UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WILMINGTON TRUST, NATIONAL ASSOCIATION, as trustee of ARLP Securitization Trust, Series 2014-2, Plaintiff, vs. COMMONWEALTH LAND TITLE INSURANCE COMPANY, Defendant.	Case No.: 2:18-cv-02023-GMN-BNW **ORDER**

Pending before the Court is the Motion to Dismiss, (ECF No. 10), filed by Defendant Commonwealth Land Title Insurance Company ("Defendant"). Plaintiff Wilmington Trust, National Association ("Plaintiff") filed a Response, (ECF No. 19), and Defendant filed a Reply, (ECF No. 20).[1] For the reasons discussed below, the Court **GRANTS in part** and **DENIES in part** Defendant's Motion to Dismiss.

I. BACKGROUND

This case arises from a deed of trust ("DOT") secured on real property located at 5552 Collier Hills Street, Las Vegas, Nevada 89149, ("the Property"). (Compl. ¶ 5, ECF No. 1);

[1] Also pending before the Court is Defendant's Motion for Leave to File Supplemental Authority, (ECF No. 28). Plaintiff filed a Response, (ECF No. 31), to which Defendant filed a Reply, (ECF No. 33). Defendant filed the Motion for Leave as an "emergency" filing. The Court, however, does not find such issue to require emergency resolution for purposes of this District's Local Rule 7-4. Nevertheless, rather than denying the Motion for Leave outright, the Court will simply not treat it on an expedited basis. Moreover, because the Motion for Leave concerns authority that would be found within the Court's independent research, and because the authority concerns issues relevant to the case, the Court **GRANTS** Defendant's Motion for Leave to File Supplemental Authority.

(DOT, Ex. 2 to Compl., ECF No. 1-1). Jairam and Shawna Ramkalawan ("Borrowers") executed the DOT on April 28, 2006, upon purchasing the Property by way of a loan for $624,465.00. (Compl. ¶ 5–6); (DOT, Ex. 2 to Compl., ECF No. 1-1) (recorded on April 28, 2006). At that time, the DOT identified SFG Mortgage as the Lender, Nevada Title Co. as the Trustee, and Mortgage Electronic Registration System, Inc. as the Beneficiary acting solely as a nominee for SFG Mortgage and its successors and assigns. (*Id.* ¶ 6). Moreover, Defendant issued its Loan Policy of Title Insurance (the "Policy") in connection with the DOT on April 28, 2006. (*Id.* ¶ 8–13); (Title Policy, Ex. 4 to Compl., ECF No. 1-1). Wilmington Trust became the Beneficiary of the DOT from an Assignment recorded on November 5, 2014. (Compl. ¶ 7).

On September 1, 2011, Alessi & Koenig ("A&K"), acting as an agent for the Sable Oaks Manor Homeowners Association (the "HOA"), recorded a Notice of Delinquent Assessment (the "Lien") against the Property. (*Id.* ¶ 14). A&K thereafter recorded a Notice of Default and Election to Sell under the HOA's Lien (*Id.* ¶¶ 15–16). Based on that Lien, HOA foreclosed on the Property and held a sale on December 5, 2012. (*Id.* ¶ 17). Red Lizard Productions, LLC ("Red Lizard") recorded its Deed Upon Sale for the Property on December 7, 2012. (*Id.*).

Because of the underlying foreclosure, Plaintiff alleges that it provided written notice (the "Tender Letter") to Defendant on October 13, 2014, that Red Lizard was claiming a superior interest in the Property compared to Plaintiff. (*Id.* ¶ 20). That Tender Letter requested "both indemnity and defense from [Defendant] pursuant to the Policy terms." (*Id.*). Defendant, however, denied Plaintiff's claim on October 24, 2014, on the basis that the claim did not fall within the Policy's provisions—specifically, that the HOA's Lien was created after the date of the Policy's issuance. (*Id.* ¶ 21).

