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**United States District Court
Central District of California**

VIZIO, INC.,

Plaintiff,

v.

NAVIGATORS INSURANCE
COMPANY, et al.,

Defendants.

Case No. 2:20-cv-06864-ODW (ASx)

**ORDER GRANTING
DEFENDANT’S MOTION TO
DISMISS [30]**

I. INTRODUCTION

On July 30, 2020, Plaintiff Vizio, Inc. initiated this action against Defendants Navigators Insurance Company and Arch Insurance Company based on its claim that Defendants failed to provide benefits pursuant to the terms of their primary and excess insurance policies. (*See generally* FAC, ECF No. 27.) Arch, the excess insurer, moves to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. (Mot. to Dismiss (“Motion” or “Mot.”), ECF No. 30.) For the reasons discussed below, the Court **GRANTS** Arch’s Motion.¹

¹ Having carefully considered the papers filed in connection with the Motion, the Court deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.

II. BACKGROUND

1
2 Arch issued an insurance policy (“Arch Policy”) to Vizio for the policy period
3 December 31, 2013, through June 30, 2015. (FAC ¶ 14, Ex. 8, ECF No. 27-8.) The
4 Arch Policy “follows form” and is excess to the primary policy issued by Navigators
5 Insurance Company (“Navigators Policy”). (Arch Policy § 1; FAC ¶ 9, Ex. 7, ECF
6 No. 27-7.) As an excess insurance policy, the Arch Policy provides coverage only
7 after exhaustion of the underlying primary policy limit, which includes a \$100,000
8 retention and a \$5 million limit of liability. (FAC ¶ 9.)

9 Between November 2015 and October 2017, consumers filed a series of
10 lawsuits against Vizio pertaining to its Smart TV products (“Smart TV Litigation”).
11 (*Id.* ¶ 19.) According to Vizio, Navigators wrongfully denied coverage of the Smart
12 TV Litigation, and Arch failed to timely accept or deny Vizio’s claim. (*See id.* ¶¶ 30,
13 32, 51.) On March 15, 2018, Vizio settled the Smart TV Litigation for \$17 million.
14 (*Id.* ¶ 70.) Vizio alleges that Chubb, a commercial general liability and primary
15 insurer, agreed to pay a confidential amount on behalf of Vizio to effectuate the
16 settlement. (*See id.* ¶¶ 8, 71.) Vizio claims that the amount Chubb and Vizio paid to
17 settle the Smart TV Litigation exceeds the underlying limit of the Arch Policy, and
18 thus, Arch is obligated to extend benefits pursuant to the terms of the Arch Policy.
19 (*Id.* ¶ 72.)

20 Based on the foregoing, Vizio asserts claims against Arch for (1) breach of
21 written contract; (2) breach of the covenant of good faith and fair dealing;
22 (3) equitable contribution; and (4) declaratory judgment. (*Id.* ¶¶ 97–101, 108–13,
23 122–29, 130–36.) Arch moves to dismiss for failure to state a claim and the matter is
24 fully briefed. (Mot.; Opp’n, ECF No. 34; Reply, ECF No. 35.)

III. LEGAL STANDARD

26 A court may dismiss a complaint under Rule 12(b)(6) for lack of a cognizable
27 legal theory or insufficient facts pleaded to support an otherwise cognizable legal
28 theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). To

1 survive a dismissal motion, a complaint need only satisfy the minimal notice pleading
2 requirements of Rule 8(a)(2)—“a short and plain statement of the claim.” *Porter v.*
3 *Jones*, 319 F.3d 483, 494 (9th Cir. 2003). The factual “allegations must be enough to
4 raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*,
5 550 U.S. 544, 555 (2007). That is, the complaint must “contain sufficient factual
6 matter, accepted as true, to state a claim to relief that is plausible on its face.”
7 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). The
8 determination of whether a complaint satisfies the plausibility standard is a
9 “context-specific task that requires the reviewing court to draw on its judicial
10 experience and common sense.” *Id.* at 679. On a Rule 12(b)(6) motion, a court is
11 generally limited to the pleadings and must construe all “factual allegations set forth
12 in the complaint . . . as true and . . . in the light most favorable” to the plaintiff. *Lee v.*
13 *City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001). However, a court need not
14 blindly accept conclusory allegations, unwarranted deductions of fact, and
15 unreasonable inferences. *Spewell v. Golden State Warriors*, 266 F.3d 979, 988
16 (9th Cir. 2001).

