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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PREMIER POOLS MANAGEMENT CORP.,
a Nevada Corporation,

Plaintiff,

v.

COLONY INSURANCE COMPANY, a
Virginia Corporation,

Defendant.

No. 2:13-cv-02038-JAM-EFB

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiff Premier Pools Management Corp. ("Plaintiff") brings this lawsuit against Defendant Colony Insurance Company ("Defendant") alleging that Defendant breached the parties' insurance agreement by declining to defend Plaintiff in a lawsuit brought against it by Premier Pools, Inc. ("PPI") in Texas state court (the "Texas Case"). See Second Amended Complaint ("SAC"), ECF No. 38-1. This Court granted Defendant's first summary judgment motion in April 2014. ECF No. 20. The Court reasoned that Plaintiff was not a named insured under the parties' insurance agreement's plain language and so Defendant had no duty to defend in the Texas Case. Id. at 8. In May 2016, the Ninth Circuit reversed. ECF No. 27 (the "Ninth Circuit Ruling"), 649

1 Fed. Appx. 490 (9th Cir. 2016).

2 After the Ninth Circuit mandate issued, Plaintiff filed its
3 SAC in August 2017 and Defendant initially moved for judgment on
4 the pleadings in January 2018. See ECF Nos. 38-1 and 45. After
5 that motion was denied without prejudice for failing to meet and
6 confer, Plaintiff filed its motion for partial summary judgment
7 in April 2018. ECF No. 54; ECF No. 71 ("Pl. Mem."). Plaintiff
8 seeks summary judgment on its first claim for declaratory relief,
9 second claim for breach of insurance contract – duty to defend,
10 and third claim for breach of insurance contract – duty to
11 indemnify. Pl. Mem. Defendant opposed and filed a cross-motion
12 for summary judgment as to all of Plaintiff's claims – the three
13 claims Plaintiff moved on and also Plaintiff's claims for breach
14 of the implied covenant of good faith and fair dealing and its
15 claim for punitive damages. Def. Mem., ECF No. 74. Plaintiff
16 opposed the cross-motion. Pl. Opp., ECF No. 75. The motions
17 were heard on June 26, 2018.

18 19 II. FACTUAL AND PROCEDURAL BACKGROUND

20 Plaintiff entered into an insurance agreement with Defendant
21 in 2010 (the "Policy"). The Pertinent policy language reads as
22 follows:

23 "We will pay those sums that insured becomes legally
24 obligated to pay as damages because of 'personal and
25 advertising injury' to which this insurance applies.
We will have the right and duty to defend the insured
against any 'suit' seeking those damages."

26 "'Personal and advertising injury means' injury,
27 including consequential 'bodily injury', arising out of
28 one or more of the following offenses: ... Oral or
written publication, in any manner, of material that
slanders or libels a person or organization or

1 disparages a person's or organization's goods, products
2 or services ... The use of another's advertising idea
3 in your 'advertisement'; or Infringing upon another's
4 copyright, trade dress or slogan in your
5 'advertisement.'"

6 ""Advertisement' means a notice that is broadcast or
7 published to the general public or specific marketing
8 segments about your goods, products or services for the
9 purpose of attracting customers or supports."

10 See Insurance Policy No. AC800001A-2, Ex. 1 to SAC, ECF No.
11 38-1, at 29, 55-65; Insurance Policy No. AC800001A-3, Ex. 2
12 to SAC, ECF No. 38-1, at 95, 124-134. The Policy's coverage
13 exclusions state, in relevant part:

14 "Knowing Violation Of Rights Of Another: 'Personal and
15 advertising injury' caused by or at the direction of
16 the insured with the knowledge that the act would
17 violate the rights of another and would inflict
18 'personal and advertising injury'."

19 "Material Published With Knowledge Of Falsity:
20 'Personal and advertising injury' arising out of oral
21 or written publication of material, if done by or at
22 the direction of the insured with knowledge of its
23 falsity."

24 "Infringement Of Copyright, Patent, Trademark Or Trade
25 Secret: 'Personal and advertising injury' arising out
26 of the infringement of copyright, patent, trademark,
27 trade secret or other intellectual property rights.
28 Under this exclusion, such other intellectual property
 rights do not include the use of another's advertising
 idea in your 'advertisement.' However, this exclusion
 does not apply to infringement, in your
 'advertisement', of copyright, trade dress or slogan."

29 Id.

30 A. The Texas Case - The First Trial

31 In July 2012, Premier Pools, Inc. ("PPI," with its principal
32 place of business in Lewisville, Texas) filed its First Amended
33 Petition ("FAP") in Texas state court against Plaintiff and Shan
34 Pools, Inc. (Plaintiff's licensee incorporated in Allen, Texas),
35 bringing claims for: (1) common law trade name infringement;

1 (2) common law service mark infringement; (3) unfair competition;
2 (4) infringement of Texas service mark; and (5) trade name and
3 service mark dilution. SAC, ECF No. 38-1, Ex. 6, at 217-244.

4 The FAP includes the following relevant allegations:

5 "... I[n] 2011, Defendant Pools Management licensed
6 Defendant Shan to use the name "Premier Pools and Spas"
7 and began advertising Defendant Shan as its
8 "Dallas/Fort Worth location on its website." FAP, ¶ 2.

9 "Defendants have taken advantage of Plaintiff's well
10 known "Premier Pools" name and mark, and its reputation
11 for providing services of the highest quality, to cause
12 Plaintiff to lose business and harm its valuable
13 reputation." FAP, ¶ 2.

14 "For over 22 years, the Dodds have built a favorable
15 and valuable reputation for themselves in this
16 geographic area under the trade name and service mark
17 'Premier Pools' [.]" FAP, ¶ 12.

18 "In early 2012, Defendant Pools Management blanketed
19 the Dallas-Fort Worth market with advertising about
20 'Premier Pools and Spas' and its operations in Dallas,
21 sending advertisements to homes all over the Dallas-
22 Fort Worth area..." FAP, ¶ 21.

23 "Beyond all of the confusion that is being caused and
24 the business that is being lost, Plaintiff's reputation
25 and goodwill are being seriously harmed because
26 Defendant Shan's work does not rise to the level of
27 quality and professionalism that has defined
28 Plaintiff's business." FAP, ¶ 34.

"A direct example of how Defendant Shan's work is
tarnishing Plaintiff's reputation occurred in Flower
Mound, when a city official, as a courtesy, called
Plaintiff to ask if a pool that had been built in the
area was Plaintiff's product, saying effectively that
the pool that had been built was so deficient and in
violation of the relevant code provisions that it could
not have been Plaintiff's work." FAP, ¶ 34.

"By using the name 'Premier Pools and Spas,' Defendant
Shan has unfairly competed with Plaintiff by
appropriating Plaintiff's valuable goodwill and
business and injuring Plaintiff thereby. FAP, ¶ 50.

