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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re: The Roman Catholic Bishop of Oakland, Debtor in Possession.	Chapter 11
The Roman Catholic Bishop of Oakland, Plaintiff, v. Pacific Indemnity, Insurance Company of America, Aetna Insurance Company, Travelers Insurance Company, Certain Underwriters at Lloyds of London Subscribing to Syndicates 2623 (AFB) and 623 (AFB), Insurance Company of North America, ACE Limited, United States Fire Insurance, Employers Reinsurance, CNA Insurance Company, Pacific Employers Insurance, Westchester Fire Insurance Company, and California Insurance Guarantee Association, Defendants.	Adv. Pro. No. 23-04028 WJL **NOTICE OF MOTION AND MOTION TO DISMISS OR FOR A MORE DEFINITE STATEMENT** Objections Due: October 4, 2023 Hearing Date: October 18, 2023 Hearing Judge: Hon. William J. Lafferty, III Time: 10:30 a.m. Place: Courtroom 220 1300 Clay Street Oakland, CA 94612

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Pacific Indemnity Company, Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America, Pacific Employers Insurance Company and Westchester Fire Insurance Company (collectively, "Moving Insurers"), defendants in the above-captioned adversary proceeding, respectfully move to dismiss the Complaint (Dkt. No. 2) pursuant to Fed. R. Civ. P. 12(b)(6) or, in the alternative, for a more definite statement pursuant to Fed. R. Civ. P. 12(e), both made applicable under Bankruptcy Rule 7012.

As set forth in the accompanying Memorandum of Points and Authorities (the "MPA"), there is good cause for the relief requested herein. This motion (the "Motion") is made on the grounds that the Complaint fails to assert the bare elements of any claim against the Moving Insurers and, accordingly, the Moving Insurers are unable to adequately respond to the allegations as pled due to the lack of necessary detail. The Motion is based on this Notice of Motion and Motion, the MPA, the pleadings and other documents that may be filed by the Moving Insurers in connection with this action, and such other and further matters and argument as may be offered at or in connection with the hearing on this Motion.

Dated: August 31, 2023

O'MELVENY & MYERS LLP

By: /s/ *Karen Rinehart*

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re: The Roman Catholic Bishop of Oakland, Debtor in Possession.	Chapter 11 Case No. 23-40523-WJL Adv. Pro. No. 23-04028 WJL **MOTION TO DISMISS OR FOR A MORE DEFINITE STATEMENT; MEMORANDUM OF LAW IN SUPPORT THEREOF**
The Roman Catholic Bishop of Oakland, Plaintiff, v. Pacific Indemnity, Insurance Company of America, Aetna Insurance Company, Travelers Insurance Company, Certain Underwriters at Lloyds of London Subscribing to Syndicates 2623 (AFB) and 623 (AFB), Insurance Company of North America, ACE Limited, United States Fire Insurance, Employers Reinsurance, CNA Insurance Company, Pacific Employers Insurance, Westchester Fire Insurance Company, and California Insurance Guarantee Association, Defendants.	

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Pacific Indemnity Company, Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America, Pacific Employers Insurance Company and Westchester Fire Insurance Company (collectively, "Moving Insurers"), defendants in the above-captioned adversary proceeding, submit this memorandum of law in support of their motion, pursuant Federal Rules of Civil Procedure 12(b)(6) and 12(e) , and Bankruptcy Rule 7012, to dismiss the Complaint in the above-captioned adversary proceeding (the "Adversary Proceeding" or the "Coverage Action") for failure to state a claim or, in the alternative, to require the Roman Catholic Bishop of Oakland, a corporation sole (a/k/a Diocese of Oakland) (the "Debtor") to provide a more definite statement of the alleged factual basis for its claims.

PRELIMINARY STATEMENT

The *Twombly/Iqbal* standard requires a Debtor to do more than provide a formulaic recitation of the elements of a cause of action or off naked assertions devoid of further factual enhancement. Under Fed. R. Civ. P. 12(e) a complaint must state clearly how each and every defendant is alleged to have violated the Debtor's legal rights in order to provide defendants a fair opportunity to frame a responsive pleading. A complaint that fails to provide adequate factual detail, as this one does, must be dismissed.

The Complaint does not plausibly articulate how any of the Moving Insurer allegedly failed to perform any duty owed to the Debtor. The Debtor alleges that Pacific Indemnity issued primary policies to the Debtor. While the Debtor alleges that the "Primary Insurers" failed to "provide indemnity to [the Debtor] in the Suits," the term "Suits" is defined in paragraph 25 as the "pending" lawsuits and not ones for which there are judgments or settlements.