17 IV. DISCUSSION

18 Vizio contends that Arch breached the Arch Policy by (1) failing to provide a
19 defense or indemnify Vizio in connection with the Smart TV Litigation, and
20 (2) failing to timely accept or deny Vizio’s claim. (FAC ¶¶ 24–35, 76.) Vizio also
21 contends that Arch is liable for equitable contribution and must indemnify Chubb for a
22 portion of the Smart TV Litigation defense costs. (FAC ¶¶ 122–129.) The Court
23 addresses each argument in turn.

24 A. Breach of Contract

25 “As a general rule, under California law the primary insurer alone owes a duty
26 to defend” and “[i]n absence of contract language to the contrary, the excess carrier
27 has no right or duty to participate in the defense until the primary policy limits are
28 exhausted.” *Ticor Title Ins. Co. v. Emps. Ins. of Wausau*, 40 Cal. App. 4th 1699, 1707

1 (1995). The primary insurer’s refusal to defend a third-party claim against the insured
2 does not trigger the excess insurer’s duty to defend. *See id.* at 1708. The excess
3 insurer’s defense obligations arise only when the underlying primary insurance
4 coverage is exhausted. *Iolab Corp. v. Seaboard Sur. Co.*, 15 F.3d 1500, 1504
5 (9th Cir. 1994). Moreover, an excess insurer’s “silence in the face of notice of [a]
6 claim . . . [is] not wrongful or a breach of the policy” where there is no duty to defend.
7 *One W. Bank v. Houston Cas. Co.*, No. CV 14-00547-BRO (JCGx), 2015 WL
8 11090350, at *13 (C.D. Cal. Mar. 9, 2015), *aff’d sub nom. OneWest Bank v. Houston*
9 *Cas. Co.*, 676 F. App’x 664 (9th Cir. 2017).

10 Here, the Arch Policy “provides excess coverage after exhaustion of the
11 Underlying Limit.” (Arch Policy § 1.) The Underlying Limit is defined as “the
12 aggregate sum of all limits of liability of all Underlying Insurance.” (*Id.* § 3F.) And
13 the Underlying Insurance is defined as the Primary Policy (i.e., Navigators Policy) and
14 any Underlying Excess Policies. (*Id.* § 3E.) Importantly, the Arch Policy provides
15 that the “Underlying Limit shall be exhausted by payment . . . of covered Loss by the
16 insurers of the Underlying Insurance” (Navigators), “the Insureds” (Vizio), “or any
17 DIC Insurer.” (*Id.* § 2A.)

18 The Arch Policy’s terms are clear that, as the excess insurer, Arch’s obligations
19 were not triggered until Vizio exhausted the Underlying Limit. (*See* Arch Policy.)
20 Thus, Vizio’s claim for breach of contract is deficient for at least two reasons. **First**,
21 Vizio’s contention that Arch breached the Arch Policy by not paying for its defense or
22 indemnifying the company fails because there are no allegations demonstrating
23 exhaustion of the Underlying Limit. Instead, Vizio vaguely alleges that “[t]he
24 amounts paid as Settlement Sum and Defense Costs by *Chubb and Vizio* exhausted the
25 Underlying Limit.” (*See* Opp’n 21 (citing FAC ¶ 72 (emphasis added)).) This
26 allegation fails to demonstrate that the Underlying Limit was exhausted because (1) as
27 currently phrased, it is impossible to discern how much *the insured*, Vizio, contributed
28 to the costs of defense; and (2) any payments made by Chubb, a general liability and

1 primary insurer, would not serve to exhaust the Underlying Limit, as Chubb is not the
 2 Underlying Insurer, the Insured, or a DIC Insurer. (*See generally* Arch Policy; FAC.)
 3 As it is not clear that the Underlying Limit was exhausted, Arch had no duty to
 4 defend. **Second**, Vizio’s contention that Arch breached the Arch Policy by not timely
 5 accepting or denying Vizio’s claim falls flat because where, as here, there was no duty
 6 to defend, Vizio’s silence “was not wrongful or a breach of the policy.” *See One W.*
 7 *Bank*, 2015 WL 11090350, at *13.