On March 5, 2013, four days after receiving Plaintiff's
tender of the Texas state court case, Colony's adjuster, Becky
Vogel ("Vogel") notified Plaintiff's founder Paul Porter

1 ("Porter") by email that Defendant was "in receipt of the notice
2 of the lawsuit in Texas alleging trademark infringement. Colony
3 will investigate this matter under a full and complete
4 reservation of rights as afforded by the policy." Pl. Notice of
5 Lodgment ("PNOL"), ECF No. 71-5, Ex. 2, ECF No. 71-7. Vogel also
6 asked Porter for a copy of PPI's complaint against Plaintiff to
7 investigate whether there was coverage under the Policy. Id. On
8 March 15, 2013, Vogel told Porter that based on her initial
9 review, it appeared PPI was alleging trade name and service mark
10 claims that the Policy did not cover. Decl. of Rebekah Vogel
11 ("Vogel Decl."), ECF No. 74-4, ¶ 4.

12 To investigate further, Vogel spoke with Plaintiff's counsel
13 in the Texas Case, Leland de la Garza ("de la Garza"), on March
14 27, 2013, and went through each of the offenses listed in the
15 definition of "personal and advertising injury" with him. Vogel
16 Decl., ¶ 5. Vogel claims that de la Garza told her there was
17 (1) no allegation in the lawsuit that Plaintiff used PPI's
18 advertising ideas or that Plaintiff was infringing upon a
19 copyright, trade dress or slogan; (2) that "Premier Pools" was
20 not a slogan; and (3) the PPI lawsuit was purely a trade name and
21 service mark infringement matter. Id. de la Garza testified
22 that he recalls reviewing the claims with Vogel but does not
23 recall her using the terms "offenses" and he does not believe he
24 stated that "PPI was not alleging any claim that fit within the
25 covered offenses." Decl. of Leland de la Garza ("de la Garza
26 Decl."), ECF No. 75-5, ¶ 2.

27 The next day, Colony (via Vogel) formally denied Plaintiff's
28 tender by letter. SAC, Ex. 8, ECF No. 38-1, at 247-256. Vogel

1 explained in her letter that trade name infringement and service
2 mark infringement did not fit within the "Personal and
3 Advertising Injury" definition under the Policy and that
4 Plaintiff was not named as an insured on the Policy. Id.
5 Defendant also reserved the right to rely on the exclusion for
6 "Infringement Of Copyright, Patent, Trademark Or Trade Secret"
7 claims and reserved the right to assert that Plaintiff did not
8 qualify as an insured. Id.

9 The Texas Case went to trial in July 2013 and the jury found
10 in favor of PPI, but awarded no damages. Decl. of Paul Porter
11 ("Porter Decl."), ECF No. 71-3, ¶¶ 6-7. Plaintiff moved for, and
12 was granted, a second trial. Id.

13 B. The Texas Case - The Second Trial

14 In July 2012, Plaintiff again tendered a coverage request to
15 Defendant, and Defendant again declined. Porter Decl., ¶ 7. In
16 September 2013, PPI brought substantially the same claims against
17 Plaintiff and Shan Pools in its Second Amended Petition ("SAP").
18 PNOL, Ex. 1, ECF No. 71-6. The only apparent differences in the
19 claims are that the second claim is styled "Common Law Trademark
20 and Service Mark Infringement," the fifth claim is styled
21 "Trademark, Trade Name and Service Mark Dilution" and PPI added a
22 claim for declaratory judgment. Id. Porter did not send the SAP
23 to Vogel. Vogel Decl., ¶ 9.

24 1. Allegations And Testimony About Advertising

25 The SAP added new allegations that Plaintiff created a
26 letter purportedly from the Better Business Bureau ("BBB") that
27 Plaintiff used in its advertising and sales that falsely
28 attributed BBB complaints to PPI to make it look like PPI

1 committed the actions giving rise to the BBB complaints. SAP,
2 ¶¶ 46-48. Specifically, PPI alleged that Defendant Shan Johnson
3 wrote a bogus letter purporting to be from the BBB dated April 9,
4 2012. Id. In it, Johnson allegedly wrote that the BBB
5 erroneously named "Premier Pools and Spas of Allen Texas with the
6 complaint you have inquired about. This complaint should have
7 been placed in the bureau of a smaller pool builder in
8 Lewisville, Texas also using the name Premier Pools. We have
9 corrected this error and offer you our apologies for this
10 inconvenience." Id., ¶ 46. PPI alleged Shan Johnson had given
11 this letter to one or more of his sales personnel and told them
12 to show this to customers if they inquired about complaints filed
13 against Defendant Shan with the BBB. Id. PPI alleged that the
14 BBB denied authoring this letter. Id., ¶ 47. Finally, PPI
15 alleged that this letter was created to show to potential
16 customers to attempt to deflect inquiries about BBB complaints
17 against Shan Johnson to PPI, and "falsely make it look like the
18 offending conduct was committed by [PPI]." Id.

19 PPI expert Karl D. Weisheit ("Weisheit") also wrote in his
20 November 2013 report that Plaintiff sent advertisements
21 throughout the Dallas-Fort Worth area about "Premier Pools and
22 Spas" that confused customers into thinking they were looking at
23 advertisements by PPI. PNOL, Ex. 3. For example, the
24 advertisements falsely claimed Plaintiff had operated in the area
25 since 1988 because PPI had operated in the area since 1989. Id.
26 One of Plaintiff's representatives testified that customers cared
27 about how long the companies had been around. PNOL Ex. 5, ECF
28 No. 71-10, Trial Transcr. Vol. 7, 247:24-248:13.

1 At the second trial in September 2014, PPI's representatives
2 testified that their advertising relied almost entirely on their
3 name and what it represented. PNOL Ex. 5, ECF No. 71-10, Trial
4 Transcr. Vol. 7, 191:15-22; PNOL Ex. 6, ECF No. 71-11, Trial
5 Transcr. Vol. 8, 53:13-20. Plaintiff's representatives also
6 testified that they falsely showed pools built by Plaintiff's
7 franchises outside the Dallas-Fort Worth area and tried to pass
8 them off like they had been built in the Dallas-Fort Worth area.
9 PNOL Ex. 5, Trial Transcr. Vol. 7, 135:6-15.