Not surprisingly, the Complaint fails to plead that there were any judgments or settlements, that any judgments or settlements were tendered, or identify any judgments or settlements. Nor does the Complaint allege that any particular insurer failed to provide indemnity

for any particular judgment or settlement under any particular policy. There is no indemnity obligation absent a judgment or settlement. The Complaint does not and cannot state a claim for breach of an indemnity obligation against Pacific Indemnity.

And while a duty to defend may arise when there is a potential for indemnity, there is no breach of contract for failure to defend when an insurer has provided a qualified defense under a reservation of rights. The Complaint fails to allege on a claim by claim basis which claims we didn't provide a qualified defense for as support for a breach of defense obligations against Moving Insurers.

The Debtor's allegations that Pacific Indemnity acted wrongfully are impermissibly vague. The Complaint fails to plead, among other relevant facts, which of the hundreds of Lawsuits are allegedly covered by which of the Insurance Policies, when any request for defense and indemnity was allegedly tendered, and to which entity it was sent, what contractual provision(s) were allegedly breached, the coverage limit for any applicable insurance policy, and whether the coverage limit for any insurance policy has allegedly been satisfied. The Debtor instead resorts to conclusory allegations that the "Primary Insurer Defendants" either "denied" or "failed to confirm" defense or indemnity coverage (or both) and failed to "provide defense." Pacific Indemnity cannot frame responses to these allegations because the Complaint fails to state what it allegedly did or failed to do.

According to the allegations of the Complaint, Westchester Fire and INA issued excess insurance policies to the Debtor and Pacific Employers issued an umbrella policy. The Complaint fails to allege that primary coverage underlying the policies that Westchester Fire, INA and Pacific Employers are alleges to have issued is exhausted. As the Certain Excess Insurers point out in their memorandum of law, under controlling Ninth Circuit precedent and California law, the effect of the Complaint's failure to allege exhaustion of primary coverage that underlies the

policies that these defendants are alleged to have issued is that it fails to state a claim against them, and therefore should be dismissed, because excess and umbrella insurers have no duty to defend or indemnify until the underlying primary insurance coverage has exhausted.

The Debtor's allegations that Westchester Fire, INA and Pacific Employers acted wrongfully are impermissibly vague. Debtor alleges that the "Excess Insurer Defendants" and "Umbrella Insurer Defendants" either "denied" or "failed to confirm" defense or indemnity coverage (or both) and failed to "recognize the exhaustion of underlying insurance" through payment, liquidation of the underlying insurance carrier, or some unspecified "other means." Westchester Fire, INA and Pacific Employers cannot frame responses to these allegations because the Complaint fails to state what any of them allegedly did or failed to do. Further, the Complaint fails to allege the basis for its passing assertion that Westchester Fire, INA and Pacific Employers have any obligation to "drop down" in place of primary coverage.

Finally, the Complaint must be dismissed to the extent it asserts that Westchester Fire, INA and Pacific Employers breached some purported duty to "confirm coverage" under their policies. Excess and umbrella insurers have no duty to "confirm coverage" in response to Debtor's tender of the underlying suits because Debtor has not alleged that primary coverage has exhausted, and California law is clear that excess and umbrella carriers have no duty to respond to a tender, much less "confirm" coverage, until all underlying coverage has exhausted.

Because the Debtor has not plausibly asserted any claim against any of the Moving Insurers, the Complaint should be dismissed in its entirety or, in the alternative, the Debtor should be required to file an amended complaint that provides adequate detail regarding the alleged claims asserted so that the Moving Insurers are in a position to meaningfully respond.

THE ALLEGATIONS OF THE COMPLAINT

On June 22, 2023, the Diocese initiated this adversary proceeding and filed a first

amended complaint (the "Complaint") on June 26, 2023, against 13 defendants including the California Insurance Guarantee Association, which is a state created entity that never issued a policy.[1] Some named defendants do not exist, and others never issued an insurance policy and yet others were never tendered a claim.

Using boilerplate language and without stating any alleged facts, policy provisions, or other allegations that might demonstrate entitlement to relief, the Complaint generically seeks a declaration against all 13 defendants "that [the Debtor] is entitled to both defense and indemnity" under unidentified policies "regarding Suits," as well as a rulings that all 13 defendants, including the California Insurance Guarantee Association, a state entity that never issued a policy, breached unidentified insurance policies. *See* Complaint ¶ 43.

