UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AXIS INSURANCE COMPANY,

Plaintiff,

v.

INTER/MEDIA TIME BUYING CORPORATION, et al.,

Defendants.

Case No. CV 15-01380-DMG (AJWx)

ORDER RE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [32]

The matter before the Court is the summary judgment motion of Defendants Inter/Media Time Buying Corporation ("Inter/Media"); InterQuantum LLC ("InterQuantum"); Bellatrix Media, Inc. ("Bellatrix"); Inter/Image Productions, Inc. ("Inter/Image"); Inter/Post Productions, Inc. ("Inter/Post"); Inter/Media Interactive, Inc. ("I/M Interactive"); MediaPoint Network, Inc. ("MediaPoint"); Inter/Media Advertising, Inc. ("Inter/Media Advertising"); and Robert Yallen. A hearing on the motion was held on June 5, 2015. Having duly considered the parties' written submissions, the Court now renders its decision.

I.

FACTUAL BACKGROUND

The Court sets forth the uncontroverted material facts below, and views all reasonable inferences to be drawn from them in the light most favorable to Plaintiff Axis Insurance Company, the non-moving party.

A. The Parties

Axis insures Inter/Media and its related entities pursuant to a series of Multimedia Liability Policies ("Policy"), which have been in effect continuously since October 29, 2008. (Plaintiff's Statement of Genuine Disputes of Material Fact ("SGD") ¶ 2; Compl., Exhs. A-G ("Policies").) Inter/Media is the Named Insured under the Policy. (*See* Compl., Exhs. A-G ("Policies").) InterQuantum, Bellatrix, Inter/Image, Inter/Post, Interactive, and Mediapoint are subsidiaries of Inter/Media. (SGD ¶ 4; *see* Declaration of Robert Yallen ("Yallen Decl.") ¶ 3.) Inter/Media Advertising is the entity under which Inter/Media is "doing business." (*See* Yallen Decl. ¶ 4.) Yallen is the president of Inter/Media and has been an officer of the company since the inception of the Policy. (SGD ¶ 5; *see* Yallen Decl. ¶ 1.)

B. The Policy Terms

The Policy contains an "Advertising Services Errors & Omissions Endorsement" ("E&O Endorsement"). (SGD ¶ 6; *see* Compl., Exh. A ("2008-2009 Policy") at 34.) The E&O Endorsement provides as follows:

> The Company will pay on behalf of the **Insured** all **Damages** in excess of the Self-Insured Retention and within the applicable Policy Limit as a result of an **Occurrence** during the Policy Period that gives rise to a **Claim** for or arising out of any negligent act, error, omission, misstatement, misleading statement or misrepresentation in connection with the performance of **Advertising Services**, regardless of when **Claim** is made or suit is brought.

(*See* Compl., Exh. A ("2008-2009 Policy") at 34 (emphasis in original).)

The Policy defines "Insured" as "the Named Insured," "any Subsidiary in existence on the Inception Date of this Policy," and "the Named Insured's or Subsidiary's . . . officers and directors." (*See id.* at 14.)

Moreover, an "Occurrence" is defined as "actual or alleged . . . acts committed in the process of researching, investigating, gathering, acquiring, obtaining, preparing, compiling or producing Matter during the Policy Period." (*See id.*) Further, the Policy defines "Matter" as "communicative or informational content." (*See id.*)

Next, the Policy defines "Advertising Services" as follows:

> [S]ervices rendered or which should have been rendered by the **Insured** in the development, production, placement, use, dissemination and exhibition of **Advertising** of the products and services of others.

(*See id.* at 34 (emphasis in original).)

The Policy also contains a number of exclusions, including one for breach of contract. The exclusion provides as follows:

> The Company will not be obligated to pay **Damages** or **Claim Expense** for **Claims** for or arising out of any actual or alleged: breach of contract. . . . except that this exclusion shall not apply to:
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> a. Liability which the **Insured** would have incurred in the absence of such contract, warranty, guarantee or fiduciary relationship; . . . .

(*See id.* at 16 (emphasis in original).)

