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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

KAREN L. ZOPATTI,

Plaintiff,

vs.

RANCHO DORADO HOMEOWNERS
ASSOCIATION, et al.,

Defendants.

CASE NO. 10CV1091 DMS (WVG)

**ORDER (1) GRANTING IN PART
AND DENYING IN PART
DEFENDANT CHOTINER’S
SPECIAL MOTION TO STRIKE,
(2) GRANTING IN PART AND
DENYING IN PART DEFENDANT
CHOTINER’S MOTION TO
DISMISS AND/OR STRIKE, AND
(3) DENYING PLAINTIFF’S
MOTION TO STRIKE**

Pending before this Court are (1) Defendant Chotiner’s special motion to strike the breach of contract and invasion of privacy claims in the First Amended Complaint (“FAC”), (2) Defendant Chotiner’s motion to dismiss and/or strike portions of Plaintiff’s FAC, and (3) Plaintiff’s motion to strike portions of Defendants’ answer and counterclaim. For the following reasons, Defendant Chotiner’s special motion to strike is granted in part and denied in part, Defendant Chotiner’s motion to dismiss and/or strike is granted in part and denied in part, and Plaintiff’s motion to strike is denied.

**I.
BACKGROUND**

Plaintiff and her husband purchased a home in the Rancho Dorado community in San Marcos,

1 California in May 2001, where they have resided with their minor children since. (FAC ¶ 14.)
2 Plaintiff alleges she suffers from various medical conditions, including Multiple Chemical
3 Sensitivities, Mixed Connective Tissue Disease, Vasculitis, Polymyositis, Scleroderma, Lupus,
4 Rheumatoid Arthritis, Thyroid Disease, and Asthma. (*Id.* at ¶ 15.) Plaintiff further alleges her medical
5 conditions cause her immune system to react to exposure to various environmental chemicals or
6 pesticides, insecticides, fungicides, fertilizers, and herbicides, making such materials dangerous to her
7 health and potentially life threatening. (*Id.* at ¶¶ 15, 17.) Plaintiff has informed Defendants Rancho
8 Dorado Homeowners Association and The Prescott Companies (collectively, the “HOA Defendants”)
9 of her special sensitivity to such materials and requested certain accommodations. (*Id.* at ¶ 18.)
10 Despite this, Plaintiff alleges the HOA Defendants caused such materials to be applied to the common
11 area around Plaintiff’s property in 2008 and 2009, causing her bodily injury, damages, and severe
12 emotional distress. (*Id.* at ¶¶ 19-20, 27-33, 36-38.)

13 Defendant Chotiner filed a special motion to strike the fifteenth and sixteenth claims for relief
14 in Plaintiff’s original Complaint pursuant to California Code of Civil Procedure § 425.16 on July 12,
15 2010 (“anti-SLAPP motion”). (Doc. 6.) On August 6, 2010, Plaintiff filed the FAC. (Doc. 18.) On
16 August 12, 2010, the Court issued an Order construing Defendant Chotiner’s anti-SLAPP motion as
17 a motion to strike the breach of contract and violation of privacy claims from the FAC. (Doc. 22.)
18 Defendant Chotiner subsequently filed a motion to dismiss and/or strike portions of the FAC. (Doc.
19 24.) The HOA Defendants filed an answer to the original Complaint and a counterclaim on July 23,
20 2010. (Docs. 11-12.) On August 12, 2010, Plaintiff filed a motion to strike portions of Defendants’
21 answer and counterclaim. (Doc. 23.) An opposition and a reply were filed to each of the three
22 motions. On September 13, 2010, the HOA Defendants filed an answer to the FAC. (Doc. 35.)

23 II.

24 DISCUSSION

25 A. Defendant Chotiner’s Anti-SLAPP Motion

26 1. Legal Standard

27 Under California’s anti-SLAPP statute, “[a] cause of action against a person arising from any
28 act of that person in furtherance of the person’s right of petition or free speech under the United States

1 Constitution or the California Constitution in connection with a public issue shall be subject to a
2 special motion to strike, unless the court determines that the plaintiff has established that there is a
3 probability that the plaintiff will prevail on the claim.” Cal. Code Civ. P. § 425.16(b)(1). An “act in
4 furtherance of a person’s right of petition or free speech” includes: “(1) any written or oral statement
5 or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding
6 authorized by law; (2) any written or oral statement or writing made in connection with an issue under
7 consideration or review by a legislative, executive, or judicial body, or any other official proceeding
8 authorized by law; (3) any written or oral statement or writing made in a place open to the public or
9 a public forum in connection with an issue of public interest; or (4) or any other conduct in furtherance
10 of the exercise of the constitutional right of petition or the constitutional right of free speech in
11 connection with a public issue or an issue of public interest.” *Id.* at § 425.16(e).

