

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 08/30/18

DEPT. 17

HONORABLE Richard E. Rico

JUDGE A. ORTIZ

DEPUTY CLERK

HONORABLE 34

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

C. ELLIS, C.A.

Deputy Sheriff

NONE

Reporter

8:30 am

BC707386

Plaintiff

Counsel

NO APPEARANCES

AETNA INC

VS

Defendant

WHATLEY KALLAS LLP ET AL

Counsel

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER

The Court, having previously taken the matter under submission on 08/20/18, issues its ruling consisting of 9 pages, filed this date and incorporated herein by reference to the Court file.

Summary of the court's Ruling:

The Plaintiff cannot demonstrate a probability of prevailing and the motion is GRANTED.

A true copy of this minute order and the Court's ruling are mailed to counsel through U.S. Mail.

CLERK'S CERTIFICATE OF MAILING

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the minute order dated 8/30/18

upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address

MINUTES ENTERED
08/30/18
COUNTY CLERK



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as shown below with the postage thereon fully prepaid,
in accordance with standard court practices.

Dated: 09/5/18

Sherri R. Carter, Executive Officer/Clerk

By: _____

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NATURE OF PROCEEDINGS:

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<p>MINUTES ENTERED 08/30/18 COUNTY CLERK</p>
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Los Angeles

30 2018

Sherri R. ... Executive Officer/Clerk
By Anthony Ortiz, Deputy

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

AETNA, INC.,)	Case No. BC 707386
Plaintiff,)	RULING
vs.)	
WHATLEY KALLAS LLP and CONSUMER)	
WATCHDOG,)	
Defendants.)	

The motions to strike by Defendants Whatley Kallas LLP (“WK”) and Consumer Watchdog (“Watchdog”) were heard on July 31, 2018 and August 20, 2018 respectively. Appearing on behalf of WK was Julian Brew, esq., appearing on behalf of Watchdog was Jennifer Saunders, esq. and appearing on behalf of Plaintiff Aenta, Inc. (“Aetna”) was Matthew P. Kanny, esq. and Benjamin G. Shatz, esq. The court heard oral arguments on both dates and at the conclusion of the last hearing date took the matter under submission. The court now rules as follows.

Aetna, Inc. (“Aetna”) brings this action against Whatley Kallas, LLP (“WK”) and Consumer Watchdog (“Watchdog”). Defendants are law firms that represented class-action Plaintiffs in lawsuits brought against Aetna in 2014 and 2015. By ways of the instant action, Aetna seeks to force Defendants to pay their share of damages caused by their alleged failure to

1 supervise the mailing of benefit notices to Aetna members, which led to the disclosure of the
2 members' protected health information ("PHI"). Plaintiff's complaint sets forth claims for 1)
3 implied indemnity; 2) equitable indemnity; 3) contribution; and 4) declaratory relief.

4 WK and Watchdog bring the special motions to strike the complaint. (CCP § 425.16.)
5 Defendants present similar arguments and the motions are analyzed together.

6 CCP §425.16 is a procedural remedy to dispose of suits expeditiously and thereby protect
7 defendant's free exercise of First Amendment rights on matters of public interest. (*Lafayette*
8 *Morehouse, Inc. v. Chronicle Pub. Co.* (1995) 37 Cal.App.4th 855, 865.) "In ruling on a
9 defendant's anti-SLAPP motion, the trial court engages in a two-step analysis. (*Navellier v.*
10 *Sletten* (2002) 29 Cal.4th 82, 88.) First, the court determines "whether the defendant has made a
11 threshold showing that the challenged cause of action is one arising from protected activity."
12 (*Id.*) Second, if the court finds this showing has been made, it must dismiss the cause of action
13 unless the plaintiff meets its burden to demonstrate a probability of prevailing on the claim."
14 (*Balzaga v. Fox News Network, LLC* (2009) 173 Cal.App.4th 1325, 1336.)