Plaintiff eventually filed a Complaint against Red Lizard in Nevada state court on March 24, 2015, seeking to quiet title against Red Lizard. (*Id.* ¶ 18). Plaintiff later settled its claim

against Red Lizard, but not after incurring "significant attorney's fees and costs defending its interest in the Property." (*Id.* ¶ 19).

Plaintiff then filed its instant Complaint against Defendant in this Court on October 19, 2018, asserting five causes of action: (1) breach of contract; (2) contractual breach of the implied covenant of good faith and fair dealing; (3) tortious breach of the implied covenant of good faith and fair dealing; (4) breach of fiduciary duties; and (5) violation of Nev. Rev. Stat. § 686A.310. (*Id.* ¶¶ 23–59). Roughly three months later, Defendant filed its Motion to Dismiss, (ECF No. 10).

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action that fails to state a claim upon which relief can be granted. *See N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the Court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

The Court, however, is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation is *plausible*, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555).

A court may also dismiss a complaint pursuant to Federal Rule of Civil Procedure 41(b) for failure to comply with Federal Rule of Civil Procedure 8(a). *Hearns v. San Bernardino Police Dept.*, 530 F.3d 1124, 1129 (9th Cir. 2008). Rule 8(a)(2) requires that a plaintiff's complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion . . . . However, material which is properly submitted as part of the complaint may be considered on a motion to dismiss." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule of Evidence 201, a court may take judicial notice of "matters of public record." *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers materials outside the pleadings, the motion to dismiss becomes a motion for summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

If the court grants a motion to dismiss, it must then decide whether to grant leave to amend. The court should "freely give" leave to amend when there is no "undue delay, bad faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party by virtue of . . . the amendment, [or] futility of the amendment . . . ." Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear that the deficiencies of the complaint cannot be cured by amendment. *See DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

III. DISCUSSION

Defendant moves to dismiss Plaintiff's Complaint in its entirety for several reasons. First, Defendant argues that Plaintiff does not have standing to assert its claims based on the Policy because, according to the exhibits attached to the Complaint, Plaintiff never tendered a claim to Defendant. (Mot. Dismiss ("MTD") 10:6–15, ECF No. 10). Defendant similarly contends that the Complaint's exhibits reveal Plaintiff was never assigned the DOT nor became a beneficiary of the DOT. (*Id.* 11:21–12:10). Defendant then argues that, even if Plaintiff properly made the title insurance tender claim to Defendant, that claim is not covered under the Policy. (*Id.* 12:11–25:20). Thus, Plaintiff's claims would each fail because Defendant's denial of coverage would have been appropriate. (*Id.*). The Court's below discussion first addresses the issue of standing, then turns to the merits of Plaintiff's claims.

A. Standing

Defendant argues that Christiana Trust tendered the title insurance claim for the DOT, not Plaintiff. (MTD 10:6–10). As a separate entity from Christiana Trust, Plaintiff then cannot rely on Christiana's tender request to support its own claims because Defendant "never denied any claim by [Plaintiff]." (*Id.*). Defendant continues that Plaintiff "fails to allege any facts or present any documentary support suggesting that Christiana Trust's interests in the Policy or the Deed of Trust were somehow transferred to [Plaintiff] in any way." (*Id.* 10:25–28). Defendant contends that, even though Plaintiff claims to be a beneficiary under the DOT, Plaintiff's own exhibits in the Complaint (specifically, exhibit 3 revealing a "Request for Notice Pursuant to NRS 116.31168") pertain to Christiana Trust instead of the DOT's Assignment to Plaintiff. (*Id.* 11:21–12:5).

In response, Plaintiff concedes that it inadvertently attached the wrong exhibit to support its interest as a beneficiary under the DOT. (Resp. 10:5–11:18, ECF No. 19). Plaintiff

thereafter provided the appropriate exhibits,[2] and argues that they reveal Plaintiff's status as a beneficiary under the DOT who asserted a claim under the Policy. (*Id.* 10:19–11:18).

Upon review of Plaintiff's corrected exhibits, the Court finds Plaintiff has standing to assert its claims against Defendant. Plaintiff demonstrates its status as the current beneficiary of the DOT through a July 7, 2015 Assignment. (Corporate Assignment, Ex. 3 to Errata, ECF No. 15-1); (Compl. ¶ 7). Further, Plaintiff's October 13, 2014 Letter reveals its tender of a claim to Defendant under the Policy and Defendant's subsequent denial. (Notice of Claim, Ex. 9 to Compl., ECF No. 1-1); (Denial of Claim, Ex. 10 to Compl., ECF No. 1-1).

B. Claims for Relief

i. *Breach of Contract*

Plaintiff's first claim is for breach of contract on the ground that Defendant failed to perform its obligations under the Policy. Specifically, Defendant allegedly failed to defend and indemnify Plaintiff "for loss or damage sustained by reason of any lien or encumbrance on the title, the priority of any lien or encumbrance over the lien of the insured mortgage, or the invalidity or unenforceability of the lien of the insured mortgage upon the title." (Compl. ¶ 24).

Under Nevada law, a breach of contract claim has three elements: (1) the existence of a valid contract; (2) a breach by the defendant; and (3) damage as a result of the breach. *Saini v.*

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[2] Defendant asserts that Plaintiff's attempt to correct its Complaint's exhibits in the Errata, (ECF No. 15), is improper under Federal Rule of Civil Procedure 30(e), and warrants the filing of an amended complaint rather than an untimely substantive correction. (Reply 5:7–6:2). However, FRCP 30(e) governs deposition testimony, not corrections to pleadings in this context. Further, any claimed prejudice by Plaintiff's corrections are rectified because Defendant, in its Reply in support of its Motion to Dismiss, (ECF No. 20), adequately addressed how Plaintiff's corrections were still insufficient to show standing. Moreover, Plaintiff's corrections are to mistakenly attached exhibits rather than substantive allegations forming the basis of its claims. *Compare* (Resp. 10:10–17) (stating that Plaintiff "inadvertently included the wrong exhibit" to support paragraph seven in its Complaint); *with Day v. Corner Bank (Overseas) Ltd.*, 789 F. Supp. 2d 136, 143 (D.D.C. 2011) (striking an errata when "[b]y her own admission, plaintiff, through her notice, wishes to 'add' statements to the Complaint in a manner that will alter the plain meaning of the allegations in this case.").

Int'l Game Tech., 434 F.Supp.2d 913, 919–20 (D. Nev. 2006) (citing *Richardson v. Jones*, 1 Nev. 405, 405 (Nev. 1865)). In analyzing the terms of an insurance policy and the underlying obligations, "[a]n insurance policy should 'be read as a whole,' and its 'language should be analyzed from the perspective of one untrained in law or in the insurance business. Policy terms should be viewed in their plain, ordinary and popular connotations.'" *Fourth St. Place v. Travelers Indem. Co.*, 270 P.3d 1235, 1239 (Nev. 2011), *as modified on reh'g* (May 23, 2012); *Nat'l Union Fire Ins. Co. of State of Pa. v. Reno's Exec. Air, Inc.*, 682 P.2d 1380, 1382 (Nev. 1984).

The relevant portions of the Policy, according to Defendant, are the Preamble, paragraph 3(d) of the "Exclusions from Coverage," and Exception 15 addressing covenants, conditions, and restrictions ("CC&Rs"). The Policy's Preamble states that it insures "as of Date of Policy shown in Schedule A," which in this case was April 28, 2006. (Title Policy, Ex. 4 to Compl, ECF No. 1-1). Paragraph 3(d) of the "Exclusions from Coverage," in relevant part, states:

> The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:
>
> 3. Defects, liens, encumbrances, adverse claims or other matters; . . .
>
> (d) attaching or created subsequent to Date of Policy…

(*Id.*). Exception 15 declares the Policy does not insure against loss of damage by reason of:

> The right to levy certain charges or assessments against said land which shall become a lien if not paid as set forth in the above Declaration of Restrictions, and is conferred upon Sable Oaks Manor Homeowners Association . . . including any unpaid delinquent assessment as provided therein.

