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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GOTHAM INSURANCE COMPANY,

Plaintiff,

No. C 13-3810 PJH

v.

**ORDER DENYING MOTION TO
STRIKE, DENYING MOTION TO
DISMISS**

SHASTA TECHNOLOGIES, LLC, et al.,

Defendants.

United States District Court
For the Northern District of California

BACKGROUND

Plaintiff's motion to dismiss and/or strike defendant's counterclaims came on for hearing before this court on January 22, 2014. Plaintiff Gotham Insurance Company ("plaintiff" or "Gotham") appeared through its counsel, Michael Schack. Defendant Shasta Technologies, LLC ("defendant" or "Shasta") appeared through its counsel, Nicole Hess and Randy Hess. Having read the papers filed in conjunction with the motion and carefully considered the arguments and the relevant legal authority, and good cause appearing, the court hereby DENIES plaintiff's motion as follows.

This case arises out of a dispute over insurance coverage. Plaintiff Gotham originally filed this suit against its insured (defendant Shasta), seeking a declaratory judgment regarding the scope of its coverage obligations. The coverage dispute relates to a patent infringement suit (which is not before this court) brought against Shasta and three other companies (Instacare Corp.¹ ("Instacare"), Pharmatech Solutions, Inc. ("Pharmatech"), and Conductive Technologies, Inc. ("CTI")). The facts of that patent

¹According to Gotham's motion, Instacare is now known as "Decision Diagnostics," but the parties' papers refer to it as "Instacare," so this order will do the same.

1 infringement case are as follows: Lifescan, Inc. (a company which makes glucose
2 monitoring systems for use by people with diabetes) filed suit against Shasta, Instacare,
3 Pharmatech, and CTI in this district. Shasta has an insurance policy with Gotham, under
4 which Gotham is obligated to reimburse Shasta up to \$2 million in legal expenses for
5 defense against intellectual property claims. At some point, Pharmatech and Instacare
6 were added to Shasta's policy (but notably, CTI was not added to the policy). However,
7 after Pharmatech and Instacare were added to the policy, a dispute developed between
8 Shasta and Pharmatech/Instacare as to whether Pharmatech/Instacare would be entitled to
9 their own separate counsel, which would be paid from the policy. Shasta and
10 Pharmatech/Instacare submitted conflicting insurance claims to Gotham, so Gotham filed
11 an interpleader suit against all three, seeking an order requiring the parties to litigate their
12 claims regarding the insurance proceeds, and seeking a declaratory judgment as to how
13 much money was owed to each of the three insureds. That interpleader suit (referred to as
14 "Gotham I") was settled on September 6, 2012, and while the parties do not clearly explain
15 the terms of the settlement, it does appear that Pharmatech/Instacare were permitted to
16 proceed with their own separate legal counsel, with their expenses paid by Gotham.

17 After the Gotham I settlement, there arose a new dispute between Gotham and
18 Shasta (which is the subject of the present suit). In the Lifescan case, Shasta's counsel is
19 also representing CTI. Because CTI is not insured under the Gotham policy, Gotham has
20 taken the position that it is not obligated to reimburse CTI's defense costs, and thus,
21 whenever Shasta submits invoices for reimbursement, Gotham has paid only 50% of the
22 invoices (on the theory that 50% of the costs are attributable to insured Shasta, while the
23 other 50% are attributable to non-insured CTI). Shasta disputed this 50% reduction, which
24 led to this lawsuit.

25 On August 16, 2013, Gotham filed this action, naming Shasta, Pharmatech, and
26 Instacare as defendants. The complaint asserts two causes of action: (1) an interpleader
27 claim, seeking an order requiring the parties to interplead and litigate their claims regarding
28 the insurance proceeds, and (2) a claim for declaratory relief, seeking an order regarding

1 the proceeds owed by Gotham under the policy. Shasta filed an answer on October 14,
2 2013, but also included two counterclaims: (1) breach of contract, and (2) breach of the
3 implied covenant of good faith and fair dealing. Pharmatech and Instacare filed their own
4 separate answer on October 16, 2013, and did not assert counterclaims.

5 On November 4, 2013, Gotham filed the present motion to dismiss/strike Shasta's
6 counterclaims. Gotham argues first that Shasta's counterclaims should be struck under
7 California's anti-SLAPP statute (arguing that Shasta accuses Gotham of having breached
8 the contract by filing this interpleader suit, and thus is attempting to interfere with Gotham's
9 protected activity), and separately argues that Shasta's counterclaims fail to state a claim.

