UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EMERSON EQUITY, LLC,

Plaintiff,

v.

FORGE UNDERWRITING LIMITED, et al.,

Defendants.

Case No. 22-cv-06037-HSG

ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT

Re: Dkt. No. 44, 64

Before the Court is Plaintiff's motion for partial summary judgment. *See* Dkt. No. 44. For the reasons detailed below, the Court **GRANTS** the motion.[1]

I. BACKGROUND

This case involves interpretation of various provisions of an insurance policy. Plaintiff, Emerson Equity, LLC ("Emerson"), is a financial services company that provides brokerage services, private placements, and managing broker-dealer services. Compl. ¶¶ 8-9. On October 25, 2021, Defendants, Forge Underwriting Limited; Voltane International; and Certain Underwriters at Lloyd's, London Subscribing to Securities Broker/Dealer Professional Liability (collectively, "Insurers" or "Defendants"), issued a "Securities Broker/Dealer Professional Liability Insurance Policy" (the "Policy) to Emerson. Compl. ¶¶ 2, 12. The policy period covered October 25, 2021, to October 25, 2022, and had an aggregate $5,000,000 liability limit. Compl. ¶ 14. The Policy provided:

> This policy shall pay on behalf of the Broker/Dealer Loss arising from a Claim first made against the Broker/Dealer during the Policy Period or the Discovery Period (if applicable) and reported in writing to the Insurer pursuant to the terms of this policy for any actual or alleged

[1] The Court finds this matter appropriate for disposition without oral argument and the matter is deemed submitted. *See* Civil L.R. 7-1(b).

> Wrongful Act committed by the Broker/Dealer . . . . "This policy shall pay on behalf of a Registered Representative Loss arising from a Claim first made against the Registered Representative during the Policy Period or the Discovery Period (if applicable) and reported in writing to the Insurer pursuant to the terms of this policy for any actual or alleged Wrongful Act committed by the Registered Representative in the rendering or failure to render Professional Services on behalf of the Broker/Dealer.

Compl. ¶ 15. Within the policy period, Plaintiff submitted to Defendants over fifty Statements of Claim ("SOCs" or "claims"), and alleges that these SOCs are based on a "loss and a wrongful act by the broker/dealer or its registered representative involving professional services." Compl. ¶ 19. The crux of the allegations in each claim is that Emerson's registered representative, Tony Barouti, made unsuitable recommendations to Emerson customers to purchase GWG L Bonds ("L Bonds"), and that Emerson failed to conduct reasonable due diligence and supervision of the securities transactions. Compl. ¶ 20. Claimants also allege that given the SEC's investigation of GWG and GWG's inability to make payments on L Bonds, their investments are now nearly worthless. Dkt. No 44-7.

On May 6, 2022, after receiving several of these SOCs, Defendants issued a reservation of rights letter to Plaintiff. Dkt. No. 44-7. In that letter, Defendants cited Endorsement No. 8 of the Policy, the "Professional Services Retroactive Date Endorsement" ("Endorsement 8"), as a basis for denying coverage of the L Bond claims. Endorsement 8 provides that the Insurer is not liable to cover loss in connection with any claims alleging wrongful acts "occurring prior to 25th October 2019, including any Interrelated Wrongful Acts." *Id*. at 3. Defendants explained in the reservation letter that the Policy defines "Interrelated Wrongful Acts as Wrongful Acts which are the same, related or continuous, or Wrongful Acts which arise from the same, related or common nexus of facts." *Id* at 4. Accordingly, Defendants argued that all claims based on Emerson's allegedly improper sale of L Bonds "constitute[d] a single Claim" that arose before the retroactive coverage date. *Id*. On this basis, Insurers denied coverage for all L Bond claims. Insurers also argued that Exclusion (i) of the Policy precludes coverage for the L Bond claims. *Id*. Insurers said that this exclusion bars coverage for "Investment Banking Activity," and argued that coverage was precluded because Emerson engaged in such activity.

On March 12, 2022, Plaintiff filed this lawsuit in San Mateo Superior Court alleging

breach of written contract, breach of the implied covenant of good faith, and for declaratory relief. Compl. ¶ ¶ 7-73. Defendants removed the case based on diversity jurisdiction on October 13, 2022. Dkt. No. 1. Defendants filed a Motion to Dismiss on October 19, 2022. Dkt. 5. The parties then stipulated to a stay which the Court ordered on January 18, 2023. Dkt. 31. The stay was lifted on May 18, 2023. Dkt. 42. Plaintiff then filed this Motion for Partial Summary Judgment seeking a determination that Defendants owe a duty to defend.[2] Dkt. 44.

II. LEGAL STANDARD

A. Summary Judgment

Summary judgment is proper where the pleadings, discovery and affidavits show that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See id.*

A court shall grant summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial [,] ... since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The moving party bears the initial burden of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Id.* at 323. The burden then shifts to the nonmoving party to "go

[2] After briefing on the motion was complete, Plaintiff submitted a "notice of pending submission and request for ruling thereon." Dkt. No. 72. In that filing, Plaintiff cited L.R. 7-13, which allows a party, whenever any motion has been under submission for more than 120 days, to "file with the Court a notice that the matter remains under submission." Plaintiff's filing was thus appropriate under the Local Rules to the extent it was limited to noting the pendency of the motion. But the document also included six pages of plainly impermissible substantive briefing and further argument on the motion. Plaintiff's filing thus obviously violated the Local Rules, and the Court did not consider any of this improper argument. *See* L.R. 7-3 ("Once a reply is filed, no additional memoranda, papers or letters may be filed without prior Court approval" with two exceptions not applicable here, both of which preclude further argument in any event). All counsel are directed to review and scrupulously follow the Local Rules at all times going forward, and further instances of clear noncompliance will be grounds for sanctions.

beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file, 'designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (citing Fed. R. Civ. P. 56(e)).

For purposes of summary judgment, the court must view the evidence in the light most favorable to the non-moving party, drawing all justifiable inferences in that party's favor. *AXIS Reinsurance Co. v. Northrop Grumman Corp.*, 975 F.3d 840, 844 (9th Cir. 2020). If, as to any given material fact, evidence produced by the moving party conflicts with evidence produced by the nonmoving party, the Court must assume the truth of the evidence set forth by the nonmoving party with respect to that material fact. *Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th Cir. 2013). However, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts. *Scott v. Harris*, 550 U.S. 372, 380 (2007). The Court's function on a summary judgment motion is not to make credibility determinations or weigh conflicting evidence. *Manley v. Rowley*, 847 F.3d 705, 711 (9th Cir. 2017).

B. Duty to Defend

An insurer has a very broad duty to defend its insured under California law. *Anthem Elecs., Inc. v. Pac. Emp'rs Ins. Co.*, 302 F.3d 1049, 1054 (9th Cir. 2002). As the California Supreme Court has explained, "the insured is entitled to a defense if the underlying complaint alleges the insured's liability for damages potentially covered under the policy, or if the complaint might be amended to give rise to a liability that would be covered under the policy." *Montrose Chem. Corp. v. Superior Court*, 6 Cal.4th 287, 300 (Cal. 1993). "Even if it is ultimately determined no coverage existed, the insurer refusing to defend is liable for defense costs if there was any potential of coverage under the policy during pendency of the action." *Md. Cas. Co. v. Nat'l Am. Ins. Co.*, 48 Cal.App.4th 1822, 1829 (1996) (internal brackets omitted).

To determine whether the insurer owes a duty to defend, courts first "compare the allegations of the complaint—and facts extrinsic to the complaint—with the policy terms to see if they reveal a possibility that the claim may be covered by the policy." *Pension Tr. Fund for Operating Eng'rs v. Fed. Ins. Co.*, 307 F.3d 944, 949 (9th Cir. 2002) (internal quotation marks and brackets omitted). "[U]nder California law, the insurer's duty is not measured by the technical

legal cause of action pleaded in the underlying third party complaint, but rather by the potential for liability under the policy's coverage as revealed by the facts alleged in the complaint or otherwise known to the insurer." *Hudson Ins. Co. v. Colony Ins. Co.*, 624 F.3d 1264, 1267 (9th Cir. 2010) (internal quotation marks omitted). "It only matters whether the facts alleged or otherwise known by the insurer suggest potential liability or whether they do not." *Id.* at 1269. "Any doubt as to whether these facts trigger a duty to defend is resolved in favor of the insured." *Pension Tr. Fund*, 307 F.3d at 949.

While the "insured need only show that the underlying claim may fall within policy coverage, the insurer must prove it cannot." *Montrose Chem. Corp.*, 6 Cal.4th, at 300. To this point, "California courts have repeatedly found that remote facts buried within causes of action that may potentially give rise to coverage are sufficient to invoke the defense duty." *Pension Tr. Fund*, 307 F.3d at 951. "Once the insured makes a showing of potential coverage, the insurer may be relieved of its duty only when the facts alleged in the underlying suit can by no conceivable theory raise a single issue that could bring it within the policy coverage." *Id.* at 949 (internal quotation marks and brackets omitted). An insurer's duty to defend generally can be resolved at the summary judgment stage. *Butler v. Clarendon Am. Ins. Co.*, 494 F. Supp. 2d 1112, 1122 (N.D. Cal. 2007) (citing *Transamerica Ins. Co. v. Superior Court*, 29 Cal.App.4th 1705, 1713 (1994)).

Under California law, "exclusionary clauses are interpreted narrowly against the insurer." *MacKinnon v. Truck Ins. Exchange*, 31 Cal.4th 635, 648 (2003). In the insurance context, the Court begins with the fundamental principle that an insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear. *Haynes v. Farmers Ins. Exchange*, 32 Cal.4th 1198, 1204 (2004). Accordingly, exclusion provisions must be "conspicuous, plain, and clear." *Id.* If such an exclusion is clear, coverage may be limited by a valid endorsement, and if a conflict exists between the main body of the policy and an endorsement, the endorsement prevails. *Id.*

III. DISCUSSION

This case turns on interpretation of Endorsement 8. Defendants argue that Endorsement 8 unambiguously precludes coverage for any claims based on the marketing and sale of the L Bonds.

Defendants contend that Plaintiff's interpretation of Endorsement 8 is facially unreasonable and that the Insurers' interpretation is the only one that gives effect to the parties' intentions. *See* Opp. at 23-24. Plaintiff likewise argues that Endorsement 8 is unambiguous, but in the opposite direction, contending that the clear language of Endorsement 8 covers L Bond claims. Mot. at 27. In the alternative, Plaintiff argues that if the Court finds Endorsement 8 to be ambiguous, that ambiguity should be resolved in Plaintiff's favor. Reply at 6-7.

Interpretation of an insurance policy is a question of law. *Mirpad, LLC v. California Ins. Guarantee Assn.*, 132 Cal. App. 4th 1058, 1069 (2005). While insurance contracts have special features, they are still contracts to which the ordinary rules of contract interpretation apply. *Id*. Under those rules, the mutual intention of the parties at the time the contract is formed governs its interpretation. *Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 667 (1995) (en banc) ("*Admiral Ins. Co.*"). Such intent is to be inferred, if possible, solely from the written provisions of the contract. *Id.*

A policy provision is ambiguous when it can have two or more reasonable constructions. *Safeco Ins. Co. of America v. Robert S.*, 26 Cal. 4th 758, 763 (2001). An ambiguity is resolved by interpreting the ambiguous provisions in the sense the promisor (i.e., the insurer) believed the promisee understood them at the time of formation. *Id*; *Admiral Ins. Co.*, 10 Cal. 4th at 667 (citing Cal. Civ. Code § 1649). If application of this rule does not eliminate the ambiguity, ambiguous language is construed against the party who caused the uncertainty to exist. *Safeco*, 26 Cal. 4th at 763; *see also Smith Kandal Real Estate v. Cont'l Cas. Co.*, 67 Cal.App.4th 406, 79 Cal.Rptr.2d 52, 56 (1998) ("If an exclusion ambiguously lends itself to two or more reasonable constructions, the ambiguity will be resolved against the insurer and in favor of coverage."). This rule, as applied to a promise of coverage in an insurance policy, protects not the subjective beliefs of the insurer, but instead "the objectively reasonable expectations of the insured." *Admiral Ins. Co.*, 10 Cal. 4th at 667.

A. Endorsement 8

Endorsement 8 provides that "the Insurer shall not be liable [to] make payment for **Loss** in connection with any **Claim**, including any **Interrelated Wrongful Act(s)**, occurring prior to 25th

October 2019." Dkt. No. 5-2, Ex. A at 47 (emphasis added). A retroactive date (here, October 25, 2019) limits coverage to a specific date defined in the contract, and thus precludes coverage for claims that occurred before the retroactive date, even if they are brought during the coverage period. *See generally Group Voyagers, Inc. v. Employers Ins. Of Wausau*, No. C 01–0400 SI, 2002 WL 356653, at *3 (N.D. Cal. March 4, 2002); *see Philip L. Bruner And Patrick J. O'Connor, Jr., 4A Bruner & O'Connor on Constr. Law* § 11:283 (2012).

Plaintiff argues that Endorsement 8 was a retroactive date intended to exclude all *claims* made before October 25, 2019. Plaintiff alleges that GWG missed its first interest and principal payment on the L Bonds in January 2022, and that the first associated Claims were not served on Plaintiff until February 2022. Plaintiff contends that because "[t]here w[ere] no Claim[s] reported before the retroactive date," the Insurers have a duty to defend all claims. *Id*. Further, Plaintiff argues that to the extent Endorsement 8 is ambiguous, any ambiguities are construed in its favor. Reply at 3.

Defendants argue that because all of the L Bond Claims arise from the same, related or common nexus of facts, regardless of whether such claims involve different claimants, they constitute an interrelated wrongful act. Defendants contend that the alleged wrongful acts all occurred prior to the retroactive coverage date of October 25, 2019. In all, Defendants posit that sixteen Claims allege wrongful acts connected to the L Bond offering that predate October 25, 2019. For example:

- Ohanian, et al. SOC (Dandelles Decl., Group Ex. B, pp. 747-747): Claimant Mirmohammadsadeghi invested $230,000 in L Bonds on November 1, 2018 after Barouti induced same by misrepresenting L Bonds as being "risk free, insured and simply investments" on his radio program;
- Nowroozi, et al. SOC (Id. at 719–723): Claimants allege Barouti ignored Claimants' investments objectives and recommended they invest "all their savings in a single private placement, alternative investments" – L Bonds – which they purchased in 2017-2019;
- Adelpour & Dinani SOC (Id. at 20-24): Claimant Dinani alleges investing $300,000 in L Bonds in August 2018 after Barouti and Emerson purportedly made false statements such as that GWG was profitable, investments in L Bonds were secured by the life settlement policies, and failed to disclose that "GWG changed its business model in approximately January 2018;
- Abouzar SOC (Id. at 5): Claimant alleges that Barouti induced an $85,000 investment in L Bonds in March 2019 by alleging such "carried virtually no risk and paid steady

distributions" among other purported misrepresentations and/or omissions;

- Collins SOC (Id. at 289–296): Claimant alleges first investing in L Bonds in November 2018 after Emerson and/or Barouti misrepresented the nature of and risks associated with L Bonds, including that GWG had materially changed its business model when Claimant invested in L Bonds.

Opp. at 19-20. On this basis, Defendants claim that "it is undisputable that the L Bond Claim arises from Wrongful Acts, including Interrelated Wrongful Acts, occurring prior to October 25, 2019." Opp. at 20. Thus, Defendants argue they have no duty to defend any of the associated L Bond Claims, without regard to whether the claimant specified that the wrong occurred before or after October 25, 2019.

The Court finds that Endorsement 8 has two reasonable constructions, and is therefore ambiguous. *See Safeco Ins. Co. of America*, 26 Cal. 4th at 763. Beginning with the provision's plain language, the insurer is not liable to make payment "for Loss in connection with any Claim, including any Interrelated Wrongful Act(s) occurring" before October 25, 2019. Defendants proffer one reasonable construction of this provision: regardless of whether a claim was made after the retroactive date, if the claim was connected to an "interrelated wrongful act" that predates the retroactive date, coverage is precluded. Under this interpretation, L Bond claims would not be eligible for coverage. Under the Policy, "interrelated wrongful acts" are wrongful acts which are "the same, related or continuous," or acts which "arise from the same, related or common nexus of facts regardless of whether such Claims involve the same or different claimants, Insureds or legal causes of action." Because all L Bond claims arise from a common nexus of facts that occurred prior to the retroactive date, under Defendants' interpretation they would be barred from coverage.

But Plaintiff's construction is also reasonable: Endorsement 8 precludes coverage only for *claims* that were *filed* before the retroactive date. Under this interpretation, all L Bond claims filed after the retroactive date would be eligible for coverage. Endorsement 8 provides that Insurers are not liable for loss in connection with "any claim, including any interrelated wrongful acts." As Plaintiff points out, this provision does not say that coverage is precluded for "any claim *arising from* any interrelated wrongful act." Accordingly, this provision also could be reasonably interpreted as barring only claims filed before the retroactive date.

As Endorsement 8 is ambiguous, under California law it must be construed in the sense the

promisor (i.e. the Insurers) believed the promisee (i.e., the insured) understood it at the time of formation. *Safeco*, 26 Cal.4th at 763. Insurers argue that their interpretation of Endorsement 8 is "consistent with Plaintiff's 'objectively reasonable expectations' of coverage." Opp. at 24. Defendants submits three declarations as evidence that Plaintiff had no expectation of coverage for wrongful broker-dealer acts that occurred before the retroactive date. *See* Opp. at 24 (citing Redding Decl. ¶¶ 15-16; Campbell Decl. ¶¶ 16-17; Betts Decl. ¶¶ 14-15). But this does not resolve the ambiguity. The declarations do not establish that Emerson expected for claims filed during the policy period to be barred from coverage if they involved wrongful activity predating the retroactive coverage date. *See e.g.*, Campbell Decl. ¶¶ 16-17 ("With respect to the 2018-2019 Policy, the only covered business activities of Emerson were with respect to fixed annuities, variable annuities, indexed annuities, life or accident insurance, and health insurance. For the proposed 2019-2020 Policy, Emerson sought to obtain coverage for its additional activities as a broker-dealer (e.g., securities, its registered representatives, registered investment advisors, private placement activities) as well as a higher limit of liability (the 'New Coverage'")).[3] Even considering this evidence, there is still a dispute as to what the parties' expectations were.

Given that Defendants' submission did not eliminate the ambiguity, California law requires the Court to construe ambiguous language against the party who caused the uncertainty to exist, and in the insurance context, to resolve ambiguities in favor of coverage. *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 822 (1990). Insurers argue that Plaintiff's agent drafted Endorsement 8, such that it should be construed against Plaintiff. Opp. at 27. However, Insurers do not reconcile this assertion with the well-established rule that in the insurance context, ambiguity is resolved in favor of coverage, a principle that is intended to protect "the objectively reasonable expectations of the insured." *Admiral Ins. Co.*, 10 Cal. 4th at 667. The Court thus must determine, in light of Endorsement 8, whether a reasonable insured party in Emerson's position would expect its policy to cover claims filed during the policy period even if those claims allege wrongful activity that preceded the retroactive coverage date. The Court finds, at this stage

[3] The other declarations – Redding and Betts – do not say anything meaningfully different from the quoted portion of Campbell's declaration.

and based on the strong presumption under California law that an insurer should provide a defense even where it may be able to establish later that there is no coverage, that Emerson's position is plausible. Emerson submits evidence representing that it reasonably believed Endorsement 8 barred only claims filed before October 25, 2019. *See* Barouti Decl. ¶¶ 39-41. Emerson argues that the operative phrase here is "Loss in connection with any Claim," and that it understood that phrase to mean that if a Claim was made before the retroactive date, a later Wrongful Act, if Interrelated, could be subject to this endorsement. But because they received no L Bond Claims before October 25, 2019, they did not believe this would bar coverage for that activity. *See id.* Whether or not Plaintiff ultimately succeeds on this argument, the Court finds this reasonable expectation to be adequately proffered at this stage. Accordingly, the Court resolves this ambiguity in favor of Emerson.[4]

B. Exclusion (i)

Defendants also argue that if Plaintiff's activities related to L Bonds were not private placement activities, Exclusion (i) precludes coverage. Exclusion (i) precludes coverage for loss in connection with any claim "alleging, arising out of, based upon or attributable to, in whole or in part, any Investment Banking Activity by an Insured, including but not limited to any disclosure requirements in connection with such Investment Banking Activity." Dkt. No. 5-2, Ex. A, at 29. "Investment Banking Activity" means "the underwriting, syndicating or promotion of any securities or partnership interest in connection with any of the following: any primary or secondary offering of securities (regardless of whether the offering is a public offering or private placement), or effort to raise or furnish capital or financing for any enterprise or entity, or any

[4] Defendants also argue that if the Court believes there is a dispute over the parties' intentions with respect to Endorsement 8, this would create a genuine issue of fact about the scope of coverage, and contend that this issue must be decided before determining Insurers' duty to defend. Opp. at 28. For this proposition, Defendants cite *Am. Ins. Co. v. Freeport ColdStorage, Inc.*, 703 F. Supp. 1475 (D. Utah 1987). However, that case did not involve California law, which provides that "[i]f coverage depends on an unresolved dispute over a factual question, the very existence of that dispute would establish a possibility of coverage and thus a duty to defend." *Mirpad, LLC*, 132 Cal. App. at 1068; *see also McGranahan v. Ins. Corp. of NY*, 544 F. Supp. 1052, 1057 (E.D. Cal. 2008) ("An insurer has a duty to defend where a factual dispute exists over the scope of coverage."). The Court thus rejects Defendants' position that this issue is not ripe for determination on Plaintiffs' motion for summary judgment.

acquisition or sale of securities by the Broker/Dealer for its own account, or any disclosure requirements in connection with any of the foregoing." *Id*. at 26.

Defendants argue that Plaintiff's activities in connection with the sale of L Bonds were efforts to raise capital for GWG, and thus constituted Investment Banking Activities. Opp. at 31. Accordingly, they assert that Plaintiff's activities fell within the categories set out in Exclusion (i), precluding coverage for L Bond claims. *Id*. Plaintiff contends that Defendants' assertion that Emerson raised money for GWG is totally unsupported. Reply at 14. Plaintiff argues that none of Defendants' supporting declarants have any personal knowledge regarding this assertion.

The record evidence does not conclusively establish that Emerson was attempting to raise or furnish capital or financing for GWG. Plaintiff submits evidence that Emerson did not engage in investment banking because it offered L Bonds to customers in its capacity as a managing broker-dealer, not for the purpose of raising capital for GWC. Defendant argues that the Langley, Lindsay, and Daskalakis declarations establish that Plaintiff's activities triggered Exclusion (i). But each of these declarants simply asserts that "coverage for the L Bond claim is precluded by Exclusion (i)," without offering any supporting facts showing why this is the case. Dkt. No. 53, Langley Decl., ¶ 35; Lindsay Decl., ¶ 37; Daskalakis Decl., ¶ 29. Accordingly, Defendants have not shown that Exclusion (i) conclusively means that the L Bond claims are not even potentially covered. [5]

IV. REQUEST FOR ATTORNEY'S FEES

Defendants request attorney's fees for "responding to this unnecessary motion." Opp. at 31. Attorneys' fees are awarded under California law only when a statute or contract provision so provides. *Reynolds Metals Co. v. Alperson*, 25 Cal.3d 124, 127 (1979); *Lerner v. Ward*, 13

[5] On August 25, 2023, Defendants filed an administrative motion for leave to supplement the record on Plaintiff's motion for partial summary judgment. *See* Dkt. No. 64. There is no basis under the Local Rules for the purported "supplementation" Defendants request. *See* L.R. 7-3; 7-11. And Defendants failed to argue in their opposition that they were unable to present key facts as described in Federal Rule of Civil Procedure 56(d). Accordingly, the Court **DENIES** the motion. The Court also **DENIES** and disregards Plaintiff's request, raised in passing at the end of its reply, for the Court to "make findings of fact not substantively contested in the Insurers' Opposition." Reply at 14. Plaintiff identifies no legal basis whatsoever for the Court to make such findings on a motion for summary judgment.

Cal.App.4th 155, 158 (1993). Even setting aside that the Court is granting the "unnecessary" motion, Defendants point to no provision in the Policy or in any statute that authorizes the award of attorneys' fees here, and make no argument beyond this one-sentence throw-in at the end of their opposition. The Court thus denies this entirely unsupported request.

V. CONCLUSION

The Court **GRANTS** Plaintiff's motion for summary judgment. The Court finds that Defendants have a duty to defend Plaintiff against the L Bond Claims.

The Court SETS a case management conference on January 9, 2024, at 2:00 p.m. All counsel shall use the following dial-in information to access the call:

Dial-In: 888-808-6929;

Passcode: 6064255

All attorneys and pro se litigants appearing for a telephonic case management conference are required to dial in at least 15 minutes before the hearing to check in with the courtroom deputy. For call clarity, parties shall NOT use speaker phone or earpieces for these calls, and where at all possible, parties shall use landlines. The Court DIRECTS the parties to meet and confer and submit a joint case management statement by January 2, 2024. The parties should be prepared to discuss how to efficiently move this case to a conclusion, and to do so in scrupulous and complete compliance with this Court's Local Rules and the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

Dated: 12/15/2023

HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California