UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DATAMAXX APPLIED TECHNOLOGIES, INC.,

Plaintiff,

v. **Case No. 6:20-cv-291-CEM-DCI**

CHUBB CUSTOM INSURANCE COMPANY,

Defendant.

______________________________________/

ORDER

THIS CAUSE is before the Court on Plaintiff's Motion for Summary Judgment (Doc. 26), Defendant's Motion for Final Summary Judgment (Doc. 63), Plaintiff's Motion for Leave to Supplement Summary Judgment Record ("Motion to Supplement," Doc. 78), and Plaintiff's Motion to Strike Defendant's Expert Report ("Motion to Strike," Doc. 80). For the reasons stated herein, Plaintiff's Motion for Summary Judgment will be denied, Defendant's Motion for Final Summary Judgment will be granted, Plaintiff's Motion to Supplement will be granted,[1] and Plaintiff's Motion to Strike will be denied as moot.

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[1] The Court reviewed and considered the evidence submitted with Plaintiff's Motion to Supplement, (Doc. 78-1), but it does not relate to the issues discussed herein, so it is not referenced.

I. BACKGROUND

Plaintiff states that it "provides advanced communications, data access, information sharing, enterprise intelligence, and access control solutions to the law enforcement, criminal justice, public safety, and security industries." (Compl., Doc. 1-1, at 2).[2] Defendant is an insurance company that issued an integrated liability and indemnity insurance policy (the "Policy," Doc. 26-2) to Plaintiff. (*Id.* at 1). This suit arises out of Defendant's denial of coverage under the Policy for underlying litigation between Plaintiff and non-party Gold Type Business Machines, Inc. ("GTBM"). (Doc. 1-1 at 1–18).[3] A history of the prior litigation between Plaintiff and GTBM is necessary for the determination of this matter.

A. First GTBM Litigation

GTBM first filed suit against Plaintiff in the District of New Jersey in September 2013. (First GTBM Compl., Doc. 62-1, at 1, 27). The factual allegations of that litigation are as follows. As part of its business, GTBM developed and sold a software product called "Info-Cop," which allows individuals designated as "National Crime Information Center (NCIC) terminal operators"—such as law enforcement officers and individuals with similar clearance—to remotely and

[2] Neither party has offered evidence of this fact, but it does not appear to be in dispute. (*See* Am. Answer, Doc. 33, at 1 (noting that Defendant is without knowledge of this allegation); Doc. 64 at 1–5 (failing to object to this fact in response to Plaintiff's Motion for Summary Judgment)).

[3] Plaintiff also originally filed claims for failure to procure and negligent misrepresentation, (Doc. 1-1 at 19–25), but those claims were previously dismissed in state court prior to removal, (Feb. 13, 2020 Order, Doc. 1-9, at 45–47).

quickly access motor vehicle and warrant information from multiple law enforcement databases. (*Id.* at 5).

GTBM wanted to expand the same concept to non-NCIC terminal operators, focusing on customers such as "military bases, schools, chemical plants, stadiums, hospitals, and government contractors who provide services to government entities." (*Id.* at 6). As part of this effort, GTBM patented "a method and system by which non-NCIC terminal operators can conduct queries against the NCIC, Criminal Justice Information System (CJIS), and other law enforcement systems restricted to authorized persons, and comply with the rules and regulations for disseminating such data." (*Id.*).

To further its goals, GTBM entered negotiations with Plaintiff to develop a business arrangement by which they would work together to modify Plaintiff's existing product suite—Omnixx—"so that it could be sold and used to implement [GTBM's patented] process, and they would share in the proceeds of all sales." (*Id.* at 7). Ultimately, Plaintiff and GTBM entered a Development and License Agreement ("DLA"). (*Id.* at 8). Under the DLA, GTBM licensed its patent "together with other intellectual property rights (including trade secrets and confidential business information) to [Plaintiff] solely to develop, make, use, sell, and offer to sell the contemplated" jointly-developed "Enhanced Product." (*Id.*). "Among other things, the parties subsequently agreed that sales of any product that falls within the definition of Enhanced Product under the [DLA] must be marked with the jointly owned GREENLIGHT™ trademark." (*Id.* at 10).

