UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	ED CV14-00486 JAK (SPx)	Date	July 15, 2015
Title	Timothy D. Murphy v. American General Life Insurance Company et al.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER DEFENDANTS' MOTIONS TO DISMISS (DKT. 94; DKT. 95; DKT. 96; DKT. 97; DKT. 98)**

I. Introduction

On February 25, 2014, Timothy Murphy ("Plaintiff") brought this action against American General Life Insurance Company ("AGL") in the Riverside Superior Court. Complaint ("Compl."), Dkt. 1, Ex. 1 at 8. Plaintiff, who is self-represented and an attorney, claims to be a beneficiary of a $5,000,000 life insurance policy purchased by his parents from AGL. *Id.* He alleges that AGL failed to pay policy benefits due to him after the death of his parents. *Id.* On March 13, 2014, AGL removed the matter based on diversity jurisdiction. Notice of Removal, Dkt. 1.

The operative Third Amended Complaint ("TAC") advances nine causes of action against AGL and 19 other defendants: (1) breach of fiduciary duty and conspiracy; (2) conversion and conspiracy; (3) money had and received, conspiracy, constructive trust and resulting trust; (4) constructive fraud and conspiracy; (5) tortious intentional interference with expectancy and conspiracy; (6) accounting; (7) breach of contract; (8) insurance bad faith; and (9) violation of Cal. Ins. Code § 790.03(h) and conspiracy. TAC, Dkt. 91.[1]

On February 6, 2015, many of the defendants ("Moving Defendants")[2] filed motions to dismiss the TAC

[1] The other 19 defendants are: (1) Philip C. Murphy; (2) Mark M. Murphy; (3) David Murphy; (4) Claudia Semplenski; (5) the Shirley S. Murphy Trust; (6) the Estate of Shirley S. Murphy; (7) the Robert. H. Murphy Trust; (8) the Estate of Robert H. Murphy; (9) the Robert & Shirley Murphy Survivorship Trust; (10) CNF II, LLC; (11) Mitchell K. Smith; (12) Gaines & Smith Financial Group; (13) the Murphy Family Trust; (14) Fred C. Cohen; (15) Cohen, Norris, Wolmer, Ray, Telepmann and Cohen; (16) American International Group; (17) RAI Premium Finance, LLC; (18) RAI Insurance Group; and (19) Gerald Morlitz. TAC, Dkt. 91.

[2] There has been no response in this action by CNF II, LLC or RAI Insurance Group. Plaintiff filed a proof of service as to RAI Insurance Group (Dkt. 64) and CNF II, LLC (Dkt. 60), stating that each had been served by mail with the Second Amended Complaint on November 14, 2014. The address listed for both entities is "21 Main Street, Suite 352, Hackensack, NJ 07601." Dkt. 64; Dkt. 60. Plaintiff has not filed any proof of service as to RAI Premium Finance, LLC. No proof of service has been filed as to any defendant as to the TAC.

on several grounds, including lack of personal jurisdiction and failure to state a claim. Dkt. 94; Dkt. 95; Dkt. 96; Dkt. 97; Dkt. 98. Plaintiff opposed each of the motions. Dkt. 100; Dkt. 101; Dkt. 102; Dkt. 103. The Moving Defendants replied. Dkt. 104; Dkt. 105; Dkt. 107; Dkt. 108.

On March 5, 2015, the Court took the Motions under submission, without a hearing, pursuant to Local Rule 7-15. Dkt. 110. For the reasons stated within this Order, the Motions are **GRANTED**.

II. Factual Background

Many of the factual allegations underlying the claims in this action have been detailed in prior orders, and are incorporated by this reference. Dkt. 26; Dkt. 52; Dkt. 87; Dkt. 92. Because those orders primarily addressed issues as to AGL and its parent corporation, American International Group ("AIG"), certain factual matters are discussed in this Order.

A. Party Information

Plaintiff is the son of Robert and Shirley Murphy ("Robert" and "Shirley")[3] and the brother of Shane Murphy ("Shane"), Philip Murphy ("Philip"), Mark Murphy ("Mark"), David Murphy ("David") and Claudia Semplenski ("Semplenski"). TAC ¶¶ 1-3, 6-9. The TAC alleges that Robert and Shirley each had a trust, and that following their respective deaths, each had an estate. *See* TAC ¶¶ 10-13 (naming as defendants the Shirley S. Murphy Trust, the Estate of Shirley S. Murphy, the Robert H. Murphy Trust and the Estate of Robert H. Murphy). These are referred to in this Order respectively as the "Parental Trusts" and "Parental Estates." The TAC alleges that Mark and Semplenski are the co-trustees of the Parental Trusts. *Id.* ¶¶ 10, 12. The TAC alleges that Plaintiff and his five other siblings are equal beneficiaries of the Parental Trusts and the Parental Estates. *Id.* ¶¶ 10-13.

B. The Policy, Its Terms and the Robert and Shirley Murphy Survivorship Trust

Robert and Shirley purchased a $5 million last survivor, flexible premium, universal life insurance policy ("Policy") from AGL on or about September 20, 2005. TAC ¶ 31. The premium for the Policy was $350,000. *Id.* Mitchell K. Smith ("Smith") was listed as the "servicing agent." *Id.* The TAC alleges that the Policy was purchased after negotiations that began in July 2005 between Smith and Gaines & Smith Financial Group ("GSFG") on behalf of Robert and Shirley. TAC ¶ 29b.[4] Smith was also one of the listed "writing producers" of the Policy. *Id.* ¶ 38. Robert appears to have been the initial owner and beneficiary of the Policy. Part A Life Insurance Application, Dkt. 1-1, Ex. C at 45-46 (May 27, 2005).

The TAC alleges that, rather than designating Plaintiff and his siblings as direct beneficiaries of the Policy, Smith and GSFG informed AGL and AIG that the beneficiary would be the Robert & Shirley

[3] The use of first names of those with a common surname is for clarity. No disrespect is intended by the use of this common convention.

[4] The TAC alleges that Smith and GSFG were the agents of AIG and AGL. TAC ¶ 29a. No factual allegations are made in support of this claim.

Murphy Survivorship Trust ("RSMS Trust"). TAC ¶¶ 14, 29c.[5] Gerald Morlitz ("Morlitz") was to be named trustee of the RSMS Trust. *Id.*[6] The trust was to be created by November 2005. *Id.* ¶ 29c.

