UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

EISAI INC.,	:	
Plaintiff,	:	**Civil Action No. 12-7208 (ES)**
v.	:	**ORDER**
ZURICH AMERICAN INSURANCE COMPANY,	:	
Defendant.	:	

SALAS, DISTRICT JUDGE

Pending before the Court are (1) Zurich American Insurance Company's ("Zurich") motion for summary judgment, (D.E. No. 26), and (2) Eisai Inc.'s ("Eisai") motion for partial summary judgment, (D.E. No. 27). For the reasons in an accompanying opinion that will follow the issuance of this Order,

IT IS on this 30th day of June 2014, hereby

ORDERED that Eisai's motion for partial summary judgment, (D.E. No. 27), is GRANTED; and it is further

ORDERED that Zurich's motion for summary judgment, (D.E. No. 26), is DENIED *without prejudice* in relevant part as set forth in the accompanying opinion; and it is further

ORDERED that Zurich's request for judicial notice, (D.E. No. 26-6), is DENIED *without prejudice* as set forth in the accompanying opinion; and it is further

ORDERED that a telephone conference is scheduled for **July 8th, 2014** at **3:30 p.m.** before the Undersigned for which Eisai's counsel shall coordinate the conference call.

/s/ Esther Salas
Esther Salas, U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

EISAI INC.,	:	
Plaintiff,	:	**Civil Action No. 12-7208 (ES)**
v.	:	**OPINION**
ZURICH AMERICAN INSURANCE COMPANY,	:	
Defendant.	:	

SALAS, DISTRICT JUDGE

I. Introduction

This action arises out of defendant Zurich American Insurance Company's ("Zurich" or "Defendant") denial of insurance coverage for Eisai Inc. ("Eisai" or "Plaintiff"). Pending before the Court are two motions: (1) Zurich's motion for summary judgment, (D.E. No. 26); and (2) Eisai's motion for partial summary judgment, (D.E. No. 27).

The parties' motions primarily raise the following issue. Eisai purchased an employment practices liability insurance policy from Zurich. Eisai was then sued in a *qui tam* action under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq*. Pursuant to the insurance policy, Eisai sought coverage from Zurich for defending the *qui tam* action. Zurich, however, denied coverage. Eisai subsequently brought this lawsuit against Zurich, arguing that the *qui tam* action is a "claim" for a "wrongful employment act" under the policy. Zurich disagrees. The Court must therefore interpret the scope of the policy and resolve whether Zurich had a duty to defend Eisai.

The Court has jurisdiction under 28 U.S.C. § 1332 and resolves the parties' motions without oral argument under Federal Rule of Civil Procedure 78(b). For the reasons below, the Court GRANTS Eisai's motion for partial summary judgment and DENIES Zurich's motion for summary judgment.

II. Background[1]

A. The Insurance Policy

Eisai is a pharmaceutical company. (D.E. No. 37-2, Eisai Inc.'s Response and Objections to Zurich's Rule 56.1 Statement of Material Facts ("Eisai's RSMF") ¶ 1). Zurich is an insurance company. (D.E. No. 9, Zurich's Answer, ¶ 3).

Zurich issued to Eisai an "Employment Practices Liability Policy" (the "Policy"). (D.E. No. 1-2, Ex. A to Complaint ("Ex. A"); Eisai's RSMF ¶ 9; D.E. No. 34, Zurich American Insurance Company's Response to Eisai Inc.'s Rule 56.1 Statement of Material Facts ("Zurich's RSMF") ¶ 1). The coverage period was April 1, 2009 to April 1, 2010. (*Id.*).

The Policy provides, in relevant part, that:

> The Underwriter shall pay on behalf of the Insureds all Loss for which the Insureds become legally obligated to pay on account of any *Claim* made by or on behalf of a past, present or prospective Employee of the Company for a *Wrongful Employment Act* taking place before or during the Policy Period if such Claim is first made against the Insureds, individually or otherwise, during the Policy Period or, if exercised, during the Extended Reporting Period.

(Ex. A at 3 (emphasis added)). The Policy further provides that the "Underwriter shall have the right and duty to defend Claims against the Insureds, even if the allegations in the Claim are groundless, false or fraudulent." (*Id.*).

[1] These background facts are undisputed unless otherwise noted. Additional facts are provided elsewhere in this Opinion as relevant to the Court's analysis.

A "Claim" is defined as, *inter alia*, "a civil proceeding commenced by the service of a complaint or similar pleading . . . against any Insured for a Wrongful Employment Act, including any appeal therefrom." (*Id.* at 4). Importantly, the Policy defines a "Wrongful Employment Act" as follows:

> any error, misstatement, misleading statement, act, omission, neglect, or breach of duty actually or allegedly committed or attempted by the Company or by one or more Insured Persons in their capacities as such or by any other person for whom the Insureds are legally responsible, in connection with any actual, alleged or constructive wrongful dismissal, discharge or termination of employment; breach of any oral, written, or implied employment contract or quasi-employment contract; employment-related misrepresentation; violation of any federal, state or local statute, regulation, ordinance, common law or public policy concerning employment or discrimination in employment; sexual or other illegal workplace harassment (including without limitation offensive, intimidating, coercive or unwelcome conduct, advances, contact or communications); wrongful failure to employ or promote; wrongful discipline; wrongful deprivation of a career opportunity; wrongful demotion or adverse change in the terms, conditions or status of employment; failure to grant tenure; failure to adopt adequate workplace or employment policies and procedures; illegal retaliatory treatment of employees; negligent hiring; negligent evaluation of employees; wrongful reference; employment-related invasion of privacy; employment-related defamation; employment-related wrongful infliction of emotional distress; or other employment-related torts.

(*Id.* at 7).

Finally, the Policy defines "Interrelated Wrongful Employment Acts" as "all Wrongful Employment Acts that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of causally connected facts, circumstances, situations, events, transactions or causes." (*Id.*).

