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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

PAYODA, INC.,  
Plaintiff,  
v.  
PHOTON INFOTECH, INC.,  
Defendant.

Case No. [14-cv-04103-BLF](#)

**ORDER GRANTING DEFENDANT’S  
MOTION TO DISMISS, WITH LEAVE  
TO AMEND; DENYING  
DEFENDANT’S SPECIAL MOTION TO  
STRIKE**

[Re: ECF 11, 22]

Before the Court are two motions by defendant Photon Infotech, Inc. (“Defendant”): Defendant’s Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(7), ECF 11, and Defendant’s Special Motion to Strike pursuant to California Code of Civil Procedure § 425.16 (“Anti-SLAPP Motion”), ECF 22. The Court heard arguments on both motions on March 12, 2015. For the reasons stated herein, Defendant’s Motion to Dismiss is GRANTED and the Complaint is dismissed with leave to amend. Defendant’s Anti-SLAPP Motion is DENIED without prejudice.

**I. BACKGROUND**

Plaintiff Payoda, Inc. (“Plaintiff”) is a New York corporation with its principal place of business in Plano, Texas. Compl. ¶ 1, ECF 1. Defendant is a California corporation with its principal place of business in California. *Id.* ¶ 2. Plaintiff alleges that Defendant has been falsely accusing it, its Chief Executive Officer, Anand Purusothaman, and its employee, Thennavan Asaithambi (who, until 2013, worked for Defendant), of misappropriating Defendant’s proprietary information. Specifically, Plaintiff alleges that Defendant lodged a private complaint with the Saidepet Magistrate Court in India against Plaintiff, Mr. Purusothaman, and Mr. Asaithambi, among others, based upon “fabricated” emails purporting to show that Mr. Asaithambi transferred

1 Defendant's sales presentations to Mr. Purusothaman while the former was still employed with  
2 Defendant. *Id.* ¶ 8. This complaint led to Mr. Asaithambi's arrest and detention by Indian judicial  
3 authorities for approximately three weeks. *Id.* ¶ 9.

4 The gravamen of this lawsuit concerns letters that Defendant's attorney, Christopher  
5 Sargent, allegedly sent to three of Plaintiff's customers about the complaint made in India. *Id.* ¶  
6 10; *id.* Exhs. A-C. These letters discussed the Indian investigation and indicated that "Photon has  
7 recently uncovered substantial evidence that its intellectual property has been stolen by Payoda."  
8 *Id.* The customers were cautioned that Photon "believe[s] that the ongoing police investigation  
9 will reveal the full extent of the theft of intellectual property by Payoda and will involve the  
10 review of any and all work that may have been done by Payoda for all its customers, including  
11 you." *Id.* The letters moreover solicited the customers' "cooperation and assistance in this serious  
12 and ongoing investigation," indicating that "our client does take any violation of their IP  
13 extremely seriously and will take all corrective steps necessary to protect their rights." *Id.*  
14 Plaintiff alleges that these letters were false, malicious, and defamatory, and filed suit in federal  
15 court asserting claims against Defendant for defamation, trade libel, intentional interference with  
16 prospective economic advantage, and violation of the California Unfair Competition Law  
17 ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.* *Id.* ¶¶ 11, 14-34.

18 In response to the allegations in the Complaint, Defendant filed the two motions presently  
19 before the Court. In its motion to dismiss, Defendant contends that the Complaint should be  
20 dismissed under Rule 12(b)(6) for failure to state a claim and under Rule 12(b)(7) for failure to  
21 join an indispensable party. *See* Def.'s MTD, ECF 11. In its special motion to strike, Defendant  
22 argues that the Complaint should be stricken pursuant to California Code of Civil Procedure §  
23 425.16 because Plaintiff's is a "strategic lawsuit[s] against public participation" ("SLAPP"). *See*  
24 Def.'s Anti-SLAPP Mot., ECF 22.

