

1 fulfill its obligations to provide an immediate defense
2 to Plaintiff and one of its directors in an
3 investigation initiated by the United States Attorney's
4 Office for the Central District of California (the
5 "Federal Investigation"). Currently before the Court
6 is Defendant's Motion for Summary Judgment, or in the
7 Alternative, Partial Summary Judgment ("Motion"). For
8 the reasons set forth below, the Motion is **GRANTED in**
9 **part** and **DENIED in part**.

10 I. BACKGROUND

11 A. Factual Background

12 Plaintiff is a California nonprofit public benefit
13 corporation. Order re Cross-Mot. for Summ. J.
14 ("Order") 1:11-13, ECF No. 50. As of January 2017,
15 Grace Canada was Plaintiff's CEO and Kendal Turner was
16 Plaintiff's CFO.² Id. at 2:18-20. Plaintiff's board of
17 directors is comprised of five members: Ron Ben-Yehuda,
18 Curt Hessler, Francisco Mares, Julie Stern, and Dana
19 Walden ("Walden"). Id. at 2:20-3:3.

20 1. The Policy

21 Defendant issued a Business and Management
22 Indemnity Policy, No. EKS3192143 (the "Policy"), to
23 Plaintiff for the period of July 1, 2016 to July 1,
24 2017 (the "Policy Period"). Def.'s App. of Exs.
25 ("AOE") Ex. 1, ECF No. 100-1. Under the Policy,
26

27 ² At certain other times relevant to the Federal
28 Investigation, Plaintiff's CEO was Vielka McFarlane. Compl.
¶ 27, ECF No. 1.

1 Plaintiff and its officers and directors are
2 "Insureds." Id. at SIC00023-24 §§ B.4, 5. The Policy
3 provides the following insuring agreement under the
4 Insured Person and Organization Coverage Section ("IPO
5 Coverage Section"):

6 Insurer shall pay for the Loss of the
7 Insureds which the Insureds have become
8 legally obligated to pay by reason of a
9 Claim first made against the Insureds during
10 the Policy Period . . . and reported to the
11 Insurer pursuant to Section E.1. herein, for
12 any Wrongful Act taking place prior to the
13 end of the Policy Period.

14 Id. at SIC00023 § A. A "Claim" under the Policy
15 includes, among other things, "a criminal proceeding
16 against any Insured, commenced by a return of an
17 indictment or similar document, or receipt or filing of
18 a notice of charges" and "a civil, administrative or
19 regulatory proceeding or a formal governmental
20 investigation against any insured commenced by the
21 filing of a notice of charges, investigative order or
22 similar document." Id. § B.1. Subject to certain
23 exceptions, the Policy defines "Loss" as "damages,
24 judgments, settlements, pre-judgment or post-judgment
25 interest awarded by a court, and Costs, Charges and
26 Expenses incurred by any of the Insureds." Id. at
27 SIC00024 § B.7. "Costs, Charges and Expenses" include
28 "reasonable and necessary legal costs, charges, fees
and expenses incurred by any of the Insureds in
defending Claims" Id. at SIC00023 § B.3.

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1 2. The Federal Warrants and Investigation

2 On January 23, 2017, the United States Attorney's
3 Office for the Central District of California ("USAO")
4 issued three search and seizure warrants (the
5 "Warrants") at locations affiliated with Plaintiff.
6 See Pl.'s Index of Exs. ("IOE") Exs. B, C, D, ECF No.
7 102-2. The Warrants were issued in connection with the
8 Federal Investigation initiated by the USAO into
9 alleged theft of government property in violation of 18
10 U.S.C. § 641, theft or bribery concerning programs
11 receiving federal funds in violation of 18 U.S.C.
12 § 666, major wire fraud against the United States in
13 violation of 18 U.S.C. § 1031, mail fraud in violation
14 of 18 U.S.C. § 1341, wire fraud in violation of 18
15 U.S.C. § 1343, and engaging in monetary transactions in
16 property derived from specified unlawful activity in
17 violation of 18 U.S.C. § 1957. Id.; AOE Ex. 12 ("March
18 14 USAO Letter"). The Warrants authorized the search
19 and seizure of Plaintiff's bank, accounting, and
20 corporate records. IOE Exs. B, C, D.

21 The Warrants were executed on January 25, 2017.
22 Order at 6:12. As part of the Federal Investigation
23 leading up to the issuance of the Warrants, the USAO
24 named certain directors and officers of Plaintiff's as
25 "persons of interest." Id. at 6:13-16. The issuance
26 and execution of the Warrants created a public
27 relations crisis for Plaintiff. Id. at 6:17-19.

28 It is undisputed that the Policy obligates

1 Defendant to defend Plaintiff and all other Insureds
2 under the Policy with respect to the Federal
3 Investigation. Id. at 6:20-23.

4 3. Plaintiff's Retention of Gibson, Dunn &
5 Crutcher, LLP

6 Maurice Suh ("Suh"), a partner of Gibson, Dunn &
7 Crutcher LLP ("Gibson Dunn") has represented Plaintiff
8 since February 2015. Id. at 7:3-5. Plaintiff first
9 retained Suh in connection with matters arising out of
10 an audit of Plaintiff initiated by the Los Angeles
11 Unified School District Office of the Inspector General
12 ("OIG"). See Decl. of Maurice M. Suh ("Suh Decl.")
13 ¶ 11, ECF No. 102-7. The Federal Investigation at
14 issue in this Action is related to the OIG's
15 investigation. Order at 7:10-12.

16 Soon after the Warrants were executed, Plaintiff
17 sought assistance from Suh. Id. at 7:13-14. On
18 February 3, 2017, Gibson Dunn entered into a written
19 retainer agreement with Plaintiff and some of its
20 officers. Id. at 7:14-17.