The TAC alleges that, by November 2005, GSFG and Smith informed AGL and AIG that the RSMS Trust was to be an irrevocable life insurance trust. TAC ¶ 29c; Part A Life Insurance Policy, Dkt. 57-1, Ex. 1 at 31 (Nov. 3, 2005). The corpus of the RSMS Trust was to consist of the proceeds of the Policy. TAC ¶¶ 29c, e. The beneficiaries of the RSMS Trust were to be Plaintiff and his siblings, each of whom was to receive an equal share of the corpus. *Id.* The designations as beneficiaries were to be irrevocable. *Id.* The sole purpose of the trust was to "distribute after the later of the deaths of Robert H. and Shirley S. Murphy, the trust property to its beneficiaries[.]" *Id.* The RSMS Trust was to be governed by New Jersey law. *Id.* ¶ 29i. The TAC alleges that Morlitz, Smith and GSFG informed AGL and AIG that "regardless of the beneficiary designation registered and/or reflected on the records of [AIG and AGL], the true beneficial interest in benefits" of the Policy "was held by those irrevocable beneficiaries" of the RSMS Trust. *Id.* ¶ 29f. By December 2005, Morlitz provided to Smith, AIG and AGL copies of the RSMS Trust indenture, which is dated November 1, 2005. TAC ¶ 29d.[7]

C. Pre-Sale Activity; Sale of the Policy; Subsequent Release and Indemnity Agreement

On November 9, 2005, Morlitz authorized an assignment of interest in the Policy to RAI Premium Finance, LLC ("RPF") in exchange for "financing some of the premium due thereon." TAC ¶ 37. As of December 7, 2007, Robert and Shirley owed AGL a premium of $350,000, which was to be paid by September 20, 2008. *Id.* ¶ 38.

The TAC alleges that Smith, RAI Insurance Group, LLC ("RIG"), Morlitz, Fred. C. Cohen ("Cohen"), Cohen, Norris, Wolmer, Ray, Telepmann and Cohen (the "Firm") and Mark "conceived of a scheme and design to sell [the Policy] on the secondary market for cash." TAC ¶ 39. Smith, Morlitz and Mark "intended to receive cash commissions and/or compensation for their participation in the scheme." *Id.*

While preparing the Policy for sale, Smith and RIG discovered that the Policy documents were in error as to Shirley's date of birth. TAC ¶ 40. Accordingly, they allegedly obtained from AGL a replacement policy that stated the correct date of birth for Shirley. *Id.* The RSMS Trust remained the listed beneficiary. *Id.*

In July 2008, RIG offered $810,000 to purchase the Policy. TAC ¶ 41. Morlitz, Smith, Cohen and the Firm did not disclose this offer to Plaintiff. *Id.* ¶¶ 41-42.

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[5] The TAC also states that the "Murphy Family Trust" ("Family Trust") is a beneficiary of the Policy. TAC ¶ 21. However, there are no allegations about the terms of the Family Trust or its trustee. Instead, the TAC alleges only that "on information and belief," the Family Trust is also a beneficiary of the policy. *Id.*

[6] Morlitz is a citizen of New York. TAC ¶ 18.

[7] Plaintiff alleges that, because he did not have a copy of the RSMS Trust indenture at the time the TAC was filed, he did not attach it to the TAC. *Id.* ¶ 35. However, Plaintiff's opposition to Morlitz's motion takes a different position. Dkt.100 at 8-9 ("When defendant Morlitz made his Rule 26 disclosures on January 20, 2015 . . . [t]he evidence that defendant Morlitz provided in his Rule 26 disclosures [included] a copy of the trust indenture for the Robert H. and Shirley S. Murphy Survivorship Trust dtd 11/1/05, whose contents plaintiff had anticipated but which were previously unconfirmed in the case"). The TAC was filed on January 26, 2015, which was six days after this disclosure. Dkt. 91.

On July 7, 2008, the Policy was sold to CNF II, LLC ("CNF") for $716,865. TAC ¶ 43; *cf. id.* ¶ 46 (alleging the Policy was sold in August 2008).[8] To complete the sale, the "parties"[9] were required to sign documents including the following: (1) a "Policy Origination Statement"; (2) "Notice to Policy Owners and Insureds"; and (3) "Acknowledgement of The Insured." *Id.* ¶ 43. Mark signed these documents on July 15, 2008. *Id.*; *see also id.* ¶ 46g (alleging that Cohen and the Firm co-signed the documents); *id.* ¶ 46j (Semplenski also executed documents). The TAC alleges that Mark signed for Shirley as her "attorney in fact" notwithstanding that he did not have the legal authority to do so. *Id.* ¶ 43.

AGL and AIG allegedly issued a new policy in which CNF was listed as owner. TAC ¶¶ 46a-b. The TAC alleges that some portion of the $716,865 may have been paid to RPF pursuant to the assignment in November 2005. *Id.* ¶ 46c. As a consequence, RPF released its assignment rights in the Policy. *Id.* ¶ 46d. The TAC alleges that AGL and AIG have not produced the original Policy issued to Robert and Shirley. TAC ¶¶ 146-47. It alleges that AGL and AIG have manipulated "policy records and policy contract records so as to attempt to justify denial of plaintiff's claim[.]" *Id.* ¶ 147a.

The TAC also alleges that, in July 2008, Smith, GSFG, Cohen and the Firm sent Plaintiff a "Beneficiary's Consent" form. TAC ¶ 29k. The Consent Form was sent to Plaintiff by "M. Ivette McCartney" in a letter on GSFG stationary dated July 16, 2008. Dkt. 101-1, Ex. 5 at 67.[10] Plaintiff attached a copy of the Consent Form to his opposition to the motion brought by Smith and GSFG. Consent Form, Dkt. 101-1, Ex. 5 at 68. The Consent Form provides as follows:

> **BENEFICIARY AND SPOUSAL CONSENT TO TRANSFER OF POLICY, WAIVER OF INTEREST, AND RELEASE OF CLAIMS**
>
> This Consent to Transfer of Policy, Waiver of Interest, and Release of Claims (this "Agreement") is made and executed by Tim Murphy ("Beneficiary").
>
> **WHEREAS**, Robert H. and Shirley S. Murphy Survivorship Trust dated 11/01/05, ("Policyowner"), is the owner of a certain life insurance policy issued by American General Life Insurance Company (the "Insurer") with policy number UME125760L the (the "Policy") [sic], insuring the lives of Robert H. and Shirley S. Murphy, (the "Insured's*"*);
>
> **WHEREAS**, Policyowner has agreed to sell and transfer the Policy to CNF II LLC (the "Purchaser") and in connection with such sale the Purchaser will rely upon the consent, waiver and release of the Beneficiary set forth herein;

[8] The TAC alleges that this sale was the result of a conspiracy to deprive Plaintiff of his interest in the Policy. TAC ¶ 46. It also alleges that Morlitz, Cohen, the Firm, Smith, GSFG, AIG, AGL, RPF, RIG, CNF, Mark, Semplenski, the Parental Estates, the Parental Trusts and the RSMS Trust were all co-conspirators. *Id.*

[9] The word "parties" is not defined.