10 After the case closed and the parties prepared jury
11 instructions, PPI's counsel argued that false advertising
12 constituted independent tortious activity that was required for
13 PPI's unfair competition claim. PNOL Ex. 7, ECF No. 71-12, Trial
14 Transcr. Vol. 11, 37:18-38:2. The Court disagreed that false
15 advertising had been tried, but stated "I'm not sure why we
16 didn't try a false advertising claim because it's certainly
17 present, but we didn't." Id., 44:4-9. The Court's jury
18 instruction on PPI's unfair competition claim stated, in relevant
19 part, that "[t]o prove unfair competition, it is not necessary to
20 prove that Defendants intended to deceive the public, nor that
21 anyone was actually deceived. However, either actual or probable
22 deception must be shown, and a mere possibility of deception is
23 not enough." Id., 74:8-18. During closing arguments,
24 Plaintiff's counsel argued that Premier Pools is just defined as
25 a "high quality pool, a first class pool." Id., 113:21-23.
26 PPI's counsel responded in rebuttal that "[t]he deception, the
27 clever thing is, well, if you advertise, if you spend more, you
28 have a bigger website, you have search engine optimization, you

1 have the mark ... you can't advertise your way to a good
2 reputation." Id., 157:17-23.

3 Recently in a deposition, Plaintiff's attorney from the
4 Texas Case testified that PPI's only slogan was its name, Premier
5 Pools. PNOL Ex. 8, ECF No. 71-13, Depo. of Leland de la Garza,
6 52:12-53:11, 57:17-58:10.

7 2. Defendant's Involvement In The Second Trial

8 At the second trial, Plaintiff retained Veritas Advisory
9 Group ("Veritas") as rebuttal damages experts. Porter Decl.,
10 ¶ 12; SAC, ¶ 30. Plaintiff, however, could not afford Veritas
11 and asked Defendant to pay for Veritas's services. Id.
12 Defendant agreed to pay \$25,000 for the expert's services and
13 reserved its rights. Def. Not. of Lodgment of Exhibits ("DNOL"),
14 ECF No. 74-8, Ex. 4, ECF No. 74-12. One of Defendant's explicit
15 reservations was that it

16 continues its denial of coverage to Premier Pools on
17 all the grounds previously asserted in its
18 correspondence and its papers filed in the matter of
19 *Premier Pools Management Corp. v. Colony Insurance*
20 *Company*, Case No. 2:13-cv-02038-JAM-EFB (E.D. CA),
21 including without limitations that Premier Pools is not
22 an insured under the Colony policy, that the claims in
23 the Underlying Action do not fall within the policy's
24 "personal and advertising injury" coverage and that
25 coverage for the claims are barred by various
26 exclusions [.]

27 Id. Defendant never sought reimbursement of these fees it paid.
28 Porter Decl., ¶ 3. In addition to paying for Veritas's services
at the second trial, Defendant also had a representative attorney
attend the second trial. PNOL Ex. 9, ECF No. 14, Depo. of Ellen
Fine ("Fine Depo."), ECF No. 71-14, 58:10-24.

In October 2014, the jury found Plaintiff liable to PPI for
trademark and tradename infringement and unfair competition and

1 awarded \$287,876.00 in damages for lost profits. SAC, Exs. 10-
2 11, at 259-78. Plaintiff settled the Texas Case with PPI in
3 April/May 2017 while the appeal of the judgment was pending. See
4 Porter Decl., ¶¶ 14-17; SAC, ¶ 77.

5 C. The Ninth Circuit Ruling And Remand

6 In May 2016, the Ninth Circuit reversed this Court's
7 previous grant of Defendant's motion for summary judgment. ECF
8 No. 27 ("Ninth Circuit Ruling"), 649 Fed. Appx. 490 (9th Cir.
9 2016). The Ninth Circuit found that the Policy documents were
10 ambiguous as to which entities were insured and that the policy
11 should be interpreted as a "layman would read it and not as it
12 might be analyzed by an attorney or an insurance expert." Id. at
13 2 (internal quotation marks and citation omitted). The Ninth
14 Circuit concluded that, when the extrinsic evidence is
15 considered, Plaintiff "sufficiently established that it was an
16 insured so as to trigger a duty to defend under California law."
17 Id., at 3 (internal citation omitted). Accordingly, the Ninth
18 Circuit held that "because there was potential coverage for the
19 underlying suit, Colony had a duty to defend it." Id. The Ninth
20 Circuit, however, explicitly noted that "Colony raises other
21 coverage defenses. However, the district court confined its
22 decision to the Declarations Certificates. We decline to
23 consider the additional coverage issues for the first time on
24 appeal, leaving those issues for the district court on remand to
25 consider in the first instance." Id., at 3-4.

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1 III. OPINION

2 A. Law Of the Case - Ninth Circuit Ruling

3 Plaintiff argues that because the coverage issue was briefed
4 extensively and argued by Defendant in the Ninth Circuit, the
5 holding from the Ninth Circuit Ruling should be read broadly and
6 that law of the case means that the Ninth Circuit has already
7 decided that Defendant had a duty to defend. Pl. Mem. at 17; Pl.
8 Opp., at 2-4.

9 Defendant responds that Plaintiff has mischaracterized the
10 law of the case doctrine and the Ninth Circuit opinion. Def.
11 Mem. at 19-20. Law of the case does not apply to issues or
12 claims that were not actually decided. Mortimer v. Baca, 594
13 F.3d 714, 720 (9th Cir. 2010) (internal citation and quotation
14 marks omitted). In Mortimer, the district court granted summary
15 judgment on one issue, and the Ninth Circuit reversed, ruling
16 that the issue was for a jury to decide. Id. at 718-19. After
17 remand, the district court granted summary judgment a second time
18 on a different ground. Id. The Ninth Circuit affirmed and ruled
19 that law of the case did not bar the district court from granting
20 summary judgment a second time. Id. The Ninth Circuit explained
21 that, in applying law of the case, the statement in the initial
22 appellate opinion had to be read in the context of the entire
23 opinion. Id. at 720.

24 Here, similarly, this Court previously granted Defendant's
25 summary judgment motion on the basis that Plaintiff did not
26 qualify as an insured entity under Defendant's policies. The
27 Court did not address whether the Policy covered the claims
28 alleged in the Texas Case. ECF No. 20. The Ninth Circuit's

1 written opinion reversed this Court's ruling on whether Plaintiff
2 qualified as an insured entity. Ninth Circuit Ruling at 3.

3 Plaintiff contends that the Ninth Circuit's statement that
4 it declined to rule on additional coverage issues just means that
5 the Ninth Circuit declined to delve into the numerous coverage
6 issues raised by Defendant in its appellate opposition brief.
7 Pl. Opp. at 3. Plaintiff asserts that the Ninth Circuit's
8 statement does not mean the Ninth Circuit did not consider the
9 potential for coverage because the Ninth Circuit Panel asked
10 several questions about the potential for coverage at oral
11 argument. Id. Plaintiff also claims that the Ninth Circuit
12 found a potential for coverage and reserved "any additional
13 actual coverage issues for the Court on remand." Id. at 4.

14 Defendant responds that if Plaintiff was correct in
15 asserting that the Ninth Circuit summarily adjudicated the duty
16 to defend, it would have instructed this Court to enter judgment
17 for Plaintiff. Def. Reply, ECF No. 79, at 2. Defendant also
18 contends that what the parties briefed on appeal and argued on
19 appeal do not matter - what matters is what the Ninth Circuit did
20 and did not decide. Id. The Court agrees.

