 for the purpose of the instant Motion.

A. Legal Standards

In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court may only consider the complaint, documents incorporated by reference in the complaint, and matters of judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). In evaluating a motion to dismiss, a court accepts the plaintiff's factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000).

Federal Rule of Civil Procedure 12, which provides for dismissal of a plaintiff's cause of action for "failure to state a claim on which relief can be granted," *see* Fed. R. Civ. P. 12(b)(6), must be read in conjunction with Federal Rule of Civil Procedure 8(a) ("Rule 8"). *See Ileto v. Glock Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). Rule 8 requires that "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although the pleader is not required to plead "detailed factual allegations" under Rule 8, this standard demands "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Pleadings that contain nothing more than legal conclusions or "a formulaic recitation of the elements of a cause of action" are insufficient. *Id.* (citation and quotation marks omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Where a complaint pleads sufficient facts "to raise a right to relief above the speculative level," a court may not dismiss the complaint under Rule 12(b)(6). *See Twombly*, 550 U.S. at 545.

A state law fraud claim brought in federal court must comply with the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure. *L'Garde, Inc. v. Raytheon Space & Airborne Syst.*, 805 F. Supp. 2d 932, 944 (C.D. Cal. 2011). Rule 9(b) states, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). The particularity requirement is satisfied if the pleading is "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). "While statements of the time, place and nature of the alleged fraudulent activities are sufficient, mere conclusory allegations of fraud are insufficient." *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).

A court may deny leave to amend where amendment would be futile or if the claim is legally insufficient. *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

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B. Judicial Notice

In support of its Motion, XL submits a declaration with twelve supporting documents, ten of which appears to have been filed in the New York County Surrogate's Court: (1) Natalia Shvachko's ("Shvachko") December 22, 2005 Petition to Revoke Letters, for a Compulsory Accounting, for Declaratory Relief, and for Related Relief, in the Estate of Charles M. Kotick (Goldman Decl., Ex. C); (2) Robert Kotick's ("Insured") September 12, 2006 Verified Petition to Recover Property of Decedent (Goldman Decl., Ex. D); (3) Insured's September 12, 2006 Verified Petitions to Discover and Demand Delivery of Property Withheld (Goldman Decl., Ex. E); (4) Shvachko's October 12, 2006 Answer (Goldman Decl., Ex. F); (5) Insured's October 23, 2006 Verified Petition (Goldman Decl., Ex. G); (6) Shvachko's January 30, 2007 Second Amended Answer and Counterclaim (Goldman Decl., Ex., H); (7) Shvachko's November 5, 2009 Verified Petition (Goldman Decl., Ex. I ("November 2009 Petition")); (8) Shvachko's September 14, 2009 Objections (Goldman Decl., Ex. J ("September 2009 Objections")); (9) Shvachko's September 23, 2010 Summons with Notice and May 2, 2011 Order for Inquest (Goldman Decl., Ex. K ("2010 Action")); and (10) Shvachko's September 6, 2011 Verified Complaint (Goldman Decl. Ex. L).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989) (citing *Fort Vancouver Plywood Co. v. U.S.*, 747 F.2d 547, 552 (9th Cir. 1984)). "In addition to the complaint, it is proper for the district court to 'take judicial notice of matters of public record outside the pleadings' and consider them for purposes of the motion to dismiss." *Mir. v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988) (quoting *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986)). Courts are permitted to "take into account documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading." *Knievel v. ESPN,* 393 F.3d 1068, 1076 (9th Cir. 2005) (citing *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir.1999) (citation and internal quotation marks omitted)).

Further, pursuant to Federal Rule of Evidence 201, the court "may take judicial notice on its own" of "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)-(c).

Though XL does not expressly request that the Court take judicial notice of the aforementioned documents, the Court concludes that it is proper to take judicial notice of the ten documents filed in the New York County Surrogate's Court because they are not subject to reasonable dispute as all are publicly recorded, and as such, their existence can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. *See* Fed. R. Evid. 201(b)(2).