[10] The letter states: "Dear Mr. Murphy, Please find enclosed the paperwork that requires your signature. Please sign where indicated and return in the enclosed envelope as soon as possible. If you have any questions or require additional information please do not hesitate to contact Ryan Perna or Mitchell Smith at 561-989-0077." Dkt. 101-1, Ex. 5 at 67.

NOW, THEREFORE,

9. Beneficiary acknowledges that he/she has or may in the future have an interest in the assets or estate of Policyowner or in the proceeds or benefits payable under the Policy as a direct or indirect beneficiary under the Policy or as an heir to Insured's estate or otherwise.

10. Beneficiary acknowledges that he/she is executing this Beneficiary's consent, waiver and release agreement without any coercion, duress, undue influence or other circumstance that would cause Beneficiary to act contrary to his/her own free will.

11. Beneficiary irrevocably consents to the sale and transfer of the Policy by Policyowner to the Purchaser and hereby waives, releases and relinquishes any and all rights and interests that Beneficiary has or may have in and to the Policy and the proceeds, benefits, rights, and claims, privileges or other interests therein. Beneficiary agrees that all representations, consents, waivers and releases contained herein shall be forever binding upon Beneficiary and his or her heirs, executors, administrators, successors, and assigns.

12. Beneficiary acknowledges that he/she has been given the opportunity to review this Agreement with counsel.

Id. (emphasis in original).

On or about July 30, 2008, Plaintiff sent an e-mail to Smith, Cohen and the Firm with respect to his efforts to gather additional information about the Consent Form. TAC ¶ 29l. The TAC alleges that Plaintiff "advised that he would consider the matter closed unless he heard from [Smith, Cohen and the Firm]." *Id.* It then alleges that neither Cohen nor the Firm "thereafter disclosed any information to [P]laintiff" about the Policy. *Id.*

In October 2008, Mark asked GSFG for assistance in the "collection of commissions and disbursement of funds from the sale escrow, and upon disbursement assisted to conceal the proceeds knowing that plaintiff had refused consent[.]" TAC ¶ 46f. The TAC alleges that Cohen and the Firm assisted Mark in concealing the proceeds of the sale. *Id.* ¶ 46g. It is also alleged that Smith and GSFG recovered commissions and "other proceeds" from the sale. *Id.* ¶ 46h.

In December 2008, Morlitz obtained a release from Mark,[11] Semplenski, Philip, Shane, David and Robert. TAC ¶ 29aa. This alleged purpose of the release was "to facilitate Morlitz's improper distribution of the proceeds of the sale and to attempt to shield Morlitz from liability individually and as trustee, for Morlitz's illicit conduct and breach of fiduciary duty towards the plaintiff." *Id.* The TAC alleges that Plaintiff's siblings received disproportionately large shares of the proceeds of the sale of the Policy because Plaintiff was not paid any portion of his share of them. *Id.* ¶¶ 47, 65, 73, 95, 110, 131.

[11] The TAC alleges that Mark signed this release on behalf of himself and for his mother, Shirley. TAC ¶ 29aa.

D. Plaintiff's Demands to AGL and AIG for Payment of Policy Benefits

On January 27, 2009, Shirley died. TAC ¶ 29p. In February 2009, Plaintiff wrote letters to AGL, Smith, GSFG, Cohen and the Firm, in which he demanded payment of benefits from the Policy. *Id.* In May 2009, Cohen and the Firm sent Plaintiff a letter in which the following representations were made: (1) the Firm represented Robert with respect to the Policy; (2) Cohen was a "capable attorney and advisor involved in Robert H. Murphy's financial affairs"; and (3) the Policy "did not exist any longer." *Id.* ¶ 29q.

Plaintiff received a letter dated January 5, 2010 from Evan Koch ("Koch"), who heads the legal department at AGL. TAC ¶ 29r. The TAC alleges that this letter caused Plaintiff to conclude that a prior representation by Cohen -- that the Policy no longer existed -- was false. *Id.* Thus, the TAC alleges that this letter informed Plaintiff that the Policy was a "last to die" life insurance policy, so that no benefits would be payable until his father, Robert, died. *Id.* ¶ 29s. Koch also allegedly refused to provide a copy of the Policy to Plaintiff on the ground that Plaintiff was not "listed as the owner or beneficiary of the policy." *Id.*

On February 26, 2013, Robert died. TAC ¶ 29y. On April 28, 2013, Plaintiff sent AGL a letter in which he demanded the payment of life insurance benefits. *Id.* AGL again refused to provide a copy of the Policy or pay benefits to Plaintiff. *Id.* ¶ 51.[12]

On February 12, 2014, AGL and AIG paid $5,317,808.10 to US Life Corporation. TAC ¶ 147d.

III. Procedural Background

As stated above, Plaintiff brought this action against AGL in the Riverside Superior Court. Compl., Dkt. 1, Ex. 1 at 8. AGL removed the action based on diversity jurisdiction. Notice of Removal, Dkt. 1. On March 31, 2014, Plaintiff moved to remand the action on the ground that the amount in controversy requirement was not satisfied. Dkt. 11.

While the motion to remand was pending, on May 28, 2014, Plaintiff filed a First Amended Complaint ("FAC") without first seeking leave as required pursuant to Fed. R. Civ. P. 15(a)(2). Dkt. 21. The FAC sought to add a non-diverse party -- Shane -- who is Plaintiff's brother. *Id.* Plaintiff also named 19 new, diverse defendants in the FAC. *Id.* The claim for breach of contract was not amended.

On July 1, 2014, the motion for remand based on the original complaint was denied. Dkt. 26. On October 14, 2014, the FAC was stricken because its filing had not complied with Fed. R. Civ. P. 15(a)(2). Dkt. 52. The original, form complaint was also stricken for failure to comply with Rule 10(b). *Id.* Plaintiff was instructed that, if he wished to pursue the action, he was to file an amended complaint that conformed to Rule 10(b) on or before October 28, 2014. *Id.*

On October 23, 2014, Plaintiff filed a Second Amended Complaint ("SAC"). Dkt. 53. It names the same defendants who were named in the FAC. *Id.* The SAC advances the following causes of action:

[12] The TAC alleges that AGL refused to pay these benefits on April 20, 2013. TAC ¶ 29y. However, because April 20, 2013 was eight days before Plaintiff requested the payment, the reference to this date appears to be an error.