While the Debtor alleges that it has been named in various complaints as a result of California's passing the Child Victims Act, it does not identify in its complaint any case as having gone to judgment or for which indemnity is owing. *Id*. ¶¶ 28, 29. With regard to coverage for defense, the Debtor acknowledges in the complaint that the automatic stay applies to all the cases against it. *Id*. ¶¶ 28, 29.

According to the Complaint, it's alleged that Pacific Indemnity issued primary policies to the Debtor. *Id.* ¶ 7. Other than the paragraph that describes Pacific Indemnity as a primary carrier, there isn't a single other reference to Pacific Indemnity anywhere else in the Complaint. The other three entities, INA, Pacific Employers, and Westchester are identified as excess carriers and one as an umbrella carrier. *Id.* ¶¶ 14, 18, 23 There are no specific allegations as to any of those entities anywhere else in the Complaint.

We do note, however, that the Debtor filed voluntary dismissals of ACE Limited and

[1] *See First Amended Complaint for Breach of Contract and Declaratory Judgment Relief, Adv. Dkt. No. 2.*

Insurance Company of America without prejudice on August 25, 2023. *See* Notice of Voluntary Dismissal Without Prejudice of ACE Limited, Adv. Proc. Dkt. No. 65; Notice of Voluntary Dismissal Without Prejudice of Insurance Company of America, Adv. Proc. Dkt. No. 66.

LEGAL STANDARD

"A motion to dismiss in an adversary bankruptcy proceeding is governed by Federal Rule of Bankruptcy Procedure 7012(b), which incorporates Federal Rule of Civil Procedure 12(b)-(i)." *Tracht Gut, LLC v. Los Angeles Cty. Treasurer & Tax Collector (In re Tracht Gut, LLC)*, 836 F.3d 1146, 1150 (9th Cir. 2016). Under Rule 12(b)(6), "a court must dismiss a complaint if it fails to state a claim upon which relief can be granted." *Kasolas v. Brower (In re Brower)*, 644 B.R. 187, 191-92 (Bankr. N.D. Cal. 2022); *see also In re Harris*, No. 10-01238, 2012 WL 5986534, at *3 (B.A.P. 9th Cir. Nov. 29, 2012), *aff'd*, 596 F. App'x 581 (9th Cir. 2015) ("Under Civil Rule 12(b)(6), applicable through Rule 7012, a court must dismiss a complaint if it fails to state a claim upon which relief can be granted").

To survive dismissal, a plaintiff must allege "sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *In re Harris*, 2012 WL 5986534 at *4 (quoting *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555)). The *Twombly/Iqbal* standard requires a plaintiff to do more than provide a "formulaic recitation of the elements of a cause of action" or offer "naked assertions devoid of further factual enhancement." *Id*. (citations and internal quotation marks omitted). A complaint that fails to provide adequate factual detail must be dismissed. *See, e.g., In re Theos Fedro Holdings, LLC*, No. 21-ap-03023, 2022 WL 10685907, at *4 (Bankr. N.D. Cal. Oct. 18, 2022) (dismissing complaint for failing to satisfy *Twombly/Iqbal* standard); *In re Delta Fin. Corp.*, 398 B.R. 382, 407 (Bankr. D. Del. 2008), *aff'd*, 409 B.R. 709 (D. Del. 2009), *aff'd*, 378 F. App'x 241 (3d Cir. 2010) (affirming dismissal of insurance coverage action).

Under Fed. R. Civ. P. 12(e) a complaint must "state[] clearly how each and every defendant is alleged to have violated plaintiff['s] legal rights" in order to provide defendants "a fair opportunity to frame a responsive pleading." *McHenry v. Renne*, 84 F.3d 1172, 1176 (9th Cir. 1996); *see also* 5C FED. PRAC. & PROC. CIV. § 1376 (3D ED.) (Rule 12(e) applies in adversary proceedings under Bankruptcy Rule 7012(b)).

A complaint that fails to meet this standard must be amended to provide sufficient detail as to the allegations. *Gregory Vll. Partners, L.P. v. Chevron U.S.A., Inc*., 805 F. Supp. 2d 888, 896 (N.D. Cal. 2011) ("A Rule 12(e) motion is proper . . . where the complaint is so indefinite that the defendant cannot ascertain the nature of the claim being asserted"); *see also, e.g., In re Joe Gibson's Auto World, Inc.*, No. 09–80052, 2010 WL 5136154 at *2 (D. S.C. Aug. 3, 2010) (granting motion for a more definite statement where the allegations were not "detailed and informative enough to enable the defendant to respond").

