UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES - GENERAL

Case No.	2:15-cv-02416-SVW-JPR	Date	June 21, 2019
Title	*Office Depot Inc. v. AIG Specialty Insurance Co.*		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [118] AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [122]

I. Introduction and Procedural History

Plaintiff Office Depot, Inc. ("Office Depot") originally filed this action on April 2, 2015. Dkt. 1. Plaintiff brought four claims: (1) breach of contract (duty to defend); (2) breach of contract (duty to indemnify); (3) tortious breach of the implied covenant of good faith and fair dealing; and (4) declaratory judgment on Defendant AIG Specialty Insurance Company ("AIG")'s duty to defend and indemnify. *Id.* On July 21, 2016, the Court dismissed Office Depot's duty-to-indemnify claim, holding that California Insurance Code § 533 precluded coverage. Dkt. 48. The Court also stayed Office Depot's good-faith-and-fair-dealing claim pending resolution of the duty-to-defend claim. *Id.* On January 4, 2017, the Court granted AIG's motion for summary judgment, holding that Section 533 also barred Office Depot's duty-to-defend claim. Dkt. 90. On appeal, the Ninth Circuit rejected the Court's interpretation of Section 533. Dkt. 104. It also "le[ft] for [this Court] to consider in the first instance AIG's alternative arguments based on the scope of coverage and exclusions in the insurance policies." *Id.* at 3. On remand, this Court reopened discovery for approximately two months and directed the parties to file cross-motions for summary judgment. Dkt. 116. Before the Court are the cross-motions for summary judgment as to Claims 1, 2, and 4. For four independent reasons, including the scope of the policies and three policy exclusions, the Court GRANTS AIG's motion and DENIES Office Depot's

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motion.[1]

II. Factual Background

A. The AIG Policies

AIG issued two[2] insurance policies to Office Depot: (1) AIG netAdvantage Policy No. 966-95-20 for the period March 8, 2007 through March 8, 2008; and (2) AIG netAdvantage Policy No. 345-53-20 for the period March 8, 2008 through March 8, 2009 (collectively, the "Policies"). Dkt. 136 ¶ 24. The Policies had three primary sections: a Declarations page, a Base section, and a Multimedia Module. *Id.* ¶ 25. The Multimedia Module Insuring Clause of the Policies covered some "wrongful acts," providing[3] as follows:

> **We [AIG]** shall pay on **your [Office Depot's]** behalf those amounts, in excess of the applicable Retention, **you [Office Depot]** . . . are legally obligated to pay, including liability **assumed under contract**, as **damages** resulting from any **claim** made against **you [Office Depot]** . . . for **your [Office Depot's] wrongful acts**; provided that such **wrongful act(s)** first occur during the **policy period**, regardless of when such **claim** is made or a **suit** is filed.

Id. ¶ 28 (emphasis in original). The Policies defined a "wrongful act" to mean:

> [S]olely in the broadcast, creation, distribution, exhibition, performance, preparation, printing, production, publication, release, display, research or serialization of **material** by **you [Office Depot]**, any actual or alleged act,

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1 AIG raises at least four additional independent arguments that the Court need not address.

2 AIG has in fact issued more than two policies, but only two are relevant here.

3 The relevant policy language is present in both Policies.

> error, omission, breach of duty, misstatement or misleading statement, first occurring during the **policy period**, which results in:
> (1) any **covered peril**; or
> (2) **loss** because a third party . . . acts upon or makes a decision or decisions based on the content of the **material** disseminated by **you [Office Depot]** or with **your [Office Depot's]** permission.

Id. ¶ 29 (emphasis in original). "Material" is defined as "**content**":

> (2) in publications, including, but not limited to, newspaper, newsletter, magazine, book and other literary form, monograph, brochure, directory, screen play, film script, playwright and video publications;
> (3) in **advertising**; or
> (4) displayed on an **Internet** site.

Dkt. 119-1, Ex. 3, OD-AIG0025440. "Content" is further defined as "written, printed, video, electronic, digital, or digitized images, sounds, text, music, descriptions and information." *Id.*

The Policies also contained several policy exclusions. Section 7(e) of the Multimedia Module excluded coverage for any claim:

> alleging, arising out of or resulting, directly or indirectly, from any liability or obligation under any contract or agreement or out of any breach of contract; however, this exclusion does not apply to:
> (1) liability or obligation **you [Office Depot]** or an **insured** would have in the absence of such contract or agreement;
> (2) liability to an **additional insured** agreed to in accordance with subparagraph (1) of the definition of **additional insured**; or
> (3) liability **assumed under contract**[.]