12 The anti-SLAPP movant must first make a threshold showing that the claim for relief being
13 challenged arises from protected activity under the anti-SLAPP statute. *Newsham v. Lockheed*
14 *Missiles & Space Co.*, 190 F.3d 963, 971 (9th Cir. 1999); *Rusheen v. Cohen*, 37 Cal.4th 1048, 1055-56
15 (2006). If the court determines that such a showing has been made, it then looks to whether the party
16 opposing the motion has demonstrated a reasonable probability of prevailing on the claim. *Newsham*,
17 190 F.3d at 971. If the movant prevails on a special motion to strike, she or he is “entitled to recover
18 his or her attorney’s fees and costs.” Cal. Code Civ. P. § 425.16(c)(1). Additionally, if the Court
19 “finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the
20 court shall award costs and reasonable attorney’s fees to a plaintiff prevailing on the motion.” *Id.*

21 **2. Discussion**

22 Defendant Chotiner is an attorney with the firm of Epstein, Grinnell & Howell, APC, which
23 represented the HOA Defendants in connection with Plaintiff’s requests for accommodation and
24 proceedings before the Department of Fair Employment and Housing (“DFEH”). Plaintiff’s claims
25 for breach of contract and violation of privacy against Defendant Chotiner primarily stem from the
26 Agreement to Mediate and Confidentiality Form (“Confidentiality Agreement”) that was entered into
27 by Plaintiff and certain Defendants, including Defendant Chotiner, in connection with proceedings
28 before the DFEH and a subsequent response filed by Chotiner in reply to Plaintiff’s second complaint

1 filed with the DFEH. Plaintiff alleges Chotiner breached the Confidentiality Agreement by providing
2 certain information from the mediation held in connection with Plaintiff's first DFEH complaint in
3 her response to Plaintiff's second DFEH complaint. (FAC ¶ 143.) Plaintiff further claims Chotiner's
4 disclosure of information in her response to the second DFEH complaint, as well as her alleged
5 disclosure of Plaintiff's medical information to certain individuals, constituted an invasion of her
6 privacy. (*Id.* at ¶¶ 146-49.) Defendant Chotiner filed a special motion to strike the breach of contract
7 and invasion of privacy claims pursuant to California's anti-SLAPP statute. Cal. Code Civ. P. §
8 425.16. Chotiner argues Plaintiff's claims for breach of contract and invasion of privacy as to her
9 constitute "cause[s] of action against a person arising from any act of that person in furtherance of the
10 person's right of petition or free speech" as they were based on written statements made before a quasi-
11 judicial or other official proceeding authorized by law and were made in connection with an issue
12 under consideration in that proceeding. *Id.* at § 425.16(b)(1), (e)(1)-(2).

13 The Court will address Plaintiff's claim for breach of contract first. The DFEH is a state
14 agency with the authority to investigate and conciliate complaints alleging discrimination in
15 employment and housing and to issue and prosecute accusations. Cal. Gov. Code § 12930. A person
16 claiming to have suffered housing discrimination may file a complaint with the DFEH, which the
17 DFEH must investigate and, if valid, attempt to resolve. *Id.* at §§ 12980(a), 12963, 12963.7. If the
18 DFEH fails to resolve the matter, it may issue an accusation to be heard administratively by the Fair
19 Employment and Housing Commission, or either of the parties may choose to have the claims
20 adjudicated in a civil action. *Id.* at §§ 12965(a), 12969, 12981, 12989. A proceeding before the DFEH
21 therefore qualifies as a "proceeding authorized by law" under the anti-SLAPP statute. Cal. Code Civ.
22 P. § 425.16(e). The statements forming the basis of Plaintiff's claim for breach of contract were made
23 by Defendant Chotiner in her response to Plaintiff's second complaint filed with the DFEH.
24 Accordingly, Chotiner has made a *prima facie* showing that the statements forming the basis for
25 Plaintiff's claim constitute protected activity under the anti-SLAPP statute and that Plaintiff's claim
26 against Chotiner for breach of contract arises from such protected activity. The Court therefore looks
27 to whether Plaintiff has established there is a probability she will prevail on this claim.

