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NOTICE OF MOTION

YOU AND EACH OF YOU PLEASE TAKE NOTICE that the undersigned will bring the foregoing **DEFENDANT’S MOTION TO DISMISS PLAINTIFF’S COMPALINT** on for hearing before the above entitled Court, on the _____ day of _____,2009, at the hour of _____ .m., or as soon thereafter as counsel may be heard.

DATE this _____ day of September 2009

JOSEPH IARUSSI, ESQ.
Nevada Bar No. 9284
320 E. Charleston Blvd. Suite 105
Las Vegas, Nevada 89104
(702) 473-9640
(702) 473-9641 Fax
Counsel for Defendant

NATURE OF MOTION

Defendant Dania Lucia Coskey has filed the instant Motion to dismiss Plaintiffs’ Complaint for falling to state a claim for which relief can be granted. Therefore, Plaintiff’s Complaint against her must be dismissed.

POINTS AND AUTHORITIES

- I. **DISMISSAL OF PLAINTIFF’S COMPLAINT IS APPROPRIATE PRUSANT TO NRCP 12(B)(5) FOR FAILURE TO STATE A CLAIM.**

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STATEMENT OF THE FACTS

This matter arises out of a dispute between Donald Sakowski and Worldmark, Inc., over coverage under a Mobile Homeowners Policy between Plaintiff Mildred Wilson (hereinafter “Plaintiff” or “Wilson”) and her insurance company, Defendant Century National Insurance Company. Plaintiff filed a Complaint on May 22, 2009 against Defendant Century National alleging that coverage was denied for her claim of damage that occurred to her mobile home on December 17, 2008. See Complaint, pgs. 2-3. Based on Century National’s denial of Plaintiff’s claim, Plaintiff has alleged various causes of action, including violation of NRS 686.A310, common law bad faith, breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and breach of fiduciary duty. See Complaint. Pursuant to Nevada law, however, a cause of action against Defendant for the breach of fiduciary duty is inappropriate and non-existent and therefore must be dismissed.

ARGUMENT

I. NEVADA LAW DOES NOT RECOGNIZE A CAUSE OF ACTION FOR THE BREACH OF FIDUCIARY DUTY BETWEEN AN INSURER AND ITS INSURED AND THEREFORE, PLAINTIFF’S CAUSE OF ACTION REGARDING THE SAME MUST BE DISMISSED.

In her Complaint, Ms. Wilson alleges that Defendant sold her an insurance policy to insure Plaintiff against damages to her mobile home and personal property, and therefore “the relationship of Insurance-Insured[sic] was created, and Defendant owed a fiduciary duty to Plaintiff.” See Complaint pg. 8. However, the Nevada Supreme Court has refused to recognize a cause of action for the breach of a fiduciary duty against an insurer. “Although Nevada has recognized the special contractual relationship between insurer and insured, it has never classified the relationship as a fiduciary duty giving rise to a tort action for breach.” Powers v. United Serv. Auto. Ass’n, 114 Nev. 690, 726 ft nt 10 (Nev. 1998) (citing Martin v. State Farm Mut. Auto. Ins. Co., 960 F. Supp. 233 (D. Nev. 1997));

1 see also Albert H. Wohlers & Co. v. Bartgis, 114 Nev. 1249, 1258 (Nev., 1998) (“With
2 regard to first party claims, we have determined this relationship to be ‘akin’ but not
3 ascending to a fiduciary relationship”).

4 Both the majority and the dissent in Powers, 114 Nev. 690 (1998), agreed that no
5 action for breach of fiduciary duty can be brought by an insured against an insurer. Indeed,
6 although the relationship between an insured and insurer is “fiduciary in nature,” “ it is not
7 identical to the fiduciary duty relationship of a trust.” Id. At 701 (citing Tynes v. Bankers
8 Life Co., 730 P. 2d 1115, 1124-26 (Mont. 1986)).

9 “While an insurance contract is a special contract, Nevada courts have not recognized
10 a fiduciary duty between an insurer and the insured.” Martin v. State Farm Mut. Auto. Ins.
11 Co., 960 F/ Supp 233 235 (D. Nev., 1997). The Nevada Supreme Court further held:

12 “While the duty of good faith and fair dealing is fiduciary in nature, it does not
13 create a fiduciary relationship, The covenant of good faith and fair dealing does
14 not require that the insurer place the insured’s interests above its own as would
15 be the case if the insured were a fiduciary. While the special duties of an
16 insurer to the insured resemble the duties owed by a fiduciary, these duties
17 arise due to the unique characteristics of an insurance contract, not because the
18 insurer is a fiduciary.”

19 Id.

20 More recently, in Strabala v. State Farm Fire & Cas. Ins. Co., 124 Fed. Appx.
21 517,518 (9th Cir. Nev. 2005) (unpublished),¹the Ninth Circuit of Appeals stated:

22 The district court was also correct in finding that Nevada law does not
23 recognize an independent claim for breach of fiduciary duty against an insurer.
24 In Powers v. United Servs. Auto. Ass’n, 962 . 2d 596, 602-03(Nev. 1998), the
25 Nevada Supreme Court specifically stated that it was not creating a “new tort”
26 but simply noting that an insurer’s duty to its policy holder is “akin to a
27 fiduciary relationship,” and is “fiduciary in nature.” The district court therefore
28 did not err in concluding that, ‘There being no fiduciary duty, Plaintiffs’ claim
alleging breach of fiduciary duty fails to state a claim upon which relief can be
granted. “

¹ While this case is an unpublished opinion, its review of the state of the law in Nevada is pertinent to this Motion.

Pursuant to Powers, Martin, and Strabala, Plaintiff cannot maintain an independent action for breach of fiduciary duty against Defendant. As such, Plaintiff’s cause of action for breach of fiduciary duty must be dismissed.

II. DISMISSAL OF PLAINTIFF’S BREACH OF FIDUCIARY DUTY CLAIM IS APPROPRIATE PURSUANT TO NRCP 12(B)(5) FOR FAILURE TO STATE A CLAIM.

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“NRC 12(b)(5) provides that a claim may be dismissed for “failure to state a claim upon which relief can be granted.” Simpson v. Mars Inc., 113 Nev. 188 (1997). When considering a motion to dismiss, “all factual allegations of the complaint must be accepted as true.” Id. Assuming Plaintiff’s factual allegations are true for purposes of this motion, it cannot be established that Defendant owed Plaintiff a fiduciary duty. Therefore, dismissal of Plaintiff’s breach of fiduciary duty claim is necessary and appropriate pursuant to NRC 12(b)(5).

CONCLUSION

Defendant respectfully request that Plaintiff’s fourth cause of action for breach of fiduciary duty be dismissed.

DATE this _____ day of July, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of February, 2007, I served a copy of the foregoing Notice of Intent to Take Default via regular mail, postage prepaid to the following:

GEPRGE B. HIBBELER, ESQ.
Nevada Bar No. 7746
LAW OFFICE OF SEAN P. HILLIN, P.C.
1800 E. Sahara Ave., Suite 102
Las Vegas, NV 89104
(702)737-3939
On behalf of both Defendants

An Employee of the Law Office of Joseph Iarussi, Esq.,