(1) breach of fiduciary duty and conspiracy; (2) conversion and conspiracy; (3) money had and received, conspiracy, constructive trust and resulting trust; (4) constructive fraud; (5) tortious intentional interference with expectancy and conspiracy; and (6) an accounting. *Id.* It does not include a claim for breach of contract.

On November 10, 2014, AGL and AIG moved, pursuant to 28 U.S.C. § 1447(e), to dismiss Shane as a defendant. Dkt. 57. They also moved, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the claims brought against them. *Id.* While this motion to dismiss was pending, several defendants moved to dismiss the SAC. Thus, on December 23, 2014, Cohen, Mark, the Firm, Semplenski, the Parental Trusts and Estates, the "Shirley Murphy Survivorship Trust"[13] and the Family Trust moved pursuant to Fed. R. Civ. P. 12(b) to dismiss the SAC for lack of personal jurisdiction, failure to state a claim and forum non conveniens. Dkt. 82. On January 6, 2015, Plaintiff opposed this motion. Dkt. 84. On January 14, 2015, Smith and GSFG[14] moved pursuant to Fed. R. Civ. P. 12(b) to dismiss for lack of personal jurisdiction, improper service and failure to state a claim. Dkt. 86. On January 22, 2015, Plaintiff opposed this motion. Dkt. 90. On January 16, 2015, Morlitz moved to dismiss pursuant to Fed. R. Civ. P. 12(b) for lack of personal jurisdiction and failure to state a claim. Dkt. 89.

On January 15, 2015, the motion to dismiss brought by AGL and AIG was granted, and the claims against those parties were dismissed. Dkt. 87. That same order dismissed Shane as a party, without leave to amend in this action. *Id.* However, the Order provided that its effect would be stayed for 14 days to allow Plaintiff the opportunity to file an action against Shane in state court while the claims against him in this action were still pending. *Id.* at 15. Plaintiff was also given leave to amend the SAC. *Id.* at 18. The SAC included references to Doe defendants. SAC, Dkt. 53. Those "parties" were stricken because Plaintiff had failed to comply with the terms of the October 14, 2014 Order related to these potential defendants. Dkt. 87 at 15.

On January 26, 2015, Plaintiff filed a Third Amended Complaint ("TAC"). Dkt. 91. Notwithstanding the express ruling in the January 15, 2015 Order that dismissed Shane as a defendant without leave to amend, Plaintiff named him as a defendant in the TAC. *Id.* Similarly, notwithstanding the prior order that struck the Doe defendants, the TAC named 100 Doe defendants. *Id.*

On January 27, 2015, the pending motions to dismiss the SAC (Dkt. 82, 86, 89) were deemed moot due to Plaintiff's filing of the TAC. Dkt. 92. The Court also struck Shane and the Doe defendants from the TAC in accordance with the January 15, 2015 Order. *Id.* The Court instructed Plaintiff to file a redlined version of the TAC as required by the Court's Standing Order 10(b). Dkt. 8 at 9. Plaintiff did so the following day. Dkt. 93. The Moving Defendants then filed their motions to dismiss. Dkt. 94; Dkt. 95; Dkt. 96; Dkt. 97; Dkt. 98. Plaintiff opposed these motions (Dkt. 100, 101, 102, and 103) and the Moving Defendants replied (Dkt. 104, Dkt. 105, Dkt. 107 and Dkt. 108).

[13] The "Shirley Murphy Survivorship Trust" is not named in the SAC. However, the SAC identifies the "Robert and Shirley Murphy Survivorship Trust." It also identifies the "Estate of Shirley S. Murphy." Thus, "Shirley Murphy Survivorship Trust" appears to reference either or both named parties. *See* Dkt. 82 at 2; Decl. of Mark M. Murphy ¶ 5, Dkt. 96-2 ("THE ESTATE OF SHIRLEY S. MURPHY was submitted to probate in Florida").

[14] The motion states that GSFG is now known as Universal Partners, Inc. Dkt. 86 at 2.

IV. Analysis

A. Whether Plaintiff Was Prejudiced by the Briefing Schedule

1. Legal Standard

Local Rule 6-1 provides that a motion must be filed at least 28 days before it is scheduled for a hearing. Local Rule 7-9 provides that an opposition to a motion must be served at least 21 days before the scheduled hearing. Local Rule 7-10 provides that a reply in support of a motion must be filed at least 14 days before the scheduled hearing. These dates may be modified by an order of the court.

2. Application

Plaintiff argues that he was prejudiced because he was only given seven days to respond to the motions. The Local Rules contemplate that schedule. The Court's Order (Dkt. 92) applied the same schedule. Further, the motions brought by the Moving Defendants do not differ substantially from the earlier motions as to the SAC to which Plaintiff previously responded. *Compare* Dkt. 82, Dkt. 86, *and* Dkt. 89, *with* Dkt. 94, Dkt. 95, *and* Dkt. 96. For these reasons, there is no showing that Plaintiff was prejudiced by the briefing schedule.

B. The Personal Jurisdiction Motions (Dkt. 94; Dkt. 95; Dkt. 96; Dkt. 97)

1. Legal Standard

To establish personal jurisdiction over a party that does not reside in the forum state, the party asserting jurisdiction must show both that the long-arm statute of the forum state confers personal jurisdiction, and that the exercise of that jurisdiction will conform to the requirements of due process. *Gray & Co. v. Firstenberg Mach. Co., Inc.*, 913 F.2d 758, 760 (9th Cir. 1990). California's long-arm statute is consistent with federal due process requirements. Cal. Code Civ. Proc. § 410.10; *Roth v. Garcia Marquez*, 942 F.2d 617, 620 (9th Cir. 1991).

Due process requires that an out-of-state defendant have sufficient minimum contacts with the forum such that the exercise of in personam jurisdiction would not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). There are two types of personal jurisdiction: specific and general. *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1066 (9th Cir. 2014), *cert. denied*, 575 U.S. ___, 135 S. Ct. 2310 (2015).

a) General Personal Jurisdiction

When there is general jurisdiction over a defendant, that party may "be haled into court in the forum state to answer for any of its activities anywhere in the world." *Martinez*, 764 F.3d at 1066. There is general personal jurisdiction over a party who is physically present in the state whether or not such presence is related to the claim asserted. *Burnham v. Super. Ct.*, 495 U.S. 604, 617-19 (1990).

