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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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JASBIR MOONACH, BHAVANEDEEP S.
MOONACH, PUNEET S. MOONACH, a
Minor, By and Through His
Guardian Ad Litem, MICHAEL D.
McCLELLAND

NO. CIV. S-06-1520 FCD/DAD

Plaintiffs,

v.

MEMORANDUM AND ORDER

UNITRIN AUTO AND HOME
INSURANCE COMPANY AND DOES 1-
100,

Defendants.

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This matter comes before the court on plaintiffs' motion to strike defendant Unitrin Auto and Home Insurance Company's ("defendant") first amended answer to the complaint and counterclaim for restitution and to enter default against defendant.¹ By the motion, plaintiffs argue that defendant does

¹ Plaintiffs styled their motion a motion to "strike," however, they did not cite any Federal Rule of Civil Procedure (continued...)

1 not have standing to sue or be sued in the State of California as
2 defendant was suspended from doing business in California, in
3 February 2004, for failure to pay taxes. For the following
4 reasons, plaintiffs' motion is DENIED.²

5 **BACKGROUND**

6 On July 25, 2005, Ajitpal Singh Moonach and plaintiff
7 Bhavandeep Moonach were involved in a motor vehicle accident with
8 Alfonso Gonzalez ("Gonzalez"). (Pl's Compl., filed July 7, 2006,
9 at ¶ 13.) Ajitpal Singh Moonach ("Decedent") died as a result of
10 the accident. (Id. at ¶ 16.) Bhavandeep Moonach was injured and
11 incurred medical bills. (Id. at ¶ 17.) The traffic collision
12 report indicated that Gonzalez was uninsured. (Id. at ¶ 14.)

13 Approximately two years before the accident, on or about
14 August 21, 2003, Decedent purchased motor vehicle insurance from
15 defendant. (Id. at ¶ 11.) The policy included uninsured
16 motorist coverage. (Id.) The policy was renewed annually and
17 was in force and effect at the time of the accident. (Id. at
18 ¶¶ 11-12.) Between July 25, 2005 and April 2006, defendant paid
19 plaintiffs approximately \$325,000 pursuant to plaintiffs'
20 uninsured motorist claim. (Id. at ¶ 18.)

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23 ¹(...continued)
24 under which they bring the motion. Motions to strike are
25 normally considered under Federal Rule of Civil Procedure 12(e);
26 however, here, plaintiffs' motion essentially seeks dismissal for
27 lack of jurisdiction and thus is properly considered under
28 Federal Rule of Civil Procedure 12(b)(1).

² Because oral argument will not be of material
assistance, the court orders this matter submitted on the briefs.
E.D. Cal. Local Rule 78-230(h).

1 On or about January 23, 2006, plaintiffs brought suit in
2 state court against Gonzalez and his employer, Stucco, for the
3 death of Decedent, and for the injuries sustained by Bhavandeep
4 Moonach arising from the motor vehicle accident. (Id. at ¶ 19.)
5 Stucco responded to interrogatories and indicated that Gonzalez
6 would be defended by its insurance carrier under a reservation of
7 rights. (Id. at ¶ 20.)

8 Plaintiffs claim that their total damages as a result of the
9 motor vehicle accident are in excess of \$1,000,000. (Id. at ¶
10 26.) Gonzalez does not have any assets, nor insurance, from
11 which to satisfy the damages claimed by plaintiffs. (Id. at ¶
12 11.) In addition, Stucco is a small business owned by a husband
13 and wife. (Id. at ¶ 25.) Stucco has a \$1,000,000 insurance
14 policy for motor vehicle accidents. (Id.)

15 On or about May 15, 2006, Stucco and Gonzalez offered to
16 resolve the claims arising from the motor vehicle accident by
17 payment of Stucco's insurance policy limit of \$1,000,000. (Id.
18 at ¶ 27.) Plaintiffs found this settlement offer to be
19 reasonable given the improbability of collecting an excess
20 judgment from either Stucco or Gonzalez, the expense of
21 protracted litigation, and the emotional turmoil of having to
22 relive the events of the accident. (Id. at ¶ 28.)

23 On or about April 2006, defendant made a demand for payment
24 of approximately \$325,000 from Gonzalez--the same amount
25 defendant paid to plaintiffs for their uninsured motorist claim.
26 (Id. at ¶ 29.) On or about May 15, 2006, plaintiffs requested
27 defendant waive its subrogation rights, as there was not enough
28 money to make plaintiffs whole. (Id. at ¶ 30.) Plaintiffs have

1 thereafter consistently made this request to defendant. (Id. at
2 ¶ 31.) Plaintiffs claim that defendant has refused to negotiate
3 its subrogation claim in good faith. (Id. at ¶ 32.)