15
16 **A. Summary of Relevant Allegations in the Complaint:**

17
18 In 2014 and 2015 respectively, two putative class actions were filed against Aetna in
19 federal courts in California and Florida (the "Doe Actions"). Plaintiffs were represented by WK
20 and Watchdog. The Doe Actions settled. (Complaint ¶ 12.) Under the terms of the settlement
21 agreement, which Defendants signed as Plaintiffs' counsel, a written notice was required to be
22 sent to certain Aetna Members advising them of their options when filling prescriptions for HIV
23 medications. In addition to the notices, a separate written notice also was required to be sent to
24 Members regarding their rights to file a claim for refunds of certain out-of-pocket costs. (*Id.* ¶
25 13.)

26 Defendants proposed using Kurtzman Carson Consultants, LLC ("KCC") to serve as the
27 settlement administrator for the Settlement. (*Id.* ¶ 14.) Plaintiff is informed and believed that
28 Defendants used KCC in the past and that WK was the requesting attorney for KCC's services.

1 (*Id.* ¶¶ 15-16.) After settlement, KCC generated a proposal for their work which was addressed
2 to WK and Aetna’s outside legal counsel. The Proposal identified only WK as “Client” and
3 provided signature blocks for KCC and WK. The Proposal specifically states that KCC would
4 use envelopes to mail the Notices and window envelopes to mail the Settlement Notices. (*Id.* ¶
5 17.) Shortly after an amended Proposal was sent to WK and Aetna counsel, WK demanded that
6 Aetna provide the PHI to KCC. (*Id.* ¶¶ 18-19.)

7 Defendants knew, or should have known, that the terms of the Settlement would require
8 KCC to handle the confidential PHI of Aetna Members. Further, the Proposal required non-
9 windowed envelopes to be used for the Notices. (*Id.* ¶¶ 20-21.) Defendants knew, or should have
10 known, that the words “HIV Medications” were referenced in each of the Notices below the
11 recipient’s name and addresses. (*Id.* ¶ 22.) Defendants did not take any steps to ensure that the
12 PHI was protected. (*Id.* ¶ 23.) Aetna’s former counsel produced the requisite information to
13 KCC. Plaintiff is informed and believes that Defendants worked with and/or supervised KCC in
14 preparing the Notices and Settlement Notices. (*Id.* ¶ 25.) Plaintiff is informed and believes that
15 Defendants did not review the final proofs. (*Id.* ¶ 26.)

16 On July 28, 2017, KCC improperly mailed the Notices to Members using envelopes with
17 see-through address windows, even though KCC knew, or should have known, that they were
18 handling PHI. KCC mailed the Notices to thousands of members. (*Id.* ¶ 27.) In early August
19 2017, Aetna began receiving communications from concerned Members. (*Id.* ¶ 28.) Soon
20 thereafter, a putative class action was filed in Pennsylvania federal court (the “Beckett Action”);
21 Plaintiffs alleged that the Notices were positioned in their envelopes in such a manner that
22 allowed the words “HIV Medication,” in whole or in part, to be viewed through the envelope’s
23 window below the Member’s name and address. (*Id.* ¶ 29.) In September 2017, without
24 admitting wrongdoing, Aetna initiated a program to address potential harm caused by the
25 disclosures to affected Members. (*Id.* ¶ 30.) In addition to the Beckett Action, there have been six
26 other class action lawsuits filed in various state and federal courts. (*Id.* ¶ 31.) Five class actions
27 were voluntarily joined and/or consolidated with the Beckett Action (the “Consolidated Action”).
28 (*Id.* ¶ 32.)

1 On January 17, 2018, Plaintiffs in the Consolidated Action filed a Motion for Preliminary
2 Approval of Class Action Settlement. As part of the settlement, Aetna agreed to resolve all
3 claims for a total sum just over \$17,000,000. Preliminary approval was granted in May 2018. (*Id.*
4 ¶ 33.) In addition to the lawsuits, several state attorneys general have opened up investigation.
5 (*Id.* ¶¶ 35-36.) Plaintiff anticipates substantial costs and expenses. In August and October 2017,
6 Aetna sent letters to WK and Watchdog notifying them of claims and/or demanding that they
7 defend, indemnify, and/or hold Plaintiff harmless from and against any liability, damages, etc.
8 (*Id.* ¶¶ 37-38.)

