Superior Court of California
County of San Benito

Tentative Decisions for September 25, 2024

Courtroom #1: Judge Pro Tempore Page Galloway

CU-23-00049 DeCarlo, Timothy Lee vs. Enviorsciences LLC et al 9-25-24

On calendar for Defendant's Counsel Notice of Motion and Motion to be relieved as Counsel

Plaintiff: John Crowley,

Defendant: Adron Been

All procedural elements have been met, Motion is Granted as prayed.

CU-24-00167 Lucille Del Carlo v. Frank Del Carlo, et al. 9-25-24

On Calendar for Defendant's Demurrer to Petition for lack of jurisdiction, failure to state a claim.

Plaintiff: Stephan Allan Barber

Defendant: Frank Del Carlo (Pro Per)

Defendant: Al Fresco Landscape Management, Inc.

Next Hearing set 10-16-24 on Defendant's motion to reconsider.

Defendant: Al Fresco Landscaping, Inc.

The underlying complaint seeks 1) Involuntary Dissolution of Al Fresco Landscape Management, Inc. and Al Fresco Landscaping, Inc; 2) Partition of Real Properties; 3) Breach of Fiduciary Duty; 4) Injunctive Relief; 5) Restitution; and Damages.

The Complaint avers that Plaintiff as an individual holds 50% of the outstanding shares of Al Fresco Landscaping, Inc, and 80% of the outstanding shares of Al Fresco Landscape

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Management, Inc. Defendant Frank DelCarlo holds 50% of the outstanding shares of Al Fresco Landscaping, Inc. and 20% of the outstanding shares of Al Fresco Landscape Management, Inc. The real property in question is at 1761 Shelton Drive, Hollister, and is a commercial property. Lucille Del Carlo and Frank Del Carlo each own a 50% undivided interest in the commercial property. Both of the named businesses are operated from the commercial property, and work in close connection as a landscape construction business and landscape maintenance business, respectively, and each would lose value without the other. The Del Carlos are in the middle of a marital dissolution proceeding (FL-23-00086), and there are related Domestic Violence cases, DV-24-00030 filed by Lucille against Frank, in which a temporary order granting Lucille exclusive use and operation of both business interests and expressly forbidding Frank from interfering with the operation of either business, inappropriate communication to employees, and generally erratic behaviors at the business. The Del Carlos no longer have a productive or functioning business relationship and cannot co-manage the businesses. There are also allegations regarding Frank's conduct that have harmed or potentially harmed the companies as alleged therein in greater detail.

8-28-24 The court grants Plaintiff's motion for preliminary injunctive relief and for exclusive possession and control of the business, restricting Defendant from the premises.

Motion: 8-22-24 Defendant states that the filing of the instant case violates the preclusion from filing a separate civil action to address matters that are already the subject of ongoing family law litigation. No form of pleading can remedy these defects, and the demurrer should be sustained without leave to amend. The filing of the instant case defeats the family law court's ability to adjudicate and dispose of the property of the marriage, determine and allocate separate property in accord with the well-established law regarding jurisdiction pursuant to *Askew v. Askew* (1994) 22 Cal. App. 4th 942. Demurrer is proper where the court lacks jurisdiction. (CCP § 430.010 sub. (c).) The Plaintiff has already invoked family law jurisdiction with her dissolution petition, seeking division of the community property, allocation of separate property, of which these businesses are a part. These issues should be resolved by the family law court.

8-22-24 Defendant's Request for Judicial Notice. Defendant requests judicial notice be taken of 1) the Plaintiff's petition in FL-23-00086, filed in this court on 4-18-23; 2) Defendant's response to the petition in FL -23-00086, filed in this court 5-3-23; and 3) Plaintiff's request for a Domestic Violence Restraining Order against Defendant in DV-24-00030, filed in this court.

This last action was filed on 3-24-24 and remains pending.

