UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 17-7762 PSG (GJSx)	Date	February 4, 2019
Title	Scottsdale Insurance Co. v. CSC Agility Platform, Inc., et al.		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): **Order GRANTING Scottsdale's motion for summary judgment and DENYING Defendants' motion for summary judgment**

Before the Court are cross-motions for summary judgment, one filed by Plaintiff/Counter-Defendant Scottsdale Insurance Company ("Scottsdale") and another filed by Defendant/Counter-Claimant CSC Agility Platform, Inc., formerly known as ServiceMesh, Inc. ("ServiceMesh"), and Defendant Computer Sciences Corporation ("Computer Sciences") (collectively "Defendants"). *See* Dkt. # 55 ("*Def. Mot.*"); Dkt. # 58 ("*Pl. Mot.*"). Both sides have filed oppositions and replies. *See* Dkt. # 67 ("*Pl. Opp.*"); Dkt. # 70 ("*Def. Opp.*"); Dkt. # 82 ("*Pl. Reply*"); Dkt. # 83 ("*Def. Reply*"). The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. Having considered the moving papers, the Court **GRANTS** Scottsdale's motion and **DENIES** Defendants' motion.

I. Background

The facts of this case are largely not in dispute.[1] The Court notes disputed facts where relevant.

[1] As a preliminary matter, Defendants assert evidentiary objections along with their opposition. *See* Dkt. # 70-3. To the extent that the Court relies on objected-to evidence, it relies only on admissible evidence and, therefore, the objections are overruled. *See Godinez v. Alta-Dena Certified Dairy LLC*, No. CV 15-01652 RSWL (SSx), 2016 WL 6915509, at *3 (C.D. Cal. Jan. 29, 2016).

A. Pre-Insurance Application Background

ServiceMesh was a private start-up company that designed a technology for "policy-based cloud management." *Defendants' Statement of Undisputed Facts*, Dkt. # 55-2 ("*Def. SUF*"), ¶ 21. This technology was "unique and highly sought-after" by ServiceMesh's customer base, which largely consisted of large enterprise companies. *Id.* ¶¶ 22–23. Like many tech start-ups, ServiceMesh's long-term strategy was to be acquired by a company that wanted access to its technology or to go public, though an initial public offering. *Id.* ¶ 27. Accordingly, when ServiceMesh began a relationship with a prospective business partner, "the dialogue always centered on whether the partner wanted to license, re-sell, or co-sell ServiceMesh's technology, or consider acquiring the company in the future." *Id.* ¶ 31.

One of these business partners was Defendant Computer Sciences. As early as January 2013, Shawn Douglass, ServiceMesh's Chief Technology Officer at the time, reached out to several companies, including Computer Sciences, at the behest of ServiceMesh CEO Eric Pulier. *See Deposition of Shawn Douglass*, Dkt. # 59-1 ("*Douglass Dep.*"), 14:17–25. Douglass's communications with these potential business partners, Computer Sciences included, involved at least in part discussions about a potential acquisition of ServiceMesh. *See id.* 25:3–24.

In February 2013, Computer Sciences and ServiceMesh began conducting due diligence. *See Plaintiff's Statement of Undisputed Facts*, Dkt. # 58-2 ("*Pl. SUF*"), ¶ 18. Scottsdale contends that the due diligence was done with a view toward Computer Sciences potentially acquiring ServiceMesh. *Id.* Defendants argue that it was conducted to more generally explore ways in which the two companies might work together. *See Defendants' Statement of Genuine Disputes*, Dkt. # 70-2 ("*Def. Genuine Disputes*"), ¶ 18. The parties code-named the potential relationship "Project Seashell." *See Pl. SUF* ¶ 19. Again, Scottsdale claims that Project Seashell referred to a plan for Computer Sciences to acquire ServiceMesh, while Defendants counter that it referred more generally to a plan for some kind of business relationship of which acquisition was only one possibility. *Id.*; *Def. Genuine Disputes* ¶ 19.