9
10 **B. Protected Activity:**

11
12 To prevail on an anti-SLAPP motion, the movant must first make a threshold showing
13 that the suit falls within the class of suits subject to a motion to strike under Section 425.16. A
14 defendant meets this burden by showing that the acts underlying the plaintiff's cause of action
15 fall within one of the four categories of conduct described in section 425.16, subdivision (e).
16 (*Nygaard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1036.) An "act in furtherance of a
17 person's right of petition or free speech under the United States or California Constitution in
18 connection with a public issue includes: (1) any written or oral statement or writing made before
19 a legislative, executive, or judicial proceeding, or any other official proceeding authorized by
20 law, (2) any written or oral statement or writing made in connection with an issue under
21 consideration or review by a legislative, executive, or judicial body, or any other official
22 proceeding authorized by law..."(CCP § 425.16(e).)

23 *Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th
24 95, 11, relief on by WK, is instructive. Therein, a venture capital firm sued a former investor and
25 former investor's counsel for conversion and fraudulent transfer arising from transfer of money
26 allegedly looted from venture capital firm. The Court held that the gravamen of venture capital
27 firm's claim was the protected activity of law firm's representation of former investor's in
28

1 underlying legal actions resulting in settlement that led to transfer, and thus law firms made
2 prima facie showing under anti-SLAPP. *Optional Capital* states:

3
4 It is well established that the protection of the anti-SLAPP statute extends to
5 lawyers and law firms engaged in litigation-related activity. As our Supreme Court
6 explained, “ ‘Any act’ ” under section 425.16, subdivision (b)(1) “includes
7 communicative conduct such as the filing, funding, and prosecution of a civil action.
8 [Citation.] This includes qualifying acts committed by attorneys in representing clients in
9 litigation.” (*Rusheen v. Cohen*, 37 Cal.4th 1048, 1056.)

10
11 In fact, courts have adopted “a fairly expansive view of what constitutes
12 litigation-related activities within the scope of section 425.16.” (*Kashian v. Harriman*
13 (2002) 98 Cal.App.4th 892, 908.) “ ‘***Under the plain language of section 425.16,***
14 ***subdivisions (e)(1) and (2), as well as the case law interpreting those provisions, all***
15 ***communicative acts performed by attorneys as part of their representation of a client in***
16 ***a judicial proceeding or other petitioning context are per se protected as petitioning***
17 ***activity by the anti-SLAPP statute.’ ”*** (*Finton Construction, supra*, 238 Cal.App.4th at p.
18 210.) Cases construing the anti-SLAPP statute hold that “a statement is ‘in connection
19 with’ litigation under section 425.16, subdivision (e)(2), if it relates to the substantive
20 issues in the litigation and is directed to persons having some interest in the litigation.”
21 (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1266.) Consequently, because
22 settlement negotiations are regarded as an exercise of the right to petition,
23 communications during such negotiations are regarded as having been made in
24 connection with the underlying lawsuit for purposes of section 425.16, subdivision (e)(2).
25 (See *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 963–964.)...

26
27 Here...Defendants' conduct at issue—as established by Plaintiff's pleading and
28 the factual material submitted by the parties in connection with the anti-SLAPP

1 motions—arose directly out of the litigation in which they were respectively representing
2 DAS. Under Plaintiff's theory of the case, there would not have been any transfer of
3 funds from the Credit Suisse account to DAS but for Akin's work in negotiating a
4 settlement of the state court action and but for Parker's alleged failure to timely disclose
5 the settlement to the federal district court. In fact, Plaintiff even relies on in-court
6 statements by Akin lawyers as evidence of a conspiracy with the Kim parties. [¶] In short,
7 the gravamen of Plaintiff's claims against Defendants is based on protected activity,
8 namely Defendants' representation of DAS in litigation the state court action and the
9 federal forfeiture action). Accordingly, we hold that Defendants made a prima facie
10 showing that Plaintiff's claims arise from Defendants' constitutionally protected petition
11 rights.