9-11-24 Plaintiff's opposition to demurrer argues that while Plaintiff does not dispute that she and Frank Del Carlo are the parties to the pending dissolution or that proceeding has the authority to determine the rights and the debts of the marriage and marital community, she opposes the demurrer because the family court lacks the ability to grant relief in certain aspects of this case. The civil court thus has concurrent jurisdiction to afford her the relief she seeks (involuntary dissolution of the businesses) as a corporate shareholder, distinct from the relief sought in the divorce proceeding. The parties own the businesses' stock as community property, but the business entities themselves are not community property. The court has the authority to wind up

the companies, dissolve them, or if necessary, appoint a receiver or provisional director to manage them based on these causes of action, which do not preclude division of the marital property, to wit, the stock holdings of these corporate entities. The breach of fiduciary duty as a corporate shareholder addresses his actions as a shareholder and how they damage Plaintiff as a shareholder, not with regard to the ownership of the business. Most of the citations that Defendant refers to address post judgment dissolution cases. The complaint will not interfere with or supplant the family court decisions, if the court is inclined to dismiss on the grounds asserted, they ask the court to consider consolidation of the actions.

Legal Authority: A demurrer tests the legal sufficiency of pleadings. (CCP§§422.10, 589). A demurer is properly utilized where the pleading shows a legal deficiency on its face. (*Estate of Moss* (2012) 204 Cal. App. 4th 521, 535.) In reviewing a demurrer, the court must confine its review to the complaint, or to matters of which it may take judicial notice. (CCP§430.30 subd. (a).) In analyzing the complaint, the court must treat the demurrer as an admission of all material facts that are properly pled in the challenged pleading or that reasonably arise by implication, regardless of how improbable those facts may be. (*Collins v. Thurmond* (2019) 41 Cal. App. 5th 879, 894.) A demurrer to a complaint is proper there the court has no jurisdiction over the subject matter of the complaint. (CCP§430.010 sub (a).) Similarly, pursuant to the same code section, a demurrer is proper where there is another case pending between the same parties on the same cause of action. (CCP§430.010 sub (c), or where the complaint fails to state a cause of action (CCP §430.010 sub (e).)

In analyzing whether another action is pending on the same cause of action, a judge must consider whether the primary rights asserted in each action are the same. (*Bush v. Superior Court* (1992) 10 Cal. App. 4th 1374, 1384.), whether the two actions involve the same evidence, (Pitts *v. City of Sacramento* (2006) 138 Cal. App. 4th 853, 856.), and whether a judgment in the first action would be a complete bar to the second action. (*Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal. App. 3rd 781, 787-788.) If the two actions involve substantially the same controversy between the same parties, the judge must abate, but not dismiss, the second action pending the outcome of the first.

As a general principle, to avoid redundant proceedings and the possibility of conflicting rulings, one department of the superior court lacks jurisdiction to act on a matter already before another department of the superior court. (*Glade v. Glade* (1995) 38 Cal. App. 4th 1441, 1449-50.) Additionally, when there is an ongoing marital dissolution action, the parties are precluded from reframing their family court claims as civil causes of action, which would result in "an improper attempt to wage 'family law . . . by other means...." (*Burkle v Burkle* (2006) 144 Cal. App. 4th 387, 393 (internal citations omitted.) The family law division is tasked with determining the character of alleged community and separate property, dividing community property, allocating separate property, among other tasks related to the division of property. Moreover, the family law court sits in both law and equity and has broad discretion in fashioning orders in this regard.

Analysis:

Contrary to the Plaintiff's position, given that *all* of the shares in each of the businesses are owed by Lucille Del Carlo and Frank Del Carlo, a fact not in dispute in either case, the distinction between being a shareholder and owner of the business entity as community property is a distinction without a difference. The court notes that the Family Court sits not just as a court of law, but as a court of equity, and the ability to determine issues of breach of fiduciary duty, the ability to appoint a receiver or director to prevent damage to the community property fisc, or even to order a business entity sold or otherwise dissolved when it is owned entirely by the parties to a marital dissolution is wholly within the ambit of the family court's power. The underlying principle in the line of cases starting with *Askew,* cited by the parties herein is that the civil court should not be used to wage the dissolution case by other means, potentially resulting in disparate judgments or conflicting orders.

The family law court has the authority in determining the division of community property to make a broad variety of orders intended to preserve the community property's value pending ultimate disposition, and similarly to control the disposition of alleged separate property pending the court's final determination that it is, in fact, separate property to be allocated, and to redress breaches of the fiduciary duties which attach as a consequence of the marital union. The case at bar , as noted in *Dale v. Dale,* (66 Cal. App. 4th 1172, at 1183) noted that the effect of pursuing such a civil action is to "usurp the power and obligation of the Family Law Court [in the pending dissolution proceeding] to determine the character of...properties..., " when discussing the effect of the imposition of constructive trusts on community property subject to a marital dissolution action in *In re Marriage of Schenk* (1991) 228 Cal. App. 3rd 1474. In that case the Court of Appeal noted that the civil case effectively removed from the family court the power to characterize and divide those properties as a community asset. Herein the analysis is similar. The businesses themselves are community assets as they are owned wholly by both of the parties to the marital dissolution, as they each of them own 50% of the stock in each entity. The Family Court therefore is tasked not only with dividing the stock shares in the company but in effect determining who will therefore own the business entities themselves, or whether those entities must be wound up in order to effectuate a complete community property division.