C. <u>The Allegations and Requests for Disclosures in the Underlying Action</u>

On November 9, 2012, Inter/Media filed a complaint against Biotab Nutraceuticals, Inc. ("Biotab"), seeking to collect debts owed for advertising services provided to Biotab and its predecessor Dish Direct ("Dish"). Inter/Media provided its services to Dish and then Biotab pursuant to various agreements entered into between 2003 and 2011. (*See* Yallen Decl. ¶ 2.) The most recent of these contracts, dated November 15, 2010, which superseded the parties' previous advertising agreements, included a guarantee on Biotab's part that it would pay previously accrued debts

pending a further stipulation regarding the amounts due. (*See* Yallen Decl. ¶ 5f, Exh. 6 ("Biotab Agreement").) The contract also included provisions regarding the exclusivity of the advertising relationship and the disclosure of media costs. (*See id.*)

On July 8, 2013, Biotab filed a cross-complaint against Inter/Media and its related entities, alleging the following causes of action: (1) breach of written contract with respect to the exclusivity requirement against Inter/Media; (2) breach of written contract with respect to the full disclosure of media costs requirement against Inter/Media; (3) fraud against Inter/Media; (4) conspiracy to defraud against all Cross-Defendants[1]; (5) unfair business practices against Inter/Media, and (6) accounting against all Cross-Defendants. (*See* Compl., Exh. H ("Biotab Cross-Complaint").)

The cross-complaint alleges that Biotab agreed to use Inter/Media exclusively for its advertising needs. (*See id.* ¶ 23.) In return, Inter/Media was allegedly obligated to perform services in accordance with Paragraph 5 of their agreement, which provides as follows:

> 5. Company's Services. During the term of this Biotab Agreement, Company shall be the exclusive media buying agency of Client's Products and/or Services as set forth in Paragraph 6, in the United States and Canada, with respect to national and/or regional cable, national network broadcast television, regional network broadcast television and/or radio, national network and/or syndicated radio, local spot market broadcast television and/or radio, and/or cable, and/or satellite advertising, and newspaper and advertising (for the purpose of this Biotab Agreement, the foregoing shall be referred to as "Media"). Company shall plan, research, negotiate and place all advertising for Client's Products and Services. Among the responsibilities of Company is to place the advertising with the Media, and check and track the advertising for proper

[1]Cross-Defendants in the underlying action include all Defendants herein, except Inter/Media Advertising.

> performance. During the term of this Biotab Agreement, Client hereby agrees to make Company its exclusive media buying company for the Media defined herein. ***No other entity, including Client (Biotab) itself [sic] may perform any services as set forth in this Biotab Agreement including the placement of Media***. Expressly excluded from the definition of Media for the United States and Canada shall be direct mail. Notwithstanding the foregoing, this Biotab Agreement shall not preclude a retailer or wholesaler from advertising Client's products/services utilizing the services of another media buying agency so long as such advertising is planned, directed, and initiated by the retailer or wholesaler and the advertising features the retailer or wholesaler as well as Biotab's products.

(*See id.* (emphasis in cross-complaint).)

With respect to the first cause of action for breach of contract, the cross-complaint alleges that Inter/Media "repeatedly breached the Agreement by utilizing other entities, including but not limited to each of the InterMedia Affiliated Companies, to perform media buying and other advertising services for Biotab." (*See id.* ¶ 23.) Inter/Media allegedly added an additional commission or markup on those occasions when an Inter/Media affiliated company performed the services Inter/Media was obligated to perform. (*See id.* ¶ 24.)

With respect to the second cause of action for breach of contract, the cross-complaint alleges that Paragraph 17 of their agreement required the following:

> 17. Full Disclosure of Media Costs. Company shall make full disclosure of all media costs to Client. Invoices shall include affidavits, or some other form of proof of the specific ads running, along with individual prices for each item of advertising. Company shall exert its best efforts to timely obtain proof of performance from media vendors.