C. Sufficiency of Cove's Claims

In the FAC, Cove's asserts the following six causes of action against XL: (1) breach of the implied covenant of good faith and fair dealing; (2) fraudulent inducement; (3) fraud; (4) breach of contract; (5) declaration of coverage under the Policy; and (6) reformation fo the insurance contract. (*See*

generally FAC ¶¶ 36-68.) XL argues in its Motion that Cove's FAC should be dismissed because it fails to state any claim for which relief may be granted. (Mot. 8.) Principally, XL argues that Cove cannot make out a breach of contract claim because the Shvachko Claims each involve the same allegations as earlier claims that were pending before the inception of the Policy, and therefore are not covered under the Policy's plain language. (Mot. 1.)

Cove responds that the FAC contains sufficient factual allegations regarding the course of negotiations leading to the enactment of the Policy both to demonstrate that XL's interpretation of exclusions in the Policy were "made in bad faith" and are the "result of fraud" and to put XL on sufficient notice to defend against its fraud and fraudulent inducement claims. (Opp'n 1-3, ECF No. 20.)

The Court now addresses the sufficiency of each cause of action.

1. Breach of Contract

Cove alleges that XL breached its obligations under the Policy by repudiating its promise to pay for Cove's defenses fees and costs incurred in connection with the Shvachko Claims. (FAC ¶¶ 59-60.) The parties do not dispute that the Policy is a contract entered into between Cove and XL, nor do they dispute that the Policy only covers claims made between June 18, 2008 and June 18, 2011. (*See* FAC ¶¶ 10-19; Mot. 2-5, 8-13.)

"A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts § 1 (2012). "[A]n insurance policy is a contract and must be construed in the same manner as other contracts." *Inamed Corp. v. Medmarc Cas. Ins. Co.*, 258 F. Supp. 2d 1117, 1121 (C.D. Cal. 2002) (citing *Garcia v. Trans Pac. Life Ins. Co.*, 203 Cal. Rptr. 325, 327 (Ct. App. 1984)). In California, "[a] cause of action for breach of contract requires proof of the following elements: (1) existence of the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff as a result of the breach." *CDF Firefighters v. Maldonado*, 70 Cal. Rptr. 3d 667, 679 (Ct. App. 2008).

XL argues that Cove cannot state a claim for breach of contract because the facts as alleged in the FAC show that coverage for the claims is not available on three independent bases: (1) the Shvachko claims are not claims first made during the Policy period; (2) the Prior and Pending Litigation Exclusion bars coverage; and (3) the Prior Knowledge Exclusion bars coverage. (Mot. 9-13.) For the same reasons, XL argues that Cove's request for a declaration of coverage should be denied. (Mot. 13.)

XL first argues that the Shvachko Claims are not claims first made during the Policy Period, but rather arise out of Interrelated Wrongful Acts made before the onset of the Policy Period and are therefore not covered by the Policy. Specifically, XL contends that five of the seven New York Related Cases/Actions ("Prior Proceedings") and the Shvachko Claims all: (1) are either part of

or are based upon a single case in New York Surrogate's Court, Case No. 1202/2005 ("2005 Executor Litigation"), which commenced on December 22, 2005; (2) involve Shvachko's allegations against Kotick regarding his role as executor and trustee of the estate; and (3) involve allegations of interference with the prenuptial agreement and allegations that the promissory note is invalid. (Mot. 11.)

The Policy contains an Interrelated Claims Provision, which provides that "[a]ll Claims arising from the same Interrelated Wrongful Acts shall be deemed to constitute a single Claim and shall be deemed to have been made at the earliest of the time at which the earliest such Claim is made . . ." (Policy § VI(B).) The Policy defines "Interrelated Wrongful Acts" as "any Wrongful Act based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any of the same or related facts, series of related facts, circumstances, situations, transactions or events." (Policy § II(K).) "Wrongful Act" is defined to include, among other things, "Professional Service Wrongful Act[s]," a term which was amended to include the services of "Trustee" and "Executor." (Policy §§ II(aa), II(S), Professional Services Endorsement.)

The Policy also contains a Prior and Pending Litigation Exclusion providing that XL

> shall not be liable to make any payment for Loss in connection with any Claim made against an Insured . . . based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any fact, circumstance, situation, transaction, event, **Wrongful Act underlying or alleged in any prior and/or pending litigation** or administrative or regulatory proceeding or arbitration which was brought prior to the Pending and Prior Litigation Date set forth in ITEM 6 of the Declarations . . .