10 **DISCUSSION**

11 A. Legal Standards

12 1. Motion to strike under anti-SLAPP

13 The anti-SLAPP statute prohibits the filing of legal actions based on the defendant's
14 lawful pursuit of a right to petition, or a right to free speech, where such speech or
15 petitioning activity is in connection with a public issue. It may be applied in federal court in
16 diversity actions and to actions with pendent state law claims. Globetrotter Software, Inc.
17 v. Elan Computer Group, Inc., 63 F.Supp. 2d 1127, 1130 (N.D. Cal. 1999).

18 The anti-SLAPP statute authorizes a special motion to strike certain pleadings in a
19 cause of action based on any act of the defendant in furtherance of his or her right of
20 petition or free speech, under the federal or state constitutions, in connection with a public
21 issue, as defined by the statute. Cal. Code. Civ. P. § 425.16. Once the defendant has
22 made out a prima facie case, the burden shifts to the plaintiff to demonstrate a probability
23 of prevailing on the challenged claims for those claims to survive dismissal. Id. To meet
24 this burden, the plaintiff must demonstrate that the complaint is legally sufficient and
25 supported by a prima facie showing of facts to sustain a favorable judgment if the evidence
26 submitted by the plaintiff is credited. Wilcox v. Superior Court, 27 Cal. App. 4th 809, 823-
27 25 (1994).

28 The anti-SLAPP statute authorizes a motion to strike meritless lawsuits filed to chill

1 the defendant's exercise of First Amendment rights. Subdivision (b)(1) of the statute
2 provides:

3 A cause of action against a person arising from any act of that person in
4 furtherance of the person's right of petition or free speech under the United
5 States or California Constitution in connection with a public issue shall be
6 subject to a special motion to strike, unless the court determines that the
7 plaintiff has established that there is a probability that the plaintiff will prevail
8 on the claim.

9 Cal. Civ. P. Code § 425.16(b)(1).

10 The statute requires the court to engage in a two-step process in ruling on an anti-
11 SLAPP motion. "First, the court decides whether the defendant has made a threshold
12 showing that the challenged cause of action is one arising from protected activity. . . . If the
13 court finds such a showing has been made, it then determines whether the plaintiff has
14 demonstrated a probability of prevailing on the claim." Equilon Enterprises v. Consumer
15 Cause, Inc., 29 Cal. 4th 53, 67 (2000); see also Vess v. Ciba-Geigy Corp. USA, 317 F.3d
16 1097, 1110 (9th Cir. 2003).

17 2. Motion to dismiss

18 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the legal
19 sufficiency of the claims alleged in the complaint. Ileto v. Glock, Inc., 349 F.3d 1191,
20 1199-1200 (9th Cir. 2003). Review is limited to the contents of the complaint. Allarcom
21 Pay Television, Ltd. v. Gen. Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). To survive
22 a motion to dismiss for failure to state a claim, a complaint generally must satisfy only the
23 minimal notice pleading requirements of Federal Rule of Civil Procedure 8, which requires
24 that a complaint include a "short and plain statement of the claim showing that the pleader
25 is entitled to relief." Fed. R. Civ. P. 8(a)(2).

26 A complaint may be dismissed under Rule 12(b)(6) for failure to state a claim if the
27 plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support
28 a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
1990). The court is to "accept all factual allegations in the complaint as true and construe
the pleadings in the light most favorable to the nonmoving party." Outdoor Media Group,

1 Inc. v. City of Beaumont, 506 F.3d 895, 899-900 (9th Cir. 2007).

2 However, legally conclusory statements, not supported by actual factual allegations,
3 need not be accepted. Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009). The allegations in
4 the complaint “must be enough to raise a right to relief above the speculative level.” Bell
5 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations and quotations omitted). A
6 claim has facial plausibility when the plaintiff pleads factual content that allows the court to
7 draw the reasonable inference that the defendant is liable for the misconduct alleged.”
8 Iqbal, 556 U.S. at 678 (citation omitted). “[W]here the well-pleaded facts do not permit the
9 court to infer more than the mere possibility of misconduct, the complaint has alleged – but
10 it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’” Id. at 679. In the event
11 dismissal is warranted, it is generally without prejudice, unless it is clear the complaint
12 cannot be saved by any amendment. See Sparling v. Daou, 411 F.3d 1006, 1013 (9th Cir.
13 2005).

14 In addition, while the court generally may not consider material outside the pleadings
15 when resolving a motion to dismiss for failure to state a claim, the court may consider
16 matters that are properly the subject of judicial notice. Lee v. City of Los Angeles, 250 F.3d
17 668, 688-89 (9th Cir. 2001); Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279,
18 1282 (9th Cir. 1986). Additionally, the court may consider exhibits attached to the
19 complaint, see Hal Roach Studios, Inc. V. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555
20 n.19 (9th Cir. 1989), as well as documents referenced extensively in the complaint and
21 documents that form the basis of a the plaintiff’s claims. See No. 84 Employer–Teamster
22 Joint Counsel Pension Trust Fund v. America West Holding Corp., 320 F.3d 920, 925 n.2
23 (9th Cir. 2003).