21 The Ninth Circuit only reversed this Court's ruling that
22 Plaintiff was not an insured under the Policy, since that was the
23 only issue before it. The Ninth Circuit did not decide any other
24 coverage issues and specifically stated that it was "leaving
25 those issues for the district court on remand to consider...".
26 This Court, therefore, must now address for the first time the
27 other coverage issues raised by the parties in these motions.

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1 B. Duty To Defend

2 Words in an insurance policy must be interpreted as they are
3 understood by the average insured person, not as they may be
4 understood by an intellectual property lawyer. See MacKinnon v.
5 Truck Ins. Exch., 31 Cal. 4th 635, 647-48 (2003). An insurer's
6 duty to defend its insured against claims is triggered when the
7 facts alleged in the complaint create a potential for coverage.
8 Scottsdale Ins. Co. v. MV Transp., 36 Cal. 4th 643, 654 (2005).
9 This is regardless of the technical legal causes of action
10 pleaded by the third party. Barnett v. Fireman's Fund Ins. Co.,
11 90 Cal. App. 4th 500, 510 (2001). The duty to defend also exists
12 where extrinsic facts known to the insurer suggest the claim may
13 be covered. Id. at 509-10. If any facts fairly inferable from
14 the complaint, or otherwise known by the insurer, suggest a claim
15 potentially covered by the policy, the insurer's duty to defend
16 arises. Scottsdale Ins. Co., 36 Cal. 4th at 654-55.

17 Where there is any issue of a potential for coverage and
18 therefore a duty to defend, the insurer must defend until it can
19 secure an adjudication that there is no such potential or duty.
20 Montrose Chem. Corp. v. Sup. Ct., 6 Cal. 4th 287, 295 (1993). An
21 insurer must protect the insured's interests as if it were its
22 own and it may not deny a claim without thoroughly investigating
23 it. Mariscal v. Old Republic Life Ins. Co., 42 Cal. App. 4th
24 1617, 1623 (1996) (internal citation and quotation marks
25 omitted). Accordingly, an insurer must liberally construe claim
26 forms and the policy in favor of coverage; exclusions are
27 strictly interpreted against the insurer. Id. (internal citation
28 omitted). The duty to defend does not depend on whether facts

1 supporting a covered claim predominate or generate the claim and
2 the labels applied to claims do not govern coverage. Pension
3 Trust Fund v. Federal Ins. Co., 307 F.3d 944, 951 (9th Cir.
4 2002).

5 There are, however, limitations on the duty to defend. The
6 duty is limited by the nature and kind of risk covered by the
7 policy. La Jolla Beach & Tennis Club, Inc. v. Indus. Indem. Co.,
8 9 Cal. 4th 27, 38 (1994). An insured may not trigger the duty to
9 defend by speculating about extraneous facts regarding potential
10 liability or ways in which the third party claimant might amend
11 its complaint at some future date. Gunderson v. Fire Ins. Exch.,
12 37 Cal. App. 4th 1106, 1114 (1995). In addition, the duty to
13 defend is not extinguished until the insurer negates all facts
14 suggesting potential coverage.¹ Scottsdale, 36 Cal. 4th at 655.

15 Once the insurer determines on the basis of the lawsuit and
16 the facts known to it at that time that there was no potential
17 for coverage, the insurer does not have a continuing duty to
18 investigate or monitor the lawsuit to see if the third party
19 later made some new claim not found in the original lawsuit.
20 Gunderson, 37 Cal. App. 4th at 1117. But where information
21 available at the time of tender shows no coverage and information
22 available later shows otherwise, a duty to defend may then arise.
23 Am. States Ins. Co. v. Progressive Cas. Ins. Co., 180 Cal. App.
24 4th 18, 26 (2009).

25 ///

26 ¹ Plaintiff argues that an insurer has a continuing duty to
27 evaluate a potential for coverage all the way thru trial in the
28 case. Pl. Opp. at 5. But Montrose, the case Plaintiff cites for
this proposition, does not support this argument. 6 Cal. 4th at
299.

1 1. Disparagement

2 Plaintiff claims that PPI's SAP alleged Plaintiff disparaged
3 PPI's products or services, thus triggering Defendant's duty to
4 defend under the Policy's "Personal and advertising injury"
5 provision. Pl. Mem. at 18. Plaintiff argues that, even if it
6 did not tender the SAP to Defendant, Defendant is charged with
7 knowledge of the SAP and what happened at the second trial since
8 it had a representative there. Pl. Mem. at 15. Plaintiff also
9 contends that even if the BBB allegations from the SAP are
10 alleged against Shan Johnson, they apply to Plaintiff because
11 PPI's causes of action were brought against both defendants. Id.

12 Disparagement concerns damage to the reputation of products,
13 goods, or services. Hartford Casualty Ins. Co. v. Swift
14 Distrib., Inc., 59 Cal. 4th 277, 288-89 (2014). There are two
15 elements to a disparagement claim in the context of commercial
16 liability coverage: "A false or misleading statement (1) must
17 specifically refer to the plaintiff's products or business, and
18 (2) must clearly derogate that product or business. Each
19 requirement must be satisfied by express mention or by clear
20 implication." Id. at 291.

21 Here, Plaintiff points to PPI's allegations that Plaintiff
22 created a letter specifically stating that Plaintiff was accused
23 of falsely informing potential customers that a BBB complaint was
24 wrongly attributed to Plaintiff when it should have been
25 attributed to PPI. Pl. Mem. at 19 (citing SAP, ¶¶ 46-48).
26 Plaintiff asserts that, since these allegations are extensions
27 and amendments to PPI's initial allegations of disparagement,
28 Defendant had a duty to defend these foreseeable allegations from

1 the beginning. Id.

2 Plaintiff also contends that Swift Distrib. (relied on by
3 Defendant), a case where no coverage was found for disparagement,
4 does not apply because there was no alleged inferiority in the
5 competing product in that case. Swift Distrib., 59 Cal. 4th at
6 297. In contrast, Plaintiff claims that the FAP alleges
7 Plaintiff's inferior product is alleged to have been attributed
8 to PPI. Pl. Mem. at 22 (citing FAP, ¶¶ 2, 34, 61 ("By
9 advertising such services in the same market for its 'Dallas/Fort
10 Worth' location through its website and through mailed
11 advertisements, Defendant Pools Management has actively
12 contributed to Defendant Shan's dilution of Plaintiff's trade
13 name and mark, and has done so knowingly since no later than July
14 of 2011"))).