25 **II. DISCUSSION**

26 The Court must at this juncture pause to observe that though it is not clearly alleged, there  
27 are actually two other entities involved in this action: Payoda Technologies, a Coimbatore, India  
28 based company ("Payoda India" for ease of reference), and Photon Infotech Pvt. Ltd., an Indian

1 private limited company (“Photon India” for ease of reference). *See* Compl. Exhs. A-C; Def.’s  
2 MTD 1. In fact, the exhibits attached to the Complaint and incorporated by reference therein  
3 clearly show that Photon India filed the complaint in India against, among others, Mr.  
4 Purusothaman in his capacity as “Managing Director” of “Payoda Technologies Pvt Ltd.,” which  
5 this Court assumes refers to Payoda India. *See* Compl. Exh. D; *see also id.* Exhs. A-G.  
6 Furthermore, each of the three letters that form the gravamen of Plaintiff’s claims here indicates  
7 that the sender represents Photon India and is writing concerning Payoda India. *See* Compl. Exhs.  
8 A-C. Thus, although the Complaint describes a dispute between Plaintiff (or, “Payoda U.S.”) and  
9 Defendant (or, “Photon U.S.”), the documents attached to the Complaint directly contradicts those  
10 allegations and instead indicate that all of the alleged misconduct was perpetrated by Photon India  
11 against Payoda India.

12         After the allegations are placed in the proper context between the proper parties, it is not  
13 clear whether a controversy exists between Plaintiff and Defendant,<sup>1</sup> let alone whether Plaintiff  
14 has a claim for relief against Defendant and whether Defendant has standing to invoke the  
15 protections of California’s anti-SLAPP statute against Plaintiff.

16         **A. Defendant’s Motion to Dismiss**

17         To survive a motion to dismiss, a complaint must plead sufficient factual matter that, when  
18 accepted as true and construed in the light most favorable to the non-moving party, “allows the  
19 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”  
20 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681,  
21 690 (9th Cir. 2011). Although, in evaluating a motion to dismiss under Rule 12(b)(6), a court  
22 accepts well-pleaded factual allegations in the complaint as true, the allegations are not taken as  
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24 <sup>1</sup> Exhibits A, B, and C to the Complaint clearly indicate that Photon India’s letters concerned  
25 Payoda India and, as such, would have injured Payoda India if they were false. *See, e.g.*, Compl.  
26 Exh. A at 1 (“We understand that you work with a firm called Payoda Technologies . . . a  
27 Coimbatore, India based IT services provider”). Plaintiff at the March 12 hearing averred that the  
28 letters were sent to its customers and that though they discussed Payoda India, it was actually  
Plaintiff that suffered injury as a result of the letters being sent to Plaintiff’s customers. To the  
extent that could plausibly demonstrate injury to Plaintiff, it is not alleged in the Complaint, which  
conflates the American and Indian entities of both parties and assumes that they are one and the  
same.

1 true when directly contradicted by materials attached to or incorporated by reference into the  
2 complaint. *In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008); *Sprewell v.*  
3 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (citation omitted), *amended on other*  
4 *grounds*, 275 F.3d 1187 (9th Cir. 2001)).

5 Applying that standard here, the documents attached to the Complaint contradict any  
6 assertion that the allegedly defamatory letters were sent by *Defendant*. In fact, the documents  
7 show that all of the alleged misconduct that Plaintiff attributes to Defendant should instead be  
8 attributed to Photon India, as that is the entity that made the complaint in India and on whose  
9 behalf the letters were sent. *See* Compl. Exhs. A-G. It is thus not clear whether Defendant took  
10 any part in any of the alleged misconduct. Plaintiff does not dispute that the letters attached to the  
11 Complaint are from Photon India. Plaintiff argues, however, that the letters “boast” of Photon’s  
12 large number of employees in “10 offices across US, India and Indonesia” and that Photon’s  
13 California office is “listed among Photon’s numerous U.S. offices appearing on its website.” Pl.’s  
14 Opp. to MTD 6. Plaintiff contends based on these facts that “any ambiguity between Photon and  
15 Photon India is one of their own making.” *Id.* Plaintiff further argues that Plaintiff is a “wholly  
16 owned subsidiary of Photon India, and both are managed by a common management team that  
17 includes Srinivas Balasubramaniam . . . . Accordingly, to the extent Srinivas directed the alleged  
18 activity, there is a question as to whether he did so for Photon, Photon India, or both.” *Id.*