Therefore, in analyzing the demurrer, the court notes that the Plaintiff has properly stated a cause of action, and notes that while this case falls afoul of the well-established principles of jurisdiction with respect to suing in the civil division of the court to pursue relief relating to property already under the jurisdiction of the family law division in the same court, the requested relief is within the scope of the family law case. The court therefore overrules the demurrer as to failing to state a cause of action; and rather than sustaining the demurrer for want of jurisdiction, the court instead will consolidate this case into FL-23-00086, with the family law matter as the lead file.

Proposed Ruling: 1) The court grants Defendant's request for Judicial Notice as prayed. The court notes that the case DV-24-00030 is scheduled for long cause hearing 10-7-24.

2) The court overrules the demurrer on the basis of failing to state a claim. The court in the alternative to sustaining the demurrer for lack of jurisdiction court instead consolidates this case with the marital dissolution in FL-23-00086, with the family law matter designated as the lead file.

CU-24-00110 California Mutual Insurance Co. v. State Farm Gen. Ins. Co. 9-25-24

On Calendar for Defendant's Demurrer to Complaint and Motion to Strike

Plaintiff: Alexander F. Stuart

Defendant: Colin M. Adkins

5-7-24 Complaint for Damages for 1. Breach of Insurance Contract; 2. Bad Faith. The underlying facts as pled are that Defendant refused to defend and indemnify their insured own insured, Mission Village (a shopping center landlord), as an additional insured under a policy of general liability insurance issued to a pizza parlor tenant. The claim in the underlying action by Jake Davis alleged he sustained bodily injury performing maintenance work for the pizza parlor at the shopping center owned by Mission Village. The pizza parlor, as a tenant of the shopping center had promised to provide liability coverage to Mission Village as an additional insured. The policy from State Farm insuring Mission Village as an additional insured was issued, and provided that Mission Village was covered "with respect to liability arising out of the ownership, maintenance or use of that part of the premises" that the pizza parlor leased It also provided, additionally, that its coverage was "primary to and will not seek contribution from any other insurance available to an additional insured…provided that the additional insured is a named insured under such other insurance." There was a $1 million per occurrence policy limit. (Complaint ¶7.)

In the underlying case State Farm prevailed on a summary judgment action on the cross complaint against Mission Village finding the accident did not arise from occupation or use of the premises. However, no finding was made as to whether the accident arose from maintenance of the premises, one of the triggers for coverage. (Complaint ¶12.) Defendant after the summary judgement abused the ruling to withdraw from Defending Mission Village and ignored established case law that the duty to defend an additional insured must be construed along the terms of the policy, not just the terms of a contractual indemnity provision in a lease. State Farm's abandonment of Mission Village as additional insured was wrongful and oppressive and compelled Plaintiff to undertake both defense and indemnification, settled the Davis Claim within State Farm's policy limits and seeks recompense for that sum and the costs of the defense which Defendant should have borne. Plaintiff also seeks punitive damages for bad faith.

7-23-24 Demurrer: California Mutual has no standing to bring a direct action for breach of contract, or bad faith. A party must generally be a signatory of the contract or be an intended third-party beneficiary to sue on the contract. (Berclain *America Latina v. Baan Co.* (1999) 74 Cal. App. 4th 401, 405.) A stranger to a contract cannot enforce covenants not made for their benefit. (*Seretti v Superior Nat. Ins. Co.* 1999) 71 Cal. App. 4th 920, 929.) Therefore, a party attempting to bring a claim for damages on an insurance contract must show an underlying contractual relationship. *Austero v. National Casualty Company* (1976) 62 Cal. App. 34d 511 516.) Bad faith has been "strictly tied to the implied-in-law covenant of good faith and fair dealing arising out of an underlying contractual relationship." (*Id.*) No such relationship exists here, and no facts establishing some other right to sue for direct benefits under the policy have been alleged. Their