15 Plaintiff also argues that Total Call, Int'l, Inc. v.
16 Peerless Ins. Co. (also relied on by Defendant), 181 Cal. App.
17 4th 161, 170-71 (2010) does not apply. Pl. Mem. at 22. In Total
18 Call, the California Court of Appeal found no disparagement
19 because the gravamen of the relevant allegations against the
20 insured were that the insured misstated its own products'
21 capabilities, to the detriment of the entire industry and not the
22 underlying plaintiff specifically. 181 Cal. App. 4th at 170-71.
23 Here, PPI alleged that Plaintiff misstated its capabilities to
24 the detriment of PPI specifically. FAP, ¶¶ 2, 19, 31-34, 61.

25 Plaintiff contends this case is more like Tria Beauty v.
26 Nat'l Fire Ins. Co., No. C 12-05465, 2013 WL 2181649 (N.D. Cal.
27 May 20, 2013). Pl. Mem. at 22. There, the key issue was whether
28 the policy language included coverage for claims that sounded in

1 disparagement in the broader sense of injurious falsehoods, as
2 opposed to a narrower category of claims that met the pleading
3 requirements for trade libel. Tria Beauty, 2013 WL 2181649, *5.
4 In denying summary judgment for the insurer, the Northern
5 District of California stated that the term “disparages” in the
6 policy should be resolved by construing the language in a way
7 that is consistent with the plaintiff’s objectively reasonable
8 expectations, and in case of doubt, against the insurers. Id.
9 The Northern District of California cited Travelers Prop. Cas.
10 Co. v. Charlotte Russe Holding, Inc., 207 Cal. App. 4th 969, 976-
11 80 (2012) in holding that “the disparagement policy language at
12 issue here covered implied disparagement claims based on
13 statements about the insured’s own products.” Id. Plaintiff
14 argues that, similarly, its alleged advertising about its own
15 products—that it was established in 1988 and that it built
16 certain pools in the Dallas Fort-Worth area—impliedly disparaged
17 PPI. Pl. Mem. at 23 (citing PNOL Ex. 5, Transcr. Vol. 7, 135:6-
18 15; PNOL Ex. 7, Transcr. Vol. 11, 97:21-99:21).

19 Defendant counters that there was no implicit disparagement
20 in the Texas Case because the PPI lawsuit only alleged that
21 Plaintiff copied PPI’s good name and traded on its good
22 reputation. Def. Mem. at 11. In support, Defendant relies on
23 cases that the California Supreme Court cited in Swift. Def.
24 Mem. at 12. In Aetna Casualty & Surety Co. v. Centennial Ins.
25 Co., 838 F.2d 346 (9th Cir. 1988), the Ninth Circuit found the
26 insurer had no duty to defend under its trade libel coverage
27 provision because disparagement claims did not arise from
28 allegations that the policyholder had “palmed off” the

1 competitor's products as its own. 838 F.2d at 349, 351. The
2 underlying complaint did not allege any publication which
3 directly cast aspersions on the underlying plaintiff's product or
4 business. Id. In Homedics, Inc. v. Valley Forge Ins. Co., 315
5 F.3d 1135 (9th Cir. 2003), the Ninth Circuit found that the
6 insurer had no duty to defend because an entity's imitation of a
7 product design did not constitute disparagement. 315 F.3d at
8 1137, 1142. In Microtec Research v. Nationwide Mut. Ins. Co., 40
9 F.3d 968, 972 (9th Cir. 1994), the Ninth Circuit ruled that the
10 insurer had no duty to defend based on disparagement because the
11 underlying claims were only that Microtec palmed off the
12 underlying plaintiff's compilers and not that Microtec made a
13 false or injurious statement about the quality of the underlying
14 plaintiff's compilers. 40 F.3d at 972.

15 Defendant also argues that, just like all the aforementioned
16 Ninth Circuit cases and Swift Distrib., PPI here did not allege
17 that Plaintiff specifically referred to PPI in its advertisements
18 or specifically disparaged PPI's products or services. Def. Mem.
19 at 12. PPI did not allege Plaintiff's advertisements referred to
20 PPI and only alleged that Plaintiff misappropriated its name,
21 which caused confusion. Id. Accordingly, Defendant argues it
22 had no duty to defend under a disparagement theory. Id.
23 Defendant adds that coverage under the disparagement provision
24 does not arise from PPI's alleged damage to its reputation from
25 consumers thinking PPI did the inferior work. Def. Mem. at 13.

26 Defendant further contends that Plaintiff's reliance on Tria
27 Beauty is misplaced because it predated Swift Distrib., which is
28 binding on this Court's application of California law as a

1 California Supreme Court holding. Def. Mem. at 13 (citing Aceves
2 v. Allstate Ins. Co., 68 F.3d 1160, 1164 (9th Cir. 1995)).

3 Defendant also notes that Tria Beauty has questionable persuasive
4 value because it followed Charlotte Russe, which Swift Distrib.
5 specifically addressed and disapproved of. Id.; Tria Beauty,
6 2013 WL 2181649, * 6; Swift Distrib., 59 Cal. 4th at 295.

7 Defendant asserts that, as a general matter, the new BBB
8 allegations from the SAP did not trigger a duty to defend
9 because: (1) Plaintiff never tendered the SAP to Defendant;
10 (2) the BBB allegations were made against Shan Johnson and not
11 Plaintiff; and (3) the claim based on the BBB letter would fall
12 within the Policy exclusions for "material published with
13 knowledge of falsity" and "knowing violation of rights of
14 another." Def. Mem. at 21-22. Defendant mentions that when it
15 denied coverage in March 2013, it told Plaintiff to forward any
16 information which they thought would be relevant to policy
17 coverage. Id. at 22. But Plaintiff never forwarded the SAP or
18 tendered it, or even attached it in this case until Plaintiff's
19 summary judgment motion. Id. And the Second Trial that
20 Defendant's representative attended did not mention the BBB
21 allegations. Id. In support of its argument, Defendant cites
22 Travelers Casualty & Surety Co. v. Employers Ins. Of Wasau, 130
23 Cal. App. 4th 99 (2005), where the California Court of Appeal
24 found the insurer had no duty to defend because facts giving rise
25 to potential coverage were only asserted in the fourth amended
26 complaint, which was never tendered. Id.

27 Finally, Defendant reasons that the BBB letter, if bogus,
28 could not have been written without knowing it was false. Def.

1 Mem. at 22. The BBB allegations would fall within the “Knowing
2 Violation Of Rights Of Another” and “Material Published With
3 Knowledge Of Falsity” Policy exclusions. Id.

4 Plaintiff counters that the BBB allegations establish a
5 potential for coverage under the Policy because the alleged
6 conduct involved disseminating damaging information (the BBB
7 complaint) against PPI, which “directly cast aspersions” on PPI’s
8 business. Pl. Opp. at 16. But the BBB allegations do not state
9 that Plaintiff casted aspersions on PPI’s business. Plaintiff
10 also fails to address the Ninth Circuit cases about disparagement
11 that Defendant cited and fails to address Defendant’s claim that
12 Tria Beauty relies on law that has been disapproved of by the
13 California Supreme Court. See id.

14 The Court finds that the FAP did not give rise to coverage
15 under the disparagement provision - the FAP simply alleges that
16 Plaintiff traded on PPI’s strong reputation and name. It does
17 not allege that Plaintiff directly casted aspersions on PPI’s
18 name or products or that Plaintiff made false or injurious
19 statements about the quality of PPI’s products. The
20 disparagement provision does not apply. See Swift Distrib., 59
21 Cal. 4th at 296; Aetna, 838 F.2d at 349, 351; Homedics, 315 F.3d
22 at 1137, 1142; Microtec, 40 F.3d at 972.

23 The Court further finds that the BBB letter allegations from
24 the SAP did not trigger a duty to defend. Defendant did not have
25 a duty to further investigate coverage until Plaintiff submitted
26 a new tender. See Upper Deck, 358 F.3d 608, 613 (9th Cir. 2004).
27 Plaintiff alleged it asked and was refused coverage for defense
28 of the Second Trial in the SAC, but it does not say when or what

1 information it sent to Defendant. See SAC, ¶ 31. And Plaintiff
2 did not rebut Defendant's contention that it never received the
3 SAP until the recent depositions in this case. See Pl. Opp. at
4 17, n.66. The Court finds that Defendant's duty to defend was
5 not triggered under any potential disparagement allegations.

6 2. Advertisement

7 Plaintiff claims Defendant alternately had a duty to defend
8 under the Policy's "use of another's advertising idea in your
9 'advertisement'" provision because PPI alleged that Plaintiff's
10 use of the name "Premier Pools" in advertisements harmed it. Pl.
11 Mem. at 19.

12 Copying a competitor's product and selling that product does
13 not constitute use of an advertising idea for an insurer's duty
14 to defend. Oglio Entm't Grp., Inc. v. Hartford Cas. Ins. Co.,
15 200 Cal. App. 4th 573, 584-85 (2011). Even where an insured
16 infringes on a patent in their advertisement, this does not
17 constitute use of another's advertising idea. Mez Indus., Inc.
18 v. Pac. Nat'l Ins. Co., 76 Cal. App. 4th 856, 872 (1999). But
19 when the infringement deals with an advertising idea itself, that
20 constitutes use of an advertising idea. Hyundai Motor Am. v.
21 Nat. Union Fire Ins. Co. of Pittsburgh, Pa., 600 F.3d 1092, 1101-
22 1102 (9th Cir. 2010) (found advertising idea existed where the
23 infringement dealt with a way to solicit customers).

24 Plaintiff points out that PPI officials testified at the
25 Second Trial that PPI's entire advertising scheme was to use its
26 name "Premier Pools" by yard signs and referrals because the name
27 was everything. Pl. Mem. at 19. Plaintiff also notes that the
28 FAP alleges Plaintiff took advantage of PPI's well known "Premier

1 Pools” name and mark, and its reputation for providing services
2 of the highest quality. Pl. Mem. at 20 (citing FAP, ¶ 2).
3 Plaintiff further argues that coverage arises from Plaintiff
4 falsely marketing that it was established in Texas in 1989 and
5 trying to exploit the fact that PPI came into the Dallas Fort-
6 Worth area in 1989. Id.

7 Defendant counters that Plaintiff’s infringement of PPI’s
8 name “Premier Pools” was not the use of another’s advertising
9 idea. Def. Mem. at 14-15. Defendant specifically argues that
10 “California courts and the Ninth Circuit have interpreted
11 “advertising idea” based on its plain meaning—an *idea* used for
12 advertising. ‘Advertising idea’ does not mean a company’s name
13 or product itself ...” Id. at 14. The Court agrees and finds
14 that “Premier Pools” is a *name*, and not an advertising *idea*. The
15 Court finds that PPI did not allege that Plaintiff stole an
16 advertising idea, e.g., a special computer program designed to
17 track customer preference data. The “use of an advertising idea”
18 Policy coverage provision does not apply.

19 3. Slogan Infringement

20 Plaintiff next contends that Defendant’s duty to defend was
21 triggered by potential slogan infringement claims based on the
22 facts alleged in the FAP and SAP. Pl. Mem. at 20.

23 In Street Surfing, LLC v. Great American E&S Ins. Co. 776
24 F.3d 603, 608 (9th Cir. 2014)², the Ninth Circuit stated that the
25 definition of slogan is “a brief attention-getting phrase used in
26 advertising or promotion or a phrase used repeatedly, as in

27 ² Plaintiff cites to Street Surfing, 752 F.3d 853 (9th Cir. 2014)
28 in its moving papers, but that opinion was explicitly amended and
superseded by Street Surfing, 776 F.3d 603. Pl. Mem. at 21.

1 promotion.” (citing Palmer v. Truck Ins. Exch., 21 Cal. 4th 1109
2 (1999)). The Ninth Circuit also noted that there may be
3 instances where the name of a business, product, or service, by
4 itself, is also used as a slogan. Id. (citing Palmer, 21 Cal.
5 4th 1109). The Ninth Circuit acknowledged that the Eighth
6 Circuit in Interstate Bakeries Corp. v. OneBeacon Ins. Co., 686
7 F.3d 539, 546 (8th Cir. 2012) mentioned that “Nature’s Own” could
8 serve as a slogan, even though it was also a name. In finding no
9 duty to defend, however, the Ninth Circuit cited Interstate
10 Bakeries Corp. to explain that the underlying plaintiff never
11 suggested that the insured ever used “Streetsurfer” as a slogan.
12 Id. at 609. The Ninth Circuit concluded that the duty to defend
13 was absent because the plaintiff used “Streetsurfer” as a
14 recognizable brand name to identify his products, not as a phrase
15 promoting that brand. Id.

16 In Palmer v. Truck Ins. Exch., 21 Cal. 4th 1109 (1999), the
17 California Supreme Court also held that a trademarked name was
18 not a slogan. The insured was sued for infringing the mark
19 “Valencia” in its housing project known as “Valencia Village
20 Apartments.” Id. at 1112-13. The California Supreme Court
21 rejected the contention that the conduct constituted slogan
22 infringement because “the infringing use of a trademark that is
23 merely a word in a phrase used as a slogan is not the same as the
24 infringing use of a slogan.” Id. at 1120.

25 Plaintiff contends that the name “Premier Pools” is an
26 advertising slogan since it is the phrase that Plaintiff and PPI
27 both used for promoting the brand Premier Pools. Pl. Mem. at 21.
28 Plaintiff cites from de la Garza’s closing argument in the Texas

1 Case to support this argument. Pl. Mem. at 21.

2 Plaintiff also argues that "Premier Pools" is both a name
3 and a slogan because it is a brief, attention-getting phrase used
4 in advertising or promotion. Pl. Opp. at 5. Plaintiff attempts
5 to distinguish Palmer by claiming it only determined that
6 "Valencia" is a word and not a slogan, and cannot be applied more
7 broadly. Id. at 6. Plaintiff cites Hudson Ins. Co. v. Colony
8 Ins. Co., 624 F.3d 1264, 1265 (9th Cir. 2010) to argue that
9 slogan infringement need not be a specific pleaded cause of
10 action in a complaint to trigger coverage. Id. In Hudson, the
11 complaint listed causes of action for trademark infringement,
12 trademark counterfeiting, trademark dilution, unfair competition,
13 and deceptive acts and practices. 624 F.3d 1264. The insured in
14 Hudson successfully asserted that the phrase "Steel Curtain"
15 raised the potential for coverage for trade dress infringement
16 and slogan infringement, even though neither was expressly pled.
17 Id. at 1270. In affirming a grant of partial summary judgment to
18 the insured, the Ninth Circuit noted that "Steel Curtain" was a
19 brief attention-getting phrase used to promote fan loyalty to the
20 Pittsburgh Steelers and to a subset of Steelers players. Id. at
21 1268. The Ninth Circuit also looked favorably on the analysis
22 from Cincinnati Ins. Co. v. Zen Design Grp., Ltd., 329 F.3d 546,
23 550, 556 (6th Cir. 2003), where the Sixth Circuit ruled that even
24 though it was doubtful whether WEARABLE LIGHT could legally be a
25 slogan, the complaint's failure to refer to WEARABLE LIGHT as a
26 slogan and its failure to include slogan infringement in the
27 complaint did not alleviate the duty to defend. Id. at 1268-69.

28 Plaintiff further contends that like "Steel Curtain" in

1 Hudson, "Quality Vehicle Modifier" (an automobile safety
2 certification and product feature) in Ultra Coachbuilders, Inc.
3 v. Gen. Sec. Ins. Co., No. 02 CV 675, 2002 WL 31528474, *2-3
4 (S.D.N.Y. Jul. 15, 2002), and "fullblood" (a term of art within
5 the cattle industry) in Am. Simmental Ass'n v. Coregis Ins. Co.,
6 75 F. Supp. 2d 1023, 1030 (D. Neb. 1999), "Premier Pools" is also
7 a slogan. Pl. Opp. at 8. Plaintiff contends that "Premier
8 Pools" has a meaning to the target audience - homeowners
9 interested in a luxurious backyard pool. Id. Plaintiff claims
10 that the target audiences appreciate the implications of the
11 phrase suggesting they are purchasing an attractive product, like
12 Wearable Light in Zen Design. Id. Plaintiff also asserts that
13 "Premier Pools" is both a name and a slogan since the phrase
14 indicates "first" or "best" or "leader," which embodies the idea
15 itself. Plaintiff's alleged infringement of the phrase thus may
16 contain an idea, slogan, and a name, all in one. Pl. Opp. at 11.
17 Notably, these characterizations of the phrase "Premier Pools"
18 are not alleged in the FAP or SAP. See Pl. Opp. at 8, 11.

19 Plaintiff also points out that the Dodd Family (founders of
20 PPI) did not use "Dodd's Pools" as their business's names, but
21 the slogan and idea "Premier Pools." Pl. Opp. at 11. Similarly,
22 Porter did not call Plaintiff "Porter's Pools" or "Shan's Pools"
23 for Shan Johnson in Texas. Id. Accordingly, Plaintiff claims
24 that even if it is doubtful whether "Premier Pools" is a slogan,
25 Defendant was on notice about a slogan infringement claim and
26 should have adhered to its duty to defend. Id.

27 To support its argument, Plaintiff cites A Touch of Class
28 Imports Ltd. V. Aetna Casualty Ins. Co., 901 F. Supp. 175, 177

1 (S.D.N.Y. 1995), where "Touch of Class" served as both a title
2 and a slogan. Pl. Opp. at 10. The California Supreme Court in
3 Palmer, 21 Cal. 4th at 655-56, however, called this
4 interpretation dicta and said "we do not find the decision to be
5 persuasive precedent because the court failed to consider the
6 policy language as a whole and provided no analysis whatsoever."

7 Defendant counters these arguments by pointing out that
8 PPI's trademarked name was not simultaneously a slogan and that
9 PPI did not allege Plaintiff used "Premier Pools" as a slogan.
10 Def. Mem. at 16-17. PPI's FAP and SAP only alleged that "Premier
11 Pools" was a name and mark that Plaintiff infringed. Id. (citing
12 FAP). Further, nobody from PPI testified that Premier Pools was
13 a slogan or advertising idea, but that the name was "everything"
14 because of what it indicated about PPI's business and reputation.
15 Id. at 24-25 (citing PNOL, Ex. 6, Transcript Vol. 8, 53:13-20.)
16 As a result, no duty arose because speculating about facts not
17 found in the complaint (even if they might naturally be supposed
18 to exist along with the alleged facts) is insufficient to give
19 rise to an insurer's duty to defend. Def. Reply at 4 (citing
20 Advent, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 6
21 Cal. App. 5th 443, 460 (2016) and Friedman Prof. Mgmt. Co., Inc.
22 v. Norcal Mut. Ins. Co., 120 Cal. App. 4th 17, 34-35 (2004)).

23 Defendant distinguishes Hudson by arguing that "Steel
24 Curtain" is not the name of the team and here, "Premier Pools" is
25 the name of the Texas pool company. Def. Reply at 3. Defendant
26 also emphasizes that Street Surfing does not help Plaintiff
27 because the Ninth Circuit in that case held that "Streetsurfer"
28 was not a slogan, since the underlying infringement complaint

1 alleged only that the plaintiff used "Streetsurfer" as a
2 recognizable brand name to identify his products. Id. (citing
3 776 F.3d at 609.) Defendant distinguishes Zen Design by pointing
4 out that the case did not apply California law and that the court
5 found WEARABLE LIGHT to be a slogan partially because it was not
6 the actual name of the product. Id. at 4 (citing 329 F.3d at
7 556-57).

8 The Court agrees with Defendant's assertion that "Premier
9 Pools" is more like the phrases at issue in the following cases,
10 where the respective courts found those phrases were names and
11 not slogans: Palmer, 21 Cal. 4th at 1120 (where "Valencia" was a
12 name and not a slogan), Aloha Pac., Inc. v. Cal. Ins. Guarantee
13 Ass'n, 79 Cal. App. 4th 297, 317 (2000) ("Rusty's Island Chips"
14 and "Island Chips" were trademarks and not slogans), and N. Coast
15 Med., Inc. v. Hartford Fire Ins. Co., No. 13-CV-03406, 2014 WL
16 605672, *5-6 (N.D. Cal. Feb. 17, 2014) (finding "THERA-PUTTY" was
17 a product name and not a slogan). Def. Mem. at 16.

18 The FAP and SAP do not allege facts suggesting a potential
19 slogan infringement claim. Like the underlying complaint in
20 Street Surfing, the FAP and SAP only allege that Premier Pools is
21 a valuable brand that Plaintiff unfairly used. 776 F.3d at 608-
22 09. To find Defendant had a duty to defend, the Court would have
23 to improperly presume facts not alleged in the complaint. See
24 Advent, Inc., 6 Cal. App. 5th at 460; See also Gunderson, 37 Cal.
25 App. 4th at 1114 ("An insured may not trigger the duty to defend
26 by speculating about extraneous 'facts' regarding potential
27 liability or ways in which the third party claimant might amend
28 its complaint at some future date."). The Court will not do so.

1 The Court finds Defendant did not have a duty to defend a slogan
2 infringement claim that PPI did not bring.

3 4. Trade Dress Infringement

4 Plaintiff argues Defendant had a duty to defend Plaintiff
5 because of a potential trade dress infringement claim, with
6 "trade dress" defined as a product's "total image" or "overall
7 appearance" and "may include features such as size, shape, color
8 or color combinations, texture, graphics or even particular sales
9 techniques." Pl. Mem. at 23 (citing Harland Co. v. Clarke
10 Checks, Inc., 711 F.2d 966, 980 (11th Cir. 1983)). Plaintiff
11 claims the FAP gave Defendant notice of a potential trade dress
12 claim because of allegations of consumer confusion based on
13 Plaintiff's use of a "Premier Pools" logo in marketing materials
14 and also because de la Garza testified that he was prepared to
15 defend a trade dress infringement claim. Pl. Mem. at 16, 23.

16 To support its argument, Plaintiff also cites a part of
17 Lanham Act Section 43(a), which states that a trade dress cause
18 of action can arise from use in commerce of "any word, term,
19 name, symbol, or device, or any combination thereof" that
20 "misrepresents the nature, characteristics, qualities, or
21 geographic origin of his or her or another's person's goods [.]"
22 Pl. Opp. at 17-18.

23 Defendant contends that it does not matter whether de la
24 Garza was prepared to defend against a trade dress claim. Def.
25 Mem. at 26. de la Garza conceded that PPI did not plead a trade
26 dress claim and that is because trade dress refers to the design
27 or packaging of a product that may acquire a distinctiveness
28 which serves to identify the product with its manufacturer or

1 source. Id. (citing TraFix Devices, Inc. v. Mktg. Displays,
2 Inc., 532 U.S. 23, 28 (2001)). PPI also did not allege that the
3 design of its pools was distinctive or that Plaintiff copied that
4 design or PPI's logo. Id. Defendant also reiterates that the
5 duty to defend is not based on speculation about what claims the
6 plaintiff might possibly bring since that would effectively
7 remove the limits on the duty to defend. Id.

8 Defendant further contends that Plaintiff mischaracterizes
9 Section 43(a) of the Lanham Act, which is not just about trade
10 dress, but is the main intellectual property and false
11 advertising federal statute (citing POM Wonderful LLC v. Coca-
12 Cola Co., 134 S. Ct. 2228, 2233 (2014)). Def. Reply at 8-9.
13 Defendant points out that this mischaracterization is important
14 because even if Plaintiff engaged in false advertising in
15 violation of the Lanham Act, this does not necessarily make its
16 conduct a trade dress violation. Id.

17 The Court finds that the FAP did not contain potential trade
18 dress allegations or facts giving rise to such claims. PPI made
19 no allegations that Plaintiff copied its designs and so Defendant
20 was not on notice that a trade dress claim was possible.

21 5. Libel Or Slander

22 Finally, Plaintiff argues that Defendant had a duty to
23 defend because the FAP and/or SAP contain potential libel
24 allegations. Pl. Mem. at 23-24. Libel means a "false and
25 unprivileged publication by writing... which exposes any person to
26 hatred contempt, ridicule, or obloquy, or which causes [any
27 person] to be shunned or avoided, or which has tendency to injure
28 [them] in his occupation." Cal. Civ. Code § 45. Plaintiff

1 contends that potential libel claims arise from PPI's allegations
2 that it lost business because of Plaintiff falsely advertising
3 that Plaintiff was PPI. Pl. Mem. at 23-24. However, PPI did not
4 allege that Plaintiff specifically published any negative
5 statements about PPI. See id. Plaintiff also fails to provide
6 any authority in support of this argument.

7 Plaintiff further asserts that potential libel claims arise
8 from the SAP's allegations that Plaintiff wrote the false BBB
9 letter that falsely attributed shoddy work to PPI, causing
10 potential customers to shun or avoid PPI. Pl. Mem. at 23-24.
11 But, as explained above, Defendant was not liable for coverage
12 for the SAP's BBB allegations. In addition, Plaintiff has not
13 cited any authority to support a finding that libel claims arise
14 from the BBB allegations. See id. Accordingly, there was no
15 potential for coverage and no duty to defend on any potential
16 libel claim.

17 The Court does not find potential for coverage based on any
18 of the provisions in the parties' insurance agreement relied upon
19 by Plaintiff. Because Defendant has shown that there was no
20 potential for coverage under the Policy, the Court finds it had
21 no duty to defend the Texas Case and summary judgment is granted
22 for Defendant on Plaintiff's First Cause of Action for
23 Declaratory Relief and Second Cause of Action for Breach of
24 Insurance Contract Duty to Defend.

25 C. Other Causes of Action

26 Defendant argues that because it has no duty to defend the
27 Texas Case, it has no duty to indemnify the judgment either.
28 Def. Mem. at 27 (citing Imperium Ins. Co. v. Unigard Ins. Co., 16

1 F. Supp. 3d 1104, 1116 (E.D. Cal. 2014) (“where there is no duty
2 to defend, there cannot be a duty to indemnify”) (citing and
3 quoting Certain Underwriters at Lloyd’s of London v. Sup. Ct., 24
4 Cal. 4th 945, 958 (2001))). The Court agrees and finds that
5 because Defendant had no duty to defend, it had no duty to
6 indemnify. Because the Court finds Defendant lacked a duty to
7 defend and a duty to indemnify, Plaintiff’s claims for breach of
8 the covenant of good faith and fair dealing and for punitive
9 damages must also be dismissed as a matter of law. Def. Mem at
10 30-34. Defendant’s motion for summary judgment on these causes of
11 action is granted.

12
13 IV. ORDER

14 For the reasons set forth above, the Court GRANTS
15 Defendant’s Motion for Summary Judgment and DENIES Plaintiff’s
16 Motion for Partial Summary Judgment. The dates set for the
17 pretrial conference and trial are vacated.

18 IT IS SO ORDERED.

19 Dated: July 25, 2018

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21 
22 JOHN A. MENDEZ,
23 UNITED STATES DISTRICT JUDGE
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