21 4. Communications Regarding Representation of
22 Plaintiff in the Federal Investigation

23 On February 7, 2017, Suh notified Defendant of the
24 Warrants and corresponding Federal Investigation and
25 sought Defendant's consent to Plaintiff's selection of
26 Gibson Dunn as counsel. Order at 7:20-23. On March 7,
27 2017, Defendant sent an email to Plaintiff's former COO
28 informing Plaintiff that Defendant had chosen Kasowitz,

1 Benson, Torres & Friedman LLP to defend Plaintiff in
2 the Federal Investigation. Id. at 7:24-28. Defendant
3 indicated in that email that it would not consent to
4 Gibson Dunn representing Plaintiff in the Federal
5 Investigation. Id. at 7:28-8:3. Plaintiff
6 subsequently objected to Defendant's refusal to consent
7 to Plaintiff's selection of Gibson Dunn. Id. at 8:3-5.

8 Suh met with representatives of the USAO on
9 February 10, 2017 to advise them that Gibson Dunn had
10 been retained to represent Plaintiff, as well as its
11 officers and directors, in connection with the Federal
12 Investigation. Id. at 8:6-10. Approximately five
13 weeks later, the USAO informed Suh that it believed a
14 conflict of interest might preclude Gibson Dunn from
15 concurrently representing Plaintiff and some of its
16 officers, directors, and employees. Id. at 8:10-15;
17 see March 14 USAO Letter. That same written
18 communication identified numerous individuals as
19 "persons of interest" in the Federal Investigation,
20 including one of Plaintiff's board members, Dana
21 Walden. March 14 USAO Letter. Plaintiff thereafter
22 notified Defendant that those individuals identified as
23 "persons of interest" who qualify as Insureds under the
24 Policy request a defense of the claims therein. Order
25 at 8:19-24.

26 Gibson Dunn executed a new retainer agreement with
27 Plaintiff on or about April 18, 2017. Id. at 8:25-27;
28 AOE Ex. 21. Defendant subsequently appointed separate

1 defense counsel for two of Plaintiff's officers—Grace
2 Canada and Kendal Turner. Order at 8:28-9:2.
3 Plaintiff thereafter requested that Defendant appoint
4 separate counsel for each of Plaintiff's five board
5 members. Id. at 9:2-5. Defendant refused to appoint
6 separate counsel because Plaintiff had not "identified
7 any conflicts of interest between [the board members]
8 individually and/or with respect to" Plaintiff. Id. at
9 9:5-9. Accordingly, Gibson Dunn continued to represent
10 Plaintiff and all five members of its board of
11 directors in the Federal Investigation. Id. at 9:9-11.

12 On April 11, 2018, this Court issued an Order
13 holding that, as a matter of law, Plaintiff is not
14 entitled to independent counsel, but that Walden is
15 entitled to separate counsel based upon the USAO March
16 14, 2017 letter identifying him as a person of
17 interest. See generally Order. Thereafter, on April
18 19, 2018, Defendant offered to appoint separate counsel
19 to Walden. AOE Ex. 17; AOE Ex. 2, Dep. of Michael
20 Zartman ("Zartman Dep.") 217:7-218:17, ECF No. 100-2.
21 Walden agreed to accept Defendant's appointed defense
22 counsel on June 8, 2018. Def.'s Reply to Pl.'s Opp'n
23 to Def.'s Statement of Undisputed Facts ("SUF") ¶ 31,
24 ECF No. 103-1.

25 **B. Procedural Background**

26 Plaintiff filed its Complaint [1] on April 28,
27 2017, asserting four causes of action: (1) a
28 declaration that Defendant failed to provide

1 independent counsel in violation of California Civil
2 Code section 2860; (2) breach of contract; (3) specific
3 performance of Defendant's alleged duty to provide
4 independent counsel; and (4) breach of the implied
5 covenant of good faith and fair dealing.

6 On February 16, 2018, the parties filed cross-
7 summary judgment motions [32, 38] relating to
8 Plaintiff's right to independent counsel, and on April
9 11, 2018, the Court denied Plaintiff's claim for
10 independent counsel, but granted Plaintiff's claim for
11 separate counsel for Walden [50]. Defendant filed the
12 instant Motion [96] on November 20, 2018. Plaintiff
13 timely opposed [102], and Defendant timely replied
14 [103].

15 II. DISCUSSION

16 A. Legal Standard

17 1. Summary Judgment

18 Federal Rule of Civil Procedure 56(a) states that a
19 "court shall grant summary judgment" when "the movant
20 shows that there is no genuine dispute as to any
21 material fact and the movant is entitled to judgment as
22 a matter of law." A fact is "material" for purposes of
23 summary judgment if it might affect the outcome of the
24 suit, and a "genuine" issue exists if the evidence is
25 such that a reasonable fact-finder could return a
26 verdict for the nonmovant. Anderson, 477 U.S. 242, 248
27 (1986). The evidence, and any inferences based on
28 underlying facts, must be viewed in the light most

1 favorable to the nonmovant. Twentieth Century-Fox Film
2 Corp. v. MCA, Inc., 715 F.2d 1327, 1328-29 (9th Cir.
3 1983). In ruling on a motion for summary judgment, the
4 court's function is not to weigh the evidence, but only
5 to determine if a genuine issue of material fact
6 exists. Anderson, 477 U.S. at 255.

7 Where the nonmovant bears the burden of proof at
8 trial, the movant need only prove that there is no
9 evidence to support the nonmovant's case. In re Oracle
10 Corp. Secs. Litig., 627 F.3d 376, 387 (9th Cir. 2010).
11 If the movant satisfies this burden, the burden then
12 shifts to the nonmovant to produce admissible evidence
13 showing a triable issue of fact. Id.; Nissan Fire &
14 Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102-03
15 (9th Cir. 2000); see also Cleveland v. Policy Mgmt.
16 Sys. Corp., 526 U.S. 795, 805-06 (1999)(quoting Celotex
17 Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

18 2. Partial Summary Judgment

19 Federal Rule of Civil Procedure 56 authorizes
20 courts to grant partial summary judgment to limit the
21 issues to be tried in a case. State Farm Fire & Cas.
22 Co. v. Geary, 699 F. Supp. 756, 759 (N.D. Cal. 1987)
23 (citing Lies v. Farrell Lines, Inc., 641 F.2d 765, 769
24 n.3 (9th Cir. 1981)); see, e.g., White v. Lee, 227 F.3d
25 1214, 1240 (9th Cir. 2000)("[A] court may award a
26 partial summary judgment that decides only [the] issue
27 [of liability]"). Absent special circumstances,
28 partial summary judgment is not appealable prior to the

1 entry of a final judgment because such orders do not
2 dispose of all claims or end the litigation on the
3 merits. Williamson v. UNUM Life Ins. Co. of Am., 160
4 F.3d 1247, 1250 (9th Cir. 1998)(citations omitted).