4 In the instant action, plaintiffs state three causes of
5 action against defendant: (1) breach of contract; (2) breach of
6 the covenant of good faith and fair dealing and violation of
7 fiduciary duties; and, (3) declaratory relief. (Id. at ¶¶ 34-
8 58.) Defendant answered the complaint, and subsequently filed an
9 amended answer and counterclaim for restitution. Defendant's
10 counterclaim for restitution alleges that the uninsured motorist
11 claim paid to plaintiffs should be reimbursed since Gonzalez was
12 not an uninsured motorist. (Def's Am. Ans. & Compl., filed July
13 25, 2006, at 11:25-12:5.) Plaintiffs now move to strike
14 defendant's first amended answer and counterclaim, arguing that
15 jurisdiction does not exist and default should be entered, as
16 defendant is unable to either sue or be sued in the State of
17 California based on its forfeited corporate status.

18 Specifically, plaintiffs claim that defendant was suspended
19 from conducting business operations in the State of California on
20 February 2, 2004, for failure to meet franchise tax obligations
21 of the California Revenue and Taxation Code ("Tax Code"). After
22 learning of the alleged forfeiture pursuant to the motion,
23 defendant initiated an investigation and determined that it had
24 been in compliance with California law at all relevant times, but
25 the Franchise Tax Board made a mistake and erroneously listed
26 defendant as a "general" corporation rather than an insurance
27 company. (Opp'n, filed Aug. 17, 2006, at 1:6-9.) A Franchise
28 Tax Board representative indicated that the problem was related

1 to defendant's name change in 2003. (Langley Dec., filed Aug.
2 17, 2006, at ¶ 5.)

3 At the request of the Franchise Tax Board representative,
4 defendant sent certain documentation to the Board, including a
5 Department of Insurance Certificate of Authority issued to
6 defendant under its previous name, General Security Insurance
7 Company, the Secretary of State name change certificate, and
8 defendant's current Department of Insurance Certificate of
9 Authority. (Topp Dec., filed Aug. 17, 2006, at ¶ 3.) Given this
10 evidence that defendant was properly registered with the
11 Department of Insurance as an insurance corporation, the auditors
12 at the Franchise Tax Board agreed to notify the Secretary of
13 State that defendant's corporate status should be "restored,"
14 denoting that defendant had remained at all times in good
15 standing. (Id. at ¶ 5.)

16 The Franchise Tax Board representative informed defendant
17 that a "certificate of revivor" would not be issued.³ On August
18 15, 2006, the Franchise Tax Board sent defendant an Entity Status
19 letter affirming that defendant's standing had been "restored."
20 (Id. at ¶¶ 6-7.) On August 16, 2006, defendant received a
21 Certificate of Status from the California Secretary of State,
22 certifying that defendant was in good standing. (Id. at ¶ 8.)⁴

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26 ³ A certificate of revivor implies that corporate status
27 has been "revived" after a delinquent obligation has been cured.

28 ⁴ Plaintiffs did not file a reply, contesting any of the
above facts.

STANDARD

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2 Under the Federal Rule of Civil Procedure 12(b)(1), a party
3 may by motion raise the defense that the court lacks
4 "jurisdiction over the subject matter of a claim." It is well
5 established that the party seeking to invoke the jurisdiction of
6 the federal court bears the burden of establishing the court's
7 subject matter jurisdiction. Stock West, Inc. v. Confederated
8 Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989).

9 On a motion to dismiss pursuant to Rule 12(b)(1), the
10 standard the court is to apply varies according to the nature of
11 the jurisdictional challenge. A motion to dismiss for lack of
12 subject matter jurisdiction may either attack the allegations of
13 jurisdiction contained in the complaint as insufficient on their
14 face to demonstrate the existence of jurisdiction ("facial
15 attack"), or may be made as a "speaking motion" attacking the
16 existence of subject matter jurisdiction in fact ("factual
17 attack"). Thornhill Publishing Co. v. General Tel. & Elec.
18 Corp., 594 F.2d 730, 733 (9th Cir. 1979); Mortensen v. First Fed.
19 Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). If the
20 motion constitutes a facial attack, the court must consider the
21 factual allegations of the complaint to be true. Williamson v.
22 Tucker, 645 F.2d 404, 412 (5th Cir. 1981); Mortensen, 549 F.2d at
23 891. If the motion constitutes a factual attack, as we have
24 here, "no presumptive truthfulness attaches to plaintiffs'
25 allegations, and the existence of disputed material facts will
26 not preclude the trial court from evaluating for itself the
27 merits of jurisdictional claims." Thornhill, 594 F.2d at 733
28 (quoting Mortensen, 549 F.2d at 891).