On February 23, 2013, Ryan S. Barry, a member of Computer Sciences's Corporate Development team, sent an internal email to other Computer Sciences personnel which described the "plan" for an upcoming meeting between Computer Sciences and ServiceMesh. *Pl. SUF* ¶ 20. The email noted that the plan was to have conversations "exploring the possibility and setting the stage for a potential acquisition" and that Computer Sciences's "interest [was] to explore potential acquisition." *Id.* After the meeting took place four days later, Eric Pulier (ServiceMesh's CEO) emailed Siki Giunta (the head of Computer Sciences's Cloud Group),

thanking her for hosting the discussion and stating that ServiceMesh "looked forward to the next steps as we get to know each other better and develop a view on both the partnership and M&A potential." *Id.* ¶ 21.

In early March 2013, representatives of Computer Sciences and ServiceMesh met in Las Vegas. *Id.* ¶ 22. At the meeting, Giunta from Computer Sciences told the ServiceMesh representatives, "We want to acquire you." *See Douglass Dep.* 56:17–23. Defendants have not specifically disputed this but contend that acquisition was only one type of potential business relationship discussed during the meeting. *See Deposition of Jeff Drake*, Dkt. # 59-2 ("*Drake Dep.*"), 79:18–23. On March 4, 2013, Computer Sciences's Director of Global Mergers and Acquisitions Adam Shiepe emailed ServiceMesh's Executive Vice President of Corporate Development Jeff Drake, stating that Computer Sciences had "put together an initial set of data that will help [Computer Sciences] develop a solid view on value." *Pl. SUF* ¶ 23. The email also included a list of due diligence requests. *Id.* The following day, Drake informed other ServiceMesh executives that the company was "pulling together the data per their request." *Id.* ¶ 24.

On March 18, 2013, Drake emailed Frank Martinez, a ServiceMesh employee, stating that Project Seashell was progressing with "detailed financial diligence" and that he would be having calls that week to "address questions, then will either move forward on the 'Project Seashell' track or will revert into a partnership and possible investment." *Id.* ¶ 27. The parties continued negotiating and exchanging information throughout the spring. *Id.* ¶¶ 28–29. On May 23, 2013, Computer Sciences's deal committee met and discussed the acquisition of ServiceMesh, though a member of that deal committee testified in a deposition that the talk of an acquisition during the meeting did not necessarily mean that the committee thought that that was where the relationship would end up. *Id.* ¶ 30; *Def. Genuine Disputes* ¶ 30. On June 7, 2013, Giunta (head of Computer Sciences's Cloud Group) prepared an internal presentation indicating that the ServiceMesh acquisition "must [be] accelerate[d]." *Pl. SUF* ¶ 32.

B. The Insurance Application

On June 26, 2013, ServiceMesh's General Counsel Tamara Brandt filled out and submitted to Plaintiff Scottsdale a "Renewal Application for Business and Management Indemnity Insurance." *Id.* ¶ 33. The application asked several questions about ServiceMesh's business. *See Insurance Application*, Dkt. # 59-19. Relevant to this case, Question 7 asked: "Has the Company in the past 18 months been involved with any actual, negotiated or attempted merger, acquisition or divestment?" *Id.* at 2. And Question 8 asked "Does the Company

contemplate transacting any mergers or acquisitions in the next 12 months where such merger or acquisition would involve more than 50% of the total assets of the company?" *Id.* On behalf of ServiceMesh, Brandt checked the answer box for "No" to both of these questions. *Id.* The same day, Brandt filled out an application on behalf of ServiceMesh for a different insurance policy issued by Beazley Insurance Company. *Pl. SUF* ¶ 39. Question 9 on that application asked "Has the Applicant in the past twelve (12) months completed or agreed to, or does it contemplate within the next twelve (12) months, a merger, acquisition, consolidation, whether or not such transactions were or will be completed?" *See Beazley Application*, Dkt. # 59-20, at 3. Again, Brandt checked the answer box for "No." *Id.*

After receiving ServiceMesh's application, Scottsdale went on to issue the company a Business and Management Indemnity Policy effective for the period of August 24, 2013 to August 24, 2014 (the "Policy"). *Pl. SUF* ¶ 51.

C. The Merger

Discussions between ServiceMesh and Computer Sciences continued in the months following the insurance applications. Internal Computer Sciences documents from early July 3, 2013 show that officials there had been appointed "to participate in the assessment and prosecution of [Computer Science's] acquisition of ServiceMesh, aka Project Seashell." *Id.* ¶ 44. On July 10, 2013, Sheipe (from Computer Sciences) emailed Drake (from ServiceMesh) to set up a meeting to discuss "product capabilities, technology road map, go-to-market plan, customer and partner relationships, historical financial performance and forecast, accounting policies, capital structure and tax (at a rudimentary level) and HR matters." *Id.* ¶ 45. ServiceMesh provided Computer Sciences with further information in response to due diligence requests. *Id.* ¶ 47. On July 17, 2013, Pulier (the ServiceMesh CEO) informed Frank Artale, a member of ServiceMesh's board of directors, that he was meeting with Computer Sciences, to which Artale responded "Tell them I need a term sheet for $500K or we stop answering the phone." *Id.* ¶ 48. The next day, Drake sent Pulier an email stating that Computer Sciences had "put together a large line to do acquisitions" and that he assumed Computer Sciences "would leverage their credit line and some stock for retention, etc." *Id.* ¶ 49.

On September 1, 2013, only days after the Scottsdale Policy took effect, ServiceMesh and Computer Sciences entered into a Non-Disclosure Agreement that stated that they were considering a possible strategic transaction. *Id.* ¶ 66. On September 9, 2013, Nelson Eng, Computer Sciences's head of Corporate Development, signed a document entitled "Project Seashell Term Sheet" that set forth the terms of Computer Sciences's acquisition of

ServiceMesh. *Id.* ¶ 67. Two days later, Pulier signed the term sheet on behalf of ServiceMesh. *Id.* ¶ 68. After the equity holders of ServiceMesh approved the acquisition by Computer Sciences, the deal closed on November 15, 2013 for more than $260 million. *Id.* ¶¶ 72–73. After the acquisition, ServiceMesh became known by its current name, CSC Agility Platform, Inc. *Id.* ¶ 68.

D. The Aftermath

On May 12, 2015, Computer Sciences filed a lawsuit against Pulier (ServiceMesh's CEO), among others, in the Delaware Court of Chancery, alleging that Pulier intentionally made misrepresentations in order to induce Computer Sciences to acquire ServiceMesh (the "Computer Sciences Action"). *Id.* ¶¶ 77–78. The lawsuit specifically alleged that ServiceMesh entered into fraudulent contracts with the Commonwealth Bank of Australia Ltd. to increase its apparent revenue in order to inflate the earnout payment in the acquisition deal. *Id.* ¶ 79. Pulier in turn filed suit against Computer Sciences and CSC Agility (ServiceMesh's successor), arguing that they were required by the companies' bylaws to advance him the costs of defending himself in the Computer Sciences Action (the "Pulier Action"). *Id.* ¶ 88. The court ultimately ordered Defendants to pay Pulier's defense costs. *Id.* ¶ 85.

The Scottsdale Policy potentially required it to indemnify ServiceMesh for Pulier's legal fees. After Plaintiff Scottsdale became aware of the Pulier Action, it informed Defendants that it would deny coverage based on what it alleged were material misrepresentations in the insurance application. *Id.* ¶ 94. However, after Defendants contested this determination, Scottsdale agreed to provisionally reimburse ServiceMesh for Pulier's defense costs while explicitly reserving its right to deny coverage and seek reimbursement in the future. *See Scottsdale Letter*, Dkt. # 59-46.

After the U.S. Department of Justice, Securities and Exchange Commission, and the Australian Government began investigating Pulier and his role in the merger (the "Investigations"), Pulier and ServiceMesh tendered the defense of the Investigations to Plaintiff Scottsdale for coverage under the Policy. *Id.* ¶ 92. Again, Scottsdale initially denied coverage but then tentatively agreed to reimburse ServiceMesh for Pulier's defense costs, subject to a reservation of rights. *See id.* ¶ 104. In total, Scottsdale ended up paying Defendants the entire $5 million policy limit. *See id.* ¶ 109.

E. The Current Action

Scottsdale then initiated this action against Defendants to recoup the amounts paid under the policy, arguing that it could deny coverage based on the Policy's Warranty Exclusion because ServiceMesh made material misrepresentations in its insurance application. *See generally First Amended Complaint*, Dkt. # 12. ServiceMesh asserted a counterclaim against Scottsdale, alleging that Scottsdale unreasonably delayed in making payments due under the Policy. *See generally Counterclaim*, Dkt. # 20.