(Policy § III(C) (emphasis added).) Furthermore, the first page of the Policy provides, in pertinent part, that "THIS IS A CLAIMS MADE POLICY. EXCEPT AS OTHERWISE PROVIDED HEREIN, THIS POLICY ONLY APPLIES TO CLAIMS FIRST MADE DURING THE POLICY PERIOD . . ." (Policy 1.) The first page of the Application similarly provides that "THE POLICY FOR WHICH THIS APPLICATION IS MADE APPLIES, SUBJECT TO ITS TERMS, ONLY TO 'CLAIMS' FIRST MADE DURING THE POLICY PERIOD." (Appl. 1.) These provisions, taken together, operate to broadly exempt from coverage claims submitted during the Policy Period that arise out of prior or pending litigations.

In its Opposition, Cove maintains that the Policy provides coverage for the Shvachko Claims and argues that XL's interpretation of the Interrelated Claims Provision and Prior and Pending Litigation Exclusion are unreasonable because XL and Cove **intended** the Policy to cover all liability associated with Kotick being the executor and trustee of his father's estate. (Opp'n 8-11.) Cove further argues that the Application is incorporated into and forms a part of the Policy, and explicitly requested coverage for "all liab[ility] associated with being executor and trustee." (Opp'n 11-13, Appl. 6 ("Kotick Entity Summary").) Critically, however, Cove does **not** argue that the Shvachko Claims are not "based on, arising out of, directly or indirectly resulting from, in

consequence of, or in any way involving any of the same or related facts, series of related facts, circumstances, situations, transactions or events" as the Prior Proceedings. Nor does Cove argue that the Prior Proceedings all involve claims by Shvachko against Kotick in his capacity as executor and trustee of his father's estate.

As Cove points out in its Opposition, "[i]f contractual language is clear and explicit it governs." (Opp'n 8 (quoting *Bank of the West v. Super. Ct.*, 2 Cal. 4th 1254, 1264 (1992)).) Indeed, "[t]he 'clear and explicit' meaning of [contract] provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' controls judicial interpretation." *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.*, 5 Cal. 4th 854, 867 (1993) (internal citation omitted) (quoting Cal. Civ. Code § 1638). Here, the Policy clearly and unequivocally excludes from coverage claims that are "based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any fact, circumstance, situation, transaction, event, Wrongful Act underlying or alleged in any prior and/or pending litigation," which includes the "New York Related Cases/Actions" that Cove disclosed as part of its Application. (Policy § III(C).) Although Cove argues that it intended to have claims such as the Shvachko Claims covered under by the Policy, the mutual intention of the parties "is to be inferred, if possible, solely from the written provisions of the contract." *Id.* (citing Cal. Civ. Code § 1639).

As such, even construing the allegations in the FAC in the light most favorable to Cove, Cove cannot establish that XL breached the Policy and incorporated Application, and therefore cannot prevail on a breach of contract claim against XL. Thus, the Court **DISMISSES WITHOUT LEAVE TO AMEND** Cove's fourth cause of action for breach of contract.[3]

2. Fraud and Fraudulent Inducement Claims

Cove's second and third causes of action are for fraudulent inducement and fraud, respectively. (FAC ¶¶ 45-56.) In support of these causes of action, Cove alleges that when XL (1) agreed that the Policy would cover "all liab[ility] associated with being executor and trustee;" (2) agreed to excise the Family Exclusion so as to provide coverage in the event of a claim by the insured's principal's step mother; and (3) failed to address the prior act exclusion date during the extensive negotiations that led to the Policy, it made "material" misrepresentations to the decision of Cove to enter into the insurance contract, and that Cove "reasonably relied" on those misrepresentations. (FAC ¶¶ 46-48, 51-54.)

[3] Because the Court finds that the Shvachko Claims fall outside the scope of the Policy's coverage and are excludable under the Policy's Prior and Pending Litigation Exclusion, the Court does not address XL's tertiary argument that such claims fall within the Policy's Prior Knowledge Exclusion. (Mot. 4-5, 12-13.)