role is alleged as an excess insurer or subrogee, even if true, do not allow them to bring this claim. The proper claim is in subrogation, if it satisfies all six elements of such a claim. Nor can they an excess carrier, assert an equitably subrogated bad faith claim. But an excess insurer can only raise claims the original insured could bring and has no greater rights than the insured and is subject to the same defenses. Therefore, they cannot pursue a bad faith cause of action through equitable subrogation where the insured has suffered no loss. In *National Union Fire Ins. Co. of Pittsburgh v. Tokio Marine and Nichido Fire Ins. Co.* (2015) 233 Cal. App. 4th 1348, 1350 (*Tokio Marine*) the subrogation claims of the excess insurer whose insured suffered no real harm was denied. This denial was upheld because the settlement payment made by National Union was not a loss suffered by their insured (Costco), which is the case here, thus there is no claim for damages and that arises from the alleged bad faith, and California Mutual is not subrogated to a non-existent claim. Therefore, Demurrer should be granted.

9-10-24 Opposition: The cases cited by the Defendant lead to an illogical result, if followed, and are distinguishable in any event. AN insurer is liable for bad faith with it asserts an unreasonable coverage position. (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal. 3rd 566, 575. AN Insurer may not merely focus on those facts justifying a denial of a claim. It is incumbent to look to the significance to the insured of the duty being breached. (*Campbell v. Sup. Ct.* (1996) 44 Cal. App. 4th 1308, 1319.) State farm's bad faith action is not excused by their good faith in stepping into the breach. The Contention that because Plaintiff stepped in and protected the insured when Defendant breached their obligations and arguing that as a result the insured suffered no damages renders the matter a subrogation to a non-existent claim is not supported by a long history of decisional law. Moreover, the argument that Plaintiff's lack standing is equally flawed. The contention that the proper cause of action is subrogation rather than breach of contract ignores the fundamental basis of subrogation. As a subrogee, the insurer steps into the shoes of the insured, and is entitled to assert the insured's causes of action. This is acknowledged by the Defendant, that the Plaintiff is subrogated to the insured's right of action thus they have standing to pursue this claim. Should the court sustain the demurrer, the court should grant leave to amend, noting the policy of great liberality in granting leave to amend where there is reasonable possibility to cure defects. A first test of the pleadings does not give a fair opportunity to cure defects if demurrer is sustained.

Reply declaration argues simply that without harm to the insured, no bad faith claim can be subrogated. (*Bosetti v. U.S. Life Ins. Co. (2009) 175 Cal. App. 4th 1208.*) Plaintiff's complaint identifies no harm to the insured, only to itself. *Tokio Marine* is fully applicable, and in that case the court sustained a demurrer where an excess insurer, like Plaintiff, sought recovery for alleged bad faith despite no harm to the insured, as the excess insurer paid out.

7-23-24 Motion to Strike: The claim does not support the damages alleged, specifically, punitive damages. Thus, motion to strike pursuant to CCP§435,436 (a) is proper. Plaintiff fails to allege sufficient facts to support the punitive or exemplary damages claims. Additionally, punitive damages are a personal right that cannot be assigned to the Plaintiff in subrogation, and this is effectively a subrogation case. Plaintiff must provide the court with clear and convincing evidence Defendant is guilty of fraud, oppression, or malice to frame a prima face claim for punitive damages. (Civ. Code §3294(a).) Moreover, the claim for punitive damages is personal in nature and

cannot be assigned, even in the context of an insurance subrogation action such as this one, where the Plaintiff stands in the place of the insured. (*Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3rd 937, 942.)*