B. Lawsuits Against Eisai

1. The Florida State Court Whistleblower Action

Michael Keeler ("Keeler") was a sales representative for Eisai. (Eisai's RSMF ¶ 6; Zurich's RSMF ¶¶ 6, 9). At Eisai, Keeler marketed and sold a drug called Ontak®. (Eisai's RSMF ¶ 7). On April 24, 2009, Eisai terminated Keeler. (*Id.* ¶ 8). On May 12, 2010, Keeler sued Eisai in Florida state court claiming improper retaliation under the Florida Whistleblower's Protection Act (the "State Court Whistleblower Action"). (Zurich's RSMF ¶ 6).[2]

In the State Court Whistleblower Action, Keeler alleged that Eisai directed its sales force to illegally market Ontak® for treatment of cancers for which it had not been approved by the FDA. (D.E. No. 1-3, Ex. B to Complaint ¶ 11; Zurich's RSMF ¶ 8). Zurich provided a defense to Eisai against the State Court Whistleblower Action under the Policy. (Zurich's RSMF ¶ 17).

On or about December 9 or 10, 2010, Eisai and Keeler settled this action. (*Id.* ¶ 19). The "Settlement Agreement and General Release" was "consented to and partially funded by Zurich under the Policy." (*Id.*).

Among other things, the "Settlement Agreement and General Release" provides that Keeler and Eisai "forever release and discharge one another from any and all claims, demands, causes of action and liabilities of any kind whatsoever (upon any legal or equitable theory, whether contractual, common-law, statutory, federal, state, local, or otherwise)." (D.E. No. 1-4, Ex. C to Complaint ¶ 4). The agreement also provides that Keeler "agrees and acknowledges that the payments provided for in . . . this Agreement . . . are in full discharge of any and all of

[2] To be sure, Eisai removed this action to federal court. *See Keeler v. Eisai, Inc.*, No. 10-60959 (S.D. Fla. June 8, 2010). For the sake of convenience, however, the Court refers to this action as the "State Court Whistleblower Action."

[Keeler's] claims which [Keeler] had, has, or can, shall or may have against [Eisai] or any of its past, present, or future parent corporations, subsidiaries, divisions, affiliates." (*Id.* ¶ 3).

And the agreement further sets forth that:

> the payments provided for in . . . this Agreement . . .fully and completely settles all of [Keeler's] claims against [Eisai] . . . for attorney's fees, costs, disbursements, and any and all claims, demands, causes of action, fees and liabilities of any kind whatsoever, whether known or unknown, which [Keeler] ever had, now has, or may have against any of them by reason of any act, omission, transaction, practice, plan, policy, procedure, conduct, occurrence, or other matter, up to and including the date [Keeler] signs this Agreement.

(*Id.*).

2. The Florida Federal Court *Qui Tam* Action & Eisai's Instant Action Against Zurich

Unbeknownst to Eisai, on August 4, 2009, the United States of America, Individual States and Keeler sued Eisai in the United States District Court for the Southern District of Florida *in camera* and under seal (the "*Qui Tam* Action"). (Eisai's RSMF ¶ 27; Zurich's RSMF ¶ 20). This action sought damages and other relief under the *qui tam* provisions of the federal FCA and similar state provisions. (Eisai's RSMF ¶ 27). In this action, Keeler also brought a claim for retaliation and violation of 31 U.S.C. § 3730(h). (Zurich's RSMF ¶ 22).

On February 25, 2011, the *Qui Tam* Action was unsealed. (Eisai's RSMF ¶ 29). On April 4, 2011, "Eisai was first served with, and first became aware of, the Qui Tam Action." (*Id.* ¶ 30).

On April 18, 2011, Eisai notified National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union")—pursuant to an insurance policy having a period from April 1, 2011 to April 1, 2012—of the *Qui Tam* Action. (Zurich's RSMF ¶ 29). But, in a letter dated June 7,

2011, National Union denied coverage for the *Qui Tam* Action. (*Id.* ¶ 30; D.E. No. 27-2, Ex. F to Ross Decl.).

On May 2, 2011, Eisai filed a "Motion to Enforce Settlement and Motion to Dismiss" in the *Qui Tam* Action. (Eisai's RSMF ¶ 33). On June 21, 2011, the Southern District of Florida entered an order on this motion. (*Id.* ¶ 34). In that order, the court dismissed, with prejudice, Keeler's claim for retaliation and violation of 31 U.S.C. § 3730(h) in view of the "Settlement Agreement and General Release" from the State Court Whistleblower Action. *See United States ex rel. Keeler v. Eisai, Inc.*, No. 09-22302, slip op. at 7, 16 (S.D. Fla. June 21, 2011).

On July 1, 2011, the *Qui Tam* Action plaintiffs filed a second amended complaint. (D.E. No. 39-3, Zurich American Insurance Company's Response to Eisai Inc.'s Rule 56.1 Statement of Supplemental Material Facts ("Zurich's RSSMF") ¶ 7).[3] And, on July 29, 2011, these plaintiffs filed a third amended complaint. (*Id.*). These amended complaints did not assert Keeler's Section 3730(h) claim. (D.E. No. 38-1, Plaintiff Eisai Inc.'s Response and Objections to Defendant Zurich American Insurance Company's Supplemental Statement of Material Facts ("Eisai's RSSMF") ¶¶ 13 & 26).

Eisai notified Zurich of the *Qui Tam* Action, but the parties dispute when Eisai did so. Eisai claims that it did so on June 30, 2011, but Zurich contends that Eisai did so on July 14, 2011. (D.E. No. 1 ("Compl.") ¶ 23; D.E. No. 27-4, Eisai Inc.'s Rule 56.1 Statement of Material Facts that are not in Genuine Dispute Regarding its Motion for Partial Summary Judgment ¶ 31; Zurich's RSMF ¶ 31). Nevertheless, the parties agree that, by July 14, 2011, Zurich was notified of the *Qui Tam* Action. (*See* D.E. No. 37, Eisai Inc.'s Brief in Opposition to Defendant Zurich

[3] The docket for the *Qui Tam* Action reveals that a first amended complaint was filed. *See United States ex rel. Keeler v. Eisai, Inc.*, No. 09-22302 (S.D. Fla. July 8, 2010). Neither party, however, accords any significance to this first amended complaint in relation to the pending summary judgment motions.