Under California law, a plaintiff must prove five elements to succeed on a fraud claim: "[1] misrepresentation (false representation, concealment, or nondisclosure); [2] knowledge of falsity (or 'scienter'); [3] intent to defraud, i.e., to induce reliance; [4] justifiable reliance; and [5] resulting damage." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009) (emphasis omitted) (internal quotation marks omitted); *see also Conroy v. Regents of Univ. of Cal.*, 45 Cal. 4th 1244, 1255 (2009). "'Promissory fraud' is a subspecies of the action for fraud and deceit." *Lazar v. Super. Ct.*, 12 Cal. 4th 631, 638 (1996). "An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract." *Id.* (citing *Chelini v. Nieri*, 32 Cal. 2d 480, 487 (1948)). "In such cases, the plaintiff's claim does not depend upon whether the defendant's promise is ultimately enforceable as a contract," for "'[i]f it is enforceable, the [plaintiff] . . . has a cause of action in tort as an alternative at least, and perhaps in some instances in addition to his cause of action on the contract.'" *Id.* (quoting Restatement (Second) of Torts § 530, subd. 1).

XL argues that Cove has failed to allege with the required specificity that XL made any false representations to Cove, and also that Cove cannot establish, as a factual matter, justifiable reliance. (Mot. 14.) Cove responds that the FAC adequately alleges that XL and Cove negotiated the terms of the policy and both parties understood and intended that it was to cover all liability associated with the insured being executor and trustee, and that XL acknowledged that intention when it removed the Family Exclusion to ensure that coverage would exist for any claims brought by Shvachko. (Opp'n 17.)

a. XL's Allegedly False Representations

In the FAC, Cove alleges that XL: (1) agreed that the Policy would cover "all liab[ility] associated with being executor and trustee;" (2) agreed to excise the Family Exclusion so as to provide coverage in the event of a claim by the insured's principal's step-mother; and (3) failed to address the prior act exclusion date during the negotiations that led to the Policy. (FAC ¶ 46-48.) More specifically, Cove alleges that XL did not provide draft Declarations seeking to exclude the disclosed "New York Related Cases/Actions" or otherwise attempt to restrict the coverage for "'all liab[ility] associated with being executor and trustee,'" nor did XL indicate that the coverage could be voided by interpretation of "separate part[s] of the Policy" such as "Interrelated acts." (FAC ¶ 18-19.)

The parties contest whether Cove alleges the circumstances of XL's representations with the specificity required under Rule 9(b). (*See* Mot. 14; Opp'n 16-17.) In order to sufficiently allege the existence of a misrepresentation, which is the first element of a fraud claim, a plaintiff must state with particularity both (1) the circumstances of the representation—"the who, what, when, where, and how of the misconduct charged"—and (2) "what is false or misleading about a statement, and why it is false." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2002) (internal quotation marks omitted); *see also Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010) (holding that, in order to prevail on a fraud claim, a plaintiff must show both components to prove the defendant made a misrepresentation). In evaluating whether

a plaintiff has pled sufficient factual allegations concerning an alleged misrepresentation, courts may only consider the complaint, documents incorporated by reference in the complaint, and matters of judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). "On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court must limit its review to the operative complaint and may not consider facts presented in briefs or extrinsic evidence." *Maiden v. Finander*, No. CV 12-01818-CJC (JEM), 2013 WL 5969840, at *3 (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)).

The FAC, as currently written, does not allege a single misrepresentation made by XL. First, Cove does not allege any facts in support of its claim that XL "agree[d] that the Policy would cover 'all liab[ility] associated with being executor and trustee." (FAC ¶¶ 17-19, 46, 51.) The FAC does not allege which person or persons at XL agreed to Cove's statement in the Application or how or under what circumstances they communicated such agreement to Cove. Second, with respect to the removal of the Family Exclusion, the FAC similarly does not allege who within XL agreed to excise the exclusion, under what circumstances they agreed to do so, or how they communicated such agreement to Cove. (FAC ¶¶ 19, 46.) Finally, with respect to Cove's assertion that XL "induced" Cove to enter into the Policy through its "fail[ure] to address the prior act exclusion date during the extensive negotiations that led to the Policy," (FAC ¶ 46), the FAC does not allege who at XL engaged in the negotiations with Cove or what representations were made regarding the scope of the Policy's coverage.