In Opposition, Plaintiff argues that the punitive damages claim cannot be eliminated at the pleadings stage, as the Jury is entitled to award damages in light of the expansive scope of the cumulative conduct alleged. An insure is liable for punitive damages where it acts with "the intent to vex, injure or annoy, or *with a conscious disregard of the plaintiff's rights*." (*Colonial Life& Accident Ins. Co. v. Sup. Ct.* (1982) 31 Cal. 3rd 785,792. (Emphasis original).) Direct evidence that the insurer acted with intent described in Civ. Code §3294 is not needed. These elements may be shown by indirect evidence from which the jury may draw inferences. (*Neal v. Farmers Insurance Exch.* (1978) 21 Cal. 3rd 910, 023, fn. 6.) Liability may be premised on the cumulative conduct of the insurer, and it is for the jury to determine whether the conduct meets that standard. (*Mazik v. Geico General Ins. Co.* (2019) 35 Cal. App. 5th 455.) General pleading is sufficient, as the Supreme Court determined that general allegations of wrongful intent are sufficient to support punitive damages claim. (*Unruh v. Truck Ins. Exch.* (1972) 7 Cal. 3rd 616 ('Malice is properly pleaded by alleging the wrongful motive, intent, or purpose. A general allegation of such intent is sufficient to support a claim for exemplary damages." *At 632.)* The complaint sufficiently states the cause of action, and it must be read as a whole. Nor can Defendant elude responsibility because Plaintiff protected the insured. The argument made here, like that in the demurrer is baseless, that they are immune from liability because Plaintiff protected the insured from suffering damages resulting from Defendant's conduct. The courts have long overruled arguments by breaching insurers seeking to elude liability for wrongful conduct because another insurer. protected the insured. (*Interstate Fire & Casualty Ins. Co. v. Cleveland Wrecking Co.* (2010) 182 Cal.App.4th 23.) The argument that the right is not assignable cited in *Murphy v, Allstate* (1976) 17 Cal. 34d 937, 942 is merely dicta. Subrogation rights don't depend on assignment. In the Demurrer defendant admits the Plaintiff's rights arise through subrogation (Demurrer*, pg. 7.)* Subrogation is governed by different law, as it is measured by the application of equitable principles, not by the law of assignments. (*Meyers v. Bank of American National Trust & Savings Ass'n.* (1938) 11 Cal, 2nd 82m 97, 102; *San Diego Assemblers, Inc v. Work Comp. for Less Ins. Svc's, Inc.* (2013) 220 Cal. App, 4th 1362, 1368.)

Reply: While Plaintiff is correct that insurer's right to subrogation arises by operation of law, this does not extend to recovering punitive damages. They are distinct from compensatory damages and intended to punish egregious conduct. They are awarded to punish a defendant's wrongdoing toward the original plaintiff. They are a personal right, and contrary to Plaintiff's assertion, cannot be transferred, even through subrogation. The language in *Murphy* is not dicta, and frames properly that a subrogation claim cannot pursue punitive damages.

Legal Authority

Motion to Strike: A claim that does not support the damages alleged is appropriately challenged by a motion to strike. (*CCP§§435, 436 sub (a).).* Similarly, a claim for punitive damages may be subject to motion to strike when it fails to adequately state a claim. A punitive damages claim must provide clear and convincing evidence that there has been "oppression, fraud, or malice"

pursuant to Civil Code §3294(a). As defined at sub part (c)(2) of the statute, oppression is "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." Specific facts supporting this claim must be alleged. (*Grieves v. Sup. Ct*. (1984) 157 Cal. App. 3rd 159, 166.) Conclusory allegations are insufficient. (*Brousseau v. Jarrett* (1977) 73 Cal. App. 3rd 864.). An insurer's claim for punitive damages must state conduct which goes beyond that ordinarily characterized as bad faith. The breach of the implied covenant of good faith and fair dealing alone does not establish that the insurer acted with the required oppression, fraud, or malice justifying a punitive damages award. (*Silberg v. Calif. Life Ins. Co.* (1974) 11 Cal, 3rd 453m 462-3.)

Demurrer: Demurrer tests whether, as a matter of law, the facts plaintiff has alleged in the complaint constitute a cause of action under any legal theory. (C.W. *Johnson & Sons, Inc. v. Carpenter* (2020) 53 Cal. App. 5tj 165. 168.) Only the legal sufficiency of the factual allegations is tested, not the truth or accuracy of the facts alleged. The court must assume the truth of all properly pleaded factual allegations. A demurrer is not the proper method to test the merits of the Plaintiff's case. (*Tenet Healthsystem Desert, Inc. v. Blue Cross of Cal.* (2016) 245 Cal. App. 4tj 821, 834, n. 13.) Since demurrer challenges defects on the face of the complaint, it can only refer to matters outside of the pleadings that are subject to judicial notice (*Id.* 831.) THE court must treat the demurrer as an admission of all material facts that are properly pleaded in the challenged pleading or that reasonably arise by implication, however improbable those facts may be. (*Collins v. Thurmond* (2019) 41 Cal. App. 5th 879, 894.) However, demurrer does not admit contentions, deductions, or conclusions of fact or law alleged in the challenged pleading. Demurrer may address all or party of a complaint, cross complaint, or answer. (CCP §§430.10, 430.20. 430.50.) Generally, a party may demur that the complaint fails to state facts sufficient to state a cause of action. (CCP §430.10 sub. (e).) The only issue thus involved in such general demurrer is whether the complaint, as it stands. States a cause of action. (*McKenney v. Purepac Pharm. Co.* (2008) 167 Cal. App. 4th 72, 77.) The acts included in the complaint to properly allege a cause of action are the essential elements included in the cause of action as determined by the substantive law defining the cause of action. Evidentiary facts need not be alleged. (*Foster v. Sexton* (2021) 61 Cal. App. 5th 998, 1018; *C.W. Johnson & Sons, Inc. v. Carpenter, supra*, at 169.)

