UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MILLENNIUM LABORATORIES, INC.,

Plaintiff,

vs.

DARWIN SELECT INSURANCE COMPANY,

Defendant.

CASE NO. 12-CV-2742 H (KSC)

ORDER:
1) GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT ON THE DUTY TO DEFEND AND ON BAD FAITH, and

[Doc. Nos. 59 & 62]

2) GRANTING DEFENDANT'S MOTION TO FILE SUPPLEMENTAL BRIEF

[Doc. No. 103]

This action involves an insurance coverage dispute. On March 26, 2014, Plaintiff Millennium Laboratories, Inc. ("Millennium Labs") filed a motion for summary judgment that Defendant Darwin Select Insurance Company ("Darwin") breached its duty to defend Millennium Labs in two underlying lawsuits. (Doc. No. 59.) On the same day, Darwin filed a cross-motion for summary judgment that it owes no duty to defend and did not deny Millennium Labs's claims in bad faith. (Doc. No. 62.) On April 11, 2014, Millennium Labs and Darwin each filed a response in

opposition to the other party's motion for summary judgment. (Doc. Nos. 75 & 81.) On April 18, 2014, the parties each filed a reply. (Doc. No. 84 & 93.) The Court held a hearing on the parties' cross-motions for summary judgment on April 25, 2014. Marc D. Halpern, Vincent H. Herron, and Anthony J. Matera appeared for Millennium Labs. Ronald P. Schiller and Robert A. Wiygul appeared for Darwin. The Court grants Millennium Labs's motion for partial summary judgment that Darwin breached its duty to defend and denies Darwin's motion for summary judgment on the duty to defend and bad faith claims.

Background

Plaintiff Millennium Labs is a diagnostics laboratory that provides specialty testing services at the request of health care providers. (Doc. No. 73-1, Declaration of Robert Wiygul ("Wiygul Decl."), Ex. 1.) Specifically, Millennium Labs offers urine drug testing to identify the presence or absence of medications, illegal drugs, and other substances present in a patient's system at the time of the test. (Id.; see also Wiygul Decl., Ex. 2.) Millennium Labs obtained from Darwin a Miscellaneous Medical Facilities, Professional Employment Practices and General Liability Insurance Policy No. 0305-0307 ("the policy"), issued for the policy period of December 1, 2011 to December 1, 2012. (Doc. No. 73-2, Wiygul Decl., Ex. 6.) The policy covers "claims alleging Personal or Advertising Injury caused by an offense that takes place during the policy period" and defines "Personal or Advertising injury" in pertinent part as "injury, other than bodily injury, arising out of . . . [o]ral or written publication, in any manner, that slanders or libels a person or organization or disparages a person's or organization's goods, product or services." (Id. at 17, §I.B.2; id. at III.CC.4.) The policy's coverage includes "the right and duty to defend any such Claim brought against" Millennium Labs. (Id. at 17, §I.B.2.)

A. The Underlying Ameritox Action

On April 8, 2011, one of Millennium Labs's competitors, Ameritox Ltd., filed a lawsuit against Millennium Labs in the United States District Court for the Middle

District of Florida. (See Doc. No. 62-4, Darwin's Request for Judicial Notice ("RJN"), Ex. 1.)[1] On April 22, 2011, Ameritox filed another lawsuit against Millennium Labs in the United States District Court for the Southern District of California. (See id., Ex. 2.) The court granted a motion to transfer the second suit to the Middle District of Florida, where the court consolidated the two cases (the "underlying Ameritox action") on March 28, 2012. (Id. Exs. 5 & 6.)

On April 9, 2012, Ameritox filed a third amended complaint in the consolidated case, alleging seven causes of action: 1) false advertising in violation of the Lanham Act, 15 U.S.C. § 1125(a) et seq.; 2) injunctive relief under Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. § 501.201, et seq.; 3) damages under FDUTPA; 4) injunctive relief under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200; 5) injunctive relief and damages under New Hampshire's Consumer Protection Act ("NHCPA"), N.H. Rev. Stat. Ann. § 358-A, et seq.; 6) common law tortious interference; and 7) common law unfair competition. (Id. Ex. 7.) Particularly relevant is paragraph 28 of the complaint, alleging that

> Millennium uses . . . kickbacks and improper practices to increase its market share to the detriment of Ameritox. In fact, Millennium's scheme is specifically directed at causing the destruction of Ameritox. In or about February 2012, Millennium's general counsel, Martin Price, gave a PowerPoint presentation to a gathering of Millennium's nationwide sales representatives which included a slide with a graphic of a target over Ameritox's name. On a follow-up slide, Ameritox's name was displayed in a body bag with a toe-tag hanging from it. Millennium's actions have evidenced its intent to do harm to Ameritox in the marketplace at any cost, and Millennium has instructed its sales reps to do the same.