"Corporations speak though agents and, therefore plaintiffs must identify the agent who made the fraudulent statement, their authority to speak, and to whom the agent spoke." *Mat-Van, Inc. v. Sheldon Good & Co. Auctions, LLC*, No. 07-CV-912-IEG (BLM), 2007 WL 2206946, at *5 (S.D. Cal. July 27, 2007). In an attempt to circumvent these well-established principles, Cove submits in its Opposition emails that detail the specific XL representatives and their alleged misrepresentations, which Cove alleges it reasonably relied on when it decided to purchase the Policy. (Opp'n 3, ECF No. 20; Opp'n Ex. A, B.) These allegations do not appear in the FAC and the documents in which they are found—largely redacted emails purportedly exchanged between the XL and Aon Risk Services—are not judicially noticeable under Federal Rule of Evidence 201. The Court therefore disregards them for the purpose of the Motion. *Maiden*, 2013 WL 5969840, at *3.

In sum, the Court concludes that FAC does not adequately allege who made the purported misrepresentations and omissions or when, where, or under what circumstances such statements were made. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2002). The conclusory allegations contained in the FAC are insufficient to meet the heightened pleading standard required by Rule 9(b). The Court concludes that Cove's fraudulent inducement and fraud causes of action can be dismissed on this ground alone.

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b. Justifiable Reliance

Even if Cove could amend its pleadings to include additional factual allegations to satisfy Rule 9, however, XL contends that Cove cannot, as a matter of law, prove "justifiable" reliance because Cove cannot rely on its own statements in the Application and because insured parties are presumed to have read their insurance contracts. (Mot. 15.) The Court agrees.

To establish a fraud or fraudulent inducement claim, a plaintiff must prove it justifiably relied upon a defendant's representation or omission. *City Sols., Inc. v. Clear Channel Commc'n*, 365 F.3d 835, 839-40 (9th Cir. 2004). This requires proof that a plaintiff "acted or refrained from acting as a result of the promise" made by a defendant. *Grant v. Aurora Loan Servs., Inc.*, 736 F. Supp. 2d 1257, 1272 (C.D. Cal. 2010). "Only [i]f the conduct of the plaintiff [in relying upon a representation] in the light of his own intelligence and information was manifestly unreasonable will he be denied recovery." *Dias v. Nationwide Life Ins. Co.*, 700 F. Supp. 2d 1204, 1216 (E.D. Cal. 2010) (alterations in original) (internal quotation marks omitted). Importantly, however, "[i]t is a general rule that the receipt of a policy and its acceptance by the insured without an objection binds the insured as well as the insurer and he cannot thereafter complain that he did not read it or know its terms," for "[i]t is the duty of the insured to read his policy." *Hackenthal v. Nat'l Cas. Co.*, 189 Cal. App. 3d 1102, 1112 (1987)

Cove alleges in the FAC that it reasonably relied on XL's misrepresentations regarding the scope of the Policy's coverage, which were material to Cove's decision to enter into the insurance contract. (FAC ¶¶ 47-48, 54.) With respect to Cove's allegation that XL agreed that the Policy would cover “all liab[ility] associated with being executor and trustee" (*See* FAC ¶ 17; Appl, Attachment A), Cove cannot plausibly allege justifiable reliance based on XL's alleged agreement, as it directly conflicts with the scope of coverage and exclusionary provisions in the Policy that the parties ultimately agreed upon and signed. *See Hadland v. NN Investors Life Ins. Co.*, 24 Cal. App. 4th 1578, 1589, 30 Cal. Rptr. 2d 88, 95 (1994) (finding reliance on a representation found to be "unjustified as a matter of law" where it conflicted with the provisions of the written contract). The Policy, by its terms, does not provide blanket coverage for claims relating to Kotick being the executor and trustee of his father's estate, as it, like all insurance contracts, contains limitations and exclusions that define the scope of the parties' relationship and XL's coverage obligations. In fact, the Policy expressly excludes from coverage claims relating to the Prior Proceedings. *See* Section II(C)(1), *supra*. "A reasonable person will read the coverage provisions of an insurance policy to ascertain the scope of what is covered." *Hallmark Ins. Co. v. Super. Ct.*, 201 Cal. App. 3d 1014, 1019 (1988). This is because the insured is generally "bound by clear and conspicuous provisions in the policy even if evidence suggests that the insured did not read or understand them." *Hadland*, 24 Cal. App. 4th at 1586 (citing *Malcom v. Farmers New World Life Ins. Co.*, 4 Cal. App. 4th 296, 304 n. 6 (1992)).

