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United States District Court
For the Northern District of California

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

SEAGATE TECHNOLOGY LLC, SEAGATE
TECHNOLOGY INTERNATIONAL and SEAGATE
SINGAPORE INTERNATIONAL HEADQUARTERS
PTE LTD,

Plaintiffs,

v.

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA and INSURANCE
COMPANY OF THE STATE OF PENNSYLVANIA,

Defendants.

No. 09-04120 CW

ORDER DENYING
DEFENDANTS'
MOTION TO COMPEL
ARBITRATION AND
GRANTING
PLAINTIFFS'
MOTION FOR
PARTIAL SUMMARY
JUDGMENT

_____ /

This case presents a dispute about the duty to defend and the proper forum to address related unpaid attorneys' fees. Defendants National Union Fire Insurance Company of Pittsburgh, PA (National Union) and Insurance Company of the State of Pennsylvania (ISOP) move to compel arbitration and stay the case. Plaintiffs Seagate Technology, Seagate Technology International and Seagate Singapore International Headquarters (Seagate) oppose the motion and separately move for partial summary judgment that Defendant ISOP breached its duty to defend. ISOP opposes that motion. Having considered all of the papers filed by the parties, the Court denies Defendants' motion to compel and grants Plaintiffs' motion for

1 partial summary judgment.

2 BACKGROUND

3 National Union and ISOP issued foreign and domestic commercial
4 general liability policies to Seagate for two consecutive policy
5 periods beginning on September 30, 2006 and ending on September 30,
6 2008. These policies covered damages because of "personal and
7 advertising injury," which includes claims of "oral or written
8 publication in any manner, of material that slanders or libels a
9 person or organization or disparages a person or organization's
10 goods, products or services." Weinreich Decl., Exh. B, C. The
11 policies imposed a duty on National Union and ISOP to defend suits
12 for such personal and advertising injury until the policies' limits
13 of liability were exhausted by indemnity payments.

14 Over the past several years, Seagate initiated multiple
15 actions against several eSys entities alleging various claims. The
16 contracts on which Seagate sued contained various dispute
17 resolution and forum selection provisions requiring Seagate to
18 pursue its claims in multiple venues. As a result, Seagate filed
19 one lawsuit in the Santa Cruz County Superior Court, two lawsuits
20 in Singapore and three arbitration actions. eSys filed
21 counterclaims against Seagate in the each of the underlying
22 actions. The counterclaims included the allegation that Seagate
23 defamed eSys.

24 Seagate tendered the eSys counterclaims in the underlying
25 Singapore and Santa Cruz actions to National Union and ISOP, and it
26 tendered the counterclaim in the underlying arbitration claims to
27 ISOP only. National Union and ISOP agreed to defend Seagate, under

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1 reservation of rights, against the eSys counterclaims. In their
2 letters expressing their reservation of rights, National Union and
3 ISOP noted that Seagate had retained its own counsel to defend
4 these matters and that they would compensate such independent
5 counsel at an hourly rate comparable to the hourly rate that they
6 compensate counsel of their own selection in similar matters.
7 Weinreich Decl., Exhs. B, C.

8 The underlying Singapore, Santa Cruz, and arbitration claims
9 settled without payment by Seagate of any amounts that would be
10 subject to indemnity under Defendants' policies. Thus, this case
11 is not a dispute about indemnity. Rather, the dispute is about
12 attorneys' fees and costs related to the defense of Seagate in the
13 underlying cases.

14 In June, 2008, Seagate began submitting defense attorneys'
15 invoices to National Union and ISOP. From December, 2008 until the
16 conclusion of the last case in June, 2009, Seagate's defense
17 counsel sent National Union and ISOP regular reports on their
18 activities and the status of the litigation. Coll-Very Decl.
19 ¶¶ 12-14. These included quarterly status reports; biweekly
20 minutes of meetings among Seagate and the various attorneys
21 defending the underlying actions; pleadings; and descriptions
22 of various events in the actions, such as depositions, witness
23 interviews and hearings. Id.