American Insurance Company's Motion for Summary Judgment ("Eisai's Opp. Br.") at 20 n.6; Zurich's RSMF ¶ 31). In a letter dated September 12, 2011, Zurich denied coverage for the *Qui Tam* Action. (Zurich's RSMF ¶ 32).

On November 20, 2012, Eisai brought the instant action against Zurich, asserting the following three counts: (1) a count seeking a declaratory judgment concerning, *inter alia*, Zurich's obligation to defend Eisai in the *Qui Tam* Action under the Policy, (Compl. ¶¶ 30-36); (2) a count for breach of contract relating to the Policy, (*id.* ¶¶ 37-42); and (3) a count for breach of the duty of good faith and fair dealing, (*id.* ¶¶ 43-49).

III. Legal Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine" issue of material fact exists for trial "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The movant bears the initial burden of establishing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the non-moving party bears the burden of proof at trial, the moving party may discharge its burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. If the movant meets this burden, the non-movant must then set forth specific facts that demonstrate the existence of a genuine issue for trial. *Id.* at 324; *Azur v. Chase Bank, USA, Nat'l Ass'n*, 601 F.3d 212, 216 (3d Cir. 2010).

Conversely, where the moving party bears the burden of proof at trial, it "must show that it has produced enough evidence to support the findings of fact necessary to win." *El v. Se. Pa. Transp. Auth. (SEPTA)*, 479 F.3d 232, 237 (3d Cir. 2007). "Put another way, it is inappropriate to grant summary judgment in favor of a moving party who bears the burden of proof at trial unless a reasonable juror would be compelled to find its way on the facts needed to rule in its favor on the law." *Id.* at 238.

Notably, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. But the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *see also Swain v. City of Vineland*, 457 F. App'x 107, 109 (3d Cir. 2012) (stating that the non-moving party must support its claim "by more than a mere scintilla of evidence").

Finally, "[t]he summary judgment standard does not change when . . . the parties have filed cross-motions for summary judgment." *Wimberly Allison Tong & Goo, Inc. v. Travelers Prop. Cas. Co. of Am.*, 559 F. Supp. 2d 504, 509 (D.N.J. 2008) (citing *Appelmans v. City of Phila.*, 826 F.2d 214, 216 (3d Cir. 1987)), *aff'd* 352 F. App'x 642 (3d Cir. 2009). "Such motions [ ] 'are no more than a claim by each side that it alone is entitled to summary judgment . . . .'" *Transportes Ferreos de Venezuela II Ca v. NKK Corp.*, 239 F.3d 555, 560 (3d Cir. 2001) (quoting *Rains v. Cascade Indus., Inc.*, 402 F.2d 241, 245 (3d Cir. 1968)).

IV. Discussion

A. Zurich's Duty to Defend Eisai Under the "Wrongful Employment Act" Provision

1. The Parties' Respective Motions and Arguments

Eisai moves for partial summary judgment regarding Zurich's duty to defend Eisai for the *Qui Tam* Action. (D.E. No. 27-1, Eisai Inc.'s Brief in Support of Motion for Partial Summary Judgment Regarding the Duty to Defend ("Eisai's Partial SJ Mov. Br.") at 1). Eisai also opposes Zurich's summary judgment motion. (Eisai's Opp. Br.).

Eisai contends that the allegations in the *Qui Tam* Action constitute a "Wrongful Employment Act." (Eisai's Partial SJ Mov. Br. at 16-19). Eisai argues that the "Policy's language unambiguously provides coverage for more than just the specifically named employment acts [in the definition of Wrongful Employment Act]—it provides coverage for any act or omission allegedly committed by Eisai in connection with any of the employment acts." (Eisai's Opp. Br. at 10).

And Eisai asserts that the "in connection with" language is significant because such language "requires only a link, however remote or tangential." (*Id.* at 10-11). Eisai contends that, here, the "*Qui Tam* Action alleges that Eisai potentially committed an act, 'causing the filing of false claims to be presented,' in connection with the alleged commission of employment acts such as negligent evaluation and wrongful discipline of employees, failing to adopt policies and procedures, and retaliatory treatment." (D.E. No. 38, Eisai Inc.'s Reply Brief in Support of Motion for Partial Summary Judgment on the Duty to Defend ("Eisai's SJ Reply Br.") at 7 (quoting D.E. No. 1-7 ("*Qui Tam* Action 3AC"))).[4]

[4] Both parties appear to agree that the third amended complaint in the *Qui Tam* Action is the operative complaint. (*See* Eisai's Opp. Br. at 7; D.E. No. 28, Zurich American Insurance Company's Memorandum in Support of its Motion for Summary Judgment ("Zurich's SJ Mov. Br.") at 15 n.3)

Zurich moves for summary judgment and opposes Eisai's motion for partial summary judgment. (Zurich's SJ Mov. Br.; D.E. No. 33, Zurich American Insurance Company's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment ("Zurich's Opp. Br.")).[5]

In so doing, Zurich argues that comparing the allegations in the *Qui Tam* Action complaint with the Policy language "leads to the inescapable conclusion that, as a matter of law, the Qui Tam Action is not within the scope of coverage afforded by the Policy." (Zurich's SJ Mov. Br. at 19).

Zurich asserts that the *Qui Tam* Action alleges that Eisai violated federal and various state false claims acts by causing health care providers to submit false claims for reimbursement for off-label uses (i.e., unapproved uses) of certain drugs. (*Id.* at 1, 20-21). Zurich argues that the government allegedly sustained damages as a result of Eisai having caused false claims to be submitted, but "not for any Wrongful Employment Act as defined in the Policy." (Zurich's Opp. Br. at 9).