In general, a corporation is deemed to be present in a state in which it is incorporated or in which it has its principal place of business. Therefore, general jurisdiction "over a corporation is appropriate only when the corporation's contacts with the forum state are so constant and pervasive as to render it essentially at home in the state." *Martinez*, 764 F.3d at 1066 (internal quotation marks omitted); *Daimler AG v. Bauman*, 571 U.S. ___, 134 S. Ct. 746, 761 (2014).

b) Specific Personal Jurisdiction

Specific personal jurisdiction requires a showing of forum-related activities by the defendant that are linked to the claim asserted. *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 588 (9th Cir. 1993). It is "confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. ___, 131 S. Ct. 2846, 2851 (2011) (internal quotation marks removed). The Ninth Circuit has established a three-part test for determining specific jurisdiction: (1) the defendant must purposefully avail itself of the privilege of conducting activities in the forum and in receiving the benefits and protections of its laws; (2) the claim must arise out of or result from the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable. *Rano*, 987 F.2d at 588; *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985). The party asserting jurisdiction bears the burden of satisfying the first two prongs of this test. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). If that party does so, the burden then shifts to the party contesting jurisdiction to "present a compelling case" that the third prong of reasonableness has not been satisfied. *Id.*

c) Burden of Proof

The nature of the burden of proof for establishing personal jurisdiction depends on the "mode of []determination" employed by the district court in deciding the issue. *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977). If the question is decided on the basis of affidavits, a party asserting jurisdiction need only make a *prima facie* showing of the jurisdictional facts. *Id.*; *accord Martinez*, 764 F.3d at 1066. If it does so based on other written materials, if credibility issues are presented or if there are disputed jurisdictional facts, a district court may consider the evidence at a hearing at which the party seeking to invoke the jurisdiction of the court has the burden of proof by a preponderance of the evidence. *Data Disc*, 557 F.2d at 1285.

Uncontroverted allegations in a complaint must be taken as true when a *prima facie* showing of personal jurisdiction is required. *Am. Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996). However, courts "may not assume the truth of allegations in a pleading which are contradicted by affidavit." *Data Disc*, 557 F.2d at 1284. Conflicts between facts contained in the parties' affidavits must be resolved in favor of the party asserting jurisdiction when deciding whether there has been a *prima facie* showing of personal jurisdiction. *Am. Tel. & Tel.*, 94 F.3d at 588.

d) Conspiracy

It has been recognized that personal jurisdiction over a defendant who is part of a conspiracy may be present in a forum so long as an "actionable conspiracy" is pled and a "substantial act in furtherance of the conspiracy" is performed in the forum state. *Textor v. Bd. of Regents of N. Ill. Univ.*, 711 F.2d 1387,

1393 (7th Cir. 1983). There, the plaintiffs alleged that certain universities conspired to deprive female coaches and athletic directors of their rights to due process and equal protection. *Id.* at 1392. They allegedly entered this conspiracy during meetings that occurred in Illinois. *Id.* One of the alleged conspirators was a university located in Illinois. *Id.* The Seventh Circuit found that these allegations were a sufficient basis to establish personal jurisdiction in Illinois as to the defendants. *Id.* at 1393.

Giusti v. Pyrotechnic Indus., 156 F.2d 351, 352 (9th Cir. 1946) presented the issue whether service of process should be quashed as to an out-of-state defendant who was alleged to be a part of an association of fireworks manufacturing companies that conspired to commit antitrust violations. The complaint alleged that this conduct caused harm to plaintiff's California-based, fireworks business. *Id.* at 352-53. The Ninth Circuit found that the out-of-state defendant conducted business in California through the actions of its co-conspirators. *Id.* at 354. Because these actions harmed the plaintiff's business, there was personal jurisdiction in California over the out-of-state defendant. *Id.* However, *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 492 (9th Cir. 1979), "expressly reject[ed] any implication" in *Giusti* that "members of a conspiracy, as agents of one another, 'transact business' for venue purposes in any district where one of them transacts business." In *Piedmont*, the complaint alleged that the out-of-state defendant and four other companies were engaged in an antitrust conspiracy. *Id.* The out-of-state defendant had not done business, or maintained an office, agent or property, in California. *Id.* The Ninth Circuit rejected a conspiracy theory as a basis for venue. *Id.* at 496. It did not reach the issue of whether California had personal jurisdiction over the out-of-state defendant. *Id.*

2. Application

Morlitz, Smith, GSFG, Cohen, Mark, the Firm, Semplenski, the Parental Trusts, the Estate of Robert H. Murphy, the "Shirley Murphy Survivorship Trust,"[15] the Family Trust, David and Phillip have moved to dismiss for lack of personal jurisdiction.[16] Plaintiff advances three theories in support of his claim as to personal jurisdiction over these defendants. First, there is general personal jurisdiction as to certain defendants. Second, as members of a conspiracy that targeted a California resident, specific personal jurisdiction is present. Third, each of the defendants engaged in intentional, tortious conduct toward a California resident.

a) General Personal Jurisdiction

The TAC does not allege that any of these defendants is a citizen of California. None allegedly resides here, is incorporated here or has its principal place of business here. Nor does the evidence proffered by Plaintiff support a showing of general jurisdiction. *E.g.*, Dkt. 100-1; Dkt. 101-1; Dkt. 103-1. Thus, it does not support a finding that this is an "exceptional case" where general personal jurisdiction is asserted over an entity whose principal place of business and state of incorporation is elsewhere. Further, the proffered evidence does not support a finding that any of the defendants is domiciled in California. Finally, there is no evidence that any individual defendant was served in California. Accordingly, there is no general

[15] As previously noted, this appears to reference the RSMS Trust and/or the Estate of Shirley S. Murphy.
[16] Plaintiff argues that these parties have waived the right to challenge personal jurisdiction because the text of the motion (Dkt. 96) does not include specific arguments as to each defendant. Dkt. 103 at 10-11. The motion sufficiently discloses its bases, which apply to all moving parties.

personal jurisdiction.

b) Conspiracy Theory of Specific Personal Jurisdiction

Plaintiff argues that these defendants entered into a conspiracy to deprive him of his financial interest in the Policy. Accordingly, Plaintiff argues that any contact with California by any member of this alleged conspiracy should be imputed to every other member. Plaintiff alleges the following contacts with California:[17]

- In November 2005, Plaintiff (a California resident) and Shane (a California resident) were listed as beneficiaries of the RSMS Trust. TAC ¶¶ 14, 29c.
- In 2006, Cohen sent Plaintiff an e-mail instructing him not to "officiously intermeddle" in Shirley's medical care. Dkt. 101-1, Ex. 3 at 43-51.
- In July 2008, Smith, GSFG, Cohen and the Firm sent Plaintiff a Consent Form, which he did not sign. TAC ¶ 29k; Consent Form, Dkt. 101-1, Ex. 5 at 68. Plaintiff's consent would have released all claims arising from the sale of the Policy.
- In December 2008, Morlitz obtained a release and indemnity agreement from Shane regarding the sale of the Policy. TAC ¶¶ 29aa, 46i.
- In May 2009, Cohen and the Firm sent Plaintiff a letter regarding the Policy and Plaintiff's attempts to obtain more information about its sale. *Id.* ¶ 29q.
- In January 2010, AGL sent Plaintiff a letter regarding the Policy. *Id.* ¶¶ 29r-s.
- After April 2013, AGL refused to pay Plaintiff benefits from, or provide him a copy of, the Policy. *Id.* ¶ 51.