28 "In order to establish a probability of prevailing for purposes of section 425.16,

1 subdivision(b)(1), the plaintiff must demonstrate that the complaint is both legally sufficient and
2 supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence
3 submitted by the plaintiff is credited.” *Seltzer v. Barnes*, 182 Cal. App. 4th 953, 969 (2010)(citations
4 and quotations omitted). With respect to her breach of contract claim against Defendant Chotiner,
5 Plaintiff has sufficiently demonstrated her claim possesses the minimal merit necessary to survive an
6 anti-SLAPP motion. To establish a claim for breach of contract, a plaintiff must establish the
7 existence of a contract, plaintiff’s performance or excuse for nonperformance, defendant’s breach, and
8 damages as a result of the breach. *CDF Firefighters v. Maldonado*, 158 Cal. App. 4th 1226, 1239
9 (2008). In her opposition to Defendant Chotiner’s anti-SLAPP motion, Plaintiff cites to the
10 Confidentiality Agreement and statements made by Defendant Chotiner in her response to the second
11 DFEH complaint, which were allegedly in breach of the Confidentiality Agreement. In her response
12 to the second DFEH complaint, Defendant Chotiner specifically referred to terms of settlement that
13 were discussed, although not ultimately agreed upon, in the context of the DFEH mediation.
14 (Defendant Chotiner’s Compendium of Exhibits in Support of Special Motion to Strike, Ex. P at 4:9-
15 13.)¹ These documents, submitted to the Court by Defendant Chotiner in support of her anti-SLAPP
16 motion and cited to by Plaintiff in her opposition to that motion, are sufficient to support a finding that
17 Plaintiff has demonstrated a reasonable probability of prevailing on her claim for breach of contract.
18 Furthermore, the Court finds that the policies behind the litigation privilege codified at California Civil
19 Code § 47(b) would not be furthered by application of the privilege to this breach of contract claim.
20 *Wentland v. Wass*, 126 Cal. App. 4th 1484, 1494 (2005); *see also Paul v. Friedman*, 95 Cal. App. 4th
21 853, 869 (2002). Accordingly, the Court denies Defendant Chotiner’s anti-SLAPP motion as to
22 Plaintiff’s breach of contract claim.

23
24 ¹ Because Plaintiff referred to Defendant Chotiner’s response to the second DFEH
25 complaint in her FAC, the Court may consider it here. In opposition to Defendant Chotiner’s anti-
26 SLAPP motion, Plaintiff filed a motion to strike certain materials submitted to this Court by Defendant
27 Chotiner pursuant to Federal Rule of Civil Procedure 12(f). Although it is not entirely clear exactly
28 what Plaintiff moves to strike, the Court interprets the motion to pertain to Exhibit P to Defendant
Chotiner’s Compendium of Exhibits in Support of her Special Motion to Strike at 4:11-13 and 6:7-16.
Exhibit P submitted by Defendant Chotiner is Defendants’ response to the second DFEH complaint,
which Plaintiff refers to in the instant FAC and alleges is largely the basis for the breach of contract
and violation of privacy claims against Defendant Chotiner. (FAC ¶¶ 143, 147.) Accordingly,
Plaintiff’s motion to strike materials submitted by Defendant Chotiner is denied.