Similarly, with respect to Cove's second purported misrepresentation—that XL agreed to excise the Family Exclusion so as to provide coverage in the event of a claim by the insured's principal's stepmother—such an allegation is again insufficient to overcome the plain language of the Policy

and its attendant limitations and exclusions. Moreover, even viewing Cove's allegation in a light most favorable to it, that XL might have agreed to excise the Family Exclusion **specifically** to provide coverage in the event Shvachko were to bring claims against Kotick, such a decision on the part of XL would neither be material nor demonstrate an intent to defraud, as Cove's own allegations reveal that XL denied coverage based on the Shvachko Claims being related to Prior Proceedings, not because they were brought by Ms. Shvachko. Thus, Cove cannot prevail, as a matter of law, on this theory of justifiable reliance.

Cove's third and final claimed ground for fraud and fraudulent inducement—i.e., that XL failed to address during the extensive negotiations leading to the Policy the contours of the Policy's exclusionary provisions, including the Prior and Pending Litigation Exclusion—fares no better than its other grounds. The FAC alleges that the Policy and Application were reached through "extensive negotiations" during which time "detailed discussions concerning the express purpose of the policy" were discussed. (FAC ¶¶ 2, 18.) Thus, the Policy is a "manuscript" policy specifically drafted for Cove to cover claims made during the three-year Policy Period, and as such, ambiguities in the Policy, to the extent there are any, need not be strictly construed against XL. *See Garcia v. Truck Ins. Exchange*, 36 Cal. 3d 426, 441 (1984) (finding an insurance contract to be a "manuscript" policy where "[t]he terms of this policy were negotiated between the carrier and CHA, and the language in contention was the product of joint drafting"). Any claim by Cove that it was mislead by XL during the negotiations process is belied by the nature and provisions of the Policy and the duty of an insured to read his policy.

For the foregoing reasons, Cove cannot establish as a matter of law justifiable reliance based on XL's purported misrepresentations and omissions. The Court accordingly **DISMISSES WITHOUT LEAVE TO AMEND** Cove's second and third causes of action for fraudulent inducement and fraud.

3. Reformation of the Insurance Contract

Cove's sixth cause of action for reformation requests that Court reform the Policy to delete the date advanced by XL as the prior acts date because: (1) XL's insertion of the date into the Policy after it was fully negotiated was a mistake inconsistent with the explicit intent of the Policy and Cove was unaware of that insertion; (2) the parties were mistaken as to this term and its impact on the claims for which coverage was sought; and (3) XL's misrepresentations of the Policy were the result of fraud or deceit. (FAC ¶ 68.)

Reformation of an insurance policy is permitted “where, by reason of fraud, inequitable conduct or mutual mistake, the policy as written does not express the actual and real agreement of the parties.” *American Sur. Co. of N. Y. v. Heise*, 136 Cal. App. 2d 689, 695-96, 289 P.2d 103, 107–108 (4th Dist. 1955). California law provides that a contract may be revised where it does not truly express the parties' intentions "through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected . . . ." Cal. Civ. Code § 3399. The court may reform the writing “to conform with the mutual understanding of the parties at the

time they entered into it, if such an understanding exists." *Hess v. Ford Motor Co.*, 41 P.3d 46, 52 (2002) (citing *Bailard v. Marden*, 227 P.2d 10 (1951)).

As discussed in Sections III(C)(1)-(2), *supra*, Cove has failed to sufficiently allege a fraud claim. Moreover, Cove has failed to allege either a unilateral or bilateral mistake with respect to the "prior acts date." Cove has not alleged that XL either intended the Policy to provide coverage for future claims directly relating to the Prior Proceedings, such as the Shvachko Claims, or knew that Cove desired coverage for such claims, which are expressly excluded by the provisions contained in the Policy and Application. Accordingly, the Court **DISMISSES WITHOUT LEAVE TO AMEND** Cove's sixth cause of action for reformation of the insurance contract.

4. Breach of Implied Covenant of Good Faith and Fair Dealing

Cove next alleges that XL had a duty to act fairly toward Cove and its principal in carrying out its responsibilities under the Policy, including: (1) responding promptly and fairly to claims and requests; (2) making reasonable, good faith decisions concerning such claims and requests; and (3) doing nothing to injure, frustrate or interfere with the rights of Cove and its principal under the Policy. (FAC ¶ 37.) Cove further alleges that XL breached the implied covenant of good faith and fair dealing by wrongfully refusing to provide insurance coverage for the Shvachko Claims. (FAC ¶ 38.) Specifically, Cove alleges that, in contravention of its duties under the Policy, XL has: (1) unfairly and unreasonably construed the "Interrelated Acts" exclusion in breach of representations it made; (2) engaged in a pattern of delay; (3) construed the disclosed prior and pending litigation to support denying coverage rather than construing them in favor of coverage as required by California law; (4) relied unfairly on Declarations that were not provided to Cove until well after coverage was in place; and (5) failed to acknowledge that the Family Exclusion was removed from the Policy to ensure coverage in the event a beneficiary of the estate administered by Plaintiff's principal brought claims against him. (FAC ¶ 38.)

Under California law, "[t]he covenant of good faith and fair dealing [is] implied by law in every contract." *Guz v. Bechtel Nat'l Inc.*, 24 Cal.4th 317, 349 (2000); *see also Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 683 (1988). The covenant exists "to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made." *Guz*, 24 Cal.4th at 349 (emphasis omitted). To prove a breach of the covenant, Cove "must establish the existence of a contractual obligation, along with conduct that frustrates the other party's rights to benefit from the contract." *Fortaleza v. PNC Fin. Servs. Grp.*, 642 F. Supp. 2d 1012, 1021-1022 (N.D. Cal. 2009) (citing *Racine & Laramie v. Dep't of Parks & Rec.*, 14 Cal. Rptr. 2d 335, 338 (Ct. App. 1992); *Guz*, 24 Cal.4th at 349-350. Furthermore, "an insurer's denial of or delay in paying benefits gives rise to tort damages only if the insured shows the denial or delay was unreasonable." *Wilson v. 21st Century Ins. Co.*, 42 Cal. 4th 713, 723 (2007) (citing *Frommoethelydo v. Fire Ins. Exch.*, 42 Cal. 3d 208, 214-215 (1986)).

Cove alleges the existence of a valid contract with XL, and XL does not contend that Cove failed to perform its contractual duties. (*See* FAC ¶¶ 10-19; Policy; Mot.) Cove further alleges that it

was deprived of a benefit conferred by the contract—i.e., insurance coverage in the event a beneficiary of the estate administered by Kotick brought affirmative claims against him—in violation of Cove's expectations and contrary to the negotiations leading to the Policy. (*See* FAC ¶ 38.)

Notwithstanding Cove's allegations in the FAC, however, "an insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith . . . ." *Wilson*, 42 Cal. 4th 713, 723, 171 P.3d 1082, 1089 (2007) (citing *Chateau Chamberay Homeowners Assn. v. Associated Int'l Ins. Co.,* 90 Cal. App. 4th 335, 347 (2001)). As noted in Section II(C)(1), *supra*, the Policy clearly and unequivocally excludes from coverage claims arising out of "Prior Proceedings," as such claims are "deemed to have been made at the earliest of the time at which the earliest such Claim is made or deemed to have been made." (Policy § VI(B).) Also as discussed in Section II(C)(1), *supra*, the Shvachko Claims are properly excluded under the Policy's Prior and Pending Litigation Exclusion. Thus, XL cannot be liable for breaching the covenant of good faith and fair dealing because XL's coverage position is not unreasonable. Accordingly, the Court **DISMISSES WITHOUT LEAVE TO AMEND** Cove's first cause of action for breach of the implied covenant of good faith and fair dealing.