These contacts are insufficient to establish personal jurisdiction. Plaintiff focuses on his own contacts with California and the alleged knowledge that one or more of these defendants had about them. This is not the test for establishing specific personal jurisdiction. Such jurisdiction "must arise out of contacts that the defendant *himself* creates with the forum State." *Walden v. Fiore*, 571 U.S. ___, 134 S. Ct. 1115, 1122 (2014) (internal quotation marks removed) (emphasis in original). Courts must consider the "defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id.* A "plaintiff cannot be the only link between the defendant and the forum." *Id.* No "relationship with a plaintiff or third party, standing alone," is a sufficient basis for jurisdiction. *Id.* at 1123.

None of the alleged contacts with California by any of these defendants has been shown to be central to the alleged conspiracy. The Policy was not purchased in California and the RSMS Trust was not formed here. The alleged scheme to sell the Policy was not developed by these defendants while they were in California. The Policy was not sold in California and the proceeds of its sale were not distributed here. AIG and AGL are not based in California. In sum, none of the alleged acts in furtherance of the conspiracy occurred in California. For these reasons, Plaintiff's conspiracy theory in support of specific personal jurisdiction fails.

[17] This list includes matters alleged in the TAC as well as those identified in Plaintiff's memoranda. Dkt. 100; Dkt. 101; Dkt. 103. The latter are considered for the purpose of determining whether to allow an amendment of the TAC would be futile as to the basis for personal jurisdiction.

c) Intentional Tort Theory of Specific Personal Jurisdiction

Plaintiff next argues that each of these defendants intentionally conspired to target him while he was a resident of California. *Walden* rejects this theory. The defendant in *Walden*, who was sued in Nevada, was a federal agent who "approached, questioned, and searched respondents, and seized" cash from the plaintiffs while at an airport in Georgia. 134 S. Ct. at 1124. The agent "never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada." *Id.* The Court stated that a "forum State's exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum." *Walden*, 134 S. Ct. at 1123. In doing so, it analyzed *Calder v. Jones*, 465 U.S. 783 (1984), on which Plaintiff relies. As the Court explained:

> *Calder v. Jones*, 465 U.S. 783, illustrates the application of these principles. In *Calder*, a California actress brought a libel suit in California state court against a reporter and an editor, both of whom worked for the National Enquirer at its headquarters in Florida. The plaintiff's libel claims were based on an article written and edited by the defendants in Florida for publication in the National Enquirer, a national weekly newspaper with a California circulation of roughly 600,000.
>
> We held that California's assertion of jurisdiction over the defendants was consistent with due process. Although we recognized that the defendants' activities "focus[ed]" on the plaintiff, our jurisdictional inquiry "focuse[d] on 'the relationship among the defendant, the forum, and the litigation.'" *Id.*, at 788 (quoting *Shaffer*, 433 U.S., at 204). Specifically, we examined the various contacts the defendants had created with California (and not just with the plaintiff) by writing the allegedly libelous story.
>
> We found those forum contacts to be ample: The defendants relied on phone calls to "California sources" for the information in their article; they wrote the story about the plaintiff's activities in California; they caused reputational injury in California by writing an allegedly libelous article that was widely circulated in the State; and the "brunt" of that injury was suffered by the plaintiff in that State. 465 U.S., at 788–789. "In sum, California [wa]s the focal point both of the story and of the harm suffered." *Id.*, at 789. Jurisdiction over the defendants was "therefore proper in California based on the 'effects' of their Florida conduct in California." *Ibid.*
>
> The crux of *Calder* was that the reputation-based "effects" of the alleged libel connected the defendants to California, not just to the plaintiff. The strength of that connection was largely a function of the nature of the libel tort. However scandalous a newspaper article might be, it can lead to a loss of reputation only if communicated to (and read and understood by) third persons. See Restatement (Second) of Torts §577, Comment *b* (1976); see also *ibid*. ("[R]eputation is the estimation in which one's character is held by his neighbors or associates"). Accordingly, the reputational injury caused by the defendants' story would not have occurred but for the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens. Indeed, because publication to third persons is a necessary element of libel, see *id.*, §558, the defendants' intentional tort actually occurred *in* California. *Keeton*, 465 U.S., at 777 ("The tort of libel is generally held to occur wherever the offending material is circulated"). In

> this way, the "effects" caused by the defendants' article—*i.e.*, the injury to the plaintiff's reputation in the estimation of the California public—connected the defendants' conduct to *California*, not just to a plaintiff who lived there. That connection, combined with the various facts that gave the article a California focus, sufficed to authorize the California court's exercise of jurisdiction.

134 S. Ct. at 1123-24 (emphasis in original).

The Court found that the contacts with Nevada were insufficient. *Id.* at 1124-25. Thus, it concluded that "no part of petitioner's course of conduct occurred in Nevada." *Id.* at 1124. The defendant's "actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections." *Id.* at 1125. "Such reasoning improperly attributes a plaintiff's forum connections to the defendant and makes those connections 'decisive' in the jurisdictional analysis." *Id.* The Court next explained:

> Relying on *Calder*, respondents emphasize that they suffered the "injury" caused by petitioner's allegedly tortious conduct (*i.e.*, the delayed return of their gambling funds) while they were residing in the forum. [citation omitted] This emphasis is likewise misplaced. As previously noted, *Calder* made clear that mere injury to a forum resident is not a sufficient connection to the forum. Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State. The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way.
>
> Respondents' claimed injury does not evince a connection between petitioner and Nevada. Even if we consider the continuation of the seizure in Georgia to be a distinct injury, it is not the sort of effect that is tethered to Nevada in any meaningful way. Respondents (and only respondents) lacked access to their funds in Nevada not because anything independently occurred there, but because Nevada is where respondents chose to be at a time when they desired to use the funds seized by petitioner. Respondents would have experienced this same lack of access in California, Mississippi, or wherever else they might have traveled and found themselves wanting more money than they had. Unlike the broad publication of the forum focused story in *Calder*, the effects of petitioner's conduct on respondents are not connected to the forum State in a way that makes those effects a proper basis for jurisdiction. [footnote omitted]
>
> The Court of Appeals pointed to other possible contacts with Nevada, each ultimately unavailing. Respondents' Nevada attorney contacted petitioner in Georgia, but that is precisely the sort of "unilateral activity" of a third party that "cannot satisfy the requirement of contact with the forum State." *Hanson*, 357 U.S., at 253. Respondents allege that some of the cash seized in Georgia "originated" in Nevada, but that attenuated connection was not created by petitioner, and the cash was in Georgia, not Nevada, when petitioner seized it. Finally, the funds were eventually returned to respondents in Nevada, but petitioner had nothing to do with that return (indeed, it seems likely that it was respondents' unilateral decision to have their funds sent to Nevada).

Id. at 1125-26.

Plaintiff argues that the moving defendants entered into a conspiracy knowing that it would cause harm to Plaintiff, who resides in California. However, under *Walden*, this is insufficient to establish jurisdiction in this forum. Unlike the defendants in *Calder*, it has neither been alleged nor shown that the defendants took any particular, meaningful actions in California. That Plaintiff lives here, and suffered alleged financial harm here, is not a basis for personal jurisdiction over the moving defendants.

d) Disposition

For the foregoing reasons, there is neither general nor specific personal jurisdiction over these defendants. Therefore, their motions to dismiss (Dkt. 94; Dkt. 95; Dkt. 96; Dkt. 97) are **GRANTED**.

C. Motion to Dismiss of AGL and AIG (Dkt. 98)

1. Legal Standard

Fed. R. Civ. P. 8(a) provides 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 . . . ." The complaint must state facts sufficient to show that a claim for relief is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint need not include detailed factual allegations, but must provide more than a "formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations and quotations omitted).

A party may bring a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Dismissal is appropriate only where a cause of action as pleaded is without a cognizable legal theory or sufficient facts to support one. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In considering a motion to dismiss, the allegations in the challenged complaint are deemed true and must be construed in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.,* 80 F.3d 336, 337-38 (9th Cir. 1996). However, a court need not "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (internal quotation marks omitted).

2. Application

AGL and AIG have moved to dismiss the claims for conspiracy, breach of contract, insurance bad faith, insurance code violations and accounting.

a) Whether Plaintiff Has Stated a Claim for Conspiracy

(1) Legal Standard

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although

not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510-11 (1994). A claim of conspiracy requires that "two or more persons agree to perform a wrongful act . . . ." *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 784 (1979). By agreeing to a common plan or design to commit a tort, co-conspirators "incur[] liability co-equal with the immediate tortfeasors" because they effectively adopt "the torts of other coconspirators within the ambit of the conspiracy." *Applied Equip. Corp.*, 7 Cal. 4th at 511. A "plaintiff is entitled to damages from those defendants who concurred in the tortious scheme with knowledge of its unlawful purpose." *Wyatt*, 24 Cal. 3d at 784.

"Standing alone, a conspiracy does no harm and engenders no tort liability." *Applied Equip. Corp.*, 7 Cal. 4th at 511. "A bare agreement among two or more persons to harm a third person cannot injure the latter unless and until acts are actually performed pursuant to the agreement." *Id.* (internal quotation marks omitted).

"The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design." *Applied Equip. Corp.*, 7 Cal. 4th at 511. (internal quotation marks omitted). Concurrence with, and knowledge of, a conspiracy "may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances." *Wyatt*, 24 Cal. 3d at 785. (internal quotation marks omitted). Tacit consent and express approval is each sufficient to establish concurrence and knowledge. *Id.* "By its nature, tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty." *Applied Equip. Corp.*, 7 Cal. 4th at 511.

(2) Application

The January 15, 2015 Order provided that Plaintiff would have one, final opportunity to allege cognizable claims against AGL and AIG. Plaintiff's TAC has not done so; the deficiencies of the SAC have not been addressed adequately. Indeed, the allegations of a conspiracy in the TAC are essentially the same as those previously advanced. The TAC contains no allegations concerning when or where such a conspiracy was conceived. Rather, the TAC alleges only that, because Smith and GSFG were in a principal-agent relationship with AIG and AGL, their knowledge and actions should be imputed to these entity defendants. TAC ¶ 29a, Dkt. 91. However, these allegations are conclusory; no factual bases are advanced.[18] Nor are there any allegations in the TAC sufficient to support an inference that AGL and AIG agreed with Morlitz and the other defendants to deprive Plaintiff of his rights. Thus, the TAC does not sufficiently allege the formation or operation of a conspiracy.

[18] In his opposition, Plaintiff argues for the first time that AIG issued an errors and omissions policy to Smith and GSFG. He then argues that this is a basis to conclude that there is a principal-agent relationship between these parties. However, these allegations are not presented in the TAC. Further, the presence of an insurer-insured relationship does not establish a principal-agent relationship through which the insurer is responsible for the conduct of the insured.

b) Whether Plaintiff Has Stated a Claim for Breach of Contract

A claim for breach of contract must include the following elements: (1) the existence of a contract; (2) plaintiff's performance or excuse for non-performance of his obligations thereunder; (3) defendant's breach; and (4) resulting damage to the plaintiff. Cal. Civ. Code § 1550; *Acoustics, Inc. v. Trepte Constr. Co.*, 14 Cal. App. 3d 887, 913 (1971).

Plaintiff has failed to allege the existence of a contract with either AGL or AIG. Therefore, he cannot meet the first element of the cause of action. Further, he has not alleged a basis for standing to assert such a claim. Thus, the TAC does not allege that he is either a beneficiary or a third-party beneficiary of the Policy. The only beneficiaries identified in the Policy were Robert and the RSMS Trust. Policy, Dkt. 1-1, Ex. C at 45-46; Policy, Dkt. 57-1, Ex. 1 at 31. That Plaintiff was a beneficiary of the RSMS Trust does not make him a beneficiary of the Policy. Moreover, the terms of the Policy provide that the owner could change the owner or beneficiary "at any time prior to the Death of the last surviving Contingent Insured unless the previous designation provides otherwise." Policy, Dkt. 57-1, Ex. 1 at 19. Prior to the death of Robert, the beneficial ownership of the Policy was transferred to CNF. Transfer of Ownership Confirmation, Dkt. 57-1, Ex. 5. Because Plaintiff was not an initial beneficiary of the Policy, and was not later added as one, he has failed to allege the existence of a contract with AGL or AIG.[19]

c) Whether Plaintiff Has Stated a Claim for Bad Faith and Violation of Cal. Ins. Code § 1861.03

"California law is clear, that without a breach of the insurance contract, there can be no breach of the implied covenant of good faith and fair dealing." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1034 (9th Cir. 2008) (citing *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 36 (1995)). In *Waller,* the California Supreme Court stated:

> It is clear that if there is no *potential* for coverage and, hence, no duty to defend under the terms of the policy, there can be no action for breach of the implied covenant of good faith and fair dealing because the covenant is based on the contractual relationship between the insured and the insurer.

