

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

NATIONAL UNION FIRE INSURANCE)
COMPANY OF PITTSBURGH, PA,)
)
Plaintiff,)
)
v.)
)
SMALL SMILES HOLDING CO., LLC,)
)
Defendant.)

**Case No. 3:10-cv-00743
Judge Campbell
Magistrate Judge Griffin**

**DEFENDANT’S RESPONSE IN OPPOSITION TO
PLAINTIFF’S MOTION TO DISMISS COUNTERCLAIM**

Introduction

The chief flaw in National Union’s Motion to Dismiss is best illustrated on the first page of its brief. There, in a disingenuous effort to squeeze the facts of this case into the holding in *Nautilus v. In the Crowd, infra*, National Union claims that the issue before this court is whether an insured can sue its insurer “for having filed a good faith lawsuit seeking to rescind the insured’s policies even as the insurer is defending the insured in accordance with those policies” That is not the issue before the court. Simply put, Defendant’s counterclaim does not allege that National Union acted “in good faith” in seeking rescission. It alleges just the opposite – that National Union, an AIG company, acted in bad faith by bringing this rescission suit based on claims it knows to be false. Moreover, SSHC disputes that National Union has provided any defense to SSHC while it pursues its rescission claim against SSHC.¹

¹ As discussed *infra*, in an effort to establish that it is defending the underlying claims on behalf of SSHC, National Union has ventured outside the pleadings and has attached reservation of rights letters to its brief. These letters should not be considered in a motion to dismiss, nor do they establish that National Union is providing any sort of defense to SSHC.

The instant case is not the only case National Union has filed against SSHC. In federal court in Toledo, Ohio, National Union has filed a declaratory judgment action seeking to determine the parameters of coverage under the same insurance policies (“Policies”) at issue here. While SSHC disagrees with National Union’s coverage position in the Toledo case, SSHC has not filed a counterclaim based on fraud or any consumer protection statute there. The Toledo case is much more similar to the *Nautilus* case (except that SSHC has yet to see any “defense” by National Union to the underlying lawsuits). The instant case, however, is quite different in that National Union bases its rescission case on the assertion of facts it knows to be false. It was brought solely for its *in terrorem* effect on SSHC and to gain leverage in eventual settlement discussions. SSHC’s counterclaim in this matter alleges, among other things, that the **very facts** National Union claims it did not know and that give rise to rescission were, in fact, disclosed to National Union through its agent Affinity/Dentist’s Advantage, and National Union knew that **before** filing this suit. It is beyond dispute that Affinity/Dentist’s Advantage was notified of the government investigations of SSHC **before** National Union issued any of the Policies. National Union **knew**, as a matter of law, about the government investigations before it issued the Policies (see TENN. CODE ANN. § 56-6-115(b)) – yet National Union remained silent and made no complaint or inquiries about those government investigations until SSHC sought coverage for the underlying *Parnell* and *Hernandez* cases. Only then did National Union file the instant lawsuit and claim that the Policies were void *ab initio* based on alleged omissions of the **very facts** about which it already had knowledge. That is fraud and deceit in its most basic form, and for that reason, National Union’s Motion to Dismiss should be denied.

BACKGROUND

A. National Union Misstates the Facts Alleged in SSHC's Counterclaim

While National Union repeatedly states in its Motion to Dismiss that Small Smiles Holding Company LLC's ("SSHC") counterclaim makes allegations against National Union "without any factual support," National Union is deliberately ignoring the eighteen paragraphs of well-pleaded factual allegations which support SSHC's causes of action for violation of the Tennessee Consumer Protection Act and TENN. CODE ANN. § 56-7-105.

As SSHC alleges in its counterclaim, beginning with its inception in 2006, SSHC purchased dental professional liability insurance for itself, FORBA, the Small Smiles Dental Centers, and the dentists who worked at the Small Smiles Dental Centers (the "SSHC-Insureds") from Affinity Insurance Services, Inc.'s Dentist's Advantage Program ("Affinity" or "Dentist's Advantage"). (Counterclaim ¶ 5). In 2006 and 2007, Affinity/Dentist's Advantage sold dental professional liability insurance to the SSHC-Insureds on behalf of American Insurance Company and/or its parent, Fireman's Fund Insurance Company (collectively "Fireman's Fund"). (*Id.* at ¶ 6).

