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United States District Court
Central District of California

HOLLYWAY CLEANERS &
LAUNDRY COMPANY, INC.; MILTON
CHORTKOFF; BURTON CHORTKOFF;
EDYTHE CHORTKOFF; WILMA
CHORTKOFF,
Plaintiffs,
v.
CENTRAL NATIONAL INSURANCE
COMPANY OF OMAHA, INC.,
Defendant.

Case No. 2:13-cv-07497-ODW(Ex)
**ORDER DENYING PLAINTIFFS’
MOTION FOR PARTIAL SUMMARY
JUDGMENT [17] AND GRANTING
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT [23]**

I. INTRODUCTION

The instant action arises from an insurance coverage dispute between insureds, Plaintiffs Hollyway Cleaners & Laundry, Inc., Milton Chortkoff, Burton Chortkoff, Edythe Chortkoff and Wilma Chortkoff, and their carrier, Defendant Central National Insurance Company of Omaha, Inc. Plaintiffs allege Defendant breached, and continues to breach, its duty to defend in an underlying action potentially covered by their insurance policy. Defendant contends there is no duty to defend because the policy does not cover the environmental damage in the underlying action. Plaintiffs

1 filed a Motion for Partial Summary Judgment, and Defendant filed a Motion for
2 Summary Judgment. (ECF Nos. 17, 23.) For the reasons discussed below, the Court
3 **DENIES** Plaintiffs’ Motion and **GRANTS** Defendant’s Motion.¹

4 **II. FACTUAL BACKGROUND**

5 **A. The Policy**

6 Central National Insurance Company of Omaha, Inc. (“CNI”) issued a standard
7 comprehensive general liability insurance policy (“the Policy”) to Hollyway Cleaners
8 & Laundry Co., Inc. (“Hollyway”), Milton Chortkoff, and Burton Chortkoff. (P. SUF
9 ¶ 1.) Under the Policy, Milton and Burton Chortkoff’s wives, Edythe Chortkoff and
10 Wilma Chortkoff, are also insureds.² (*Id.* ¶ 2.)

11 Originally, the Policy was issued for a three-year period from November 1,
12 1983 to November 1, 1986, but was cancelled on November 1, 1985. (*Id.* ¶ 3.) The
13 Policy limits liability to \$500,000 per occurrence, in the aggregate, and per year. (*Id.*
14 ¶ 4.) According to the Policy:

15 CN will pay on behalf of the Insured all sums which the
16 Insured shall become legally obligated to pay as damages of
17 . . . property damage to which this insurance applies, caused
18 by an occurrence and arising out of the ownership,
19 maintenance or use of the insured premises and all
20 operations necessary or incidental to the business of the
21 Named Insured at or from the insured premises, and CN
22 shall have the right and duty to defend any suit against the
23 Insured, seeking damages on account of such . . . property
24 damage, even if any of the allegations of the suit are
25 groundless, false, or fraudulent. . . .

26 (*Id.* ¶ 5.) The Policy contains a “chemical discharge exclusion,” which provides that:

27 ¹ After carefully considering the papers filed in support of and opposition to the Motions, the Court
deems the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15.

28 ² To avoid confusion, the Court references individual Plaintiffs by their first name since they all
share the same last name.

1 [t]his insurance does not apply * * * to . . . property damage
2 arising out of the discharge, dispersal, release or escape of
3 smoke, vapors, soot, fumes, acids, alkalies, toxic chemicals,
4 liquids or gases, waste materials or other irritants,
5 contaminants or pollutants into or upon land, the atmosphere
6 or any water course or body of water, but this exclusion does
not apply if such discharge, dispersal, release or escape is
sudden and accidental.

7 (*Id.* ¶ 6.)

8 **B. The Underlying Action**

9 On February 4, 2013, Echo Complex, Inc. (“Echo”) filed suit in Los Angeles
10 Superior Court—*Echo Complex, Inc. v. Hollyway Cleaners & Laundry Co., Inc., et*
11 *al.*, No BC500453 (“Underlying Action”). (*Id.* ¶ 7.) Hollyway and the Chortkoffs
12 were sued for allegedly causing environmental contamination to the soil and
13 groundwater at and around the site where their dry cleaning business was located. (*Id.*
14 ¶ 12.) The complaint states the following causes of actions: (1) indemnity and
15 contribution under California’s Hazardous Substance Account Act; (2) negligence; (3)
16 trespass; (4) nuisance; and (5) declaratory relief.³ (*Id.* ¶ 8.)

