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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

YAHOO! INC.,
Plaintiff,
v.
NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA,
Defendant.

Case No. [5:17-cv-00489-EJD](#)

**ORDER DENYING IN PART AND
DEFERRING IN PART DEFENDANT’S
MOTION FOR JUDGMENT AS A
MATTER OF LAW**

Re: Dkt. No. 156

I. INTRODUCTION

Defendant National Union Fire Insurance Company of Pittsburgh, PA (“National Union”) moves for judgment as a matter of law on Plaintiff Yahoo! Inc.’s (“Yahoo”) bad faith and punitive damages claims. National Union contends that there is no proof of bad faith, no proof of tort damages under *Brandt v. Superior Court*, 37 Cal.3d 813, 817 (1985), and no proof of punitive damages. For the reasons set forth below, National Union’s motion for judgment as a matter of law will be denied in part and deferred in part.

II. STANDARDS

Federal Rule of Civil Procedure 50(a) authorizes the Court to enter judgment for a party as a matter of law:

If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

- (A) resolve the issue against the party; and

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1 (B) grant a motion for judgment as a matter of law against the party
2 on a claim or defense that, under the controlling law, can be
maintained or defeated only with a favorable finding on that issue.

3 Fed. R. Civ. P. 50(a)(1).

4 **III. DISCUSSION**

5 **A. Bad Faith**

6 “To breach the implied obligation of good faith and fair dealing, an insurance company
7 must unreasonably act or fail to act in a manner that deprives the insured of the benefits of the
8 policy. To act unreasonably is not a mere failure to exercise reasonable care. It means that the
9 insurer must act or fail to act without proper cause. However, it is not necessary for the insurer to
10 intend to deprive the insured of the benefits of the policy.” CACI No. 2330.

11 National Union contends that there is no evidence from which a reasonable jury could find
12 that National Union acted in bad faith. According to National Union, no reasonable jury could
13 find that National Union’s decisions on the “publication” issue and the “Criminal Acts” exclusion
14 were unreasonable. National Union also contends that Chan’s citation to the “media and internet
15 type business” exclusion does not establish bad faith because Chan did not rely upon that
16 exclusion to deny coverage in *Sutton/Penkava*; instead, National Union merely reserved its rights
17 under that exclusion. National Union acknowledges that San Julian relied upon the “media and
18 internet type business” exclusion to initially deny coverage in *Holland*, but argues that the
19 undisputed evidence shows San Julian did not know that an endorsement had removed that
20 exclusion, and in any event, the coverage decision would have been the same. National Union
21 also contends that the denial of coverage for the *Holland* settlement was not unreasonable.

22 Yahoo counters that there is ample evidence from which a reasonable jury could infer
23 National Union’s bad faith. Among other things, Yahoo relies on evidence that:

- 24 • National Union’s denial letters for the *Sutton* and *Penkava* lawsuits cited to
25 exclusion 2(j)—an exclusion that was not in the 2011 Policy;
26 • National Union cited the same exclusion 2(j) in its denial of coverage for the

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- Holland* lawsuit;
- National Union used an incomplete copy of the 2011 Policy to determine whether *Holland* was a covered claim;
- National Union “insinuated that Yahoo’s inaction in arguing for coverage was a reason it denied coverage for *Holland*”;
- National Union focused on the criminal acts alleged in the underlying suits and found no coverage instead of construing the allegations of the underlying suits in a manner that would favor a finding of coverage;
- National Union did not conduct a thorough investigation of the six underlying class actions and closed its claim files without “reaching out” to Yahoo other than to notify Yahoo that there was no duty to defend;
- When Yahoo asked National Union to reconsider its position, National Union continued to deny coverage for all the reasons set for in its original letter, including the exclusion 2(j);
- National Union took a “belts and suspenders” approach to deny coverage; and
- The denial letters prepared by National Union’s claims analysts, Jack Chan, Erik San Julian, and Jonathan Kipnis, were approved by their managers before being sent to Yahoo.

Yahoo’s Opp’n at 3-4.

Having reviewed the evidence described above, the court concludes that a reasonable jury could find, as National Union argues, that its coverage decisions were not unreasonable. Nevertheless, there is a legally sufficient evidentiary basis for a jury to find that National Union acted or failed to act without proper cause. National Union’s motion for judgment as a matter of law is therefore denied as to the bad faith claim. “Judgment as a matter of law is proper when the evidence permits a reasonable jury to reach only one conclusion.” *Quiksilver, Inc. v. Kymsta Corp.*, 466 F.3d 749, 755 (9th Cir. 2006) (internal quotation marks omitted).

1 National Union’s motion is DENIED as to Yahoo’s bad faith claim.

2 **B. Proof of Bad Faith Damages**

3 National Union raises two challenges to Yahoo’s bad faith damages calculation. First,
4 National Union contends that Yahoo may not recover the full defense costs and settlement costs
5 incurred in *Holland* because Yahoo has not presented any evidence that those losses were
6 proximately caused by National Union’s breach. According to National Union, the sums Yahoo
7 incurred to defend and settle *Holland* resulted from Yahoo being sued and choosing an insurance
8 program under which it retained the risk of having to defend and settle such suits, and not from
9 anything National Union did. Second, National Union contends that Yahoo has failed to produce
10 a witness to explain to the jury what portion of its attorney fees are properly allocated to obtaining
11 contract benefits, and therefore, Yahoo is not entitled to any fees under *Brandt v. Superior Court*,
12 37 Cal.3d 813, 817 (1985).

13 In response, Yahoo points to Mr. Tepstein’s trial testimony, which went unchallenged by
14 National Union. Mr. Tepstein confirmed that National Union never hired or paid any attorneys to
15 defend Yahoo or help settle the underlying lawsuits. Yahoo contends that as a result of National
16 Union’s bad faith, Yahoo “did not get the peace of mind and the benefit of the security of a
17 defense” and that the damages it seeks “go directly to the harm that Yahoo suffered because of
18 National Union’s conduct.” Yahoo’s Mot. at 5:15-22.

19 The court finds that Yahoo has presented a legally sufficient evidentiary basis for its
20 claimed damages. When an insurer breaches its duty of good faith and fair dealing, the insured is
21 entitled to recover damages “for all harm that was caused by the insured.” California Civil Jury
22 Instruction No. 2350. Here, Yahoo has presented evidence from which a reasonable jury could
23 conclude that Yahoo incurred defense and settlement costs because National Union denied
24 coverage in bad faith. The damages Yahoo seeks were foreseeable are not speculative. Further,
25 the court finds that the Deductible Coverage Endorsement (“Endorsement”) does not limit
26 Yahoo’s right to seek extra-contractual damages if the jury finds that National Union denied

1 coverage in bad faith. This is because National Union did not pay any amounts to Yahoo for
2 defense or settlement, and therefore cannot, as a matter of right or equity, now claim that its right
3 to reimbursement under the Endorsement should limit extra contractual damages.

4 The court also finds that Yahoo has presented a legally sufficient evidentiary basis for
5 *Brandt* fee allocation: (a) the fee invoices admitted into evidence, which cover periods of time
6 when Yahoo was pursuing policy benefits and have been redacted to exclude work unrelated to
7 Yahoo’s pursuit of policy benefits; and (b) Mr. Tepstein’s trial testimony.

8 National Union’s motion is DENIED with respect to the issue of bad faith damages.

9 **C. Proof of Punitive Damages**

10 National Union contends that Yahoo’s failure to prove any tort damages precludes any
11 award of punitive damages. National Union also contends that there is no evidence—much less
12 clear and convincing evidence—that any National Union corporate decisionmaker engaged in
13 “despicable” conduct or intended to defraud Yahoo by denying coverage.

14 National Union’s motion is DEFERRED with respect to the issue of punitive damages.

15 **IV. CONCLUSION**

16 For the reasons set forth above, Defendant’s motion for judgment as a matter of law is
17 DENIED in part and DEFERRED in part.

18 **IT IS SO ORDERED.**

19 Dated: May 17, 2019

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22 EDWARD J. DAVILA
23 United States District Judge
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