While the Fireman's Fund policies were in effect, SSHC learned of and responded to a series of investigations initiated by the Office of the Inspector General, U. S. Department of Health and Human Services ("OIG-HHS"), the United States Department of Justice, and various State Attorneys General and State Boards of Dental Examiners. (*Id.* at ¶ 7). These investigations focused on allegations that FORBA and certain Small Smiles Dental Centers committed wrongful acts in connection with claims for dental services submitted to Medicaid and the State Children's Health Insurance Program ("SCHIP") (collectively, the "Government Investigations"). (*Id.*). As SSHC alleged in its counterclaim, SSHC promptly notified

Affinity/Dentist's Advantage of the Government Investigations and sent copies of all subpoenas and investigative demands to Affinity/Dentist's Advantage. (*Id.* at ¶ 8). Moreover, information about the Government Investigations was publicly available and easily accessible through television and the internet. (*Id.*).

In 2008, Affinity/Dentist's Advantage's relationship with Fireman's Fund ended and Affinity/Dentist's Advantage entered into a contract with National Union, under which Affinity/Dentist's Advantage served as National Union's agent and partner, and provided underwriting, billing, claims, and other services on National Union's behalf. (*Id.* at ¶ 9). National Union was aware that Affinity/Dentist's Advantage held itself out as National Union's agent and partner. (*Id.* at ¶ 10). In fact, National Union stated in its Complaint that “[b]etween May 2008 and the present, Affinity was and is authorized by National Union to underwrite and issue dental professional liability insurance policies for National Union through the Dentist's Advantage Program” (Complaint ¶ 19). As a matter of law in Tennessee, Affinity/Dentist's Advantage was National Union's agent. TENN. CODE ANN. § 56-6-115(b) (“An insurance producer who solicits or negotiates an application for insurance shall be regarded, in any controversy arising from the application for insurance or any policy issued in connection with the application between the insured or insured's beneficiary and the insurer, as *the agent of the insurer and not the insured* or insured's beneficiary.”)

In July 2008, Affinity/Dentist's Advantage notified SSHC that Affinity/Dentist's Advantage had ended its contract with Fireman's Fund, and that SSHC's dental professional liability policies would not be renewed with Fireman's Fund at the end of the policy term in September 2008. (*Id.* at ¶ 11). Instead, Affinity/Dentist's Advantage offered renewal with its new partner AIG, through AIG's affiliate National Union. (*Id.*). In its notice to SSHC of the

change to National Union, Affinity/Dentist's Advantage advised SSHC that there would be no changes in the coverage or procedures, that the "transition to the new carrier will be very smooth," and that Affinity/Dentist's Advantage would notify SSHC of the new premium as soon as it worked it up with National Union. (*Id.* at ¶ 12) (July 2008 e-mail from Affinity/Dentist's Advantage attached as Ex. 1).² Further, as discussed above, *prior to* this communication, SSHC had already provided notice and information to Affinity/Dentist's Advantage regarding the Government Investigations.

At no point during the transition of the SSHC-Insureds' insurance coverage to National Union did Affinity/Dentist's Advantage or National Union ask SSHC to complete any policy applications to obtain coverage from National Union, nor did they request additional information regarding the Government Investigations that SSHC had previously disclosed. (*Id.* at ¶ 13). National Union never communicated directly with SSHC during this transition process, and relied on its agent and partner, Affinity/Dentist's Advantage, to issue the Policies to the SSHC-Insureds. (*Id.*). Moreover, because SSHC had already notified Affinity/Dentist's Advantage of the Government Investigations and had been reassured that the transition to the new carrier, National Union, would be "smooth," SSHC did not seek other insurance or have any reason to doubt the validity of the Policies. (*See id.*). SSHC paid all of the premiums and otherwise complied with all requirements of the Policies with National Union. (*Id.* at ¶ 14).

During the policy periods of the Policies, the SSHC-Insureds were sued in two class actions, *Parnell* and *Hernandez*, and upon learning of each of the class actions, SSHC provided notice of the actions in keeping with the notification requirements of the Policies. (*Id.* at ¶¶ 15-

² "[A] document is properly considered on [a motion to dismiss] when it is 'referred to in the complaint and . . . central to the plaintiff's claim.'" *Alvord Investments, LLC v. The Hartford Financial Svcs. Group, Inc.*, 660 F. Supp. 2d 850, 853 (W.D. Tenn. 2009). In this case, the e-mail sent by Affinity/Dentist's Advantage to SSHC is central to SSHC's claims, and should be considered in analyzing the Motion to Dismiss.

18). During these same periods of the Policies, SSHC also learned of other claims and potential claims against the SSHC-Insureds, and provided notice of those claims in keeping with the notification requirements of the Policies. (*Id.* at ¶¶ 19-20).