5 **B. Analysis**

6 1. Request for Judicial Notice

7 Plaintiff seeks judicial notice of the fact that
8 Defendant previously took the position and argued to
9 this Court that it was not obligated to provide
10 separate counsel to Walden based on the March 14, 2017
11 letter from the USAO. See Req. for Judicial Notice,
12 ECF No. 102-4. Judicial notice may be taken of an
13 adjudicative fact not subject to reasonable dispute in
14 that it "(1) is generally known within the trial
15 court's territorial jurisdiction; or (2) can be
16 accurately and readily determined from sources whose
17 accuracy cannot reasonably be questioned." Fed. R.
18 Evid. 201(b). Defendant's position that it was not
19 obligated to provide separate counsel to Walden is
20 documented in its motion that was filed with the Court.
21 See ECF No. 42. As such, and because Defendant does
22 not oppose the request for judicial notice, it is
23 **GRANTED.** Fed. R. Evid. 201(c)(2).

24 2. Evidentiary Objections

25 Plaintiff filed numerous objections to the evidence
26 Defendant submitted in support of its Motion. See
27 Pl.'s Evid. Objs., ECF No. 102-3. Defendant responded
28 to Plaintiff's objections, see Def.'s Response to Pl.'s

1 Evid. Objs., ECF No. 103-3, and also filed numerous
2 objections to the evidence Plaintiff submitted in
3 support of its Opposition. See Def.'s Evid. Objs., ECF
4 No. 103-2. Where the objected-to evidence is relevant
5 to the Court's analysis, the pertinent objections and
6 reasons for overruling or sustaining the objections
7 will be delineated.

8 3. Breach of Contract

9 As a preliminary matter, Defendant argues that it
10 is not liable for Gibson Dunn Fees incurred by
11 Plaintiff because Defendant did not consent to Gibson
12 Dunn and under the Policy, Defendant is not required to
13 pay for legal fees incurred without its consent.³ SUF ¶
14 9; AOE Ex. 1. This provision is known as a no
15 voluntary payment provision ("NVP"), which "California
16 law enforces . . . in the absence of economic
17 necessity, insurer breach, or other extraordinary
18 circumstances." Jamestown Builders, Inc. v. Gen. Star
19 Indemnity Co., 77 Cal. App. 4th 341, 346 (Cal. Ct. App.
20 1999). NVPs are "based on the equitable rule that 'the
21 insurer [is invested] with the complete control and
22 direction of the defense' and cannot be expected to pay
23 for that which it does not control." Tradewinds

24 _____
25 ³ Condition F.3 of the Policy provides: "The Insureds agree
26 not to settle or offer to settle any Claim, incur any Costs,
27 Charges and Expenses or otherwise assume any contractual
28 obligation or admit any liability with respect to any Claim
not to be unreasonably withheld." SUF ¶ 9; AOE Ex. 1 at CEG
000591.

1 Escrow, Inc. v. Truck Ins. Exchange, 97 Cal. App. 4th
2 704, 710 (Cal. Ct. App. 2002) (citations omitted).
3 However, "when the insured has requested and been
4 denied a defense by the insurer . . . the insured may
5 ignore the policy's provisions forbidding the incurring
6 of defense costs without the insurer's prior consent,
7 and under the compulsion of that refusal undertake his
8 own defense at the insurer's expense." Gribaldo,
9 Jacobs, Jones & Assocs. v. Agrippina Versicherungen A.,
10 3 Cal. 3d 434, 449 (1970); Jamestown Builders, Inc., 77
11 Cal. App. 4th at 348 ("The no-voluntary-payments
12 provision is superseded by an insurer's antecedent
13 breach of its coverage obligation."). Thus, if
14 Defendant breached the Policy by refusing to provide an
15 immediate defense, then the NVP provision will not
16 apply to bar Plaintiff from recovering the defense fees
17 it incurred during this period.

18 In establishing its claim for breach of contract,
19 Plaintiff must prove (1) the existence of a valid
20 contract, (2) Plaintiff's performance, (3) Defendant's
21 breach, and (4) damage resulting from the breach.
22 Reichert v. General Ins. Co., 68 Cal. 2d 822, 830
23 (1968). With respect to the first two elements, there
24 is no dispute that the parties had a valid contract and
25 that Plaintiff performed under the contract. See Buss
26 v. Superior Court, 16 Cal. 4th 35, 44 (1997) ("An
27 insurance policy is a contract between an insurer and
28 an insured.").

1 a. *Breach of Policy*

2 As to breach, Plaintiff alleges that Defendant
3 breached the Policy by: (1) failing to pay defense fees
4 incurred between tender and acceptance of a defense;
5 (2) failing to reimburse Plaintiff for defense fees
6 incurred prior to Plaintiff's tender of the claim to
7 Defendant; and (3) failing to assign separate counsel
8 to Walden sooner or reimburse Plaintiff for fees
9 incurred as a result thereof. The Court addresses each
10 allegation in turn.

11 i. *Failure to Pay Fees Between Tender and*
12 *Acceptance of Defense*

13 Plaintiff argues that Defendant breached the Policy
14 by failing to pay Plaintiff's defense fees incurred
15 between tender and acceptance of a defense. It is
16 settled that "the duty to defend arises as soon as
17 tender is made [and] the insurer is responsible
18 for those costs whether or not there is ultimately any
19 duty to indemnify the insured for the claim."

20 Montgomery Ward & Co., Inc. v. Imperial Cas. & Indem.
21 Co., 81 Cal. App. 4th 356, 373 (2000). However,
22 determining whether an insurer "has breached its duty
23 to provide an immediate defense is a fact-bound inquiry
24 that looks to both the insurer's diligence in accepting
25 the tender and the insured's diligence in responding to
26 the insurer's requests for further information
27 regarding the claim." Haskins v. Employers Ins. of
28 Wausau, 126 F. Supp. 3d 1117, 1123 (N.D. Cal. Aug. 26,

1 2015).

2 It is undisputed that on February 7, 2017,
3 Plaintiff notified Defendant of the Warrants and sought
4 consent to Plaintiff's selection of Gibson Dunn as
5 counsel. AOE Ex. 3. However, the parties dispute the
6 date on which Defendant offered to provide defense
7 counsel to Plaintiff. See Signal Products, Inc. v.
8 American Zurich Ins. Co., No. 2:13-cv-04581-CAS-AJWx,
9 2014 WL 12782198, at *4 (C.D. Cal. Aug. 4, 2014)
10 ("[N]ormally an insurer may discharge [the duty to
11 defend] by appointing counsel to defend the insured.").
12 It is possible that Defendant offered counsel as early
13 as February 7, 2017, as Plaintiff's CEO emailed
14 Plaintiff's insurance agent on February 10, 2017
15 stating "I am writing in response to your February 7,
16 2017 email indicating that Scottsdale Insurance Co.
17 intends to appoint defense attorneys from its panel."
18 See AOE Ex. 5.⁴ Yet, other evidence, including claim
19 notes taken by Defendant's employees shows that on
20 February 9, 2017, Plaintiff was not considered an
21 insured, but that as of February 10, 2018, Plaintiff

23 ⁴ Plaintiff objects to this evidence on grounds of lack of
24 foundation, hearsay, best evidence, and Federal Rules of Evidence
25 403. Pl.'s Objs. No. 2. None of these grounds support
26 Plaintiff's objection, as the email was sent by Plaintiff's CEO,
27 is admissible hearsay as a party admission, Fed. R. Evid. 801
28 (d)(2), is not unduly prejudicial, and is not being used to
describe the contents of the February 7 email, but instead to
show Plaintiff's knowledge that as of February 9, 2017, Defendant
intended to appoint counsel to defend Plaintiff. As such,
Plaintiff's Objection is **OVERRULED.**

1 was deemed an insured and referral to coverage counsel
2 was approved. AOE Ex. 7. These notes also reveal that
3 a representative of Defendant spoke with a Gibson Dunn
4 attorney on February 9, 2017, but the parties dispute
5 whether the attorney told Defendant that there was
6 "nothing to do" with respect to the Federal
7 Investigation at the time. Id.; Decl. of Jeremy S.
8 Smith ("Smith Decl.") ¶¶ 7-9, ECF No. 102-6.⁵
9 Ultimately, the parties agree that on March 7, 2017,
10 Defendant notified Plaintiff that it did not consent to
11 Gibson Dunn, but it had assigned defense counsel to
12 represent Plaintiff. AOE Ex. 8 at 5.

13 Viewing the evidence in the light most favorable to
14 the non-moving party, and thereby assuming that
15 Defendant first notified Plaintiff that it would assign
16 defense counsel on March 7, 2017, a question of fact
17 still remains as to whether this month-long delay
18 constitutes a breach of the Policy. Specifically,
19 Plaintiff was the target of a highly-publicized Federal
20 Investigation, and three Warrants had just been
21

22 ⁵ Defendant objects to this evidence on the basis that Smith
23 is an undisclosed expert, and his testimony constitutes improper
24 expert opinion and hearsay. However, Smith is an attorney
25 retained by Plaintiff in connection with the underlying
26 Investigation. His testimony is not expert testimony, as he is
27 merely testifying to events that he was personally involved in,
28 and responding to Defendant's characterization of a phone call
which included him. Moreover, this is not impermissible hearsay,
because the statement is being used to show that there is a
dispute over what the parties communicated to each other at the
time of the phone call in question, not for its truth. As such,
Defendant's Objection is **OVERRULED.**

1 executed against it. According to Plaintiff's counsel
2 for the Federal Investigation, the "high-profile and
3 high-stakes nature of the Warrants [made it] necessary
4 for Celerity to act immediately to respond to the
5 Warrants." Suh Decl. ¶ 14.⁶ Thus, a trier of fact
6 could find that this delay breached the Policy in light
7 of the surrounding circumstances. See e.g. Signal
8 Products, Inc., 2014 WL 12782198, at *16 (finding that
9 whether an insurer breached its duty to defend, where
10 it failed to respond to the insured's initial tender
11 within 40 days, was a question of fact for the jury to
12 decide in light of the totality of the evidence).

13 Because a triable issue of fact remains as to the
14 urgency with which Defendant should have responded to
15 Plaintiff's claim, and the speed with which Defendant
16 did respond to Plaintiff's claim, the Court cannot
17 conclude that as a matter of law, Defendant did not
18 breach the Policy on these grounds.

19 *ii. Failure to Reimburse Pre-Tender*
20 *Defense Fees*

21 Plaintiff next asserts that Defendant breached the

22
23 ⁶ Defendant objects to this evidence on the grounds that Suh
24 is an undisclosed expert witness, and that the testimony
25 constitutes inadmissible hearsay and improper expert opinion.
26 See Def.'s Evid. Objs. However, Suh is the attorney who
27 represented Plaintiff in connection with the Investigation. His
28 testimony is not an expert opinion, but is instead, knowledge
that he acquired by virtue of his representation. Moreover, this
is not impermissible hearsay because he is not describing an out
of court statement, but merely discussing the events which
transpired during his representation of Plaintiff. Thus, the
Court **OVERRULES** Defendant's Objection.

1 Policy by failing to compensate Plaintiff for defense
2 fees incurred following execution of the Warrants, but
3 prior to Plaintiff's tender of the claim to Defendant.
4 Plaintiff claims it was required to immediately hire
5 counsel to represent its interests in response to the
6 Warrants, and as such, its pre-tender defense costs
7 were involuntary and should be recoverable.

8 "An insured may be able to avoid application of a
9 no-voluntary-payments provision where the previous
10 payments were made involuntarily because of
11 circumstances beyond its control [o]r the
12 insured may be faced with a situation requiring
13 immediate response to protect its legal interests."
14 Jamestown Builders, 77 Cal. App. 4th at 348. In
15 determining whether an insured incurred fees
16 voluntarily, "the key is not the involuntary nature of
17 the underlying obligation, but the involuntariness of
18 not giving prior notice to the insurer as required by
19 NVP clauses." Corthera, Inc. v. Scottsdale Ins. Co.,
20 No. 14-cv-05014-EMC, 2016 WL 270951, at*8-9 (N.D. Cal.
21 Jan. 22, 2016) (citations omitted) ("[T]he courts have
22 found involuntary payment in relatively limited
23 situations. The two California cases that found
24 involuntary payments both 'concerned situations in
25 which the insured's delay in tendering was allegedly
26 due to the difficulty locating the policy or
27 identifying the insurer.'").

28 Here, the Warrants were issued on January 23, 2017

1 and executed on January 25, 2017. By the time
2 Plaintiff sought assistance from Gibson Dunn, the
3 Warrants had already been executed. See Suh Decl. ¶
4 15. Plaintiff fails to provide evidence establishing
5 why it was unable to immediately contact Defendant to
6 notify it of the Federal Investigation. In re Oracle
7 Corp. Secs. Litig., 627 F.3d at 387 ("Where the non-
8 moving party bears the burden of proof at trial, the
9 moving party need only prove that there is an absence
10 of evidence to support the non-moving party's case. . .
11 . [then] the non-moving party must come forth with
12 evidence from which a jury could reasonably render a
13 verdict in the non-moving party's favor."). Because
14 Plaintiff fails to produce any evidence to create a
15 triable issue as to whether Plaintiff's decision to
16 incur Gibson Dunn fees was involuntary, the Court
17 **GRANTS** Defendant's Motion with respect to Plaintiff's
18 claim that Defendant breached the Policy by refusing to
19 reimburse Plaintiff for its pre-tender fees.

20 iii. *Failure to Assign Separate Counsel*
21 *to Walden Sooner*

22 Lastly, Plaintiff argues that Defendant breached
23 the Policy by failing to assign separate counsel to
24 Walden until ordered by this Court, and failing to
25 reimburse Plaintiff for related fees incurred.
26 Defendant alleges that Plaintiff lacks standing to
27 pursue this claim, and the related bad faith claim
28 discussed below, because Walden is the real party in

1 interest as to these claims, the Policy does not allow
2 Plaintiff to pursue Walden's claims, and Walden did not
3 assign his claims to Plaintiff. However, Plaintiff is
4 a direct party to the Policy, the very nature of which
5 is to ensure that Plaintiff's directors and officers,
6 through whom Plaintiff acts, are insured.⁷ While the
7 directors and officers may ultimately benefit from the
8 Policy, that does not mean that Plaintiff is not a real
9 party in interest with respect to its claims. See Fed.
10 R. Civ. P. 17(a) ("a party with whom or in whose name a
11 contract has been made for another's benefit ... may
12 sue in [that person's] own name[] without joining the
13 person for whose benefit the action is brought.").
14 Plaintiff incurred the costs resulting from Defendant's
15 alleged breach, and thus, any damages due to the
16 pecuniary loss should be recovered by Plaintiff.⁸

17
18 ⁷ The Policy defines "Insureds" to include "the Organization
19 and Insured Persons." The term "Organization" is identified on
20 the Certificate of Insurance as "Celerity Educational Group."
21 "Insured Persons" is defined to include "all persons who were,
22 now are or shall become . . . a director, officer, trustee,
23 volunteer, committee member or employee of the Organization."
24 SUF ¶ 17.

25 ⁸ Defendant further argues that allowing Plaintiff to pursue
26 these claims now, subjects Defendant to the risk that it will
27 have to re-litigate these issues later, in the event that Walden
28 pursues the same claims seeking emotional distress damages.
29 Defendant cites Reichert v. General Ins. Co. of America, 68 Cal.
30 2d 822 (1968), for the proposition that "an entire claim arising
31 either upon a contract or from a wrong cannot be divided and made
32 the subject of several suits." However, as far as the Court is
33 aware, there is only one suit that has been brought against
34 Defendant. Any suit that would be brought against it by Walden
35 directly for personal emotional distress damages is purely
36 hypothetical at this juncture and should not be the basis for
37 dismissing Plaintiff's claims.

1 On April 11, 2018, this Court issued an Order
2 requiring Defendant to provide Walden with separate
3 counsel. ECF No. 50. This Order was predicated on the
4 March 14 USAO Letter, identifying Walden as a person of
5 interest in the Federal Investigation. Id. at 22:1-9;
6 AOE Ex. 12. Consequently, as of March 15, 2017, when
7 Defendant received the March 14 USAO letter, Defendant
8 had a duty to assign separate counsel to Walden. See
9 SUF ¶ 23. Defendant seeks summary judgment, suggesting
10 that it complied with its duty because on March 27,
11 2017, it agreed to appoint Arent Fox to represent the
12 twenty persons identified in the March 14 letter. AOE
13 Ex. 13. However, as this Court held in its April 11,
14 2018 Order, “[a] person of interest potentially would
15 have a personal interest adverse to the other Insureds’
16 corporate interest.” Order at 22:7-9. Thus, Walden
17 was entitled to his own separate counsel, not counsel
18 shared with other persons of interest. As such, the
19 Court cannot conclude that as a matter of law,
20 Defendant did not breach the Policy by failing to
21 provide separate counsel to Walden sooner.

22 In sum, because triable issues of fact exist
23 regarding whether Defendant breached the Policy by its
24 delay in providing defense counsel to Plaintiff and its
25 delay in providing separate defense counsel to Walden,
26 Defendant has not shown that Plaintiff cannot establish
27 that Defendant breached the Policy as a matter of law.

28 ///

1 b. *Causation & Damages*

2 Defendant contends that Plaintiff fails to prove
3 causation and damages. Defendant alleges that
4 Plaintiff would have retained Gibson Dunn even if
5 Defendant had offered Plaintiff counsel sooner, and
6 that because Plaintiff chose to incur Gibson Dunn fees,
7 these cannot be considered "damages." However, even if
8 Plaintiff preferred to be represented by Gibson Dunn,
9 the Court cannot conclude as a matter of law that
10 Plaintiff would have hired Gibson Dunn regardless of
11 whether Defendant provided an immediate defense.
12 Moreover, if a jury finds that Defendant breached the
13 Policy, then Plaintiff was within its right to hire
14 Gibson Dunn, and the fees incurred during the breach
15 must be reimbursed by Defendant. See Travelers
16 Property Cas. Co. of America, 2012 WL 1657121, at *4
17 (finding that insurer's initial refusal to provide its
18 insured with a defense divested it of the right to
19 control the insured's defense); Amato v. Mercury
20 Casualty Co., 53 Cal. App. 4th 825, 831 (Cal. Ct. App.
21 1997) ("Where an insured mounts a defense at the
22 insured's own expense following the insurer's refusal
23 to defend, the usual contract damages are the costs of
24 the defense.").