17 Echo owns the property located at 1157-1159 Echo Park Avenue, Los Angeles,
18 California, a multi-unit commercial property with a dry cleaner since at least 1941.
19 (*Id.* ¶ 10.) Echo alleges that Defendants, including Hollyway, Fatehali Amersi
20 (“Amersi”), Valetor, Inc. (“Valetor”), Charlie Yi, and Song Yi, are the former owners
21 and operators of the dry cleaner; Hollyway operated the dry cleaner from 1946
22 through 1985; the soil and groundwater on and around the property are contaminated
23 with PCE—a dry cleaning solvent and “hazardous substance” under relevant law;
24 such contamination was accidentally, negligently, recklessly, and/or deliberately
25 caused by all or some of the defendants during their respective ownership and/or
26 operation of the property; the contamination has migrated to, and damaged, other

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28 ³ On August 6, 2013, Echo amended its Complaint and added Milton and Burton as defendants. (*Id.*
¶ 24.)

1 properties and will continue to migrate to, and damage, other properties until it is
2 remediated; and defendants are liable for indemnity or contribution to address the
3 contamination. (*Id.* ¶¶ 10–15.)

4 On May 29, 2013, Amersi and Valetor filed a cross-complaint against cross-
5 defendants Hollyway, Hollyway Real Property & Development Corporation, Milton,
6 Burton, Edythe, and Wilma. (*Id.* ¶ 16.) The cross-complaint states the following
7 causes of action: (1) breach of a stipulated judgment; (2) express indemnity; (3)
8 implied equitable indemnity; and (4) contribution. (*Id.* ¶ 17.)

9 Amersi and Valetor allege that Hollyway owned and operated a dry cleaning
10 business on the property; Milton and Edythe own 50 percent of Hollyway shares;
11 Burton and Wilma also own Hollyway shares; the Chortkoffs assumed all liabilities of
12 Hollyway upon its dissolution; and “[t]he liability that either of Cross-Complainants
13 may have, if any, to any person or governmental entity . . . related to the pollution of
14 the property, is the result of Cross-Defendants’ active intentional or negligent conduct
15 which took place prior to Cross-Defendant Valetor’s possession and occupancy of the
16 property.” (*Id.* ¶¶ 18–22.) Amersi and Valetor amended their cross-complaint twice,
17 and the court in the Underlying Action dismissed their final pleading. (*Id.* ¶¶ 25–27.)

18 On April 30, 2014, Charlie Yi and Song Yi filed a cross-complaint against
19 cross-defendants Hollyway, Milton, Burton, Amersi, and Valetor. (*Id.* ¶ 28.) The
20 cross-complaint states the following causes of action: (1) equitable indemnity; (2)
21 contribution/comparative indemnity; and (3) declaratory relief. (*Id.* ¶ 29.) Yi
22 alleges that cross-defendants caused or contributed to the presence of hazardous
23 materials in, on and under the property by negligently or recklessly causing or
24 permitting sudden or accidental discharges of hazardous material through their acts or
25 omissions. (*Id.* ¶ 30.)

26 On June 17, 2014, the parties requested the court in the Underlying Action
27 vacate the November 14, 2014 trial date so they could investigate and remediate the
28 property, as required by an oversight agency, and negotiate a cost-sharing settlement

1 agreement to avoid the need for trial. (*Id.* ¶ 34.) On June 20, 2014, the court vacated
2 the trial date. (*Id.* ¶ 35.)

3 **C. Coverage Dispute and Instant Action**

4 Three days after Echo filed suit, Bret Stone, *Cumis* counsel for Hollyway,
5 tendered the complaint to CNI. (*Id.* ¶ 36.) “CNI agreed to defend Hollyway, under a
6 reservation of rights, in its capacity as a dissolved corporation.” (Lowe Decl., Ex. H.)⁴
7 After the individual Chortkoffs were added as defendants in the Underlying Action,
8 CNI denied that it had any duty to “fund a defense in which the interests of the
9 individual Chortkoffs, whom CNI was not defending, were prioritized over the
10 different and conflicting interests of Hollyway as a dissolved corporation, which CNI
11 was defending.” (Lowe Decl., Ex. I; 5/28/14 Ogle Depo. p. 70, lines 5–25, p. 72, line
12 7 to p. 74, line 18, p. 75, lines 15–22.)

13 According to CNI, the Underlying Action “is directly related” to a 1989 federal
14 lawsuit—*Sunset/Echo Corporation v. Hollyway Real Estate and Development, et al.*,
15 No. 89-1490 WMB (“1989 Action”). (D. Mot. 1.) CNI alleges that, during their
16 depositions, Milton and Burton could not recall any chemical leaks or spills at the
17 property, including any spills resulting from the delivery of chemicals, transfer of
18 clothes from the cleaner to the dryer, or from an earthquake or any other natural event.
19 (*Id.* at 2.) CNI further alleges that Milton and Burton admitted that “the regular
20 practice at Hollyway Cleaners was the intentional and deliberate disposal of the
21 chemical waste – i.e. ‘muck’ – and/or the filters containing the chemical waste into the
22 dumpster and other trash receptacles on the Subject Property.” (*Id.*) “CNI ultimately
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25 ⁴ In a seven-page letter dated April 19, 2013, Jeffrey Ogle, CNI’s Senior Vice President, detailed the
26 allegations against Hollyway, provided excerpts of the Policy, including the chemical discharge
27 exclusion, and explained that CNI would not defend the individual Chortkoffs should they become
28 parties to the litigation. Ogle stated: “Notwithstanding the above, CN does agree to defend
Hollyway Cleaners & Laundry Co., Inc. and will allow you to represent Hollyway Cleaners &
Laundry Co., Inc. pursuant to Civil Code, Section 2860 under a FULL AND COMPLETE
RESERVATION OF RIGHTS OF CN.” (Lowe Decl., Ex. H.)

1 became aware of this deposition testimony and relied on the evidence provided therein
2 as part of its evaluation of the duty to defend [Hollyway and the Chortkoffs] in the
3 Underlying Case.” (*Id.*)

4 On September 23, 2013, Hollyway and the Chortkoffs filed suit against CNI in
5 Los Angeles Superior Court for: (1) declaratory relief; (2) breach of contract; (3)
6 breach of the implied covenant of good faith and fair dealing; and (4) unjust
7 enrichment. (ECF No. 1.) On October 9, 2013, CNI removed the action to federal
8 court. (*Id.*)

9 On July 23, 2014, Plaintiffs filed a Motion for Partial Summary Judgment.
10 (ECF No. 17.) Plaintiffs seek summary judgment on their first three causes of action
11 on the grounds that: (1) Defendant has a duty to defend Hollyway and the Chortkoffs
12 against the complaint and cross-complaints filed in the Underlying Action; (2)
13 Defendant breached, and continues to breach, its duty to defend; and (3) Defendant’s
14 breach was in bad faith. (P. Mot. 2.) This Motion is currently before the Court for
15 decision.

16 On July 24, 2014, Defendant filed a Motion for Summary Judgment. (ECF No.
17 23.) Defendant seeks summary judgment and opposes Plaintiffs’ Motion on the same
18 grounds: “there has never been a duty to defend because the extrinsic evidence
19 available to CNI conclusively demonstrates that the environmental damage alleged in
20 the Underlying Case is not covered” under the terms of the Policy’s chemical
21 discharge exclusion. (D. Mot. 1; D. Opp’n 2.) The Motion is also currently before the
22 Court for decision.

23 On November 25, 2014, Plaintiffs filed an Ex Parte Application requesting the
24 Court stay portions of its ruling on Defendant’s Motion for Summary Judgment and
25 portions of its ruling on Plaintiffs’ Motion for Partial Summary Judgment. (ECF No.
26 53.) The Court stayed the matter in its entirety. (ECF No. 56.) On January 1, 2015,
27 Plaintiffs filed an Ex Parte Application for Reconsideration, which the Court denied.
28

1 (ECF Nos. 57, 59.) On February 23, 2015, Plaintiffs filed a Motion to Lift the Stay of
2 the Entire Action, which the Court granted. (ECF No. 60, 64.)

3 III. LEGAL STANDARD

4 Summary judgment is appropriate if, viewing the evidence and drawing all
5 reasonable inferences in the light most favorable to the nonmoving party, there are no
6 genuine disputed issues of material fact, and the movant is entitled to judgment as a
7 matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322
8 (1986). A fact is “material” if it “might affect the outcome of the suit under the
9 governing law,” and a dispute as to a material fact is “genuine” if there is sufficient
10 evidence for a reasonable trier of fact to decide in favor of the nonmoving party.
11 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “If the evidence is merely
12 colorable, or is not significantly probative,” the Court may grant summary judgment.
13 *Id.* at 249–50 (citation omitted). At the summary judgment stage, the Court “does not
14 assess credibility or weigh the evidence, but simply determines whether there is a
15 genuine factual issue for trial.” *House v. Bell*, 547 U.S. 518, 559–60 (2006).
16

17 The moving party has the burden of demonstrating the absence of genuine issue
18 of fact for trial. *Celotex*, 477 U.S. at 323. To meet its burden, “the moving party must
19 either produce evidence negating an essential element of the nonmoving party’s claim
20 or defense or show that the nonmoving party does not have enough evidence of an
21 essential element to carry its ultimate burden of persuasion at trial.” *Nissan Fire &*
22 *Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000) (citation omitted).
23 Once the moving party satisfies its initial burden of production, the burden shifts to
24 the nonmoving party to show that there is a genuine issue of material fact. *Id.* at 1103.

25 “It is well-settled in this circuit and others that the filing of cross-motions for
26 summary judgment, both parties asserting that there are no uncontested issues of
27 material fact, does not vitiate the court's responsibility to determine whether disputed
28 issues of material fact are present. A summary judgment cannot be granted if a

1 genuine issue as to any material fact exists.” *United States v. Fred A. Arnold, Inc.*,
2 573 F.2d 605, 606 (9th Cir.1978).

3 IV. DISCUSSION

4 In their respective Motions for Summary Judgment, Plaintiffs and Defendant
5 address: (1) whether Defendant has a duty to defend; (2) whether Defendant breached,
6 and continues to breach, that duty; and (3) whether Defendant’s breach was in bad
7 faith.

8 A. Duty to Defend

9 Plaintiffs allege there is no genuine dispute as to any material fact regarding
10 Defendant’s duty to defend. (P. Mot. 14.) Defendant concedes the Policy includes a
11 duty to defend; however, Defendant contends that extrinsic evidence “conclusively
12 demonstrates there were no sudden or accidental discharges of chemicals into the
13 ground and thus . . . the claims against Plaintiffs in the Underlying Case cannot be
14 covered by the Policy.” (D. Opp’n 5.)

15 A federal court sitting in diversity jurisdiction applies federal procedural law
16 and state substantive law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).
17 Therefore, in the instant diversity action, the Court applies California substantive law.

18 “The duty to defend is determined by reference to the policy, the complaint, and
19 all facts known to the insurer from any source.” *Montrose Chem. Corp. v. Superior*
20 *Court*, 6 Cal. 4th 287, 295 (1993) (quoting *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263,
21 276–77 (1966)) (original emphasis). Whether an insurer has a duty to defend turns on
22 “those facts known by the insurer at the inception of a third party lawsuit, even though
23 the face of the complaint does not reflect a potential for liability under the policy.” *Id.*
24 at 295 (quoting *Saylin v. California Ins. Guarantee Assn.*, 179 Cal. App. 3d 256, 263
25 (1986)). Thus, “the insurer must defend in some lawsuits where liability under the
26 policy fails to materialize.” *Id.* at 299 (citing *Gray*, 65 Cal. 2d at 263). “Any doubt as
27 to whether the facts establish the existence of the defense duty must be resolved in the
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1 insured's favor." *Id.* at 299–300.

2 The insured and the insurer do not bear the same burden of proof in an action
3 seeking declaratory relief on the issue of the duty to defend:

4 [t]o prevail, the insured must prove the existence of a
5 *potential for coverage*, while the insurer must establish *the*
6 *absence of any such potential*. In other words, the insured
7 need only show that the underlying claim *may* fall within
8 policy coverage; the insurer must prove it cannot. Facts
9 merely tending to show that the claim is not covered, or may
10 not be covered, but are insufficient to eliminate the
11 possibility that resultant damages (or the nature of the
12 action) will fall within the scope of coverage, therefore add
13 no weight to the scales. Any seeming disparity in the
14 respective burdens merely reflects the substantive law.