12 (*Optional Capital, Inc.*, *supra* 18 Cal.App.5th at pp. 113–115, emphasis added.)
13

14 Mirroring *Optional Capital, Inc.*, WK and Watchdogs' role as opposing counsel and their
15 representation of the class action serves as the basis for this action. Plaintiff counters that
16 *Optional Capital, Inc.* is distinguishable because it is not an indemnity case and “because the
17 gravamen of the claims was that the Defendant-lawyers were sued for conversion and fraudulent
18 transfer, not for breaching any duties to their own clients.” (Oppo. p. 8, FN 15.) Plaintiff's
19 argument is unsupported and ignores the expansive language cited above. As discussed below,
20 this is not an attorney-client malpractice case and the same concerns are not present. There is
21 little doubt that the scope of litigation-related activities is broad and extends to activities in
22 connection with the negotiation, implementation, and enforcement of a settlement agreement.

23 Moreover, none of the cases Aetna cites are persuasive or factually analogous. *Chodos v.*
24 *Cole* (2012) 210 Cal.App.4th 692, 703-704 stands for the proposition that section 425.16 did not
25 apply to “an indemnity claim [that was] ... grounded in allegations of malpractice.” (*Id.* at p.
26 705.) The court explained: “The authorities have established that the anti-SLAPP statute does not
27 apply to claims of attorney malpractice. ... ‘[W]hen a claim [by a client against a lawyer] is based
28 on a breach of the fiduciary duty of loyalty or negligence, it does not concern a right of petition

1 or free speech, though those activities arose from the filing, prosecution of and statements made
2 in the course of the client's lawsuit. The reason is that the lawsuit concerns a breach of duty that
3 does not depend on the exercise of a constitutional right.' [Citation.] Even though the
4 'petitioning activity is part of the evidentiary landscape within which [claimant's] claims arose,
5 the gravamen of [claimant's] claims is that [the former attorney] engaged in nonpetitioning
6 activity inconsistent with his fiduciary obligations owed to [claimant].' [Citation.]" (*Id.* at p.
7 702.) *Chodos* involves an indemnity cross-complaint by a lawyer against co-counsel for their
8 common client in that client's malpractice claim. *Chodos*' fundamental policy concerns and
9 discussion of fiduciary obligation do not extend to non-clients.

10 Based on the foregoing, the first prong is satisfied.

11
12 **C. Probability on the Merits:**

13
14 The second prong of the anti-SLAPP analysis is to determine whether the plaintiff has
15 shown a probability of succeeding on his claim. (*Feldman, supra*, 160 Cal.App.4th at pp. 1477–
16 1478.) The plaintiff bears the burden, but need make only a prima facie showing, “ ‘akin to that
17 of a party opposing a motion for summary judgment.’ ” (*Id.* at p. 1478.) Put another way, the
18 plaintiff must demonstrate that the complaint is both legally sufficient and supported by a
19 sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted
20 by the plaintiff is credited. The “court considers the pleadings and evidentiary submissions of
21 both parties but does not weigh the credibility or comparative probative strength of [the]
22 competing evidence. (*Salma, supra* 161 Cal.App.4th at pp. 1288–1289.)

23 Defendant is correct to argue that the litigation privilege bars Aetna's claims. Civil Code
24 § 47 provides that statements made in connection with judicial proceedings are privileged and
25 thus are immune from civil liability. The litigation privilege is absolute, which means it applies
26 regardless of the existence of malice or intent to harm. (*Abraham v. Lancaster Community*
27 *Hospital* (1990) 217 Cal.App.3d 796, 810.) The litigation privilege is relevant to the second step
28 in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome

1 to demonstrate a probability of prevailing. (*See Feldman, supra*, 160 Cal.App.4th at 1485.)
2 “Although originally enacted with reference to defamation [citation], the privilege is now held
3 applicable to any communication, whether or not it amounts to a publication [citations], and all
4 torts except malicious prosecution. [Citations.] Further, it applies to any publication required or
5 permitted by law in the course of a judicial proceeding to achieve the objects of the litigation,
6 even though the publication is made outside the courtroom and no function of the court or its
7 officers is involved. [Citations.] [¶] The usual formulation is that the privilege applies to any
8 communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other
9 participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some
10 connection or logical relation to the action. [Citations.]” (*Silberg v. Anderson* (1990) 50 Cal.3d
11 205, 212.) Thus, ‘communications with ‘some relation’ to judicial proceedings’ are ‘absolutely
12 immune from tort liability’ by the litigation privilege. (*Rusheen v. Cohen* (2006) 37 Cal.4th
13 1048, 1057.)

14 The claims arise solely from Defendants’ involvement in a settlement that required
15 mailing of notices. All of this is indisputably appropriate conduct and is subject to the litigation
16 privilege.

17 The court notes that in the final analysis its ruling is consistent with the stated purpose of
18 the Anti-SLAPP statute, to eliminate suits meant “to chill the valid exercise ... [to] petition for
19 redress of grievances.” § 425.16 (a) “The goal is to eliminate ... retaliatory litigation at an early
20 stage of the proceedings.” *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Ca.App.4th 798, 806.

21 In the present case the original plaintiffs, a class of Aetna’s insureds, sought to address a
22 grievance with their insurance company, Aetna, regarding the handling of certain drug
23 requirements. This resulted in the settlement in which the original plaintiffs were to be notified
24 of a change in Aetna’s policy. The original plaintiffs were individuals whose health information
25 was considered confidential. In notifying these individuals of the change in Aetna’s policy, the
26 original plaintiffs’ protected health information was disclosed. The culprit is apparently KCC
27 which served as the settlement administrator. Aetna is attempting to shift some responsibility
28 onto WK for purportedly recommending KCC to serve as the administrator and then for failing

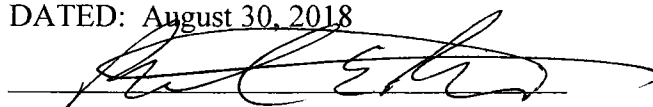
1 to insure that in mailing notification to Aetna's insureds, KCC did not disclose the PHI of the
2 original plaintiffs when they were informed of the change in Aetna's drug policy. The basis for
3 this indemnity claim is tenuous at best. Indeed the unsigned Proposal may have been unsigned
4 for a reason, the true client was Aetna which by virtue of settling the underlying case was forced
5 to change its policy necessitating notification to its' insureds.

6 Attempts by Aetna to shift the liability to others begs the question of Aetna's liability.
7 Aetna surely had a duty to keep its insureds' information confidential. There is some indication
8 in the facts presented to the court that Aetna's attorneys in the underlying case had some say in
9 the matter along with KCC as evidenced by the unsigned Proposal. Should Aetna's attorneys in
10 the underlying action be part of the class of indemnifiers under Aetna's theory? It is also
11 unclear just what Watchdog did in this scenario since it was not named in the Proposal. The fact
12 that Watchdog is named leads the court to conclude that the situation is a classic case of an
13 attempt to chill and in this case punish the original plaintiffs for exercising their right to address
14 a grievance. KCC's and certainly Watchdog's purported responsibility in this indemnity claim
15 is in successfully representing the original plaintiffs in a claim against Aetna which led to
16 disclosure of the PHI of the original plaintiffs. The Defendants' actions clearly arose out of their
17 involvement in representing their clients in the settlement and this current lawsuit for indemnity
18 is a way of punishing the lawyers directly and the original plaintiffs indirectly for the underlying
19 lawsuit.

20 In light of the foregoing, Plaintiff cannot demonstrate a probability of prevailing and the
21 motion is GRANTED.

22 Clerk to give notice. All further dates are off calendar.

23 DATED: August 30, 2018

24 

25 RICHARD E. RICO

26 Judge of the Superior Court