(*Id.* at Schedule B, Part I). Based on these provisions, Defendant argues that the Policy could not have covered damages associated with the foreclosure from the HOA's Lien because that Lien arose and was recorded more than five years *after* the Policy took effect. (MTD 13:16–14:24) (citing, among other authority, *Liberty Nat'l Enterprises,*

L.P. v. Chicago Title Ins. Co., 217 Cal. App. 4th 62, 75 (2013), for the position that "[t]itle insurance, as opposed to other types of insurance, does not insure against future events. . . . It insures against losses resulting from differences between the actual title and the record title as of the date title is insured.").

Plaintiff counters this argument by pointing to NRS 116.3116, which states that the "[r]ecording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required." Nev. Rev. Stat. 116.3116(9). Plaintiff contends that this statutory section means the HOA Lien existed before the Policy's creation of April 28, 2006, because the Lien was technically recorded and perfected at the time of the CC&Rs recordation—on June 22, 2005. (Resp. 13:19–14:1).[3]

Upon review of the Policy's language and NRS 116.3116, the Court agrees with Defendant and finds that the HOA Lien arose after the date of the Policy. NRS 116.3116(1) guides the Court's conclusion, because it states that "[t]he association has a lien on a unit for . . . any assessment levied against that unit or any fines imposed against the unit's owner *from the time* the . . . assessment or fine *becomes due*. Nev. Rev. Stat. 116.3116(1). While NRS 116.3116(9) would consider the HOA Lien as perfected automatically based on the CC&R's recordation, the Court reads NRS 116.3116(1) as meaning that the Lien did not exist until an amount became due to the HOA. Thus, the HOA Lien did not exist at the time of the Policy and is not covered by the Policy's plain

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[3] Plaintiff phrases the interpretation of the Policy as an issue of fact appropriate for summary judgment; and Plaintiff states that the Complaint properly pleads a claim for breach of contract at this stage because its allegations presently must be taken as true. (Resp. 12:3–13:16). However, by attaching the Policy to its Complaint, the Court can review those documents to determine if Plaintiff states a plausible claim. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). Further, "[i]n the absence of ambiguity, contract interpretation is an issue of law for the court, and may be decided on a motion to dismiss." *Keife v. Metro. Life Ins. Co.*, 797 F. Supp. 2d 1072, 1075 (D. Nev. 2011) (citing *Shelton v. Shelton*, 78 P.3d 507, 510 (Nev. 2003), and explaining that a contract is ambiguous if it is "reasonably susceptible to more than one interpretation.").

language based on the "Exceptions" and "Exclusions from Coverage" sections. (Title Policy, Ex. 4 to Compl, ECF No. 1-1).[4] Indeed, one court in this District arrived at the same conclusion. *Wells Fargo Bank, N.A. v. Commonwealth Land Title Ins. Co.*, No. 2:18-cv-00494-APG-BNW, 2019 WL 2062947, at *4 (D. Nev. May 9, 2019).

Nevertheless, Plaintiff directs the Court's attention to Endorsement 100 of the Policy, which includes several relevant portions to the issues here. (Resp. 16:4–18:10). One of those portions states that insurance extends to:

> "[a]ny future violation on the land of any covenants, conditions or restrictions occurring prior to acquisition of title to the estate or interest referred to in Schedule A by the insured, provided such violations result in impairment or loss of the lien of the mortgage referred to in Schedule A."

(Title Policy at 2(a), Ex. 4 to Compl.). Another relevant portion from Endorsement 100 states that coverage applies to mortgage loss or damages by reason of "[c]ovenants, conditions, or restrictions under which the lien of the mortgage . . . can be cut off, subordinated, or otherwise impaired." (*Id.* at 1(a)). Plaintiff argues that Endorsement 100 would provide coverage in the circumstances here because the HOA's ability to extinguish the DOT stemmed from the CC&Rs authorization of delinquent assessments. (Resp. 17:10–20). Defendant, by contrast, argues that Endorsement 100 is not applicable because no provision of the CC&Rs explicitly provides such power to "subordinate [Plaintiff's DOT]." (Reply 11:5–15). Defendant points to the CC&Rs' own language stating that a violation shall not defeat nor render invalid the lien of any Mortgage or Deed of Trust made in good faith and for value. (Reply 11:5–15).

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[4] Because the Court finds that the HOA Lien did not exist at the time of the Policy, it then follows that Endorsement 115.2 of the Policy would not provide coverage. That is, Endorsement 115.2 provides coverage only for damages sustained by reason of "[t]he priority of any lien for charges and assessments *at Date of Policy*. . . ." (Title Policy, Ex. 4 to Compl.).

According to Defendant, it was NRS 116 that caused the subordination of Plaintiff's DOT because that it where the superpriority scheme originates. (*Id.* 3:15–25).

Defendant does not, however, address how the CC&Rs interact with NRS 116.1206, and how that interaction—specifically, the provision of Chapter 116 authorizing an HOA assessment to have a superpriority status in certain instances—might affect Endorsement 100. NRS 116.1206 states:

> Any provision contained in a declaration, bylaw or other governing document of a common-interest community that violates the provisions of this chapter . . . shall be deemed to conform with those provisions by operation of law, and any such declaration, bylaw or other governing document is not required to be amended to conform to those provisions. . . . [and] is superseded by the provisions of this chapter . . . .

See Nev. Rev. Stat. 116.1206(1)(a)–(b). Without Defendant addressing how NRS 116.1206 could not impact the Policy's coverage, the Court cannot fully rule on the merits of Plaintiff's breach of contract claim. Notably, at this time the Court takes no position on NRS 116.1206's interaction with Endorsement 100 and the Policy, and Defendant is not foreclosed from addressing this issue in full through future arguments.

ii. *Breach of Fiduciary Duties*

Plaintiff's fourth claim for breach of fiduciary duties arises from Defendant's denial of coverage. However, the Supreme Court of Nevada in *Powers v. U.S. Auto Association*, 962 P. 2d 596, 602–603 (1998), explained that "[w]e are not adopting a new cause of action based on an insurance company's failure to put its insured's interests above its own; we are merely recognizing that breach of the fiduciary nature of the insurer-insured relationship is part of the duty of good faith and fair dealing." Consequently, the Court can presently adjudicate Plaintiff's breach of fiduciary duties claim, even though the extent of coverage is still an outstanding issue, because Nevada does not recognize a stand-alone claim for breach of fiduciary duties in the context of this case, and because Plaintiff brings an independent claim

for breach of the duty of good faith and fair dealing. *See Nelson v. XL Am., Inc.*, No. 2:16-cv-00060JAD-GWF, 2017 WL 4185461, at *4 (D. Nev. Sept. 21, 2017). Plaintiff's fourth claim is thus dismissed with prejudice.

iii. ***Remaining Causes of Action***

Plaintiff's remaining causes of action are for contractual breach of the implied covenant of good faith and fair dealing, tortious breach of the implied covenant of good faith and fair dealing, and violation of Nev. Rev. Stat. § 686A.310. According to Plaintiff's Complaint, each of these causes of action rely on a finding that the Policy provides coverage for circumstances where the HOA's Lien is in a superior position as that of Plaintiff's DOT. (Compl. ¶¶ 33, 42, 55–58). In light of the Court's denial of Defendant's current Motion to Dismiss on the specific issue of the Policy's coverage, the Court similarly denies Defendant's Motion to Dismiss as to Plaintiff's remaining causes of action, though Defendant is not foreclosed for asserting its same arguments in future filings.

IV. CONCLUSION

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss, (ECF No. 10), is **GRANTED in part** and **DENIED in part**.

DATED this 30 day of September, 2019.

Gloria M. Navarro, District Judge
United States District Court