Ultimately, GTBM alleged that Plaintiff used the Enhanced Product code to develop its own product—Omnixx+—which Plaintiff offered as a competing product to Greenlight. (*Id.* at 20–21, 25). As a result, GTBM sued Plaintiff for breach of the DLA, breach of a Letter Agreement between the parties, False Designation of Origin in violation of the Lanham Act, 15 U.S.C. § 1125, and Misappropriation of Trade Secrets. (*Id.* at 21–26). GTBM alleged that Plaintiff breached the DLA by failing to properly brand the Omnixx+ product as using the Greenlight technology and failing to pay GTBM for using Greenlight in the Omnixx+ product under the terms of the DLA. (*Id.* at 21). This claim was also asserted against an additional party, LSQ Funding Group, L.C. ("LSQ"), but only insofar as LSQ allegedly failed to transfer to GTBM the funds it was owed. (*Id.* at 22).

The claim for breach of the Letter Agreement involved allegations that Plaintiff "failed to invoice subscriptions for its sales" to two customers and failed to "indicate that payment will be remitted to the [designated bank account] controlled solely by GTBM." (*Id.* at 23). GTBM's false designation of origin claim alleged that Plaintiff "has and continues to promote, distribute, sell and/or offer for sale . . . Greenlight™ . . . under the false designation 'Omnixx+.'" (*Id.* at 23). Finally, in its misappropriation of trade secrets claim, GTBM alleged that Plaintiff was "using GTBM's trade secret information without authorization and in violation of the [DLA]" by "launch[ing] a new product Omnixx+, which competes with the Enhanced Product jointly developed by [Plaintiff] and GTBM utilizing GTBM's trade secret information." (*Id.* at 25).

GTBM also initiated arbitration on the same basis. (*See generally* Am. Statement of Claim, Doc. 67-1). The allegations in arbitration were substantially the same as those in the district court Complaint. (*Compare id. with* Doc. 62-1). The claims in arbitration also included those in the district court Complaint, but GTBM added two additional claims. The first additional claim was for breach of the DLA's implied covenant of good faith and fair dealing, which complained of Plaintiff's diminished efforts to sell and support Greenlight in favor of its own product. (Doc. 67-1 at 25). And the second additional claim was for breach of an agreement with the State Department, which allegedly required Plaintiff to pay GTBM fifty percent of the gross revenues under that agreement but which Plaintiff failed to do. (*Id.* at 28).[4]

Ultimately, GTBM and Plaintiff settled the First GTBM Litigation. (*See* Doc. 1-1 at 3 (Plaintiff alleging this fact); Doc. 63 at 4 (Defendant citing this allegation

[4] Together, the claims asserted in the first Complaint and first arbitration statement will be referred to as the "First GTBM Litigation."

as true); Oct. 29, 2018 Statement of Claim, Doc. 26-3, at 14 (GTBM alleging this fact)).

B. Second GTBM Litigation

In October 2018, however, GTBM initiated a second litigation against Plaintiff by submitting claims to arbitration.[5] (*See generally* Doc. 26-3). In the Second GTBM Litigation, GTBM alleged claims for breach of the First GTBM Litigation settlement agreement ("First Settlement Agreement"), breach of the First Settlement Agreement's implied covenant of good faith and fair dealing, breach of the DLA, breach of the DLA's implied covenant of good faith and fair dealing, and violations of the Lanham Act and state unfair competition laws. (*Id.* at 22–25).

The Second GTBM Litigation is prefaced on the same background as the First GTBM Litigation, relating to the DLA and Greenlight. (*Id.* at 7–13). The Second GTBM Litigation then discusses the First Settlement Agreement, alleging that "[Plaintiff] represented and warranted that other than [Greenlight], it has not sold or offered for sale any product other than Ominixx+ that uses any code written for any Enhanced Product." (*Id.* at 14). It further stated that Plaintiff "shall not use any code written for any Enhanced Product for any product or service other than an Enhanced Product subject to the parties' DLA," nor would Plaintiff "develop or sell [any product or service] that utilizes . . . GTBM's patented process, . . . any code written

[5] This arbitration will be referred to as the "Second GTBM Litigation."

for any Enhanced Product, . . . or . . . any non-public information provided to [Plaintiff] by GTBM in connection with the DLA." (*Id.* (quotation omitted)). Additionally, Plaintiff agreed that "prior to the termination of the DLA neither Party [would] market or sell any product developed after the effective date of the DLA, into the Target Market (as defined by the DLA) that competes with the functionality of Greenlight or any Enhanced Product. (*Id.* (quotation omitted)).