24 B. Legal Analysis

25 Because Gotham's motion focuses on the anti-SLAPP standard, the court will
26 address that argument first. As discussed above, the anti-SLAPP statute prohibits the filing
27 of legal actions based on the lawful pursuit of a right to petition, or a right to free speech,
28 where such speech or petitioning activity is in connection with a public issue. Courts use a

1 two-part test when determining whether the anti-SLAPP statute applies. “First, the court
2 decides whether the defendant has made a threshold showing that the challenged cause of
3 action is one arising from protected activity. . . . If the court finds such a showing has been
4 made, it then determines whether the plaintiff has demonstrated a probability of prevailing
5 on the claim.” Equilon, 29 Cal. 4th at 67.

6 Regarding the first anti-SLAPP prong, Gotham argues that Shasta's counterclaims
7 “arise out of Gotham's filing of the interpleader complaints which are communications in the
8 course of a judicial proceeding and are therefore protected activity.” Gotham primarily
9 points to paragraph 15 of Shasta's counterclaims, which allege that “Gotham has breached
10 its contract with Shasta by filing an interpleader action when the Policy clearly indicates that
11 Shasta, and only Shasta, is entitled to control the Policy.” Dkt. 11 at 13. Gotham further
12 points to paragraphs 16, 19, and 24 of the counterclaims, which similarly allege that
13 Gotham breached the contract between the parties by filing this interpleader action.

14 Shasta responds by arguing that the gravamen of its suit arises from “Gotham’s
15 unilateral and unsupported 50% reduction in payment of benefits owed to Shasta,
16 Gotham’s months-long refusal to pay Shasta’s fees and expenses incurred in an underlying
17 action, and Gotham’s total disregard of Shasta’s interests in obtaining the benefits of the
18 policy for which it paid.”

19 As an initial matter, the court finds that Gotham’s filing of this lawsuit was indeed
20 “protected activity” for purposes of the anti-SLAPP statute. The statute provides protection
21 for “any act of that person in furtherance of the person's right of petition or free speech
22 under the United States or California Constitution in connection with a public issue.” See
23 Cal. Civ. P. Code § 425.16(b)(1). The statute provides examples of such protected activity,
24 which includes “any written or oral statement or writing made before a legislative,
25 executive, or judicial proceeding” as well as “any written or oral statement or writing made
26 in connection with an issue under consideration or review by a legislative, executive, or
27 judicial body.” Cal. Civ. P. Code § 425.16(e).

28 The next question is whether Shasta’s counterclaims “arise from” Gotham’s

1 protected activity. Here, the court notes that Gotham is correct in arguing that the
2 counterclaims themselves allege that “Gotham has breached its contract with Shasta by
3 filing an interpleader action,” but at the same time, Shasta is correct in arguing that the
4 counterclaims also allege that Gotham breached the insurance contract by, among other
5 things, refusing to reimburse Shasta for all of its litigation expenses. Courts have
6 developed a test to analyze suits such as this, where a party’s claims reference both
7 protected and unprotected activity. See Scott v. Metabolife Int’l, Inc., 115 Cal. App. 4th
8 404, 414 (2004). The Scott court held as follows:

9 [W]hen allegations of nonprotected activity are incidental or collateral to a
10 plaintiff’s claim challenging primarily the exercise of the rights of free speech
11 or petition, they may be disregarded in determining whether the cause of
12 action arises from protected activity. Conversely, if the allegations of
protected activity are only incidental to a cause of action based essentially on
nonprotected activity, the mere mention of the protected activity does not
subject the cause of action to an anti-SLAPP motion.

13 Id.

14 Here, the court finds that the allegations regarding protected activity are only
15 incidental to Shasta’s counterclaims, which are based essentially on unprotected activity.
16 While Shasta does allege that “Gotham has breached its contract with Shasta by filing an
17 interpleader action,” it also alleges that “Gotham breached the contract of insurance by
18 allocating reimbursement of litigation expenses based on the Named Insured’s counsel’s
19 concurrent representation of an uninsured entity.” Dkt. 11, ¶ 14. Shasta’s breach of
20 contract counterclaim then presents a longer list of alleged breaches, only a small portion
21 of which relate to the filing of this suit. Specifically, Shasta alleges that “Gotham breached
22 the policy by, among other things, refusing and failing to fully reimburse Shasta for litigation
23 expenses incurred in the underlying action,” “failing adequately to investigate or evaluate
24 Shasta’s claims for benefits under the policy, refusing and failing to timely reconsider and
25 reverse its erroneous reductions of benefits owed to Shasta under the policy, failing to
26 explain and/or misrepresenting policy provisions to Shasta, failing to consider facts and
27 evidence supporting coverage, [and] succumbing to threats made by additional insureds
28 instead of adhering to policy provisions clearly articulating the duties owed to” Shasta. Id.,

1 ¶ 18. Shasta then includes a bullet-pointed list of 19 other acts/omissions that constitute
2 breaches of the insurance contract, only three (or at most, four) of which relate to the filing
3 of the interpleader action. Id., ¶ 19.