5. Declaration of Coverage

Cove alleges in the FAC that coverage exists for the Shvachko Claims and that a declaratory judgment is therefore "necessary at this time to determine the rights and obligations of the parties under the Policy." (FAC ¶ 63-65.) XL argues in its Motion that Cove's cause of action for declaration of coverage for the Shvachko Claims should be denied for the same reasons that Cove has failed to state a claim for breach of contract, as discussed in Section II(C)(1), *supra*. (Mot. 13.)

"Where subject matter jurisdiction is solely based on diversity, federal law determines whether there is a controversy before the Court within the purview of the Declaratory Judgment Act, 28 U.S.C. § 2201 . . ." *Compass Bank v. Petersen*, 886 F. Supp. 2d 1186, 1195-96 (C.D. Cal. 2012). The Declaratory Judgment Act provides jurisdiction "[i]n a case of actual controversy . . . [to] any court of the United States . . . [so that it] may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). In order to qualify as an "actual controversy," a dispute must be "definite and concrete, touching the legal relations of parties having adverse legal interests; and that it be real and substantial and admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (internal quotations omitted). The Court's dismissal of Cove's breach of contract, fraud, and fraudulent inducement claims resolve any existing controversy raised by Cove's declaratory relief cause of action.

Moreover, "[i]t is well established that the Declaratory Judgment Act does not create an independent cause of action." *Del Monte Int'l GmbH v. Del Monte Corp.*, 995 F. Supp. 2d 1107, 1124 (C.D. Cal. 2014) (citing *Chevron Corp. v. Camacho Naranjo*, 667 F.3d 232, 244-45 (2d Cir.2012) (quoting *Davis v. United States*, 499 F.3d 590, 594 (6th Cir.2007)) "[A] federal court may decline to address a claim for declaratory relief where the substantive claims would resolve the issues raised by the declaratory action." *Vang Chanthavong v. Aurora Loan Servs., Inc.*, 448 B.R. 789, 803 (E.D. Cal. 2011) (internal quotations omitted). As such, the Court need not separately determine if Cove has adequately plead a claim under the Declaratory Judgement Act.

Accordingly, the Court **DISMISSES WITHOUT LEAVE TO AMEND** Cove's fifth cause of action for declaration of coverage under the Policy.

D. Leave to Amend

Cove spends much of its Opposition setting forth additional facts regarding the negotiations between Cove and XL that it argues it could and should be permitted to allege in a second amended complaint. (*See generally* Opp'n 8-9, 13-15, Decl. M. Cris Armenta in Supp. Opp'n ("Armenta Decl."), ECF No. 20.) The Court has reviewed each of these anticipated allegations, and finds that they are insufficient to establish any of Cove's causes of action. None of the anticipated allegations touch on the critical point that the Shvachko Claims are related to the Prior Proceedings, nor do they shed light on whether XL believed that Cove desired coverage for claims against Kotick in his role as executor and trustee of his father's estate that were related to the Prior Proceedings. At most, the anticipated allegation that XL, when asked if the Prior and Pending Act Litigation Exclusion would exclude coverage for negligence claims brought by Shvachko against Kotick related to then-pending **tax audit** matters, represented that it "wouldn't consider an IRS Audit an admin or reg proceeding," would lead to the plausible conclusion that XL intended that the Policy would or would not cover certain types of claims. (Armenta Decl. ¶ 5(a).) Such an allegation, however, does not lead to the plausible inference that XL intended that claims against Kotick in his role as executor and trustee of his father's estate that were related to the Prior Proceedings, which were disclosed by Cove in its Application as "Prior Activities" that "would fall within the scope of the proposed insurance," would be covered by the Policy.

Thus, because the Court finds that the claims are legally insufficient and that amendment of the complaint would be futile, the Court denies Cove leave to amend. *See Rykoff-Sexton*, 845 F.2d at 214.

III. RULING

For the foregoing reasons, the Court **GRANTS** Defendant XL's Motion and **DISMISSES WITHOUT LEAVE TO AMEND** Cove's First Amended Complaint. This matter shall close.

IT IS SO ORDERED.