1 As to Plaintiff's claim for invasion of privacy, "[t]he party claiming a violation of the
2 constitutional right to privacy established in article I, section 1 of the California Constitution must
3 establish (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the
4 circumstances, and (3) a serious invasion of the privacy interest." *Int'l Fed'n of Prof'l & Technical*
5 *Eng'rs, Local 21, AFL-CIO v. Superior Court*, 42 Cal.4th 319, 338 (2007). Plaintiff's claim for
6 invasion of privacy against Defendant Chotiner appears to be based on two sets of allegations: that
7 Chotiner revealed confidential mediation communications in her response to the second DFEH
8 complaint and that Chotiner improperly revealed Plaintiff's medical information to certain individuals.
9 (FAC ¶¶ 25, 146-49.) However, as the allegations regarding Defendant Chotiner's statements in the
10 second DFEH complaint, which constitute protected activity under the anti-SLAPP statute for the
11 reasons stated above, form the gravamen of Plaintiff's claim for invasion of privacy and are not merely
12 incidental to Plaintiff's allegations regarding Defendant Chotiner's revelation of Plaintiff's medical
13 information, the anti-SLAPP statute applies to Plaintiff's entire invasion of privacy claim. *See Bulletin*
14 *Displays, LLC v. Regency Outdoor Adver., Inc.*, 448 F. Supp. 2d 1172, 1180 (C.D. Cal. 2006)("Anti-
15 SLAPP Motions challenge particular causes of action, rather than individual allegations or theories
16 supporting a cause of action."); *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*,
17 133 Cal. App. 4th 658, 672 (2005); *Martinez v. Metabolife Int'l, Inc.*, 113 Cal. App. 4th 181, 187-88
18 (2003).

19 As discussed above, Defendant Chotiner has made the necessary threshold showing that
20 Plaintiff's invasion of privacy claim based upon the statements made by Defendant Chotiner in her
21 response to the second DFEH complaint arises from protected activity under the anti-SLAPP statute.
22 Accordingly, the Court looks to whether Plaintiff has demonstrated a reasonable probability of
23 prevailing on the claim. In contrast to the breach of contract claim, courts have routinely held that the
24 litigation privilege applies to all torts claims except for malicious prosecution, including invasion of
25 privacy claims. *See Jacob B. v. County of Shasta*, 40 Cal.4th 948, 960 (2007); *Kimmel v. Goland*, 51
26 Cal.3d 202, 209 (1990). The litigation privilege extends to "any communication (1) made in judicial
27 or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve
28 the objects of the litigation; and (4) that have some connection or logical relation to the action."

1 *Silberg v. Anderson*, 50 Cal.3d 205, 212 (1990). As the statements Plaintiff alleges give rise to her
2 claim for invasion of privacy against Defendant Chotiner were made in a quasi-judicial proceeding by
3 a litigant, were intended to achieve the objects of the litigation, and had a relation to the action, the
4 litigation privilege applies and shields Defendant Chotiner from liability for invasion of privacy based
5 upon the statements made by Defendant Chotiner. Accordingly, Defendant Chotiner’s anti-SLAPP
6 motion is granted as to Plaintiff’s invasion of privacy claim.

7 Both Plaintiff and Defendant Chotiner request attorneys’ fees in connection with the anti-
8 SLAPP motion. Because Defendant Chotiner’s anti-SLAPP motion is granted as to Plaintiff’s
9 invasion of privacy claim, the statute provides that she is entitled to costs and attorneys’ fees incurred
10 with respect to the portion of the anti-SLAPP motion upon which she prevails. Cal. Code Civ. P. §
11 425.16(c)(1). The Court does not find that Defendant Chotiner’s anti-SLAPP motion was frivolous
12 or intended to cause unnecessary delay. *Id.* Therefore, Plaintiff is not awarded costs or attorneys’ fees
13 in connection with the anti-SLAPP motion.

14 **B. Defendant Chotiner’s Motion to Dismiss and/or Strike Portions of the FAC**

15 **1. Legal Standard**

16 A party may move to dismiss a claim under Rule 12(b)(6) if the claimant fails to state a claim
17 upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The Federal Rules require a pleading to
18 include a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.
19 R. Civ. P. 8(a)(2). The Supreme Court, however, recently established a more stringent standard of
20 review for pleadings in the context of 12(b)(6) motions to dismiss. *See Ashcroft v. Iqbal*, ___ U.S.
21 ___, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). To survive a motion
22 to dismiss under this new standard, “a complaint must contain sufficient factual matter, accepted as
23 true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 129 S. Ct. at 1949 (quoting
24 *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content
25 that allows the court to draw the reasonable inference that the defendant is liable for the misconduct
26 alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). “Determining whether a complaint states a plausible
27 claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its
28 judicial experience and common sense.” *Id.* at 1950 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d

1 Cir. 2007)). The reviewing court must therefore “identify the allegations in the complaint that are not
2 entitled to the assumption of truth” and evaluate “the factual allegations in [the] complaint to
3 determine if they plausibly suggest an entitlement to relief.” *Id.* at 1951.

4 **2. Discussion**

5 Defendant Chotiner is named as a Defendant in seven claims for relief in the FAC: declaratory
6 relief, negligence, harassment, intentional infliction of emotional distress, negligent infliction of
7 emotional distress, breach of contract, and invasion of privacy. Defendant Chotiner moves to dismiss
8 each of these claims.

9 Plaintiff’s seventh claim is for declaratory relief against all Defendants. Plaintiff alleges the
10 Confidentiality Agreement entered into in connection with the mediation of the first DFEH complaint
11 constitutes a valid contract based upon consideration. (FAC ¶ 139.) Plaintiff further alleges Defendant
12 Chotiner breached the Confidentiality Agreement by revealing certain information in her response to
13 the second DFEH complaint. (*Id.* at ¶ 143.) Defendant Chotiner moves to dismiss this claim on the
14 basis that Plaintiff has failed to state a claim for declaratory relief as to her. Although Plaintiff argues
15 in her opposition that the allegations contained in the FAC are sufficient to state a claim for declaratory
16 relief, the Court disagrees. Plaintiff has failed to allege sufficient facts demonstrating the existence
17 of an actual controversy between her and Defendant Chotiner warranting declaratory relief.
18 Accordingly, Plaintiff’s claim for declaratory relief as to Defendant Chotiner is dismissed without
19 prejudice.

20 Plaintiff’s ninth claim is for negligence against all Defendants. To state a claim for negligence
21 under California law, a party must show (1) a legal duty to exercise due care, (2) a breach of that duty,
22 and (3) that the breach was the proximate or legal cause of the resulting injury. *S. Cal. Hous. Rights*
23 *Ctr. v. Los Feliz Homeowners Ass’n*, 426 F. Supp. 2d 1061, 1069 (C.D. Cal. 2005). Defendant
24 Chotiner argues Plaintiff has failed to sufficiently plead the existence of a duty owed by her, as
25 attorney for Plaintiff’s adversaries, to Plaintiff and therefore fails to state a plausible claim for
26 negligence. Generally, an attorney does not owe a duty of care to a nonclient or to the adverse party.
27 *See Mattco Forge, Inc. v. Arthur Young & Co.*, 38 Cal. App. 4th 1337, 1356 (1995); *Mason v. Levy*
28 *& Van Bourg*, 777 Cal. App. 3d 60, 67-68 (1978). Plaintiff argues in opposition that an attorney may

1 owe a duty to a third person if that person was intended to be benefitted by the attorney's performance,
2 and that, in assuming the role of "disability coordinator", Defendant Chotiner intended to benefit
3 Plaintiff and therefore owed her a duty of care. *See Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*,
4 57 Cal. App. 3d 104, 110 (1976). However, Plaintiff does not allege sufficient facts to demonstrate
5 Defendant Chotiner undertook to perform services for her benefit, how Chotiner assumed the role of
6 "disability coordinator", or what duty was owed to Defendant as a result of such role. Accordingly,
7 Plaintiff's claim for negligence as to Defendant Chotiner is dismissed without prejudice.

8 Plaintiff also states a claim for negligent infliction of emotional distress against all Defendants.
9 Negligent infliction of emotional distress is not itself an independent tort, but is rather the tort of
10 negligence. There is no duty under California law to avoid negligently causing emotional distress to
11 another and a claim for negligent infliction of emotional distress is valid "only if the defendant has
12 breached some other duty to the plaintiff." *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 984
13 (1993). Here, because Plaintiff fails to plead facts sufficient to state a plausible duty owed by
14 Defendant Chotiner to her, her claim for negligent infliction of emotional distress is dismissed without
15 prejudice.

16 Plaintiff's twelfth claim is for harassment against all Defendants. Plaintiff alleges "Defendant
17 Chotiner's communications with Plaintiff, and the decisions made by Defendant Chotiner regarding
18 how to respond to Plaintiff's concerns and requests were designed to seriously alarm, annoy, intimidate
19 and harass Plaintiff" in violation of California Code of Civil Procedure § 527.6. (FAC ¶¶ 113, 116.)
20 Section 527.6 states in relevant part "'harassment' is unlawful violence, a credible threat of violence,
21 or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys,
22 or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as
23 would cause a reasonable person to suffer substantial emotional distress, and must actually cause
24 substantial emotional distress to the plaintiff." Cal. Code Civ. P. § 527.6(b). Plaintiff alleges
25 Defendant Chotiner directed Plaintiff to send correspondence concerning pesticide use to her, urged
26 her to reconsider posting information in the community regarding this issue, requested medical
27 information from Plaintiff, asserted that the medical information provided by Plaintiff was insufficient
28 to show she had a qualified disability, and at times informed Plaintiff she was not authorized to

1 communicate with her regarding certain record requests. (FAC ¶¶ 23, 34-35.) Such allegations fall
2 short of the requirements for pleading a claim of harassment. Although Plaintiff recites the elements
3 of a harassment claim, she does not allege sufficient facts to state a plausible claim for relief for
4 harassment as to Defendant Chotiner and the claim is therefore dismissed without prejudice.

5 Plaintiff also states a claim for intentional infliction of emotional distress against all
6 Defendants. “Under California law, to make out a cause of action for intentional infliction of
7 emotional distress, a plaintiff must show, in relevant part, that the defendant engaged in extreme and
8 outrageous conduct that exceeded the bounds of what is generally tolerated in a civilized society.
9 Conduct which exhibits mere rudeness and insensitivity does not rise to the level required for a
10 showing of intentional infliction of emotional distress.” *Braunling v. Countrywide Home Loans Inc.*,
11 220 F.3d 1154, 1158 (9th Cir. 2000)(citations omitted). Plaintiff alleges “Defendant Chotiner’s
12 communications with Plaintiff, and the decisions made by Defendant Chotiner regarding how to
13 respond to Plaintiff’s concerns and requests, is conduct so egregious that it establishes an intention by
14 the Defendant Chotiner to cause emotional distress.” (FAC ¶ 127.) However, Plaintiff’s claim for
15 intentional infliction of emotional distress incorporates the allegations set forth in the Complaint
16 supporting her claim for harassment. These allegations fall short of the extreme and outrageous
17 conduct that must be alleged to state a plausible claim for intentional infliction of emotional distress.
18 Accordingly, Plaintiff’s fourteenth claim as to Defendant Chotiner is dismissed without prejudice.

19 As discussed above in the context of the anti-SLAPP motion, Plaintiff has sufficiently
20 established that there is a probability she will prevail on her claim for breach of contract. Accordingly,
21 Defendant’s motion to dismiss this claim is denied.

22 Defendant Chotiner also moves to dismiss Plaintiff’s claim for invasion of privacy. As the
23 Court grants Defendant’s anti-SLAPP motion to strike Plaintiff’s claim for invasion of privacy, it need
24 not address Defendant’s motion to dismiss that claim.²

25 //

26
27 ² Defendant Chotiner also moves to strike Plaintiff’s claims for punitive damages, treble
28 damages, and attorneys’ fees in the FAC pursuant to Rule 12(b). In light of the Court’s instant
disposition of Defendant Chotiner’s motion to dismiss the FAC, the motion to strike portions of the
FAC is denied as moot.

1 **C. Plaintiff's Motion to Strike Portions of Defendants' Answer and Counterclaim**

2 **1. Legal Standard**

3 Federal Rule of Civil Procedure 12(f) provides “[t]he court may strike from a pleading an
4 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” “[T]he function
5 of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating
6 spurious issues by dispensing with those issues prior to trial.” *Sidney-Vinsein v. A.H. Robbins Co.*,
7 697 F.2d 880, 885 (9th Cir. 1983). Matter is “immaterial” where it has “no essential or important
8 relationship to the claim for relief . . . being pleaded.” *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527
9 (9th Cir. 1993)(quoting 5 Charles A. Wright & Arthur R. Miller, *Fed. Prac. & Proc.* § 1382 (1990)),
10 *rev'd on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). A court may strike a prayer
11 for relief if it seeks damages that are not recoverable as a matter of law. *Arcilla v. Adidas Promotional*
12 *Retail Operations, Inc.*, 488 F. Supp. 2d 965, 968 (C.D. Cal. 2007); *Wells v. Board of Trs. of Cal. State*
13 *Univ.*, 393 F. Supp. 2d 990, 994-95 (N.D. Cal. 2005).

