IN THE SUPREME COURT OF THE STATE OF NEVADA

NAUTILUS INSURANCE COMPANY, Appellant, v. ACCESS MEDICAL, LLC; ROBERT CLARK WOOD, II; AND FLOURNOY MANAGEMENT LLC, Respondents.	**Supreme Court 79130** United States District Court, for the District of Nevada Case No. 2:15-cv-00321 United States Court of Appeals for the Ninth Circuit: Case Nos. 17-16265 17-16272 17-16273

JOINT APPENDIX VOLUME I

IN THE SUPREME COURT OF THE STATE OF NEVADA

NAUTILUS INSURANCE COMPANY, Appellant, v. ACCESS MEDICAL, LLC; ROBERT CLARK WOOD, II; AND FLOURNOY MANAGEMENT LLC, Respondents.	**Supreme Court 79130** United States District Court, for the District of Nevada Case No. 2:15-cv-00321 United States Court of Appeals for the Ninth Circuit Case Nos. 17-16265 17-16272 17-16273

JOINT APPENDIX

Citations to the joint appendix will include a page number, which refers to the "NV Sup Ct CQ – Joint Appendix00001" page numbering. This is to prevent any confusion, as many of the documents were previously numbered as exhibits in support of the briefing on this issue before the Ninth Circuit. The volumes of the Joint Appendix are labeled in Roman Numerals to prevent confusion with the volumes of the two underlying sets of exhibits. Tabs are only provided for the volumes of the Joint Appendix, not for the underlying sets of exhibits. Indices of the underlying exhibit volumes can be found at NV Sup CT CQ – JointAppendix00053, 00800.

INDEX BY VOLUME		
VOLUME I		
Tab #	Description	Ninth Circuit Case 17-16265 Docket Entry No.
1	Appellant's Opening Brief	15
2	Nautilus Insurance Company's Excerpts of Record Vol. 1 of 4	16-1

VOLUME II		
Tab #	Description	Ninth Circuit Case 17-16265 Docket Entry No.
3	Nautilus Insurance Company's Excerpts of Record Vol. 2 of 4	16-2

VOLUME III		
Tab #	Description	Ninth Circuit Case 17-16265 Docket Entry No.
4	Nautilus Insurance Company's Excerpts of Record Vol. 3 of 4	16-3

VOLUME IV		
Tab #	Description	Ninth Circuit Case 17-16265 Docket Entry No.
4 (Con't)	Nautilus Insurance Company's Excerpts of Record Vol. 3 of 4 (Con't)	16-3
5	Nautilus Insurance Company's Excerpts of Record Vol. 4 of 4	16-4

VOLUME V		
Tab #	Description	Ninth Circuit Case 17-16265 Docket Entry No.
6	Appellee's Principal and Response Brief	24
7	Access Medical, LLC and Robert Clark Wood, II's Supplemental Excerpts of Record Vol. 1 of 2	25-1
8	Access Medical, LLC and Robert Clark Wood, II's Supplemental Excerpts of Record Vol. 1 of 2	25-2
9	Flournoy Management, LLC's Brief on Cross-Appeal	31

VOLUME VI		
Tab #	Description	Ninth Circuit Case 17-16265 Docket Entry No.
10	Nautilus Reply Brief on Cross-Appeal	36
11	Appellees' Reply Brief	43
12	Flournoy Management, LLC's Reply Brief on Cross-Appeal	44
13	Notice of Supplemental Authority Pursuant to FRAP 28(j) and Circuit Rule 28-6	59
14	Memorandum of Decision	62-1
15	Order Certifying Question to the Nevada Supreme Court	63

ALPHABETICAL INDEX			
Document Title	Tab #	Vol. #	Page #[1]
Access Medical, LLC and Robert Clark Wood, II's Supplemental Excerpts of Records, Vol. 1 of 2	7	V	00799
Access Medical, LLC and Robert Clark Wood, II's Supplemental Excerpts of Records, Vol. 2 of 2	8	V	00814
Appellant's (Nautilus) Opening Brief Before the Ninth Circuit	1	I	00001
Appellee's (Access Medical) Reply Brief Before the Ninth Circuit	11	VI	00993
Appellees' Principal and Response Brief	6	V	00743
Flournoy Management, LLC's Brief on Cross-Appeal	9	V	00910
Flournoy Management, LLC's Reply Brief on Cross-Appeal	12	VI	01021
Memorandum of Decision	14	VI	01046
Nautilus Insurance Company's Excerpts of Record in Support of Brief Before the Ninth Circuit, Vol. 1 of 4	2	I	00052
Nautilus Insurance Company's Excerpts of Record in Support of Brief Before the Ninth Circuit, Vol. 2 of 4	3	II	00079
Nautilus Insurance Company's Excerpts of Record in Support of Brief Before the Ninth Circuit, Vol. 3 of 4	4	III & IV	00311
Nautilus Insurance Company's Excerpts of Record in Support of Brief Before the Ninth Circuit, Vol. 4 of 4	5	IV	00578
Nautilus Reply Brief on Cross-Appeal	10	VI	00965
Notice of Supplemental Authority Pursuant to FRAP 28(j) and Circuit Rule 28-6	13	VI	01035
Order Certifying Question to the Nevada Supreme Court	15	VI	01052

[1] NV Sup CT CQ – JointAppendix Numbering

Joint Appendix

Tab #1

Appeal Nos. 17-16265 (lead), 17-16272, 17-16273

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NAUTILUS INSURANCE COMPANY,

Plaintiff-Appellant-Cross-Appellee,
v.

ACCESS MEDICAL, LLC; ROBERT CLARK WOOD II; FLOURNOY MANAGEMENT, LLC,

Defendants-Appellees-Cross-Appellants.

On Appeal From the United States District Court,
for the District of Nevada
The Honorable Jennifer A. Dorsey, United States District Judge
Case No. 2:15-CV-00321-JAD-GWF

APPELLANT'S OPENING BRIEF

LINDA WENDELL HSU
JENNIFER WAHLGREN
SELMAN BREITMAN LLP
33 New Montgomery, Sixth Floor
San Francisco, CA 94105-4537
Telephone: 415.979.0400
Facsimile: 415.979.2099

Attorneys for Plaintiff, Appellant and Cross-Appellee NAUTILUS INSURANCE COMPANY

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rules of Appellate Procedure, Rule 26.1, Plaintiff/Appellant/Cross-Appellee Nautilus Insurance Company ("Nautilus") by and through its undersigned counsel, certifies the following information with regard to its corporate parents, subsidiaries or affiliates:

Nautilus hereby declares it is a wholly owned subsidiary of Admiral Insurance Company, which is a wholly owned subsidiary of Berkley Insurance Company, and both are subsidiaries of W.R. Berkley Corporation.

A supplemental disclosure statement will be filed upon any change in the information provided herein.

DATED: October 25, 2017 Selman Breitman LLP

By: s/ Linda Wendell Hsu
LINDA WENDELL HSU
JENNIFER WAHLGREN
Attorneys for Plaintiff, Appellant, and Cross Appellee NAUTILUS INSURANCE COMPANY

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

State Cases

TABLE OF AUTHORITIES

I. INTRODUCTION

Plaintiff/Appellant/Cross-Appellee Nautilus Insurance Company ("Nautilus") spent approximately half a million dollars defending a claim for which there existed no potential for coverage. Respectfully, the district court erred by failing to enforce Nautilus's multiple reservation of rights letters in which it expressly stated that the defense of the insureds' claim would be provided under the reservation of the right to seek reimbursement of defense costs it incurred defending that uncovered claim. The insureds accepted payment of defense costs on their behalf for years following the receipt of these multiple reservations of rights letters. The district court erred by finding that the acceptance of payment of defense costs on the insureds' behalf did not constitute an agreement between the parties sufficient to entitle Nautilus to reimbursement under Nevada law.

Under the terms of an insurance policy, an insurer only bargains to assume the cost of defense of claims potentially covered under the terms of the policy. Under Nevada law, where an insurer, in an abundance of caution, provides a defense under a reservation of rights for a claim as to which it owed no duty of defense, and the insured accepts the payment of defense costs on its behalf, the insurer is entitled to reimbursement. *Capitol Indem. Corp. v. Blazer*, 51 F.Supp.2d 1080, 1090 (D. Nev. 1999) ("*Blazer*"); *Probuilders Specialty Ins. Co. v. Double M. Constr.*, 116 F. Supp.3d 1173, 1182 (D.Nev. 2015) ("*Probuilders*"). By denying

Nautilus's request for reimbursement, the district court unjustly enriched the insureds.

The district court also erred by refusing to grant Nautilus the relief it sought under 28 U.S.C. section 2202. This statute expressly provides the district court with the opportunity to grant necessary or proper further relief based on a declaratory judgment. Nautilus's request for further relief in the form of reimbursement of defense costs following a declaratory judgment entered in its favor finding it had no duty to defend its insureds constituted proper relief as described by the statute.

Further, the district court erred by failing to grant Nautilus's alternative request to reopen the judgment to allow Nautilus to bring a second motion for partial summary judgment and amend its complaint to include a request for damages (if the district court believed it was necessary.) To prevent Nautilus from obtaining reimbursement of defense costs from the insureds permits a manifest injustice because it provides the insureds with a windfall as Nautilus had no contractual duty to provide them with a defense

II. JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. Section 1332(a)(1) in that it is a civil action between citizens of different states and the amount in controversy exceeds $75,000.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. Section 1291 and 1294(1) because this is an appeal from a final decision of the United States District Court, District of Nevada. Judgment was entered in favor of Nautilus on its declaratory relief action on September 27, 2016. Nautilus filed a motion for further relief under 28 U.S.C. Section 2202 on October 25, 2016 to obtain defense reimbursement. The district court issued an order denying Nautilus's motion on May 18, 2017. Nautilus filed a timely notice of appeal on June 16, 2017.

III. STATEMENT OF ISSUES PRESENTED

1. Whether the district court erred when it failed to enforce Nautilus's reservation of rights letters evidencing Nautilus reserved the right to seek reimbursement of defense costs it incurred in the defense of an uncovered claim.

2. Whether the district court erred when it refused to grant Nautilus's request for further relief under 28 U.S.C. Section 2202; or in the alternative, to reopen the judgment under Federal Rules of Civil Procedure Rule 59(e) to allow Nautilus to bring a second motion for summary judgment and amend its complaint, if necessary.

IV. PRIMARY AUTHORITY

28 U.S. Code Section 2202 – Further relief:

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose

rights have been determined by such judgment.

V. STATEMENT OF THE CASE

A. The *Switzer* Cross-Complaint

On June 3, 2013, Ted Switzer ("Switzer") filed the underlying cross-complaint at issue, entitled "Cross-Complaint Of Ted Switzer For Legal And Equitable Relief On Individual Claims On His Behalf And Derivative Claims On Behalf Of Nominal Defendant, Flournoy Management, LLC" ("*Switzer* Cross-Complaint"). (Vol. 4/ER 556)[1]. The *Switzer* Cross-Complaint arises from an alleged decision by Switzer and Nautilus' insured, Defendant/Appellee/Cross-Appellant Robert Clark Wood II ("Wood"), in November of 2010 to form a business to market and sell medical implants in Tennessee and Georgia. (Vol. 4/ER 576, ¶47). Switzer and Wood formed Defendant/Appellee/Cross-Appellant Flournoy Management, LLC ("Flournoy") for that purpose in December 2010. (Vol. 4/ER 577, ¶49). In or about May 2011, Switzer and Wood allegedly orally agreed to use Flournoy to sell medical implants in the markets "previously reserved" to Wood and Switzer but not serviced by Flournoy (e.g. California, Oregon and Nevada). (Vol. 4/ER 577, ¶50). In his cross-complaint, Switzer alleges Wood breached the partnership agreement by taking in income that should have been delivered to Flournoy, specifically, "Mr. Wood took away from Mr.

[1] "ER" refers to the page number on the Index of Excerpts of Record.

Switzer and kept for himself the lucrative business relationships and income Mr. Switzer had developed and enjoyed with hospitals previously served by Epsilon and the business entities associated with Mr. Switzer[.]" (Vol.4/ER 574 – 575, ¶43).