15 *Id.* at 300.

16 i. Waiver

17 Plaintiffs argue that Defendant “waived its right to contest coverage by failing
18 to timely reserve that right.” (P. Opp’n 1.) In two March 28, 2013 emails, Defendant
19 agreed to defend Hollyway but did not reserve its right to contest coverage. In a letter
20 dated three weeks later, Defendant again agreed to defend Hollyway but explained
21 that it would not defend the different and conflicting interests of the Chortkoffs,
22 should the Chortkoffs become parties to the litigation. Defendant agreed to defend
23 Hollyway “under a FULL AND COMPLETE RESERVATION OF RIGHTS OF
24 CN.”

25 Plaintiffs do not offer any authority that requires an insurer reserve its right to
26 contest coverage the instant it agrees to defend an insured. Plaintiffs cite *Miller v.*
27 *Elite Ins. Co.*, 100 Cal. App. 3d 739, 754 (1980); however, in *Miller* the court found
28 waiver because the insurer *never* reserved its right to contest coverage or
communicated that there was a coverage dispute. That is not the case here.
Furthermore, Plaintiffs do not claim that they suffered prejudice or any other harm

1 because Defendant reserved its right to contest coverage three weeks after agreeing to
2 defend. Therefore, the Court finds that Defendant timely reserved its right to contest
3 coverage.⁵

4 ii. Extrinsic Evidence

5 Because the parties agree the Policy includes a duty to defend, the Court must
6 determine whether extrinsic evidence eliminates the possibility of coverage under the
7 Policy and thus Defendant's duty to defend.

8 The extrinsic evidence at issue is Milton and Burton's deposition testimony
9 from the 1989 Action, which was filed decades before the Underlying Action. During
10 their depositions, Milton and Burton explained that the regular practice at Hollyway
11 for disposing of chemical waste and filters containing chemical waste was to throw
12 such materials in the dumpster and other trash receptacles on the property. From this,
13 Defendant determined that Plaintiffs conduct fell under the Policy's chemical
14 discharge exclusion. Finding no evidence that "such discharge, dispersal, release or
15 escape" of chemical waste was "sudden and accidental," Defendant concludes that it
16 has no duty to defend.
17

18 Plaintiffs object to the admissibility of Milton and Burton's deposition
19 transcripts on three grounds. (P. Opp'n 7.) Plaintiffs argue the transcripts are
20 inadmissible because: (1) Defendant violated Federal Rule of Civil Procedure
21 26(a)(1)(A)(ii) by not identifying this extrinsic evidence in its initial disclosures or
22 discovery responses until after the close of discovery and after the parties had already
23 filed their summary judgment motions; (2) they are prejudicial to Hollyway and the
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26
27 ⁵ Plaintiffs also argue that "[e]ven if CNI had not waived its right to contest coverage by failing to
28 timely reserve that right, it nevertheless forfeited that right by breaching its duty to defend." (P.
Opp'n 6.) The Court rejects this argument on the grounds that it assumes, but does not prove,
Defendant has a duty to defend.

1 Chortkoffs in the Underlying Action; and (3) they are disputed.⁶ (*Id.*)

2 While the Court recognizes, and Defendant concedes, the transcripts were not
3 disclosed during Defendant’s initial disclosure, once CNI began preparation of its
4 summary judgment motion and it became clear that the transcripts would be an active
5 part of CNI’s defense, CNI timely filed supplemental discovery responses to
6 specifically identify these transcripts. (D. Reply 6.) Pursuant to 26(e)(1)(A), a party:

7 who has made a disclosure under 26(a)—or who has
8 responded to an interrogatory, request for production, or
9 request for admission—must supplement or correct its
10 disclosure or response in a timely manner if the party learns
11 that in some material respect the disclosure or response is
12 incomplete or incorrect, and if the additional or corrective
information has not otherwise been made known to the other
parties during the discovery process or in writing.

13 Fed. R. Civ. P. 26(e)(1)(A). Therefore, Defendant followed proper procedure.
14 Furthermore, Plaintiffs do not claim that they suffered any prejudice.

15 Plaintiffs refuse “to say more” about their prejudice argument because “[t]heir
16 liability in the Underlying Case is still at issue.” (P. Opp’n 10.) The Court
17 acknowledges that “[t]he law does not require insureds to prove their own liability or
18 to otherwise prejudice themselves in a pending liability action in order to obtain a
19 defense to that liability in that action from their insurer.” (*Id.*) (citing *Scottsdale Ins.*
20 *Co. v. MVTransp.*, 36 Cal.4th 643, 661–62 (2005)). However, in the instant action,
21 Plaintiffs, not Defendant, moved for the Court to lift its stay of the entire action. (ECF
22 No. 60.) Plaintiffs, not Defendant, created this predicament. Any potential prejudice
23 that Plaintiffs might suffer in the Underlying Action does not absolve Plaintiffs of
24 their burden at the summary judgment stage in the instant action.
25

26 _____
27 ⁶ Plaintiffs also make a half-hearted attempt to dispute the authenticity of the deposition transcripts.
28 (P. Evid. Obj. 4.) However, Plaintiffs do not dispute that Milton and Burton had their depositions
taken and made the alleged admissions. Therefore, the Court will not delay its ruling or force
Defendant to incur the unnecessary cost of presenting these transcripts in their entirety.

1 The Court rejects Plaintiffs’ argument that the extrinsic evidence is
2 inadmissible because it is disputed. This argument goes to the weight, not
3 admissibility.

4 Milton and Burton’s deposition testimony shows that, over twenty-four years
5 before Echo and Yi filed suit, the regular practice at Hollyway was disposing of
6 chemical waste and filters containing chemical waste in the dumpster and other trash
7 receptacles on the property. Such “discharge, dispersal, release or escape” of
8 chemical waste is neither “sudden” nor “accidental” and therefore not covered by the
9 Policy. The Court finds that this extrinsic evidence conclusively eliminates the
10 possibility of coverage under the Policy.

11 Defendant has satisfied its burden of production by presenting affirmative
12 evidence that there were no sudden or accidental chemical discharges while Plaintiffs
13 owned the property. This negates an essential element of Plaintiffs’ claim and shows
14 that Plaintiffs do not have sufficient evidence to carry their ultimate burden of
15 persuasion at trial. Therefore, the burden shifts to Plaintiffs to produce evidence to
16 support their claims and show that there is a genuine issue of material fact.

17 Plaintiffs argue that “to eliminate a duty to defend, [extrinsic evidence] must be
18 undisputed and must conclusively eliminate any potential for coverage under the
19 policy.” (P. Opp’n 9) (citing *Montrose*, 6 Cal. 4th at 300–01.) Plaintiffs dispute that
20 Milton and Burton’s deposition testimony from the 1989 Action represents the *only*
21 evidence as to the nature of chemical discharges at Hollyway while owned and
22 operated by Plaintiffs. In other words, the Court concludes, Plaintiffs *do not dispute*
23 Milton and Burton’s admissions during their depositions.

24 Plaintiffs argue that it is “possible that a sudden and accidental release that
25 caused the property damage during the CNI Policy could be discovered during the
26 course of the Underlying Case.” (P. Opp’n 9.) However, a good many things are
27 technically possible but Plaintiffs fail to produce a single piece of evidence to show
28

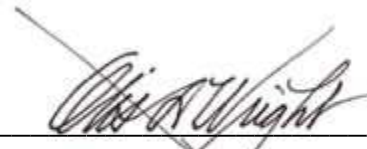
1 that this possibility contributed to or caused the contamination. Plaintiffs' speculation
2 is not sufficient to create a genuine issue of material fact. Plaintiffs must, and have
3 failed to, provide evidentiary support to substantiate their claims.

4 **V. CONCLUSION**

5 The Court finds that there is no genuine dispute as to any material fact
6 regarding the absence of Defendant's duty to defend. As a result, the Court need not
7 address issues of breach and bad faith. For the reasons discussed above, the Court
8 **DENIES** Plaintiffs' Motion for Partial Summary Judgment, and **GRANTS**
9 Defendant's Motion for Summary Judgment. (ECF Nos. 17, 23.)

10 **IT IS SO ORDERED.**

11
12 April 23, 2015

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15 _____
16 **OTIS D. WRIGHT, II**
17 **UNITED STATES DISTRICT JUDGE**