(*See id.* ¶ 30.) Allegedly, Inter/Media breached the agreement "by failing to provide Biotab with affidavits or other proof of the specific ads running, along with individual

prices for each item of advertising." (*See id.* ¶ 31.) The cross-complaint also alleges that "in numerous instances InterMedia either redacted the documentation provided to Biotab, including but not limited to the pricing information on such documentation, or generated its own invoices in lieu of providing Biotab with the actual station or media company invoices for the advertising in issue as part of its effort to conceal from Biotab the actual costs that InterMedia incurred for the media purchased for Biotab." (*See id.*)

With respect to the third cause of action for fraud, the cross-complaint asserts that a number of Inter/Media's executives represented to Biotab that it would always provide and had provided accurate information regarding the actual costs incurred in placing the advertisements. (*See id.* ¶¶ 36, 37.) The cross-complaint alleges that Biotab never intended to disclose the actual costs for all for the media time and services that it acquired and that, rather than making refunds to Biotab when televisions stations and other media companies failed to run advertisements for Biotab during the original time slots, Inter/Media instead allowed the advertisements to run at less desirable time slots for which Inter/Media was charged lower rates. (*See id.* ¶ 39.) Biotab and Dish claim that they reasonably and justifiably relied on these misrepresentations in selecting Inter/Media as their advertising agency and in continuing to do business with Inter/Media. (*See id.* ¶ 40.) Furthermore, in the fourth cause of action, Biotab and Dish allege that Inter/Media conspired with its affiliated companies and Yallen to charge "multiple commissions and markups for services that should have been performed exclusively by InterMedia." (*See id.* ¶ 45.)

Biotab propounded Requests for Admissions on Inter/Media regarding whether Inter/Media was the exclusive media buying agency for Biotab and its predecessor Dish during the term of the parties' agreements and whether Inter/Media exclusively performed the services set forth in the parties' agreements. (*See* Declaration of David Casselman ("Casselman Decl.") ¶ 3(a), Exh. 7 ("Requests for Admission").) The requests further seek admissions regarding the required disclosures regarding media purchases. (*See id.*)

C. The Tender and Reservation of Rights

On November 6, 2014, Inter/Media tendered the defense of the Biotab cross-complaint to Axis. (SGD ¶ 16; *see* Compl., Exh. I ("November 6, 2014 Inter/Media Letter to Axis").) On December 19, 2014, Axis advised that it would not defend or indemnify Inter/Media against the cross-complaint because it determined there was no potential for coverage under the Policy. (SGD ¶ 17; *see* Compl., Exh. N ("December 19, 2014 Axis Letter to Inter/Media").)

II.
LEGAL STANDARD

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Wash. Mut. Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011). Material facts are those that may affect the outcome of the case. *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "[T]he inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

Determining the scope of coverage under an insurance contract, which generally involves only issues of law, is particularly appropriate for summary judgment. *See Big 5 Sporting Goods Corp. v. Zurich Am. Ins. Co.*, 957 F. Supp. 2d 1135, 1142 (C.D. Cal. 2013) (citing *First Am. Title Ins. Co. v. XWarehouse Lending Corp.*, 177 Cal. App. 4th

106, 113, 98 Cal. Rptr. 3d 801 (2009) ("Summary judgment is an appropriate vehicle to determine coverage under an insurance policy when it appears there is no material issue of fact to be tried and the sole issue before the court is one of law.") (internal quotation marks omitted)).

III.

DISCUSSION

An insurer's duty to defend is broader than the duty to indemnify. *Hartford Cas. Ins. Co. v. Swift Distribution, Inc.*, 59 Cal. 4th 277, 287, 172 Cal. Rptr. 653 (2014); *see also Anthem Electronics, Inc. v. Pac. Employers Ins. Co.*, 302 F.3d 1049, 1054 (9th Cir. 2002) (under California law, an insurer's duty to defend is broader than its duty to indemnify). "The existence of a duty to defend turns upon the facts known to the insurer at the inception of the lawsuit, not upon the ultimate adjudication of coverage." *Nat'l. Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 499 (9th Cir. 1997). The duty to defend "extends to claims that are merely potentially covered," while the duty to indemnify "runs only to claims that are actually covered by the policy." *Crawford v. Weather Shield Mfg. Inc.*, 44 Cal. 4th 541, 547, 79 Cal. Rptr. 3d 721 (2008). To prevail on a duty to defend claim, the insured "need only show that the underlying claim may fall within policy coverage," while the insurer must prove that it cannot. *Montrose Chemical Corp. of Cal. v. Super. Ct. (Can. Universal Ins. Co., Inc.)*, 6 Cal. 4th 287, 295, 24 Cal. Rptr. 2d 467 (1993). "Facts merely tending to show that the claim is not covered, or may not be covered, but are insufficient to eliminate the possibility that resultant damages (or the nature of the action) will fall within the scope of coverage, therefore add no weight to the scales." *Id.* at 300. "If the facts alleged by the third party or known to the insurer create any potential for indemnity under the policy, the insurer must provide a defense even though noncovered acts are also alleged by the third party action." *Smith Kandal Real Estate v. Continental Casualty Co.*, 67 Cal. App. 4th 406, 414, 79 Cal. Rptr. 2d 52 (1998).