The four causes of action at issue in this case consist of the 13th through 16th causes of action for interference with prospective economic advantage. The allegations in those causes of action against Wood are identical except that they reference different hospitals in which Switzer allegedly "enjoyed a long-standing and mutually beneficial relationship." (Vol.4/ER 592, ¶107; 593 ¶114; 595, ¶121; 596-597, ¶ 128). Switzer goes on to allege in relevant part as follows:

- Wood "acted to disrupt the relationship between Mr. Switzer and [hospital] by his wrongful acts as alleged herein [i.e. the allegations in ¶ 43 cited above]" (Vol. 4/ER 592, ¶107; 593 ¶114; 595, ¶121; ¶596-597, ¶128);
- Those wrongful acts (i.e. the taking away by Wood from Switzer the business relationships and income Switzer had developed and enjoyed with hospitals) "has resulted in injury to the personal and business reputation of Mr. Switzer[.]" (Vol.4/ER 592, ¶109; 594, ¶116; 595, ¶123; 597, ¶130).

B. The Policy and the Weide Email

Nautilus issued policy no. BN952426 to named insured Access Medical, effective January 15, 2011 to January 15, 2012 ("Policy"). (Vol. 4/ER 617). Endorsement No. 1 adds "Flournoy Management LLC" as a named insured to the Policy. (Vol. 4/ER 666). The Policy insures Wood; but only with respect to Wood's liability as a shareholder or manager of Defendant, Appellee/Cross-Appellant Access Medical LLC ("Access Medical") and/or Flournoy. (Vol.4/ER 630).

The Policy includes Coverage B, Personal and Advertising Injury Liability, which includes the following pertinent provisions:

> SECTION I – COVERAGES
> …
> COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY
> 1. Insuring Agreement
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However,, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. (Vol. 4/ER 623).

The Nautilus Policy contains the following definition:

> SECTION V – DEFINITIONS
> …
> 14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:
> …
> d. Oral or written publication, in any manner, of mater that slanders or libels a person or organization or disparages a person's or organization's goods, products or services[.] … (Vol. 4/ER 636).

Access Medical, Wood and Flournoy (collectively "the Insureds") tendered the Switzer Cross-Complaint to Nautilus under the Policy. (Vol. 3/ER 494, ¶7.) During the course of Nautilus's coverage investigation, Nautilus's counsel discovered an email from an employee of Access Medical, Jacquie Weide, to Deborah Fanning of Santa Barbara Cottage Hospital. (Vol.3/ER 504). Ms. Weide advised Ms. Fanning that Access Medical wanted to obtain a contract with Cottage Hospital to provide spinal implants. When Ms. Fanning asked for more information, Ms. Weide responded in relevant part as follows:

> I believe Dr. Early and Dr. Kahmann were using Alphatec's implants but their Distributor in the California area is now banned from selling Alphatec implants. We are in Las Vegas and have been using their products here for 2 years. Alphatec recently contacted us and asked that we take over the California region as well. ("Weide Email") (Vol. 3/ER 505).

C. Nautilus Prophylactically Agreed to Provide a Defense To The *Switzer* Cross-Complaint Under A Full and Complete Reservation of Rights, Including The Right To Seek Reimbursement Of Defense Fees And Costs

On May 19, 2014, Nautilus agreed to provide Access Medical and Wood with a defense against the *Switzer* Cross-Complaint, subject to a full and complete reservation of rights to disclaim coverage, withdraw from the defense, and obtain reimbursement of defense fees following a determination that no potential for coverage existed for the Insureds' claim. (Vol.2/ER 32 - 33). Nautilus assigned Wolfe & Wyman, LLP to protect Access Medical and Wood's interests pursuant to the terms and conditions of the Nautilus Policy. (Vol.2/ER 32). Gordon Rees Scully Mansukhani, LLP eventually substituted in as defense counsel for Access Medical and Wood. (Vol. 3/ER 496, ¶15). Neither Access Medical nor Wood objected to the payment of defense counsel invoices on their behalf. (Vol. 3/ER 495, ¶10).

On October 2, 2014, Nautilus issued a supplemental reservation of rights letter to Access Medical and Wood, in which Nautilus once again reserved its right to reimbursement for all attorneys' fees, expert fees, defense costs, indemnification payments, and any other litigation-related expenses it paid in connection with its defense and indemnification of Access Medical and Wood. (Vol.2/ER 48).

Nautilus also offered Access Medical and Wood the option of selecting independent counsel at Nautilus's expense.[2] (Vol. 2/ER 57). Access Medical and Wood selected Wild Carter & Tipton as independent counsel. (Vol. 3/ER 495, ¶12). Nautilus paid invoices submitted by independent counsel, as well as defense counsel. (Vol. 2/ER 495 – 497, ¶¶ 12 - 18). Neither Access Medical nor Wood objected to the payment of independent counsel on their behalf. (Vol. 3/ER 495, ¶ 10; 491, ¶5).

On October 17, 2014, Nautilus agreed to provide Flournoy with a defense against the *Switzer* Cross-Complaint, subject to a full and complete reservation of rights, including the right to seek reimbursement for all attorneys' fees, expert fees, defense costs, indemnification payments, and any other litigation-related expenses that it paid in connection with its defense and indemnification of Flournoy. (Vol. 3/ER 470 - 471). Nautilus paid for defense counsel (Hall Hieatt & Connely LLP) as well as Flournoy's prior counsel, McCormick Barstow LLP. (Vol.3/ER 485 – 486, ¶¶7 - 8). Flournoy never objected to the payment of defense counsel's invoices on its behalf. (Vol. 3/ER 486, ¶10). Flournoy selected the Law Office of Amy R. Lovegren-Tipton as its independent counsel and Nautilus paid their invoices on Flournoy's behalf. (Vol. 3/ER 486, ¶ 9). Flournoy never objected to

[2] Under California law, an insured may select independent counsel if a possible conflict of interest with the insurer may arise or does exist. Cal. Civil Code § 2860.

Nautilus's payment of independent counsel's invoices on their behalf. (Vol. 3/ER 486, ¶10).

On April 5, 2016, Nautilus's coverage counsel and counsel in this action, Selman Breitman LLP, sent a letter to Insureds' counsel confirming that Nautilus reserved the right to demand the Insureds reimburse Nautilus for defense fees and costs incurred in the defense of each of the Insureds. (Vol. 3/ER 482-483). Nautilus continued to pay defense costs on behalf of its Insureds after the April 5, 2016 letter. (E.g., Vol. 3/ER 465; Vol. 2/ER 225). Neither Selman Breitman LLP nor Nautilus received any objection by the Insureds to the continued payment of defense costs on their behalf. (Vol. 3/ER 491, ¶5; 495, ¶10; 486, ¶ 10).

D. The Coverage Action

In the meantime, on February 24, 2015, Nautilus initiated this action by filing a complaint seeking a declaratory judgment that Nautilus never had a duty to defend or indemnify the Insureds. (Vol. 4/ER 545-554). On January 15, 2016, Nautilus filed a motion for partial summary judgment. (Vol. 4/ER 670). Nautilus intended to file a second motion for partial summary judgment seeking reimbursement of defense costs if the district court found that Nautilus had no duty to defend the Insureds. The Insureds filed a counter motion for summary judgment. (Vol. 4/ER 670).

The district court granted Nautilus's motion, construed the motion as a

motion for full summary judgment, entered judgment in favor of Nautilus, and closed the case. (Vol. 1/ER 15; 23). In the ruling granting Nautilus's motion, the district court ordered:

> Under California law, a disparagement claim "requires a plaintiff to show a false or misleading statement that (1) specifically refers to the plaintiff's product or business and (2) clearly derogates that product or business. Each requirement must be satisfied by express mention or by clear implication." Libel and slander are both forms of defamation, and each requires proof of a false and unprivileged communication that injures the plaintiff's reputation.
>
> Switzer's cross-complaint – even when read in conjunction with the June 25, 2011 – e-mail does not give rise to a potential claim for slander, libel, or disparagement (or include allegations of these offenses), and therefore does not trigger Nautilus's duty to defend under the "personal and advertising injury" provision of the policy. Each of these torts requires a false statement, among other elements. Even assuming that the June 25, 2011, e-mail mentions Switzer by clear implication (he is not expressly named) defendants do not argue – let alone offer any facts to show – that the e-mail contains a false statement, i.e. that Switzer was not, at that time, banned from distributing Aphatec spinal implants as the e-mail states. Additionally, nowhere in Switzer's cross-complaint does he allege that defendants made any false statement about him in an effort to tortiously interfere with his business relationships, and the cross-complaint does not mention or incorporate the June 25, 2011, e-mail. Accordingly, Nautilus is entitled to a declaration that it owes no duty to defend defendants against Switzer's cross-complaint.
>
> ***

> Because I conclude that Nautilus owes no duty to defend, it likewise owes no duty to indemnify. The duty to indemnify arises when an insured becomes legally obligated to pay damages in the underlying action that give rise to coverage under the policy. Thus, to trigger the duty to indemnify, the insured's activity and the resulting loss or damages must actually fall within the policy's coverage. The defendants have not become legally obligated to pay any damages in the underlying action, let alone damages that actually fall within the policy's coverage. Accordingly, Nautilus is also entitled to a declaration that it owes no duty to indemnify the defendants for damages awarded to Switzer on his cross-claims in the California action. (Vol. 1/ER 21 - 22) (citations omitted.)

The district court denied the Insureds' counter motion for summary judgment. (Vol. 1/ER 23).

As the district court entered judgment in Nautilus's favor (thereby foreclosing the opportunity for Nautilus to bring a second motion for partial summary judgment) Nautilus brought a motion for further relief under 28 U.S.C. 2202 seeking reimbursement of the defense costs incurred defending the Insureds for the *Switzer* cross-complaint. (Vol. 4/ER 672). In the alternative, Nautilus requested that the court construe its motion as a motion to set aside the judgment so that Nautilus could bring a second motion for partial summary judgment and amend its complaint to include a request for reimbursement, if necessary. Defendants filed a motion for reconsideration of the district court's order denying its counter motion for summary judgment. (Vol. 4/ER 672).

On May 18, 2017, the district denied the Insureds' motion for reconsideration and Nautilus's motion for further relief in the same order. (Vol. 1/ER 5). In the order denying the motion for reconsideration, the district court found:

> [T]he defect in the defendants' theory remains: there is no indication that the plaintiff in the state action has alleged that the predicate wrongful act for the intentional-interference claim is a defamatory publication that would trigger Nautilus's coverage. That the plaintiff in the state action could theoretically add a qualifying allegation or that new evidence could surface in the future makes no matter. The duty to defend does not sprout from thin air anytime someone is sued; it exists when the allegations and known facts create a potential for coverage. In other words, coverage exists only when the evidence and allegations given to the insurer could possibly – on their own – result in covered liability. **Without any existing evidence or allegations giving rise to a potential for covered liability, there is no present duty to defend**. (Vol. 1/ER 8- 9) (emphasis added).

The district court also noted that the evidence submitted by the Insureds with their motion for reconsideration (consisting of discovery responses in the underlying action) actually cut against their argument, as the plaintiff states he "has not alleged any claim for defamation" against the Insureds. (Vol. 1/ER 9).

The district court denied Nautilus's motion for further relief for three reasons: (1) Nautilus never raised a claim for reimbursement or damages in its

complaint; (2) Nautilus did not show that it was entitled to further relief as a matter of law; (3) Nautilus did not establish it was entitled to reimbursement under Nevada law. (Vol. 1/ER 9 - 11). The district court erred in each of these three findings.

VI. SUMMARY OF THE ARGUMENT

Nautilus issued multiple reservation of rights letters over the course of two years in which Nautilus expressly reserved the right to seek reimbursement of defense fees and costs paid on behalf of the Insureds if the court decided there existed no potential for coverage for their insurance claim. The Insureds impliedly agreed to the defense under a reservation of rights by accepting the payment of defense costs on their behalf for years. The District Court of Nevada correctly decided no coverage exists for the Insureds' insurance claim and entered judgment in Nautilus's favor. As Nautilus reserved its right to reimbursement, and the Insureds impliedly agreed to this reservation, Nautilus is entitled to reimbursement of the defense fees and costs under Nevada law. The District Court of Nevada erred by failing to enforce Nautilus's multiple reservation of rights letters and denying its request for reimbursement.

The district court also erred by failing to grant Nautilus further relief pursuant to 28 U.S. Code section 2202. The plain language of the statute allows the court to grant "[f]urther necessary or proper relief based on a declaratory

judgment." 28 U.S.C. § 2202. Nautilus's request for reimbursement of defense costs from the Insureds absolutely follows from the district court's determination that Nautilus owed no duty to the Insureds under the policy. The district court misinterpreted 28 U.S. Code section 2202 by finding that Nautilus was required to make a claim for reimbursement of defense costs in its complaint in order to grant its request for further relief. The statute on its face only requires reasonable notice and a hearing. In the alternative, the district court should have considered Nautilus's request to construe its motion as a motion to reopen the judgment to allow Nautilus to bring a second motion for partial summary judgment and amend its complaint (if the district court felt it was necessary to do so.) By preventing Nautilus from pursuing its request for reimbursement for a claim not covered by the policy, the district court granted the Insureds a windfall.

VII. ARGUMENT

A. Standard of Review: De Novo

The district court's order denying Nautilus further relief depended on the interpretation of a statute as well as Nevada law. A district court's decision based on purely or predominately legal issues is reviewed de novo. *Torres-Lopez v. May*, 111 F.3d 633, 638 (9th Cir. 1997) (application of a statute). When a denial of request for further relief under section 2202 is based on question of law, it is subject to de novo review. *Pro-Eco, Inc. v. Board of Comm'rs of Jay County,*

Indiana, 57 F.3d 505, 508 (7th Cir. 1995); *United Nat. Ins. Co. v. SST Fitness Corp*., 309 F.3d 914, 916 (6th Cir. 2002); *see Unocal Corp. v. United States*, 222 F.3d 528, 544 (9th Cir. 2000) ("Because the district court's failure to issue a declaratory judgment turned on a question of statutory interpretation, this court reviews it de novo.") "Whether declaratory relief should be exercised in a given instance 'is subject to more searching review by an appellate court than the 'abuse of discretion standard.'" *Penthouse Int'l, Ltd. v. Barnes*, 792 F.2d 943, 949 (9th Cir. 1986) ("*Penthouse*"). Therefore, a de novo standard of review applies.

B. Nautilus is Entitled to Reimbursement Under Nevada Law

1. Nevada Law Allows Reimbursement of Defense Costs

Under Nevada law, an insurer has a right to reimbursement of defense costs if there is an understanding between the parties that the insured would be required to reimburse the insurer for monies expended in providing a defense. *Blazer*, 51 F. Supp.2d at 1090. "[A]cceptance of monies constitutes an implied agreement to the reservation of the insurer's right to seek reimbursement for claims outside of the policy's coverage." *Probuilders,* 116 F. Supp.3d at 1182. In *Probuilders*, the district court held that since the underlying action included claims not covered by the policy, Double M had to reimburse Probuilders for its defense costs. *Id*. at 1182. In reaching this conclusion, the district court noted that Double M was

notified of Probuilders' full reservation of rights, including Probuilders' right "to recover monies spent in defense, settlement or satisfaction of judgments, and to file a declaratory relief action to secure a resolution of any coverage issues." *Id*. The district court found that "Double M implicitly agreed to the reservation of rights by accepting Probuilders' defense and passing litigation costs to it for two years." *Id*. Accordingly, the District Court of Nevada granted Probuilders' motion for summary judgment on the issue that Probuilders was entitled to reimbursement. *Id*. at 1183.

Here, Nautilus advised its Insureds, on at least four occasions, namely on May 19, 2014, October 2, 2014, October 17, 2014 and April 5, 2016, that it reserved all rights, including the right to seek reimbursement of all defense fees and costs incurred. (Vol. 2/ER 32, 48; Vol. 3/ER 470,482 - 483). Nautilus expressly reserved the right to seek declaratory relief and reimbursement of defense costs it incurred for the Insureds' defense in the Underlying Action. (Vol. 2/ER 32, 48; Vol. 3/ER 470,482 - 483). Nautilus paid defense costs on behalf of its Insureds for well over two years. (Vol. 2/ER 59 – 226; Vol. 3/ER 252 - 445). The Insureds never requested that Nautilus stop paying for defense fees and costs or independent counsel fees and costs on their behalf. (Vol. 3/ER 491, ¶5; 495, ¶10; 486, ¶ 10). By accepting Nautilus's defense and passing litigation costs to it for over two years, the Insureds' implicitly agreed to the reservation of rights.

Probuilders, 116 F. Supp.3d at 1182. Accordingly, the district court erred by finding that there existed no agreement between the Insureds and Nautilus such that Nautilus may seek reimbursement for defense costs. Nautilus is entitled to reimbursement as a matter of law.

2. The District Court Erred When It Failed to Enforce Nautilus's Reservation of Its Right To Seek Reimbursement Of Defense Fees And Costs

The district court erred by finding that Nautilus failed to establish it was entitled to reimbursement of defense costs under Nevada law. Specifically, the district court erred by failing to enforce Nautilus's reservation of rights letters. The district court based its ruling on two cases, *Blazer* and *Great W. Cas. Co. v. See*, 185 F.Supp.2d 1164 (D. Nev. 2002) ("*See*"). Neither of these cases supports the district court's decision.

In *Blazer*, the insurer did not submit any evidence of a reservation of rights letter in which it reserved the right to seek reimbursement of defense fees and costs if there was a judicial determination of no duty to defend. *Blazer*, 51 F.Supp.2d at 1090-1091. The *Blazer* court recognized that there is a right to reimbursement if there is an understanding between the parties (such as a unilateral reservation of rights letter) that the insured will be required to reimburse the insurer for monies expended in providing a defense. *Id*. at 1090 (citing to a case allowing for

reimbursement because there was sufficient evidence of an "understanding" (i.e. a unilateral reservation of rights letter) that the insurer would be reimbursed for the defense costs). However, in *Blazer*, the insurer presented no such evidence. *Id*.

In contrast, in this case, Nautilus has presented evidence of multiple reservation of rights letters, all of which specifically stated that Nautilus reserved the right to seek reimbursement of defense fees and costs. (Vol. 2/ER 32, 48; Vol. 3/ER 470,482 - 483). Accordingly, Nautilus complied with the requirement set forth in *Blazer* and thus is entitled to reimbursement as a matter of law.

The district court's reliance on *See* is also unavailing. The *See* case did not involve an insurer's claim for reimbursement of defense fees and costs in an underlying action. Rather, in *See*, the insurer sought a judicial determination of no coverage, and the insured cross-claimed for attorney's fees and costs incurred in defending itself in that coverage action. *See*, 185 F.Supp.2d at 1165 – 1166. The district court found that the insurance policy provided coverage for the claim, and that the terms of the policy allowed the insured to recover the attorneys' fees incurred in responding to the declaratory relief action. *Id*. at 1172 - 1173[3]. The factual situation in *See* bears no resemblance to the matter before this Court in which Nautilus, as the insurer, seeks reimbursement of defense costs paid on behalf of its Insureds in an underlying action after a determination that no potential

[3] Specifically, the policy provided that the insurer would "pay . [a]ll reasonable expenses incurred by the 'insured' at our request." *Id*. at 1173.

for coverage existed.

"Generally, an appropriate course of action for an insurer who believes that it is under no obligation to defend is to provide a defense to the insured under a reservation of its right to seek reimbursement[.]" *Wheeler v. Reese*, 835 P.2d 572, 577 (Colo. 1992) (citation omitted). For example, in *Walbrook Ins. Co. Ltd. v. Goshgarian & Goshgarian*, 726 F.Supp. 777 (C.D. Cal. 1989)[4], the insurer undertook the defense of the insured under a reservation of rights. *Id*. at 779. The letter specifically stated that the insurer reserved the right to recover all sums paid on behalf of the insured for defense. *Id*. at 782. The insured "objected" to the reservation of rights but accepted payments from the insurer totaling $500,000 to the insured's independent counsel in the underlying suit. *Id*.

In holding that the insurer was entitled to reimbursement, the *Walbrook* court held as follows:

> In the present case there can be no doubt that [the insured] knew that [the insurer] intended to seek reimbursement if it was found that there was no duty to defend. . . . [T]his awareness can be shown from the fact of the explicit reservation letters sent to [the insured] explaining the reservation prior to the payment of defense costs . . . While [the insured] did specifically object to this reservation, they also accepted $500,000 in defense costs from [the insurer]. This would be inconsistent with their objections, as they are refusing to accept the agreement yet retaining the fruits of it. There is adequate evidence

[4] "In situations where no state case law exists, Nevada 'courts have looked to the law of other jurisdictions, particularly California, for guidance.'" *Rimini Street, Inc. v. Hartford Fire Ins. Co*., No. 2:15-cv-2202 JCM (CWH), 2016 WL 3192709, at *3 (D. Nev. 2016), citing *Mort v. United States*, 86 F.3d 890,893 (9th Cir. 1996).

> showing an "understanding" that [the insurer] would seek reimbursement. Furthermore, this Court holds that acceptance of the monies constitutes an implied agreement to the reservation.

Id. at 784 (citation omitted); *see also Crawford v. Ranger Ins. Co*., 653 F.2d 1248 (9th Cir.1981) (under Hawaiian law, an insurer did not waive its right to disclaim coverage when it provided a defense without first securing an insured's consent to a reservation of rights letter); *Draft Sys., Inc. v. Alspach*, 756 F.2d 293, 296 (3d. Cir.1985) (under Pennsylvania law, reservation of rights letters do not require the assent of the insured to be valid and effective).

Here, there is indisputable evidence that the insured was informed on multiple occasions that Nautilus reserved the right to obtain reimbursement of defense fees and costs incurred. Under the plethora of case law cited above, these letters were adequate to allow Nautilus to recover defense fees and costs after it obtained a judicial determination of no coverage under the policy.

3. The District Court's Finding that the Lack of Coverage Was Prospective, Rather than Retrospective, Misinterprets Nautilus's Complaint and the Law

The district court found that Nautilus only asked for a declaration that it had no <u>further</u> duty to defend the Insureds. (Vol. 1/ER 10). This is not accurate. Nautilus' complaint asserts in relevant part as follows:

31. Nautilus is informed and believes and therefore alleges that the

terms, conditions, exclusions, and endorsements of the Nautilus Policy, along with Nevada law, preclude Nautilus from having any duty to defend Defendants Access Medical, Flournoy and/or Wood and/or indemnify said Defendants for damages which may be awarded in the underlying Switzer Action

. . .

34. Nautilus contends that it has no duty to defend Defendants Access Medical and Wood in the Switzer Action pursuant to the Nautilus Policy, and in accordance with prevailing legal authority.

. . .

41. Nautilus contends that it has no duty to defend Defendant Flournoy in the Switzer Action pursuant to the Nautilus Policy's provisions, and in accordance with prevailing legal authority.

(Vol. 4/ER 550 - 551).

Further, when there is a determination that there is no potential for coverage, the duty to defend is extinguished retrospectively, not prospectively. "[A]n insurer…bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy." *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc*. 99 P.3d 1153, 1158 (Nev. 2004) (en banc) (citation omitted) ("*Frontier*"). "[I]n an action wherein none of the claims is even

potentially covered because it does not even possibly embrace any triggering harm of the specified sort within the policy period caused by an included occurrence, the insurer does not have a duty to defend." *Scottsdale Ins. Co. v. MV Transp.*, 115 P.3d 460, 468 (Cal. 2005) (internal quotations and citations omitted) ("*MV Transportation*"). "By law applied in hindsight, courts can determine that no potential for coverage, and thus no duty to defend, ever existed." *Id*. at 658. "If that conclusion is reached, the insurer, having reserved its right, may recover from its insured the costs it expended to provide a defense which, under its contract of insurance, it was never obliged to furnish." *Id*. An insured cannot have a reasonable expectation that it would be entitled to a windfall. *Buss v. Superior Court*, 939 P.2d 766, 784 (Cal. 1997).

Here, the district court determined that there existed no potential for coverage based on the allegations in the *Switzer* cross-complaint and the extrinsic evidence presented to Nautilus. (Vol. 1/ER 9) Based on its order, the district court determined that Nautilus never had a duty to defend. Stated another way, according to the district court's ruling, the Insured never presented Nautilus with facts which gave rise to the potential for coverage under the policy. Therefore, Nautilus never had a duty to defend. *See Frontier*, 99 P.3d at 1158. Accordingly, Nautilus is entitled to restitution. *MV Transportation*, 115 P.3d at 469. By failing to grant Nautilus's request for reimbursement, the district court granted the

Insureds a windfall and unjustly enriched them. *Id*. The district court erred by finding that there was no further duty to defend (i.e. there was no potential for coverage from the time of its order moving forward), rather than finding Nautilus never had a duty to defend in the first place, and thus was entitled to reimbursement of defense costs it paid for an uncovered claim.

C. The District Court Erred When It Failed to Grant Nautilus's Unopposed Motion Seeking Reimbursement from Flournoy

The district court's order denying Nautilus's request for reimbursement does not address Nautilus's request for reimbursement from Flournoy. The district court erred by not granting Nautilus's request for reimbursement from Flournoy as Flournoy did not oppose Nautilus's motion for further relief. Accordingly, this Court should overturn the district court's ruling as to Flournoy and find that Nautilus is entitled to reimbursement of defense costs it incurred in providing Flournoy with a defense and independent counsel in the underlying action.

D. The District Court Erred By Denying Nautilus's Request for Further Relief Under Section 2202

1. Nautilus's Request for Further Relief Effectuates the Declaratory Judgment Finding It Had No Duty To Defend

As Nautilus established it is entitled to reimbursement as a matter of law,

Nautilus should have been granted reimbursement by the district court under the Declaratory Judgment Act, which provides that "[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202. Under section 2202, the court retains jurisdiction to enter such further orders as is necessary or proper to give complete and effectual relief consistent with its declaratory judgment. *Powell v. McCormack*, 395 U.S. 486, 499 (1969) (28 U.S.C. section 2202 allows "declaratory judgment [to] be used as a predicate to further relief."); *Penthouse*, 792 F.2d at 950 ("The Declaratory Judgment Act provides the district court with the power to issue an appropriate order so as to effectuate a grant of declaratory relief."); *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569, 575 (9th Cir. 1980) (Section 2202 "empowers the district court to grant supplemental relief"); *In re U.S.A. Commercial Mortgage Co. v. Compass U.S.A. SPE LLC*, 802 F.Supp.2d 1147, 1179 (D. Nev. 2011); *see also United Teacher Assoc. Ins. Co. v. Union Labor Life Ins. Co*., 414 F.3d 558, 574 (5th Cir. 2005) (denial of further relief would effectively render the declaratory judgment meaningless); Wright & Miller, § 2771 Judgment, 10B Fed. Prac. & Proc. Civ. § 2771 (4th ed.).

The district court entered judgment in favor of Nautilus and against the Insureds adjudging that "Nautilus is entitled to a declaration that it owes no duty

under policy number BN952426 to defend Access Medical, LLC, Flournoy Management, LLC or Robert Clark Wood II, against Switzer's cross-claims[.]" (Vol. 1/ER 12). Nautilus paid defense fees on behalf of the Insureds for years. (Vol. 2/ER 59-226; Vol. 3/ER 252-445). An order granting Nautilus reimbursement of the defense costs it paid without a contractual obligation to do so would effectuate the district court's judgment that Nautilus owed the Insureds no duty to defend.

2. The District Court Applied An Incorrect Standard In Determining Whether To Grant Nautilus Further Relief

Relying on *Alliance of Nonprofits for Insurance, Risk Retention Group v. Barratt*, No. 2:10-cv-1749 JCM RJJ, 2013 WL 3200083, at *3 (D. Nev. June 24, 2013) ("*Barratt*"), the district court declined to adopt an appropriate reading of the Declaratory Judgment Act which would have permitted Nautilus to recover defense costs by way of a motion for further relief under section 2202. However, the facts of *Barratt* bear no resemblance to the circumstances of this case.

In *Barratt*, the Commissioner of Insurance for the State of Nevada ("Commissioner") issued an order prohibiting plaintiff, a risk retention group ("RRG") from writing "first dollar" liability policies in Nevada. *Barratt*, 2013 WL 32000083, at *1. Plaintiff filed an action in the United States District Court, District of Nevada, seeking declaratory and injunctive relief from the

administrative order. *Id*. The district court entered a declaratory judgment that the Commissioner's order violated the Liability Risk Retention Act ("LRRA") and thus was preempted. *Id*. The district court awarded RGG the attorneys' fees and costs they had incurred in prosecuting their declaratory relief complaint under 42 U.S.C. § 1983 and entered judgment. *Id*. The Commissioner appealed both orders. *Id*. The Ninth Circuit affirmed the entry of declaratory and injunctive relief but vacated the award of attorneys' fees on the basis that RRG lacked an enforceable right under 42 U.S.C. § 1983, and therefore was not entitled to attorneys' fees as a prevailing party under 42 U.S.C. § 1988. *Id*. RRG then filed a motion for relief under 28 U.S.C. section 2202 seeking the attorneys' fees they had expended in prosecuting the declaratory relief action. *Id*.

Because RGG's request was for attorneys' fees incurred in prosecuting their declaratory relief action, the court was required to apply the restrictive standard of awarding attorneys' fees when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id*. at *2. Because the court did not find that the Commissioner acted in bad faith or with a vexatious intent, there was no basis to award attorneys' fees under this court's inherent power. *Id*. at *3.

In this case, Nautilus is not seeking the attorneys' fees it incurred in prosecuting its declaratory relief action against its insureds. Rather, it is merely seeking the fruits of the court's decision that it never had a duty to defend its

insureds in the underlying action, a right that it reserved several times. Therefore, the district court in this case should not have adopted the holding of *Barratt* and applied it to this case.

A case more properly on point is *Horn & Hardart Co. v. National Rail Passenger Corp*., in which the court held:

> Section 2202…provides for "necessary or *proper* relief" – specifically, "proper relief *based on* the declaratory judgment." 28 U.S.C. § 2202 (emphasis added.) Amtrak's request for further relief in the form of triple rent and attorneys' fees follows absolutely from, and is based on, the district court's decision in *Horn & Hardart I* confirming Amtrak's right to terminate the leasehold. And even though Amtrak's present request may not be "necessary" to effectuate the lease termination ruling, **the plain language of the Declaratory Judgment Act does not require this degree of stringency. The relief need only be proper.** *Horn & Hardart Co. v. National Rail Passenger Corp*. 843 F.2d 546 (D.C. Cir. 1988). (emphasis added).

Here, just like in *Horn & Hardart*, Nautilus's request for reimbursement of the defense fees and costs expended to defend its insureds in a case that was ultimately determined not to be covered under the policy is proper relief under the Declaratory Judgment Act.

The fact that Nautilus is entitled to such relief was confirmed in the court's decision in *Omaha Indemnity Insurance Co. v. Cardon Oil Co*., 687 F.Supp. 502 (N.D. Cal. 1988); aff'd, 902 F.2d 40 (9th Cir. 1990) ("*Omaha*") (*declined to follow on other grounds by Evanston Ins. Co. v. OEA, Inc.*, 566 F.3d 915, 921, fn. 3 (9th

Cir. 2009)). In *Omaha*, the trial court had granted the insurer's request for declaratory relief, holding that the policy did not cover the investment loss claims alleged against the insureds in the underlying case, and that plaintiff had no duty to defend or indemnify. *Id*. at 503. The insurer then brought a motion for summary adjudication under 28 U.S.C. § 2202 seeking an order that the insureds reimburse the insurer for all attorney's fees and costs advanced in the underlying action. *Id*. The insurer pointed out that it had expressly reserved its right to recover attorney's fees and costs advanced on behalf of the insureds in the underlying case and that it was entitled to recovery since the court had ruled that it had no duty to defend. *Id*. The insureds moved to strike on the grounds that there was no action pending before the court since a judgment was entered in the case. *Id*.

In ruling for the insurer, the *Omaha* court made the following rulings:

- The further relief requested by the insurer was a proper request for relief under section 2202. *Id*. at 503-504.
- The insurer was entitled to reimbursement because the insurer had reserved its right to seek reimbursement in its reservation of rights letter. *Id*. at 504. The silence of the insured in accepting the defense with reservation of rights was sufficient to require reimbursement. *Id*. at 504-505.
- Any allegation that the insurer delayed payment of certain invoices,

> made only partial payments, and disputed legitimate items in the invoices did not defeat the insurer's right to recover monies that it actually paid on the insured's behalf. *Id*. at 505.

Similarly, in this case, Nautilus is entitled to relief under section 2202, because Nautilus reserved its right to obtain reimbursement and the insured did not object. *See also Progressive Cas. Ins. Co. v. Peerless Ins. Co*., No. CVF06-1113, 2007 WL 1655790, at *2 (E.D. Cal. June 7, 2007); *Columbia Cas. Co. v. Abdou* ,No. 15CV80-LAB (KSC), 2016 WL 4417711 at *1, (S.D. Cal. Aug. 18, 2016) ("*Abdou*"); *Continental Cas. Co. v. Assicurazioni Generali, S.P.A*., 903 F.Supp. 990 (S.D. W.Va. 1995); *Hewlett Packard Co. v. Ace Prop. & Cas. Co*., No. C-99-20207, 2010 U.S. Dist. LEXIS 145065, *8 (N.D. Cal. Dec. 15, 2010) ("Reimbursement of defense costs pursuant to a motion for reimbursement qualifies as 'proper relief' following a court order that a carrier had no duty to defend."). Therefore, the district court erred by declining to find that the relief that Nautilus sought was not the type contemplated under the Declaratory Judgment Act.

3. Nautilus's Complaint Sufficiently States A Claim For Further Relief Under 28 U.S.C. Section 2202

The district court erred by failing to grant Nautilus further relief on the basis that Nautilus did not specifically request reimbursement in its complaint. (Vol.

1/ER 10). A specific request for damages in a complaint for declaratory relief is not a prerequisite to further relief under 28 U.S.C. section 2202. The Court may award monetary damages "whether or not it had been demanded, or even proved, in the original action for declaratory relief." *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc*., 155 F.3d 17, 25 (2d Cir. 1998) (internal quotations omitted); *Security Alarm Fin. Enter. L.P. v. Nepal*, 2016 WL 9051811, at *1 (D. Nev. 2016) ("'Further relief' may include monetary damages or other relief not originally requested by the party."); Wright & Miller, § 2771 Judgment, 10B Fed. Prac. & Proc. Civ. § 2771 (4th ed.). Under section 2202, further relief may be granted following notice and hearing. 28 U.S.C. § 2202; *Penthouse*, 792 F.2d at 950 (the district court may award such relief where a party was "aware of the possibility and had an opportunity to be heard"); *see also Westport Ins. Corp. v. Bayer*, 284 F.3d 489, 500 (3d Cir. 2002); *Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co*., 255 F.2d 518, 522 (2d Cir. 1958) (additional facts required to award further relief can be proved at the hearing specified in the statute.)

The district court erred by requiring Nautilus to do more than what the Declaratory Judgment Act necessitates, specifically to provide notice and a hearing. 28 U.S.C. § 2202. Nautilus gave notice of its request for further relief. Nautilus brought its request for further relief as a properly noticed motion. (Vol.

4/ER 672). In its motion, Nautilus illustrated the multiple times it warned the Insureds that their defense was provided under a complete reservation of rights, including the right to seek reimbursement of the defense costs. (Vol. 2/ER 32, 48; Vol.3/ER 470,482 - 483). The record also establishes that Nautilus specifically warned the Insureds it would seek reimbursement of defense costs following the ruling on its motion for partial summary judgment. (Vol. 3/ER 481 - 483). Nautilus submitted declarations by its claims personnel attaching invoices which detailed the fees and costs incurred in the defense of the Insureds in the *Switzer* Action. (Vol. 3/ER 484 – 488; 493 - 498). To claim that the Insureds did not have proper notice of Nautilus's request for reimbursement of defense costs is specious.

Nautilus also requested a hearing in its motion papers. However, the district court decided the motion without argument. (Vol. 1/ER 673). Therefore, the parties did not have an opportunity for a hearing as specified under the Declaratory Judgment Act. 28 U.S.C. § 2202.

The district court also erred by citing the lack of an opportunity to conduct discovery on the defense fees and costs incurred in the *Switzer* Action as a reason to deny Nautilus's request for further relief. (Vol. 1/ER 10). Discovery regarding the amounts claimed by Nautilus is neither necessary under section 2202 nor practical under the circumstances of this case. The Insureds did not object to the amount of the defense costs claimed by Nautilus; only that the Insureds were

unable to conduct discovery into the defense costs. Moreover, the defense costs for which Nautilus seeks reimbursement were incurred on behalf of the Insureds by their defense counsel. The Insureds did not need discovery; they could simply ask their defense counsel if the amounts claimed by Nautilus were accurate. *See Abdou*, 2016 WL 4417711, at *2 (discovery not necessary as the insured could simply ask his counsel whether the amount claimed by the insurer was correct). Alternatively, the district court could have continued the hearing to allow the Insureds to conduct the discovery they allegedly needed.

E. In the Alternative, the District Court Should Have Granted Nautilus's Request to Set Aside the Judgment so that Nautilus Could Amend Its Complaint and Bring a Second Motion for Partial Summary Judgment

Nautilus requested that if the district court declined to grant further relief under 28 U.S.C. section 2202, the district court should reopen the judgment under Federal Rules of Civil Procedure, Rule 59(e) to allow Nautilus to bring a second motion for summary judgment, and amend its complaint, if necessary. The court can construe a motion, however styled, to be the type proper for the relief requested. *Mill v. Transamerican Press, Inc*., 709 F.2d 524, 527 (9th Cir. 1983). "Nomenclature is not controlling." *Sea Ranch Ass'n v. California Coastal Zone Conservation Comm'n*, 537 F.2d 1058, 1061 (9th Cir. 1976). A Rule 59(e) motion

may be granted if the motion is necessary to prevent manifest injustice. *Turner v. Burlington N. Santa Fe R. Co*., 338 F.3d 1058, 1063 (9th Cir. 2003). "Amendment of a judgment is necessary to prevent manifest injustice where, as here, the Court finds that claims against an insured aren't potentially covered, but doesn't address the insurer's request for reimbursement." *Abdou*, 2016 WL4417711 at *1 citing *Colony Ins. Co. v. Fladseth*, No. C12-1157 CW, 2013 WL 3187938, at *2 (N.D. Cal. June 21, 2013) ("Amendment of the judgment is necessary here pursuant to Federal Rule of Civil Procedure 59(e) to correct the Court's failure to address Plaintiff's request for reimbursement, and to prevent manifest injustice to Plaintiff caused by requiring it to pay Defendants' defense costs even though it has no contractual obligation to do so."). Nautilus also requested an opportunity to amend its complaint (if the district court determined it was necessary) pursuant to Federal Rules of Civil Procedure Rule 15. "The court should freely give leave when justice so requires." Rule 15(a) (2). Here, to prevent Nautilus from obtaining reimbursement of defense costs from the Insureds would permit a manifest injustice as it would provide the Insureds with a windfall. This is because the district court determined Nautilus had no contractual obligation to provide them with a defense.

F. Nautilus Is Entitled to Pre-Judgment and Post-Judgment Interest

1. Nautilus's Payment of Defense Costs on Behalf of the Insureds

Nautilus opened two claim files for the Insureds' claims; one for the claims against Access Medical and Wood, and a second for the derivative claims against Flournoy. (Vol. 3/ER 494, 485). The claims against Access Medical and Wood were assigned claim file number 10067276. (Vol. 3/ER 494 ¶7). Nautilus paid the following defense costs on Access Medical and Wood's behalf:

Vendor	Role	Total Amount Paid
Wolf & Wyman LLP	Defense counsel from 2014 to May 2016	$94,647.79
Gordon Rees	Current defense counsel	$76,796.63
Hemming Morse LLP	Forensic Accountant	$80,593.63
Downing Aaron	Discovery Facilitator	$2,960.00
JAMS	Mediation	$1,500.00
Kravitz, Schnitzer & Johnson	Personal counsel for insureds	$10,013.50
Wild, Carter, Tipton	Independent counsel	$37,970.88

(Vol. 3/496 - 497). The total amount of defense costs Nautilus paid on Access Medical and Wood's behalf under claim number 10067276 is $304,482.43. (Vol. 3/494 ¶5).

The derivative claims against Flournoy were assigned claim number 10073577. (Vol. 3/ER 485 ¶5). Nautilus paid the following defense costs on Flournoy's behalf:

Vendor	Role	Total Amount Paid
McCormick Barstow	Previous defense counsel	$60,374.74
Hall Hieatt & Connely	Current defense counsel	$71,973.75
Amy R. Lovegren-Tipton	Independent counsel	$9,962.00

(Vol. 3/485 - 486). The total amount of defense costs Nautilus paid on Flournoy's behalf is $142,310.52. (Vol. 3/ER 485, ¶6). In its motion seeking reimbursement of defense fees and costs, Nautilus reserved the right to supplement its request with additional fees and costs incurred since the time it filed its motion. Should this Court overrule the district court's order denying Nautilus's request for reimbursement, Nautilus requests that this Court remand the case to the district court to allow the parties to determine the amount of fees and costs the district court should award Nautilus.

2. Nautilus is Entitled to Pre-Judgment Interest

As a general rule, in diversity actions such as this one, state law determines the rate of pre-judgment interest. *Citicorp Real Estate, Inc. v. Smith*, 155 F.3d 1097, 1107 (9th Cir. 1998). Nevada Revised Statute section 17.130 provides:

> [w]hen no rate of interest is provided by contract or otherwise by law, or specified in the judgment, the judgment draws interest from the time of service of the summons and complaint until satisfied…at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions on January 1 or July 1, as the case may be, immediately preceding the date of judgment, plus 2 percent.

The judgment was entered on September 27, 2016. The prime rate as of July 1, 2016, was 3.5%. (State of Nevada, Dept. of Business & Industry, Financial Institutions (visited October 21, 2016), <fid.nv.gov/Resources/Fees_and_Prime_Interest_Rates>.) Thus the appropriate interest rate is 5.5%. Nautilus sent requests for waiver of the service of summons on March 23, 2015. Therefore, interest began to accrue on March 23, 2015. Accordingly, Nautilus is entitled to an order finding that it is entitled to pre-judgment interest at a rate of 5.5% from March 23, 2015 until satisfied.

3. Nautilus is Entitled to Post-Judgment Interest

In a diversity action, federal law governs the award of post-judgment interest. *American Tel. Co. v. United Computer Sys. Inc*., 98 F.3d 1206, 1209 (9th Cir. 1996). "Interest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961. "Thus, it is mandatory that postjudgment interest be allowed where a money judgment has been recovered in a civil case." *Lake Tahoe Sailboat Sales & Charter, Inc. v. Douglas County*, 562

F.Supp. 523, 524 (D. Nev. 1983). Post-judgment interest accrues on pre-judgment interest. *Air Separation Inc. v. Underwriters at Lloyd's of London*, 45 F.3d 288, 290- 291 (9th Cir. 1994). Under 28 U.S.C. § 1961(a):

> interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment.

"Interest shall be computed daily to the date of payment[.]" 28 U.S.C. § 1961(b). The applicable interest rate is 0.66% per annum, as published by the Board of Governors of the Federal Reserve System. Board of Governors of the Federal Reserve System, (visited October 25, 2016), https://www.federalreserve.gov/releases/h15.) Therefore, Nautilus is entitled to post-judgment interest on the entire award, including an award of pre-judgment interest, at a rate of 0.66% per year until satisfied.

VIII. CONCLUSION

Nautilus respectfully requests that this Court reverse the district court's order denying Nautilus's request for reimbursement of defense costs and either award such costs to Nautilus, or remand this case back to the district court with

///

///

instructions to determine the amount of reimbursement owed to Nautilus by the Insureds.

DATED: October 25, 2017 Selman Breitman LLP

By: s/ Linda Wendell Hsu
LINDA WENDELL HSU
JENNIFER WAHLGREN
Attorneys for Plaintiff, Appellant, and Cross Appellee NAUTILUS INSURANCE COMPANY

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28 – 2.6 Nautilus Insurance Company hereby sets forth the following related cases pending before the United States Court of Appeals for the Ninth Circuit:

- *Nautilus Insurance Company v. Access Medical LLC, et al.*, Case No. 17-16272 (cross-appeal by Access Medical LLC and Mr. Wood in this action);
- *Nautilus Insurance Company v. Access Medical, LLC, et al*., Case No. 17-16273 (cross-appeal by Flournoy Management LLC in this action);
- *Nautilus Insurance Company v. Access Medical, LLC, et al*. Case No. 17-16840 (Access Medical LLC and Mr. Wood's appeal from an order denying their second motion for reconsideration, which is separate from this appeal);
- *Nautilus Insurance Company v. Access Medical, LLC et al*, Case No. 17-16273 (Flournoy Management LLC's appeal from an order denying the second motion for reconsideration, which is separate from

///

///

this appeal).

DATED: October 25, 2017 Selman Breitman LLP

By: /s/ Linda Wendell Hsu
LINDA WENDELL HSU
JENNIFER WAHLGREN
Attorneys for Plaintiff, Appellant, and Cross Appellee NAUTILUS INSURANCE COMPANY

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,666 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word (Version 2010) Times New Roman 14-point font.

DATED: October 25, 2017 Selman Breitman LLP

By: s/ Linda Wendell Hsu
LINDA WENDELL HSU
JENNIFER WAHLGREN
Attorneys for Plaintiff, Appellant, and Cross Appellee NAUTILUS INSURANCE COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2017, I electronically filed Nautilus Insurance Company's Opening Brief to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED: October 25, 2017

Selman Breitman LLP

By: s/ *Pamela Smith*
Pamela Smith

Joint Appendix

Tab #2

Appeal No. 17-16265 (lead), 17-16272, 17-16273

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAUTILUS INSURANCE COMPANY,

Plaintiff-Appellant-Cross-Appellee,

v.

ACCESS MEDICAL, LLC; ROBERT CLARK WOOD II;
FLOURNOY MANAGEMENT, LLC,

Defendants-Appellees-Cross-Appellants.

On Appeal From the United States District Court,
for the District of Nevada
The Honorable Jennifer A. Dorsey, United States District Judge
Case No. 2:15-CV-00321-JAD

NAUTILUS INSURANCE COMPANY'S EXCERPTS OF RECORD VOLUME 1 OF 4

LINDA WENDELL HSU, ESQ
JENNIFER WAHLGREN, ESQ
SELMAN BREITMAN LLP
33 New Montgomery, Sixth Floor
San Francisco, CA 94105-4537
Telephone: 415.979.0400
Facsimile: 415.979.2099

Attorneys for Plaintiff-Appellant-Cross-Appellee
NAUTILUS INSURANCE COMPANY

VOLUME 1

VOLUME 2

25	507	Exhibit 11 to Index of Exhibits – "Law and Motion Minute Order" filed in the California Superior Court, County of Fresno	36.11
VOLUME 4			
TAB #	**PAGE #**	**DESCRIPTION**	**DKT. #**
26	515	Request for Judicial Notice In Support of Nautilus's Motion for Partial Summary Judgment	35
27	519	Declaration of Linda Hsu In Support of Nautilus's Motion for Partial Summary Judgment	34
28	522	Declaration of Dan Curran In Support of Nautilus's Motion for Partial Summary Judgment	33
29	526	Access Medical LLC's and Robert Wood's Answer	21
30	535	Flournoy Management LLC's Answer	20
31	542	Waiver of Service as to Flournoy Management LLC	15
32	543	Waiver of Service as to Robert Clark Wood	14
33	544	Waiver of Service as to Access Medical LLC	13
34	545	Nautilus's Complaint for Declaratory Relief	1
35	555	Exhibit 1 to Complaint – Cross-Complaint of Mr. Switzer	1-1
36	615	Exhibit 2 to Complaint – Insurance Policy	1-2
37	667	Docket Sheet from the District Court of Nevada	n/a
38		Certificate of Service	n/a

GALINA KLETSER JAKOBSON
NEVADA BAR NO. 6708
LINDA WENDELL HSU *(PRO HAC VICE)*
CALIFORNIA BAR NO. 162971
SELMAN BREITMAN LLP
33 New Montgomery, Sixth Floor
San Francisco, CA 94105-4537
Telephone: 415.979.0400
Facsimile: 415.979.2099
Email: gjakobson@selmanbreitman.com
Email: lhsu@selmanlaw.com

Attorneys for Plaintiff
NAUTILUS INSURANCE COMPANY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NAUTILUS INSURANCE COMPANY, Plaintiff, v. ACCESS MEDICAL, LLC; ROBERT CLARK WOOD, II; FLOURNOY MANAGEMENT, LLC; and DOES 1-10, inclusive, Defendants.	Case No. 2:15-cv-00321-JAD-GWF NOTICE OF APPEAL AND REPRESENTATION STATEMENT

NOTICE OF APPEAL

Under Federal Rules of Appellate Procedure 3, notice is hereby given that plaintiff Nautilus Insurance Company ("Nautilus") hereby appeals in the above-named case to the United States Court of Appeals for the Ninth Circuit from the portion of the District Court's order filed on May 18, 2017 (ECF No. 102), denying Nautilus's Motion for Further Relief Pursuant to 28 U.S.C. section 2202.

The District Court entered judgment in favor Nautilus and against defendants Access Medical, LLC; Robert Clark Wood, II; and Flournoy Management, LLC (ECF No. 71). The parties filed timely post-judgment motions under Federal Rules of Civil Procedure, Rules 59 and 60, and 28 U.S.C. section 2202. The District Court ruled on all of the post-judgment motions in the same order filed on May 18, 2017. (ECF No. 102.) Nautilus's appeal of the District Court's order denying its

request for further relief is timely. Fed. R. App. R. 4(a)(4).

Nautilus's Representation Statement is attached to this Notice as required by Ninth Circuit Rule 3-2(b).

DATED: June 16, 2017

SELMAN BREITMAN LLP

By: /s/ Linda Wendell Hsu

Galina Kletser Jakobson
Nevada Bar No. 6708
Linda Wendell Hsu (pro hac vice)
California Bar No. 162971
33 New Montgomery, Sixth Floor
San Francisco, CA 94105-4537
Phone: 415.979.2024
Facsimile: 415.979.2099
Attorneys for Plaintiff
NAUTILUS INSURANCE COMPANY

REPRESENTATION STATEMENT

Under Federal Rules of Appellate Procedure 12(b) and Ninth Circuit Rule 3-2(b), counsel signing the notice of appeal represent plaintiff Nautilus Insurance Company in this matter and no other parties. Below is a roster showing the parties to this action and identifying their counsel by name, address, telephone number and email address.

Counsel Name/Contact Information	Party Represented
Jordan P. Schnitzer L. Renee Green KRAVITZ, SCHNITZER & JOHNSON 8985 S. Eastern Ave., Ste. 200 Las Vegas, NV 89123 Phone: (702) 362-6666 Facsimile: (702) 362-2203 Email: jschnitzer@ksjattorneys.com Email: rgreen@ksjattorneys.com	Attorneys for Defendants and Appellees Access Medical, LLC and Robert Clark Wood, II
James E. Harper HARPER LAW GROUP 1935 Village Center Circle Las Vegas, NV 89134 Phone: (702) 948-9240 Facsimile: (702) 778-6600 E-mail: james@harperlawlv.com	Attorneys for Defendant and Appellee Flournoy Management, LLC
Taylor G. Selim HALL JAFFE & CLAYTON 7425 Peak Drive Las Vegas, NV 89128 Phone: (702) 316-4111 Facsimile: (702) 316-4114 Email: tselim@lawhjc.com	Attorneys for Defendant and Appellee Flournoy Management, LLC

Selman Breitman LLP
ATTORNEYS AT LAW

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of SELMAN BREITMAN LLP and, pursuant to Local Rule 5.1 and Federal Rules of Appellate Procedure 25(c)(2), service of the foregoing **NOTICE OF APPEAL AND REPRESENTATION STATEMENT,** was served on this 16th day of June, 2017, via Court's CM/ECF electronic filing system addressed to all parties on the e-service list, as follows:

Jordan P. Schnitzer L. Renee Green KRAVITZ, SCHNITZER & JOHNSON 8985 S. Eastern Ave., Ste. 200 Las Vegas, NV 89123 Phone: (702) 362-6666 Facsimile: (702) 362-2203 Email: jschnitzer@ksjattorneys.com rgreen@ksjattorneys.com	Attorneys for Defendants Access Medical, LLC and Robert Clark Wood, II
James E. Harper HARPER LAW GROUP 1935 Village Center Circle Las Vegas, NV 89134 Phone: (702) 948-9240 Facsimile: (702) 778-6600 E-mail: james@harperlawlv.com	Attorneys for Defendant Flournoy Management, LLC
Taylor G. Selim HALL JAFFE & CLAYTON 7425 Peak Drive Las Vegas, NV 89128 Phone: (702) 316-4111 Facsimile: (702) 316-4114 Email: tselim@lawhjc.com	Attorneys for Defendant Flournoy Management, LLC

/s/ Pamela Smith
PAMELA SMITH
An Employee of Selman Breitman LLP

Selman Breitman LLP
ATTORNEYS AT LAW

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Nautilus Insurance Company,

Plaintiff

v.

Access Medical, LLC, et al.,

Defendants

2:15-cv-00321-JAD-GWF

Order denying motions for reconsideration and further relief

[ECF Nos. 73, 80, 81, 83]

Nautilus Insurance Company brought this action seeking a declaration that it does not owe a duty to defend its insureds, defendants Access Medical, LLC, Flournoy Management, LLC, and one of the companies' managing members, Robert Clark Wood, II. Access, Flournoy, and Wood are defendants in a California state-court action brought by Wood's former business partner, non-party Ted Switzer.[1]

I granted summary judgment in favor of Nautilus, holding that it had no duty to defend the defendants in the state action.[2] Nautilus's policy extends coverage only to claims arising from slander, libel, or disparagement, and I explained that the state-court claims asserted against the defendants did not allege any of these. The defendants now ask me to reconsider my prior order.[3] They do not cite any new law or changed circumstances; they contend that I clearly erred.

But the defendants have simply repackaged the same arguments that they made before, and I am no more persuaded now than I was then. The thrust of their argument is that a covered claim, such as slander, could possibly be alleged against them in the future. I don't disagree, and if that happens, then perhaps Nautilus will then have a duty to defend. But that does not change the fact that existing allegations asserted against the defendants in the state-court action are not covered by

[1] ECF No. 1.

[2] ECF No. 70.

[3] ECF Nos. 80, 81.

Nautilus's policy. I therefore deny the defendants' motions.[4]

Now that I have ruled that Nautilus had no duty to defend, it moves to recover the fees and costs it incurred in defending the state-court action. But Nautilus did not plead a claim for damages or reimbursement in its complaint, and it has not established that it is entitled to these costs as a matter of law, so I deny its motion.

Discussion

A. Defendants have not demonstrated that I should reconsider my prior order.

A motion to reconsider must set forth "some valid reason why the court should reconsider its prior decision" by presenting "facts or law of a strongly convincing nature."[5] Reconsideration is appropriate if the court "is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law."[6] "A motion for reconsideration is not an avenue to re-litigate the same issues and arguments upon which the court has already ruled"[7] or "to raise arguments or present evidence that could have been raised prior to the entry of judgment."[8]

The defendants do not demonstrate any of the three grounds for reconsideration. They offer no new material evidence, they cite no intervening caselaw, and they have not shown that I clearly erred in my prior order.

1. Defendants fail to demonstrate that they need time for more discovery.

The defendants' first argument for reconsideration is that they need more time for discovery. Rule 56(d) provides "a device for litigants to avoid summary judgment when they have not had

---

[4] The defendants also move to stay my consideration of Nautilus's motion for fees pending my determination of the motion to reconsider. ECF No. 83. Because I am denying defendants' motions to reconsider, their motion to stay is moot.

[5] *Frasure v. United States*, 256 F. Supp. 2d 1180, 1183 (D. Nev. 2003).

[6] *Sch. Dist. No. 1J v. Acands, Inc.*, 5 F.3d 1244, 1263 (9th Cir. 1993).

[7] *Brown v. Kinross Gold, U.S.A.*, 378 F. Supp. 2d 1280, 1288 (D. Nev. 2005).

[8] *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008).

sufficient time to develop affirmative evidence."[9] To prevail on a Rule 56(d) request, the movant must show: "(1) that [she has] set forth in affidavit form the specific facts that [she] [hopes] to elicit from further discovery, (2) that the facts sought exist, and (3) that these sought-after facts are 'essential' to resist the summary judgment motion."[10] A Rule 56(d) motion "may be denied where the movant has been dilatory, or where the movant seeks irrelevant, speculative, or cumulative information."[11]

I previously explained why the defendants' prior showing on this point fell short, and they offer nothing new here. Defendants still have not articulated any specific facts that they hope to discover, what basis they have for believing those facts exist, and how these specific facts are essential. The defendants have therefore not shown that I clearly erred by declining to reopen discovery or otherwise delay my ruling under FRCP 56(d).

2. Defendants fail to demonstrate that I clearly erred in determining that Nautilus has no duty to defend them.

The defendants next argue that I clearly erred in determining that Nautilus has no duty to defend them. Defendants maintain that the allegations against them in the state action create a potential for coverage triggering Nautilus's duty to defend under its policy.

"The duty to defend is broader than the duty to indemnify."[12] An insurer has a duty to defend unless "there is no *potential* for coverage."[13] The duty to defend arises whenever the insurer

---

[9] *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002).

[10] *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008); *California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998) (stating standard under former Rule 56(f)).

[11] *Slama v. City of Madera*, 2012 WL 1067198, *2 (E.D. Cal. March 28, 2012) (citing *California Union Ins. Co. v. Am.*, 914 F.2d 1271, 1278 (9th Cir. 1990) (stating that, under former Rule 56(f), a district court may deny a request for further discovery if the movant has failed to pursue discovery in the past, or if the movant fails to show how the information sought would preclude summary judgment)).

[12] *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 1158 (Nev. 2004) (en banc).

[13] *Id.* (quotation omitted) (emphasis in original).

"ascertains facts [that] give rise to the potential of liability under the policy"[14] and "continues throughout the course of the litigation."[15] To prevent an insurer from evading its defense obligations "without at least investigating the facts behind a complaint," any doubts about the insurer's duty to defend must be resolved in the insured's favor.[16] As I explained in my prior order, the duty to defend may be triggered by facts known to the insurer through extrinsic sources or by the factual allegations in the complaint.[17]

Nautilus's policy requires it to defend against claims arising from "oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services[.]"[18] Defendants thus needed to point to allegations or extrinsic evidence asserted against them in the state action amounting to a claim of a "publication" of "material that slanders or libels" or "disparages" another.

The thrust of the defendants' argument for reconsideration is a repackaged version of the same arguments that they made before. They contend that the claims asserted against them in the state-court action could potentially include an allegation of defamation in the future, so Nautilus should defend them. They point to the fact that the intentional-interference claim that they are defending against requires proof of a "wrongful act"—and that independent torts like defamation (which is covered under Nautilus's policy) could constitute that wrongful act.

But the defect in the defendants' theory remains: there is no indication that the plaintiff in the state action has alleged that the predicate wrongful act for the intentional-interference claim is a defamatory publication that would trigger Nautilus's coverage. That the plaintiff in the state action

---

[14] *Id.* (quotation omitted).

[15] *Id.* (quotation omitted).

[16] *Id.*

[17] *Andrew v. Century Surety Co.*, 2014 WL 1764740, at *4 (D. Nev. April 29, 2014) (Gordon, A.) (predicting that the Nevada Supreme Court would apply the four-corners rule only when the complaint raises the possibility of coverage but the insurer's own investigation suggests there is no possibility of coverage).

[18] *Id.* at 22.

could theoretically add a qualifying allegation or that new evidence could surface in the future makes no matter. The duty to defend does not sprout from thin air anytime someone is sued; it exists when the allegations and known facts create a potential for coverage. In other words, coverage exists only when the evidence and allegations given to the insurer could possibly—on their own—result in covered liability. Without any existing evidence or allegations giving rise to a potential for covered liability, there is no present duty to defend.

Taking all of the allegations in the state-court complaint and the extrinsic evidence that the defendants offer here, there is no indication that they are being sued for an act covered by Nautilus's policy. The defendants offer no new evidence on this point, save some irrelevant discovery responses from the state action.[19] Indeed, these discovery responses cut against the defendants' theory. For example, the plaintiff in the state action says that he "has not alleged any claim for defamation" against the defendants.[20] Because the defendants offer no new relevant evidence, law, or persuasive explanation of how I clearly erred, I deny their motion for reconsideration.[21]

D. I deny Nautilus's request for the fees and costs it incurred in the underlying action.

Now that I have ruled that Nautilus owes the defendants no duty to defend, it asks that I award it the costs it incurred in defending the state-court action. Although Nautilus did not allege a claim for reimbursement or damages in its complaint, it contends that a provision in the Declaratory Relief Act, 28 U.S.C. § 2202, allows it to seek this relief.

Some courts have allowed insurers to seek reimbursement of defense costs under § 2202.[22]

---

[19] ECF No. 99-1.

[20] *Id.*

[21] Defendants also argue that it is unfair to require them to implicate themselves in tortious conduct before triggering the duty to defend. But they need not implicate themselves in a tort, they merely need to demonstrate an existing potential for coverage—that, they have not done.

[22] *See, e.g., Hewlett Packard Co. v. ACE Prop. & Cas. Ins. Co.*, 2010 WL 11469575, at *3 (N.D. Cal. Dec. 15, 2010); *Omaha Indem. Ins. Co. v. Cardon Oil Co.*, 687 F. Supp. 502, 505 (N.D. Cal. 1988).

This provision gives courts discretion to award "further necessary or proper relief" in declaratory relief actions. But while "further relief may include an award for damages, it is not the primary function of a district court in a declaratory judgment proceeding."[23] Courts have also read this "grant of power narrowly."[24] I find three problems with Nautilus's arguments.

First, Nautilus never raised a claim for reimbursement or damages in its complaint. All it asked for was a declaration that it has no *further* duty to defend the insureds.[25] Because it never asked for damages or reimbursement, neither party developed discovery or briefing related to Nautilus's incurred costs, whether those costs should be offset, or whether the parties agreed to shift those costs to the defendants if coverage did not exist. Understandably, the defendants respond that they would dispute many of Nautilus's proposed costs. Nautilus offers scant authority suggesting that an insurer may seek damages under § 2202 without alleging that claim in its initial complaint, and I decline to adopt such a liberal reading of the Act here.

The second problem is that even if Nautilus had properly alleged a claim for reimbursement, it has not shown that it is entitled to that relief as a matter of law. Nautilus argues that I should award damages under § 2202 itself, but it does not offer a single case in which a court has reimbursed a party in a state-law diversity case solely under the power of § 2202.[26] It would make little sense to apply substantive federal legal standards to a state-law case brought under diversity jurisdiction, particularly when "the operation of the Declaratory Judgment Act is procedural only,"[27] and "does not create any new substantive right but rather creates a procedure for adjudicating

---

[23] *All. of Nonprofits for Ins., Risk Retention Grp. v. Barratt*, 2013 WL 3200083, at *3 (D. Nev. June 24, 2013) (quotation omitted).

[24] *Id.*

[25] ECF No. 1 at ¶¶ 2, 36, 43, 49, 51.

[26] Nautilus's authority on this point consists of cases that either addressed federal claims, like copyright infringement, or did not address reimbursement at all. *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.*, 155 F.3d 17, 25 (2d Cir. 1998); *Lake Effect Inv. Corp. v. Bluso*, 2007 WL 1231777, at *1 (N.D. Ohio Apr. 25, 2007).

[27] *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937).

existing rights."[28] Unsurprisingly, the cases that Nautilus cites apply state law to decide whether an insurer is entitled to be reimbursed, not some nebulous standard from § 2202.[29]

Finally, Nautilus has not established that it is entitled to reimbursement under Nevada law. Nevada law allows insurers to seek reimbursement only if the parties agreed to it.[30] And Nautilus has not shown that the parties did so here. The policy does not say that Nautilus can recover its costs in this situation. And although Nautilus sent the defendants a reservation-of-rights letter indicating that it might seek reimbursement, it has not demonstrated that the letter is enforceable in this case.[31]

Conclusion

Accordingly, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the **defendants' motions for reconsideration [ECF Nos. 80, 81] are DENIED.**

IT IS FURTHER ORDERED that **Nautilus's motion for relief [ECF No. 73] is DENIED.**

IT IS FURTHER ORDERED that **defendants' motion to stay [ECF No. 83] is DENIED as moot.**

Dated this 18th day of May, 2017

Jennifer A. Dorsey
United States District Judge

---

[28] *W. Cas. & Sur. Co. v. Herman*, 405 F.2d 121, 124 (8th Cir. 1968).

[29] For example, Nautilus relies heavily on *Columbia Cas. Co. v. Abdou*, 2016 WL 4417711 (S.D. Cal. Aug. 18, 2016). As the *Abdou* court, California law governed whether the insurer was entitled to reimbursement because the court's "jurisdiction is based on diversity." *Id.* at *2.

[30] *Capitol Indem. Corp. v. Blazer*, 51 F. Supp. 2d 1080, 1090 (D. Nev. 1999) ("The right to reimbursement does not arise unless there is an understanding between the parties that the insured would be required to reimburse the insurer."); *Great W. Cas. Co. v. See*, 185 F. Supp. 2d 1164, 1173 (D. Nev. 2002).

[31] *Capitol Indem. Corp.*, 51 F. Supp. 2d at 1090 (denying insurer's request for reimbursement of defense costs because there was insufficient evidence that the parties had agreed to shift them to the insurer).

AO450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

DISTRICT OF Nevada

Nautilus Insurance Company

Plaintiff,

V.

Access Medical, LLC; Robert Clark Wood, II; Flournoy Management, LLC

Defendants.

JUDGMENT IN A CIVIL CASE

Case Number: 2:15-cv-00321-JAD-GWF

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☐ **Notice of Acceptance with Offer of Judgment.** A notice of acceptance with offer of judgment has been filed in this case.

IT IS ORDERED AND ADJUDGED

that Nautilus is entitled to a declaration that it owes no duty under policy number BN952426 to defend Access Medical, LLC, Flournoy Management, LLC, or Robert Clark Wood, II, against Switzer's cross-claims in Switzer v. Flournoy Management, LLC, et al., Superior Court of California for the County of Fresno, Case No. 11 CE CG 04395.

Judgment is hereby entered in favor of plaintiff Nautilus Insurance Company and against defendants.

September 27, 2016

Date

/s/ Lance S. Wilson

Clerk

/s/ M. Morrison

(By) Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Nautilus Insurance Company,

Plaintiff

v.

Access Medical, LLC, et al.,

Defendants

2:15-cv-00321-JAD-GWF

Order Granting Plaintiff's Motion for Summary Judgment, Denying Defendants' Cross-motion for Summary judgment, and Entering Judgment, and Closing Case

[ECF Nos. 32, 45]

Nautilus Insurance Company seeks a declaration that it does not owe a duty to defend or indemnify its insureds, defendants Access Medical, LLC, Flournoy Management, LLC, and one of the companies' managing members Robert Clark Wood, II. Access, Flournoy, and Wood are defendants in a California state-court tort and contract action brought by Wood's former business partner, non-party Ted Switzer.[1] Nautilus moves for summary judgment;[2] defendants countermove for summary judgment and, alternatively, request that I delay my summary-judgment rulings.[3] Because defendants have not made the required showing for a summary-judgment delay under FRCP 56(d), I address the motions on their merits and I find that Nautilus owes no duty to defend in the underlying action. Accordingly, I grant Nautilus's summary-judgment motion, deny defendants' countermotion, enter judgment for Nautilus and against defendants, and close this case.[4]

[1] ECF No. 1.

[2] ECF No. 32.

[3] ECF No. 42. Defendants Access and Wood filed an opposition and countermotion for summary judgment, and Flournoy filed an opposition and joinder to Access and Wood's opposition and countermotion. ECF Nos. 43, 48.

[4] I find these matters suitable for disposition without oral argument. L.R. 78-2.

Background

A. The state-court lawsuit

After their relationship soured, Wood's former business partner, Ted Switzer, filed a "Complaint for Enforcement of Limited Liability Company Member Information and Inspection Rights" in the Superior Court of California, County of Fresno, against Wood and Flournoy—the company that Wood and Switzer had formed to market and sell medical implants. In the course of that suit, Switzer filed the cross-complaint that is at issue in this case. In the cross-complaint, Switzer names Wood, Access, Flourney, and various third parties as defendants and asserts 31 claims either on behalf of Switzer individually or derivatively on behalf of nominal-defendant Flournoy.[5] In the cross-complaint, Switzer alleges that Wood misappropriated funds from Flournoy's bank account, that he did not receive the distributions that he should have received from Flournoy, and that Wood and Access improperly interfered with his current and prospective business relationships.[6]

B. The Nautilus policy

Access held a policy with Nautilus during the relevant time period that named Flournoy as an additional insured.[7] Wood was also insured under the policy in his capacity as shareholder and manager of Access and Flourney.[8] In relevant part, the policy requires Nautilus to defend and indemnify its insureds for "personal and advertising injuries" resulting from claims arising from "oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services[.]"[9]

---

[5] *See* ECF No. 36-5. I take judicial notice of Switzer's cross-complaint in the underlying California state-court action. FED. R. EVID. 201.

[6] *Id.* at ¶ 43.

[7] *See* ECF No. 36-9.

[8] *Id.*

[9] *Id.* at 22.

C. Nautilus agrees to defend under a reservation of rights and then files this lawsuit

Access tendered defense of the cross-complaint to Nautilus, claiming that Switzer's four claims for interference with prospective economic advantage triggered Nautilus's duty to defend because these claims alleged facts supporting a possible defamation claim, which would constitute "personal and advertising injury" under the Nautilus policy.[10] After multiple refusals, Nautilus eventually agreed under a reservation of rights to defend Access, Wood, and Flourney and then filed this suit, seeking a declaration that it has no duty to defend or indemnify any of the defendants in the underlying action.[11]

Nautilus moves for summary judgment, arguing that none of Switzer's claims in the California suit triggers its duty to defend.[12] Defendants oppose Nautilus's summary-judgment motion and counter-move for summary judgment, arguing that Nautilus has a duty to defend them from—and indemnify them for—Switzer's claims for interference with prospective economic advantage. Alternatively, defendants ask me to delay my summary-judgment rulings under FRCP 56(d).[13]

Discussion

A. Summary-judgment standards

Summary judgment is appropriate when the pleadings and admissible evidence "show there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."[14] When considering summary judgment, the court views all facts and draws all inferences in

---

[10] ECF No. 41-20.

[11] ECF No. 1.

[12] ECF No. 32. Though Nautilus titled its motion a *partial* motion for summary judgment, it is more accurately construed as a motion for full summary judgment because it seeks summary adjudication on all four of its claims, and the complaint requests only declaratory relief and costs, so there is no damages issue.

[13] ECF No. 42 at 28. Defendants cite former Rule 56(f) but the provisions previously found at Rule 56(f) are now contained in FRCP 56(d).

[14] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (citing FED. R. CIV. P. 56(c)).

the light most favorable to the nonmoving party.[15] If reasonable minds could differ on the material facts, summary judgment is inappropriate because its purpose is to avoid unnecessary trials when the facts are undisputed and the case must proceed to the trier of fact.[16]

If the moving party satisfies FRCP 56 by demonstrating the absence of any genuine issue of material fact, the burden shifts to the party resisting summary judgment to "set forth specific facts showing that there is a genuine issue for as to the material facts"; it "must produce specific evidence, through affidavits or admissible discovery material, to show that" there is a sufficient evidentiary basis on which a reasonable fact finder could find in its favor.[17] The court may only consider properly authenticated, admissible evidence in deciding a motion for summary judgment.[18]

B. Defendants are not entitled to a summary-judgment delay under FRCP 56(d).

Rule 56(d) provides "a device for litigants to avoid summary judgment when they have not had sufficient time to develop affirmative evidence."[19] To prevail on a Rule 56(d) request, the movant must show: "(1) that [she has] set forth in affidavit form the specific facts that [she] [hopes] to elicit from further discovery, (2) that the facts sought exist, and (3) that these sought-after facts are 'essential' to resist the summary judgment motion."[20] A Rule 56(d) motion "may be denied where the movant has been dilatory, or where the movant seeks irrelevant, speculative, or cumulative

---

[15] *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

[16] *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995); *see also Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994).

[17] *Bank of Am. v. Orr*, 285 F.3d 764, 783 (9th Cir. 2002) (internal citations omitted); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991); *Anderson,* 477 U.S. at 248–49.

[18] FED. R. CIV. P. 56(c); *Orr*, 285 F.3d at 773–74.

[19] *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002).

[20] *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008); *California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998) (stating standard under former Rule 56(f)).

information."[21]

Defendants argue that they need additional discovery to fully respond to Nautilus's arguments because Switzer, his wife, his bookeeper, and doctors to whom defendant Wood allegedly made defamatory statements have not yet been deposed in the underlying action.[22] These depositions "will be helpful in ascertaining the alleged wrongful acts that ruined Mr. Switzer's reputation" and "will clarify Mr. Switzer's claims [in the underlying action] and whether the Nautilus policy provides coverage."[23] Nowhere in defendants' motion or their supporting affidavit do they identify the specific facts that they hope to elicit from these depositions, show that these facts exist, or explain why these facts are essential for them to resist summary judgment. Defendants also do not explain why they could not have deposed these defendants in connection with this lawsuit, and discovery closed well before Nautilus filed its summary-judgment motion.[24] Because defendants have not made the required showing under FRCP 56(d), their request for a delay of summary judgment is denied. I thus consider the summary-judgment motions on their merits.

C. Duty to defend

"The duty to defend is broader than the duty to indemnify."[25] An insurer has a duty to defend unless "there is no *potential* for coverage."[26] The duty to defend arises whenever the insurer

---

[21] *Slama v. City of Madera*, 2012 WL 1067198, *2 (E.D. Cal. March 28, 2012) (citing *California Union Ins. Co. v. Am.*, 914 F.2d 1271, 1278 (9th Cir. 1990) (stating that, under former Rule 56(f), a district court may deny a request for further discovery if the movant has failed to pursue discovery in the past, or if the movant fails to show how the information sought would preclude summary judgment)).

[22] ECF No. 42 at 28.

[23] ECF No. 41-21 at 2.

[24] Discovery closed on November 18, 2015, ECF No. 25 at 2, and Nautilus filed its motion (after the parties stipulated to extend the dispositive-motion deadline) on January 15, 2015.

[25] *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 1158 (Nev. 2004) (en banc).

[26] *Id.* (quotation omitted) (emphasis in original).

"ascertains facts [that] give rise to the potential of liability under the policy"[27] and "continues throughout the course of the litigation."[28] To prevent an insurer from evading its defense obligations "without at least investigating the facts behind a complaint," any doubts about the insurer's duty to defend must be resolved in the insured's favor.[29]

1. Switzer's cross-claims and the July 25, 2011, email

Defendants contend that Switzer's four interference-with-prospective-economic-advantage claims, combined with an allegedly defamatory e-mail sent by a representative of Access, trigger Nautilus's duty. In relevant part, Switzer alleges that defendants engaged in "wrongful acts" that caused "various vendors to stop using Mr. Switzer's businesses and [to] use Access instead," which resulted in "the complete loss of business . . . and injury to the personal and business reputation of Mr. Switzer and Flournoy."[30] Switzer further alleges that Wood acted maliciously and "with the intent to injure [Switzer's] profession, business and emotional well-being and with a conscious disregard of [Switzer's] rights."[31] The complaint does not contain claims for slander, libel, or defamation or allege that defendants made any false statements about Switzer or his businesses.

On July 25, 2011, Jacquie Weide, a representative of Access and Flournoy, sent an e-mail to Cottage Hospital in California (one of the companies whose relationship with Switzer the defendants are alleged to have disrupted)[32] to sell Aphatec spinal implants.[33] Weide's e-mail indicates that she believes that two of the hospital's doctors were using Aphatec's implants but that their former

---

[27] *Id.* (quotation omitted).

[28] *Id.* (quotation omitted).

[29] *Id.*

[30] ECF No. 41-4 at ¶¶ 115, 116, 123, 129, 130.

[31] *Id.* at ¶¶ 110, 114, 121, 124, 128, 131.

[32] *Id.* at ¶ 126.

[33] ECF No. 41-5.

distributor is now banned from selling them, and she offers to provide a quote on the products.[34] The e-mail does not name the banned distributor,[35] and Switzer does not reference the e-mail in his cross-complaint.

2. I may consider the e-mail in determining whether Nautilus owes a duty to defend.

The Nevada Supreme Court has never explicitly adopted or rejected the "four corners rule," which limits the duty-to-defend inquiry to a comparison between the allegations in the complaint and the policy's terms.[36] District Judge Andrew Gordon recently considered this issue in *Andrew v. Century Surety Company* and *Allstate Property and Casualty Insurance Company v. Yalda.* In *Andrew*, Judge Gordon acknowledged that the Nevada Supreme Court had never explicitly adopted the rule and concluded that the Nevada Supreme Court would likely apply the four-corners rule when the complaint raises the possibility of coverage but the insurer's own investigation suggests there is no possibility of coverage.[37] He reasoned that, in this context, applying the four-corners rule appropriately errs on the side of resolving doubts about whether the duty to defend arises in favor of the insured. By contrast, he declined to apply the rule in *Yalda* because the extrinsic facts in that case raised—rather than discounted—the possibility of coverage.[38]

I find Judge Gordon's analysis in *Andrew* and *Yalda* persuasive. I predict that, where, as here, extrinsic facts known to the insurer may raise the possibility of coverage, the Nevada Supreme Court would likely not apply the four-corners rule to exclude those facts. I therefore conclude that

---

[34] *Id.*

[35] In Weid's declaration authenticating the e-mail, she indicates that she was referring to Switzer. ECF No. 41-6.

[36] *Allstate Property and Cas. Ins. Co. v. Yalda*, 2015 WL 1344517, at *4 (D. Nev. Mar. 20, 2015 (Gordon, A.).

[37] *Andrew v. Century Surety Co.*, 2014 WL 1764740, at *4 (D. Nev. April 29, 2014) (Gordon, A.) (predicting that the Nevada Supreme Court would apply the four-corners rule only when the complaint raises the possibility of coverage but the insurer's own investigation suggests there is no possibility of coverage).

[38] *Yalda*, 2015 WL 1344517, at *4.

the duty to defend may be triggered by facts known to the insurer through extrinsic sources or by the factual allegations in the complaint.

D. Switzer's cross-complaint and the July 25, 2011, e-mail did not trigger Nautilus's duty to defend under the policy.

In relevant part, the Nautilus policy requires Nautilus to defend defendants from claims arising from "oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services[.]"[39] According to defendants, the e-mail "serves as prima facie evidence that one of the wrongful acts that Mr. Switzer allege[s] in his Cross-Complaint includes the email that allegedly slandered him."[40]

I agree with defendants that California law applies to the tortious conduct alleged in Switzer's complaint,[41] and Nautilus does not contend otherwise.[42] Federal courts sitting in diversity apply "state substantive law to state law claims, including the forum state's choice of law rules."[43] Nevada applies the most-significant-relationship test from the Restatement (Second) of Conflict of Laws § 145 to decide choice-of-law-issues in tort actions "unless another, more specific section of the Second Restatement applies to a particular tort."[44] A more specific section applies to the potential torts in Switzer's cross-complaint: § 149. Under section 149, in an action for defamation, the local law of the state where the publication occurs generally controls.[45] The July 25, 2011, e-mail that purportedly gives rise to potential defamation claims was sent to an administrator for a hospital located in California, where Switzer also lives and where his injuries would most likely be felt.

---

[39] *Id.* at 22.

[40] ECF No. 42 at 10.

[41] *Id.* at 15.

[42] ECF No. 32 at 27 (citing California law for elements of a disparagement claim).

[43] *Love v. Assoc. Newspapers, Ltd.*, 611 F.3d 601, 610 (9th Cir. 2010).

[44] *General Motors Corp. v. Eighth Judicial Dist. Court of State of Nev.*, 134 P.3d 111, 116 (Nev. 2006).

[45] Restatement (Second) of Conflict of Laws § 149 (1971).

Thus, any potential claim for libel, slander, or disparagement from the e-mail is governed by California law.

Under California law, a disparagement claim "requires a plaintiff to show a false or misleading statement that (1) specifically refers to the plaintiff's product or business and (2) clearly derogates that product or business. Each requirement must be satisfied by express mention or by clear implication."[46] Libel and slander are both forms of defamation, and each requires proof of a false and unprivileged communication that injures the plaintiff's reputation.[47]

Switzer's cross-complaint—even when read in conjunction with the June 25, 2011—e-mail does not give rise to a potential claim for slander, libel, or disparagement (or include allegations of these offenses), and therefore does not trigger Nautilus's duty to defend under the "personal and advertising injury" provision of the policy.[48] Each of these torts requires a false statement, among other elements. Even assuming that the June 25, 2011, e-mail mentions Switzer by clear implication (he is not expressly named) defendants do not argue—let alone offer any facts to show—that the e-mail contains a false statement, i.e. that Switzer was not, at that time, banned from distributing Aphatec spinal implants as the e-mail states. Additionally, no where in Switzer's cross-complaint does he allege that defendants made any false statement about him in an effort to tortiously interfere with his business relationships, and the cross-complaint does not mention or incorporate the June 25, 2011, e-mail. Accordingly, Nautilus is entitled to a declaration that it owes no duty to defend defendants against Switzer's cross-complaint.

Defendants cite the Tenth Circuit's decision in *Yousuf v. Cohlmia* for the proposition that a claim for intentional interference with business relations is always broad enough to encompass

---

[46] *Hartford Cas. Ins. Co. v. Swift Distribution, Inc.*, 326 P.3d 253, 256 (Cal. 2014).

[47] *Shivley v. Bozanich*, 80 P.3d 676, 682–83 (Cal. 2003).

[48] Because I conclude that Nautilus owes no duty to defend, I do not reach its additional argument that it owes no duty to defend Flournoy because Flournoy is only a nominal defendant in Switzer's cross-complaint.

claims for defamation.[49] *Yousuf* has little, if any, persuasive value because it is a Tenth Circuit case applying Oklahoma's substantive law. *Yousuf* is also easily distinguishable. There, the plaintiff in the underlying suit asserted a defamation claim in conjunction with his tortious-interference claims—all stemming from the defendant's allegedly false and disparaging statements about plaintiff to the board of directors of a hospital where both doctors had operating privileges and to local media.[50] After the plaintiff withdrew his defamation claim in the underlying suit, the defendant's insurer claimed that it had no duty to defend him from or indemnify him for the intentional-interference claims. The district court held that the policy—which provided coverage for offenses arising from "the publication or utterance of a libel or slander or of other defamatory or disparaging material"—was broad enough to include the plaintiff's disparagement-based intentional-interference claims.[51] The Tenth Circuit affirmed, reasoning that the damages alleged in the underlying suit were covered by the policy because they all arose from the publication or utterance of disparaging material.[52] *Yousuf* thus stands for the narrow proposition that coverage for defamation claims may include intentional-interference claims that are based on allegations of defamation. But, unlike the plaintiff in the underlying suit in *Yousuf*, Switzer does not base his intentional-interference claims on allegations of defamation. So *Yousuf* has no application here.

Because I conclude that Nautilus owes no duty to defend, it likewise owes no duty to indemnify. The duty to indemnify arises when an insured becomes legally obligated to pay damages in the underlying action that give rise to coverage under the policy.[53] Thus, to trigger the duty to indemnify, the insured's activity and the resulting loss or damages must actually fall within the

---

[49] ECF No. 42 at 18–19.

[50] *Yousuf v. Cohlmia*, 741 F.3d 31, 34 (10th Cir. 2014).

[51] *Yousuf v. Cohlmi*a, 718 F. Supp. 2d 1279, 1286 (N.D. Okla. 2010).

[52] *Yousuf*, 741 F.3d at 38.

[53] *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 99 P.3d 1153, 1157–58 (Nev. 2004).

policy's coverage.[54] The defendants have not become legally obligated to pay any damages in the underlying action, let alone damages that actually fall within the policy's coverage. Accordingly, Nautilus is also entitled to a declaration that it owes no duty to indemnify the defendants for damages awarded to Switzer on his cross-claims in the California action.

Conclusion

Accordingly, with good cause appearing and no reason to delay, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that **Nautilus's motion for summary judgment [ECF No. 32] is GRANTED and defendants' countermotion for summary judgment [ECF No. 45] is DENIED.**

Nautilus is entitled to a declaration that it owes no duty under policy number BN952426 to defend Access Medical, LLC, Flournoy Management, LLC, or Robert Clark Wood, II, against Switzer's cross-claims in *Switzer v. Flournoy Management, LLC, et al.*, Superior Court of California for the County of Fresno, Case No. 11 CE CG 04395. The Clerk of Court is instructed to enter judgment for Nautilus and against defendants accordingly and CLOSE THIS CASE.

Dated this 27th day of September, 2016.

Jennifer A. Dorsey
United States District Judge

[54] *Id.*

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of SELMAN BREITMAN LLP and on the 20th day of November, 2019, a true and correct copy of the above and foregoing document was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system and by United States First-Class mail to all unregistered parties as listed below:

Martin Kravitz
L. Renee Green
Kravitz, Schnitzer & Johnson
8985 S. Eastern Ave., Suite 200
Las Vegas, NV 89123
mkravitz@ksjattorneys.com
rgreen@ksjattorneys.com
Attorneys Robert Clark Wood, II and Access Medical, LLC

Jordan Schnitzer
The Schnitzer Law Firm
9205 W. Russell Road, Suite 240
Las Vegas, NV 89148
Jordan@theschnitzerlawfirm.com
Attorney for Robert Clark Wood, II and Access Medical, LLC

James E. Harper
Taylor G. Selim
Harper | Selim
1707 Village Center Circle, Suite 140
Las Vegas, NV 89134
eservice@harperselim.com

Attorneys for Flournoy Management Company, LLC

/s/ Bonnie Kerkhoff Juarez
BONNIE KERKHOFF JUAREZ
An Employee of Selman Breitman LLP