IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SWINERTON BUILDERS and SWINERTON INCORPORATED, Plaintiffs, v. AMERICAN HOME ASSURANCE CO.; NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PA; and DOES 1-250, inclusive, Defendants.	Case No. C 12-4350 SC ORDER COMPELLING ARBITRATION, STAYING CASE PENDING ARBITRATION, AND GRANTING IN PART DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

This is an insurance dispute. Now before the Court is Defendants American Home Assurance Co. ("American Home") and National Union Fire Insurance Co.'s ("National") (collectively "Defendants") motion to dismiss or, alternatively, to compel arbitration of Plaintiffs Swinerton Builders and Swinerton Incorporation's (collectively "Plaintiffs") complaint. ECF Nos. 9 ("FAC"), 33 ("Mot."). The motion is fully briefed. ECF Nos. 39 ("Opp'n"), 40 ("Reply"). The Court finds the motion suitable for decision without oral argument. Civ. L.R. 7-1(b). As explained

below, the Court GRANTS Defendants' motion to compel arbitration and STAYS this case pending the completion of arbitration. The Court also GRANTS in part Defendants' motion to dismiss Plaintiffs' complaint.

II. BACKGROUND

Plaintiffs were the general contractors for the construction and subsequent renovation of a residential development in Marina del Rey, California (the "Project"). FAC ¶ 18. Defendants issued two insurance policies (collectively the "Policies") that covered the Project during the time relevant to Plaintiffs' complaint. Id. ¶¶ 13-17. The first, issued by American Home, was a Commercial General Liability Policy effective March 31, 2002 to March 31, 2003. Id. ¶ 13; id. Ex. A ("CGL Policy"). The second, issued by National, was a Commercial Umbrella Policy effective March 31, 2000 to March 31, 2005. Id. ¶ 16; id. Ex. B ("Umbrella Policy"). The CGL Policy required American Home to defend and indemnify Plaintiffs for property damage arising out of operations at the Project. Id. ¶ 14. Plaintiffs paid $363,800 in premiums under the CGL Policy. Id. ¶ 15. Plaintiffs allege that they satisfied the CGL Policy's $100,000 deductible. Id. The Umbrella Policy required National to defend and indemnify Plaintiffs for property damage arising out of operations at the Project after exhaustion of the underlying CGL Policy. Id. ¶ 17.

In December 2008, the Homeowners Association for the Project (the "HOA") sent Plaintiffs a "Notice to Builder" under California Civil Code section 1375 (a "Calderon Notice"), identifying various defects in the Project's waterproofing membrane, balcony railings,

and concrete foundations. Id. ¶ 19. Plaintiffs gave American Home notice of the claim under the Policies. Id. ¶ 20. On February 9, 2009, in response to the Calderon Notice, American Home appointed defense counsel for Plaintiffs, and in reliance on this appointment, Plaintiffs did not obtain personal defense counsel, undertake any repairs at the Project, or settle with the HOA. Id. ¶ 21. In the following years, over various times, the Project was subject to site inspections and forensic testing in order to provide American Home with information about the Project's various defects. Id. ¶¶ 22-24. After these tests, two mediations were held, at which American Home refused to settle claims against Plaintiffs. Id. ¶¶ 25-26.

The HOA sued Plaintiffs on May 3, 2011, for construction defects (the "underlying case"). FAC Ex. D. Two more mediations followed Plaintiffs' filing suit, but the parties reached no settlement, even though Plaintiffs allege that at the fourth mediation, on August 15, 2012, the HOA made reasonable settlement demands within the combined policy limits of Defendants' Policies. Id. ¶¶ 28-29. Though they refused the various settlement offers, Defendants are defending Plaintiffs in the HOA's lawsuit. Id. ¶¶ 27-32. Plaintiffs allege that Defendants had a duty to settle the underlying case, and that Plaintiffs have overpaid their $100,000 deductible for the Project. See id. ¶¶ 40-48.

Based on these allegations, Plaintiffs assert three causes of action against Defendants: (1) breach of contract - failure to settle; (2) breach of the implied covenant of good faith and fair dealing - failure to settle; and (3) declaratory relief. Id. ¶¶ 40-65. Defendants respond that Plaintiffs' claims are not ripe for

adjudication, because the underlying action is not yet resolved. See Mot. at 1-2. Defendants add that even if the Court finds that Plaintiffs' claims based on their alleged overpayment of the deductible are ripe, the Court should compel arbitration of those claims and stay this case pending the outcome of arbitration. Id. at 2. The parties have a separate but practically identical case still pending before this Court. Swinerton Builders v. American Home Assurance Co., No. 12-cv-6047 EMC (the "Essex Case," named after the underlying property in that case). The Essex Case involved a separate construction defect claim. In that case, this Court sent Plaintiffs' deductible-related claims to arbitration, dismissed the remaining claims, and stayed the case pending arbitration. Swinerton Builders, 2013 WL 1122022, at *2 (N.D. Cal. Mar. 15, 2013) (dismissing claims); Swinerton Builders, 2013 WL 2237885, at *7 (N.D. Cal. May 21, 2013) (compelling arbitration).

