

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Joseph R. Inman,

Plaintiff,

v.

Wesco Insurance Company; Kathy Murphy;
et al.,

Defendants.

No. CV-12-02518-PHX-GMS

ORDER

Defendant Kathy Murphy moves to Dismiss Plaintiff Joseph Inman’s aiding-and-abetting claim against her. (Doc. 18.) For the reasons set forth below, the Court denies the Motion.¹

BACKGROUND

Inman is a Nevada resident who worked for Sybrant Construction, LLC. (Doc. 1-1 ¶¶ 2, 11.) During the course of his employment, he fell off a cliff and suffered serious injuries. (*Id.* ¶ 11.) He filed a claim for workers’ compensation with Defendant Wesco Insurance Company.² (*Id.* ¶ 12.) Wesco assigned Murphy to handle Inman’s claim. (*Id.*) Inman claims that Murphy improperly adjusted his claim, which resulted in “ceasing and denying further medical and income benefits to Mr. Inman.” (*Id.*) It appears that Wesco

¹ Inman’s request for oral argument is denied because the Parties have had an adequate opportunity to discuss the law and evidence and oral argument will not aid the Court’s decision. *See Lake at Las Vegas Investors Group v. Pac. Malibu Dev.*, 933 F.2d 724, 729 (9th Cir. 1991).

² Defendant AmTrust was dismissed from this action in Superior Court.

1 disputed several aspects of Inman’s claimed injuries. (*Id.*, Exs. A-1, A-2.)

2 Inman hired an attorney and went to the Industrial Commission of Arizona. (*Id.* ¶
3 13.) The Industrial Commission apparently overruled Wesco’s decision to deny those
4 benefits and ordered payment. (*Id.*) Inman suffered physical and economic harm as a
5 result of the delays. (*Id.* ¶ 15.) He filed suit against the Defendants in Maricopa County
6 Superior Court on October 4, 2012. (Doc. 1-1.) Defendants removed this case on
7 November 26, 2012, (Doc. 1), and Murphy filed her Motion to Dismiss on January 25,
8 2013, (Doc. 18).

9 DISCUSSION

10 I. LEGAL STANDARD

11 To survive dismissal for failure to state a claim pursuant to Federal Rule of Civil
12 Procedure 12(b)(6), a complaint must contain more than “labels and conclusions” or a
13 “formulaic recitation of the elements of a cause of action”; it must contain factual
14 allegations sufficient to “raise a right to relief above the speculative level.” *Bell Atl.*
15 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While “a complaint need not contain
16 detailed factual allegations . . . it must plead ‘enough facts to state a claim to relief that is
17 plausible on its face.’” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir.
18 2008) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the
19 plaintiff pleads factual content that allows the court to draw the reasonable inference that
20 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
21 (2009) (citing *Twombly*, 550 U.S. at 556). The plausibility standard “asks for more than a
22 sheer possibility that a defendant has acted unlawfully.” *Id.* When a complaint does not
23 “permit the court to infer more than the mere possibility of misconduct, the complaint has
24 alleged-but it has not shown-that the pleader is entitled to relief.” *Id.* at 679 (internal
25 quotation omitted).

26 When analyzing a complaint for failure to state a claim under Rule 12(b)(6), “[a]ll
27 allegations of material fact are taken as true and construed in the light most favorable to
28 the nonmoving party.” *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). However,

1 legal conclusions couched as factual allegations are not given a presumption of
2 truthfulness, and “conclusory allegations of law and unwarranted inferences are not
3 sufficient to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir.
4 1998).

5 **II. ANALYSIS**

6 Inman asserts a single claim against Murphy: aiding and abetting Wesco’s
7 allegedly tortious conduct. (Doc. 1-1 ¶¶ 29–36.) Murphy claims that Inman’s Complaint
8 suffers from two deficiencies: (1) he has failed to plead sufficient facts to support an
9 aiding and abetting claim, and (2) no claim lies against an adjuster for aiding and abetting
10 her employer, the insurer.