ARGUMENT

The Debtor fails to plausibly plead a claim for breach of contract or to articulate a request for declaratory relief because the Complaint lacks the basic information that is necessary to assert the underlying claims and put Moving Insurers on notice of the bare allegations. The Complaint fails as a matter of law under the pleading standard articulated by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). As a result, the Court should dismiss the Complaint for failure to state a claim or, at a minimum, direct the Debtor to file an amended complaint to provide a basic level of detail regarding the claims alleged. Moving Insurers cannot adequately respond to Debtor's claims regarding the insurance coverage that it contends is due for hundreds of tort lawsuits regarding alleged sexual abuse (cases in which none of Moving Insurers are a party) without being apprised of the basic elements of the claims being asserted.

A. The Debtor Has Not Stated a Claim for Breach of Contract

The Debtor's threadbare complaint lacks the basic detail necessary for Moving Insurers to understand and respond to the allegations. The Debtor fails to identify: (i) which Lawsuits are allegedly covered by which of the Insurance Policies; (ii) when any request(s) for defense and indemnity were allegedly tendered and to which entity or entities they were sent; (iii) what contractual provision(s) in the Insurance Policies were allegedly breached; (iv) the coverage limit for each of the applicable Insurance Policies; and (v) whether the coverage limit for any of these Insurance Policies has allegedly been met and a duty to provide coverage has been triggered.

The Complaint makes only boilerplate allegations regarding a purported failure to provide insurance coverage that lack any specificity. The Debtor states that it "has been named in more than 300 complaints", Complaint ¶ 27, and that it "has tendered through its broker both RCBO's defense and indemnity of the Suits under all applicable insurance policies to the associated Defendants." Complaint ¶ 30. But the Debtor does not allege that any of the Moving Insurers declined to defend a claim or allege that any judgment or settlement occurred. Nor does the Complaint include allegations that identify a claim for which a defense was not offered.

The Complaint fails to pled the most basic elements of a breach of a contract claim. By failing to allege or identify a single judgment or settlement, there is nothing to indemnify and no possible breach of an indemnity obligation.

The Complaint fails to even identify any of the Lawsuits that supposedly are subject to coverage or under which of the Insurance Policies they are allegedly subject to coverage. Nor does it specify when the tender of defense and indemnity was made for any lawsuit or to whom it was made. The Debtor refers generally to insurance policies. Complaint ¶¶ 6-10, 12-17, 19-22. But the Debtor does not indicate which provision(s) in these policies allegedly entitle it to

coverage, nor does it specify the coverage limit for any of these policies or whether this amount has allegedly been satisfied by the primary insurer.

Conclusory allegations such as those as in the Complaint are insufficient to state a claim. *Patel v. Am. Nat'l Prop. and Cas. Co.*, 367 F.Supp.3d 1186, 1190-91 (D. Nev. 2019) (granting motion to dismiss where the "formulaic recitation of a cause of action" by an insured failed to state a claim against an insurer). An insured's complaint fails where, as here, it "lumps all of the defendants together" and does not "state the express terms of the contract or policy that were allegedly breached, the relevant policy limits, or even the parties to the contract." *Heidingsfelder v. Ameriprise Auto & Home Ins.*, No. 19-CV-08255, 2020 WL 5702111, at *3 (N.D. Cal. Sept. 24, 2020) (granting motion to dismiss filed by insurer and observing that "[i]n the absence of this basic information, a plausible breach of contract claim cannot be found").

A claim for insurance coverage is only sufficient if it "allege[s] what form the claims took or how or when they were tendered." *Mitchell Eng'g/Obayashi Corp. Joint Venture v. St. Paul Fire & Marine Ins. Co.,* No. 19-CV-08120, 2020 WL 6947894, at *3 (N.D. Cal. July 2, 2020) (granting motion to dismiss).