24 Seagate has submitted defense invoices to National Union and
25 ISOP in the following amounts (1) arbitration actions --
26 \$11,218,749.28, (2) Santa Cruz action -- \$2,336,670.64 and
27 (3) Singapore action -- \$2,253,433.48. National Union and ISOP

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1 have paid nothing in connection with the Santa Cruz action and ISOP
2 has paid nothing in connection with the arbitration. Defendants
3 have paid \$130,579.40 for the Singapore actions. On September 4,
4 2009, Seagate filed suit against National Union and ISOP alleging
5 two causes of action: (1) breach of contract as to the duty to
6 defend and (2) tortious breach of the implied covenant of good
7 faith.

8 DISCUSSION

9 I. California Civil Code Section 2860 and the Duty to Defend

10 Defendants argue that California Civil Code section 2860
11 mandates arbitration of the instant lawsuit. That section
12 provides, in relevant part, "If the provisions of a policy of
13 insurance impose a duty to defend upon an insurer and a conflict of
14 interest arises which creates a duty on the part of the insurer to
15 provide independent counsel to the insured, the insurer shall
16 provide independent counsel to represent the insured . . ." Cal.
17 Civ. Code § 2860(a). Unless otherwise provided for in an agreement
18 between the parties, "[a]ny dispute concerning attorney's fees
19 . . . shall be resolved by final and binding arbitration by a
20 single neutral arbitrator selected by the parties to the dispute."
21 Id. § 2860(c).

22 Plaintiffs argue that Defendants may not rely on section 2860
23 to compel arbitration because Defendants breached their duty to
24 defend. Plaintiffs move for partial summary judgment against ISOP
25 on this issue.

26 Summary judgment is properly granted when no genuine and
27 disputed issues of material fact remain, and when, viewing the

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1 evidence most favorably to the non-moving party, the movant is
2 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
3 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
4 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
5 1987).

6 The moving party bears the burden of showing that there is no
7 material factual dispute. Therefore, the court must regard as true
8 the opposing party's evidence, if it is supported by affidavits or
9 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,
10 815 F.2d at 1289. The court must draw all reasonable inferences in
11 favor of the party against whom summary judgment is sought.
12 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
13 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
14 1551, 1558 (9th Cir. 1991).

15 Material facts which would preclude entry of summary judgment
16 are those which, under applicable substantive law, may affect the
17 outcome of the case. The substantive law will identify which facts
18 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
19 (1986).

20 In the present case, ISOP does not dispute that it had a duty
21 to defend Seagate in the underlying Singapore, Santa Cruz and
22 arbitration actions. The issue is whether ISOP breached its duty
23 to defend by paying only a small portion of the bills incurred by
24 Seagate in the underlying Singapore action and not paying any
25 portion of the bills incurred by Seagate in the Santa Cruz and
26 arbitration matters.

27 Thus, the dispute is not over whether ISOP owes Seagate money,
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1 but how much money it owes. ISOP asserts that it has withheld
2 payment because it has not received sufficient information to pay
3 the bills in the underlying actions. ISOP contends that the amount
4 of recoverable fees and costs must be adjudicated before Seagate
5 can succeed on its claim for a breach of the duty to defend.

6 ISOP relies on Dynamic Concepts, Inc. v. Truck Insurance
7 Exchange, 61 Cal. App. 4th 999, 1010-11 (1998), for the proposition
8 that it is allowed a reasonable time period to review Seagate's
9 bills before being required to pay them. Dynamic does not stand
10 for this proposition. In Dynamic the court held that an insurer
11 may appoint its own defense counsel while evaluating whether
12 independent counsel is required under section 2860, so long as it
13 completes that evaluation within a reasonable amount of time. Id.
14 The court did not speak to the amount of time an insurer can wait
15 before paying defense counsel's bills after an independent counsel
16 is selected.

17 When an insurer has a duty to defend, it must "mount and fund
18 a defense." Buss v. Superior Court, 16 Cal. 4th 35, 58 (1997).
19 "To defend meaningfully, it must defend immediately. To defend
20 immediately, it must defend entirely. It cannot parse the claims,
21 dividing those are at least potentially covered from those that are
22 not. To do so would be time consuming. It might also be futile."
23 Id. at 59. In a "mixed" action, in which some of the claims are at
24 least potentially covered and the others are not, the insurer has a
25 "duty to defend the entire 'mixed' action prophylactically, as an
26 obligation imposed by law." Id. at 48. Accepting only a share of
27 the defense burden is equivalent to breach of the duty to defend.

1 Haskel v. Superior Court, 33 Cal. App. 4th 963, 976 n.9 (1995)
2 (“[W]e will treat Hartford’s acceptance of a 13 percent share of
3 the defense burden as the equivalent of a defense denial. Such a
4 unilateral limitation of its responsibility is not justified. If
5 it owes any defense burden it must be fully borne with allocations
6 of that burden among other responsible parties to be determined
7 later.”) (internal citation omitted).

8 After the insurer has defended the action entirely, it may
9 seek reimbursement for defense costs that are not potentially
10 covered by the policy. Id. at 52. “Without a right of
11 reimbursement, an insurer might be tempted to refuse to defend an
12 action in part -- especially an action with many claims that are
13 not even potentially covered and only a few that are -- lest the
14 insurer give, and the insured get, more than they agreed.” Id. at
15 52. The court in Buss also noted that its holding does not “change
16 the insurer’s duty to defend the entire ‘mixed’ action into an
17 obligation merely to pay defense costs only as to the claims that
18 are at least potentially covered.” Id. at 59 n.23 (emphasis in
19 original).

20 Because ISOP has failed timely to pay Seagate any defense
21 costs related to the Santa Cruz and arbitration actions, and only a
22 small portion of the Singapore actions, ISOP breached its duty to
23 defend these claims. Once it has paid, ISOP can seek reimbursement
24 for all unreasonably incurred fees and for fees associated with
25 uncovered claims.

26 The next question is whether this breach extinguishes ISOP and
27 National Union’s right to compel arbitration under section 2860.

1 The Court concludes that it does. "To take advantage of the
2 provisions of § 2860, an insurer must meet its duty to defend and
3 accept tender of the insured's defense, subject to a reservation of
4 rights." Concept Enterprises v. Hartford Insurance Company of the
5 Midwest, 2001 WL 34050685, *3 (C.D. Cal.); see California v.
6 Pacific Indem. Co., 63 Cal. App. 4th 1535, 1544 (1998) (noting the
7 trial court's unchallenged finding "that [the insurer] had
8 materially breached its duty to defend, and therefore had forfeited
9 its right to participate in or control the . . . defense, whether
10 based on Civil Code section 2860 or otherwise). In Concept
11 Enterprises, the court refused to compel arbitration or calculate
12 fees under section 2860 because the insurer breached its duty to
13 defend by paying some, but not all, of the defense costs owed.
14 Id. at *3-4. The court concluded that the insurer had "failed to
15 satisfy the factual predicate of § 2680," barring it from
16 "belatedly invok[ing] that section's arbitration and rate
17 provisions." Id., at *3. Here, the Court finds that ISOP failed
18 to satisfy this factual predicate by breaching its duties to defend
19 Seagate in the arbitration, Santa Cruz and Singapore actions.
20 Accordingly, ISOP cannot avail itself of the arbitration provision
21 set forth in section 2860.¹ Although Seagate did not move for
22 partial summary judgment against National Union on the issue of
23 breach of the duty to defend, the Court concludes that arbitration
24 under 2860 is similarly unavailable for the claims against it

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26 ¹The Court need not determine whether Defendants waived their
27 right to assert section 2860 by failing to include that defense in
28 their answer.

1 because National Union has failed to pay Seagate any defense costs
2 related to the Santa Cruz action and has paid only a small portion
3 of the costs related to the Singapore action.

4 CONCLUSION

5 For the foregoing reasons, the Court denies National Union and
6 ISOP's motion to compel arbitration and grants Seagate's motion for
7 partial summary judgment.

8 IT IS SO ORDERED.

9 Dated: 07/21/10

Claudia Wilken

CLAUDIA WILKEN
United States District Judge

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