Dkt. 136 ¶ 43.

Section 7(g) of the Multimedia Module excluded coverage for any claim "alleging, arising out of or resulting, directly or indirectly, from any **wrongful act**, related **wrongful acts** or series of continuous or repeated **wrongful acts** where the first such **wrongful act** first occurs prior to the inception of or subsequent to the termination of the **policy period**." *Id.* ¶ 52.

Lastly, Section 4(i) of the Base Section excluded coverage for any claim:

> against **you [Office Depot]** that is brought by or on behalf of:
> (1) the Federal Trade Commission ("FTC"), the Department of Health and Human Services ("HHS"), the Office of Civil Rights ("OCR"), the Federal Communications Commission ("FCC") or any other federal, state or local government agency, or foreign government agency[.]

Dkt. 119-1, Ex. 3, OD-AIG0025427.

B. The *Sherwin* Lawsuit

The instant lawsuit arises out of a separate lawsuit, *State of California et al., ex rel. David Sherwin v. Office Depot, Inc.*, Case No. BC410135 (the "*Sherwin* Lawsuit"). Dkt. 136 ¶ 1. The *Sherwin* Lawsuit was commenced in Los Angeles Superior Court on March 20, 2009 and was ultimately governed by a Corrected First Amended Complaint (the "Complaint") filed on January 18, 2012. *Id.* The Complaint was filed by a qui tam "Relator" named David Sherwin, a former employee of Office Depot, containing one cause of action for violation of the California False Claims Act ("CFCA"). Dkt. 132 ¶ 10. The "real parties in interest" were over 1,000 government entities, which included over sixty "school districts and regional agencies" that were allegedly overcharged by Office Depot.[4] Dkt. 136 ¶ 2.

[4] Office Depot does not dispute this characterization, but rather adds that the Complaint stated that "[t]he real parties in interest [were] the State of California and all other political subdivisions within the State of California that purchased goods and services from Office Depot pursuant to Office Depot's contract with the U.S. Communities." Dkt. 136 ¶ 2. In addition, nineteen Real Parties intervened, filing their own claims alleging violations of the CFCA, as well as breach of contract and common law fraud. *Id.* ¶ 3. This Complaint-in-Intervention alleged that Office Depot "made misrepresentations and omissions of material fact concerning the cost and price of products sold to the City under the [U.S. Communities] Contract." *Id.* ¶ 19.

The *Sherwin* Lawsuit involved two consecutive contracts between Office Depot and Los Angeles County: a March 5, 2001 Master Agreement (No. 41421) that expired on January 1, 2006 and a January 2, 2006 Master Agreement (No. 42595) that expired on January 1, 2011 (the "Master Agreements"). *Id.* ¶ 4. The Master Agreements were made available to government customers nationwide through a contract between Office Depot and the U.S. Communities Government Purchasing Alliance ("U.S. Communities"), a nonprofit organization that maintains a variety of procurement contracts for the purchase of goods and services by state and local public entities. *Id.* ¶ 5. Pursuant to this agreement, Office Depot agreed to supply office and stationery supplies and products to any public entity nationwide that adopted or subscribed to the contract (the "U.S. Communities Contract"). *Id.* ¶ 5.

The allegations in the *Sherwin* Complaint are too numerous to list here; a summary of key allegations suffices. The *Sherwin* Complaint alleged that "[f]rom at least 2001 until January 1, 2011, Office Depot knowingly violated its contracts with hundreds of California public entities through a variety of underhanded pricing practices." *Id.* ¶ 3. Generally, the *Sherwin* Complaint alleged that Office Depot "knowingly presented and caused to be presented . . . false and fraudulent claims, and knowingly failed to disclose material facts, in order to obtain payment and approval from" California public entities. *Id.* ¶ 6. These practices allegedly led Office Depot to "overcharge[] public entities throughout California . . . by millions of dollars." *Id.* ¶ 7.

As explained by Office Depot, the *Sherwin* Complaint alleged five separate violations of the terms of the contracts: (1) failing to comply with purported "best pricing" provisions in the contracts by offering other governmental entities, under separate contracts, pricing lower than that offered under the L.A. County Contracts (i.e., the Master Agreements); (2) fraudulently switching customers from one price plan under the 2006 L.A. County Contract ("Option 1") to a different price plan ("Option 2") available under that same contract that, depending on spending patterns, could cost more; (3) misrepresenting the costs for products whose prices under the L.A. County Contracts were calculated based on cost; (4) changing list prices for products more often than permitted by the L.A. County Contracts; and (5) discontinuing items on the steeply-discounted "core" list under the L.A. County Contracts. *Id.* ¶ 8.