GTBM's allegations regarding Plaintiff's conduct following the First Settlement Agreement are as follows. Plaintiff was marketing a product called "Redtail," without GTBM's knowledge or consent, which was a "visitor management system that validates a visitor's identification by performing instant checks against FBI, DMV, and Sex Offender sources." (*Id.* at 15 (quotation omitted)). According to GTBM, these functions are indistinguishable from those provided by Greenlight and are covered by GTBM's patented process. (*Id.*). In 2018, Plaintiff gave GTBM notice that it was terminating the DLA, effective December 2018, but Plaintiff made clear to GTBM that it would continue to market and sell Redtail after the termination. (*Id.* at 21–22). GTBM alleged that these actions violated both the First Settlement Agreement and the DLA, along with violating GTBM's patent rights. (*Id.*).

In the Second GTBM Litigation, GTBM alleged that Plaintiff breached the First Settlement Agreement "by marketing and selling Redtail—an unauthorized and competing product that utilizes code written and developed solely for Greenlight . . . , as well as GTBM's patented process and other proprietary information provided to [Plaintiff] by GTBM under the DLA for use only in connection with the Enhanced Product." (*Id.* at 22). GTBM alleged that Plaintiff breached the DLA in a similar fashion by "improperly exploit[ing] technology developed under the DLA for its own competitive purposes; . . . improperly exploit[ing] GTBM's intellectual property, know-how, and other confidential information; . . . fail[ing] to properly brand technology developed using that information; and . . . fail[ing] to pay GTBM its contractual share of gross revenue deriving from its sales of Redtail." (*Id.* at 24). Relatedly, GTBM alleged that Plaintiff breached the implied covenant of good faith and fair dealing in both the First Settlement Agreement and the DLA because "[Plaintiff's] development and sale of Redtail . . . under its own brand, which directly competes with the parties' sales of Greenlight, defeats the objects of the Settlement Agreement [and the DLA] and deprives GTBM of the fruits of [those] agreement[s], including the joint development, marketing, and sale of Greenlight." (*Id.* at 23–24). Finally, in its claim for violations of the Lanham Act and state unfair competition law, GTBM alleged that Plaintiff violated the Lanham Act and state unfair competition law by continuing "to promote, distribute, sell, and/or offer for sale [Greenlight] and related Developer Guide and other documentation under the false designation 'Redtail.'" (*Id.* at 25).

On January 15, 2020, Plaintiff and GTBM entered into a Second Settlement Agreement (Doc. 67-3), concluding the Second GTBM Litigation.

It is this Second GTBM Litigation that Plaintiff alleges Defendant should have covered under the Policy. The parties have filed cross motions for summary judgment—Plaintiff asserting that it is entitled to a declaratory judgment that the Policy covers the Second GTBM Litigation, and Defendant asserting that it is entitled to a declaratory judgment that the Policy does not cover that litigation and that therefore it had no duty to defend or indemnify Plaintiff for the Second GTBM Litigation.

II. SUMMARY JUDGMENT STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it may "affect the outcome of the suit under the governing law." *Id.*

"The standard of review for cross-motions for summary judgment does not differ from the standard applied when only one party files a motion, but simply requires a determination of whether either of the parties deserves judgment as a matter of law on the facts that are not disputed." *Ness v. Aetna Life Ins. Co.*, 257 F.

Supp. 3d 1280, 1287 (M.D. Fla. 2017) (citing *Am. Bankers Ins. Grp. v. United States*, 408 F.3d 1328, 1331 (11th Cir. 2005)).