III. LEGAL STANDARDS

A. Motions to Dismiss

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court

must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 678 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a complaint must be both "sufficiently detailed to give fair notice to the opposing party of the nature of the claim so that the party may effectively defend against it" and "sufficiently plausible" such that "it is not unfair to require the opposing party to be subjected to the expense of discovery." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

B. Arbitration

Section 4 of the Federal Arbitration Act ("FAA") permits "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court . . . for any order directing that . . . arbitration proceed in the manner provided for in [the arbitration] agreement." 9 U.S.C. § 4. The FAA embodies a policy that generally favors arbitration agreements. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). Importantly, however, "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). If such an arbitration agreement is present, though, federal courts must enforce it rigorously. See Hall Street Assoc., L.L.C. v. Mattel, Inc., 552 U.S. 576, 581 (2008). Courts must also resolve any "ambiguities as to the scope of the arbitration clause itself . . .

in favor of arbitration." Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 476 (1989).

IV. DISCUSSION

A. Plaintiffs' Unripe Claims

The core of Plaintiffs' three causes of action is their allegation that Defendants breached both their contract and the implied covenant of good faith and fair dealing by refusing to settle the claims in the underlying case. Defendants argue that all of Plaintiffs' claims are premature, because Defendants are defending Plaintiffs in the ongoing underlying case. Defendants are right. Plaintiffs' claims based on Defendants' failure to provide funding or authority to settle the underlying case are unripe and must be dismissed.

"[A] claimant's action against the insurer [for breach of the duty to settle] does not mature until a judgment in excess of the policy limits has been entered against the insured." Hamilton v. Maryland Cas. Co., 27 Cal. 4th 718, 725 (Cal. Ct. App. 2002). "When, as here, the insurer is providing a defense but merely refuses to settle, the insured has no immediate remedy. A cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits." Safeco Ins. Co. v. Super. Ct., 71 Cal. App. 4th 782, 788 (Cal. Ct. App. 1999). The rationale of this rule applies to both American Home, as primary insurer, and National, as excess insurer: if there could be a breach of the duty to settle prior to an excess judgment, insureds could simply sue their insurers for breach of that duty, then potentially obtain a settlement or judgment within the primary

insurance layer and suffer no cognizable damages. See LensCrafters, Inc. v. Liberty Mut. Fire Ins. Co., No. C 07-2853 SBA, 2008 WL 410243, at *4 (N.D. Cal. Feb. 12, 2008).

Sometimes, as Plaintiffs note, an insured can bring a claim based on an insurer's refusal to settle before an excess judgment has been entered, but only when the insured has suffered damages beyond exposure to a risk of liability in excess of policy limits (e.g., damage to business reputation). See Opp'n at 10-14. However, Plaintiffs' pleadings and arguments in favor of the Court's granting them this exception are conclusory and therefore insufficient to survive Defendants' motion to dismiss. Iqbal, 556 U.S. at 678; see also Swinerton Builders, 2013 WL 1122022, at *2 (N.D. Cal. Mar. 15, 2013) (finding same). No judgment has been entered in the underlying case. Accordingly, Plaintiffs' claims based on Defendants' alleged breaches of the duty to settle are all DISMISSED as unripe.

Defendants also argue that all of Plaintiffs' claims based on alleged overpayment of their deductible are unripe, because the CGL Policy explicitly states that American Home's obligation to indemnify Plaintiffs for damages only applies in excess of the CGL Policy Schedule's stated deductible amounts. Mot. at 10-11; CGL Policy at 36-37. According to Defendants, deductible amounts cannot be calculated until the duty to indemnify attaches, i.e., after the case resolves and covered damages are determined -- a matter distinct from the duty to defend. Mot. at 11. Therefore, Defendants conclude that Plaintiffs' deductible-based claims are unripe, just as their claims for breach of the duty to settle are. Id. However, as this Court found in the parties' parallel case,

the parties' dispute over deductibles does not concern Defendants' duty to indemnify Plaintiffs for an undetermined amount: Plaintiffs have alleged that they have satisfied their $100,000 deductible and are due reimbursement of the excess payments. See Compl. ¶ 53(f); Swinerton Builders, 2013 WL 1122022, at *3. Therefore Plaintiffs' claims based on the deductible dispute are ripe. The next issue is accordingly whether an arbitration agreement governs the parties' dispute over deductibles.