On or about January 13, 2015, a Notice of Settlement Agreement was filed in the *Sherwin* Lawsuit. *Id.* ¶ 21. Pursuant to the settlement, Office Depot agreed to pay $77.5 million ($68.5 million in

damages and $9 million in attorneys' fees, costs, and expenses). *Id.* ¶ 22.

C. The Insurance Dispute

On November 15, 2012, Office Depot reported the *Sherwin* Lawsuit to AIG. *Id.* ¶ 57. On January 28, 2013, AIG denied coverage because the *Sherwin* Lawsuit did not fall under any of the Policies' coverage sections. *Id.* ¶ 58.

III. Legal Standard

Summary judgment should be granted where "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). The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of . . . [the factual record that] demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party satisfies its initial burden, the non-moving party must demonstrate with admissible evidence that genuine issues of material fact exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–86 (1986) ("When the moving party has carried its burden under Rule 56 . . . its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.").

A material fact for purposes of summary judgment is one that "might affect the outcome of the suit" under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* A court must draw all inferences from the facts in the non-movant's favor, *id.* at 255, but when the non-moving party's version of the facts is "blatantly contradicted by the record, so that no reasonable jury could believe it, [the] court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

IV. Discussion

A. Applicable Law

The interpretation of an insurance policy—specifically, whether it provides coverage for a claim and gives rise to a corresponding duty to defend or indemnify—raises a question of law for the Court. *Kazi v. State Farm Fire & Cas. Co.*, 24 Cal. 4th 871, 879 (2001); *Hyundai Motor Am. v. Nat'l Union Fire Ins. Co.*, 600 F.3d 1092, 1097 (9th Cir. 2010).

Under California law, the duty to defend is broader than the duty to indemnify. *Anthem Elecs., Inc. v. Pac. Empl'rs Ins. Co.*, 302 F.3d 1049, 1053 n.2 (9th Cir. 2002); *Buss v. Superior Court*, 16 Cal. 4th 35, 46 (1997). The duty to defend "does not depend on whether damages are ultimately awarded." *Kazi*, 24 Cal. 4th at 879. Rather, it arises where a claim is "potentially covered, in light of facts alleged or otherwise disclosed" in the underlying lawsuit; by contrast, a duty to indemnify exists where claims "are actually covered, in light of the facts proved." *Buss*, 16 Cal. 4th at 45-46; *see also Hyundai Motor*, 600 F.3d at 1097.

In determining whether a duty to defend was triggered, courts compare the terms of the policy with the facts alleged in the underlying lawsuit's complaint and, if available, extrinsic facts known to the insurer. *Montrose Chem. Corp. v. Superior Court*, 6 Cal. 4th 287, 295 (1993). If these facts "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." *Scottsdale Ins. Co. v. MV Transp.*, 36 Cal. 4th 643, 655 (2005). If, however, "neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise." *Id.* An insurance policy's terms are given their "plain meaning"—that is, the "meaning a layperson would ordinarily attach" to them. *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18 (1995). Any doubt as to whether the facts give rise to a duty to defend is resolved in the insured's favor. *Hyundai Motor*, 600 F.3d at 1097.

If a court finds that there is no duty to defend, then, because the "duty to defend is broader than the duty to indemnify," it must also "automatically [conclude] that there is no duty to indemnify." *Certain Underwriters at Lloyd's of London v. Superior Court*, 24 Cal. 4th 945, 961 (2001) (citations and quotation marks omitted); *see also Gorzela v. State Farm Gen. Ins. Co.*, 223 F. Supp. 3d 989, 996 (C.D.

Cal. 2016) (granting summary judgment to insurer on indemnity claim after granting summary judgment on duty to defend claim).