Further, the Complaint must be dismissed because the Debtor has failed to allege that Moving Insurers are obligated to indemnify the Debtor because they failed to allege or provide any evidence of the existence of any judgment or settlement in any of the underlying state court proceedings. It is well-established law that the "[t]he obligation to indemnify . . . arises when the insured's underlying liability is established." *Montrose Chemical Corp. of Cal. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 660 n. 9 (Sup. Ct. Cal. 1995) (citing Civ. Code, § 2778(1); *Clark v. Bellefonte Ins. Co.* 113 Cal. App. 3d 326, 336–337 (1980)). And while a duty to defend may arise when there is a potential for indemnity, see id., there is no breach of contract for failure to defend when an insurer has provided a qualified defense under a reservation of rights. *See*

Progressive W. Ins. Co. v. Dallo, No. 07CV1003 IEG, 2008 WL 11337361, at *5 (S.D. Cal. Sept. 10, 2008) (rejecting insured's claim that insurer's "reservation of rights . . .is a breach of contract" because "[insurer] offered to provide a qualified defense under a reservation of right . . . [which] discharged their obligation to defend.").

A plaintiff seeking coverage from a primary insurer must plausibly allege that claim alleged injury within the period of a particular primary policy, pled a defense obligation in the contract was implicated and that a defense was not offered. The barebones allegations fail to establish any of these elements of a breach of contract claim.

A plaintiff seeking coverage from an excess insurer or umbrella insurer must plausibly allege that the applicable primary insurance policy has been exhausted. *Webcor Constr., LP v. Zurich Am. Ins. Co*., No. 17-CV-02220, 2017 WL 4310763, at *3-4 (N.D. Cwal. Sept. 28, 2017) ("[P]laintiffs' failure to allege facts indicating that [defendant's] duties as an excess insurer were triggered requires dismissal of their claim").

The Complaint does not satisfy any aspect of the applicable pleading standard because it contains nothing more than conclusory claims that insurers purportedly failed to perform their contractual duties without explaining *how* this is the case or *why* the Debtor believes it is entitled to insurance coverage for any of the tort lawsuits it is defending. *See* Complaint ¶¶ 31-34 (asserting in summary form that the Insurer Defendants "received [a] tender on behalf of [the Debtor] but have improperly denied or failed to confirm coverage and/or provide defense and/or indemnity").

B. The Request for Declaratory Relief Must be Similarly Dismissed

The Debtor's request for declaratory relief fails for the same reasons as the breach of contract claim because it is based upon the same conclusory assertions and threadbare claims. *See* Complaint ¶¶ 24-34. Courts routinely hold that when a request for declaratory relief in an

insurance coverage action is "wholly derivative of the cause of action for breach of contract" it should be dismissed if the complaint fails to state a claim for breach of contract. *Galusha v. Unigard Ins. Co*., No. 18-06905, 2019 WL 8128571, at *5 (N.D. Cal. June 28, 2019), *aff'd*, 816 F. App'x 46 (9th Cir. 2020) (affirming dismissal of complaint in insurance coverage action seeking monetary damages and declaratory relief); *see also Tyler v. Travelers Com. Ins. Co*., 499 F. Supp. 3d 693, 702 (N.D. Cal. 2020) (collecting cases); *Palmtree Acquisition Corp. v. Neely*, No. 08-3168, 2011 WL 3419493, at *3 (N.D. Cal. Aug. 4, 2011) (granting Rule 12(e) motion for a more definite statement as to request for declaratory relief). The Debtor's request for declaratory relief relies upon the same boilerplate allegations as the breach of contract claim and it is foreclosed by the same legal arguments set forth above.

CONCLUSION

For all of the foregoing reasons, Moving Insurers' motion to dismiss for failure to state a claim should be granted and the Complaint should be dismissed under Fed. R. Civ. P. 12(b)(6). In the alternative, at a minimum the Debtor should be required to file an amended complaint with sufficient detail to provide Pacific with notice of the basic allegations supporting the underlying claims as required by Fed. R. Civ. P. 12(e).[2]

[2] This filing does not constitute a waiver of the Moving Insurers right to have any and all final orders in any and all non-core matters entered only after *de novo* review by a Federal district court (or, as applicable, appellate court) and/or the Moving Insurers' right to trial by jury in any proceeding as to any and all matters so triable, whether or not the same be designated legal or private rights, or in any case or controversy or proceeding related thereto, and whether such jury trial is pursuant to statute or the United States Constitution. Pursuant to United States Bankruptcy Court, Northern District of California Local Bankruptcy Rule 7012-1, the Moving Insurers hereby represent that they does not consent to the entry of a final order or judgment by the Bankruptcy Court.

Dated: August 31, 2023

By: */s/ Karen Rinehart*

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