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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA.,

Plaintiff,

v.

NVIDIA CORPORATION,

Defendant.

No. C 09-02046 CW

ORDER DENYING
NATIONAL UNION'S
MOTION FOR SUMMARY
JUDGMENT

This declaratory judgment action involves a dispute over whether NVIDIA Corporation has breached various clauses of the insurance policies it maintains with National Union Fire Insurance Company of Pittsburgh, PA (National Union). National Union has filed a motion for partial summary judgment as to NVIDIA's duty to cooperate. NVIDIA opposes the motion. Having considered oral argument and all of the papers submitted by the parties, the Court denies National Union's motion for summary judgment.

BACKGROUND

NVIDIA sells graphics processing units (GPUs) and media communication processors (MPCs). Computer manufacturers incorporate GPUs and MPCs into their final product. In recent years, many computer manufacturers and individual computer owners have complained to NVIDIA that their GPUs and MPCs were not working

1 properly. Between September 12, 2008 and November 18, 2008, eight
2 class action lawsuits were filed against NVIDIA about these
3 products. On February 25, 2009, United States District Court Judge
4 James Ware consolidated the cases in this district under the
5 caption The NVIDIA GPU Litigation, Case No. 08-04312, and a
6 consolidated amended complaint was filed on May 6, 2009
7 (Consolidated Class Action). National Union is providing legal
8 representation for NVIDIA in the Consolidated Class Action. The
9 Consolidated Class Action purports to bring claims on behalf of all
10 retail purchasers of computers equipped with a defective NVIDIA GPU
11 or MCP. In that case, the plaintiffs allege that NVIDIA knowingly
12 sold defective GPU and MCP chips which, after installation in
13 notebook computers, caused the graphics to malfunction.

14 The current case concerns a related issue. As a result of the
15 malfunctions in GPUs and MCPs, the companies for whom NVIDIA
16 designed and sold the GPUs and MCPs also began to receive
17 complaints from end users of notebook computers and requests to
18 repair the problem. The parties refer to these companies as Chip
19 Claimants. On at least seven occasions, NVIDIA tendered to
20 National Union notices of claims made by Chip Claimants against
21 NVIDIA. The claims sought defense, indemnity, compensation for
22 repairs and extended warranties, and damages. NVIDIA also
23 requested that National Union waive conditions in the insurance
24 policies that prevent any insured from voluntarily assuming any
25 obligation or making any payment without National Union's consent.
26 This aspect of the policy is called a consent condition. National
27 Union did not agree to waive the consent conditions with respect to
28 some of the claims.

1 National Union has requested detailed information about the
2 nature, extent, timing and causes of the claims tendered by NVIDIA.
3 Specifically, National Union has requested:

- 4 1. Records, including primary source data, showing the dates
5 of repair and/or replacement for each affected notebook;
- 6 2. Records, including primary source data, showing the dates
7 of failure of each affected notebook;
- 8 3. Records, including primary source data, showing the
9 itemized cost of any repair and/or replacement for any
10 notebook;
- 11 4. Records, including primary source data, showing what
12 components were replaced, when, how and why;
- 13 5. Records, including primary source data, identifying and
14 describing damage, if any, to computer components other
15 than to the NVIDIA chip(s), including the nature and
16 extent of the injury; and
- 17 6. NVIDIA'S estimated settlement proposal for each Chip
18 Claimant, the basis for such estimate, and all documents
19 supporting the estimate. With respect to already
20 executed settlements, the basis for the settlement amount
21 and a copy of all information possessed by NVIDIA at the
22 time of executing such settlements.

23 Motion at 10. NVIDIA has supplied summary and secondary source
24 data in response to the requests, but not primary source data. At
25 this juncture, National Union has not consented to any settlements
26 nor has it been permitted to participate in any settlement
27 negotiations between NVIDIA and the Chip Claimants. To date,
28 NVIDIA has not sought indemnification from National Union with
respect to settlements that NVIDIA has unilaterally negotiated with
some of the Chip Claimants. However, in an August 28, 2009 letter
to National Union, NVIDIA stated that "to the extent that there are
available limits under the National Union Policies after the
resolution of the pending NVIDIA GPU Litigation, C 08-4312, NVIDIA
currently does intend to pursue indemnification for the ODM and OEM

1 claims." Scalise Decl., Exh. 7.

2 In the present lawsuit, National Union seeks a declaration
3 concerning its coverage obligations, if any, owed to NVIDIA with
4 respect to claims arising from its product malfunctions. National
5 Union asserts that it does not have a legal obligation to pay
6 damages because the harm NVIDIA incurred does not constitute
7 "property damage" as defined in the insurance policies described
8 below. National Union also alleges that NVIDIA breached the
9 "voluntary payments" and "cooperation" provisions of the insurance
10 policies.

11 There are two relevant insurance policies at issue between the
12 parties: Commercial General Liability Policy No. 721-8839 (CGL
13 Policy) and Commercial Umbrella Liability Policy No. 9835530
14 (Umbrella Policy). The CGL Policy is subject to a limit of \$1
15 million and the Umbrella Policy is subject to a limit of \$25
16 million. The CGL Policy provides, in pertinent part,

17 We will pay those sums that the insured becomes legally
18 obligated to pay as damages because of "bodily injury" or
19 "property damage" to which this insurance applies. . . . We
may, at our discretion, investigate any "occurrence" and
settle any claim or "suit" that may result.

20 Compl., Exh. 1 at 7. The CGL Policy and the Umbrella policy also
21 list the insured's "duties in the event of an occurrence, offense,
22 claim, or suit:"

23 (c) You and any other involved insured must:
24 (1) Immediately send us copies of any demands, notices,
summonses or legal papers received in connection with the
25 claim or "suit";
26 (2) Authorize us to obtain records and other information;
(3) Cooperate with us in the investigation or settlement
27 of the claim or defense against the "suit"; and
28 (4) Assist us, upon our request, in the enforcement of
any right against any person or organization which may be
liable to the insured because of injury or damage to
which this insurance may also apply.

1 (d) No insured will, except at that insured's own cost,
2 voluntarily make a payment, assume any obligation, or
3 incur any expense, other than first aid, without our
4 consent.

5 Id. at 15, Exh. 2 at 17 (emphasis added).

6 The present motion concerns only the "cooperation" provision
7 of the policies. National Union argues that NVIDIA's refusal to
8 grant National Union access to the settlement process with Chip
9 Claimants as well as myriad documents related to the settlements
10 has violated NVIDIA's duty to cooperate.

11 LEGAL STANDARD

12 Summary judgment is properly granted when no genuine and
13 disputed issues of material fact remain, and when, viewing the
14 evidence most favorably to the non-moving party, the movant is
15 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
16 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
17 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
18 1987).

19 The moving party bears the burden of showing that there is no
20 material factual dispute. Therefore, the court must regard as true
21 the opposing party's evidence, if supported by affidavits or other
22 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815
23 F.2d at 1289. The court must draw all reasonable inferences in
24 favor of the party against whom summary judgment is sought.

25 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
26 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
27 1551, 1558 (9th Cir. 1991).

28 Material facts which would preclude entry of summary judgment
are those which, under applicable substantive law, may affect the

1 outcome of the case. The substantive law will identify which facts
2 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
3 (1986).

4 DISCUSSION

5 A condition of an insurance policy requiring the cooperation
6 and assistance of the insured in opposing a claim is an important
7 aspect of a policy. Truck Ins. Exch. v. Uniqard Ins. Co., 79 Cal.
8 App. 4th 966, 976 (2000). Without cooperation and assistance, the
9 insurer may be severely handicapped and unable to advance a
10 defense. Valladao v. Fireman's Fund Ind. Co., 13 Cal. 2d 322, 328-
11 39 (1939). These provisions "enable the [insurer] to possess
12 itself of all knowledge, and all information as to other sources
13 and means of knowledge, in regard to facts, material to [its]
14 rights, to enable [it] to decide upon [its] obligations, and to
15 protect [itself] against false claims." Truck Ins. Exch., 79 Cal.
16 App. 4th at 976 (internal quotation marks and citation omitted).

17 The parties do not dispute that NVIDIA has a duty to cooperate
18 under the insurance policy and that NVIDIA has cooperated to an
19 extent. Rather, National Union is not satisfied with the extent of
20 NVIDIA's cooperation and it asks the Court to enforce the duty to
21 cooperate to require NVIDIA to turn over the requested documents
22 and allow it to participate in settlement discussions.

23 The underlying cases involve numerous products liability
24 claims arising out of allegedly defective NVIDIA chips. These
25 allegedly defective chips are used in each of the Chip Claimants'
26 notebook computers. The Chip Claimants have sought reimbursement
27 from NVIDIA for all repair and replacement costs of the chips and
28 defense and indemnification from third-party claims. National

1 Union wants to analyze the repair and replacement records to
2 authenticate the Chip Claimants' claims and demands, and it wants
3 information verifying the failures of the chips and confirming the
4 type of damage caused by the failure of the defective chips.
5 National Union also seeks the information upon which NVIDIA relied
6 to execute its settlements with Chip Claimants.

7 Instead of providing this information, NVIDIA has compiled
8 summaries of the Chip Claimants' claims, which include information
9 such as the chip at issue and the date and the amount of the
10 demand. NVIDIA has not provided National Union with primary source
11 data, such as the actual complaint forms from notebook computer
12 users, from which National Union can authenticate the failures and
13 repairs of the allegedly defective NVIDIA chips. NVIDIA claims
14 that it does not have this type of primary source information
15 within its possession and that it would be too disruptive to its
16 relationships with Chip Claimants and their customers to obtain
17 this information from them.

18 Further, NVIDIA argues that it need not comply with the duty
19 to cooperate because National Union "has essentially denied
20 coverage" for the Chip Claims. Opposition at 9. However, National
21 Union has not denied coverage for the Chip Claims. National Union
22 has reserved its rights with respect to this coverage. In its
23 reservation of rights letter, National Union stated, "[W]e have
24 received only limited information regarding the nature and extent
25 of the NVIDIA Chip Claims to date, and thus, we currently have
26 insufficient information about the claims to provide you with a
27 final coverage position under the National Union Policies." Fallo
28 Decl., Exh. B at 2.