B. Duty to Defend

1. Scope of the Policies

The Policies stated that AIG would provide coverage for Office Depot's wrongful acts as long as (among other things) the wrongful acts first occurred during the policy period. This language appeared in the Multimedia Module, which was added for the policy period of March 8, 2007 through March 8, 2008 and continued during the policy period of March 8, 2008 through March 8, 2009. Thus, an important threshold question is whether Office Depot's alleged wrongful acts first occurred during the policy periods of March 8, 2007 through March 8, 2008 or March 8, 2008 through March 8, 2009.[5]

It is undisputed that the *Sherwin* Complaint sought damages for sales transactions over a ten-year period starting in 2001 and continuing through 2011. Office Depot acknowledges that the Complaint alleged overcharges to the City of Los Angeles alone of at least $2 million per year for ten years starting in 2001. Dkt. 136 ¶ 36. Indeed, the fact that the Complaint alleged wrongful conduct under the first Master Agreement between Office Depot and Los Angeles County—which was in effect from 2001 to 2006—forecloses the possibility that Office Depot's allegedly wrongful acts first occurred after March 8, 2007. Furthermore, Office Depot previously raised a statute-of-limitations defense against the Complaint-in-Intervention on the ground that "some or all of the Plaintiff-Intervenor's alleged causes of action accrued before March 20, 2005 (or March 20, 2006)." *Id.* ¶ 34. 2005, of course, is more than a year before the inception date of the first of the two Policies.

Office Depot contends that the "first occurred" requirement is satisfied based on the relatively permissive duty-to-defend standard, namely that the duty to defend attaches as long as liability could "potentially" be premised on a wrongful act that first occurred during the policy period. Office Depot asserts that the wrongful acts could potentially have first occurred during the policy period because, "for

[5] This analysis proceeds "in light of facts alleged or otherwise disclosed" in the underlying lawsuit. *Buss*, 16 Cal. 4th at 46.

nearly all of the five factual theories raised in *Sherwin*, there are specific allegations in the complaint falling *within* the applicable policy period." Dkt. 135 at 5 (emphasis in original). Office Depot continues: "The mere fact that contracts were dated in earlier years, or that damages were *sought* for an extended period, does not mean 'wrongful acts' did not occur later. . . . Given that the complaint alleged the use of 'material' *within* the AIG coverage period, AIG should have provided a defense." *Id.* (emphasis in original). Office Depot misreads the policy language; the test is not whether some wrongful acts took place during the relevant policy periods, but rather whether the wrongful acts *first* took place during the policy periods.[6] Based on the allegations in the *Sherwin* Complaint, which is what the Court must consider in its duty-to-defend analysis, it is clear that the wrongful acts alleged did not first take place during the relevant policy periods. Thus, the *Sherwin* Lawsuit did not trigger the Policies and AIG had no duty to defend Office Depot.

2. Policy Exclusions

i. The Contract Exclusion

Section 7(e) of the Multimedia Module excluded coverage for any claim alleging, arising out of or resulting, directly or indirectly, from any liability or obligation under any contract or agreement or out of any breach of contract. On its face, this exclusion applies; under any reasonable interpretation of the exclusionary language, the *Sherwin* Litigation alleged, arose out of, or resulted, indirectly (if not directly), from Office Depot's obligations under the Master Agreements and U.S. Communities Contract.

Office Depot argues in opposition that AIG ignores an exception to the exclusion that narrows its application: the exclusion did not apply to a liability or obligation Office Depot would have in the absence of the allegedly breached contract or agreement. Office Depot interprets this exception to mean that extra-contractual liability is excepted from the exclusion and is covered under the policy. Dkt. 135

[6] To the extent Office Depot is arguing that there were separate categories of wrongful acts, some of which first took place during the policy periods, such an argument also fails. This argument is discussed, below, in Part IV.B.2.ii.

at 10. Thus, according to Office Depot, because the *Sherwin* Lawsuit sought to impose liability under extra-contractual legal theories—for violations of the CFCA and for common law fraud—the exclusion does not apply.

Office Depot's interpretation is not supported by the record or the case law. First, Office Depot characterizes the exclusion as a "breach of contract" exclusion and cites case law involving policy exclusions for claims arising out of alleged contract breaches. But the exclusion here is much broader than a typical "breach of contract" exclusion; it excludes not only claims arising out of a breach of contract but also claims alleging, arising out of, or resulting, even indirectly, from any liability or obligation under any contract or agreement. The distinction is crucial because the additional breadth excludes claims that are not strictly contractual. Under any fair reading of the exclusion, all of the *Sherwin* Lawsuit claims are excluded because they all arose out of, at least indirectly, Office Depot's contractual obligations. To put it more plainly, none of the claims—which ultimately all related to the core allegation that Office Depot overcharged on government contracts—could have been raised absent the underlying contracts. This is true even of the CFCA and fraud claims; there could have been no fraudulent misrepresentations or omissions regarding the contracts, for example, without the contracts. Thus, all of the *Sherwin* Lawsuit claims are subject to this exclusion.

