UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 20-682 JVS (KESx)	Date	May 24, 2023
Title	Evanston Insurance Company v. Footprints Behavioral Interventions, Inc.		

Present: The Honorable	**James V. Selna, U.S. District Court Judge**

Elsa Vargas	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **[IN CHAMBERS] Order Regarding Motion for Summary Judgment [38]**

Plaintiff and Cross Defendant, Evanston Insurance Company ("Evanston"), moves for summary judgment and sanctions. (Mot., Dkt. No. 38.) Defendant and Cross Claimant, Footprints Behavioral Interventions, Inc. ("Footprints"), opposed.[1] (Opp'n, Dkt. No. 39.) Evanston replied. (Reply, Dkt. No. 42.) The Court heard oral argument on May 15, 2022. (Dkt. No. 56.)

For the following reasons, the Court **GRANTS in part and DENIES in part** the motion.

I. BACKGROUND

The following facts are undisputed and come from Evanston's response to Footprints Statement of Genuine Disputes of Material Facts and Statement of Undisputed Material Facts (collectively, "SOF"). (SOF, Dkt. No. 42-4.)

This case arises out of Evanston's disclaimer of coverage of a claim tendered by Footprints. (Id. ¶¶ 19–26.) Footprints' claim was for coverage of an underlying lawsuit. (Id.) Evanston provided various insurance policies to Footprints beginning in 2005. (Id.

[1] Footprints filed a crossclaim against Evanston. (See Crossclaim, Dkt. No. 29.) Crossclaims are claims brought against a co-party. See Fed. R. Civ. p. 13(g). Footprints' crossclaim should properly be characterized as a counterclaim. See Fed. R. Civ. P. 13(a), (b). Accordingly the parties are counter-parties, and not cross-parties. Nonetheless, to avoid confusion, the Court will refer to the parties and documents based on their listed captions.

¶ 28.) Since 2005, the practice of the parties would be for Footprints to fill out an annual renewable application in the June or July of the year in which the policy was expiring. (Id. ¶ 34.) Evanston issued to Footprints a General Policy from 2018 to 2020, and a Specified Medical Professions Insurance Policy from 2005 to 2020. (Id. ¶ 36.)

Abigail Kim ("Kim") was a former behavioral technician and employed by Footprints. (Id. ¶ 10.) Kim worked with Footprints' client, K.B., a minor. (Id. ¶¶ 10, 55.) On November 19, 2017, a Footprints employee received an email from Kim alleging Kim had been sexually harassed by K.B. (Id. ¶ 55.) Footprints terminated Kim soon after. (Id. ¶ 56.) Footprints prepared a Special Incident Report (the "SIR" or "Report") regarding the conduct between Kim and K.B. (Id. ¶¶ 58–59.) In February 2019, Footprints' employees Jessica Barkley ("Barkley"), Chelsea Bryant ("Bryant"), Corey Stump ("Stump"), and Victoria Coe ("Coe"), testified at Kim's criminal trial. (Id. ¶ 15.)

Kristine Carillo ("Carillo") is the Director of Human Resources and Administration for Footprints. (Id. ¶ 1.) In July 2019, Carillo, on behalf of Footprints, submitted a renewal application to Evanston for the Specified Medical Professions Insurance Policy. (Id.) Evanston issued Footprints a Specified Medical Professions Insurance Policy No. SM931910 (the "Specified Policy"). (Id. ¶ 3.)

In November 2019, Footprints was served with a lawsuit from K.B. (Id. ¶ 65.) Footprints subsequently tendered the lawsuit to Evanston for coverage. (Id. ¶ 68.) On February 20, 2020, Evanston issued a letter to Footprints regarding Evanston's preliminary views as to coverage. (Id. ¶ 23.) The letter requested certain information regarding the incident with Kim and K.B. (Id.) Evanston also stated it intended to disclaim coverage. (Id.) On March 24, 2020, Evanston disclaimed coverage under the Specified Policy. (Id. ¶ 25.)

On April 8, 2020, Evanston filed a Complaint against Footprints for breach of contract and seeking declaratory relief of its rights under the Specified Policy. (Compl., Dkt. No. 1.) Footprints answered and filed crossclaims. (See supra n.1.) Footprints' crossclaim seeks declaratory relief of its rights under the Specified Policy. Evanston now moves for summary judgment on its claims and the crossclaim.

II. LEGAL STANDARD

Summary judgment is appropriate where the record, read in the light most favorable to the nonmovant, indicates "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); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986). Summary adjudication, or partial summary judgment "upon all or any part of [a] claim," is appropriate where there is no genuine dispute as to any material fact regarding that portion of the claim. Fed. R. Civ. P. 56(a); see also Lies v. Farrell Lines, Inc., 641 F.2d 765, 769 n.3 (9th Cir. 1981) ("Rule 56 authorizes a summary adjudication that will often fall short of a final determination, even of a single claim . . . ." (internal quotation marks omitted)).

Facts that are "material" are those necessary to the proof or defense of a claim, and are determined by referring to substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To determine if a dispute about a material fact is "genuine," the trial court must not weigh the evidence and instead must draw all reasonable inferences in the nonmoving party's favor. Tolan v. Cotton, 572 U.S. 650, 655–59 (2014) (per curiam). The nonmoving party cannot manufacture a "genuine dispute" by relying on allegations in the pleadings. Anderson, 477 U.S. at 251; Oracle Am., Inc. v. Hewlett Packard Enter. Co., 971 F.3d 1042, 1049 (9th Cir. 2020).

A trial court may not resolve issues of credibility to determine whether a fact is "genuinely disputed." Id. at 658–59. To do so is to improperly weigh the evidence. Id. A court may discount uncorroborated, self-serving testimony where "it states only conclusions and not facts." Nigro v. Sears, Roebuck & Co., 784 F.3d 495, 497–98 (9th Cir. 2015). However, a court may not discount "self-serving" testimony that includes contrary factual assertions and requires the observation of a witness's demeanor to assess credibility. See Manley v. Rowley, 847 F.3d 705, 711 (9th Cir. 2017). Furthermore, an undisputed fact may support several reasonable inferences, but a trial judge must resolve those differing inferences in favor of the nonmoving party. Hunt v. Cromartie, 526 U.S. 541 (1999). In deciding a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255.

The moving party has the initial burden of establishing the absence of a material fact for trial. Id. at 256. "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . ., the court may . . . consider the fact

undisputed." Fed. R. Civ. P. 56(e)(2). Furthermore, "Rule 56[(a)] mandates the entry of 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." Celotex Corp., 477 U.S. at 322. To defeat summary judgment, the nonmoving party who bears the burden at trial must present more than a "mere scintilla" of "affirmative evidence." Galen v. Cnty. of L.A., 477 F.3d 652, 658 (9th Cir. 2007) (citing Anderson, 477 U.S. at 248). Therefore, if the nonmovant does not make a sufficient showing to establish the elements of its claims, the Court must grant the motion.

When resolving a motion for summary judgment, courts may only consider admissible evidence. Fed. R. Civ. P. 56. On a motion for summary judgment, a party may object that the material used to "dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). A court must rule on material evidentiary objections. Norse v. City of Santa Cruz, 629 F.3d 966, 973 (9th Cir. 2010).

III. PROCEDURAL ISSUES

As an initial matter, the Court will address the procedural issues raised by Footprints.

A. Compliance with Local Rule 7-3

Footprints contends Evanston failed to comply with Local Rule 7-3. Local Rule 7-3 provides "[C]ounsel contemplating the filing of any motion must first contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution. The conference must take place at least 7 days prior to the filing of the motion. If the parties are unable to reach a resolution that eliminates the necessity for a hearing, counsel for the moving party must include in the notice of motion a statement [indicating as such]."

Evanston asserts it complied with Local Rule 7-3. Specifically, counsel for Evanston, Michael F. Perlis ("Perlis"), declared under penalty of perjury he "met and conferred with counsel for Footprints Suren N. Weerasuriya [("Weerasuriya")] regarding Evanston's motion for summary judgment pursuant to L.R. 7-3." (Mot., Declaration of

Michael F. Perlis ("Perlis Decl."), Dkt. No. 38-1, ¶ 18.) Nonetheless, Weerasuriya contends the meeting centered around Footprints' intended motion for summary judgment, and not Evanston's. (Opp'n, Declaration of Suren N. Weerasuriya ("Weerasuriya Decl."), Dkt. No. 39-8, ¶¶ 28–30.) While it's clear the parties met and conferred, it is disputed as to whether it was regarding Evanston's motion for summary judgment. Nonetheless, because the issues are fully briefed, the Court will consider the merits of Evanston's motion. See CarMax Auto Superstores Cal. LLC v. Hernandez, 94 F. Supp. 3d 1078, 1087–88 (C.D. Cal. 2015) (noting a district court has discretion to deny or consider a motion that does not comply with Local Rule 7-3).

The Court declines to deny the motion for summary judgment on these grounds.

B. Whether Evanston's Motion Seeks Relief on Issues Outside the Complaint

Footprints argues Evanston seeks relief on issues outside the complaint. (Opp'n at 12.) Specifically, Footprints argues Evanston seeks summary judgment on the Specified Policy which was not attached to the complaint. (Id.) But Footprints does not cite any persuasive authority in support of its position. And in any event, Evanston properly sought relief regarding the Specified Policy which is a part of the record.

The Court declines to deny the motion for summary judgment on these grounds.

C. Whether Evanston's Separate Statement is Defective

Footprints argues Evanston "did not state all pertinent material facts relating to several exclusionary clauses on which Evanston seeks declaratory relief. . . ." (Opp'n at 13.) The Court will necessarily address this argument in the following analysis of the merits of Evanston's motion.

IV. EVIDENTIARY OBJECTIONS

The Court will next consider the evidentiary objections raised by Footprints. (See Evid. Obj., Dkt. No. 39-2.) Footprints raises several objections to the Perlis Declaration and related exhibits.

"A trial court can only consider admissible evidence in ruling on a motion for

summary judgment. Authentication is a condition precedent to admissibility, and this condition is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. [An] unauthenticated document[] cannot be considered in a motion for summary judgment." Orr v. Bank of Am., NT & SA, 285 F.3d 764, 773 (9th Cir. 2002) (internal citations and quotations omitted). Documents may be authenticated by any manner permitted under Federal Rule of Civil Procedure 901. Id. at 774. A document authenticated by personal knowledge "must be attached to an affidavit that meets the requirements of [Fed.R.Civ.P.] 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence.'" Id. "[W]hen a document has been authenticated by a party, the requirement of authenticity is satisfied as to that document with regards to all parties, subject to the right of any party to present evidence to the ultimate fact-finder disputing its authenticity." Id. at 776.

The Court only considered admissible evidence in resolving the motion for summary judgment. When the Order cites evidence to which the parties have objected, the objection is impliedly overruled. Additionally, the Court declines to rule on objections to evidence upon which it did not rely.

A. Objection Nos. 1 & 2

Footprints objects to Exhibit B because the exhibit is improperly authenticated. (Dkt. No. 38-3.) Exhibit B is a commercial insurance application with Carillo listed as the applicant, but notably not signed. Exhibit B is attached to Perlis' declaration. Perlis' declaration contains a blanket statement that the facts in the declaration are true to Perlis' own personal knowledge and Perlis could testify competently to the information. (Perlis Decl. ¶ 1.) Footprints argues because Perlis is Evanston's counsel and he did not prepare, fill out, or transmit the application, authentication is improper. (Evid. Obj. at 1–2.) Perlis argues, as counsel for Evanston, he "has access to and can attach Evanston's business records to a declaration." (Response Evid. Obj., Dkt. No. 42-4, at 2.) But aside from Perlis' blanket statement, Perlis fails to lay a proper foundation as to Exhibit B. See Orr, 285 F.3d at 777–78 (holding, where counsel attached exhibits to their own declaration, there is insufficient foundation for one such exhibit where counsel neither wrote nor witnessed the writing of a memo).

Evanston argues, nonetheless, because Exhibit B is incorporated into Exhibit A, it is properly authenticated. (Response Evid. Obj. at 1–2.) Exhibit A is the Specified

Policy. Exhibit A states "[t]he Declarations, Common Policy Conditions, Coverage Part(s), the application(s) and written endorsements attached hereto shall be deemed to be a single unitary contract." (Opp'n, Ex. A, MESM 5100 02 16, at 2.) Exhibit A and B are central to the parties' claims. And Footprints does not actually contest Exhibit B's authenticity aside from how Evanston introduced the exhibit. In fact, Footprints' opposition includes a declaration from Carillo. Carillo is listed as the applicant on Exhibit B and could lay a foundation as to Exhibit B at trial, or any proper custodian at Evanston could. Because Exhibit B could be presented in admissible form at trial, the Court will consider its contents for the purposes of these summary judgment motion. See Fraser v. Goodale, 342 F.3d 1032, 1037 (9th Cir. 2003).

Footprints' objection to Exhibit A is based on the same grounds. (Dkt. No. 38-2.) For the same reasons discussed above, the Court will consider Exhibit A for the purposes of evaluating Evanston's motion summary judgment.

For these reasons, Footprints' objection Nos. 1 and 2 are **OVERRULED**.

B. Objection Nos. 4, 5, 6, 9 & 11

Footprints objects to Exhibits G, H, and L because Perlis improperly authenticated them in his declaration and the exhibits contains hearsay. Exhibit G is a Special Incident Report prepared by Coe. (Dkt. No. 38-8.) Exhibit H is an email exchange between Kim, Coe, and Stump. (Dkt. No. 38-9.) Exhibit L is an email between Kim and Coe. (Dkt. No. 38-13.) Exhibit E is a letter addressed to Perlis. (Dkt. No. 38-6.) Perlis clearly has personal knowledge of Exhibit E. Footprints does not otherwise dispute the actual authenticity of these exhibits. Exhibits G, H, and L could be presented at trial in admissible form. Moreover, the declarations of Footprints' employees make numerous references to the Special Incident Report. The Court will consider the exhibits for the purposes of this Order. See Fraser, 342 F.3d at 1037. The Court will consider the hearsay objections as necessary if the exhibits are relied upon.

For these reasons, Footprints' objection Nos. 4, 5, 6, 9, and 11 are **OVERRULED**.

C. Objection No. 7, 8, 10, and 12

Footprints objects to Exhibits J, K, and the Declaration of Mary Claire Tillotson. Exhibits J and K are transcripts from Kim's criminal trial. (Dkt. No. 38-11.) Footprints objects to all three documents as hearsay. The Court will consider the hearsay objections as necessary if the exhibits are relied upon.

Footprints also objects to the Tillotson Declaration because Evanston failed to initially attach the declaration to its motion. The Court discusses the Tillotson Declaration further below.

For these reasons, Footprints' objection Nos. 7, 8, 10, and 12 are **OVERRULED** subject to the Court's later discussion of the Tillotson Declaration.

IV. DISCUSSION

"When determining whether a particular policy provides a potential for coverage and a duty to defend, [the Court is] guided by the principle that interpretation of an insurance policy is a question of law." Waller v. Truck Ins. Exch., Inc., 11 Cal. 4th 1, 18 (1995). "An insurer moving for summary judgment must establish the absence of any . . . potential for coverage, i.e., that the underlying complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage. When an insurer seeks summary judgment on the ground the claim is excluded, the insurer has the burden to prove that the claim falls within an exclusion. Any doubt as to whether the facts give rise to a duty to defend is resolved in the insured's favor." Imperium Ins. Co. v. Unigard Ins. Co., 16 F. Supp. 3d 1104, 1115 (E.D. Cal. 2014) (internal citations and quotations omitted).

A. Breach of Contract Claim

"Material misrepresentation or concealment of such facts are grounds for rescission of the policy, and an actual intent to deceive need not be shown. Materiality is determined solely by the probable and reasonable effect which truthful answers would have had upon the insurer. The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law." Thompson v. Occidental Life Ins. Co., 9 Cal. 3d 904, 916 (1973) (internal citations omitted). The burden of proving misrepresentation is with the insurer. Id. at 919. But all ambiguities are construed against the insurer. Ransom v.

Penn Mut. Life Ins. Co., 43 Cal. 2d 420, 424 (1954); State Farm Mut. Auto. Ins. Co. v. Partridge, 10 Cal. 3d 94, 102 (1973).

Evanston seeks summary judgment on its claim for breach of contract. (Mot. at 14–15.) Evanston argues it has no obligation for coverage under the Specified Policy because of Footprints' failure to provide truthful responses in its application for renewal of insurance. The Specified Policy provides "the Insureds agree . . . [t]hat the information and statements contained in the application(s) are their representations, . . . and that this policy is issued in reliance upon the truth of such representations." (Ex. A 014.) The "Commercial Insurance Application" (the "Application") prepared by Carillo asks several questions under "Applicant History/Claims." (Ex. B 084.) Evanston focuses on Footprints' responses to questions 7(a)(ii), (a)(iv), and (e). (Mot. at 14.) The Application is dated June 4, 2019, and is for coverage between July 25, 2019, and July 25, 2020. (Ex. B 072.) Neither party disputes that the Application is incorporated into and is part of the Specified Policy. (Ex. A 014.)

Questions 7(a)(ii) and (a)(iv) ask if "[Footprints] or any of [Footprints'] employees" have been convicted of a crime or had a license suspended, revoked, or accepted on special terms. (Ex. B 084.) The Application is marked "No" for these two questions. Footprints argues the term "employees" applies to only current employees. As such, according to Footprints, Footprints' response was truthful because Kim was not an employee at the time. (Opp'n at 19–20.) Footprints argues interpreting employees to mean only current employees is reasonable because of how the Specified Policy defines an "employee" and because such an interpretation does not lead to absurd results. (See Opp'n at 20.)

The Court agrees with Footprints. The plain language of "employees" appears to refer to employees in the present tense. More fatally to Evanston is that the Specified Policy defines "Employee" as:

> [A]ny natural person while in the regular service of the Named Insured in the ordinary course of the Named Insured's business and whom the Named Insured compensates by salary, wages or commissions and has the right to govern and direct the performance of such service. Employee includes a Leased Worker but does not include any Temporary Worker or independent contractor.

(Mot. Ex. A 020.) Based on the definition provided in the Specified Policy, the meaning of "employees" is unambiguous. "Employees" does not refer to past employees as Evanston contends. At the time of the Application, Kim was not in the regular service of Footprints and was not receiving compensation from Footprints. (See SOF ¶ 56.) Even if the term "employees" is unambiguous, Footprints interpretation is not unreasonable. And any ambiguity must be construed against Evanston. See Ransom, 43 Cal. 2d at 424; see, e.g., Unionamerica Ins. Co., Ltd. v. Fort Miller Grp, Inc., 590 F. Supp. 2d 1254, 1259–60 (N.D. Cal. 2008). Accordingly, Footprints' answers to questions 7(a)(ii) and (iv) were not material misrepresentations.

Question 7(e) asks, "Are you aware of any circumstances which may result in a malpractice claim or suit being made or brought against you or any of your employees?" (Ex. B 084.) Footprints marked "No" for this question. (Id.) Evanston contends Footprints misrepresented this response based on several facts. First, Evanston contends Footprints was aware of Kim's conviction in March of 2019, prior to the furnishing of the Application. Second, Evanston contends Footprints itself reported Kim's conduct to law enforcement and licensing authorities in November 2017. Lastly, Evanston contends admissions by Footprints' show Footprints was aware of a possible lawsuit. The Court addresses each of these facts in turn.

Evanston cites to Exhibit I to show Footprints knew of Kim's conviction. (Dkt. No. 38-10.) Exhibit I appears to be a webpage listing Kim's convictions. This is clearly hearsay if used to prove Kim was convicted of certain crimes. Fed. R. Evid. 801. Moreover, Exhibit I has no bearing on whether Footprints was actually aware of Kim's conviction prior to submitting the Application in June 2019.

Evanston points to the SIR (or "Report") from November 20, 2017. (Id. Ex. G.) The Report states Kim was terminated "for not following company procedure." (Id. at 133.) Although this statement is hearsay, Stump confirmed Kim was fired for failing to follow procedure. (Declaration of Corey Stump ("Stump Decl."), Dkt. No. 39-4, ¶¶ 3, 9.) The Report also contains Kim's account of what events occurred between her and K.B., including several sexual acts. (Id. at 133–35.) The Report also lists Gresham Police Department, DHS Behavioral Analyst Certification Board, and Oregon Behavior Analysis Regulatory Board, as involved agencies. According to the Report, Coe was present when the Report was filed with the Gresham Police Department. The Report, while hearsay if used to establish the facts therein, does show Coe and Footprints were

aware of some type of potential sexual contact between Kim and K.B., and the involvement of law enforcement and regulatory agencies. (See also Stump Decl. ¶¶ 7, 10.)

Evanston also points out Footprints' employees testified at Kim's trial in February 2019. (See SOF ¶¶ 15–17.) This testimony is hearsay, and the Court does not find Federal Rule of Evidence 804(b)(1) applicable. The Court will not rely on trial transcripts from Kim's trial for the fact that Footprints' employees were mandatory reporters or if they actually reported Kim's conduct. Nonetheless, the testimony of the Footprints' employees goes towards Footprints' knowledge of "circumstances" that might give raise to a "malpractice claim or suit" brought against Footprints. (Ex. B 084.) Footprints' employees even admit as such. (See, e.g., Stump Decl. ¶ 7 ("I learned later at Ms. Kim's criminal trial long after her employment had been terminated that the police determined she had committed sexual battery against K.B.")).

Lastly, Evanston relies on the Tillotson declaration. Tillotson is a claims service manager for Evanston. (Tillotson Decl. ¶ 1.) This declaration was late filed. Even if the Court were to consider it, it is not dispositive. Tillotson states "Mr. Nuyen stated that Footprints knew since 2017 that it was going to be sued." (Id. ¶ 4.) K. Maxwell Nuyen ("Nuyen") is the general counsel of Footprints. (See Declaration of K. Maxwell Nuyen ("Nuyen Decl."), Dkt. No. 39-7, ¶ 3.) While the statement is hearsay, Federal Rule of Evidence 801(d)(2) applies. Nonetheless, Nuyen stated he did not make that statement. (Id. ¶ 6.) Because Evanston moves for summary judgment, the Court must make all reasonable inferences in favor of Footprints. Accordingly, Nuyen's statement does not go towards Footprints knowledge of a potential lawsuit.

The Report establishes Footprints was aware of possible sexual contact between Kim and K.B. while Kim was an employee of Footprints. This is notwithstanding the fact that the exhibits do not establish whether such events actually happened because they are hearsay. The Report is dated November 17, 2017. Based on the undisputed, admissible facts, Kim's trial was in February 2019. (SOF ¶¶ 15–17.) Footprints submitted the renewal application in June 2019. (Ex. B 072.) Regardless of whether the facts within the Report are true or not, together the Report and Kim's trial put Footprints on notice a claim was possible, if not likely. See, e.g., W. World Ins. Co. v. Prof. Collection Consultants, 2016 WL 6023825, at *6 (C.D. Cal. Mar. 24, 2016) ("[N]o reasonable jury could conclude that knowledge of the criminal investigation would not

have, at a minimum, altered Plaintiff's evaluation of the risk in issuing the Policy Agreement."), aff'd 721 Fed. App'x 621 (9th Cir. 2018); El Gallo Giro Corp. v. Houston Cas. Co., 2012 WL 5829966, at *3–4 (C.D. Cal. Nov. 15, 2012); Wallbrook Ins. Co. Ltd. v. Spiegel, 1993 WL 580759, at *9 (C.D. Cal. Aug. 6, 1993). Put another way, just prior to Footprints tendering of the Application, Footprints' former employee was criminally tried for inappropriate sexual contact with a minor and former client. A reasonable inference is that a malpractice lawsuit against Footprints or its current employees was very possible, if not likely. Kim's criminal trial related to her time as an employee of Footprints, related to the scope of her employment, and was connected to a former Footprints client. (See Stump Decl. ¶ 7.) It does not matter if Kim was an employee at the time of the Application because a lawsuit against a Footprints or a current employee based on Kim's previous conduct was possible. Footprints does not point to any other evidence showing a different, reasonable inference. Thus, Footprints response to question 7(e) of the Application was a material misrepresentation.

Accordingly, the Court **GRANTS** the motion for summary judgment on Evanston's second claim for breach of contract.

B. Prior Knowledge

Evanston argues coverage is precluded on a separate basis under the "Prior Knowledge Provision." (Mot. at 15.) The Prior Knowledge Provision of the Specified Policy provides Evanston will pay applicable claims *provided*:

> Prior to the effective date of this policy the Insured had no knowledge of such act, error or omission or any fact, circumstance, situation or incident which may lead a reasonable person in the Insured's position to conclude that a Claim was likely.

(Ex. A 019 (underline omitted).)

This clause establishes a condition precedent such that there is no duty to defend if the condition is not met. See, e.g., Kinsale Ins. Co. v. Golden Beginnings, LLC, 557 F. Supp. 3d 1000, 1007–10 (C.D. Cal. 2021). Footprints argues (1) the "effective date" refers to 2005, and not 2019, and (2) the facts do not show prior knowledge. (Opp'n at 20–21.)

Footprints argues "effective date" could reasonably mean July 2005. (Opp'n at 21.) Since 2005, the practice of the parties would be that Footprints would fill out an annual renewable application in the June or July of the year in which the policy was expiring. (SOF ¶ 34.) Footprints' own evidence states that the Specified Policy "provided coverage to Footprints from July of a calendar year to July of the next calendar year, e.g., from July 2005 to July 2006, July 2006 to July 2007, and so forth." (Id. ¶ 33.) While true the policy never lapsed, that is because Footprints renewed the Specified Policy each year in the prior June or July. The Specified Policy was not obtained in July 2005 for a continuous amount of time until July 2020. Rather, it was renewed each year. That necessarily means the effective date was sometime in July of each year. The Application even states as much, listing the "proposed eff[ective] date" as July 25, 2019. No reasonable person could conclude "effective date" referred to July 2005. Thus, the provision is clear and unambiguous. Accordingly, the Court must look to any knowledge Footprints may have had prior to July 25, 2019, that would lead a reasonable person to conclude a claim is likely.

Footprints argues the facts are "genuinely in dispute" and do not reveal Footprints did any wrongdoing. (Opp'n at 23.) As an initial matter, the Court's analysis above regarding Footprints knowledge of a potential claim based on the Report and Footprints' employees testifying at Kim's trial is just as applicable and important here. Footprints reliance on Juarez v. Boy Scouts of America, Inc., 81 Cal. App. 4th 377 (2000), for the proposition that employers are not liable for the sexual misconduct of their employees is unavailing given the California Supreme Court expressly disapproved of the case in Brown v. USA Taekwondo, 11 Cal. 5th 204 (2021). True, Brown was decided after the events of the case. But Footprints could have been liable for claims such as negligent hiring and supervising, not just for respondeat superior claims. Relatedly, Footprints contends Nuyen's declaration, which includes a letter tendering Footprints' claim for the lawsuit to Evantson, establishes the lawsuit does not allege Kim "was 'acting on behalf of' Footprints when she sexually assaulted K.B." (See Nuyen Decl.; Opp'n at 23.) But again, a claim against Footprints does not necessarily rely only on a respondeat superior theory. Next, Evanston points to Exhibit H, which is an email sent from Kim to fellow Footprints' employees, Coe and Stump, on November 19, 2017. (Mot. Ex. H 138–39.) In the email, Kim states "K has been sexually harassing me since October, ..."[2] Id. But this email has no bearing on, true or not, whether Kim sexually assaulted K.B.

[2] This email is being used not for the truth of the matter asserted, but rather for effect on the listener.

There is no coverage because the condition precedent to coverage was not satisfied. See Coregis Ins. Co. v. Camico Mut. Ins. Co., 959 F. Supp. 1213, 1219 (C.D. Cal. 1997) ("Specifically, an insurer may move for summary adjudication that no duty to defend exists on the grounds that the claim is specifically excluded by the policy."). Based on the foregoing and particularly the Court's discussion supra Part IV.A, no reasonable jury could find Footprints' did not have any prior knowledge a claim was likely. A claim under the Specified Policy is contingent on compliance with this prior knowledge clause. (See Ex. A 019–20.)

Footprints argues the Sexual Acts Clause of the Specified Policy still imposes a duty to defend. (Opp'n at 24.) Footprints argues Evanston owes a duty for the same reasons as discussed above, for the Prior Knowledge Provision. This argument fails for the same reasons discussed already.

Footprints argues there is a duty to defend under the General Liability Insurance Coverage Part of the Specified Policy. (Opp'n at 9.) This section provides coverage based on bodily injury or property damage. (See Ex. A 027–42.) A bodily injury is defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." (Id. at 030.) California courts are in accord that this is limited to physical injury. See Chatton v. Nat'l Union Fire Ins. Co., 10 Cal. App. 4th 846, 854 (1992). The underlying lawsuit does not allege any physical injury or bodily injury, but instead focuses on emotional distress. (SOF ¶ 67.) Neither party disputes this. Accordingly, this coverage section is inapplicable here.

Footprints argues there is a duty to defend under the "General Policy" or "Health Care Umbrella Liability Policy" (collectively the "Umbrella Policy"). (Opp'n at 8–9; Carillo Decl. Ex. 1.) But the Complaint and Crossclaims seek relief only as to the Specified Policy. In fact, neither pleading raises the issue of coverage under the Umbrella Policy. Nonetheless, Evanston's motion states "the uncontroverted material facts establish that the Claim is not covered under any of the policies issued by Evanston, including the Specified [Policy]." (See Notice of Mot., Dkt. No. 38, at 1.) Thus, Evanston put at issue the Umbrella Policy.

The Umbrella Policy pays the "ultimate net loss" that exceeds the "underlying limit." (Ex. 1 at 011.) And the Umbrella Policy applies to claims "covered by the 'controlling underlying insurance.'" (Id. at 012.) Unlike the General Liability section, "bodily injury"

here is defined as "bodily injury, sickness, disease, shock, fright, mental injury, or disability sustained by a person, and includes death from any of these at any time." (Id. at 027.) Accordingly, the definition of "bodily injury" does not preclude the claims brought based on Kim's conduct.

Evanston argues the Umbrella Policy only applies when triggered. (Reply at 13.) "It is settled under California law that an excess or secondary policy does not cover a loss, nor does any duty to defend the insured arise, until *all* of the primary insurance has been exhausted." See Comm. Redevelopment Agency v. Aetna Cas. & Surety Co., 50 Cal. App. 4th 329, 339 (1996) (emphasis in original). But the Umbrella Policy expressly states:

> If denial of coverage by the "controlling underlying insurer" is legally upheld because of a breach of a policy condition by the insured and if said breach is not also a breach of a condition of this policy, the insurance afforded by this policy shall apply in the same manner as though such "controlling underlying insurance" had not been breached and had remained in full effect.

(Ex. 1 at 022.)

As discussed above, the Court upheld Evanston's denial of coverage under the Specified Policy, or controlling underlying insurance. But Evanston does not point to any facts showing Footprints breached a policy condition of the Umbrella Policy. Based on the plain language here, the Umbrella Policy could conceivably cover Footprints' claim even if there is no coverage under the Specified Policy.

Evanston argues the retroactive date bars coverage under the Umbrella Policy. (Reply at 13–14.) The retroactive date of the Umbrella Policy is June 13, 2018. (Ex. 1 at 007.) But the retroactive date of the Specified Policy, if applicable, is July 25, 2005. (Id. at 009.) While a claim made under the Umbrella Policy is not covered if made prior to June 13, 2018, the events for which the claim is based can occur as early as July 2005. The relevant conduct here occurred in 2017. Thus, Evanston has not satisfied its burden to establish Footprints' claim is not covered by the Umbrella Policy. Nonetheless, this analysis has no bearing on whether Evanston properly disclaimed coverage under the Specified Policy. To the extent Evanston seeks summary judgment on coverage under the Umbrella Policy, the motion is denied.

Accordingly, the Court **GRANTS** the motion for summary judgment as to the Specified Policy and **DENIES** the motion for summary judgment as to the Umbrella Policy.

C. Reimbursement of Defense Fees

Evanston seeks reimbursement of attorneys' fees as there was no obligation to defend. An insurer may seek reimbursement of defense costs when a claim is not covered. Buss v. Super. Ct., 16 Cal. 4th 35, 50 (1997). Although a claim under the Specified Policy is not covered, it's unclear whether a claim under the Umbrella Policy is covered. But more importantly, Evanston's only evidence of damages is inadmissible.

Tillotson states that Evanston has paid out $57,337.34 to cover the underlying lawsuit. (Tillotson Decl. ¶ 6.) But Tillotson's declaration was filed on March 14, 2023, *after* Footprints filed its opposition. Footprints did not have an opportunity to respond to Tillotson's declaration. Moreover, at oral argument, Footprints represented that Evanston never sought monetary damages in its initial disclosures. The parties Joint Rule 26(f) Discovery Plan indicates Evanston seeks reimbursement of its defense costs. (Dkt. No. 41, at 3.) But the report was submitted on March 17, 2023. As the non-moving party, Footprints did not have the opportunity to provide evidence to rebut Tillotson's declaration. Thus, the Court will not consider it for the purposes of this motion.

Accordingly, the Court **DENIES** the motion as to reimbursement of defenses costs.

D. Sanctions

Evanston requests the Court sanction Footprints for frivolous filings and misrepresentations in Footprints' Answer under the Court's inherent power and 28 U.S.C. § 1927. (Mot. at 19–21.)

Section 1927 provides that any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." "[R]ecklessness suffices for [sanctions under] § 1927, but bad faith is required for sanctions under the court's inherent power." Fink v. Gomez, 239 F.3d 989, 993 (9th Cir. 2001). Notably, 28 U.S.C. § 1927 does not permit the imposition of sanctions against

law firms; only individual attorneys may be sanctioned. Kaass Law v. Wells Fargo Bank, N.A., 799 F.3d 1290, 1295 (9th Cir. 2015).

Evanston argues Footprints frivolously sought dismissal or a stay of the case pending resolution of a separate underlying lawsuit. The Court finds this does not rise to the level of sanctionable conduct under Section 1927. After balancing the Landis factors, the Court granted the stay at Footprints request. (See Stay Order, Dkt. No. 24.) Evanston cannot now seek sanctions simply because it disagrees that the stay was unnecessary.

The Court may impose sanctions under its inherent authority for "willful disobedience of a court order or when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Fink, 239 F.3d at 991 (quoting Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980)) (cleaned up). "[S]anctions are available if the court specifically finds bad faith or conduct tantamount to bad faith. Sanctions are available for a variety of types of willful actions, including recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose." Id. at 994. "Before awarding sanctions under its inherent powers, however, the court must make an explicit finding that counsel's conduct 'constituted or was tantamount to bad faith.'" Primus Auto. Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 648 (9th Cir. 1997) (citation omitted).

Evanston contends Footprints' responses in its Answer contradict the evidence in the record. The proper recourse for sanctions on this basis would be Rule 11. Rule 11 requires "[a] motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b)." On this basis alone, the request for sanctions fails. In any event, the Court does not find any "willful disobedience of a court order or [that Footprints] has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."

Accordingly, the Court **DENIES** the motion to the extent it requests sanctions.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS in part and DENIES in part** the motion.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 20-682 JVS (KESx)	Date	May 24, 2023
Title	Evanston Insurance Company v. Footprints Behavioral Interventions, Inc.		

IT IS SO ORDERED.