19 To the extent they are relevant, these facts are not in the Complaint, which simply ignores  
20 the fact that Defendant is a different entity from Photon India. To the extent Plaintiff suggests that  
21 these and other facts show that Defendant and Photon India are alter egos, such theory is nowhere  
22 alleged in the Complaint. Nor are the few facts Plaintiff raised in its briefing sufficient, without  
23 more, to satisfy the requirements to establish alter ego liability under California law, as described  
24 in *In re Schwarzkopf*, 626 F.3d 1032, 1038 (9th Cir. 2010) and *Sonora Diamond Corp. v. Superior*  
25 *Court*, 83 Cal. App. 4th 523, 537-39 (2000). *See also NetApp, Inc. v. Nimble Storage, Inc.*, No.  
26 5:13-CV-05058-LHKHRL, 2015 WL 400251, at \*5-8 (N.D. Cal. Jan. 29, 2015). Plaintiff cites to  
27 no case law and performs no analysis of the facts to suggest that, absent proper alter ego  
28 allegations, Defendant, a purported subsidiary, can and should be held liable for the conduct of the

1 parent, Photon India. As such, Plaintiff has failed to plead facts from which the Court could  
2 reasonably infer that Defendant is liable for the misconduct alleged.

3 For the same reason that Plaintiff has failed to state a claim against Defendant, Defendant  
4 has also shown under Rule 19 that Photon India is a necessary party—in fact, it is *the* necessary  
5 party. As Plaintiff’s claims are premised on letters that were clearly sent on Photon India’s behalf,  
6 the Court cannot accord complete relief on those claims among the existing parties in this action,  
7 particularly where Defendant’s part in the alleged misconduct is not clearly alleged. *See* Fed. R.  
8 Civ. P. 19(a); *see also Salt River Project Agr. Imp. and Power Dist. v. Lee*, 672 F.3d 1176, 1179  
9 (9th Cir. 2012). Though it does not concede that Photon India is an indispensable party, Plaintiff  
10 argues that even if Photon India is necessary, its failure to join that entity as a defendant is not  
11 grounds to dismiss the complaint at this juncture. *See* Pl.’s Opp. to MTD 7. On that, at least,  
12 Plaintiff is partially correct. Defendant has made no showing that it would be *infeasible* to join  
13 Photon India as another defendant.<sup>2</sup> *Salt River*, 672 F.3d at 1178-79 (courts must engage in a  
14 three-step inquiry under Rule 12(b)(7) the second of which is whether a necessary party under  
15 Rule 19 can feasibly be joined). As such, Defendant has failed to demonstrate that Plaintiff’s  
16 failure to join Photon India warrants dismissal with prejudice.

17 Based on the foregoing, the Court concludes that Defendant’s Motion to Dismiss must be  
18 granted for two reasons: (1) Plaintiff failed to state a claim against Defendant because there are no  
19 allegations in the Complaint pertaining to Defendant’s actions, nor any allegations to suggest that  
20 Defendant is an alter ego of Photon India; and (2) Plaintiff failed to join Photon India, an  
21 indispensable party to this action. Plaintiff at the March 12 hearing suggested that it would be  
22 able to amend to allege Defendant’s liability as an alter ego of Photon India and that it wished to  
23 join Photon India in this action. Plaintiff should have an opportunity to do so. Defendant’s  
24 Motion to Dismiss is accordingly GRANTED with leave to amend.

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<sup>2</sup> The Court understands that Defendant and Photon India reserve their right to seek dismissal on other grounds should Plaintiff be permitted to join Photon India. *See* Def.’s MTD Reply 1, n.1, ECF 24.

1           **B. Defendant’s Anti-SLAPP Motion**

2           California Code of Civil Procedure § 425.16, commonly known as the “anti-SLAPP”  
3 statute, “allows a court to strike any cause of action that arises from the defendant’s exercise of his  
4 or her constitutionally protected rights of free speech or petition for redress of grievances.”