14 **2. Discussion**

15 As an initial matter, Plaintiff's motion to strike was filed on August 12, 2010—six days after
16 Plaintiff filed the FAC. The HOA Defendants subsequently filed an answer to the FAC on September
17 13, 2010. Accordingly, Plaintiff's motion to strike portions of Defendants' answer is construed as
18 relating to the HOA Defendants' answer to the FAC.

19 Plaintiff moves to strike the first, second, and fifth affirmative defenses in the HOA
20 Defendants' answer to the FAC, as well as paragraphs 17 to 23, paragraphs 36 to 43, and the first
21 prayer for relief in the HOA Defendants' counterclaim. Plaintiff moves to strike the first affirmative
22 defense, which states “[a]pplication of pesticides to the subject common areas performed in
23 compliance with governmentally approved applicable label instructions is not actionable,” and the first
24 prayer for relief in the counterclaim, which prays “[f]or a judicial declaration that Defendants are
25 entitled to contract with pest control operators to service the Rancho Dorado common areas with
26 pesticides according to the Label Instructions,” as immaterial. However, as the HOA Defendants
27 argue, this defense and prayer for relief are material in light of Plaintiff's allegations concerning the
28 application of pesticides pursuant to their label instructions. Plaintiff alleges in the FAC that the HOA

1 Defendants caused pesticides to be applied in the common areas surrounding her home “in a manner
2 inconsistent with the label(s)” on June 18, 2008 (FAC ¶ 29) and in a manner “inconsistent with these
3 chemical labels” on other occasions. (*Id.* at ¶¶ 30-32.) Plaintiff’s sixth claim for relief is for violation
4 of California Business & Professions Code § 17200 and alleges “Defendants have committed acts of
5 unfair competition . . . by engaging in the practice of using pesticides, insecticides, fungicide, and
6 herbicide in a manner inconsistent with their labeling and in violation of the California Food and
7 Agricultural Code.” (*Id.* at ¶ 83.) Accordingly, Plaintiff’s motion to strike the first defense and the
8 first prayer for relief is denied.

9 Plaintiff also moves to strike paragraphs 17 to 23 and paragraphs 36 to 43 of the HOA
10 Defendants’ counterclaim on the basis of immateriality. Plaintiff argues these paragraphs are
11 immaterial because California Government Code § 12984 provides “all matters connected with any
12 conference, conciliation, or persuasion efforts are privileged and may not be received in evidence.”
13 Plaintiff also cites to case law regarding the confidentiality of mediation communications. However,
14 Plaintiff has not established that the proceedings before the DFEH in fact constituted a “conference,
15 conciliation, or persuasion efforts” within the meaning of the statute. These paragraphs are material
16 to allegations made by Plaintiff in the FAC and Plaintiff’s motion to strike these paragraphs is denied.

17 Finally, Plaintiff moves to strike the second and fifth affirmative defenses for lack of notice.
18 Federal Rule of Civil Procedure 8(b)(1) requires a party responding to a pleading to “state in short and
19 plain terms its defenses to each claim asserted against it.” The HOA Defendants’ second affirmative
20 defense in their answer to the FAC states “Plaintiff is equitably stopped from pursuing the claims and
21 relief alleged, based on the facts set forth above in this Answer and in defendants’ Counter Claim for
22 Declaratory Relief.” This is sufficient to provide Plaintiff with fair notice of the defense. The HOA
23 Defendants’ fifth affirmative defense states “Plaintiff’s alleged injuries and damages, if any, were in
24 whole or in part caused by the conduct of a myriad of other non-party persons and/or entities
25 responsible for the release of chemicals into the environment to which plaintiff and all other members
26 of the public are exposed in the course of normal, daily life.” The Court also finds this affirmative
27 defense is sufficient. Accordingly, the Court denies Plaintiff’s motion to strike the HOA Defendants’
28 second and fifth affirmative defenses.

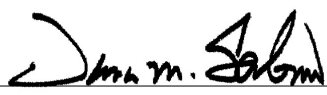
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III.
CONCLUSION

For the foregoing reasons, Defendant Chotiner's special motion to strike is granted in part and denied in part, Defendant Chotiner's motion to dismiss and/or strike is granted in part and denied in part, and Plaintiff's motion to strike portions of the HOA Defendants' answer and counterclaim is denied. Plaintiff may file an amended complaint consistent with this Order on or before January 7, 2011.

IT IS SO ORDERED.

DATED: December 15, 2010



HON. DANA M. SABRAW
United States District Judge