25 Because triable issues of fact exist regarding
26 Plaintiff's claim for breach of contract, the Court
27 **DENIES** Defendant's Motion with respect to this claim.

28 ///

1 4. Breach of Implied Covenant of Good Faith and
2 Fair Dealing

3 A covenant of good faith and fair dealing is
4 implied in every insurance contract. Jordan v.
5 Allstate Ins. Co., 148 Cal. App. 4th 1062, 1071 (Cal.
6 Ct. App. 2007). An insurer breaches this covenant when
7 it engages in "bad faith" by acting unreasonably or
8 without proper cause in delaying or denying policy
9 benefits. Chateau Chamberay Homeowners Ass'n v. Assoc.
10 Intern. Ins. Co., 90 Cal. App. 4th 335, 347 (Cal. Ct.
11 App. 2001), *disapproved on other grounds*. "Bad faith
12 does not lie with 'an honest mistake, bad judgment or
13 negligence, but rather by a conscious and deliberate
14 act, which unfairly frustrates the agreed common
15 purposes and disappoints the reasonable expectations of
16 the other party thereby depriving that party of the
17 benefits of the agreement." Tetravue Inc. v. St. Paul
18 Fire & Marine Ins. Co., No. 14-CV-2021 W (BLM), 2018 WL
19 1172852, at *5 (S.D. Cal. Mar. 6, 2018) (quoting Wilson
20 v. 21st Century Ins. Co., 42 Cal. 4th 713, 726 (2007)).

21 Plaintiff alleges that Defendant acted unreasonably
22 in failing to provide separate counsel to Walden prior
23 to this Court's Order on April 11, 2018. As discussed,
24 on March 15, 2017, Defendant was informed that Walden,
25 and nineteen other individuals, were identified as
26 persons of interest by the USAO. SUF ¶ 23. In
27 pertinent part, the USAO letter read as follows: "[t]he
28 individuals identified would have . . . interests that

1 are potentially adverse to the Celerity Entities and
2 each other. We therefore believe these individuals
3 will require independent legal counsel" AOE
4 Ex. 12. Because the USAO letter explicitly flagged a
5 potential conflict of interest with respect to Walden,
6 Plaintiff asserts that Defendant's conduct in refusing
7 to provide Walden with separate counsel upon receipt of
8 the letter establishes bad faith. On the other hand,
9 Defendant argues that it responded to the USAO letter
10 reasonably by offering to appoint Arent Fox to
11 represent all of the individual Insureds, and by twice
12 asking Plaintiff to identify whether any conflicts of
13 interest exist amongst themselves that cannot be
14 waived. See AOE Exs. 13, 15, 16.

15 Viewing the facts in the light most favorable to
16 Plaintiff, a jury could conclude that Defendant acted
17 unreasonably in refusing to provide separate counsel to
18 Walden immediately in response to the USAO's letter.
19 See Harbison v. American Motorists Ins. Co., 636 F.
20 Supp. 2d 1030, 1041 (E.D. Cal. 2009) ("A trier of fact
21 may find that an insurer acted unreasonably if the
22 insurer ignores evidence available to it which supports
23 the claim."); Chateau Chamberay Homeowners Ass'n, 90
24 Cal. App. 4th at 350 ("[T]he reasonableness of an
25 insurer's claims-handling conduct is ordinarily a
26 question of fact"). As such, a triable issue
27 of fact remains, and the Court **DENIES** Defendant's

28

1 Motion with respect to this claim.⁹

2 5. Punitive Damages

3 To recover punitive damages, a plaintiff must prove
4 "by clear and convincing evidence that the defendant
5 has been guilty of oppression, fraud, or malice." Cal.
6 Civ. Code § 3294(a). "Oppression" includes "despicable
7 conduct that subjects a person to cruel and unjust
8 hardship in conscious disregard of that person's
9 rights" and "malice" includes "conduct which is carried
10 on by the defendant with a willful and conscious
11 disregard of the rights or safety of others." Id. §
12 3294(c). "Clear and convincing evidence" refers to
13 evidence that is "so clear as to leave no substantial
14 doubt." Shade Foods, Inc. v. Innovative Products Sales
15 & Marketing, Inc., 78 Cal. App. 4th 847, 891 (Cal. Ct.
16 App. 2000) (citations omitted); see Basich v. Allstates
17 Ins. Co., 87 Cal. App. 4th 1112, 1121 (Cal. Ct. App.
18 2001) ("[P]laintiff [can only] prevail on a punitive
19 damages claim . . . by establishing malice, oppression

20 _____
21 ⁹ Plaintiff also alleges that Defendant acted in bad faith
22 by failing to appoint separate claims adjusters for each of the
23 insureds involved, and failing to give adequate consideration to
24 the exigent circumstances surrounding the execution of the
25 Warrants. In support of these claims, Plaintiff cites to a
26 report by an expert witness on claim handling standards. See IOE
27 Ex. N at 11, 12. However, Defendant objects to this evidence on
28 the grounds that it constitutes inadmissible hearsay. Because
the report is an out-of-court statement offered for its truth,
and Plaintiff does not identify an exception to the hearsay rule
which would apply, the Court **SUSTAINS** Defendant's Objection to
the report. See Hunt v. City of Portland, 599 Fed. Appx. 620,
621 (9th Cir. 2009) (concluding that expert report was
inadmissible hearsay).

1 or fraud by clear and convincing evidence. Thus, any
2 evidence submitted in response to a motion for summary
3 adjudication must necessarily meet that standard.").
4 While the same evidence may be considered for both a
5 finding of bad faith and punitive damages, "the conduct
6 required to award punitive damages . . . is of a
7 different dimension than that required to find bad
8 faith" and evidence supporting punitive damages "must
9 satisfy a . . . far more stringent standard." Shade
10 Foods, Inc., 78 Cal. App. at 891 (citations omitted).

11 Plaintiff alleges that it is entitled to punitive
12 damages due to Defendant's month-long delay in
13 initially accepting its obligation to defend Plaintiff,
14 its thirteen month delay in accepting Walden's request
15 for separate counsel, and its failure to pay any Gibson
16 Dunn fees. AOE Ex. 19 at 123:18-124:6. However,
17 Plaintiff does not cite any evidence establishing that
18 Defendant engaged in these actions with a willful
19 disregard of Plaintiff's rights. See United Investors
20 Life Ins. Co. v. Grant, 387 Fed. App'x 683, 687 (9th
21 Cir. 2010) (finding that even where an insurer waited
22 more than a year before investigating insured's claim
23 for policy proceeds, punitive damages were not
24 warranted because the insured "presented no evidence
25 that [insurer] intended to injure her or anyone else").
26 Even if a jury were to conclude that Defendant made a
27 deliberate and unreasonable decision to delay providing
28 counsel to Walden immediately upon receiving the USAO

1 letter (so as to support a finding of bad faith), in
2 determining whether punitive damages are warranted, "we
3 must look beyond the matter of reasonable response to
4 that of motive and intent." Neal v. Farmers Ins.
5 Exchange, 21 Cal. 3d 910, 922 (1978); see Slottow v.
6 Am. Cas. Co., 10 F.3d 1355, 1361 (9th Cir. 1993) ("Put
7 another way, punitive damages are recoverable only
8 where the defendant acted with the intent to vex,
9 injure, or annoy.") (citations omitted).

10 Here, the parties are engaged in a bona fide
11 dispute, and there has been no showing that Defendant
12 tried to take advantage of Plaintiff or otherwise act
13 with malicious or oppressive intent. In this context,
14 punitive damages are not proper. See Slottow, 10 F. 3d
15 at 1361 (rejecting punitive damages where the parties
16 were merely engaged in a contract dispute with each
17 side aggressively advancing its position, and the
18 record did not support a finding that the insurer acted
19 fraudulently). As such, the Court **GRANTS** Defendant's
20 Motion as to punitive damages.

21 6. Brandt Fees

22 Where an insurer breaches the implied covenant of
23 good faith and fair dealing, the insured can recover
24 attorneys' fees it incurred in order to obtain contract
25 benefits under the insurance policy ("Brandt fees").
26 Brandt v. Super. Ct., 37 Cal. 3d 813, 817 (1985).
27 Brandt fees are a component of damages which a
28 plaintiff must prove at trial. Id. at 819.

1 Defendant moves for summary judgment on Plaintiff's
2 claim for Brandt fees because Plaintiff failed to
3 produce evidence of these fees. Plaintiff argues that
4 the parties agreed to defer the issue of Brandt fees
5 until after a determination of bad faith liability.
6 Plaintiff alternatively contends that Defendant's
7 Motion is not supported by undisputed facts, because
8 Plaintiff already produced some Brandt fee evidence.
9 The Court addresses Plaintiff's arguments in turn.

10 First, it is well-established that "[s]ince
11 [Brandt] fees are recoverable as damages, the
12 determination of the recoverable fees must be made by
13 the trier of fact unless the parties stipulate
14 otherwise." Brandt, 37 Cal. 3d at 819. Plaintiff
15 attempts to circumvent this standard by pointing to the
16 parties' Updated Joint Rule 26(f) Report which states:
17 "Celerity proposes that discovery of the existence and
18 amount of its *Brandt* fees be phased to occur after an
19 adjudication of Scottsdale's liability, if any, as to
20 Celerity's bad faith claim." ECF No. 52.¹⁰ However, as
21 explicitly stated in the Report, Plaintiff merely
22 *proposed* that the parties defer Brandt fees. Neither
23 Defendant nor the Court ever accepted this proposal.

24
25 ¹⁰ Defendant objects to the Rule 26(f) report as immaterial,
26 irrelevant, and containing inadmissible hearsay. The Rule 26(f)
27 report, which was signed by both parties and filed with the
28 Court, is relevant and is being used to show why Plaintiff
believed that Brandt fee discovery would be phased, not for its
truth. See Fed. R. Evid. 801. Thus, this objection is
OVERRULED.

1 Without a stipulation by the parties to defer Brandt
2 fee discovery, or an Order by the Court bifurcating the
3 issues, Plaintiff is not excused from its discovery
4 obligations or its burden of proving its case at trial.

5 Next, the Court addresses whether Plaintiff's
6 purported evidence creates a triable issue of fact
7 sufficient to withstand summary judgment. See In re
8 Oracle Corp. Secs. Litig., 627 F.3d 376, 387 (9th Cir.
9 2010) (holding that where the moving party proves an
10 absence of evidence to support to the non-moving
11 party's case, "the burden then shifts to the non-moving
12 party to designate specific facts demonstrating the
13 existence of genuine issues for trial"). Plaintiff
14 indicates that it seeks Brandt fees incurred through
15 both Gibson Dunn and its counsel in the Instant Action,
16 Procopio, Cory, Hargreaves & Savitch LLP ("Procopio").
17 Miller Decl. ¶ 4.

18 With respect to the fees incurred by Procopio,
19 Plaintiff points to the deposition transcript of its
20 30(b)(6) witness to support its assertion that it
21 identified the Brandt fees incurred by Procopio. See
22 AOE Ex. 19, SIC00296-SIC00299. However, the only
23 information this witness provided as to Brandt fees was
24 that as of the time of his deposition on October 30,
25 2018, Procopio incurred fees "in the range of \$300,000"
26 for "all the claims of this action" and that he knew
27
28

1 this because "Ceci told" him.¹¹ Id. This evidence is
2 problematic as it is merely an approximation based on
3 hearsay statements made to the witness by others. See
4 Armor Ministries v. Century Surety Co., No. 3:13-cv-
5 01441-GPC-BGS, 2016 WL 1388077, at *15 (S.D. Cal. April
6 7, 2016) ("[A] recover[y] of [Brandt] fees requires
7 more than fair proximations."). Moreover, the
8 approximation sheds no light on the amount of fees
9 incurred through Procopio specifically to obtain Policy
10 benefits, as opposed to the fees incurred through
11 Procopio in pursuing Plaintiff's tort claim. See id.
12 at *14 (S.D. Cal. April 7, 2016) (quotations omitted)
13 ("In order to recover [Brandt] fees, a plaintiff must
14 be able to separate out its litigation expenses such
15 that it can clearly demarcate the fees that are
16 attributable to its pursuit of the benefits it is
17 entitled to under the policy, which are recoverable as
18 [Brandt] fees, from the fees expended on obtaining
19 amounts in excess of the policy . . . which aren't
20 recoverable. . . . A plaintiff's attorney has no excuse
21 for failing to do the necessary segregation of fees
22 because the [Brandt] rule is not new."). Further,
23 Plaintiff does not dispute that it did not produce,
24 describe, or otherwise make Procopio's invoices
25 available for inspection by Defendant, as it is
26 required to do under Rule 26. See Nationwide Mut. Ins.

27
28 ¹¹ Presumably, the witness is referring to Plaintiff's
coverage counsel, Cecilia O. Miller, as "Ceci."

1 Co. v. Ryan, No. 12-CV-05000-JST, 2014 WL 12709392, at
2 *2 (N.D. Cal. Apr. 14, 2014) ("By failing to either
3 produce a copy of its attorney billing records, produce
4 a description of them, or make the records available,
5 Defendants clearly violated their obligations under
6 Rule 26"). Thus, Plaintiff's purported
7 evidence regarding the Brandt fees incurred through
8 Procopio is insufficient.¹²

9 With respect to the Brandt fees Plaintiff incurred
10 through Gibson Dunn, Plaintiff alleges that it provided
11 Gibson Dunn invoices identifying approximately \$39,706
12 in Brandt fees. Plaintiff does not provide the Court
13 with the invoices, but instead, supports its assertion
14 by citing to its attorney's declaration, in which she
15 states that she has regularly transmitted to Defendant
16 copies of invoices showing the fees incurred by Gibson
17 Dunn "in responding to the federal investigation" and
18 that the invoices "included" Brandt-related work done
19 by the firm which approximately amounts to \$39,706.
20 Miller Decl. ¶¶ 3, 4. However, Brandt requires that
21 Plaintiff differentiate between recoverable and
22 nonrecoverable fees within the invoices. See Armor
23 Ministries, 2016 WL 1388077, at *14. The fact that the
24 invoices may have included some of the Brandt fees
25 which Plaintiff seeks to recover, without any more
26

27 ¹² Indeed, Plaintiff's counsel admits that she consistently
28 objected to deposition testimony or documents concerning its
Brandt fees. Miller Decl. ¶¶ 13-14.

1 information establishing that Plaintiff adequately
2 identified or segregated these fees as required by
3 Brandt, is insufficient to withstand summary judgment.¹³
4 See e.g. Slottow, 10 F.3d at 1362 ("Because the bank
5 made no effort to segregate its litigation expenses as
6 required by [Brandt], we affirm the district court's
7 decision not to award fees.").¹⁴

8 Because Plaintiff fails to establish that it
9 provided Defendant with evidence of its Brandt fees,
10 segregated as required by Brandt, Plaintiff has not
11 satisfied its burden of establishing the existence of a
12 triable issue of fact. See Erickson v. State Farm
13 General Ins. Co., No. 2:12-cv-2784 MCE DAD PS., 2013 WL
14 4056280, at *2 (E.D. Cal. Aug. 12, 2013) ("[S]ummary
15

16 ¹³ This is particularly so in light of the fact that,
17 according to Defendant, "Celerity never identified Gibson Dunn's
18 fees as its Brandt fees and Celerity's 30(b)(6) witness
19 identified Celerity's counsel of record [Procopio] when
20 describing its Brandt fee claim." Def.'s Reply at 13:8-10.
21 Thus, presumably, Defendant was not aware that it had to search
22 through the Gibson Dunn invoices to identify Brandt fees.

23 ¹⁴ In arguing that it did provide some evidence of Brandt
24 fees incurred through Gibson Dunn, Plaintiff also points to its
25 fee expert's report, in which the expert opined that Plaintiff
26 incurred \$39,706 in Brandt fees through Gibson Dunn. See IOE Ex.
27 M. However, Defendant objects to this report as inadmissible
28 hearsay. Expert reports are generally inadmissible hearsay. See
Hunt, 599 Fed. Appx. at 621 (concluding that expert report was
inadmissible hearsay); Alexie v. United States, No. 3:05-cv-00297
JWS, 2009 WL 160354, at *1 (D. Alaska Jan. 21, 2009)
("Application of the hearsay rule to exclude both parties' expert
reports is quite straightforward. The reports are out-of-court
statements by witnesses offered for their truth and so fall
within the definition of hearsay"). Plaintiff does not
argue that an exception to the hearsay rule applies to render the
evidence admissible. Accordingly, the Court **SUSTAINS** Defendant's
Objection to this report.

1 judgment should be entered, after adequate time for
2 discovery and upon motion, against a party who fails to
3 make a showing sufficient to establish the existence of
4 an element essential to that party's case, and on which
5 that party will bear the burden of proof at trial.").
6 As such, the Court **GRANTS** Defendant's Motion as to
7 Plaintiff's claim for Brandt fees.

8 **III. CONCLUSION**

9 Based on the foregoing, the Court **GRANTS in part**
10 Defendant's Motion for Summary Judgment as to (1)
11 Plaintiff's claim that Defendant breached the contract
12 by failing to reimburse its pre-tender defense fees;
13 (2) punitive damages; and (3) Brandt fees. The Court
14 **DENIES in part** Defendant's Motion for Summary Judgment
15 as to (1) breach of the implied covenant of good faith
16 and fair dealing; and (2) breach of contract based on
17 Defendant's failure to provide an immediate defense to
18 Plaintiff, and Defendant's failure to assign separate
19 counsel to Walden sooner.

20
21 **IT IS SO ORDERED.**

22
23 DATED: February 4, 2019

s/ RONALD S.W. LEW
HONORABLE RONALD S.W. LEW
Senior U.S. District Judge