5           *Flatley v. Mauro*, 39 Cal. 4th 299, 311-12 (2006). In ruling on an anti-SLAPP motion, a court  
6 engages in a two-part analysis. First, the moving party must make a threshold showing that the  
7 challenged conduct arises out of protected activity. *Equilon Enterprises v. Consumer Cause, Inc.*,  
8 29 Cal. 4th 53, 67 (2002). Once that threshold showing is made, the burden shifts to the non-  
9 moving party (the plaintiff) to demonstrate a probability of prevailing on the underlying claim. *Id.*

10           Defendant argues that the letters constitute protected speech that is privileged under  
11 California Civil Code § 47. Def.’s Anti-SLAPP Mot. 7-9, ECF 22. Moreover, because the letters  
12 are privileged, Defendant contends that Plaintiff cannot prevail on its claims. *Id.* at 9-13.  
13 Plaintiff’s mistaken attribution of Photon India’s conduct to Defendant renders the anti-SLAPP  
14 analysis intractably convoluted.<sup>3</sup> Defendant is not the “speaker” in the letters at issue, did not send  
15 the letters, and does not appear to be connected to the misconduct alleged in the Complaint. While  
16 that certainly does not bode well for Plaintiff’s ability to show a probability of prevailing on its  
17 claims against *Defendant* at the second step of the anti-SLAPP analysis, the antecedent problem is  
18 that it is not clear whether Defendant has standing to bring the anti-SLAPP motion when there is  
19 no misconduct directly attributable to Defendant alleged in the Complaint. Nor has Defendant  
20 offered any authority that would permit it to bring an anti-SLAPP motion on Photon India’s  
21 behalf. Defendant admitted at the March 12 hearing that it filed this motion to preserve its rights  
22 under the anti-SLAPP statute while maintaining—correctly—that Plaintiff sued the wrong entity.

23           Under the present state of the pleadings, the Court thus concludes that Defendant lacks

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25 <sup>3</sup> Plaintiff argues that any mistake in its pleadings is Defendant’s fault because Defendant—  
26 Photon U.S.—sued Plaintiff in state court seeking a declaration that the same three letters at issue  
27 here are protected speech and not unlawful. *See* Pl.’s Opp. to MTD 5; Pl.’s Request for Judicial  
28 Notice re Mot. to Dismiss Exh. 1, ECF 20. Defendant averred at the March 12 hearing that the  
declaratory judgment action was filed in error and was dismissed without having ever been served  
on Plaintiff. Indeed, as Defendant’s counsel admitted at the hearing, “mistakes were made.” That  
statement likely holds true for Plaintiff as well.

1 standing to invoke the anti-SLAPP statute. While the anti-SLAPP statute is to be interpreted  
2 broadly and to avoid absurdities, *see Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 18 (1995), the  
3 best way to avoid absurdity here is to bring the proper parties before the Court before determining  
4 whether an anti-SLAPP motion is proper and successful on the claims at issue. Defendant's Anti-  
5 SLAPP Motion is accordingly DENIED, without prejudice.<sup>4</sup>


6 **III. ORDER**

7 For the foregoing reasons, IT IS HEREBY ORDERED that Defendant's Motion to  
8 Dismiss is GRANTED, and Plaintiff shall have leave to amend its allegations of alter ego liability  
9 and to join Photon India as an additional defendant. No new claims may be added to the amended  
10 pleading without leave of court. Defendant's Anti-SLAPP Motion is DENIED without prejudice.

11 Plaintiff shall file its amended pleading by **no later than April 14, 2015** and shall  
12 endeavor to serve any newly joined parties expeditiously. No discovery may proceed until the  
13 pleadings are settled and all necessary parties properly served.

14 **IT IS SO ORDERED.**

15 Dated: March 24, 2015

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17 BETH LABSON FREEMAN  
18 United States District Judge

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<sup>4</sup> The Court declines to award attorney's fees because Defendant's motion was not "frivolous or [ ] solely intended to cause unnecessary delay," but rather a good faith response to Plaintiff's pleading error. Cal. Civ. Proc. Code § 425.16(c)(1).