"An insurance policy, like all contracts, is to be interpreted to effectuate the mutual intent of the parties." *Smith Kandal*, 67 Cal. App. 4th at 415. Where possible, courts look solely to the terms of the policy: the clear and explicit meaning of the policy terms, understood in their ordinary and popular sense, will govern the interpretation. *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 822, 274 Cal. Rptr. 820 (1990). "If the policy is ambiguous because it is reasonably susceptible to more than one interpretation, the ambiguity is construed in favor of coverage." *Smith Kandal*, 67 Cal. App. 4th at 415. "[W]e generally interpret the coverage clauses of insurance policies broadly, protecting the objectively reasonable expectations of the insured." *AIU Ins. Co.*, 51 Cal. 3d at 822. An exclusion or limitation on coverage, on the other hand, is interpreted narrowly: it "must be clearly stated and will be strictly construed against the insurer." *Smith Kandal*, 67 Cal. App. 4th at 414.

A. <u>The Errors & Omissions Provision</u>

The Policy covers (1) all insureds (2) for damages resulting from an Occurrence during the Policy Period (3) that gives rise to a Claim (4) for or arising out of any negligent act, error, omission, misstatement, misleading statement, or misrepresentation in connection with the performance of Advertising Services. (*See* Compl., Exh. A ("2008-2009 Policy").)

Axis disputes that the claims in the Underlying Action are "for or arising out of any negligent act, error, omission, misstatement, misleading statement or misrepresentation in connection with the performance of Advertising Services." (*See id.*) In particular, Axis argues that the claims do not arise out of the Insureds' conduct "in connection with the performance of Advertising Services."[2] (*See id.*) "Advertising

[2] The parties do not discuss the fact that the Policy covers only *negligent* acts, errors, omissions, misstatements, misleading statements, or misrepresentations. The cross-complaint currently alleges intentional fraud, which would not be covered by the Policy. (*See* Compl., Exh. H ("Biotab Cross-Complaint") ¶ 39 ("InterMedia never intended to disclose to Cross-Complainants its actual costs for all of the media time and services that it would be acquiring or providing to Cross-Complainants.").) "[T]hat the precise causes of action pled by the third-party complaint may fall outside policy coverage," however, does not excuse the duty to defend where, "under the facts

Services" is defined as "services rendered or which should have been rendered by the Insured in the development, production, placement, use, dissemination and exhibition of Advertising of the products and services of others." (*See id.*) With respect to Biotab's claim for fraud, Axis contends that the alleged fraudulent misrepresentations were not made in the performance of Advertising Services, but rather to induce Biotab to enter a contractual relationship with Inter/Media. Were the allegations in the cross-complaint limited to fraud in the inducement, there would be no coverage under the Policy because the Policy clearly covers only misrepresentations in connection with the *performance* of Advertising Services. Fraud in the inducement of the contract between Biotab and Inter/Media is not covered.

The scope of Biotab's fraud claim, however, is broader than fraud in the inducement. Among other things, Biotab alleges that Inter/Media misrepresented that it had provided accurate information regarding the actual costs incurred in placing the advertisements. (*See* Compl., Exh. H ("Biotab Cross-Complaint") ¶¶ 36, 37.) For example, rather than making refunds to Biotab when televisions stations and other media companies failed to run advertisements for Biotab during the original time slots, Inter/Media allegedly allowed the advertisements to run at less desirable time slots for which Inter/Media would be charged lower rates. (*See id.* ¶ 39.) These allegations concern services that were rendered in the performance of Advertising Services—i.e., the placement or exhibition of the advertisements.