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[5] Zurich asks the Court to take judicial notice of eight exhibits under Federal Rule of Evidence 201. (D.E. No. 26-6). But four of these eight are already in the record in this action. (*Compare* Exs. 1, 2, 7 & 8 to D.E. No. 26-6 *with* Exs. B, D, E & F to D.E. No. 1, respectively). The Court has considered these materials without taking judicial notice and denies as moot Zurich's request. *See Perdana Capital (Labuan) Inc. v. Chowdry*, 868 F. Supp. 2d 851, 854 n.1 (N.D. Cal. 2012) ("There is no need to take notice of documents that appear on the record; the motion is therefore denied."); *Lanard Toys Ltd. v. Novelty Inc.*, 511 F. Supp. 2d 1020, 1025 n.2 (C.D. Cal. 2007) ("The Court may consider previous filings in this case without judicially noticing them. The Court therefore finds it unnecessary to judicially notice these documents, and hereby DENIES defendants' request for judicial notice as moot.").

The other four exhibits are filings from the *Qui Tam* Action. (*See* Exs. 3-6 to D.E. No. 26-6). Namely, they are Eisai's motion seeking an extension of time to respond to the complaint, Eisai's motion to enforce settlement and to dismiss, Eisai's reply in support of its motion to enforce settlement and to dismiss, and the Southern District of Florida's June 21, 2011 order. (*Id.*). "Pursuant to [Federal Rule of Evidence] 201(b)(2), the Court can take judicial notice of the contents of court records from another jurisdiction." *Southmark Prime Plus, L.P. v. Falzone*, 776 F. Supp. 888, 892 (D. Del. 1991). But the Court has considered Zurich's statement of facts that cite these exhibits and taking judicial notice of these materials would not change the Court's resolution of the parties' dispute. Thus, the Court need not determine whether judicial notice is proper for these four documents. *See In re Citric Acid Litig.*, 191 F.3d 1090, 1105 (9th Cir. 1999) ("We need not resolve the dispute over whether judicial notice of this evidence would be proper . . . because the documents [the movant] seeks to add to the record would not change the result in this case . . . .").

Indeed, Zurich maintains that the alleged conduct in the *Qui Tam* Action "does not fall within any of the nineteen (19) categories of Wrongful Employment Acts specifically identified in the Policy." (Zurich's SJ Mov. Br. at 28; *see also* D.E. No. 39, Zurich American Insurance Company's Reply Brief in Further Support of its Motion for Summary Judgment ("Zurich's SJ Reply Br.") at 4 ("A review of the nineteen acts specified in the Policy clearly reveals that the Qui Tam Action plaintiffs were not suing Eisai for any of those acts.")). Zurich further argues that the "plaintiffs were the governments, not Keeler, who was merely the Relator, *i.e.*, the conduit through whom the governments' claims were being asserted." (Zurich's Opp. Br. at 22).

To be sure, Zurich addresses several allegations from the *Qui Tam* Action that Eisai cites, arguing that these allegations "were not the basis of any theory of recovery in the Qui Tam Action, but were merely potential evidence that Eisai was responsible for causing false claims to be filed." (*Id.* at 16). In other words, Zurich avers that such "allegations were merely evidence that the claims were false, and were not themselves the subject of the suit." (*See id.* at 18-19).

Finally, Zurich moves for dismissal of Eisai's claim for breach of the duty of good faith and fair dealing because, under the Policy, no coverage existed for the *Qui Tam* Action. (Zurich's SJ Mov. Br. at 31-32). And Zurich contends that, even if coverage existed, "Zurich clearly had a reasonable basis for its coverage position as a matter of law." (Zurich's SJ Reply Br. at 15).

2. Insurance Policy Interpretation & the Duty to Defend Under New Jersey Law[6]

Under New Jersey law, "[d]etermination of the proper coverage of an insurance contract is a question of law." *Buczek v. Cont'l Cas. Ins. Co.*, 378 F.3d 284, 288 (3d Cir. 2004) (citing *Atl. Mut. Ins. Co. v. Palisades Safety & Ins. Ass'n*, 837 A.2d 1096, 1098 (N.J. Super. Ct. App.

[6] The parties agree that New Jersey law governs the Court's interpretation of the Policy. (*See* Zurich's SJ Mov. Br. at 11-12; Eisai's Partial SJ Mov. Br. at 12-15).

Div. 2003)). Accordingly, the "interpretation of an insurance contract . . . can be resolved on summary judgment." *Foodtown, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. 05-3627, 2008 WL 3887617, at *1 (D.N.J. Aug. 20, 2008) (quoting *Adron, Inc. v. Home Ins. Co.*, 679 A.2d 160, 165 (N.J. Super. Ct. App. Div. 1996)).

"An insurer is contractually obliged to provide the insured with a defense against all actions covered by the insurance policy." *Abouzaid v. Mansard Gardens Assocs., LLC*, 23 A.3d 338, 346 (N.J. 2011). "The duty to defend is triggered by the filing of a complaint alleging a covered claim." *Id.* Indeed, "[a] duty to defend is a matter of contract, and the reason why primary insurers provide a defense is that their policies require that they do so." *Cooper Labs., Inc. v. Int'l Surplus Lines Ins. Co.*, 802 F.2d 667, 675 (3d Cir. 1986).

"Whether an insurer has a duty to defend is determined by comparing the allegations in the complaint with the language of the policy." *Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255, 1259 (N.J. 1992); *see also Abouzaid*, 23 A.3d at 346 ("[W]hen the complaint raises allegations that fall within a risk covered by the insurance contract, the insurer has a duty to defend."). "When the two correspond, the duty to defend arises, irrespective of the claim's actual merit." *Voorhees*, 607 A.2d at 1259. "[P]otentially coverable claims require a defense." *Abouzaid*, 23 A.3d at 346 (internal quotation marks omitted).[7]

"Generally, the words of an insurance policy are to be given their plain, ordinary meaning." *Gibson v. Callaghan*, 730 A.2d 1278, 1282 (N.J. 1999). But, "because insurance

[7] Accordingly, the court "does not look to any particular cause of action," but instead whether the "factual allegations in the underlying complaint fall within the scope of the policy's coverage" to determine whether a duty to defend exists. *Navigators Specialty Ins. Co. v. Scarinci & Hollenbeck, LLC*, No. 09-4317, 2010 WL 1931239, at *9 (D.N.J. May 12, 2010) (internal quotation marks omitted). "Conversely, there is no duty to defend if the claim is beyond the scope of the insuring agreement or precluded by a policy exclusion." *Amentler v. 69 Main St., LLC*, No. 08-0351, 2009 WL 1905062, at *5 (D.N.J. June 30, 2009) (citing *Cent. Nat'l Ins. Co. v. Utica Natural Ins. Grp.*, 557 A.2d 693, 694 (N.J. Super. Ct. App. Div. 1989)).

policies are adhesion contracts, courts must assume a particularly vigilant role in ensuring their conformity to public policy and principles of fairness." *Voorhees*, 607 A.2d at 1260.

Accordingly, "ambiguities in an insurance policy are to be interpreted in favor of the insured." *Gibson*, 730 A.2d at 1282. That said, "only genuine interpretational difficulties will implicate the doctrine that requires ambiguities to be construed favorably to the insured." *Progressive Cas. Ins. Co. v. Hurley*, 765 A.2d 195, 202 (N.J. 2001). "A 'genuine ambiguity' arises only 'where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage.'" *Id.* (quoting *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788, 795 (N.J. 1979)).

Furthermore, "[w]here the terms of an insurance policy are ambiguous, they are construed in favor of the insured so as to give effect to the insured's reasonable expectations." *Am. Guarantee & Liab. Ins. Co. v. Falk*, No. 10-2165, 2011 WL 4499282, at *3 (D.N.J. Sept. 27, 2011) (citing *Doto v. Russo*, 659 A.2d 1371, 1376-77 (N.J. 1995)). And, "[w]hen construing an ambiguous clause in an insurance policy we consider whether clearer draftsmanship by the insurer would have put the matter beyond reasonable question." *Passaic Valley Sewerage Comm'rs v. St. Paul Fire & Marine Ins. Co.*, 21 A.3d 1151, 1158 (N.J. 2011).

But a court may not "mak[e] a plain agreement ambiguous and then construe it in favor of the insured." *Id.* "In the absence of any ambiguity, courts 'should not write for the insured a better policy of insurance than the one purchased.'" *Gibson*, 730 A.2d at 1282 (quoting *Longobardi v. Chubb Ins. Co. of N.J.*, 582 A.2d 1257, 1260 (N.J. 1990)). "Once the insurance policy has been construed by the Court, the insured has the burden of bringing its claim within the basic terms of the policy." *Gladstone v. Westport Ins. Corp.*, No. 10-652, 2011 WL

5825985, at *6 (D.N.J. Nov. 16, 2011) (citing *Arthur Anderson LLP v. Fed. Ins. Co.*, 3 A.3d 1279, 1287 (N.J. Super. Ct. App. Div. 2010)).

Finally, "[i]f the [underlying] complaint is ambiguous, doubts should be resolved in favor of the insured and thus in favor of coverage." *Voorhees*, 607 A.2d at 1259. Thus, "[i]t is well-settled under New Jersey law that if the allegations in the underlying complaint are ambiguous, such that the claims might or might not fall within the scope of coverage, such ambiguities are resolved in favor of coverage." *Wimberly Allison Tong & Goo*, 559 F. Supp. 2d at 510 (citing New Jersey cases).

3. Comparison of the Policy with the *Qui Tam* Action

The Court agrees with Eisai that the *Qui Tam* Action triggers Zurich's duty to defend. The parties' dispute centers on the scope of the Policy term "Wrongful Employment Act." This term is defined, in relevant part, as (1) "any error, misstatement, misleading statement, act, omission, neglect, or breach of duty actually or allegedly committed or attempted" (2) "in connection with" (3) any one of nineteen employment acts, including "wrongful discipline," "failure to adopt adequate workplace or employment policies and procedures," "illegal retaliatory treatment of employees" and "negligent evaluation of employees." (Ex. A at 7). The Court must compare this language with the allegations in the *Qui Tam* Action complaint. *See Flomerfelt v. Cardiello*, 997 A.2d 991, 998 (N.J. 2010); *Voorhees*, 607 A.2d at 1259.

First, as Zurich itself explains, the *Qui Tam* Action "was a claim for one thing and one thing only—Eisai's allegedly causing false health care reimbursement claims to be filed." (Zurich's Opp. Br. at 13). Indeed, the operative complaint in the *Qui Tam* Action sets forth that:

> This is an action to recover damages and civil penalties on behalf of the United States of America, individual states, the District of Columbia, the City of Chicago, and New York City, arising from Defendant Eisai, Inc.'s ("Eisai") conduct in deliberately or

> recklessly causing the false claims to be presented under the Medicare, Medicaid, TRICARE and other federally-funded government health care programs.

(*Qui Tam* Action 3AC ¶ 1; *see also id.* ¶ 260 ("Eisai, in reckless disregard or deliberate ignorance of the truth or falsity of the information it conveyed, caused the submission of false or fraudulent claims to be paid or approved by the Government in violation of 31 U.S.C. § 3729(a)(1) and (a)(2) . . . ."). The Court is persuaded that this—i.e., the alleged causing of false health care reimbursement claims to be filed—meets the first portion of the definition of "Wrongful Employment Act": "any error, misstatement, misleading statement, *act*, *omission*, neglect, or breach of duty actually or *allegedly committed or attempted* by the Company." (*See* Ex. A at 7 (emphasis added)).

Second, the "in connection with" term is not defined in the Policy. Nevertheless, such language suggests some tangential link or association that is broader than a causal relationship. *See Flomerfelt*, 997 A.2d at 995, 1005. In *Flomerfelt*, the New Jersey Supreme Court rejected an insurer's argument that "arising out of" is "unrelated to causation" and "equates with concepts such as 'incident to' or 'in connection with.'" *Id.* It reasoned that this "would expand the phrase 'arising out of' to mean . . . connected in any fashion, however remote or tangential . . . rather than one that 'originates in,' 'grows out of' or has a 'substantial nexus.'" *Id.* at 1005. Thus, the inference is that "in connection with" means a link or association that is distinctly broader than a causal nexus. *See id.*; *accord Metro. Prop. & Cas. Ins. Co. v. Fitchburg Mut. Ins. Co.*, 793 N.E.2d 1252, 1255 (Mass. App. Ct. 2003) ("'In connection with' is ordinarily held to have even a broader meaning than 'arising out of' and is defined as related to, linked to, or associated with.").

After all, "clauses that extend coverage are to be viewed *broadly and liberally*." *Gibson*, 730 A.2d at 1283 (emphasis added). Moreover, for purposes of delineating the scope of the Policy, any ambiguity surrounding "in connection with" must be resolved in favor of Eisai. *See Jackson v. Atl.*, No. A-1526-04T5F, 2005 WL 2757134, at *5 (N.J. Super. Ct. App. Div. Oct. 26, 2005) (finding that the insurance policy's "plain and ordinary meaning" supports coverage and that, "even if [the language at issue] was considered 'ambiguous' for purposes of policy interpretation, all ambiguities are to be resolved in favor of the insured"); *see also Mazzilli v. Accident & Cas. Ins. Co. of Winterthur, Switz.*, 170 A.2d 800, 803 (N.J. 1961) ("Courts are bound to protect the insured to the full extent that any fair interpretation will allow."). In short, the Policy uses "in connection with," not language contemplating or involving a causal relationship like the policies at issue in the case law Zurich cites. (*See* Zurich's SJ Mov. Br. at 24-28; Zurich's Opp. Br. at 17-21).[8]

Third, in the *Qui Tam* Action, the operative complaint alleges that "Relator was a pharmaceutical sales representative, working for Eisai at all times relevant to this Complaint up to and until April 24, 2009" and that "Relator complained to his superiors concerning the illegal, off-label selling and marketing of the drug, Ontak." (*Qui Tam* Action 3AC ¶¶ 251-52). The complaint includes the following allegations:

> Relator received no training on the FDA prohibitions against off-label marketing. In addition, there was minimal or no training or even discussion of compliance issues. At Eisai, no one appeared to take compliance seriously.

[8] *See Health Care Indus. Liab. Ins. Program v. Momence Meadows Nursing Ctr., Inc.*, 566 F.3d 689, 694-95 (7th Cir. 2009) ("because of"); *Zurich Am. Ins. Co. v. O'Hara Reg'l Ctr. for Rehab.*, 529 F.3d 916, 923 (10th Cir. 2008) ("caused by"); *Jenkins v. St. Paul Fire & Marine Ins. Co.*, 8 F. App'x 573, 574 (8th Cir. 2001) ("resulting from"); *M/G Transp. Servs., Inc. v. Water Quality Ins. Syndicate*, 234 F.3d 974, 978 (6th Cir. 2000) ("by reason of, or with respect to"); *Horizon W., Inc. v. St. Paul Fire & Marine Ins. Co.*, 214 F. Supp. 2d 1074, 1077-78 (E.D. Cal. 2002) ("arises from"); *Hampton Med. Grp., P.A. v. Princeton Ins. Co.*, 840 A.2d 915, 921 (N.J. Super. Ct. App. Div. 2004) ("arising out of" and "result of").

Eisai sales representatives were frequently provided off-label marketing materials to distribute to physicians that were never cleared or reviewed by compliance or the legal department.

During Relator's training, there was no mention of the FDA warning letter . . . and no training regarding the proscriptions set forth in the warning letter.

No restrictions were ever placed on Eisai's sales representatives in securing off-label articles from Eisai or its managers. Eisai sales representatives routinely left these materials in physician's offices. This practice was actively encouraged by Eisai management.

Eisai sales representatives are each evaluated based upon the prior year's production, regardless of the overwhelming percentage of off-label sales.

Although Ontak was approved as an orphan drug, it was not marketed and sold as a house account, thereby preventing it from being included in each sales representative's quotas. Instead, Ontak was a central component of each Eisai sales representative's quota and impacted each sales representative's sales performance evaluation. For instance, Ontak was weighted for seventy percent of Relator's commissions despite its orphan drug status.

Sales representatives, who managed to sell large quantities of Ontak for such off-label and unsupported treatments as ovarian cancer and melanoma, were given trips to resort locations and other rewards.

Sales people could only hope to meet their sales quotas by selling the drug off-label.

Other Eisai oncology sales representatives often complained to Relator regarding Eisai's pressure to sell off-label and their inferior evaluations based on their failure to meet sales quotas, which were based on off-label sales.

On various occasions, the twenty-four (24) Eisai sales representatives ultimately assigned to Ontak's promotion, including Relator, complained to their supervisor, David Trexler, about the pressures and risks they were experiencing in trying to achieve the company's required sales quotas which were inflated because they included a high percentage of off-label sales.

> During [a] meeting in early October 2008, the oncology sales representatives' complaints were uniformly focused on the pressure and Eisai's requirement to sell off-label based on the quotas provided to them by Eisai, as well as the off-label information and data constantly distributed by Eisai. Sales information which was compiled and presented by the oncology sales representatives at the meeting revealed that off-label sales comprised between 50% and 70% of total Ontak sales. Ms. [Leslie] Mirani[, Eisai's Vice President of Oncology,] was combative and condescending during the meeting and denied there was any pressure or instruction to sell off-label.

(*Id.* ¶¶ 85, 86, 91, 97, 101, 102, 105, 106, 108-111).