(Id. Ex. 7.) The parties agree that this remains the operative complaint in the underlying Ameritox action. (See Doc. No. 59-1 at 14; Doc. No. 62-1 at 11.)

The Ameritox court has scheduled a trial in the action for June 2, 2014. See

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[1]Pursuant to Federal Rule of Evidence 201, the Court may take judicial notice of the complaint in this and other related actions because they are matters of public record. See Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001) ("[U]nder Fed. R. Evid. 201, a court may take judicial notice of 'matters of public record.'").

Ameritox Ltd. v. Millennium Laboratories, Inc. ("Ameritox"), Case No. 11-cv-775 (M.D. Fla.) Doc. No. 467.) On April 30, 2014, Ameritox filed a memorandum in response to a court order to clarify its pending claims and describe the factual predicates for its Lanham Act claims.[2] The memorandum does not mention the February 2012 PowerPoint presentation, but Ameritox listed the presentation as a trial exhibit. (See Doc. No. 104-2, Declaration of Christopher Lisy, ¶ 3.) Additionally, Ameritox opposed Millennium Labs's motion in limine to exclude the PowerPoint presentation at trial. (Ameritox, Doc. No 473; see also Lisy Decl., ¶ 4.)

B. The Underlying Calloway Action

On September 2, 2010, Millennium filed a complaint in the Superior Court of Massachusetts against a competitor named Calloway Laboratories, Inc. and Jim Wilkes, a Calloway employee (the "underlying Calloway action"). (See Doc. No. 62-5, RJN Ex. 10.) On September 26, 2011, the Calloway defendants filed an answer including three counterclaims: 1) interference with contractual relations; 2) unjust enrichment; and 3) unfair and deceptive practices in violation of M.G.L C. 93A. The Calloway defendants' June 2012 discovery responses, addressing their basis for the wrongdoing alleged in its counterclaims, identified the 2012 PowerPoint presentation as conduct that constituted "an attack" on Calloway. (See Doc. No. 62-1 at 12; see also Doc. No. 73-1,Wiygul Decl, Ex. 5 (sealed).) Specifically, Calloway stated the following as a factual basis for its counterclaims:

> In [Millennium's] 2012 Annual Meeting Millennium's general counsel prepared a power point presentation documenting its marketing strategy through litigation. . . . By literally showing Calloway as a target in a

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[2]On May 1, 2014, Darwin filed an ex parte motion to this Court to file a supplemental brief in support of its motion for summary judgment to advise the Court of this development, in light of the fact that it occurred after the parties fully briefed their cross-motions for summary judgment in this action, and after Court held a hearing. (Doc. No. 103.) On May 5, 2014, Millennium Labs filed an opposition, arguing that ex parte relief would not be appropriate, as well as opposing the supplemental brief on the merits. (Doc. No. 104.) After reviewing the documents in question, the Court is persuaded that a supplemental filing was appropriate in these circumstance. Accordingly, the Court grants Darwin's motion to file supplemental briefing. (Doc. No. 103.)

> firing range with gunshots heard in the background and then in a body bag with toe tags along with Calloway's former compliance officer, now deceased, . . . Millennium's general counsel stated that Millennium's goal was to see to it that Calloway was put out of business by the end of 2012.

(Id.) On January 22, 2013, the Calloway court granted Millennium Labs's motion for summary judgment on the counterclaims. (Doc. No. 62-5, RJN Ex. 13.) The parties signed a stipulated dismissal of the action on February 27, 2013. (Id. Ex. 14.)

C. Millennium Labs Tenders the Claims for Defense

The parties agree that Ameritox's original complaint and Calloway's counterclaim were both filed prior to December 1, 2011, and that the period of coverage for the policy in question covers events occurring from December 1, 2011 to December 1, 2012. (Doc. No. 59-1 at 9; Doc. No. 62-1 at 15-16.) Millennium Labs's general liability insurer prior to December 2011 was Travelers Property & Casualty Company of America, and Millennium originally tendered defense of the underlying Ameritox and Calloway actions to Travelers. (Doc. No. 59-1 at 9; Doc. No. 62-1 at 15.) Travelers initially denied coverage and sued Millennium Labs, seeking a declaration that it owed no duty to defend the lawsuits. See The Travelers Property Casualty Co. of Am. v. Millennium Lab Holdings, Inc., Case No. 37-2011-00101794-CU-IC-CTL (Cal. Super. Ct., Nov. 30, 2011). On September 18, 2012, Millennium Labs tendered these actions to Darwin and to an affiliated insurer named Allied World Assurance Company (U.S.), Inc. ("AWAC"). (Doc. No. 59-1 at 10; Doc. No. 62-1 at 17.) On October 26, 2012, an outside law firm representing both Darwin and AWAC informed Millennium Labs that the policy did not cover the Ameritox and Calloway actions on the grounds that those actions did not allege any instances of Personal or Advertising injury within the meaning of the policy. (Doc No. 73-4, Exs. 22-23, sealed.)

On November 9, 2012, Millennium Labs sued Darwin for coverage, alleging causes of action for (1) declaratory relief, (2) breach of contract, and (3) breach of the covenant of good faith and fair dealing. (Doc. No. 1, Compl.) On January 7, 2012,

Darwin filed its answer to Millennium Labs' complaint. (Doc. No. 13.)

Millennium Labs moves for partial summary judgment that Darwin owes a duty to defend it in the underlying actions. (Doc. No. 59-1 at 5.) Darwin cross-moves for summary judgment that it owes no duty to defend Millennium Labs in either of the underlying actions under the terms of the policy, and that it did not act in bad faith. (Doc. No. 62-1, at 7, 31.)

Discussion

I. Legal Standards for Summary Judgment

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure if the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997). A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party. Anderson, 477 U.S. at 248.

A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The moving party can satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to establish an essential element of the nonmoving party's case on which the nonmoving party bears the burden of proving at trial. Id. at 322-23. "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). Once the moving party establishes the absence of genuine issues of material fact, the burden shifts to the nonmoving party to set forth facts showing that a genuine issue of disputed fact remains. Celotex, 477 U.S. at 322. The nonmoving party cannot oppose a properly supported summary judgment motion

by "rest[ing] on mere allegations or denials of his pleadings." Anderson, 477 U.S. at 256. "The 'opponent must do more than simply show that there is some metaphysical doubt as to the material fact.'" Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 265–66 (9th Cir. 1991) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)).

When ruling on a summary judgment motion, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. Matsushita, 475 U.S. at 587. The Court does not make credibility determinations with respect to evidence offered. See T.W. Elec., 809 F.2d at 630-31 (citing Matsushita, 475 U.S. at 587). Summary judgment is therefore not appropriate "where contradictory inferences may reasonably be drawn from undisputed evidentiary facts." Hollingsworth Solderless Terminal Co. v. Turley, 622 F.2d 1324, 1335 (9th Cir. 1980).

II. Analysis

Millennium Labs argues that it is entitled to summary judgment because under the terms of the policy, Darwin must reimburse Millennium Labs for its defense costs if the Ameritox or Calloway suits are potentially covered by the policy. (Doc. No. 59-1 at 1-2.) Specifically, Millennium Labs argues that the Ameritox or Calloway suits are potentially covered under the policy as claims alleging personal or advertising injury. (Id. at 6.) Darwin argues that the underlying actions do not allege personal or advertising injury, (Doc. No. 62-1 at 20; 24-26), that coverage is barred by the policy's "prior noticed claims" exclusion, (id. at 20-22; 28-30), and that claims surrounding the PowerPoint presentation are not within the policy period because they relate back to prior activities under the policy's"Related Acts Deemed Single Act" provision, (id. at 22-24; 30-31). Darwin further argues that it did not act in bad faith as a matter of law because there is no duty to defend, and because its denial of Millennium Labs's claims was objectively reasonable. (Id. at 31.)