8 At bottom, Vizio’s allegations concerning Arch’s alleged breach of contract are
 9 vague and muddled. If Vizio exhausted the Underlying Limit, as it claims, then Vizio
 10 should explicitly make such an allegation in an amended pleading. However, based
 11 on the present allegations, Vizio fails to state a claim against Arch for breach of
 12 contract. Accordingly, Arch’s Motion is **GRANTED** with respect to Vizio’s claim
 13 for breach of written contract.²

14 Consequently, Vizio’s claims for breach of the implied covenant of good faith
 15 and fair dealing, and declaratory judgment also fail. *See Love v. First Ins. Exch.*,
 16 221 Cal. App. 3d 1136, 1153 (1990) (“[A] bad faith claim cannot be maintained
 17 unless policy benefits are due.”); *Blue Novis, Inc. v. United States All. Grp., Inc.*, No.
 18 SACV 20-01280 JVS (DFMx), 2021 WL 346422, at *6 (C.D. Cal. Jan. 27, 2021)
 19 (“When a [p]arty fails to adequately plead a breach of contract claim, a court may
 20 dismiss a request for declaratory relief.”). Therefore, Arch’s Motion is **GRANTED**
 21 as to these claims as well.

22 **B. Equitable Contribution**

23 Vizio asserts a claim for equitable contribution by “stand[ing] in the shoes of its
 24 primary insurer, Chubb” for the costs of settling the Smart TV Litigation. (Opp’n 12
 25 (citing FAC ¶¶ 122–29).) Without addressing whether Vizio has the right to seek
 26 contribution on behalf of Chubb, the Court finds that this claim fails. “[T]he duty to
 27

28 ² As the Court finds Vizio fails to demonstrate Arch breached the Arch Policy, it need not consider Arch’s additional arguments, and declines to do so.

1 contribute applies to insurers that share the same level of obligation on the risk as to
2 the same insured.” *Reliance Nat’l Indem. Co. v. Gen. Star Indem. Co.*, 72 Cal. App.
3 4th 1063, 1080 (1999) (citing *Signal Cos., Inc. v. Harbor Ins. Co.*, 27 Cal. 3d 359,
4 367–68 (1980)). Excess insurers and primary insurers “do not share the same level of
5 coverage and there is no right of contribution” without an agreement to the contrary.
6 *Id.* at 1080–81. Here, it is clear that, as a matter of law, Vizio cannot bring a claim for
7 equitable contribution against Arch because Arch (excess insurer) and Chubb (general
8 liability/primary insurer) do not share the same level of coverage and Vizio does not
9 point to an agreement that contracts around that default rule. *See id.* Accordingly,
10 Arch’s Motion is **GRANTED** as to this claim.

11 **V. CONCLUSION**

12 For the foregoing reasons, the Court **GRANTS** Arch’s Motion. (ECF No. 30.)
13 Vizio’s claims for breach of contract, breach of the implied covenant of good faith and
14 fair dealing, equitable contribution, and declaratory judgment against Arch are
15 **DISMISSED with leave to amend**. If Vizio chooses to file a second amended
16 complaint (“SAC”), it must do so no later than **twenty-one (21) days** from the date of
17 this Order. If Vizio files a SAC, Defendants must file their responses no later than
18 **fourteen (14) days** from the date of the SAC filing. Vizio’s failure to file a SAC will
19 convert this dismissal to one with prejudice.

20
21 **IT IS SO ORDERED.**

22
23 May 4, 2021

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26 _____
27 **OTIS D. WRIGHT, II**
28 **UNITED STATES DISTRICT JUDGE**