These allegations appear to correspond with the following acts set forth in the definition of a "Wrongful Employment Act": "wrongful discipline," "failure to adopt adequate workplace or employment policies and procedures," "illegal retaliatory treatment of employees," and "negligent evaluation of employees." *See Abouzaid*, 23 A.3d at 346 ("[T]he determination of an insurer's duty to defend requires review of the complaint with liberality . . . . [I]f the complaint comprehends an injury which *may* be within the policy, a duty to defend will be found. In other words, potentially coverable claims require a defense.") (internal quotations marks and citations omitted). Thus, in the *Qui Tam* Action, Eisai allegedly committed the causing of false or fraudulent claims to be submitted in connection with certain acts such as "failure to adopt adequate workplace or employment policies and procedures" and "negligent evaluation of employees."

Accordingly, the Court finds that the scope of the "Wrongful Employment Act"—interpreted according to its plain and ordinary meaning—corresponds to the allegations in the operative complaint of the *Qui Tam* Action. *See Mazzilli*, 170 A.2d at 803 ("Courts are bound to protect the insured to the full extent that any fair interpretation will allow."). Thus, Zurich has a duty to defend, "irrespective of the claim's actual merit." *See Voorhees*, 607 A.2d at 1259.

To be sure, Zurich asserts that "the Policy only provides coverage for a Claim 'for a Wrongful Employment Act,'" but that the "Qui Tam Action was not brought against Eisai for failing to adopt workplace or employment policies or procedures, and no damages were sought for any such failure." (Zurich's Opp. Br. at 13). It also declares that the *Qui Tam* Action was "not a Claim for retaliation." (*Id.* at 14). And Zurich argues that any *Qui Tam* Action allegations relating to failure to adopt policies or procedures, retaliatory treatment, and wrongful discipline merely "provide[] color and background information as to the internal workings of Eisai's alleged off-label marketing scheme" and "do not point to a theory of recovery." (*Id.* at 13-15; *see also id.* at 16 ("[T]he allegations referenced by Eisai were not the basis of any theory of recovery in the Qui Tam Action, but were merely potential evidence that Eisai was responsible for causing false claims to be filed.")).

But Zurich's position is inconsistent with the Policy language. As noted above, the Policy covers a "Claim" (i.e., "a civil proceeding commenced by the service of a complaint or similar pleading . . . against any Insured") for a "Wrongful Employment Act": "any act [or] omission . . . allegedly committed or attempted by" Eisai "in connection with" (i.e., some link or association with) "wrongful discipline . . . failure to adopt adequate workplace or employment policies and procedures . . . illegal retaliatory treatment of employees . . . [or] . . . negligent evaluation of employees." (*See* Ex. A at 4, 7).

Thus, Zurich appears to improperly equate "Wrongful Employment Act" with one or more of the defined nineteen employment acts. (*See, e.g.*, Zurich's Opp. Br. at 21 ("[T]he Qui Tam Action was not a Claim for 'illegal retaliatory treatment of employees.' Nor was it a Claim for 'negligent evaluation of employees.'")). Tellingly, Zurich contends that the "Policy carefully and specifically defines the term Wrongful Employment Act to include *only* the following

conduct" and then lists the nineteen acts—*without mentioning* the following language: "any error, misstatement, misleading statement, act, omission, neglect, or breach of duty actually or allegedly committed or attempted by the Company . . . in connection with . . . ." (*See* Zurich's SJ Mov. Br. at 26-27 (emphasis added)). The Court rejects Zurich's invitation to ignore this Policy language.

Finally, Zurich contends that "[i]t is essential to focus on the fact that the plaintiff in the Qui Tam Action was the government, not Keeler personally." (Zurich's SJ Mov. Br. at 29). Zurich argues that, "most critically," the *Qui Tam* Action cannot "allege any Wrongful Employment Act on behalf of Keeler because Keeler had previously released all of his personal claims against Eisai when the [State Court] Whistleblower Action was settled on December 10, 2010." (Zurich's Opp. Br. at 11). And Zurich contends that, as to the remaining claims, "the plaintiffs were the governments, not Keeler, who was merely the Relator." (*Id.* at 22). Zurich argues that "the law is clear that in such claims, it is the government, not the Relator, who is the real party in interest." (*Id.*).

Revealingly, however, Zurich fails to cite any Policy language to support its position that Keeler himself must be the "real party in interest." (*See* Zurich's SJ Mov. Br. at 29-30; Zurich's Opp. Br. at 22; Zurich's SJ Reply Br. at 13-14). In other words, Zurich fails to set forth how—under the Policy—a duty to defend is connected to who the "real party in interest" is.[9]

Indeed, the Policy provides that the "Underwriter shall pay on behalf of the Insureds all Loss for which the Insureds become legally obligated to pay on account of any Claim made *by* or on behalf of *a past, present or prospective Employee* of the Company for a Wrongful Employment Act." (Ex. A at 3 (emphasis added)). Here, the operative complaint in the *Qui Tam*

[9] In fact, Eisai argues that a "determination of the duty to defend under the Policy does not require any analysis or discussion whatsoever of the 'real party in interest' in the Qui Tam Action." (Eisai's Opp. Br. at 27). In its reply, however, Zurich fails to refute this contention. (*See* Zurich's SJ Reply Br. at 13-14).

Action asserts that, under Section 3730(b)(1) of the FCA, "Relators, like Michael Keeler, [may] prosecute FCA actions in the name of the U.S.A." and that Keeler "brings this action on behalf of himself and . . . on behalf of the United States of America, as well as the States, the District of Columbia, and the cities referenced herein." (*Qui Tam* Action 3AC ¶¶ 6, 10-11).

Indeed, the False Claims Act "contemplates two types of actions": one by the Attorney General under 31 U.S.C. § 3730(a) and one by a private person under 31 U.S.C. § 3730(b) in which the Government may or may not elect to intervene. *Rockwell Int'l Corp. v. U.S.*, 549 U.S. 457, 477 (2007). And, "[a]n action brought by a private person does not become one brought by the Government just because the Government intervenes and elects to 'proceed with the action.'" *Id.*

Here, in fact, the United States *declined* to intervene pursuant to 31 U.S.C. § 3730(b)(4)(B), such that "the person bringing the action shall have the right to conduct the action." (D.E. No. 37-1, Ex. C to Ross Decl.). Furthermore, as a *Qui Tam* plaintiff, Keeler seeks certain damages. (*See, e.g.*, *Qui Tam* Action 3AC at 114 ("Plaintiffs demand judgment against Eisai as follows . . . That Relator, as *Qui Tam* plaintiff, be awarded the maximum amount allowed pursuant to § 3730(d) of the False Claims Act and/or any other applicable provision of law . . . .")). The Court is therefore not convinced that the "real party in interest" in the *Qui Tam* Action or Keeler's settlement with Eisai in the State Court Whistleblower Action is dispositive of Zurich's duty to defend Eisai.

B. Additional Issues

The parties' briefing raises several additional issues. *First*, Eisai contends that its notice to Zurich of the *Qui Tam* Action was timely and that Zurich suffered no prejudice by any alleged delay in receiving notice of the *Qui Tam* Action. (Eisai's Opp. Br. at 18-23). But Zurich asserts

that, "[a]t no time has Zurich suggested that or denied coverage because notice was untimely, nor does Zurich contend that it was prejudiced by a delay in giving notice." (Zurich's SJ Reply Br. at 7). Thus, the Court need not address this issue because both parties seem to agree that it is irrelevant to the duty-to-defend issue. (*See* Zurich's SJ Mov. Br. at 16 n.5; Eisai's Opp. Br. at 24; Zurich's SJ Reply Br. at 10).

Second, the parties seem to dispute whether Eisai effected notice of the *Qui Tam* Action by tendering it to its insurance broker, Marsh USA Inc. ("Marsh"), on June 30, 2011, or by Marsh's tendering it to Zurich on July 14, 2011. (*See* Eisai's Opp. Br. at 24; Zurich's SJ Reply Br. at 11-12; Eisai's RSMF ¶ 11). In effect, the parties seem to disagree on Marsh's authority to accept notice of the *Qui Tam* Action on behalf of Zurich. (*See* Eisai's Opp. Br. at 24; Zurich's SJ Reply Br. at 12). As both parties seem to acknowledge, however, this issue is immaterial to Zurich's duty to defend Eisai in the *Qui Tam* Action. (*See id.*).

Third, Zurich moves for dismissal on summary judgment of Eisai's claim for breach of the duty of good faith and fair dealing. (Zurich's SJ Mov. Br. at 31). It argues that, since no coverage existed for the *Qui Tam* Action, "Eisai's purported claim for breach of the implied covenant of good faith must therefore be dismissed." (*Id.* at 32). Zurich adds that, "[e]ven if the Court were to determine that coverage existed, however, Zurich clearly had a reasonable basis for its coverage position as a matter of law, and Eisai's claim for bad faith should be dismissed." (Zurich's SJ Reply Br. at 15).

But Eisai contends that this Court and the parties were to conduct discovery only on the issue of Zurich's alleged duty to defend and therefore Zurich's summary judgment motion—with respect to Eisai's claim for breach of the duty of good faith and fair dealing—is premature. (Eisai's Opp. Br. at 29). Eisai provides a declaration that, *inter alia*, supports its request for

discovery relating to Eisai's claim for breach of the duty of good faith and fair dealing. (*See* D.E. No. 37-1, Ross Decl. ¶¶ 4-8). The Court therefore denies Zurich's motion for summary judgment as to this claim without prejudice. *See* Fed. R. Civ. P. 56(d) ("If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.").

Finally, Eisai avers that the "allegations of Wrongful Employment Acts" in the *Qui Tam* Action "are also interrelated with the Wrongful Employment Acts" alleged in the State Court Whistleblower Action. (Eisai's Partial SJ Mov. Br. at 19). Eisai asserts that, "[e]ven if the *Qui Tam* Action was brought against Eisai outside of the Policy period, Zurich still owes Eisai a duty to defend because the allegations of the Wrongful Employment Act in the *Qui Tam* Action are 'interrelated' to the allegations of Wrongful Employment Act set forth in the State Court [Whistleblower] Action." (Eisai's SJ Reply Br. at 8-9).

In response, however, Zurich contends that "the question of whether the two lawsuits involve Interrelated Wrongful Employment Act is never reached" because the *Qui Tam* Action "did not allege any Wrongful Employment Acts." (Zurich's Opp. Br. at 25-26). In other words, Zurich argues that, to satisfy this Policy provision, "the Wrongful Employment Acts alleged in each lawsuit . . . must share a common nexus in order for those acts to be deemed 'Interrelated.'" (*Id.* at 25). And Zurich maintains that, since the "Qui Tam Action is not a Claim for a Wrongful Employment Act," the "Interrelated Wrongful Employment Acts" provision "has absolutely no relevance here." (*Id.* at 24).

Under the Policy, "Interrelated Wrongful Employment Acts" are defined as "all Wrongful Employment Acts that have as a common nexus any fact, circumstance, situation,

event, transaction, cause or series of causally connected facts, circumstances, situations, events, transactions or causes." (Ex. A at 7). Thus, as Zurich correctly notes, the issue is whether the "Wrongful Employment Acts" alleged in the two lawsuits—i.e., the State Court Whistleblower Action and the *Qui Tam* Action—have a common nexus. But, because the Court finds that Zurich has a duty to defend for the reasons described above, the Court declines to reach this issue without prejudice to Eisai seeking such a declaration at a later time.

V. Conclusion

For the reasons set forth above, the Court GRANTS Eisai's motion for partial summary judgment and DENIES Zurich's motion for summary judgment. An appropriate order accompanies this Opinion.

/s/ Esther Salas
Esther Salas, U.S.D.J.