Second, even under Office Depot's narrow reading of the exclusion, courts have held that extra-contractual claims are excluded. *See, e.g.*, *Medill v. Westport Ins. Corp.*, 143 Cal. App. 4th 819 (2006). *Medill* involved a policy that excluded coverage for "[d]amages 'arising out of' breach of any contract, whether oral, written or implied, except employment contracts with individuals"—where "arising out of" was defined as "based upon, arising out of, or in connection with."[7] *Id.* at 826. Former officers and directors of a nonprofit organization faced claims of negligence and breach of fiduciary duty and the court considered whether the defendant insurance company owed a duty to defend the directors and officers in the underlying litigation under the liability policy. *Id.* at 822, 829. Notably, the officers and directors argued, as Office Depot does here, that the "breach of contract exclusion . . . [did] not apply because none of the plaintiffs in the [underlying] litigation asserted any claims for breach of contract

[7] Notably, this exclusion is thus significantly *narrower* than the Policies' exclusion; it more closely resembles the type of narrow, "breach of contract" exclusion that Office Depot purports the Policies' exclusion to be.

against [the officers and directors] . . . . [Rather,] the plaintiffs asserted only tort claims against the directors and officers for negligence and breach of fiduciary duty." *Id.* at 829.

The court disagreed, concluding that the officers and directors' allegedly tortious acts arose out of a breach of the contract. The court noted that California courts "have consistently given a broad interpretation to the term[] 'arising out of' . . . ." *Id.* at 830 (citation omitted). Specifically, under California law, the "arising out of" language requires courts "to examine the conduct underlying the . . . lawsuit, instead of the legal theories attached to the conduct." *Id.* (quoting *Century Transit Sys., Inc. v. Am. Empire Surplus Lines Ins. Co.*, 42 Cal. App. 4th 121, 127 n.4 (1996)). Applying the standard, the court explained that the directors and officers' "potential liability would not [have] exist[ed] without the contracts [the nonprofit organization] entered into . . . . All of the allegations against the directors and officers ar[o]se out of duties and obligations" assumed under the contracts. *Id.* In sum, it held that "the tort claims . . . [were] not independent of the breach of contract claims [because] [n]o aspect of the underlying . . . litigation would exist without the alleged breaches of . . . contractual obligations." *Id.* at 831.

The same is true here. Even if CFCA and fraud claims are not breach-of-contract legal theories, under the factual allegations of the *Sherwin* Lawsuit the allegedly wrongful conduct would not have existed without the Master Agreements and U.S. Communities Contract.[8] Thus, even if the exclusion were limited to claims arising out of a breach of contract—which, as discussed above, it is not—the exclusion would still bar coverage of the wrongful acts alleged in the *Sherwin* Lawsuit.

[8] As illustrative examples, during the *Sherwin* Lawsuit Office Depot characterized the allegations as follows: (1) "Sherwin and the Intervenors allege that Office Depot violated the CFCA by failing to comply with certain terms of the L.A. County Contract and the Administration Agreement, which Plaintiffs allege resulted in overcharges to them"; (2) "[t]he heart of [the *Sherwin* Lawsuit] is the contention that Office Depot overcharged California government entities under the terms of particular contracts; and (3) "[Sherwin] brought this qui tam action under the California False Claims Act alleging that, over the life of the contracts, Office Depot fraudulently overcharged hundreds of California governmental entities under the terms of the Los Angeles County contracts." Dkt. 136 ¶¶ 44-46.

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ii. The Prior Acts Exclusion

Exclusion 7(g) excluded coverage for any claim alleging, arising out of or resulting, directly or indirectly, from any wrongful act, related wrongful acts or series of continuous or repeated wrongful acts where the first such wrongful act first occurred prior to the inception of or subsequent to the termination of the policy period. At first blush, this exclusion appears to be similar to—if perhaps stated differently from—the "first occurred" policy requirement discussed above. However, this exclusion is both more specific and much broader. Notably, it bars coverage of claims *alleging*, *arising out of*, or *resulting*, even *indirectly*, from any wrongful act, *related* wrongful acts, or *series of continuous or repeated* wrongful acts where the first wrongful act occurs prior to the inception of the policy period. This language makes clear that the exclusion groups all "related" or "series of" wrongful acts. If the first of many related wrongful acts occurred prior to the inception of the policy period, all such related acts are excluded from coverage. Thus, the key issue is whether all of Office Depot's alleged wrongful acts as set forth in the *Sherwin* Lawsuit—e.g., failing to comply with "best pricing" provisions versus fraudulently switching customers to a less favorable price plan—were "related." Based on the record evidence—including Office Depot's own prior characterizations of the *Sherwin* Lawsuit—it is clear that all of Office Depot's allegedly wrongful acts were related. Thus, because the first wrongful act as alleged in the *Sherwin* Lawsuit first occurred prior to March 8, 2007, all of the claims alleged in the *Sherwin* Lawsuit are barred from coverage under this exclusion.