Axis separately contends that Biotab's contractual claims do not meet the "performance of Advertising Services" requirement. Specifically, Axis asserts that the cross-complaint does not allege that Biotab was damaged as a result of Inter/Media's development, production, placement, dissemination, or exhibition of Advertising for

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alleged, reasonably inferable, or otherwise known, the complaint could fairly be amended to state a covered liability." *Scottsdale Ins. Co. v. MV Transp.*, 36 Cal. 4th 643, 654, 31 Cal. Rptr. 3d 147 (2005). Here, because the complaint could fairly be amended to assert a claim that Inter/Media negligently represented to Biotab and its predecessor of the fact that it would place the advertisements itself and fully disclose the actual media costs, the duty to defend is not excused on the basis that the cross-complaint currently alleges only intentional fraud.

Biotab's products. Instead, Axis argues, to the extent Biotab states any claim, it is with respect to Inter/Media's billing practices and administrative activities, which the Policy does not cover. The cross-complaint does allege, however, problems with Inter/Media's performance of Advertising Services that go beyond its billing practices. Biotab also alleges, for example, that Inter/Media "repeatedly breached the Agreement by utilizing other entities, including but not limited to each of the InterMedia Affiliated Companies, to perform media buying and other advertising services for Biotab." (*See id.* ¶ 23.) Thus, Biotab's contractual claims also concern Inter/Media's performance in the placement of Advertising—i.e., using brokers to place the advertisements rather than performing these services itself.

Because all of Biotab's allegations—except for the allegation that Inter/Media made misrepresentations in inducing the contract—concern Inter/Media's performance of Advertising Services, and Axis does not dispute the other elements required for coverage, the Court finds that the Policy covers the claims in Biotab's cross-complaint against Inter/Media, the related entities, and Yallen.

B. The Contract Exclusion

Assuming there is policy coverage, Axis next contends that the Policy's contract exclusion, which excludes damages for claims for or "arising out of" any actual or alleged breach of contract, precludes coverage in this case because all of Biotab's allegations "arise out of" the breach of Inter/Media's contractual obligations to make advertising purchases directly for Biotab and to make full disclosures to Biotab regarding those purchases. Defendants, on the other hand, argue that the gravamen of the dispute is Inter/Media's alleged misrepresentations and the alleged conspiracy among Defendants to deceive Biotab.

Although exclusions are generally construed narrowly, *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 648, 3 Cal. Rptr. 3d 228 (2003), *as modified on denial of reh'g* (Sept. 17, 2003), California courts interpret the term "arising out of" broadly. *Health Net, Inc. v. RLI Ins. Co.*, 206 Cal. App. 4th 232, 262, 141 Cal. Rptr. 3d 649, 673 (2012),

as modified on denial of reh'g (June 12, 2012). As used in various types of insurance provisions, including exclusions, the term "links a factual situation with the event creating liability and does not import any particular standard of causation or theory of liability into an insurance policy." *Id.* The term is generally understood to mean "'originating from[,]' 'having its origin in,' 'growing out of' or 'flowing from' or in short, 'incident to, or having connection with.'" *Davis v. Farmers Ins. Grp.*, 134 Cal. App. 4th 100, 107, 35 Cal. Rptr. 3d 738, 744 (2005) (citing *Fibreboard Corp. v. Hartford Accident & Indemnity Co.*, 16 Cal. App. 4th 492, 503-04, 20 Cal. Rptr. 2d 376 (1993)).

Here, all of the allegations in the underlying action that are covered under the agreement's E&O Endorsement "flow from" Inter/Media's alleged contractual obligations to purchase the advertising time slots itself and to make full disclosures of all media costs to Biotab.[3] *See, e.g.*, *Medill v. Westport Ins. Corp.*, 143 Cal. App. 4th 819, 830, 49 Cal. Rptr. 3d 570, 579 (2006) (breach of contract exclusion applied in case in which no contractual claim was asserted in the underlying action but in which "[a]ll of the allegations against the directors and officers [arose] out of duties and obligations Heritage and the Heritage entities assumed under the bond contracts."). In *Medill*, the court found that "the tort claims . . . are not independent of the breach of contract claims" in that no aspect of the underlying litigation would exist without the alleged breaches of the various contractual obligations assumed by the insured, *id.* at 831. Similarly, here, Biotab's allegations of tortious misrepresentations would not exist if Inter/Media had not allegedly assumed the contractual obligations to run its operations and to disclose its actual media costs in a particular manner. The exclusion applies because Biotab's claim that Inter/Media's representations about doing the work itself and fully disclosing actual media costs were *mis*representations only insofar as the