4 While Gotham is correct in noting that Shasta’s counterclaims do reference
5 Gotham’s filing of its complaint, the California Supreme Court has held that “the trial court
6 must focus on the substance of the lawsuit to determine whether it arose from [a party’s]
7 protected activities.” See Scott, 115 Cal. App. 4th at 413-14 (citing City of Cotati v.
8 Cashman, 29 Cal.4th 69, 76-77 (2002)). Scott went on to hold that “it is the principal thrust
9 or gravamen of the [] cause of action that determines whether the anti-SLAPP statute
10 applies.” Scott, 115 Cal. App. 4th at 414. As applied to this case, the court finds that the
11 50% reduction in expense reimbursement is the thrust of Shasta’s counterclaims, just as it
12 is the thrust of Gotham’s initial suit. In essence, Shasta’s counterclaims are the mirror
13 image of Gotham’s second cause of action for declaratory relief. Gotham seeks a
14 declaratory judgment regarding its obligations under the insurance contract, and in its
15 counterclaims, Shasta seeks a ruling that Gotham breached the contract by interpreting its
16 obligations as requiring only a 50% payment of expenses. Accordingly, because Gotham
17 has not shown that Shasta’s counterclaims arise primarily out of protected activity, the
18 court finds that the first anti-SLAPP prong has not been met, and thus, Gotham’s motion
19 must be DENIED. However, the court will address the second anti-SLAPP prong in the
20 alternative.

21 If Gotham had met the first anti-SLAPP prong, the court would then consider
22 whether Shasta has demonstrated a probability of prevailing on its counterclaims. Gotham
23 argues that the Policy must be interpreted under New York law, and argues that Shasta’s
24 counterclaims are not viable under New York law. Gotham only briefly addresses the
25 possibility that California law is applicable, arguing that the result would be the same under
26 California law because “an interpleader is justified by an insurer’s good faith belief that it
27 faces the possibility of multiple claims.” However, as discussed above, Shasta’s
28 counterclaims are not based solely or primarily on Gotham’s filing of this interpleader

1 action. Instead, the counterclaims' allegations pertain mostly to Gotham's performance
2 under the insurance contract. And to the extent that Shasta's counterclaims are based on
3 this unprotected activity, the court finds that Shasta has demonstrated that the complaint is
4 legally sufficient and supported by facts sufficient to show a favorable judgment if Shasta's
5 evidence is credited.

6 Shasta argues that the insurance contract allows allocation between covered and
7 uncovered counts, and between insured and uninsured products, but that it does not allow
8 allocation between covered and uncovered persons. Gotham responds by arguing that the
9 settlement in Gotham I resolved all issues regarding the allocation provision. However, this
10 court has not yet made any determination regarding the allocation provision, as this case is
11 still in the pleading stages. The court notes that, at this early stage of the case, Shasta is
12 not yet required to submit evidence supporting its claims – instead, it need only allege facts
13 which would, "if proved at trial, support a judgment" in its favor. Wilcox, 27 Cal. App. 4th at
14 823. And the court finds that, if Shasta is able to present evidence supporting its
15 allegations that Gotham's reduction in coverage was inconsistent with the contract's
16 allocation clause (and thus constituted a breach of contract), then Shasta would be able to
17 succeed on its breach of contract counterclaim. Shasta's second counterclaim (for breach
18 of the covenant of good faith and fair dealing) includes only one additional element, that
19 Gotham's breach was unreasonable. Because Shasta has demonstrated a probability of
20 succeeding on its counterclaims, the court finds that Gotham's motion must be DENIED.

21 Regarding Gotham's motion to dismiss under Rule 12(b)(6), Gotham relies on the
22 arguments made in support of its motion to strike. And the court finds that the motion to
23 dismiss must be DENIED for the same reasons that the motion to strike was denied.

24 The court also notes that Gotham filed evidentiary objections separate from its reply
25 brief, in violation of Civil Local Rule 7-3(c). Gotham's evidentiary objections are therefore
26 STRICKEN.

27 Finally, both parties have requested attorneys' fees and costs in connection with this
28 motion, and both requests are DENIED.

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IT IS SO ORDERED.

Dated: April 3, 2014



PHYLLIS J. HAMILTON
United States District Judge