"The moving party bears the initial burden of showing the court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Allen v. Bd. of Pub. Educ.,* 495 F.3d 1306, 1313–14 (11th Cir. 2007). In ruling on a motion for summary judgment, the Court construes the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). However, when faced with a "properly supported motion for summary judgment," the nonmoving party "must come forward with specific factual evidence, presenting more than mere allegations." *Gargiulo v. G.M. Sales, Inc.*, 131 F.3d 995, 999 (11th Cir. 1997) (citing *Anderson*, 477 U.S. at 248–49 (1986)); *see also LaRoche v. Denny's, Inc.*, 62 F. Supp. 2d 1366, 1371 (S.D. Fla. 1999) ("The law is clear . . . that suspicion, perception, opinion, and belief cannot be used to defeat a motion for summary judgment.").

"[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. "[T]he proper inquiry on summary judgment is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Stitzel v. N.Y. Life Ins. Co.*, 361 F. App'x 20, 22 (11th Cir. 2009) (quoting *Anderson*, 477 U.S. at 251–52). Put another way, a motion for summary judgment should be denied only "[i]f reasonable minds could differ on the inferences arising from undisputed [material] facts." *Pioch v. IBEX Eng'g Servs.*, 825 F.3d 1264, 1267 (11th Cir. 2016) (quoting *Allen*, 121 F.3d at 646).

III. PRINCIPLES OF INSURANCE CONTRACT INTERPRETATION

It is undisputed that Florida law governs the interpretation of the insurance policy at issue. In Florida, "[s]ummary judgment is appropriate in declaratory judgment actions seeking a declaration of coverage when the insurer's duty, if any, rests solely on the applicability of the insurance policy, the construction and effect of which is a matter of law." *Northland Cas. Co. v. HBE Corp.*, 160 F. Supp. 2d 1348, 1358 (M.D. Fla. 2001); *see also Gas Kwick, Inc. v. United Pac. Ins. Co.*, 58 F.3d 1536, 1538–39 (11th Cir. 1995) ("Under Florida law, interpretation of an insurance contract is a matter of law to be decided by the court."). "[T]he Florida Supreme Court has made clear that the language of the policy is the most important factor." *James River Ins. Co. v. Ground Down Eng'g, Inc.*, 540 F.3d 1270, 1274 (11th Cir. 2008) (quotation omitted). Additionally, "insurance contracts are construed according to their plain meaning." *Id.* at 1274 (quoting *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005)). "[I]f a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision." *Taurus Holdings*, 913 So. 2d at 532 (quotation omitted).

Where the "relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the [other] limiting coverage, the insurance policy is considered ambiguous." *Westport Ins. Corp. v. VN Hotel Grp., LLC*, No. 6:10-cv-222-Orl-28KRS, 2011 WL 4804896, at *2 (M.D. Fla. Oct. 11, 2011) (quoting *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000)). For an insurance contract to be found ambiguous, "[t]here must be a genuine inconsistency, uncertainty, or ambiguity in meaning that remains after resort to the ordinary rules of construction." *Valiant Ins. Co. v. Evonosky*, 864 F. Supp. 1189, 1191 (11th Cir. 1994) (quotation omitted). Additionally, the mere fact that policy language requires interpretation does not render the language ambiguous. *Id.* "Ambiguous policy provisions are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy." *Westport Ins. Corp.*, 2011 WL 4804896, at *2 (quoting *Auto-Owners Ins. Co.*, 756 So. 2d at 34). Moreover, "[e]xclusionary clauses are construed even more strictly against the insurer than coverage clauses," and the insurer has the burden of demonstrating that an exclusion in a policy applies. *Id.* (quotation omitted).

IV. Analysis

A. Related Claims

Defendant argues that there is no coverage under the Policy because the claims in the Second GTBM Litigation are related to the claims in the First GTBM Litigation. Defendant relies on the Policy's "Claims-Made Liability Coverage" provision, (Doc. 26-2 at 28–29), which states in relevant part:

> This coverage does not apply to any damages, loss, cost or expense in connection with any claim that correlates with an act, if such act also correlates with any claim deemed to have been made before the beginning of the policy period.

(*Id.* at 29).

The parties do not dispute that the First GTBM Litigation was not covered under the Policy and that the claims made in that litigation were made prior to the beginning of the policy period. Thus, the issue of coverage here turns on whether the acts that correlate with the claims in the Second GTBM Litigation also correlate with the claims in the First GTBM Litigation.