Despite the fact that (a) National Union was notified about the Government Investigations prior to the underwriting and issuance of the Policies, and (b) neither National Union nor Affinity/Dentist's Advantage requested any additional information from SSHC prior to issuing the Policies, National Union now refuses to acknowledge the disclosures made to its agent, and has concocted an argument that it did not know of the Government Investigations. As SSHC alleged in its counterclaim, "National Union's refusal to acknowledge the disclosures made to its agent, National Union's attempt to conduct underwriting now, after failing to conduct any investigation of the risk prior to issuing the Policies, and National Union's efforts to rescind its insurance contracts with the SSHC-Insureds constitute bad faith and violate the Tennessee Consumer Protection Act." (*Id.* at ¶ 22). These facts provide ample support for the causes of action asserted in the counterclaim, and National Union's Motion to Dismiss should be denied.

B. National Union Misrepresents the Nature of Its Claim

In its motion, National Union deliberately ignores the many factual allegations supporting SSHC's counterclaim and also disingenuously paints its own action against SSHC as one made "in good faith" to seek a "judicial determination of its right to rescind the Policies." National Union's action to rescind coverage is not made in good faith. It is an action based on deceptive representations and omissions regarding its agency relationship with Affinity/Dentist's Advantage and the "material information" to which it was privy at the time it issued the Policies to the SSHC-Insureds.

Moreover, in an effort to portray its case as one similar to the *Nautilus* case, National Union attempts in its motion to submit evidence of matters outside the allegations in the pleadings. (See Motion to Dismiss Memorandum at 10). Specifically, National Union states: “[a]lthough never stated in the Counterclaim, and notwithstanding SSHC’s suggestions to the contrary, National Union acknowledged coverage under the applicable Policies, pursuant to the terms and conditions contained therein, and agreed, subject to a complete reservation of rights, to undertake SSHC’s defense (and/or the defense of SSHC-related insureds) in all four of these actions.” (*Id.*) (emphasis added). National Union then goes on to attach copies of reservation of rights letters it sent in some of the matters underlying the claims in the complaint and the counterclaim as Exhibits D through G. (*Id.*) As discussed in more detail below, SSHC does not believe that these reservation of rights letters should be considered. In addition, SSHC disputes that they establish that National Union has been providing a defense to SSHC or that National Union has actually spent the first dime to assist in SSHC’s defense of the underlying lawsuits.

ARGUMENT

A. Standard of Review

Federal Rule of Civil Procedure 8(a)(2) provides that a pleading must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” The pleading standard does not require “detailed factual allegations,” but demands more than “an unadorned, the defendant-unlawfully harmed me accusation.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, (2009). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

SSHC's counterclaim clearly contains factual allegations sufficient to meet the pleading requirements of Federal Rule of Civil Procedure 8, and for that reason, National Union's Motion to Dismiss should be denied.

B. SSHC's TCPA Claim Should Not Be Dismissed.

1. The Factual Allegations in SSHC's Counterclaim Are Sufficient to Support Its TCPA Claim.

In order to establish a TCPA claim, the claimant must assert "(1) that the defendant engaged in an unfair or deceptive act or practice declared unlawful by the TCPA and (2) that the defendant's conduct caused an 'ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated.'" *Tucker v. Sierra Builders*, 180 S.W.3d 109, 115 (Tenn. Ct. App. 2005) (quoting TENN. CODE ANN. § 47-18-109(a)(1)). "[T]he prima facie elements for a TCPA claim do not require that the deceptive act or practice be directed toward the plaintiff. Instead, the Tennessee courts have recognized that 'plaintiffs asserting claims under the TCPA are required to show that the defendant's wrongful conduct proximately caused their injury.'" *Cloud Nine, LLC v. Whaley*, 650 F. Supp. 2d 789, 798 (E.D. Tenn. 2009) (citing *Steamfitters Local Union No. 614 Health and Welfare Fund v. Philip Morris, Inc.*, No. W1999-01061-COA-CV, 2000 WL 1390171, at *7 (Tenn. Ct. App. Sept. 26, 2000)).

In order to state a TCPA claim against an insurance company, the insured must state that the insurance company "violated the terms of the insurance policy, deceived the plaintiffs about the terms of the insurance policy, or otherwise acted unfairly." *Sparks v. Allstate Ins. Co.*, 98 F. Supp. 2d 933, 938 (W.D. Tenn. 2000). "The main purpose of the TCPA is to protect consumers, and it must be liberally construed to affect [sic] that purpose." *Rothberg v. Cincinnati Ins. Co.*, No. 1:06-CV-111, 2008 WL 833201, at *7 (E.D. Tenn. Mar. 27, 2008) (citing *Gaston v. Tennessee Farmers Mutual Ins. Co.*, 120 S.W.3d 815, 822 (Tenn. 2003)).

Moreover, “[w]hen an insurance company denies a claim based on information it knows to be false, that supports a claim under the TCPA.” *Id.* at *8. In this case, SSHC has alleged facts to support a claim that National Union has acted unfairly and is attempting to void its Policies “based on information it knows to be false.” Therefore, SSHC’s allegations are sufficient to support its TCPA claim against National Union.

National Union cannot explain away these allegations. So, instead, National Union simply ignores them. For example, on page 15 of its motion, National Union states that SSHC “fails to plead a factually sufficient unfair or deceptive act or practice in violation of the TCPA,” and cites only to portions of paragraph 25 of SSHC’s counterclaim. (Motion to Dismiss Memorandum at 15). National Union argues:

SSHHC’s conclusory statement that National Union’s “representations, omissions, and other conduct of National Union in handling SSHC’s claims under the Policies” constitute “unfair or deceptive acts or practices in violation of the TCPA” fails to plead a factually sufficient unfair or deceptive act or practice in violation of the TCPA.

However, the entire text of paragraph 25 of the Counterclaim states:

The representations, omissions, and other conduct of National Union in handling SSHC’s claims under the Policies, ***including National Union’s bad faith attempt to avoid its contractual obligations under the Policies by engaging in post-claim underwriting and by falsely claiming that SSHC did not provide notice of Government Investigations***, constitute unfair or deceptive acts or practices in violation of the TCPA, entitling SSHC to actual damages plus attorneys’ fees and costs.

(Counterclaim ¶ 25) (emphasis added). This paragraph pleads a factually sufficient unfair or deceptive act or practice in violation of the TCPA.

Moreover, National Union ignores entirely the additional factual allegations in paragraphs 5-22 of the counterclaim. For example, in paragraphs 8-10, SSHC alleges that it gave notice of the Government Investigations to National Union’s agent, Affinity/Dentist’s

Advantage, and in paragraph 21 SSHC alleges that National Union, in seeking to rescind the Policies with SSHC, put forth the unfounded contention that SSHC failed to disclose “material information” regarding the Government Investigations prior to the issuance of the Policies. Moreover, National Union repeatedly and falsely has suggested that Affinity/Dentist’s Advantage somehow was SSHC’s agent, while at the same time acknowledging in its Complaint that “Affinity was and is authorized by National Union to underwrite and issue dental professional liability insurance policies for National Union through the Dentist’s Advantage Program” (Complaint ¶ 19). National Union knew of the Government Investigations before the Policies were issued, yet it never once complained of those investigations nor requested more information about them. (*See* Counterclaim ¶¶ 8-10). Only after SSHC was sued in the various class actions did National Union concoct its current position that it had no knowledge of the Government Investigations. These acts are fraudulent and deceptive, and they provide more than adequate support for the first element of a TCPA claim—that the Defendant insurance company engaged in an unfair or deceptive act or practice.

In addition, SSHC has sufficiently pled the second element of a TCPA claim: that it has suffered an “ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated” by pleading that “[a]s a result of National Union’s unfair or deceptive acts or practices in violation of the TCPA, SSHC has suffered an ascertainable loss of money or property, *including but not limited to the costs associated with seeking the insurance coverage to which it is entitled under the Policies from National Union.*” (Counterclaim at ¶ 27) (emphasis added). While National Union tries to couch this claim for damages as “conjectural,” the costs associated with seeking the insurance coverage SSHC has fully paid for, while National Union is seeking to rescind the Policies in bad

faith, constitutes an ascertainable loss and is sufficient to meet the second element of a TCPA claim. There is nothing “conjectural” about the attorneys fees and costs SSHC has already incurred and will incur in the future fighting to retain the insurance coverage it purchased.

Because SSHC has pled facts sufficient to support both elements of a TCPA claim National Union’s motion to dismiss SSHC’s TCPA claim should be denied.³

2. The Ruling in *Nautilus v. The In Crowd* Is Inapposite.

In addition to misrepresenting the contents of SSHC’s pleading of its TCPA claim, National Union also argues that *Nautilus v. The In Crowd*, No. 3:04-0083, 2005 WL 2671252 (M.D. Tenn. Oct. 19, 2005), an unreported Middle District of Tennessee case, supports dismissing SSHC’s TCPA claim. National Union contends that *Nautilus* is directly on point, but even a cursory examination of the decision reveals that *Nautilus* is distinguishable from the facts in this case and does not support dismissal.

