UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

Case No.	CV 17-7993 DSF (SSx)	Date	3/12/18
Title	Alan Lucien Cerf v. Continental Casualty Co.		

Present: The Honorable	DALE S. FISCHER, United States District Judge

Debra Plato	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (In Chambers) Order GRANTING Motion to Dismiss (Dkt. No. 26)

Defendant Continental Casualty Company moves to dismiss the complaint in this insurance coverage action. The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. The hearing and scheduling conference set for March 19, 2018 are removed from the Court's calendar.

Plaintiff Alan Lucien Cerf is an insurance agent who carried a professional liability insurance policy with Defendant. In October 2016, the California Department of Insurance (DOI) brought a disciplinary action against Plaintiff for alleged misconduct in the selling of annuities (DOI Action). Plaintiff tendered a claim for coverage and defense of the DOI Action. Defendant took the position that the DOI Action did not constitute a "Claim" under the policy and was, therefore, not covered. However, subject to a reservation of rights, Defendant agreed to cover the DOI Action up to the limits of the "Regulatory Action Endorsement" in Plaintiff's policy. That endorsement allowed for coverage of up to $25,000 in loss arising out of a regulatory action against the insured.

> The Insurer shall not be liable to pay any Loss in connection with any Claim: . . . by or on behalf of, or for the benefit of, whether directly or indirectly,
>
> . . .
>
> 7. any governmental or quasi-governmental official or agency, including but not limited to any state or federal securities or insurance

> commission or agency, in any capacity; however, this exclusion shall not apply subject to the Insurer's maximum Limit of Liability of $25,000 for all Loss for all such Claims made against an Insured, which amount shall be a sublimit which is part of and not in addition to the limit of liability set forth in Item 6. of the Declarations. Notwithstanding anything in the Policy to the contrary, the applicable retention amount for each such Claims shall be $0 . . . .

Complaint, Ex. A., ¶ XX.C.7 (as amended by Regulatory Action Endorsement)(at p.33 of 54).

To the degree that the DOI Action constitutes a "Claim," there is no question that it is a claim by a "governmental or quasi-governmental official or agency, including but not limited to any state or federal securities or insurance commission or agency, in any capacity." Therefore, coverage is limited to $25,000 in "Loss for all such Claims."

Contrary to Plaintiff's assertion that his defense costs are not subject to the $25,000 "Loss" limitation, "Loss" is explicitly defined to include "Defense Costs,"[1] which are themselves defined, in relevant part, as "reasonable and necessary fees and expenses incurred by or at the direction of the Insurer in defense of any Claim, and costs of appeal, attachment or similar bonds." Complaint, Ex. A, ¶¶ III (Definitions).

Plaintiff's other arguments are similarly meritless. The Court can properly take judicial notice of the allegations filed by the DOI. See Transmission Agency of N. California v. Sierra Pac. Power Co., 295 F.3d 918, 924 n.3 (9th Cir. 2002) (judicial notice of agency documents appropriate where there is no dispute as to authenticity). The November 10, 2016 letter from Defendant to Plaintiff can also be considered under the doctrine of incorporation by reference. "We have extended the doctrine of incorporation by reference to consider documents in situations where the complaint necessarily relies upon a document or the contents of the document are alleged in a complaint, the document's authenticity is not in question and there are no disputed issues as to the document's relevance." Coto Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010). Plaintiff claims that because he did not explicitly identify the November 10, 2016

[1] "Loss means monetary settlements or monetary judgments (including any award of pre-judgment and post-judgment interest) and Defense Costs for which the Insured is legally obligated to pay on account of a covered Claim." Plaintiff tries to argue that his own legal defense is not included because of the "legally obligated" language at the end of the definition. But this argument makes no sense in the context of the definition of "Defense Costs," which explicitly includes the cost of defending the insured.

letter it cannot be considered. Plaintiff cannot avoid incorporation by clearly referencing a document without specific identification. See id. (incorporating document by reference even though "not explicitly refer[red] to" in complaint). A comparison of the allegations at ¶¶ 8 and 9 of the Complaint and the November 10, 2016 letter make clear that this communication is what is referred to in the Complaint. The letter is relevant and is essential to Plaintiff's allegations of Defendant's purported wrongful conduct. Plaintiff "does not admit" the authenticity of the letter, Opp'n at 5, but, notably, he does not actually deny its authenticity even though that would be within his knowledge. Defendant has provided authentication of the letter, and there is no reason to doubt that the letter is what it purports to be. If a mere, apparently baseless, "failure to admit" the authenticity of an otherwise incorporated document could block incorporation, then the entire doctrine of incorporation by reference would be a nullity.

The November 10, 2016 letter shows that Defendant was relying on the Regulatory Action Endorsement in its limitation of coverage to $25,000.[2] Plaintiff argues that there is at least an ambiguity as to whether the policy's $25,000 limit is for every claim or all claims in the aggregate. First, the policy is not ambiguous. It states that the regulatory action "exclusion shall not apply subject to the Insurer's maximum Limit of Liability of $25,000 for all Loss for all such Claims made against an Insured." By the express terms of the policy, there is a $25,000 limit for "all Loss for all such Claims." Second, if it is a "Claim" at all, the DOI Action constitutes a single claim under the policy. A Claim is defined to include, in relevant part, "a civil adjudicatory or arbitration proceeding for monetary damages" against the insured. The DOI Action was a single proceeding even if it included multiple allegations.

Plaintiff appears to believe that because he did not allege that Defendant reserved its rights to limit coverage, the Complaint can be read to allege Defendant has waived its right to limit coverage. To the degree the Court can even follow this reasoning, it is incorrect. First, it is not reasonable to infer a waiver from an absence of any allegations of non-waiver in a complaint. Second, the Complaint directly states that Defendant told Plaintiff that the coverage was limited to $25,000 – that's the basis of the lawsuit. Compl. ¶¶ 8-9. To the degree that Plaintiff is trying to say that Defendant waived a right to subject defense costs to the $25,000 limit, again there is no allegation in the Complaint to that effect and the incorporated letter certainly does not show any waiver of any rights

[2] Even if the November 10, 2016 letter were not considered, the allegations directly made in the Complaint make it obvious, in the context of the terms of the policy, that Defendant was invoking the Regulatory Action Endorsement.

that might be present under the policy.

As Plaintiff's UCL claim is premised on his erroneous interpretation of the policy, it fails for the same reasons given above.

The motion to dismiss is GRANTED. Based on the record currently before the Court, amendment appears futile. As the policy is clear and unambiguous, the only apparent basis for amendment would be to allege waiver of rights by Defendant. While the Court did not consider the correspondence submitted with Defendant's reply for the substantive aspects of the motion, it has looked at those materials for the purpose of determining whether Plaintiff could successfully amend the Complaint to state a claim. Nothing in the correspondence suggests that Defendant waived any of its rights under the policy and explicit reservations of rights were made in multiple letters. If Plaintiff believes that he can successfully amend his complaint in good faith and after reviewing Rule 11 of the Federal Rules of Civil Procedure, no later than March 22, 2018, he is to file a brief of no more than three pages outlining his proposed amendments and the specific evidentiary basis for his new allegations. The material that forms the evidentiary basis for the allegations should be filed as attachments. If nothing is filed by March 22, the Court will enter judgment in favor of Defendant.

IT IS SO ORDERED.