The parties agree that the policy is governed by California law. (See Doc. No. 59-1 at 11; Doc. No. 62-1 at 18.) See, e.g., Intri-Plex Techs., Inc. v. Crest Group, Inc.,

499 F.3d 1048, 1052 (9th Cir. 2007) (stating, in an insurance coverage dispute, that the law of the forum state applies in diversity actions). Under California law, the interpretation of an insurance policy is a question of law to be determined by the Court. See Waller v. Truck Ins. Exchange, Inc., 11 Cal. 4th 1, 18 (1995); Garcia v. Truck Ins. Exch., 36 Cal. 3d 426, 439 (1984) ("It is solely a judicial function to interpret a written contract unless the interpretation turns upon the credibility of extrinsic evidence, even when conflicting inferences may be drawn from uncontroverted evidence."); see also New Hampshire Ins. Co. v. R.L. Chaides Constr. Co., 847 F. Supp. 1452, 1455 (N.D. Cal. 1994) (The "'interpretation of insurance contracts raise questions of law and thus are particularly amendable [sic] to summary judgment.'"). The mutual intention of the parties at the time the contract is formed governs the interpretation of insurance contracts. Waller, 11 Cal. 4th at 18. Courts must look first to the language of the written contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it. Id. "A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. But language in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract." Id. (internal citation omitted). If there is an ambiguity, the policy terms must be "'interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.'" Bank of the West v. Sup. Ct., 2 Cal. 4th 1254, 1264-65 (1992).

The insured bears the burden of proving coverage under the policy, and coverage is interpreted broadly in order to provide the greatest possible protections to the insured. See Waller, 11 Cal. 4th at 16; Reserve Ins. Co. v. Pisciotta, 30 Cal. 3d 800, 808 (1982). Exclusions are construed narrowly and must be proven by the insurer. Id.; see also Haynes v. Farmers Ins. Exchange, 32 Cal. 4th 1198, 1204 (2004) (stating that an exclusion "must be conspicuous, plain and clear").

Under California law, "[a]n insurer must defend its insured against claims that create a potential for indemnity under the policy." Montrose Chemical Corp. v.

Superior Court, 6 Cal.4th 287, 295 (1993); Gray v. Zurich Insurance Co., 65 Cal.2d 263, 275 (1966). "The duty to defend is broader than the duty to indemnify, and it may apply even in an action where no damages are ultimately awarded." Scottsdale Ins. Co. v. MV Transportation, 36 Cal. 4th 643, 654 (2005). A duty to defend may be triggered by an amended complaint, even where the original complaint did not trigger a duty to defend. E.g., Marie Y. v. Gen. Star Indem. Co., 110 Cal. App. 4th 928, 957 (2003). Furthermore, "that the precise causes of action pled by the third party complaint may fall outside policy coverage does not excuse the duty to defend where, under the facts alleged, reasonably inferable, or otherwise known, the complaint could be fairly amended to state a covered liability." Scottsdale, 36 Cal. 4th at 654-55. "To defend meaningfully, the insurer must defend immediately. To defend immediately, it must defend entirely. It cannot parse the claims, dividing those that are at least potentially covered from those that are not." Buss v. Superior Court, 16 Cal. 4th 35, 49 (1997).

1. The "Potential for Coverage" Standard

The policy at issue covers "claims alleging Personal or Advertising Injury caused by an offense that takes place during the policy period" and defines "Personal or Advertising injury" as injury "arising out of . . . [o]ral or written publication, in any manner, that slanders or libels a person or organization or disparages a person's or organization's goods, product or services." (Doc. No. 73-2, Wiygul Decl., Ex. 6 at 17, §I.B.2; id. at III.CC.4.) Thus, the primary dispute is whether the Ameritox third amended complaint and the Calloway counterclaim create a "potential for coverage" under the terms of the policy. The Court concludes that they do.

Under California law, "the insured need only show that the underlying claim may fall within policy coverage; the insurer must prove it cannot." Montrose Chem., 6 Cal. 4th at 300. When Millennium Labs tendered its claim for coverage of the Ameritox action under the policy, it included the text of ¶ 28, stating that "Millennium's actions have evidenced its intent to do harm to Ameritox in the marketplace at any cost, and Millennium has instructed its sales reps to do the same." (Doc No. 73-4, Ex. 20,

sealed.) When Millennium Labs tendered its claim for coverage of the Calloway action, it included Calloway's allegation that Millennium "engaged in a concerted plan to 'attack' Calloway . . . through its marketing efforts" as well as Calloway's discovery responses mentioning the PowerPoint presentation as a basis for the counterclaim. (See Doc No. 73-4, Ex. 21, sealed; see also Doc. No. 75-10, Fowler Decl. Ex. D, Calloway Answer, at 18.) Based on this information, Darwin could have determined that the underlying actions fell within the policy's coverage of claims based on disparagement of an organization's goods, product or services. Accordingly, the Court concludes that Millennium Labs has satisfied its burden to "show that the underlying claim may fall within policy coverage." Montrose Chem., 6 Cal. 4th at 300.

In discovery, Millennium Labs produced to Darwin's affiliated company AWAC a redacted copy of Mr. Price's notes used during the 2012 PowerPoint presentation itself. (See Doc. No. 92-1, Declaration of Phillip E. Wison, Jr., ¶ 12 (sealed); Doc. No. 72-4, Fowler Decl., Ex. I (sealed).) The presentation included the following sales pitch to be repeated by Millennium Labs's sales force:

> We are the only lab to offer a compliant LSA program;
> [. . .]
> I don't want Ameritox's money. I want to help you drive them out of business in 2012. They have nothing to sell against us but bad science and illegal inducements;
> [. . .]
> In 2010, we filed suit against Ameritox for falsely promoting RxGuardian . . . . RxGuardian harms patients. That's the message customers should understand about the Ameritox case;
> [. . .]
> Ameritox is the only lab in our space operating under a three year corporate-integrity-agreement imposed by the department of justice because the government did not believe that Ameritox could clean up it's [sic] act without constant oversight.
> [. . .]
> Here's the bottom line, Don't let any physician be misled into believing that Ameritox is not the most unethical, most litigatious, most fined company in our space.

(Id. (Sealed).) These comments disparage Ameritox's products and services. Specifically, the comments state that Ameritox sells "bad science," harms patients, and requires governmental oversight to be acceptable. Moreover, Millennium Labs's

deposition of Ameritox CEO Ancelmo Lopes in the underlying Ameritox action confirms a potential disparagement claim:

> Q. It's Ameritox's position in the case that Millennium has disparaged it repeatedly in the marketplace. Correct?
> A. Yes.
> Q. Okay. And that's – that's happened, according to Ameritox, through the tenure of your time as CEO and up including until today. Correct?
> A. Yes.

(Doc. No. 90-13, Declaration of Brian Fowler ("Fowler Decl."), Ex. L (sealed).) Based on these statements, Millennium Labs has shown in the Ameritox action that "the underlying claim[s] may fall within policy coverage." See Montrose Chem., 6 Cal. 4th at 300. Similarly, the Calloway action included Calloway's discovery responses that referenced the PowerPoint presentation as well as the counterclaim allegations that Millennium Labs "engaged in a concerted plan to 'attack' Calloway . . . through its marketing efforts." (See Doc No. 73-4, Ex. 21, sealed; see also Doc. No. 75-10, Fowler Decl. Ex. D, Calloway Answer, at 18.) As a result, Plaintiff has shown a potential for coverage of the Ameritox and Calloway actions.

2. Other Arguments Against Darwin's Duty to Defend

Darwin argues that, contrary to the policy's provision for its duty to defend, coverage is barred by two other provisions: the policy's "prior noticed claims" exclusion, (id. at 20-22; 28-30), and its "Related Acts Deemed Single Act" provision, (id. at 22-24; 30-31). Darwin first argues that the policy broadly excludes all claims previously noticed to other insurers. Darwin next argues that claims relating to the PowerPoint presentation should be deemed to fall outside the policy period because they relate back to prior activities under the policy's "Related Acts Deemed Single Act" provision.

The policy's "prior noticed claims" exclusion does not overcome Darwin's duty to defend. The exclusion reads, "this policy shall not apply to any claim based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving . . . [2] any acts, errors, omissions, Medical Professional Incidents,

Occurrences, facts, matters, events, suits or demands notified or reported to . . . any policy of insurance . . . in effect prior to the Inception Date of this Policy." (Doc. No. 62-1 at 20-22; 28-30; see also Doc. No. 73-2, Wiygul Decl., Ex. 6 at §IV.F.2). Darwin argues that the policy unambiguously excludes from coverage any claim arising out of the Ameritox or Calloway actions because Millennium Labs previously reported those cases to Travelers for coverage. (Doc. No. 62-1 at 21.)