Analysis:

Motion to Strike:

Notably "simple breach of contract, no matter how willful and hence tortious, is not a ground for punitive damages. Such damages are accessible only upon a showing that the defendant "act[ed] with the intent to vex, injure, or annoy." (Neal v. Farmers Ins. Exchange (1978) 21 Cal. 3d 910, 922 [148 Cal. Rptr. 389, 582 P.2d 980].)

Punitive damages for failure to pay or properly administer an insurance claim are ordinarily, as in this case, based on "malice" or "oppression," rather than on the third possible ground for the award, "fraud." Both "malice" and "oppression" are defined in Civil Code section 3294 as involving "despicable conduct," which in the case of malice "is carried on by the defendant with a willful and conscious disregard of the rights or safety of others," and as to oppression is "conduct that

subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (*Tomaselli v. Transamerica Ins. Co.* (199425 Cal. App. 4th 1269, 1287) Further, "It is notable that punitive damages have been assessed against insurance companies most commonly where a showing has been made of a continuous policy of nonpayment of claims. Cases illustrating an established practice of claims stonewalling are collected in Mock v. Michigan Millers Mutual Ins. Co. (1992) 4 Cal. App. 4th 306, 329 [5 Cal. Rptr. 2d 594], where the court suggested approval of an earlier inference to the effect that " 'a consistent and unremedied pattern of egregious insurer practices' [is required] in order for the insurer's 'bad faith' conduct to rise to the level of malicious disregard of the insured's rights so as to warrant the imposition of punitive damages." (Citing Patrick v. Maryland Casualty Co. (1990) 217 Cal. App. 3d 1566, 1576 [267 Cal. Rptr. 24].)" (Ibid.)

In the context of this case, the court is inclined to agree with the Defendant, that this is a matter, ultimately of a subrogation claim founded in an insurance contract. Any claim for punitive or exemplary damages must be pled with specificity in order to present clear and convincing evidence to support prima facie claim for such damages. In this particular context, with the claim arising out of the contractual obligations between the insurance carrier and its additional insured there must be more than a mere framing that the actions by the defendant here as "malicious" or "oppressive", facts substantiating that allegation must also be pled. These claims, inherently, involve what the statute defines as "despicable conduct", which has been interpreted in case law as having the "character of outrage" often associated with criminality. (Taylor v. Superior Court (1979) 24 Cal. 3d 890, 894.) "Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate." (Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co. (1986) 185 Cal. App. 3d 1149, 1154.) The mere describing of an act as being malicious, oppressive, vexatious, or fraudulent does not make it so, the facts which support such a description taking the actions out of the context of a mere breach of contract, which may be tortious, to one which is malicious and thus subject to punitive damages hinges on whether sufficient facts are pled. What has been pled here is the conduct that informs most insurance subrogation disputes, denial of coverage, defense, or prosecution founded in interpretation of the language of the underlying insurance contract.