An "act" is defined by the Policy as meaning "an act, error or omission," and "includes all correlated acts, errors or omissions and all series of continuous or repeated acts, errors or omissions." (*Id.* at 50). The policy does not define "correlate," but neither party argues that this term is ambiguous. Indeed, "the mere failure to provide a definition for a term involving coverage does not necessarily render the term ambiguous." *Cont'l Cas. Co. v. Wendt*, 205 F.3d 1258, 1262 (11th Cir. 2000). Further, the definition of correlate shows that it is a synonym to the word "relate." *See* Oxford English Dictionary, https://www.oed.com/ (last visited Sept. 8, 2021) (defining "correlate" as "[t]o have a mutual relation" and "relate" as "[t]o have some connection with; to stand in relation to"); Merriam-Webster Dictionary, https://www.merriam-webster.com/ (last visited Sept. 8, 2021) (defining "correlate" as "to bear reciprocal or mutual relations" and "relate" as "to have relationship or connection"). And the Eleventh Circuit has held that the use of the term "relate" in a similar provision did not render the provision ambiguous. *Wendt*, 205 F.3d at 1263.

"[A] common thread" when discussing "'relatedness' as a concept" in claims-made policies is the consideration of "both logical and causal connections." *Cap. Growth Fin. LLC v. Quanta Specialty Lines Ins. Co.*, No. 07-80908-CIV, 2008 U.S. Dist. LEXIS 65814, at *11 (S.D. Fla. July 29, 2008) (citing *Wendt*, 205 F.3d at 1258 and collecting district court cases). Courts consider a wide range of factors when making this determination, including "consideration of whether the acts in question are connected by time, place, opportunity, pattern, and perhaps most importantly, by method or modus operandi." *Id.* at *11–12. Additional factors include whether the claims all arise from the same transactions, whether the 'wrongful acts' are contemporaneous, and whether there is a common scheme or plan underlying the acts." *Id.*

Plaintiff focuses on the differences between the First and Second GTBM Litigation. For instance, Plaintiff notes that the First GTBM Litigation had an additional defendant. However, the specific language of the Policy requires the Court to look at the acts that underlie the claims. So, under this specific policy language, the fact that there was an additional defendant in the First Litigation is of little consequence. This is particularly true here because the additional defendant, LSQ, was a secondary figure in the overall scheme and was only involved in a minor part of the overall scheme—a failure to transfer money to GTBM.

Plaintiff also points out that the First GTBM Litigation involved the Omnixx+ product, while the Second involved the Redtail product. But again, this distinction is insignificant because the language of the policy requires the Court to look at the underlying acts, and the acts alleged in both the First and Second GTBM Litigation involve Plaintiff improperly using the Greenlight code in its own, competing product. While the products themselves differ, the acts are essentially the same. In both the First and Second GTBM Litigation, it is alleged that Plaintiff used the proprietary information, patented method, and code related to Greenlight to develop and sell its own competing product, that Plaintiff failed to pay GTBM as they agreed, and that Plaintiff was undermining the entire business partnership between it and GTBM by utilizing the fruits of that partnership to develop its own products to compete with the partnership's product. The overarching plan and modius operandi in the acts underlying the First and Second GTBM Litigation were nearly identical.

Additionally, Plaintiff attempts to frame the acts underlying each litigation as occurring several years apart, but contrary to Plaintiff's assertion, the acts underlying the Second GTBM Litigation began much earlier than August 2016. Instead, that is the time when GTBM alleged it discovered some of Plaintiff's acts. (Doc. 26-3 at 15). Indeed, in the Second GTBM Litigation, GTBM alleged that when Plaintiff and GTBM were negotiating the First Settlement Agreement—which would have been prior to May 8, 2014, (*id.* at 14)—Plaintiff "had already developed, marketed, and sold Redtail." (*Id.* at 6). Further, GTBM alleged that Plaintiff was "was pitching Redtail to the Transportation Security Administration for passenger screening in April 2013." (*Id.* at 17). Thus, the acts that underlie the First GTBM Litigation are not temporally removed from those that underlie the Second GTBM Litigation. (*See* Doc. 62-1 at 10, 16, 20, 22, 27 (indicating a filing date for the First GTBM Litigation of September 26, 2013, and alleging that certain acts underlying the First GTBM claims occurred throughout 2013)).

Moreover, as noted above, the Policy defines an act to include a "series of continuous or repeated acts, errors or omissions." (Doc. 26-2 at 50). It appears that at least these allegations regarding Plaintiff's violations of the DLA and trademark laws before and during the negotiations of the First Settlement Agreement constitute continuous or repeated acts.

Finally, Plaintiff has failed to address one of the most obvious points. The Second GTBM Litigation alleges a breach of the settlement of the First GTBM Litigation. It would simply defy logic to conclude that those claims are not related.

The acts underlying the claims in the Second GTBM Litigation also correlate to acts underlying the claims in the First GTBM Litigation, and therefore, are not covered by the Policy.

B. Reasonable Expectation Doctrine and Promissory Estoppel

Plaintiff also makes a vague argument that a finding that coverage does not exist on the basis of related claims would "deny [Plaintiff] coverage it reasonably expected under the Policy." (Pl.'s Resp., Doc. 69, at 12). The only authority Plaintiff cites is a district court case applying Pennsylvania law. (*Id.* (citing *Lehigh Valley Health Network v. Exec. Risk Indemn., Inc.*, No. CIV. A. 1999-CV-5916, 2001 WL 21505, at *6 (E.D. Pa. Jan. 10, 2001))). Specifically, *Lehigh Valley* is applying the "[r]easonable expectation doctrine," which is an "exception to the Pennsylvania plain meaning rule in interpreting insurance contracts." 2001 WL 21505, at *6. Florida has rejected the reasonable expectation doctrine. *Deni Assocs. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1140 (Fla. 1998). Thus, the authority relied on by Plaintiff is entirely inapplicable, and Plaintiff's argument is without merit.

Plaintiff also references Defendant's purported assurance to Plaintiff that claims like those brought in the First GTBM Litigation would be covered by the Policy. Plaintiff states that it detrimentally relied on this assurance. Plaintiff makes no real argument here and cites no legal authority. Presumably, Plaintiff is attempting to advance a promissory estoppel claim since Plaintiff made a similar argument in another section of its briefing related to a different exclusion, which cited promissory estoppel legal authority.

"The general rule in applying equitable estoppel to insurance contracts provide[s] that estoppel may be used defensively to prevent a forfeiture of insurance coverage, but not affirmatively to create or extend coverage." *Crown Life Ins. Co. v. McBride*, 517 So. 2d 660, 661 (Fla. 1987). However, there is a "very narrow" exception to this general rule, *Snell v. S.-Owners Ins. Co.*, No. 8:15-cv-368-T-27TGW, 2016 WL 9526679, at *4 (M.D. Fla. July 18, 2016) (quotation omitted), where "the form of equitable estoppel known as promissory estoppel may be utilized to create insurance coverage where to refuse to do so would sanction fraud or other injustice." *Crown Life*, 517 So. 2d at 662. "Such injustice may be found where the promisor reasonably should have expected that his affirmative representations would induce the promisee into action or forbearance substantial in nature, and where the promisee shows that such reliance thereon was to his detriment." *Id.* In other words, to prevail on its promissory estoppel defense, Plaintiff must establish: "(1) the promisor made a representation as to a material fact that is contrary to a later-asserted position; (2) the promisee reasonably relied on the representation; and (3) the promisee changed his or her position to his or her detriment based on the representation." *JN Auto Collection v. U.S. Sec. Ins. Co.*, 59 So. 3d 256, 258 (Fla. 3d DCA 2011) (citing *Romo v. Amedex Ins. Co.*, 930 So. 2d 643, 650 (Fla. 3d DCA 2006) and *FCCI Ins. Co. v. Cayce's Excavation, Inc.*, 901 So. 2d 248, 251 (Fla. 2d DCA 2005)).[6]

The only evidence referenced by Plaintiff in its cursory argument is a statement made in an e-mail chain between Plaintiff and Defendant. Specifically, Plaintiff referenced a section titled "Integrated Liability and Indemnity (Errors and Omissions) – Coverage Detail – Claims Made Form" and asked, "Do the Retroactive Dates 02/21/2012 mean that [Plaintiff] is covered for all *claims* retroactive to that date?" (Doc. 69-4 at 6 (emphasis added)). Defendant responded, clarifying that