Darwin's argument fails because it would read out the plain language of the exclusion that requires the relevant claim to have been previously noticed or tendered under another policy. The "prior noticed claims" provision only excludes Darwin's duty to defend against claims where the factual basis for those claims had been previously noticed or tendered under another policy. Cf. Minkler v. Safeco Ins. Co. Of America, 49 Cal. 4th 315 (2010) ("[C]lauses setting forth specific exclusions from coverage are interpreted narrowly against the insurer."). Here, the parties agree that prior to Ameritox's third amended complaint or Calloway's discovery responses, neither action could have been read to have alleged disparagement or another form or advertising injury. (See Doc. No. 75 at 22; Doc. No. 62-1 at 10.) When Millennium Labs initially tendered its claims to Travelers in 2011, the 2012 PowerPoint presentation had not yet existed, and therefore it could not have been a factual basis for any of the claims tendered. Accordingly, the Court concludes that Millennium's claims for coverage in the Ameritox and Calloway actions for disparagement based on the 2012 PowerPoint presentation are not excluded as prior noticed claims.

The Court further concludes that the policy's"Related Acts Deemed Single Act" provision does not eliminate Darwin's duty to defend the underlying lawsuits. Darwin argues that it is not obligated to defend the underlying Ameritox or Calloway actions because the PowerPoint presentation, though it occurred in February 2012, must be deemed to have occurred outside the policy period of December 1, 2011 through December 1, 2012 because the policy provides "all damages arising from the same or related accidents, acts, offenses, publications or general conditions are considered to

arise out of a single Occurrence," and that "such Occurrence will be deemed to have first taken place at the time the first such accident, act, publication or general condition occurs." (Doc. No. 62-1 at 22.) But Darwin does not point to any earlier acts of disparagement alleged in either the Ameritox or Calloway actions that would constitute a "same or related act" within the meaning of the policy. (See id.) Darwin instead generally asserts that the PowerPoint presentation is part of "the same alleged scheme" as the other acts described in the Ameritox complaint and the Calloway counterclaim. Darwin has not come forward with evidence to show that Mr. Price's comments in the 2012 PowerPoint presentation constituted a "same or related act" to any disparagement in the underlying actions. A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. Furthermore, in the absence of clear policy language that the provision may be used to deny coverage, the Court will not read the related acts provision to act as an exclusion. See Haynes, 32 Cal. 4th at 1204 (stating that "any provision that takes away or limits coverage reasonably expected by an insured must be conspicuous, plain and clear."). Accordingly, the Court denies Darwin's cross-motion for summary judgment on the duty to defend.

Darwin also moves for summary judgment on Millennium Labs's claim of bad faith. Darwin contends that it was not objectively unreasonable for Darwin to believe, at the time it denied coverage, that the allegations based on the PowerPoint presentation related to other claims asserted in the underlying actions, particularly in light of the fact that Millennium Labs did not provide Darwin with the redacted copy of Mr. Price's PowerPoint notes until January 22, 2014. (Doc. No. 92-1, Declaration of Phillip Wilson, ¶ 12 (sealed).) "[A]n insurer cannot be liable for bad faith if its conduct was objectively reasonable." Behnke v. State Farm General Ins. Co., 196 Cal. App. 4th 1443, 1470 (Cal. App. 4th Dist. 2011). Darwin points to Millennium Labs's belated tender of defense, Millennium Labs's delay in providing the PowerPoint presentation and notes, Darwin's coverage opinion of counsel, the policy exclusions,

the tender to another carrier, and other indicia that the suits were not potentially covered. (Doc. No. 62-1 at 31.) In response, Millennium Labs contends that the reasonableness of Darwin's position and whether Darwin acted in bad faith are questions for a jury, citing as support its allegation that Darwin did not conduct an investigation before handing over Millennium Labs's claims to outside counsel, and testimony of Darwin's employee that he did not understand Darwin's argument that an exclusion applied. (Doc. No. 75 at 30-31.) The Court agrees with Millennium Labs that Darwin's decision to deny a duty to defend raises a triable issue of material fact. See Celotex, 477 U.S. at 322. As a result, the Court denies Darwin's motion for summary judgment on the bad faith claim.

Conclusion

Millennium Labs has shown that the underlying actions triggered Darwin's duty to defend under the "potential for coverage" standard, and Darwin has not carried its burden to prove they cannot be covered. Montrose Chem., 6 Cal. 4th at 300. Accordingly, the Court grants Millennium Labs's motion for partial summary judgment and denies Darwin's cross-motion for summary judgment on the duty to defend and bad faith claims.

IT IS SO ORDERED.

DATED: May 13, 2014

MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT