

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

EYEXAM OF CALIFORNIA, INC., a
California corporation; and LUXOTTICA
RETAIN NORTH AMERICA INC., an Ohio
corporation,

Plaintiffs,

v.

ALLIED WORLD SURPLUS LINES
INSURANCE COMPANY, et al.,

Defendants.

Case No. 3:15-cv-03643-LB

**ORDER DENYING ALLIED’S MOTION
TO DISMISS**

[Re: ECF No. 17]

INTRODUCTION

The plaintiffs EYEXAM of California, Inc. and Luxottica Retail North America, Inc. (“LRNA”) sued the defendants Allied World Surplus Lines Insurance Co. and Darwin Select Insurance Co. for Darwin’s failure to defend them in two underlying lawsuits. Allied, as Darwin’s successor, moves to dismiss the claims arising from one lawsuit (*Altair Eyewear, Inc. v. Luxottica Retail North America, Inc., et al.*), on the ground that the lawsuit was not covered under the insurance policy’s definition of “Claim.” The court denies Allied’s motion.

STATEMENT

1. The Parties

EYEXAM is a health care service plan under the Knox-Keene Health Care Service Plan Act of
ORDER (No. 3:15-cv-03643-LB)

1 1975, Cal. Health & Safety Code § 1340 et seq., and is licensed by the California Department of
 2 Managed Healthcare. (Complaint, ECF No. 1, ¶ 10.) EYEXAM employs practicing optometrists
 3 who are licensed by the California Board of Optometry. (*Id.*) LRNA is a dispensing optician
 4 registered with the Division of Licensing of the California Medical Board. (*Id.* ¶ 11.) LRNA owns
 5 and operates LensCrafters, which has over 100 retail locations in California. (*Id.*) LRNA and
 6 EYEXAM have adopted business practices at LensCrafters retail locations to provide consumers
 7 with a “one-stop shopping” experience in which they can (i) obtain their eyeglass prescription
 8 from a licensed optometrist employed by EYEXAM, (ii) purchase frames and eyewear
 9 accessories, and (iii) have their lenses and frames fitted by a trained optician. (*Id.* ¶ 12.)

10 Darwin issued the insurance policy at issue in this litigation to EYEXAM and LRNA. (*Id.* ¶
 11 13.) Allied is the successor to Darwin. (*Id.* ¶ 6.)

12 2. The Insurance Policy

13 Darwin issued a Managed Care Organization Errors and Omissions Liability Insurance Policy
 14 No. 0303-7769, effective March 15, 2013 to March 15, 2014 (the “Policy”), to Luxottica U.S.
 15 Holdings Corp. (*Id.* ¶ 13; Policy, ECF No. 18-1, Policy Declarations.¹) EYEXAM was named as
 16 an “Insured Entity,” and LRNA was named as an “Additional Insured,” pursuant to an
 17 endorsement. (Complaint, ECF No. 1, ¶ 13; Policy, ECF No. 18-1, Endorsement No. 17.)

18 The Policy covers “any **Insured Loss** which the **Insured** is legally obligated to pay as a result
 19 of a **Claim** that is first made against the **Insured** during the **Policy Period . . .**” (Complaint, ECF
 20 No. 1, ¶ 14; Policy, ECF No. 18-1, Insuring Agreement, § I, Definitions, § IV(J) (bolding in
 21 original).) The policy has the following relevant definitions:

- 22 • “**Loss**” means **Defense Expenses** and any monetary amount which an insured is legally
 23 obligated to pay as a result of a **Claim**.” (Policy, ECF No. 18-1, Definitions, § IV(J); *see*
 24 Complaint, ECF No. 1, ¶ 14.) “**Defense Expenses**” are defined in part as “reasonable legal
 25

26 ¹ The court grants Allied’s unopposed request that the court consider the entire Policy under the
 27 incorporation-by-reference doctrine. (*See* Motion, ECF No. 17 at 3 n.1, 6; Request for Judicial
 28 Notice, ECF No. 18; Opposition, ECF No. 19 at 9 n.4); *see also* *Knievel v. ESPN*, 393 F.3d 1068,
 1076 (9th Cir. 2005).

1 fees and expenses incurred in the investigation, adjustment, defense, or appeal of a Claim.”
2 (Complaint ¶ 14; Policy, Definitions, § IV(E).)

- 3 • “**Claim**’ means any written notice received by any **Insured** that a person or entity intends
4 to hold an **Insured** responsible for a **Wrongful Act**” (Policy, ECF No. 18-1,
5 Definitions, § IV(C); *see* Complaint, ECF No. 1, ¶ 15.)
- 6 • “**Wrongful Act**’ means: [] (1) any actual or alleged act, error or omission in the
7 performance of, or any failure to perform, a **Managed Care Activity** by any **Insured**
8 **Entity** or by any **Insured Person** acting within the scope of his or her duties or capacity as
9 such” (Policy, ECF No. 18-1, Definitions, § IV(W)(1); *see* Complaint, ¶ 16.)
- 10 • “**Managed Care Activity**’ means any of the following services or activities: **Provider**
11 **Selection; Utilization Review**; advertising, marketing, selling, or enrollment for health
12 care or workers’ compensation plans; **Claim Services**; establishing health care provider
13 networks; reviewing the quality of **Medical Services** or providing quality assurance;
14 design and/or implementation of financial incentive plans; wellness or health promotion
15 education; development or implementation of clinical guidelines, practice parameters or
16 protocols; triage of payment of **Medical Services**; and services or activities performed in
17 the administration or management of health care of workers’ compensation plans.”
18 (Complaint, ECF No. 1, ¶ 16; Policy, ECF No. 18-1, Definitions, § IV(K).) An
19 endorsement amends the term “Managed Care Activity” to include “[c]onsumer directed
20 health plans, prescription drug, behavioral health, dental, vision, long or short-term
21 disability and automobile medical payment plans.” (Complaint, ECF No. 1, ¶ 17; Policy,
22 ECF No. 18-1, Endorsement No. 6.)
- 23 • “**Provider Selection**’ [one of the **Managed Care Activities**] means any of the following,
24 but only if performed by an **Insured**: evaluating, selecting, credentialing, contracting with
25 or performing peer review of any provider of **Medical Services**.” (Policy, ECF No. 18-1,
26 Definitions, § IV(P); *see* Complaint, ECF No. 1, ¶ 18.)
- 27 • “**Medical Services**’ means health care, medical care, or treatment provided to any
28 individual. . . .” (Policy, ECF No. 18-1, Definitions, § IV(M); *see* Complaint, ¶ 18.)

1 **3. The *Altair* Action**

2 EYEXAM and LRNA were named as defendants in two lawsuits: (1) *Altair Eyewear, Inc. v.*
 3 *Luxottica Retail North America, Inc., et al.*, Superior Court of California, County of Sacramento,
 4 Case No. 34-2014-00156471; and (2) *Smith v. Luxottica Retail North America, et al.*, United
 5 States District Court, Southern District of California, Case No. 14-cv-0366 JAH (BLM).
 6 (Complaint, ECF No. 1, ¶ 2.) Allied moves to dismiss the claims challenging its alleged failure to
 7 defend in the *Altair* lawsuit. Altair filed its complaint on January 10, 2014 against LRNA and
 8 EYEXAM in Sacramento County Superior Court. (*Id.* ¶ 20; *see also Altair* Complaint, ECF No. 1-
 9 1.) Relevant allegations from that complaint are as follows.

10 At all relevant times, Altair was in the commercial business of selling eyeglass frames as retail
 11 fashion accessories and was a competitor of LRNA. (Complaint, ECF No. 1, ¶ 21; *Altair*
 12 Complaint, ECF No. 1-1, ¶ 2.) Altair alleged that it lost business because LRNA and EYEXAM
 13 unlawfully provided consumers with a “one-stop shopping” experience. (Complaint, ECF No. 1, ¶
 14 21; *Altair* Complaint, ECF No. 1-1, ¶¶ 18-19, 42-45.) To create this experience:

- 15 • LRNA provided office space at its LensCrafters stores for EYEXAM’s doctors. (*Altair*
 16 Complaint, ECF No. 1-1, ¶¶ 18-19, 22, 25-26.)
- 17 • LRNA and its LensCrafters employees actively advertised, scheduled, and furnished the
 18 services of EYEXAM optometrists through LRNA’s LensCrafters website, other
 19 advertising, and signage in its retail stores. (*Id.* ¶¶ 18-20.)
- 20 • LRNA selected, approved, and paid for the optometric equipment and supplies for the
 21 EYEXAM doctors practicing at LRNA’s LensCrafters stores, and LRNA and EYEXAM
 22 jointly controlled the ownership and retention of patient optometric records. (*Id.* ¶¶ 18, 21.)
- 23 • LRNA designed its LensCrafters stores to require patients to walk through the dispensary
 24 where LRNA frames are sold, to the back of the store for an eye exam, and if issued a
 25 prescription, to walk back out through the dispensary, allowing LRNA’s LensCrafters
 26 employees to pressure or direct the vast majority of patients to fill their prescriptions and
 27 purchase LRNA lenses and frames. (*Id.* ¶¶ 18-19, 25-26.)
- 28 • EYEXAM paid most of its doctors by the hour, which gave LRNA and EYEXAM the

1 power to reduce or increase scheduled hours and compensation and to better control the
2 doctors' professional judgment with punishments or rewards. (*Id.* ¶ 27.)

- 3 • LRNA and EYEXAM actively pursued and retained doctors who understood that
- 4 promoting LRNA's products to patients is an important part of their jobs. (*Id.* ¶ 28.)
- 5 • LRNA and EYEXAM used "capture rates"—the frequency with which LRNA's
- 6 LensCrafters dispensary "captures" the business generated by EYEXAM's doctors' exams
- 7 and prescriptions—to evaluate and decide whether to promote EYEXAM's doctors. (*Id.* ¶¶
- 8 18-19, 28-31.)

9 Altair alleged that LRNA's and EYEXAM's business practices do not comply with several
10 California statutes regulating licensed optometrists and dispensing opticians. (Complaint, ECF No.
11 1, ¶¶ 21-22; *Altair* Complaint, ECF No. 1-1, ¶¶ 7-17, 34-40.) Altair thus sued LRNA and
12 EYEXAM for unfair competition in violation of California Business and Professions Code §
13 17200 et seq. (Complaint, ECF No. 1, ¶ 21; *Altair* Complaint, ECF No. 1-1, ¶¶ 33-45.) Altair
14 sought injunctive relief, private attorney general attorneys' fees, and costs. (Complaint, ECF No.
15 1, ¶ 21; *Altair* Complaint, ECF No. 1-1 at 13-14.)

16 LRNA and EYEXAM provided timely notice and asked Darwin to pay for defense costs
17 incurred in defending the *Altair* Action. (Complaint, ECF No. 1, ¶ 23.) Darwin denied coverage
18 and refused to pay such expenses. (*Id.*) LRNA and EYEXAM subsequently explained to Darwin
19 why its coverage position was incorrect and provided further information demonstrating that the
20 *Altair* Action was covered under the Policy. (*Id.*) More than once, LRNA and EYEXAM asked
21 Darwin to reconsider its position, but Darwin responded by confirming its denial of coverage. (*Id.*)

22 The Superior Court dismissed the *Altair* Action on December 5, 2014. (Complaint, ECF No. 1,
23 ¶ 20.)

24 **4. Relevant Procedural History**

25 On August 10, 2015, the plaintiffs LRNA and EYEXAM filed this lawsuit against the
26 defendants Darwin and Allied for wrongfully denying coverage and refusing to pay the defense
27 expenses incurred for the *Altair* Action and the *Smith* Action. (*See generally* Complaint, ECF No.
28 1.) Allied moved to dismiss the claims relating to the *Altair* Action on the ground that the *Altair*

1 Action was not a “Claim” covered under the Policy. (*See* Motion, ECF No. 17.) The claims
 2 relating to the *Altair* Action are claims one, two, and five: 1) claim one is for declaratory relief to
 3 establish the duty to pay; 2) claim two is for breach of contract for failing to pay defense expenses;
 4 and 3) claim five is for breach of the covenant of good faith and fair dealing. (*Id.* ¶¶ 36-56.)

5 The court held a hearing on the motion on November 12, 2015. (Minute Order, ECF No. 37.)

6 GOVERNING LAW

7 1. Rule 12(b)(6)

8 A complaint must contain a “short and plain statement of the claim showing that the pleader is
 9 entitled to relief” to give the defendant “fair notice” of what the claims are and the grounds upon
 10 which they rest. *See* Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
 11 (2007).” A complaint does not need detailed factual allegations, but “a plaintiff’s obligation to
 12 provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a
 13 formulaic recitation of the elements of a cause of action will not do. Factual allegations must be
 14 enough to raise a claim for relief above the speculative level....” *Id.* (internal citations omitted).

15 To survive a motion to dismiss, a complaint must contain sufficient factual allegations,
 16 accepted as true, “to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556
 17 U.S. 662,678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when
 18 the plaintiff pleads factual content that allows the court to draw the reasonable inference that the
 19 defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a
 20 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted
 21 unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 557). “Where a complaint pleads facts that are
 22 ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and
 23 plausibility of “entitlement to relief.”’” *Id.* (quoting *Twombly*, 550 U.S. at 557).

24 If a court dismisses a complaint, it should give leave to amend unless the “the pleading could
 25 not possibly be cured by the allegation of other facts.” *Cook, Perkiss and Liehe, Inc. v. Northern*
 26 *California Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990).

27 2. The Interpretation of Insurance Agreements

28 In *MacKinnon v. Truck Insurance Exchange*, the California Supreme Court summarized the

1 principles for interpreting insurance policies:

2 Interpretation of an insurance policy is a question of law and follows the general
3 rules of contract interpretation. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.
4 4th 1, 18, 44 Cal. Rptr. 2d 370, 900 P.2d 619 (*Waller*)). “The fundamental rules of
5 contract interpretation are based on the premise that the interpretation of a contract
6 must give effect to the ‘mutual intention’ of the parties. ‘Under statutory rules of
7 contract interpretation, the mutual intention of the parties at the time the contract is
8 formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if
9 possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The “clear
10 and explicit” meaning of these provisions, interpreted in their “ordinary and popular
11 sense,” unless “used by the parties in a technical sense or a special meaning is given
12 to them by usage” (*id.*, § 1644), controls judicial interpretation. (*Id.*, § 1638.)’
13 [Citations.] A policy provision will be considered ambiguous when it is capable of
14 two or more constructions, both of which are reasonable. [Citation.] But language
15 in a contract must be interpreted as a whole, and in the circumstances of the case,
16 and cannot be found to be ambiguous in the abstract.” (*Id.* at p. 18, 44 Cal. Rptr. 2d
17 370, 900 P.2d 619.)

18 Moreover, insurance coverage is ““interpreted broadly so as to afford the
19 greatest possible protection to the insured, [whereas] . . . exclusionary clauses are
20 interpreted narrowly against the insurer.”” (*White v. Western Title Ins. Co.* (1985)
21 40 Cal. 3d 870, 881, 221 Cal. Rptr. 509, 710 P.2d 309.) . . . The burden is on the
22 insured to establish that the claim is within the basic scope of coverage and on the
23 insurer to establish that the claim is specifically excluded. (*Aydin Corp. v. First
24 State Ins. Co.* (1998) 18 Cal. 4th 1183, 1188, 77 Cal. Rptr. 2d 537, 959 P.2d 1213.)

25 31 Cal. 4th 635, 647-48 (Cal. 2003).

26 3. An Insurer’s Duty to Defend

27 In *Scottsdale Insurance Company v. MV Transportation*, the California Supreme Court
28 summarized the principles relating to an insurer’s duty to defend as follows:

29 An insurer must defend its insured against claims that create a potential for
30 indemnity under the policy. (*Montrose Chemical Corp. v. Superior Court* (1993) 6
31 Cal. 4th 287, 295, 24 Cal. Rptr. 2d 467, 861 P.2d 1153 (*Montrose*); *Gray v. Zurich
32 Insurance Co.* (1966) 65 Cal. 2d 263, 275, 54 Cal. Rptr. 104, 419 P.2d 168 (*Gray*).)
33 The duty to defend is broader than the duty to indemnify, and it may apply even in
34 an action where no damages are ultimately awarded. (*Horace Mann Ins. Co. v.
35 Barbara B.* (1993) 4 Cal. 4th 1076, 1081, 17 Cal. Rptr. 2d 210, 846 P.2d 792.)

36 Determination of the duty to defend depends, in the first instance, on a
37 comparison between the allegations of the complaint and the terms of the policy.
38 (*Montrose, supra*, 6 Cal. 4th 287, 295, 24 Cal. Rptr. 2d 467, 861 P.2d 1153.) But
39 the duty also exists where extrinsic facts known to the insurer suggest that the claim
40 may be covered. (*Ibid.*) Moreover, that the precise causes of action pled by the
41 third-party complaint may fall outside policy coverage does not excuse the duty to
42 defend where, under the facts alleged, reasonably inferable, or otherwise known, the
43 complaint could fairly be amended to state a covered liability. (*Gray, supra*, 65 Cal.
44 2d 263, 275-276, 54 Cal. Rptr. 104, 419 P.2d 168; *CNA Casualty of California v.
45 Seaboard Surety Co.* (1986) 176 Cal. App. 3d 598, 610-611, 222 Cal. Rptr. 276.)

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The defense duty arises upon tender of a potentially covered claim and lasts until the underlying lawsuit is concluded, or until it has been shown that there is no potential for coverage. (*Montrose, supra*, 6 Cal. 4th 287, 295, 24 Cal. Rptr. 2d 467, 861 P.2d 1153.) When the duty, having arisen, is extinguished by a showing that no claim can in fact be covered, “it is extinguished only prospectively and not retroactively.” (*Buss v. Superior Court* (1997) 16 Cal. 4th 35, 46, 65 Cal. Rptr. 2d 366, 939 P.2d 766 (*Buss*); *see also Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal. 4th 38, 58, 70 Cal. Rptr. 2d 118, 948 P.2d 909 (*Aerojet-General*).)

On the other hand, “in an action wherein none of the claims is even potentially covered because it does not even possibly embrace any triggering harm of the specified sort within the policy period caused by an included occurrence, the insurer does not have a duty to defend. [Citation.] ‘This freedom is implied in the policy’s language. It rests on the fact that the insurer has not been paid premiums by the insured for [such] a defense. . . . [T]he duty to defend is contractual. “The insurer has not contracted to pay defense costs” for claims that are not even potentially covered.’ [Citation.]” (*Aerojet-General, supra*, 17 Cal. 4th 38, 59, 70 Cal. Rptr. 2d 118, 948 P.2d 909, quoting *Buss, supra*, 16 Cal. 4th 35, 47, 65 Cal. Rptr. 2d 366, 939 P.2d 766.)

From these premises, the following may be stated: If any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer’s duty to defend arises and is not extinguished until the insurer negates all facts suggesting potential coverage. On the other hand, if, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance.

36 Cal. 4th 643, 654-55 (Cal. 2005).

ANALYSIS

The issue is whether the Altair lawsuit is a “Claim” under the Policy. Allied makes several arguments that it is not. (Motion, ECF No. 17 at 6-8; Reply, ECF No. 23 at 4-9.)

First, Allied argues that the *Altair* Action does not meet the Policy’s definition of a “Claim” because “Claims” can be brought only by healthcare providers or plan members, and Altair “is neither a member (i.e., an enrollee or subscriber) nor a provider (i.e., a professional or health facility licensed to deliver or furnish healthcare service) of EYEXAM’s health care plan, but rather is alleged to be a competitor of [the p]laintiffs which has suffered economic harm as a result of [the p]laintiffs’ business practices in the form of loss of market share and sales.” (Motion, ECF No. 17 at 7-8.) But as the plaintiffs point out, nothing in the Policy says that “Claims” may be filed only by healthcare providers or plan members. Under the Policy, a “Claim” is “any written notice received by any Insured that a person or entity intends to hold an Insured responsible for a Wrongful Act” (Policy, ECF No. 18-1, Definitions, § IV(C) (emphasis added).) By its own

1 terms, a “Claim” is not limited to claims brought by healthcare providers or plan members.

2 Second, Allied argues that the *Altair* Action is not a “Claim” because Altair did not try to hold
3 the plaintiffs responsible for a “Wrongful Act.” (Motion, ECF No. 17 at 7.) The plaintiffs’ acts
4 were not “Wrongful Acts,” Allied argues, because the “acts, errors, and omissions” that Altair
5 alleged in the *Altair* Action do not fall within the Policy’s definition of “Managed Care Activity.”
6 (*Id.*)

7 Here, the Policy defines “Managed Care Activity,” and the definition encompasses a wide
8 range of conduct. It includes:

9 any of the following services or activities: **Provider Selection; Utilization Review;**
10 advertising, marketing, selling, or enrollment for health care or workers’
11 compensation plans; **Claim Services;** establishing health care provider networks;
12 reviewing the quality of **Medical Services** or providing quality assurance; design
13 and/or implementation of financial incentive plans; wellness or health promotion
14 education; development or implementation of clinical guidelines, practice
15 parameters or protocols; triage of payment of **Medical Services;** and services or
16 activities performed in the administration or management of health care of workers’
17 compensation plans.

18 (Policy, ECF No. 18-1, Definitions, § IV(K).) It also includes “[c]onsumer directed health plans,
19 prescription drug, behavioral health, dental, vision, long or short-term disability and automobile
20 medical payment plans.” (Policy, ECF No. 18-1, Endorsement No. 6.)

21 Allegations in the *Altair* Action fall within this definition. For example, Altair alleged that
22 LRNA and EYEXAM actively pursued and retained doctors who understood that promoting
23 LRNA’s products to patients is an important part of their jobs, used “capture rates” to evaluate and
24 decide whether to promote EYEXAM’s doctors, and paid most of the doctors by the hour, which
25 gave them the power to reduce or increase scheduled hours and compensation and to better control
26 the doctors’ professional judgment with punishments or rewards. (*Altair* Complaint, ECF No. 1-1,
27 ¶¶ 18-19, 27-31.) These acts fall within the Policy’s definition of “Provider Selection,” which
28 means “evaluating, selecting, credentialing, contracting with or performing peer review of any
provider of **Medical Services.**” (Policy, ECF No. 18-1, Definitions, § IV(P).) Altair also alleged
that LRNA provided office space at its LensCrafters stores for EYEXAM’s doctors and that
LRNA and its LensCrafters employees actively advertised, scheduled, and furnished the services
of EYEXAM optometrists through LRNA’s LensCrafters website, other advertising, and signage

1 in its retail stores. (*Altair* Complaint, ECF No. 1-1, ¶¶ 18-20, 22, 25-26.) These acts constitute
2 “Managed Care Activity” because they constitute the “advertising, marketing, selling, or
3 enrollment for health care or workers’ compensation plans” and “services or activities performed
4 in the administration or management of health care of workers’ compensation plans.” (Policy,
5 ECF No. 18-1, Definitions, § IV(K).) (*See* Opposition, ECF No. 19 at 11-12, summarizing
6 allegations in the *Altair* complaint relating to “Managed Care Activity,” including design and
7 implementation of financial incentive programs, development of clinical guidelines, practice
8 parameters, and protocols, and services performed in the administration of health-care plans.)

9 Allied does not explain how the Policy’s definition of “Managed Care Activity” can be read to
10 exclude conduct that *Altair* alleged in its complaint. Instead, Allied relies on the Policy “as a
11 whole,” arguing that it “is a Managed Care Errors & Omissions policy, not a business liability or
12 Directors & Officers policy.” (Reply, ECF No. 23 at 6-7.) “The risk insured is an error or omission
13 in the insured’s business as a managed care plan, not its anti-competitive activity as a purveyor of
14 fashion eyewear.” (*Id.*) In short, Allied asserts, coverage is limited to liability for services
15 provided by the managed care plan. (*Id.* at 9.) That, it says, is not the liability faced by the
16 plaintiffs in *Altair* action: their liability was “neither premised on their conduct in establishing
17 healthcare plan networks (e.g., a provider suing for being unfairly denied entrance into a health
18 care plan network) nor for functions that involve the typical administrative and sales activities
19 needed to maintain a managed care organization.” (Motion, ECF No. 17 at 8.) Instead, “*Altair*
20 sued for unfair competition under Business & Professions Code § 17200, not for mismanagement
21 of its own health care plan.” (Reply, ECF No. 23 at 5-6, emphasizing that *Altair* did not claim that
22 it was harmed “as a user of managed care services.”)

23 This argument does not change the outcome. It is true that “[t]he terms in an insurance policy
24 must be read in context and in reference to the policy as a whole, with each clause helping to
25 interpret the other,” *Sony Computer Entm’t Am. Inc. v. Am. Home Assurance Co.*, 532 F.3d 1007,
26 1012 (9th Cir. 2008) (citations omitted). But one cannot ignore the policy’s definitions. “If
27 contractual language is clear and explicit, it governs.” *Bank of the West v. Superior Ct.*, 2 Cal. 4th
28 1254, 1264 (1992). The Policy’s definition of “Managed Care Activity” covers allegations in the

1 *Altair* complaint. Moreover, the Policy defines the risk that it is insuring, providing coverage for
 2 “any **Insured Loss** which the **Insured** is legally obligated to pay as a result of a **Claim** that is first
 3 made against the **Insured** during the **Policy Period**.” (Policy, ECF No. 18-1, Insuring Agreement,
 4 § I.) A “Claim” is “any written notice received by any **Insured** that a person or entity intends to
 5 hold an **Insured** responsible for a **Wrongful Act**”; a “Wrongful Act,” includes “any actual or
 6 alleged act, error or omission in the performance of, or any failure to perform, a **Managed Care**
 7 **Activity** by any **Insured Entity**.” (Policy, ECF No. 18-1, Definitions, § IV(C), (W)(1).) And
 8 again, the Policy does not restrict coverage to “Claims” brought by healthcare providers or plan
 9 members.

10 Third, Allied suggests that “principles” articulated by the California Supreme Court in *Bank of*
 11 *the West* bar coverage under the Policy for the “types of allegedly anticompetitive practices” at
 12 issue in the *Altair* Action. (Reply, ECF No. 23 at 3, 4.) In *Bank of the West*, the California
 13 Supreme Court interpreted the scope of coverage in a comprehensive general liability insurance
 14 policy. *See* 2 Cal. 4th at 1258. The court addressed whether the policy covered the “damages” the
 15 insured had to pay because of “advertising injury.” *Id.* at 1262. The policy defined “advertising
 16 injury” as a list of tort offenses arising in the course of advertising activities, one of which was
 17 “unfair competition,” which the policy did not define. *Id.* The court applied general principles of
 18 contract interpretation and concluded that the undefined term “unfair competition” referred to the
 19 common-law tort and not the much broader statutory definition. *Id.* at 1262-73. But as the
 20 plaintiffs point out in their sur-reply, the policy here is markedly different. Coverage is not limited
 21 to common-law torts, and the issue is not about construing an undefined term (such as “unfair
 22 competition”) in the context of other terms that give it meaning. Instead, this is a policy covering
 23 acts, errors, and omissions in the performance of “Managed Care Activity,” a defined term that
 24 covers a broad range of advertising, marketing, and administrative activities in providing health
 25 services or managing a health-care plan. (*See* Sur-Reply, ECF No. 32-1 at 7.)

26 In sum, under the plain language of the Policy, and interpreting the Policy broadly to afford
 27 the greatest possible protection to the insured, the *Altair* Action is a covered “Claim.” *See*
 28 *MacKinnon*, 31 Cal. 4th at 648.

CONCLUSION

The court denies Allied's motion to dismiss. This disposes of ECF No. 17.

IT IS SO ORDERED.

Dated: November 12, 2015



LAUREL BEELER
United States Magistrate Judge

United States District Court
Northern District of California

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