[6] At first glance, *Crown Life*'s requirement that "the promisor reasonably should have expected that his affirmative representations would induce the promisee into action or forbearance," 517 So. 2d at 662, may appear different than *JN Auto Collection*'s requirement that "the promisee reasonably relied on the representation," 59 So. 3d at 258. But upon careful reading, these statements are simply the opposite sides of the same coin. For the promisor in *Crown Life* to reasonably expect his affirmative representations to induce action or forbearance—i.e., reliance—the promisee's reliance must be reasonable. In Plaintiff's briefing, it does not include the reasonableness requirement. (Doc. 69 at 4). However, Plaintiff only quotes a selected portion of the case it relies on—*Perry v. Owners Ins. Co.*, No. 8:17-cv-2132-T-35CPT, 2019 WL 1936195, at *8 (M.D. Fla. Mar. 8, 2019), *report and recommendation adopted by* 2019 WL 1936196 (M.D. Fla. Apr. 26, 2019). Both *Perry* and the case *Perry* relies on—*Tome v. State Farm Fire & Cas. Co.*, 125 So. 3d 864 (Fla. 4th DCA 2013)—utilize the reasonable reliance requirement. *Perry*, 2019 WL 1936195, at *8; *Tome*, 125 So. 3d at 868. Indeed, the promissory estoppel claim in *Tome* failed because the insured's reliance was not reasonable. *Tome,* 125 So. 3d at 868.

"[Defendant] will cover claims that result from *incidents* that occur on or after the retro date." (*Id.* (emphasis added)). This exchange fails to satisfy the first element of promissory estoppel—that the promisor made a representation as to a material fact that is contrary to a later-asserted position. Defendant's answer in the e-mail is not contrary to the position Defendant is currently taking. Indeed, Defendant's e-mail answer accurately explains the general coverage provision referenced by Plaintiff, which states, in relevant part, "With respect to all claims-made coverage, this insurance applies only if . . . such act was not first committed before the applicable Retroactive Date shown in the Declarations or after the end of the policy period." (Doc. 26-2 at 28). At most, Defendant omitted a full discussion of the five additional paragraphs that also apply to the claims-made coverage. (*See id.* at 28–29). But clarification of those paragraphs was not requested.

Moreover, even if that statement was contrary to the position Defendant is currently taking, Plaintiff cannot establish the second requirement—that the promisee reasonably relied on the representation. Given the obviously abbreviated nature of the conversation contained in the e-mail, along with the limited scope of Plaintiff's question, Plaintiff could not have reasonably expected Defendant's one-sentence answer to fully encompass every scenario that falls within the claims-made coverage provisions. Plaintiff has not shown that the Court can utilize the very narrow promissory estoppel exception to expand coverage here.

V. CONCLUSION

Defendant has established that there was no duty to defend or indemnify Plaintiff under the Policy for the Second GTBM Litigation because the acts that correlate to the claims in that litigation also correlate to the claims in the First GTBM Litigation, and those claims occurred prior to the beginning of the Policy period. Additionally, Plaintiff has failed to provide a basis upon which the Court could legally alter the application of this unambiguous policy provision to the facts here. Thus, Defendant is entitled to a summary judgment determination that it had no duty to defend or indemnify Plaintiff under the Policy for the Second GTBM Litigation.

Therefore, it is **ORDERED** and **ADJUDGED** as follows:

1. Plaintiff's Motion for Summary Judgment (Doc. 26) is **DENIED**.
2. Defendant's Motion for Final Summary Judgment (Doc. 63) is **GRANTED**.
3. Plaintiff's Motion for Leave to Supplement Summary Judgment Record (Doc. 78) is **GRANTED**.
4. Plaintiff's Motion to Strike Defendant's Expert Report (Doc. 80) is **DENIED as moot**.
5. The Clerk is directed to enter a declaratory judgment in favor of Defendant, stating that Defendant has no duty to defend or indemnify Plaintiff under Policy Number 3590-65-36 TPA in relation to the claims

made in American Arbitration Association Case Number 01-18-0004-0492. Thereafter, the Clerk is directed to close this case.

DONE and **ORDERED** in Orlando, Florida on September 13, 2021.

CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record