In *Nautilus*, like here, the insured was sued in an underlying claim and requested defense and indemnification from its insurer, but that is where the similarities end. 2005 WL 2671252, at *3. Unlike National Union, upon receipt of its insured’s demand, the insurer in *Nautilus* acknowledged the insurance policy, actually retained counsel for the insured, and provided a defense to the insured, while reserving its right to bring a declaratory action regarding the extent of its rights and obligations under the insurance policy. *Id.* While the lawsuit was pending, the

³ In its Motion to Dismiss, National Union also claims that SSHC fails to allege the necessary TCPA element that the insured was deceived by National Union’s unfair practices. (See Motion to Dismiss Memorandum at 19). While SSHC does not believe the case law supports such a requirement, clearly SSHC has alleged such an element in its counterclaim. SSHC has alleged that it was deceived by National Union and its agent Dentist’s Advantage when it was informed that its transition to coverage by National Union would be smooth and no additional information was requested prior to issuance of the Policies, only later to have National Union attempt to conduct its underwriting after the fact and to attempt to void the Policies. (See Counterclaim at ¶¶ 12-13; 21-22)

insurer then filed a declaratory judgment action, “seeking a determination of the parties’ rights, obligations, and liabilities under the insurance policy.” *Id.*

The course of action undertaken by the insurer in *Nautilus* differs in key ways from that undertaken by National Union. First, unlike in *Nautilus*, National Union’s lawsuit here is not a garden-variety declaratory judgment action with a legitimate, albeit contested, dispute over terms in a policy.⁴ It is one to void SSHC’s Policies *ab initio* based on claims National Union knows to be false. That scenario is a far cry from an insurer who in good faith provides a defense while seeking an interpretation of the terms of a valid insurance policy. Second, while National Union cites to reservation of rights letters that acknowledge an obligation to defend, unlike the insurer in *Nautilus*, National Union has never actually defended SSHC or paid for the defense of SSHC. Moreover, (a) the reservation of rights letters are matters beyond the pleadings that cannot be considered in the context of a motion to dismiss;⁵ and (b) even if they could be considered, the reservation of rights letters would not establish that National Union is in fact providing a defense to SSHC, or that it has paid anything toward defense costs.⁶ Third, and most importantly, unlike

⁴ As noted above, National Union has also sued SSHC in a case much more similar to *Nautilus* in federal court in Toledo. *See National Union Fire Insurance Company of Pittsburgh, PA v. FORBA Holdings, LLC, FORBA Services, Inc., Small Smiles Holding Company, LLC, and Small Smiles of Toledo, LLC*, Case No. 3:10-cv-00491-JGC, in the United States District Court for the Northern District of Ohio, Western Division.

⁵ As an initial matter, the reservation of rights letters attached as Exhibits D through G to National Union’s Motion to Dismiss should not be considered by the Court, as they relate to matters outside the pleadings. *Hensley Manufacturing v. Propride, Inc.*, 579 F.3d 603, 613 (6th Cir. 2009) (citing *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 576 (6th Cir. 2008)) (“When reviewing a motion to dismiss, the district court may not consider matters beyond the [counterclaim].”). However, “a document is properly considered on [a motion to dismiss] when it is ‘referred to in the complaint and . . . central to the plaintiff’s claim.’” *Alvord Investments, LLC v. The Hartford Financial Svcs. Group, Inc.*, 660 F. Supp. 2d 850, 853 (W.D. Tenn. 2009). In this case, even National Union admits that the reservation of rights letters are not referred to in the counterclaim or in its complaint. What is more, National Union’s reservation of rights letters are not relevant to the allegations in the Counterclaim regarding National Union’s bad faith attempt to avoid its insurance contract with the SSHC-Insureds altogether based on false representations.

⁶ If the reservation of rights letters are to be considered, the motion must be treated as one for summary judgment under Federal Rule of Civil Procedure 56, at which point, “[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.” Fed. R. Civ. P. 12(d); *Hensley Manufacturing*, 579 F.

in *Nautilus*, in which the policyholder relied upon the insurer's act of filing a complaint and pointed to no other acts undertaken or allegations made by the insurer "that might support an inference of an attempt to deceive" on the part of the insurer, SSHC here has pleaded ample facts that support an inference that National Union has attempted to deceive.

As pleaded in SSHC's counterclaim, *prior to* National Union's issuance of the Policies, SSHC informed National Union's agent, Affinity/Dentist's Advantage, of the very facts National Union is now claiming not to have known as a basis for its rescission suit. However, as a matter of law, the notice provided to National Union's agent binds National Union. *See* TENN. CODE ANN. § 56-6-115(b). For that reason, National Union clearly knows that it has no basis for seeking rescission of the Policies, and its rescission suit is nothing more than an attempt to "pile on" an already litigation-weary insured, all in an attempt to gain additional negotiation leverage over SSHC. This is a lawsuit brought for tactical reasons based on "facts" National Union knows to be false, and it clearly is not akin to the simple declaratory judgment action filed in *Nautilus*. No insurer should be permitted to act in this way.

Moreover, unlike in *Nautilus*, in which the policyholder alleged nothing more than the insurer's act of filing a complaint to support an inference of an attempt to deceive on the part of the insurer, 2005 WL 2671252, at *4, SSHC has put forth ample facts detailing National Union's deception – specifically by alleging that National Union has falsely and deceptively claimed that SSHC failed to provide notice of the Government Investigations, when SSHC in fact provided

3d at 613. SSHC certainly disputes that (a) reservation of rights letters establish that National Union is "affording a defense" to SSHC; or (b) National Union is "affording a defense" for SSHC or has fulfilled any obligation to provide a defense to SSHC in the underlying claims. Indeed, if this motion is treated as one for summary judgment (or partial summary judgment), National Union's motion should be denied at this stage, inasmuch as discovery in the case must proceed, with or without the counterclaim, on the principal case, and largely will cover discovery on the issues National Union raises with its reservation letters. If, after discovery, National Union believes the facts are sufficient to support a summary judgment, it can refile.

notice to National Union's partner and agent prior to the issuance of the Policies. (Counterclaim ¶¶ 7-13, 21-22).

SSHC acknowledges the holding in *Nautilus* – that an insured cannot maintain a counterclaim against an insurer based solely on an insurer's good faith declaratory judgment action to determine the terms of coverage under a policy while the insurer simultaneously provides a defense to the insured. However, SSHC's TCPA claim is not based solely on National Union's "having filed a ... lawsuit" or, stated another way, "seeking a judicial determination." Here, National Union's filing of a complaint was the *culmination of a series of bad acts*, all of which are alleged in SSHC's counterclaim. Those allegations state a valid TCPA claim, and National Union's mere act of filing a complaint cannot convey upon it a cloak of immunity.

Instead, this case fits more in line with *Sparks v. Allstate Ins. Co.*, in which the insurer deceptively and unfairly refused to honor an insured's insurance claim after fire damage, purportedly because of suspected arson, despite clear evidence that there was no arson and the claim fell under the insurance policy. 98 F. Supp. at 936. As the court in *Sparks* explained, "The plain language of the [TCPA] statute is broad enough to cover not only advertising and sales, but also conduct affecting the 'distribution of any services, or property.' Presumably, when an insured files a claim with an insurance company, she seeks payment from the company. Such a payment, by its nature, is a distribution of property and would appear to come within the ambit of the statute." *Id.* at 937. The court in *Sparks* then went on to hold, "Taking plaintiff's allegations as true, as the court must, and drawing all inferences from those allegations in her favor, the court finds that if defendant had clear evidence that there was no arson and yet violated the terms of the policy by refusing to pay plaintiff's claim, that action could violate the TCPA."

Id. at 938. In this case, as in *Sparks*, SSHC's TCPA claim arises from National Union having clear evidence that the very facts allegedly giving rise to rescission were in fact disclosed prior to the issuance of the Policies – thus no claim for rescission exists. *See also Cowie v. State Farm Fire & Cas. Co.*, No. 1:07-cv-63, 2007 WL 2238272, at *7 (E.D. Tenn. Aug. 1, 2007) (holding that an insured could maintain a claim against the insurer for denying an insurance claim based on information the insurer knew was untrue). Therefore, SSHC's TCPA claim should be upheld.

As alleged in its counterclaim, at the time National Union issued the Policies, it knew of the Government Investigations it now claims to have never known about. *See* TENN. CODE ANN. § 56-6-115(b). Moreover, it never asked for any information from SSHC prior to issuing the Policies. Therefore, its rescission claim is not only brought in bad faith, but is based on false information. For that reason, SSHC's counterclaim varies greatly from the counterclaim in *Nautilus* and should survive National Union's motion to dismiss.

C. SSHC's Bad Faith Statute Claim Should Survive the Motion to Dismiss.

Despite National Union's arguments to the contrary, SSHC has pleaded facts to support all the elements of its bad faith statute claim under TENN. CODE ANN. § 56-7-105. In order to establish a claim under TENN. CODE ANN. § 56-7-105, a party must show (1) the insurance policy in question is due and payable, (2) a formal demand for payment was made, (3) the insured waited at least 60 days after making the formal demand before filing suit, unless the insured refused to pay prior to the 60 days, and (4) the refusal to pay was not in good faith. *Cracker Barrel Old Country Store, Inc. v. Cincinnati Ins. Co.*, 590 F. Supp. 2d 970, 973 (M.D. Tenn. 2008). SSHC has pled facts to support each of these elements, and on that basis, National Union's motion to dismiss should be denied.

First, SSHC pleaded in its counterclaim that (a) National Union issued dental professional liability policies to SSHC; (b) SSHC paid all premiums for those policies and complied with all requirements of the policies; and (c) SSHC has sought coverage for claims, which National Union has a contractual obligation to provide, and National Union is attempting to avoid that contractual obligation by attempting to conduct its underwriting after the fact. (*See* Counterclaim at ¶¶ 13-21); *see also Commercial Standard Ins. Co. v. Paul*, 245 S.W.2d 775, 781 (Tenn. Ct. App. 1951) (holding that an insurance company is estopped from denying coverage on the ground that the insured failed to provide information to the insurance company when the insured provided the information at issue to the insurance company's agent prior to the issuance of the policy); *Provident Life & Accident Ins. Co. v. Ivy*, 73 S.W.2d 706, 711 (Tenn. Ct. App. 1933) (“where an insurer, at the time of the issuance of a policy of insurance, has knowledge of existing facts which, if insisted upon, would invalidate the contract from its very inception, such knowledge constitutes a waiver of conditions in the contract inconsistent with the known facts, and the insurer is estopped thereafter from asserting the breach of such conditions.”). These facts are sufficient to support an allegation under the first element of a claim under TENN. CODE ANN. § 56-7-105 – that the insurance policy is due and payable.

Second, SSHC pleaded facts in its counterclaim sufficient to meet the second two elements of a claim under TENN. CODE ANN. § 56-7-105. In its counterclaim, SSHC pled that it made a formal demand for payment from National Union more than 60 days prior to filing suit. (*See* Counterclaim at ¶¶ 16, 18, 20).

While National Union has claimed in its motion to dismiss that SSHC did not sufficiently allege the second two elements of a TENN. CODE ANN. § 56-7-105 claim because SSHC did not allege that it made a formal demand for payment “threatening litigation as a result of National

Union's bad faith failure to pay," (see Motion to Dismiss Memorandum at 22), the facts alleged in the counterclaim, and the attached exhibit contradict that assertion. Tennessee courts have held that the purpose of the formal demand requirement "is to allow the insurer to evaluate its reasons for denying the claim after being aware for 60 days that if the claim is not paid, the insurer faces the risk of exposure to a bad faith penalty claim." *Cracker Barrel*, 590 F. Supp. 2d at 975 (citing *Hampton v. Allstate Ins. Co.*, 48 F. Supp. 2d 739, 746 (M.D. Tenn. 1999)). Counsel for SSHC sent a letter to the senior analyst for Chartis Insurance (AIG) who was handling the dispute over insurance coverage with National Union on July 26, 2010, which gave National Union sufficient notice for it to evaluate its reasons for denying SSHC's claim and notice of its exposure if the claim was not paid.

In that letter, attached hereto as Exhibit 2, counsel for SSHC informed National Union that despite its purported basis for rescission, SSHC had given notice of the Government Investigations to National Union's agent. Moreover, there was public information available to National Union regarding the investigations. Therefore, SSHC's counsel stated in the letter, "[a]n insurer has an obligation to its insureds to do its underwriting at the time a policy application is made, not after a claim is filed. The fact that National Union has even raised the issue of rescission *raises serious questions about the manner in which it is adjusting Small Smiles' claims.*" (Exhibit 2) (emphasis added, internal citation omitted). The statements in that letter are sufficient to meet the formal demand purpose of "allowing the insurer to evaluate its reasons for denying the claim." See *Cracker Barrel*, 590 F. Supp. 2d at 975. Therefore, the allegations in the counterclaim and the attached letters are sufficient to meet the second and third elements of a claim under TENN. CODE ANN. § 56-7-105.

Third, SSHC alleged sufficient facts to meet the fourth element of a TENN. CODE ANN. § 56-7-105 claim – that the refusal to pay was not in good faith. In paragraphs 5-22 of the counterclaim, SSHC lays out the reasons National Union’s attempt to avoid coverage with this rescission suit is in bad faith, which include National Union’s denial that it had knowledge of Government Investigations which were directly communicated to its agent prior to issuance of the Policies. More specifically, SSHC pled in paragraph 21 of the counterclaim:

National Union now seeks to avoid its contractual obligations to the SSHC-Insureds and advances the frivolous and unfounded contention that its insurance contracts with SSHC are voidable and should be rescinded because SSHC allegedly ‘failed to disclose’ certain ‘material information’ to National Union during the underwriting and issuance of the Policies. National Union has espoused this position despite the fact that prior to National Union’s issuance of the Policies (a) National Union never asked for a policy application from SSHC and never asked for any of the information that it now claims was “material” to National Union’s analysis of the risk involved; (b) SSHC, in fact, already had provided express notification to and engaged in extensive correspondence with National Union’s agent, Dentist’s Advantage, regarding the Government Investigations; and (c) information about the Government Investigations was publicly available and easily accessible.

Moreover, in paragraphs 31 and 32 of the counterclaim, SSHC pled,

In keeping with the notification requirements of the Policies, SSHC provided formal notice of each of the claims brought against it as soon as it learned of the claims and formally demanded coverage, including defense and indemnity. National Union has in turn sought rescission of its insurance contracts with the SSHC-Insureds, by falsely claiming that SSHC did not provide notification of the potential claims and investigations against it at the time National Union issued its Policies to SSHC.

National Union, in a conspicuous effort to shirk its contractual obligations and obtain rescission of the Policies, has falsely claimed that SSHC did not provide notice of the Government Investigations and has otherwise acted in bad faith in regard to its obligations under the Policies.

These allegations are sufficient to meet the fourth element – that the refusal to pay was not in good faith – of a TENN. CODE ANN. § 56-7-105 claim.

Because SSHC pled facts sufficient to state a claim under TENN. CODE ANN. § 56-7-105, and has also submitted documents central to its allegations with this response that further support its allegations, SSHC has met its pleading burden for TENN. CODE ANN. § 56-7-105 claim, and National Union's motion to dismiss should be denied.

D. SSHC's Allegations Are Sufficient to Meet the Heightened Pleading Requirements of FRCP 9(b).

Federal Rule of Civil Procedure 9(b) “adds additional pleading requirements for allegations of fraud or mistake, but it should not be read to defeat the general policy of ‘simplicity and flexibility’ in pleadings contemplated by the Federal Rules.” *United States ex rel. Snapp, Inc. v. Ford Motor Co.*, 532 F.3d 496, 503 (6th Cir. 2008). “[U]nder Rule 9(b), a plaintiff must ‘allege the time, place and content of the alleged misrepresentation . . . the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud.’” *Id.* at 504 (quoting *United States ex rel. Bledsoe v. Community Health Sys., Inc.*, 501 F.3d 493, 504 (6th Cir. 2008). “Essentially, a complaint should provide fair notice to Defendants and enable them to prepare an informed pleading responsive to the specific allegations of fraud.” *Id.* As long as the pleader “pleads sufficient detail – in terms of time, place and content, the nature of a defendant’s fraudulent scheme, and the injury resulting from the fraud – to allow the defendant to prepare a responsive pleading, the requirements of Rule 9(b) will generally be met.” *Id.*

Despite National Union's arguments to the contrary, the allegations in SSHC's counterclaim are clearly sufficient to meet the heightened pleading requirements for allegations of fraud. In its counterclaim, SSHC pled that in July 2008, National Union's agent, Affinity/Dentist's Advantage, notified SSHC that it would transition SSHC to coverage from National Union and the transition would be “smooth.” (Counterclaim at ¶ 12). SSHC further

alleged that neither Affinity/Dentist's Advantage nor National Union asked SSHC to fill out an insurance application or asked for any further information regarding the Government Investigations that SSHC had already disclosed to Affinity/Dentist's Advantage. (*Id.* at ¶ 13). SSHC also alleged the time, place and content of its later notices to National Union of claims being asserted against the SSHC-Insureds. (*Id.* at ¶¶ 15-20). Finally, SSHC alleged the fraudulent scheme it is asserting against National Union in paragraphs 21-22 of its counterclaim, asserting that National Union is seeking to "avoid its contractual obligations" based on the unfounded contention that SSHC "failed to disclose" the very facts that SSHC had disclosed to National Union's agent prior to issuance of the Policies. These allegations are specific and detailed enough to meet the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), and for that reason, National Union's Motion to Dismiss should be denied.

CONCLUSION

For the foregoing reasons, SSHC respectfully requests that National Union's Motion to Dismiss be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served, via the Court's electronic filing system on all registered users, and via United States mail, first-class postage prepaid on all others, on the following:

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This 10th day of January, 2011.

/s/ Robert J. Walker _____