11 **A. The Complaint’s Factual Sufficiency**

12 Rule 8 of the Federal Rules of Civil Procedure requires “a short and plain
13 statement of the claim showing that the pleader is entitled to relief” The Supreme
14 Court, in the *Twombly* and *Iqbal* decisions cited above, has read Rule 8 to require a
15 plaintiff to plead sufficient factual content to make his claim for relief plausible.
16 *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678–79. Murphy claims that Inman simply
17 sketches the skeletal elements of an aiding and abetting case without providing the
18 necessary factual allegations. “Claims of aiding and abetting tortious conduct require
19 proof of three elements: (1) the primary tortfeasor must commit a tort that causes injury
20 to the plaintiff; (2) the defendant must know that the primary tortfeasor’s conduct
21 constitutes a breach of duty; and (3) the defendant must substantially assist or encourage
22 the primary tortfeasor in the achievement of the breach.” *Wells Fargo Bank v. Ariz.*
23 *Laborers, Teamsters & Cement Masons*, 201 Ariz. 474, 485, 38 P.3d 12, 23 (2002).
24 Inman has pled facts to support each of the elements.

25 Murphy does not contest the Complaint’s sufficiency with regard to the first
26 element, namely, that Wesco breached the duty of good faith and fair dealing. She does
27 contest the remaining two. “Because aiding and abetting is a theory of secondary liability,
28 the party charged with the tort must have knowledge of the primary violation, and such

1 knowledge may be inferred from the circumstances.” *Id.* With regard to knowledge,
2 Inman has pled the following:

- 3 • Murphy was the adjuster in charge of processing Inman’s workers’ compensation
4 claim. (Doc. 1-1 ¶ 12.)
- 5 • Murphy did not properly investigate and adjust Inman’s claim, and refused to pay
6 out on Inman’s valid claim. (*Id.* ¶ 13.)
- 7 • Murphy did not accept undisputed medical evidence, did not seek independent
8 evaluation, ignored evidence submitted by Inman, and engaged in an “outcome-
9 driven” approach to the claim. (*Id.* ¶ 14.)
- 10 • Murphy “knew that, after an adequate investigation, Mr. Inman’s claim was not
11 fairly debatable, that WESCO and AMTRUST delayed and denied Mr. Inman’s
12 claim without any reasonable basis, and that WESCO and AMTRUST knew or
13 recklessly disregarded this lack of a reasonable basis to delay and deny Plaintiff’s
14 claim.” (*Id.* ¶ 32.)

15 These allegations provide sufficient factual content to support Inman’s claim that Murphy
16 knew Wesco was breaching its duty of good faith and fair dealing. Read in the light most
17 favorable to Inman, the Complaint alleges that Murphy had evidence before her that
18 demonstrated Inman’s entitlement to certain benefits, but she nevertheless denied
19 portions of his claim. Therefore, Inman has pled knowledge.

20 The same allegations, if true, would also show that Murphy rendered substantial
21 assistance to Wesco in its breach. “The third requirement, substantial assistance by an
22 aider and abettor, can take many forms, but means more than a little aid.” *Wells Fargo*,
23 201 Ariz. at 488 (internal quotation marks omitted). As stated above, Inman claims
24 Murphy conducted a poor investigation, filed documents with the Industrial Commission,
25 did not accept undisputed medical evidence, did not seek independent evaluation, ignored
26 evidence submitted by Inman, and engaged in an “outcome-driven” approach to the
27 claim. (Doc. 1-1 ¶¶ 12, 14.) Furthermore, by knowing that Inman had a claim, but doing
28 nothing, Murphy “substantially assisted or encouraged WESCO and AMTRUST in

1 delaying or denying Mr. Inman’s on-the-job injury claim, without any reasonable basis.”
2 (*Id.* ¶ 33.) All of these allegations are sufficient to allege that Murphy lent substantial
3 assistance to Wesco’s alleged breach of the duty of good faith and fair dealing.

4 Consequently, Murphy’s claim that Inman has failed to comply with Rule 8 is
5 incorrect.

6 **B. Availability of Aiding and Abetting Liability**

7 Murphy argues that a plaintiff cannot sue an adjuster for aiding and abetting her
8 own employer, the insurer, in breaching its duty of good faith and fair dealing. First, she
9 claims that any bad faith claim lies against Wesco, and that no case has established such a
10 cause of action against the employee. That misses the point. Inman is asserting a separate
11 tort, aiding and abetting, against Murphy. He is not asserting the tort of bad faith.