iii. The Government Agency Exclusion

Section 4(i) of the Base Section excluded coverage for any claim against Office Depot that was brought by or on behalf of the Federal Trade Commission ("FTC"), the Department of Health and Human Services ("HHS"), the Office of Civil Rights ("OCR"), the Federal Communications Commission ("FCC") or any other federal, state or local government agency, or foreign government agency.

It is undisputed that the *Sherwin* Lawsuit was brought on behalf of state and local governmental *entities*. However, the parties dispute the meaning of "federal, state or local government *agency*." On the one hand, Office Depot contends that the phrase should be read in the context of the agencies listed, and that, under the doctrine of ejusdem generis, it "was obviously meant to refer to an agency bringing an

administrative or regulatory proceeding or claim." Dkt. 135 at 18. Office Depot thus distinguishes between governmental "agencies" and governmental "entities," the latter of which, according to Office Depot, is broader.

On the other hand, AIG notes that the Policies do not define "local government agency" and thus turns to the California Government Code, which does. California Government Code § 82041 defines "local government agency" as "a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing." Cal. Gov't Code § 82041. Similarly, California Government Code § 82049 defines "state agency" as "every state office, department, division, bureau, board and commission, and the Legislature." Cal. Gov't Code § 82049. By definition, according to AIG, qui tam lawsuits under the CFCA fall under this exclusion as they are necessarily brought by or on behalf of the government. Dkt. 118 at 20 (citing Cal. Gov't Code § 12652(c)(1) ("A person may bring a civil action for a violation of this article for the person and *either for the State of California in the name of the state*, if any state funds are involved, *or for a political subdivision in the name of the political subdivision*, if political subdivision funds are exclusively involved.") (emphasis added)).

The Court adopts AIG's interpretation of the exclusion as the only reasonable one. Office Depot claims that no reasonable insured could interpret the phrase "state or local government agency" to include all of the plaintiffs in the *Sherwin* Lawsuit, but Office Depot did just that. In its Complaint in this action, Office Depot stated that "any person with purported knowledge that a CFCA violation has allegedly occurred may sue in the name of the agency." Dkt. 1 ¶ 8 n.1. Furthermore, the relevant statutory qui tam provision, California Government Code § 12652(c)(1), provides that a qui tam plaintiff brings his action either for the State of California itself or for a "political subdivision," and a "political subdivision" is expressly listed as a type of "local government agency" under California Government Code § 82041. Office Depot's proposed interpretation of the exclusion—to read into the text a limitation that an "agency" can only bring an administrative or regulatory claim—strains credulity and is contrary to the best available authority. Thus, the *Sherwin* Lawsuit is barred from coverage under this exclusion.

3. Summary

Because there was no potential for coverage of the *Sherwin* Lawsuit under the Policies—it falls

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outside the scope of the Policies and, even if it did not, at least three policy exclusions would bar coverage—the Court GRANTS AIG's motion and DENIES Office Depot's motion as to the duty to defend.

C. Duty to Indemnify

As discussed above, the duty to defend is broader than the duty to indemnify. "Because Plaintiff is entitled to summary judgment as to the duty to defend, Plaintiff is also entitled to summary judgment as to indemnity." *Philadelphia Indem. Ins. Co. v. Hollycal Prod., Inc.*, No. ED CV 18-768 PA (SPx), 2018 WL 6520412, at *5 (C.D. Cal. Dec. 7, 2018). Thus, the Court GRANTS AIG's motion and DENIES Office Depot's motion as to the duty to indemnify.

V. Conclusion

For the above reasons, the Court GRANTS AIG's motion for summary judgment, Dkt. 118, and DENIES Office Depot's motion for summary judgment, Dkt. 122.

IT IS SO ORDERED.

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