[3] At the hearing, Defendants' counsel argued that the underlying action had evolved such that there may now be alleged oral agreements at issue. Whether the contractual obligations are oral or written does not alter the Court's analysis.

contract allegedly created the expectation that Inter/Media would not use brokers and would fully disclose actual media costs. (*See* Compl., Exh. A ("2008-2009 Policy") at 16 ("[T]his exclusion shall not apply to [l]iability which the **Insured** would have incurred in the absence of such contract . . . .") (emphasis in original).) This inextricable linkage between Inter/Media's contractual obligations and the fraud claims, coupled with the broad "arising out of" language in the contract exclusion, militates toward a finding that the breach of contract exclusion applies, thus precluding coverage.

Defendants attempt to distinguish the instant case from *Medill* by pointing out that *Medill* involved only torts that arose subsequent to the execution of the initial contract. Defendants rely on *Church Mutual Insurance Company v. U.S. Liability Insurance Company*, 347 F. Supp. 2d 880 (S.D. Cal. 2004), to argue that here, as in *Church*, the contract, from its inception, was simply a tool to effectuate Inter/Media's fraudulent intent. In other words, Defendants contend that the allegations of fraud in the inducement, which are in part the basis of Biotab's fraud claims, distinguish this case from *Medill*. This argument falters because, as discussed *supra*, Defendants did not establish that the allegations related to fraud in the inducement fall within the scope of the Policy's coverage, which encompasses only claims in connection with the *performance* of Advertising Services. Misrepresentations made to induce Biotab to enter into a contractual relationship, before any contract existed, cannot be construed to be connected with the *performance* of Advertising Services.

In any event, Defendants' reliance on *Church* is misplaced. *Church* involved the insured defrauding a contractor into reducing its billing statements by falsely claiming the contractor's work was unsatisfactory, and by leading the contractor to believe that if the contractor reduced its billing statements, the insured would pay the amounts owed. *Id.* Further, the insured in *Church* allegedly "stole the core of [the contractor's] business" by hiring all of the contractor's employees, including its key employee. *Id.* Moreover, after learning that other contractors and subcontractors had filed similar

actions against the insured, the contractor in the underlying action also alleged that the insured had engaged in a "pattern and practice to defraud contractors by entering into contracts without intention to pay." *Id.* Based on these facts, the court in *Church* found that the fraud allegations at issue in *Church* were independent of the contract between the insured and the contractor. *Id.* at 889.

Here, in contrast, Biotab does not allege that Defendants engaged in extracontractual misrepresentations or fraud. The claims against Defendants are based squarely on allegations that Inter/Media misrepresented that it was meeting two of its contractual obligations and that Inter/Media conspired with its related entities and Yallen in making those misrepresentations. As discussed above, to the extent that Biotab also alleges that Inter/Media misrepresented that it would fulfill those obligations in order to *induce* Biotab to enter into the contractual relationship, these particular allegations are not covered by the Policy to begin with. Thus, the Court finds, as in *Medill*, that the contract exclusion applies, precluding any possibility of coverage. Therefore, Axis has no duty to defend Defendants in this action.

Accordingly, Defendants' motion for summary judgment is **DENIED** as a matter of law. Because Axis has no duty to defend on the basis of the contract exclusion, the Court does not need to reach the questions of whether the breach of fiduciary duty exclusion or the unfair/deceptive business and trade practices exclusions apply. Because the Court denies Defendants' motion as a matter of law, that per force indicates that partial summary judgment should be granted in favor of Axis as to the duty to defend claim even though it did not bring a cross-motion for partial summary judgment. *See Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982) (the court may *sua sponte* grant summary judgment in favor of non-movant where the issues have been fully briefed).

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V.

CONCLUSION

In light of the foregoing, Defendants' motion for summary judgment is **DENIED** as a matter of law. The Court *sua sponte* GRANTS partial summary judgment in favor of Axis on the issue of its duty to defend.

IT IS SO ORDERED.

DATED: June 8, 2015

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE