SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Kayne Anderson Capital Advisors, et al. v. AIG Specialty Insurance Company, et al.
21STCV03202

Dept. 12 SSC
Hon. Carolyn B. Kuhl
Date of Hearing: June 23, 2022

Plaintiffs' Motion for Partial Summary Adjudication

AIG Specialty Insurance Company, Catlin Specialty Insurance Company, Freedom Specialty Insurance Company and Starr Indemnity & Liability Company's Motion for Summary Judgment, or, in the Alternative, Summary Adjudication

Defendant Catlin Specialty Insurance Company's Motion for Summary Adjudication on First Through Third Causes of Action

Defendants Starr Indemnity & Liability Company and Freedom Specialty Insurance Company's Supplemental Joint Motion for Summary Adjudication

Court's Ruling: The Motion for Summary Judgment brought by AIG, Catlin, Freedom and Starr is granted. Consequently, Kayne Anderson's Motion for Partial Summary Adjudication is denied. The Motions for Summary Adjudication brought by Katlin, Starr and Freedom are moot.

I. Nature of the Action and Relief Requested

Plaintiffs Kayne Anderson Capital Advisors, L.P. (KACALP) and KA Fund Advisors, LLC (KAFA) (collectively, Kayne Anderson or Plaintiffs) filed this action on January 27, 2021 against Defendants AIG Specialty Insurance Company (AIG), Catlin Specialty Insurance Company (Catlin), Freedom

Specialty Insurance Company (Freedom), and Starr Indemnity & Liability Company (Starr) (collectively, Defendants).

On June 1, 2021, Kayne Anderson filed the First Amended Complaint (FAC), raising the following causes of action against all Defendants:

(1) Declaratory Judgment as to Plaintiffs' Defense Costs in the Underlying Action;
(2) Declaratory Judgment as to Indemnification of the Settlement Payment Resolving the Underlying Action;
(3) Breach of Contract;
(4) Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing.

Kayne Anderson alleges:

> 1. This is an insurance coverage dispute by which Kayne Anderson seeks the following relief: (1) a judgment declaring that [Defendants] are obligated to provide coverage for Kayne Anderson's defense costs in the underlying action styled *Energy Intelligence Group, Inc. v. Kayne Anderson Capital Advisors, L.P.*, filed on July 8, 2014 in the United States District Court for the Southern District of Texas under case number 4:14-cv-01903 (the "Underlying Action"); (2) a judgment declaring that [Defendants] must indemnify Kayne Anderson for the settlement payment resolving all claims in the Underlying Action; (3) damages due to [Defendants'] breaches of contractual duties and obligations under the insurance policies they sold to Kayne Anderson by refusing to provide coverage for Kayne Anderson's defense costs and by refusing to indemnify Kayne Anderson for the settlement payment resolving all claims in the Underlying Action; and (4) damages due to [Defendants'] breaches of the implied covenant of good faith and fair dealing.
>
> 2. The Underlying Action alleges, among other things, that Kayne Anderson reviewed and distributed internally to Kayne Anderson personnel *Oil Daily*, a copyrighted energy industry publication, in connection with Kayne Anderson's business of providing investment advice to its clients.
>
> 3. Kayne Anderson is entitled to coverage for the Underlying Action under the insurance policies sold by [Defendants] ... because Kayne Anderson's alleged conduct in the Underlying Action included regular and necessary aspects of Kayne Anderson's business of providing investment advice,

and is therefore the precise type of conduct the subject insurance policies are intended to cover.

(FAC, ¶¶ 1-3.)

Kayne Anderson moves for summary adjudication as to the First, Second, and Third Causes of Action. All Defendants move jointly for summary judgment or, in the alternative, summary adjudication as to the Third and Fourth Causes of Action (Defendants' Joint Motion). Defendants state the grounds for the Joint Motion as follows:

> The AIG Primary Policy, to which all of Defendants' insurance policies follow form unless they contain separate provisions, limitations, and/or exclusions, precludes coverage for the Underlying Action because:
> 1. Kayne Anderson's conduct which gave rise to the Underlying Action did not arise from Kayne Anderson's having provided "Investment Advisory Services," as required by the "Investment Advisor Professional Liability" coverage section of the AIG Primary Policy; and
> 2. The AIG Primary Policy's "Investment Advisor Management Liability" coverage section expressly excludes any and all claims which arise from or allegedly relate to "copyright infringement" and the Underlying Action was based entirely upon copyright infringement by Kayne Anderson.

In addition to joining in Defendants' Joint Motion, Catlin moves for summary adjudication of the First, Second, and Third Causes of Action on the ground that it has no obligation to Kayne Anderson until AIG, as the primary insurer, has paid its policy limits, which has not occurred. Freedom and Starr, in addition to joining in Defendants' Joint Motion, move for an order adjudicating that they have no duty under their excess policies to advance defense costs incurred in the Underlying Action and no duty to indemnify Kayne Anderson for any settlement payments. Catlin joins in the Freedom and Starr Motion and has filed a Separate Statement of Material Facts in support of that joinder.

II. Relevant Facts[1]

The Underlying Action

The Underlying Action was filed by Energy Intelligence Group, Inc. (EIG) on July 8, 2014. (Defs' Fact No. 12.) Defendants were notified of the Underlying Action in September 2014. (Defs' Fact No. 15; Defs' RJN, Ex. D, ¶¶ 63-70, 72-75.) Catlin, Freedom, and Starr issued "reservation of rights" letters, declining to maintain an open file on the Underlying Action. (Defs' RJN,Ex. D, ¶¶ 64-66.) AIG, for its part, formally denied coverage for the Underlying Action on March 8, 2017. (Defs' RJN, Ex. D, ¶ 67.)

Defendants have not disputed that the Underlying Action was a "Claim" under the AIG Primary Policy. (Pls' Fact No. 10, Kayne Anderson's Separate Statement ISO MSA.) EIG's original complaint in the Underlying Action brought a claim against Kayne Anderson solely for copyright infringement, but EIG subsequently amended the complaint to include claims for direct, vicarious, and contributory copyright infringement and under 17 U.S.C. § 1202(b) of the Digital Millennium Copyright Act. (Defs' RJN, Ex. B.)

In the original complaint, EIG alleged that it was a publisher of "newsletters and other publications for the highly-specialized global energy industry." (Defs' RJN, Ex. A, at p. 2.) EIG alleged it published "the daily newsletter *Oil Daily* ... ." (*Id.*, italics in original.) EIG's Second Amended Complaint in the Underlying Action alleged that the *Oil Daily* subscriber list "consists of individuals with an interest in the oil and gas industries, including bankers, investors, stock market analysts, traders, commodity analysts and others who follow these industries." (Defs' RJN, Ex. B, at p. 3.)

EIG alleged that one of Kayne Anderson's employees regularly sent *Oil Daily* to twenty or so individuals in Kayne Anderson's office, "including a majority of senior executives of [Kayne Anderson]." (Defs' RJN, Ex. A, at pp. 11-12.) EIG alleged that Kayne Anderson had "been regularly copying and distributing copies of [*Oil Daily*] and the articles contained therein since at least as early as December 2004." (*Id.* at p. 12.) EIG contended Kayne Anderson should "be required to account for and disgorge to [EIG] all gains, profits, and advantages derived from its copyright infringement ... ." (*Id.* at p. 15.)

Kayne Anderson has presented evidence to show that the use of *Oil Daily* was important to Kayne Anderson's business of investment advice. For

[1] Unless otherwise noted, citations are to the papers filed in connection with Defendants' Joint Motion.

example, counsel for EIG stated at trial in the Underlying Action: "I think the evidence will show that this [*Oil Daily*] is clearly a business subscription, and it's *Oil Daily* [sic] is made for business consumers. It's not really made for just the general -- I mean, the general public could read it, but it's really made for professionals." (Pl's Addt'l Fact No. 58.) And Kayne Anderson points to evidence that its managing partner, Jim Baker, relied on *Oil Daily* as an important tool for his company's offering of investment advice. For example, Mr. Baker testified that *Oil Daily* "was something that I reviewed in my investment decision-making process" and that "[i]t was helpful in the investment decision-making process ... ." (Fliegel Decl., Ex. 5, at 145:19-20, 145:24-25.)

On December 7, 2017, the jury empaneled in the Underlying Action found 39 separate copyright infringements and returned a verdict awarding EIG $15,000 for each infringement – a total award of $585,000 on EIG's copyright infringement claims. (Defs' RJN, Ex. P.) On May 2, 2018, the District Court awarded EIG fees and costs of approximately $4.3 million, which resulted in a judgment against Kayne Anderson totaling approximately $4.9 million. (Pls' Fact No. 38 ISO Kayne Anderson's MSA.) The District Court entered an "Amended Final Judgment" on August 8, 2018. (Defs' Fact No. 94 ISO Freedom MSA.) The District Court reduced EIG's awarded fees by approximately $1.7 million, revising the total judgment amount down to approximately $3.2 million. (Pls' Fact No. 39 ISO Kayne Anderson's MSA.)

Both EIG and Kayne Anderson appealed. (Defs' Fact No. 19.) On January 15, 2020, the United States Court of Appeals for the Fifth Circuit vacated the District Court's Amended Final Judgment with respect to EIG's copyright claim and remanded the case "to determine the proper statutory damages for each of the 1,646 infringed works." (Def's RJN, Ex. C; see also *Energy Intelligence Group, Inc. v. Kayne Anderson Capital Advisors, L.P.* (5th Cir. 2020) 948 F.3d 261.) As for EIG's claims under the Digital Millenium Copyright Act, the Fifth Circuit entered judgment for EIG in the amount of $1,062,500 in damages. (*Id.*)

On remand, both Kayne Anderson and EIG moved for judgment as a matter of law, both of which motions were denied, and on December 16, 2020, the District Court scheduled a new trial on copyright damages. (Pls' Fact No. 43 ISO Kayne Anderson MSA.) On April 30, 2021, Kayne Anderson and EIG signed a settlement agreement, agreeing that the Underlying Action would be settled for $15 million. (Pls' Fact No. 45 ISO Kayne Anderson MSA.) Kayne Anderson contends in this action that total defense costs for the Underlying Action amount to $7,355,361.70. (Pls' Fact No. 69 ISO Kayne Anderson MSA.)

The AIG Primary Policy

Kayne Anderson seeks coverage under Insuring Agreement A of the AIG Primary Policy, which is entitled "*Investment Adviser Professional Liability Coverage.*" Insuring Agreement A provides coverage for:

> **Loss** of an **Investment Adviser** or **Insured Person** that arises from any **Claim** made against such **Insured** for a **Wrongful Act** by or on behalf of such **Insured** in the performance of or failure to perform **Investment Advisory Services.**

(AIG Primary Policy, at p. 1, § 1.A..) Indemnifiable **Loss** under the AIG Primary Policy includes "damages, settlements, judgments," and "Defense Costs." (*Id.*, at p. 22, § 13.) **Claim** includes a "civil proceeding for monetary, non-monetary or injunctive relief which is commenced by service of a complaint or similar pleading." (*Id.*, at p. 17.) **Wrongful Act** is defined to "mean[ ] any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act." (*Id.*, at p. 25.) The phrase **Investment Advisory Services** is defined to mean, as relevant here, "the following services by or on behalf of any ... **Insured Person** thereof: (1) financial, economic or investment advice or investment management services (including the selection and oversight of investment advisers ...) provided to others for consideration and pursuant to a written contract ... ." (*Id.*, at p. 22.)

Insuring Agreement A is not the only coverage provided by the AIG Primary Policy for losses related to Kayne Anderson's business. Insuring Agreement C, titled "*Investment Adviser Management Liability Coverage*" provides coverage for:

> **Loss** of an **Insured Person** that no **Organization** has indemnified or paid, and that arises from any **Claim** made against such **Insured Person** (a) for any **Wrongful Act** of such **Insured Person** ... ."

(*Id.*, at p. 1, § 1.C.) While Insuring Agreement C provides broad coverage, it has significant exclusions. Exclusion 14, entitled "*Intellectual Property,*" excludes coverage under Insuring Agreement C when the claim alleges or arises out of violations of copyright. (*Id.*, at p. 7, § 4.A.) The Intellectual Property exclusion does not apply to Insuring Agreement A. Although Kayne Anderson seeks coverage under both Insuring Agreements A and C in the original Complaint and in the First Amended Complaint, Plaintiff's papers addressed to the current cross-motions only seek coverage under Insuring

Agreement A. (See Compl., at p. 17, ¶ 98; FAC, ¶ 98.) No doubt Kayne Anderson has concluded that the Intellectual Property exclusion bars it from coverage under Insuring Agreement C.

One other provision of the AIG primary policy is arguably relevant here; it was not addressed by the parties in their briefing, but it was discussed at oral argument on the Motions. Exclusion 15, entitled "*Professional Services*," applies only to Insuring Agreement C, but it uses the defined term **Investment Advisory Services** which is also used in Insuring Agreement A. Exclusion 15 sets forth the following exclusion: "solely with respect to *Investment Adviser Management Liability Coverage* [Insuring Agreement C], for the performance of or failure to perform **Investment Advisory Services** or any other professional service to a customer or a client of an **Insured**."

Excess Policies

The Caitlin, Starr, and Freedom Policies all "follow form" with the AIG Primary Policy. (Defs' Fact No. 10.)

III. Discussion

The Standard of Proof Required for an Insurer to Demonstrate that It Does Not Have a Duty to Defend[2]

"A liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity. [Citation.] ... [T]he carrier must defend a suit which *potentially* seeks damages within the coverage of the policy. [Citation.] Implicit in this rule is the principle that the duty to defend is broader than the duty to indemnify; an insurer may owe a duty to defend its insured in an action in which no damages ultimately are awarded." (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295, internal citations, quotation marks, and brackets omitted, but italics in original.) The duty to defend "may exist even where coverage is in doubt

---

[2] The AIG Primary Policy provides that there is no duty to defend, but that "[o]nce the **Insurer** has received written notice of a **Claim** under this policy, it shall advance, excess of any applicable Retention, covered **Defense Costs** on a current basis ... ." (AIG Primary Policy, at p. 10, § 9.A.(1)-(2).) AIG argues that "'duty to advance' policies do not afford the broad 'duty to defend obligation and an insurer's duty to advance defense fees and costs arises only after the insured has 'establish[ed] that the underlying claims are within the basic scope of coverage.' *Jeff Tracy, Inc. v. U.S. Specialty Insurance Company* (C.D.Cal. 2009) 636 F.Supp.2d 995, 1004." (Joint Reply, at p. 17.) This court *assumes without deciding* that AIG owed a duty equivalent to the duty to defend with respect to its contractual duty to pay defense costs under the Policy. (*See generally, Health Net, Inc. v. RLI* (2012) 206 Cal.App.4th 232, 258-259.)

and ultimately does not develop." (*Id.*, internal citations and quotation marks omitted.)

"Any doubt as to whether the facts establish the existence of the defense duty must be resolved in the insured's favor." (*Id.* at pp. 299-300, internal citations omitted.) "To prevail, the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*." (*Id.* at p. 300, italics in original.) However, an insurer can prevail in showing that there is no duty to defend by presenting "evidence that the underlying claim cannot come within the policy coverage by virtue of the scope of the insuring clause or the breadth of an exclusion." (*Id.*, at p. 301.)

The Language of the AIG Primary Policy Does Not Provide Coverage for the Underlying Action

Taking all facts asserted by Kayne Anderson in the light most favorable to that insured, there never was a potential for coverage of the Underlying Action under Insuring Agreement A of the AIG Primary Policy. As discussed below, the copyright violation alleged in the Underlying Action cannot reasonably be construed as a wrongful act done in the performance of investment advisory services.

Courts in California construe insurance policy terms so as to give effect to the "mutual Intention" of the parties when the policy was issued, and the intent should be inferred to the extent possible solely from the written provisions of the policy. (*MacKinnon v. Truck Ins. Exch* (2003) 31 Cal.4th 635, 647.) "Courts must interpret insurance policies, like all contracts, to try to give effect to every clause and harmonize the various parts with each other." (*Friedman Prof. Management Co., Inc. v. Norcal Insurance Co.* (2004) 120 Cal.App.4th 17, 33.)

Insuring Agreement A, according to its title, covers a particular type of "professional liability": liability for performance of "investment advisory services." Inserting the language of the AIG Primary Policy's defined terms, Insuring Agreement A provides coverage for a loss

> that arises from any [civil proceeding for monetary relief] made against such **Insured** for [an actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act] by or on behalf of such **Insured** in the performance of or failure to perform

> [financial, economic or investment advice or investment management services provided to others for consideration and pursuant to a written contract].

The salient question here is whether the copyright breach alleged in the Underlying Action was an act "in the performance of or failure to perform" Investment Advisory Services, which the AIG Primary Policy defines as "financial, economic or investment advice or investment management service provided to others for consideration and pursuant to written contract."

The wrongful act alleged in the Underlying Action was the copying and distribution of copyrighted material – the *Oil Daily* – without the permission of the copyright owner. The Complaint in the Underlying Action alleged that: "Upon information and belief, Defendants have for years willfully copied and distributed copies of the [*Oil Daily*] Copyrighted Works and the articles contained therein on a consistent and systematic basis, and concealed these activities from Plaintiffs." (Defs' RJN, Ex. B, at p. 17.) EIG alleged that the wrongful copying was accomplished when "Ms. Pope forwarded, on a systematic and regular basis, the single copy the [*Oil Daily*] Copyrighted Works intended for Mr. Baker of [Kayne Anderson] to 20 or so individuals who are predominantly employees of [Kayne Anderson], including several senior executives of [Kayne Anderson]." (*Id.*, at p. 14.) Under these allegations, EIG sought relief on the basis that "[Kayne Anderson's] aforesaid acts violate [EIG's] exclusive rights under § 106 of the Copyright Act of 1976, 17 U.S.C. § 106, as amended, and constitute willful infringement of [EIG's] copyrights in the [*Oil Daily*] Copyrighted Works and the articles contained therein." (*Id.*, at p. 18.)

This court accepts (as AIG was required to do in determining whether there was a potential for coverage of the Underlying Action) Kayne Anderson's factual assertion that prompt access to and use of the content of the *Oil Daily* was essential for its investment advisers to be able to knowledgeably advise their clients. Jim Baker, a managing partner of Kayne Anderson, testified in the trial of the Underlying Action that *Oil Daily* was a source of information he reviewed in his investment decision-making process. (See Pl's Resp. Defs' Sep. St., Def's Fact No. 14; Fliegel Decl., Ex. 5, at 145:19-20, 145:24-25.) Another managing partner testified that "review of industry publications, including Oil Daily, is a necessary and typical undertaking by our investment personnel so that they are in a position to provide current and timely recommendations and purchase/sale decisions as part of Kayne Anderson's provision of investment advice ... ." (Pl's Sep. St. ISO Kayne Anderson's MSA, Fact No. 64.) Thus, reference to

and reliance on the *content* of the *Oil Daily* was part of "the performance of ... investment advisory services."

The Underlying Action, however, did not allege that Kayne Anderson committed a wrongful act by referring to the *content* of *Oil Daily* in giving investment advice. Kayne Anderson incorrectly characterizes the Underlying Action as a suit "for improperly using a specialized periodical to provide investment advice and make investment decisions ... ." (Pl's Opp., at p. 5.) The Underlying Action is based on unauthorized copying and distribution of a copyrighted work, not on using the content of that work in giving investment advice. If Kayne Anderson had purchased subscriptions to *Oil Daily* for all of its investment advisers and the investment advisers had referred to the content of the publication in formulating investment advice, no copyright violation could have been alleged. As the allegations of the Underlying Action make clear, the actions for which Kayne Anderson was sued in the Underlying Action were impermissible copying and distributing of copyrighted publications to multiple employees by email. The decision to copy *Oil Daily* without permission rather than purchase multiple subscriptions, whether that decision was made by a clerical employee, a manager, or an investment adviser, was not done in performing investment advice; it was a decision about how to run the business operations of Kayne Anderson.

Kayne Anderson argues that it "purchased insurance for lawsuits that arise in the course of their business activities as an investment management company. That is exactly what Insuring Agreement A says it covers under any reasonable interpretation." (Pl's Reply ISO Kayne Anderson's MSA, at p. 5.) Kayne Anderson's characterization of Insuring Agreement A is incorrect. Insuring Agreement A does not provide general liability insurance for Kayne Anderson as a business. General liability coverage is provided by Insuring Agreement C. If Insuring Agreement A could be read as broadly as Kayne Anderson urges, it would take the place of much of the coverage provided by Insuring Agreement C.

Insuring Agreement A provides professional liability coverage. The title of that coverage provision is "*Investment Adviser Professional Liability Coverage.*" Insuring Agreement C is titled "*Investment Adviser Management Liability Coverage.*" The structure of the AIG Primary Policy excludes from coverage under Insuring Agreement C claims that are covered under Insuring Agreement A. The Policy exclusion for "*Professional Services*" (Exclusion 15) applies to Insuring Agreement C (*Investment Adviser Management Liability Coverage*) and excludes from coverage under Insuring Agreement C claims for liability "for the performance of or failure to perform **Investment Advisory Services** or any other professional service ... ."

Thus, the insured is limited to recovery under Insuring Agreement A for liability arising from the performance of investment advice or investment management services because Insuring Agreement C is limited to coverage for non-professional activities. Kayne Anderson's expansive reading of Insuring Agreement A to cover breaches of duty or acts or omissions related to business decisions other than performing the function of giving "financial, economic or investment advice" is inconsistent with the title of Insuring Agreement A, "*Investment Adviser Professional Liability Coverage.*" Kayne Anderson's construction also is inconsistent with the exclusion for "*Professional Services*," which equates investment advisory services with other types of professional services.[3]

The language of Insuring Agreement A, considered in the context of the structure of the AIG Primary Policy, giving effect to every part of the Policy, and harmonizing the language used in the context of the reasonable expectations of the insured, does not provide coverage for the wrongful acts alleged in the Underlying Action.

California Case Law Interpreting Similar Policy Provisions Supports Construing the Reasonable Scope of Professional Liability Coverage as Not Covering Liability Arising from Business or Administrative Actions

Under California law, claims arising out of an insured's administrative or general business decisions are not covered by professional liability insurance. The distinction between claims based on actions arising out of the performance of professional services and claims based on actions related to running the professional's business has been recognized in several

---

[3] At oral argument, counsel for Kayne Anderson argued that in Exclusion 15 the prepositional phrase "to a customer or a client" modified both "**Investment Advisory Services**" and "other professional service." Counsel argued that Exclusion 15 therefore operated to exclude from Insuring Agreement C only claims brought by clients of Kayne Anderson, not claims brought by others. Counsel for Plaintiff concluded from this interpretation that AIG knew how to draft limits to coverage for professional liability so that coverage would apply only to claims brought by clients. Counsel argued that the court should infer from the absence of such language in Insuring Agreement A that Insuring Agreement A provides coverage for claims brought by persons or entities that are not clients of Kayne Anderson. This court does not need to resolve whether the prepositional phrase "to a customer or a client of an **Insured**" in Exclusion 15 applies to "**Investment Advisory Services**" or only to "other professional service." Nevertheless, the court agrees with Kayne Anderson that Insuring Agreement A does not limit coverage only to claims brought by customers or clients of Kayne Anderson. (See *Geddes v. Tri-State Ins. Co.* (1968) 264 Cal.App.2d 181, discussed *infra*, [holding that policy language similar to that at issue here provided coverage for a slanderous statement made "in the course of rendering professional services" covered by the policy, even though the claim for slander was brought by a person other than a client of the policyholder].)

California cases that have addressed the scope of coverage under a professional liability policy.

In *Inglewood Radiology Medical Group v. Hospital Shared Services, Inc.* (1989) 217 Cal.App.3d 1366 (*Inglewood*), the Court of Appeal was asked to decide whether a physician's professional liability policy covered a slander claim made by an employee who was fired by the insured. The policy covered claims "arising out of the rendering or failure to render during the policy period *professional services* by the insured ... ." (*Id.* at p. 1368, italics added by court in *Inglewood*.) "Professional services" were defined by the policy as "services performed in the practice of the profession of a physician ... ." (*Id.*) The insured argued that the employee's slander claim was covered because the decision to fire the employee was based on an evaluation of the employee's professional competence, and that only a trained physician could make that evaluation. (*Id.* at p. 1370.) The Court of Appeal rejected that argument:

> [E]ven though a physician's expertise may be required to properly evaluate a particular physician's performance as an employee, the decision to terminate that employee is not "rendering professional services." Rather, the decision to terminate employment is a business or administrative decision. In making such a decision, the physician is acting as an employer and not as a "physician rendering services."

(*Id.*) Because the Court concluded that "the character of [the act for which the insured was sued] was an administrative one rather than rendering professional services," the court found no coverage under the professional services coverage provision of the policy.

Kayne Anderson argues that *Inglewood* and other cases construing professional liability policies are inapposite because "this case is not about 'professional services' as the Primary Policy is not a traditional professional services policy, so all of this authority is inapposite to the Policies in question here." (Pl's Opp., at p. 22.) As discussed above, the AIG Primary Policy expressly characterizes Insuring Agreement A as coverage for "Professional Liability." More importantly, the policy language in *Inglewood,* as described above, is very similar to that used in the AIG Primary Policy. Kayne Anderson does not point to language of the policy construed in *Inglewood* that is materially dissimilar to the language of the AIG Primary Policy. (*Id.* p. 23, discussing *Inglewood*; see also Pl's Reply ISO Kayne Anderson's MSA, at p. 14 [arguing that *Inglewood* and other cases construing professional liability policies are "inapposite where the actual policy language is broader

and/or materially different" without explaining the operative difference in the policy language on which the *Inglewood* decision was based].)

In *Geddes v. Tri-State Insurance Co.* (1968) 264 Cal.App.2d 181 (*Geddes*), the Court of Appeal's analysis also turned on whether the act of the professional giving rise to a claim occurred while the insured was engaged in rendering a professional service. In *Geddes,* the Court considered whether a psychiatrist's professional liability policy provided coverage for an action against the insured psychiatrist for an allegedly slanderous statement made while consulting another psychiatrist about a psychiatric treatment facility. Although the lawsuit was not brought by a patient of the insured, the Court of Appeal held that the insured psychiatrist "was engaged in rendering a professional service as a psychiatrist at the time he made the allegedly slanderous statements resulting in the suit against him ... ." (*Id.* at p. 185.) As the Court of Appeal stated in *Inglewood,* the *Geddes* Court's analysis is consistent with the conclusion reached in *Inglewood* because in *Inglewood* the allegedly slanderous words were said, not in rendering a professional service, but rather in an employee termination, which was administrative rather than professional in character. (*Inglewood*, *supra*, 217 Cal.App.3d at p. 1370; cf. *Tradewinds Escrow v. Truck Ins. Exchange* (2002) 97 Cal.App.4th 704, 713 [the applicability of a professional services exclusion in a CGL policy turns on whether the injury for which coverage is sought "occurred during the performance of the professional services"].)

Similarly, in *Johnson v. First State Ins. Co.* (1994) 27 Cal.App.4th 1079 (*Johnson*), the Court of Appeal held that "[t]here is no objectively reasonable expectation of coverage when there is only a remote relationship between a claim for damages and an act, error or omission in connection with" the professional services covered by a policy. (*Id.* at p. 1083.) The policy construed in *Johnson* provided coverage for "all services rendered" in the insured's capacity as a lawyer "in the conduct of the firm's business." (*Id.*, at p. 1082.) The court held that when the insured lawyer brought a lawsuit on his own behalf and then was sued for malicious prosecution, "the malicious prosecution action [was] too remote to give rise to an objectively reasonable expectation of coverage under the policy" because it did not arise out of professional services rendered by the law firm. (*Id.*, at p. 1083.) Thus, the coverage determination turned on whether the act which generated the claim for which coverage was sought was an act done in rendering professional services as defined in the policy.

A Ninth Circuit decision, *PMI Mortgage Ins. Co. v. American International Specialty Lines, Ins. Co.* (9th Cir. 2004) 394 F.3d 761 (*PMI*),

summarized California law concerning the scope of coverage of professional liability policies as follows:

> California state courts have uniformly held that insurance policies covering "professional services" reach only those acts committed by the insured in his or her capacity as a professional – they do not cover general administrative activities that occur in all types of businesses.

(*Id.*, at p. 766.) Applying that standard, the Ninth Circuit found coverage under the policy at issue in that case because the insured "was acting in its professional capacity as a mortgage lender, and within the context of its specialized relationships with its lender-clients, when the alleged improper conduct occurred." (*Id.*, at p. 768.)[4]

By contrast, here the wrongful act that generated the claim for which coverage is sought is more like a hypothetical example of an administrative act described in *Bank of California v. Opie* (9th Cir. 1981) 663 F.2d 977 (*Opie*), a case relied upon by *PMI*.

> A professional obviously performs many tasks that do not constitute professional services. ... [T]o be considered a professional service, the conduct must arise out of the insured's performance of his specialized vocation or profession. To take an extreme example, an attorney's failure to pay for office equipment constitutes a breach of contract, not an omission in professional services, *regardless of how essential the equipment may be to the attorney's law practice.* To be covered, the liability must arise out of the special risks inherent in the practice of the profession.

(*Id.*, at p. 981, emphasis added.) To be clear, *Opie* was decided under Washington State law, and relied on cases decided in states other than California. Based on this court's review of the case law, California has not adopted a standard that limits the scope of professional liability coverage to liability that arises out of the "special risks inherent in the practice of the

---

[4] Kayne Anderson correctly points out that the policy language construed by the Ninth Circuit in *PMI* was broader than that of a traditional professional liability policy. (Pl's Opp., at p. 21.) The policy language at issue in *PMI* "defines 'Professional Services' simply as '*those services of the Company permitted by law or regulation rendered by an Insured ... pursuant to an agreement with the customer or client.*' (Emphasis added.)" (*PMI*, *supra*, at p. 765.) Nevertheless, the Ninth Circuit's reading of the general principles of California law as quoted in text is consistent with this court's analysis.

profession," and this court does not apply such "special risks" standard here. However, the "extreme example" that the Ninth Circuit in *Opie* stated could not "constitute professional service" because it did not arise out of "the insured's *performance* of his specialized vocation or profession" (emphasis added) is factually similar to the coverage claim made by Kayne Anderson. As in the *Opie* hypothetical, Kayne Anderson's liability arose out of a decision not to pay for a tool important to its profession, a decision to make additional copies rather than pay for additional subscriptions to a publication that was important to Kayne Anderson's professional practice. The decision to copy a copyrighted work rather than to pay for additional subscriptions was not the performance of giving financial or investment advice, no matter how important the copyrighted work was to Kayne Anderson's investment advisory services.

The court takes as a given that *Oil Daily* was extremely important to the business of Kayne Anderson, and that the content of the publication was used in the giving of professional advice, *i.e.*, in the performance of Investment Advisory Services. But the wrongful act alleged in the Underlying Action was not the use of the content of the *Oil Daily* in giving professional advice. The wrongful act was copying *Oil Daily* without permission. The wrongful act – the copying of the publication rather than purchasing additional subscriptions – was not an act "in the performance of" "financial, economic or investment advice." The decision to copy the copyrighted publication without permission was an administrative action that was part of running the business, not an action taken by Kayne Anderson in its capacity as a professional.

Neither AIG Nor the Excess Carriers Owed a Duty to Defend or a Duty to Indemnity Kayne Anderson for the Underlying Action

Under the plain language of the AIG Primary Policy, and applying the guidance of California case law, the copyright claim against Kayne Anderson cannot be construed as falling within the scope of Insuring Agreement A of the Policy. Coverage clauses of insurance policies are interpreted broadly to protect the "objectively reasonable expectations of the insured." (*AIU Insurance Co. v. Superior Court* (1990) 51 Cal.3d 807, 822.) But under the professional liability coverage provision at issue here, there is "no objectively reasonable expectation of coverage [because] there is only a remote relationship between [the claim for which coverage is sought] and an act, error or omission in connection with" the professional services rendered by the insured. (*Johnson*, *supra*, 27 Cal.App.4th at p. 165; *Inglewood*, *supra*, 217 Cal.App.3d at p. 1371 ["In that there was no potential for coverage, and the insured ... could not reasonably expect coverage, [the insurer] also had no duty to defend"].)

Where there is no potential for coverage, the insurer has no duty to defend, or here, no duty to pay defense costs.[5] *A fortiori* there is no duty to indemnify. (See, e.g., Buss v. Superior Court (1997) 16 Cal.4th 35, 46, fn. 10 [noting that the duty to defend is necessarily broader than the duty to indemnify].) AIG therefore is entitled to summary judgment, as are the moving parties who are excess insurers whose policies follow form with the AIG Primary Policy. Consequently, Kayne Anderson's Motion for Partial Summary Adjudication is denied. The excess insurers' Motions for Summary Adjudication are moot.

IV. Judicial Notice

The court grants the parties' unopposed requests to take judicial notice of documents filed in the Underlying Action. (Evid. Code, § 452, subd. (d).)

Kayne Anderson additionally requests judicial notice of two documents filed with the Securities and Exchange Commission (SEC) that are publicly available on the SEC's database. Defendants do not oppose this request. The court grants the request pursuant to Evidence Code section 452, subdivisions (c) and (h).

Plaintiffs' Motion to Seal

Tentative Ruling: The Motion is granted in part as explained below. With respect to Exhibits 36 and 39, the Motion is continued and Kayne Anderson must file a supplemental memorandum and declaration(s) within 15 days to prevent those documents from being placed in the public record. Kayne Anderson must also file certain documents in the public record after having made the proper redactions.

Kayne Anderson moves to file the following documents under seal:

1.) Exhibits A through K to the Declaration of Jeremy Schwartz, which are copies of the invoices Kayne Anderson received from and paid to third-party law firms and service providers in connection with Kayne Anderson's defense of in the Underlying Action;

[5] See footnote 2, *supra.*

2.) Exhibits 36 and 39 to the Declaration of Benjamin Fliegel in support of Kayne Anderson's motion for summary adjudication, which are copies of the Investment Management Agreement between Kayne Anderson Energy Total Return Fund, Inc. and Plaintiff KACALP, and the assignment and amendment thereto;

3.) Exhibits L and M to the Schwartz Declaration, which are copies of (a) the Investment Management Agreement between Kayne Anderson Midstream/Energy Fund, Inc. and Plaintiff KAFA, and the amendment thereto; and (b) the Amended and Restated Investment Management Agreement between Kayne Anderson MLP Investment Company and Plaintiff KACALP, and the assignment and amendment thereto; and

4.) Exhibits N and O to the Schwartz Declaration, which are copies of (a) the settlement agreement executed between Kayne Anderson and EIG in the Underlying Action; and (b) the wire confirmation of the $15 million payment Kayne Anderson made to EIG pursuant to the settlement agreement in the Underlying Action.

Kayne Anderson contends that it has a strong interest in protecting the confidentiality of the information in these documents because disclosure of such information would create a substantial risk of serious financial or other injury and place Kayne Anderson at a financial disadvantage. Kayne Anderson has submitted a declaration by Benjamin Fliegel (Fliegel) in support of the motion to seal. Fliegel is a partner with the law firm Reed Smith LLP and counsel for Kayne Anderson. (Fliegel Decl. ISO Mot. Seal., ¶ 1.)

"A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties." (Cal. Rules of Court, rule 2.551, subd. (a).) A motion to seal "must be accompanied by a memorandum and a declaration containing facts sufficient to justify the sealing." (Cal. Rules of Court, rule 2.551, subd. (b)(1).) The court may order that a record be filed under seal only if it expressly finds facts that establish:

(1) There exists an overriding interest that overcomes the right of public access to the record;
(2) The overriding interest supports sealing the record;
(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
(4) The proposed sealing is narrowly tailored; and

(5) No less restrictive means exist to achieve the overriding interest.

(Cal. Rules of Court, rule 2.550, subd. (d).)

Exhibits A through K to the Schwartz Declaration

Fliegel attests that these records "contain the personal financial information of Kayne Anderson and its third-party law firms and other service providers such as banking information, account numbers, and routing numbers." (Fliegel Decl. ISO Mot. Seal., ¶ 3.)

While banking information, account numbers, and routing numbers are clearly entitled to be sealed from the public record, Exhibit A through K contain much more information than this cited "personal financial information." For example, Exhibit A does not appear to contain any private financial information at all. And documents such as Exhibit B contain large amounts of non-confidential information, such as the name of the parties, the fact that payments were made in connection with the Underlying Action, the amount of such payments, etc. The proposed sealing of Exhibits A through K would thus not be "narrowly tailored."

Accordingly, Kayne Anderson shall re-file Exhibits A through K in the public record after redacting "banking information, account numbers, and routing numbers."

Exhibits 36 and 39 to the Fliegel Declaration in Support of the MSA

Fliegel attests that these records "contain Kayne Anderson's proprietary information, such as confidential information regarding Kayne Anderson's business practices and processes and its contracts with third parties." (Fliegel Decl. ISO Mot. Seal., ¶ 4.) However, Fliegel fails to state that such information, if made public, would prejudice Kayne Anderson's business interests. Moreover, even if Fliegel had so stated, he is not a proper witness on the subject of Kayne Anderson's business interests, given that he is merely Kayne Anderson's outside cousel. In such circumstances, it is the practice of this court to require a declaration from an employee of the company who has actual knowledge of the company's business operations.

The court thus continues the motion to seal as to Exhibits 36 and 39 so that Kayne Anderson may file a supplemental memorandum by a declaration by an individual (or individuals) qualified to testify on the subject of Kayne Anderson's business interests and any potential prejudice to those

interests that would result from filing the records in the public record. The supplemental memorandum and declaration(s) shall be filed within 15 days.

Exhibit N to the Schwartz Declaration

Fliegel notes that Exhibit N "contains the settlement agreement between Kayne Anderson and EIG in the Underlying Action, which states: 'The Parties shall keep the terms of this Agreement confidential, except that Kayne Anderson may disclose this Agreement and its terms to the extent necessary to pursue insurance recovery.' " (Fliegel Decl. ISO Mot. Seal., ¶ 5.)

"[A] contractual obligation not to disclose can constitute an overriding interest within the meaning of [California Rules of Court,] rule [2.550]." (*Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1283.) Because Kayne Anderson is likely contractually obligated to maintain the confidentiality of the settlement agreement, and because this court can find no strong public interest in having public access to the confidential settlement, there exists an overriding interest that overcomes the right of public access to the record. Accordingly, the motion is granted as to Exhibit N.

Exhibit O to the Schwartz Declaration

Exhibit O is a one-page document reflecting Kayne Anderson's payment of $15 million to EIG. Fliegel attests that Exhibit O "contains Kayne Anderson's and EIG's personal financial information, such as bank account numbers." (Fliegel Decl. ISO Mot. Seal., ¶ 5.) However, as with Exhibits A through K, the sealing is not narrowly tailored. Kayne Anderson shall redact "bank account numbers" from the document and file the redacted document in the public record.

Date: 7/25/2022

Carolyn B Kuhl

The Honorable Carolyn Kuhl
Judge of the Superior Court