12 Murphy’s next argument is that “Defendant Murphy and Wesco were acting as
13 one entity According to the allegations in the Complaint, Defendant Murphy’s
14 conduct was entirely within her course and scope of employment, and therefore any
15 alleged bad faith would be imputed to Wesco.” This position ignores longstanding
16 principles of the law of agency. “It is well-established law that an agent will not be
17 excused from responsibility for tortious conduct [merely] because he is acting for his
18 principal.” *Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, 127, 180 P.3d 982, 992
19 (Ct. App. 2008). The *Warner* court adopted § 7.01 of the Restatement (Third) of Agency,
20 which states that “[a]n agent is subject to liability to a third party harmed by the agent’s
21 tortious conduct. Unless an applicable statute provides otherwise, an [agent] remains
22 subject to liability although the [agent] acts . . . within the scope of employment.” *Id.*
23 (quoting Restatement (Third) of Agency § 7.01). Comment b to § 7.01 elaborates that “a
24 tort committed by an agent constitutes a wrong to the tort’s victim independently of the
25 capacity in which the agent committed the tort. The injury suffered by the victim of a tort
26 is the same regardless of whether the tortfeasor acted independently or happened to be
27 acting as an agent or employee of another person.” Restatement (Third) Of Agency §
28 7.01, cmt. b (2006).

1 While the application of these principles to the insurance setting may seem strange
2 to Murphy, it is not unusual. In *Morrow v. Boston Mutual Life Insurance Co.*, No. CIV
3 06-2635-PHX-SMM, 2007 WL 3287585 (D. Ariz. Nov. 5, 2007), the plaintiff's insurer
4 hired a company to administer claims filed under the insurer's policies. *Id.* at *1. The
5 claims administrator then engaged another company to review the plaintiff's file. *Id.* The
6 same argument was raised and rejected there: "Defendants view themselves as the same
7 entity as [the insurer] for purposes of aiding and abetting the alleged bad faith, and would
8 have Count Two dismissed on that basis." *Id.* at *4. Judge McNamee, however, rejected
9 that claim, applying the principles of agency law described above. *Id.* at *6.

10 Similarly on point was Judge Bolton's recent order in *Smith v. Country Mutual*
11 *Insurance Co.*, 2:12-cv-02351-SRB (Jan. 10, 2013). In a suit arising out of an October
12 2010 hailstorm, two plaintiffs sued their insurance company and adjuster for their
13 handling of the claim. *Id.* at 1. The claim against the adjuster was for aiding and abetting
14 the insurer's breach of the duty of good faith and fair dealing. *Id.* The insurer claimed that
15 the removal of the case was fraudulent because it was obvious no claim lay against the
16 adjuster (a citizen of Arizona whose presence destroyed complete diversity). *Id.* at 1-2.
17 Judge Bolton, like Judge McNamee, applied agency principles and determined that it was
18 not obvious that no claim existed against the adjuster.³

19 These cases make clear that an aiding and abetting claim is not barred simply
20 because a person worked for the alleged primary tortfeasor and was acting within the
21 scope of her employment. It is true that there are not many recorded cases where a claim
22

23 ³ Also instructive is the situation described in Illustration 4 in the Restatement:

24 A, an engineer, is an employee of P Corporation, a structural-engineering
25 firm. T, who is considering purchasing a house, retains P Corporation to
26 evaluate its structural stability. P Corporation assigns A to perform the
27 inspection. A, who performs the inspection negligently, reports to T that the
28 house is structurally sound, which in fact it is not. Relying on A's report, T
purchases the house and suffers loss. A is subject to liability to T. P
Corporation is also subject to liability to T.

Restatement (Second) of Agency § 7.01 cmt. b (2006).

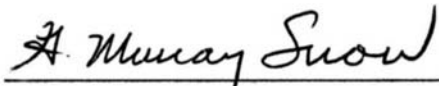
1 is pressed against the adjuster; nevertheless, Murphy has not shown any reason why
2 principles of agency law should not apply with equal force in the insurance setting. Even
3 if that application is uncertain, “uncertainties as to the current state of controlling
4 substantive law must also be resolved in favor of plaintiff and against the defendant” at
5 this stage. *Bertrand v. Aventis Pasteur Labs., Inc.*, 226 F.Supp.2d 1206, 1212 (D. Ariz.
6 2002). Murphy’s assertion that Inman’s Complaint should be dismissed because an aiding
7 and abetting claim against her cannot exist is therefore rejected.

8 **CONCLUSION**

9 Inman’s Complaint, though sparse, meets the requirements of Rule 8, as specified
10 in *Twombly* and *Iqbal*. And Murphy’s argument about the viability of an aiding and
11 abetting claim in her situation is without merit.

12 **IT IS THEREFORE ORDERED** that Murphy’s Motion to Dismiss (Doc. 18) is
13 **DENIED.**

14 Dated this 12th day of June, 2013.

15 

16 _____
17 G. Murray Snow
18 United States District Judge
19
20
21
22
23
24
25
26
27
28