ANALYSIS

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2 At issue here is defendant's corporate status as defined by
3 the Tax Code and whether defendant upheld its tax obligations
4 pursuant to the Tax Code. As set forth above, the defendant's
5 corporate status was mis-classified by the Franchise Tax Board,
6 and defendant has met its tax obligations under its corrected
7 classification. Plaintiffs' argument that defendant is unable to
8 either sue or be sued in the State of California under § 23301.5
9 of the Tax Code is therefore unavailing.

10 Section 23301.5 states:

11 Except for the purposes of filing an
12 application for exempt status or amending the
13 articles of incorporation as necessary either
14 to perfect that application or to set forth a
15 new name, the corporate powers, rights, and
16 privileges of a domestic taxpayer may be
suspended and the exercise of the corporate
powers, rights, and privileges of a foreign
taxpayer in this state may be forfeited, if a
taxpayer fails to file a tax return required
by this part. (emphasis added.)

17 The forfeiture under § 23301.5 brings with it the inability to
18 either sue or be sued within the State of California. Boyle v.
19 Lakeview Creamery, 9 Cal.2d 16 (1937); Reed v. Norman, 48 Cal.2d
20 338 (1940).

21 Defendant was not required to pay franchise taxes under
22 § 23301.5. Rather, as a foreign insurance corporation, defendant
23 was obligated to pay a premium tax, as stated in § 12201 of the
24 Tax Code. Section 12201 states: "Every insurer doing business in
25 this State shall annually pay to the State a tax on the bases, at
26 the rates, and subject to the deductions from the tax hereinafter
27 specified." The premium tax imposed by § 12201 is in lieu of
28 franchise tax pursuant to § 12204 of the Tax Code, where "[t]he

1 tax imposed on insurers by this chapter is in lieu of all other
2 taxes and licenses, state, county, and municipal, upon such
3 insurers and their property." Defendant has paid the subject
4 premium tax at all relevant times. (Opp'n, at 3:23-24.)

5 However, in determining whether defendant forfeited its
6 right to litigate in the pending action, a distinction must be
7 drawn between a corporation that has been "revived" and one that
8 has been "restored." The suspension of corporate powers, rights,
9 and privileges means that a suspended corporation cannot sue or
10 be sued while its taxes remain unpaid. Gar-Lo, Inc. v.
11 Prudential Sav. & Loan Assn., 41 Cal.App.3d 242, 244 (Cal. Ct.
12 App. 1974). A suspended corporation may continue litigation
13 against it upon paying the unpaid taxes and obtaining a
14 "certificate of revivor." Id. The corporation's "revived"
15 status allows it to retroactively validate actions taken in
16 pending litigation. Id. The issuance of a certificate of
17 revivor implies that the corporation cured a default in the
18 payment of franchise tax.

19 In this case, defendant's corporate status has been
20 "restored," not "revived," because defendant was never in default
21 of any tax obligations to the Franchise Tax Board pursuant to
22 § 23305c(c) of the Tax Code. Section 23305c(c) states:

23 If the Franchise Tax Board determines that a
24 suspension or forfeiture was in error by the
25 Franchise Tax Board, the Franchise Tax Board
26 shall, in connection with the revivor,
27 indicate that the taxpayer is "restored."
The status of the restored taxpayer shall be
retroactive to the date of suspension or
forfeiture as if there had been no suspension
or forfeiture. (emphasis added.)

28 Thus, defendant has not forfeited its rights to sue or be sued in

1 California because by statute, defendant must be treated "as if
2 there had been no suspension or forfeiture." (Opp'n, at 5:1-2.)
3 Since defendant's corporate status was not suspended or
4 forfeited, defendant had, at all relevant times, the full rights,
5 powers, and privileges of a corporation authorized to do the
6 following: transact business under California law, including the
7 right to enter into an insurance contract with Decedent; to
8 defend the "bad faith" action filed by plaintiffs; and, to assert
9 a counterclaim seeking reimbursement of uninsured motorist
10 benefits paid to plaintiffs.

11 **CONCLUSION**

12 For the foregoing reasons, plaintiffs' motion to strike
13 defendant's first amended answer to the complaint and
14 counterclaim for restitution and to enter default against
15 defendant is DENIED. Defendant has established that its
16 corporate status has been restored to good standing, such that it
17 has had all powers, rights, and privileges of a corporation under
18 California law at all relevant times.

19 IT IS SO ORDERED.

20 DATED: September 6, 2006.

21 _____
22 /s/ Frank C. Damrell Jr.
FRANK C. DAMRELL, Jr.
23 UNITED STATES DISTRICT JUDGE
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