B. Arbitration

The Policies themselves have no arbitration clause. Underlying the parties' dispute over whether arbitration is required in this case is a Letter of Understanding that Plaintiffs and National entered on August 2009, to outline the process Plaintiffs and National would follow to resolve outstanding insurance-related disputes "associated with the 3/31/00 - 3/31/05 Rolling Contractor Controlled Insurance Program (Swinerton Wrap Up)." ECF No. 32 ("Derewitz Decl. ISO Mot.") Ex. B ("LOU"). The parties do not explain what exactly the Swinerton Wrap Up is. The LOU also contains an agreement between the parties to arbitrate "any dispute between the Parties with reference to the interpretation, application, formation, enforcement or validity of this memorandum, or their right with respect to any transaction involved, whether such dispute arose before or after the termination of this memorandum." LOU at 1.

Plaintiffs deny that the LOU covers their dispute over the deductible. They ask the Court to admit and consider extrinsic evidence of a Payment Agreement and the supplemental and original declarations of John Capener, which Plaintiffs contend will clarify

that the LOU is irrelevant in this case. See Opp'n at 14-18; ECF No. 39-1 ("Fanning Decl.") Exs. 1 ("Suppl. Capener Decl. & Payment Agreement), 2 ("Capener Decl."). The Payment Agreement is an unexecuted contract from March 2000 between the parties that contains an arbitration clause governing deductibles, which Plaintiffs state would have covered the present dispute if it had been signed. Opp'n at 16-17; Suppl. Capener Decl. at 2. Both Capener Declarations state that Mr. Capener, Swinerton Incorporated's Senior Vice President and Director of Risk Services, refused to sign agreements like the Payment Agreement, which governed deductibles to be charged to Plaintiffs. Suppl. Capener Decl. at 2; Capener Decl. at 2-3. Plaintiffs also argue that the LOU identifies five specific transactions, which do not include deductible disputes. Capener Decl. ¶¶ 6-7.

In response to all of these arguments, Defendants offer the declaration of Stephen Lidz, who in the summer of 2009 was the Senior Vice President of the Construction Risk Management division responsible for Plaintiffs' primary insurance programs, including the Swinerton Wrap Up program. ECF No. 35 Ex. A. ("Lidz Decl.") ¶ 1. Mr. Lidz states that the LOU was meant to apply broadly to Plaintiffs' "obligation to reimburse and fund future paid losses within the program deductible." Id. ¶ 8. Defendants conclude that the FAA's presumption in favor of arbitration, Mr. Lidz's interpretation of the LOU, and the disputed admissibility of Plaintiffs' evidence count in favor of arbitration here. Reply at 8-12.

The Court finds no reason to depart from the rulings on this issue in the Essex Action. There, this Court found that the LOU

explicitly provides for the arbitration of the question of arbitrability -- a threshold dispute here. Swinerton Builders, 2013 WL 2237885, at *4-6. Nothing has changed since then. Plaintiffs' disputed evidence is not persuasive, and the LOU's language sends to the arbitrators the questions of both the LOU's coverage and the parties' dispute over arbitration.

Apart from their above arguments on the LOU's scope and interpretation, Plaintiffs retain their arguments that bad faith claims are not arbitrable. Opp'n at 23-24. Plaintiffs cite several cases in support of this argument, but these cases are inapposite because they were either limited to their facts or simply not supportive of Plaintiffs' arguments. Opp'n at 23-24. No other arguments remain.

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V. CONCLUSION

As explained above, Plaintiffs Swinerton Builders and Swinerton Incorporated's claims premised on Defendants American Home Assurance Co. and National Union Fire Insurance Co.'s alleged breach of the duty to settle are DISMISSED. The Court GRANTS Defendant's motion to stay this action pending the completion of arbitration, and COMPELS the parties to proceed with arbitration in accordance with the Letter of Understanding. This case is STAYED pending the outcome of that arbitration.

The Court DENIES Plaintiffs' request to amend their complaint, because Plaintiffs do not specify what new facts they could allege to cure the defects that warranted dismissal. See Opp'n at 24-25.

IT IS SO ORDERED.

Dated: July 23, 2013

UNITED STATES DISTRICT JUDGE