Waller, 11 Cal. 4th at 36 (emphasis in original) (citation omitted).

As discussed above, Plaintiff was neither a party to, nor a third party beneficiary of, the Policy. Because Plaintiff cannot sufficiently plead a breach of that contract, he is also unable to plead corresponding claims for bad faith, or breach of implied covenant of good faith and fair dealing by AIG or AGL.

[19] Plaintiff argues in his opposition (Dkt. 102 at 14-15) that he was an initial beneficiary of the Policy before the RSMS Trust was created. This is not alleged in the TAC. Further, there are no factual allegations in the TAC that support such an inference. Moreover, the terms of the Policy permitted Plaintiff's parents, as its owners, to change the beneficiary at any time prior to their deaths. Policy, Dkt. 57-1, Ex. 1 at 19. Thus, even if Plaintiff had once been a beneficiary of the Policy, he could no longer have been one after the establishment of the RSMS Trust to which such beneficial rights were transferred.

d) Whether Plaintiff Has Stated a Claim for Insurance Code § 790.03(h) Violation

The alleged violation of Cal. Ins. Code § 790.03(h) that is advanced in the TAC fails because there is no private action under that statute. *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 46 Cal. 3d 287, 313 (1988). In Plaintiff's opposition to the motion to dismiss of AGL and AIG, he asserts that his ninth cause of action for a violation of Cal. Ins. Code § 790.03(h) was incorrectly stated. Murphy Decl. ¶ 12, Dkt. 102-1. Plaintiff requests leave to add a different claim. However, Plaintiff already has had four opportunities to assert claims against the defendants in this action, and has failed to do so. Nor is there any showing that there is a viable basis for the new claim.

e) Whether Plaintiff Stated a Claim for Accounting

"An accounting is an equitable proceeding which is proper where there is an unliquidated and unascertained amount owing that cannot be determined without an examination of the debts and credits on the books to determine what is due and owing." *Prakashpalan v. Engstrom, Lipscomb & Lack*, 223 Cal. App. 4th 1105, 1136-37 (2014) (citation omitted). Because equitable principles govern, "plaintiff must show the legal remedy is inadequate." *Id.* at 1137. Accounting is proper where "the books and records are so complicated that an action demanding a fixed sum is impracticable . . . ." *Id.* (citation omitted). There must be "[s]ome underlying misconduct on the part of the defendant" to "invoke the right to this equitable remedy." *Id.* (citation omitted).

Plaintiff's accounting claims in his TAC do not correct the shortcomings of the same claims asserted in the SAC. There are no new, material allegations sufficient to support a claim for an accounting. Nor are there adequate allegations as to wrongful conduct by AGL or AIG that would support such a claim.

V. Conclusion

Throughout the course of this litigation, Plaintiff has disregarded Court orders and advanced arguments that could reasonably be deemed frivolous. For example, Plaintiff challenged the subject matter jurisdiction of this Court by arguing that the $75,000 amount in controversy requirement of diversity subject matter jurisdiction was not satisfied. Motion to Remand, Dkt. 11 at 1. This argument was advanced despite Plaintiff's admission that a jury could award "damages exceeding $75,000 to the plaintiff" (Pl. Decl., Dkt. 11 ¶ 7) and that the Policy at issue involved benefits of $5,000,000.

Plaintiff later sought to justify his failure to comply with Fed. R. Civ. P. 15(a)(2) by claiming that the FAC was not, in fact, an amended complaint but was, instead, a "replacement for his California form complaint in accord with the court's Standing Order ¶6." Opposition to Motion to Dismiss, Dkt. 25 at 7. Although this argument was rejected and the FAC was stricken, Plaintiff was afforded another opportunity to prepare a complaint that stated viable causes of action against defendants over which there was personal jurisdiction. Dkt. 52 at 5. Plaintiff was cautioned that "before including any additional defendant and/or asserting any claim, Plaintiff must believe that the claims asserted are: (1) not for an improper purpose, (2) warranted, and (3) have evidentiary support." *Id.*

Notwithstanding this procedural setting, Plaintiff filed the SAC, which named Shane as a defendant. Dkt.

53. Serious issues were presented as to the viability of these claims. Dkt. 87 at 7-10, 15. The same was true with respect to the claims asserted against AIG and AGL. *Id.* at 18. Nevertheless, Plaintiff was afforded a final opportunity to file an amended complaint -- the fourth one in this action -- in which viable causes of action were asserted. He has not done so. For the reasons stated in this Order, the TAC is not viable.

In light of this procedural history, the Motion of AGL and AIG is granted with prejudice. Further amendment would be futile and a waste of judicial and party resources. Plaintiff, who is an active member of the California bar, has been afforded multiple opportunities to amend his claims despite his noncompliance with Court orders and repeated failures to state claims. *E.g.*, Dkt. 92 (identifying violations of Court orders).

Therefore, the Motions (Dkt. 94; Dkt. 95; Dkt. 96; Dkt. 97; Dkt. 98) are **GRANTED** as follows:

1. The Motion of AGL and AIG (Dkt. 98) is **GRANTED** with prejudice.
2. The Motions of the defendants who have challenged personal jurisdiction (Dkt. 94; Dkt. 95; Dkt. 96; Dkt. 97) are **GRANTED** without prejudice. The effect of this Order shall be **STAYED** for 21 days to allow Plaintiff the opportunity to file a complaint in an appropriate forum in which there is personal jurisdiction over these defendants.
3. Finally, this action is dismissed, without prejudice, as to CNF II, LLC, RAI Insurance Group and RAI Premium Finance, LLC for failure to prosecute. There is no showing that any of these parties has been served notwithstanding that this action has now been pending for more than 16 months.

AGL and AIG shall lodge a proposed judgment consistent with the terms of this Order no later than July 29, 2015. Plaintiff shall lodge any objections to the proposed judgment within 7 days after the date it was lodged.

IT IS SO ORDERED.

_____ : _____

Initials of Preparer ak