Moreover, contrary to the Plaintiff's position, the Court cannot dismiss the citation to *Murphy v. Allstate Ins. Co. 1976) 17 Cal. 3rd 937,942,* as dicta. The cited case address when a personal tort, in that case one for infliction of emotional distress, may or may not be assigned to another. It states, in relevant part on this issue ". . . because a purely personal tort cause of action is not assignable in California, it must be concluded that damage for emotional distress is not assignable. (See *Reichert* v. *General Ins. Co.* (1968) 68 Cal.2d 822, 834 [69 Cal.Rptr. 321, 442 P.2d 377]; 7 Cal.Jur.3d, Assignments, § 5 at pp. 12-13.) *The same is true of a claim for punitive damage*. (*People* v. *Superior Court* (1973) 9 Cal.3d 283, 287 [107 Cal.Rptr. 192, 507 P.2d 1400, 55 A.L.R.3d 191]; *Dugar* v. *HappyTiger Records, Inc.* (1974) 41 Cal.App.3d 811, 819 [116 Cal.Rptr. 412]; see *French* v. *Orange County Inv. Corp.* (1932) 125 Cal.App. 587, 591 [13 P.2d 1046].)

Murphy v. Allstate Insurance Co., (Cal. 1976) 17 Cal.3d 937, 942, emphasis added. However, the claim in *Murphy is* not founded in subrogation. In *Murphy,* one of the issues in the appeal was

whether a punitive damages award was assignable, not whether it transferred via equitable subrogation. The assignability of a punitive damages claim was the issue taken up in the citations supporting the quoted section. However, Plaintiff notes, the right of subrogation, which is the basis for their claim, is not legally the same thing as an assignment, follows the equitable framework rather than le law of assignment. The insurer's subrogation rights arise by operation of law – no assignment of the insured's cause of action is necessary. (National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc. (2009) 171 Cal.App.4th 35, 55.) An insurer's right to subrogation is measured by the application of equitable principles and not by the law of assignments. (Meyers v. Bank of American National Trust & Savings Ass'n (1938) 11 Cal.2d 92, 97, 102.) A subrogated claim can include punitive damages, if those damages are available to the insured, and an excess insurer, standing in the shoes of the insured may therefore recover by way of equitable subrogation.

The court therefore grants the motion to strike on the basis that the claim for punitive damages is not pled with sufficient particularity, and grants the Plaintiff leave to amend.

Demurrer

The unique nature of insurance policies impels tort liability for breach of the covenant of good faith and fair dealing. Without tort damages, the insurer could arbitrarily deny a claim, thus "gambling with the policyholder's benefits of the agreement, and if it gambled wrong, the insurer would be no worse off than if it had honored the claim. Pulte Home Corp. v. American Safety Indemnity Co. (2017) 14 Cal.App.5th 1086, 1125 (internal citations omitted.) While *Tokio Marine* involved liability insurers, the result reached, as Plaintiffs note, was an outlier, reached by reliance on the *Gulf Insurance* surety bond case, which did not involve a liability policy, as is the case here. There is a lengthy history of decisional law in liability insurance cases, which do not allow a breaching insurer to evade liability on the basis that the insured was not damaged because another insured stepped into the breach to protect the insured. This was the unusual outcome in *Tokio Marine,* and the outcome that the Defendants espouse in this action. The court finds the reading of *Public Service Mutual Ins. v. Liberty Surplus Insurance Corp.* (2014) 51 F. Supp. 3d 937 to be enlightening. The case notes "[f]or purposes of subrogation, privity of contract between insurers is not required. That is because of the nature of subrogation, which looks to the nature of insurance as a contract of indemnity as opposed to any relation of contract or privity between insurers. Northwestern Mutual Ins. Co. v. Farmers' Ins. Group, 76 Cal. App. 3d 1031, 1050, 143 Cal. Rptr. 415 (1978); citing Offer v. Superior Court, 194 Cal. 114, 118, 228 P. 11 (1924). Nor is there any requirement that the insured itself demonstrate damages in order for its insurer to pursue by way of subrogation [**27] expenses it incurred on the insured's behalf." (*Public Serv. Mut. Ins. Co. v. Liberty Surplus Ins. Corp.* (E.D. Cal. 2016) 205 F. Supp. 3d 1161, 1173.) This case parses *Gulf Ins. Co. v. TIG Ins. Co.* (20010 86 Cal. App. 4th 422, on which *Tokio Marine* relies, and reaches a very different conclusion that the *Tokio Marine* court, and one which aligns with the general body of jurisprudence on this issue.

In interpreting *Tokio Marine,* the court notes that the decision is not without substantial criticism on the very point that Defendant seeks to make. *Tokio Marine "*involved a personal injury products liability claim stemming from a defective tire manufactured by Yokohama and sold by Costco.

Plaintiff National Union, an excess insurer for Costco, stepped in and assumed Costco's defense after Yokohama's own products liability carrier, Tokio Marine, failed to do so. National Union settled the claims against Costco on the first day of trial and then filed a complaint in subrogation against Tokio Marine to recover the settlement monies it paid on Costco's behalf.

In addition to subrogation claims for contribution and for express contractual indemnity, National Union included a claim for bad faith as Costco's subrogee on grounds that Tokio Marine's products liability policy named Costco as an additional insured. The trial court sustained Tokio Marine's demurrer on grounds that because National Union had stepped in to protect Costco's interest and settle the claim, Costco itself had suffered no damage from which a subrogation claim could flow in bad faith. On appeal, the Second District agreed that the demurrer had been properly sustained, reasoning that subrogation "only permits the paying insurer to be placed in the shoes of the insured and to pursue recovery from third parties responsible to the insured for the loss for which the insurer was liable and paid." Id. at 1362, citing Gulf Ins. Co. v. TIG Ins. Co., 86 Cal. App. 4th 422, 432, 103 Cal. Rptr. 2d 305 (2001), The National Union court consequently found that in the absence of any harm to Costco, its insurer could not pursue a bad faith claim on Costco's behalf. ... . "...(Public Serv. Mut. Ins. Co. v. Liberty Surplus Ins. Corp. (E.D. Cal. Aug. 21, 2017, No. 2:14-cv-00226-MCE-KJN) 2017 U.S. Dist. LEXIS 134339, at *3-4.)

The Second District Court of Appeal noted that in similar fact patterns where the insurer failed to provide the required insurance, the indemnitee's carrier, which then accepted the tender of defense and funded both the defense and settlement of the underlying personal lawsuit. When the excess insurer sued the primary insurer for breach of contract as its insured's subrogee, the primary insurer, as here, demurred on grounds that because the excess insurer had fully compensated the indemnitee, it could not sue for subrogation on the indemnitee's behalf. The court in that case, as ins *Public Service Mutual,* squarely rejected this contention, opining that the insistence that [the insured suffered no loss because the excess insurer paid, and the excess insurer therefore suffered no loss because it stands in the shoes of its insured," is circular and erroneous." (citations omitted) (Id 6). If this illogical contention were accepted "no insurer could ever state a cause of action for subrogation in order to recover amounts it paid on behalf of its insured, because of the very fact that it had paid amounts on behalf of its insureds." (Citations omitted) (Public Serv. Mut. Ins. Co. v. Liberty Surplus Ins. Corp. (E.D. Cal. Aug. 21, 2017, No. 2:14-cv-00226-MCE-KJN) 2017 U.S. Dist. LEXIS 134339, at -7.)

The court notes that the claim that the Plaintiff lacks standing appears to be founded more in the form of the complaint than in its merits. As noted, a demurrer must be overruled if the complaint states facts sufficient to state a cause of action under any legal theory. (*New Livable Cal. V. Assoc. of Bay Area Gov't*s (2020) 59 Cal. App. 5th 709, 714-15.) Herein the question that Defendant raises is that the Plaintiff failed to properly frame their claims as subrogation as opposed to breach of contract. However, it is a basic principle of a subrogation action is that the subrogee insurer steps into the shoes of the insured and is thus entitled to assert the insured's causes of action. On the payment of a loss, an insurer is automatically subrogated to the insured's right of action against any person who is responsible for that loss, with out the need of an assignment. The form of the pleading, the Plaintiff argues, is not material, noting that the doctrine of equitable subrogation

applies without regard to whether the action is labeled as subrogation. The nature of the underlying right asserted by the subrogee controls the proceedings. The pleading sufficiently frames the breach of contract claim (Complaint ¶¶8-15; 19.) and are sufficient to support standing.

The court therefore overrules the demurrer.

Proposed Rulings:

1) Motion to Strike: The court grants the motion to strike as to the Plaintiff's punitive damages claim for failing to sufficiently pled. The motion is granted with leave to amend. The Plaintiff will file amended pleadings within 30 calendar days from the date of this order.
2) Demurrer: The court overrules the demurrer for failure to state a claim. The court overrules the demurrer on the basis that the Plaintiff lacks standing.

END OF TENTATIVE RULING

***Please contact Judicial Courtroom Assistant, Wendy S. Guerrero, at (831) 636-4057 x129 or wguerrero@sanbenitocourt.org with any objections or concerns**