The parties now cross-move for summary judgment on Scottsdale's claims, and Scottsdale additionally moves for summary judgment on ServiceMesh's counterclaims. *See generally Pl. Mot.; Def. Mot.*

II. Legal Standard

A. Summary Judgment

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment 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 party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the nonmoving party will have the burden of proof at trial, the movant can prevail by pointing out that there is an absence of evidence to support the moving party's case. *See id.* If the moving party meets its initial burden, the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. Rather, it draws all reasonable inferences in the light most favorable to the nonmoving party. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630–31 (9th Cir. 1987). The evidence presented by the parties must be capable of being presented at trial in a form that would be admissible in evidence. *See* Fed. R. Civ. P. 56(c)(2). Conclusory, speculative testimony in affidavits and moving papers is

insufficient to raise genuine issues of fact and defeat summary judgment. *See Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

B. California Insurance Contract Interpretation

In general, under California law, interpretation of an insurance policy is decided under settled rules of contract interpretation. *See California v. Cont'l Ins. Co.*, 55 Cal. 4th 186, 194 (2012) (citing *E.M.M.I. Inc. v. Zurich Am. Ins. Co.*, 32 Cal. 4th 465, 470 (2004)). "While insurance contracts have special features, they are still contracts to which the ordinary rules of contract interpretation apply." *Bank of the W. v. Superior Court*, 2 Cal. 4th 1254, 1264 (1992) (internal citations omitted). An insurance policy should be read as a layman would read it and not as it might be analyzed by an attorney or insurance expert. *See Bischel v. Fire Ins. Exch.*, 1 Cal. App. 4th 1168, 1176 (1991).

To determine if a policy is ambiguous, the Court must provisionally consider credible extrinsic evidence to determine if a policy provision is "reasonably susceptible to an alternative meaning." *See Pac. Gas & Elec. Co. v. G.W. Thomas Drayage Co.*, 69 Cal. 2d 33, 39–40 (1968); *see also Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18 (1995) ("A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable."). A term is not ambiguous because of "[d]isagreement concerning the meaning of a phrase," or "the fact that a word or phrase isolated from its context is susceptible of more than one meaning." *See Castro v. Fireman's Fund Am. Life Ins. Co.*, 206 Cal. App. 3d 1114, 1120 (1988). "[L]anguage in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract." *Bank of the W.*, 2 Cal. 4th at 1265.

"If the policy language 'is clear and explicit, it governs.'" *Rosen v. State Farm Gen. Ins. Co.*, 30 Cal. 4th 1070, 1074–75 (2003). However, if there is ambiguity, the court must construe the ambiguity "against the party who caused the uncertainty to exist (i.e., the insurer) in order to protect the insured's reasonable expectation of coverage." *La Jolla Beach & Tennis Club, Inc. v. Indus. Indem. Co.*, 9 Cal. 4th 27, 37 (1994). "To protect the interests of the insured, coverage provisions are interpreted broadly, and exclusions are interpreted narrowly." *Medina v. GEICO Indem. Co.*, 8 Cal. App. 5th 251, 259 (2017) (citing *Stellar v. State Farm Gen. Ins. Co.*, 157 Cal. App. 4th 1498, 1503 (2007)).

III. Discussion

A. Scottsdale's Claims

The parties do not dispute that the terms of the Policy generally provide for coverage of defense expenses of the type incurred by Pulier, and consequently ServiceMesh. Instead, Scottsdale relies on the Policy's Warranty Exclusion to argue that it had no obligation to indemnify Defendants for Pulier's defense costs. *See generally Pl. Mot.* The Warranty Exclusion reads:

> By acceptance of this policy, the Insureds agree that:
>
> 1. the statements in the Application are their representations, that such representation shall be deemed material to the acceptance of the risk or the hazard assumed by Insurer under this Policy, and that this Policy and each Coverage Section are issued in reliance upon the truth of such representations; and
>
> 2. in the event the Application, including materials submitted or required to be submitted therewith, contains any misrepresentation or omission made with the intent to deceive, or contains any misrepresentation or omission which materially affects either the acceptance of the risk or the hazard assumed by Insurer under this Policy, this Policy, including each and all Coverage Sections, shall be void ab initio with respect to any Insureds who had knowledge of such misrepresentation or omission.

Insurance Policy, Dkt. # 59-21 at 11–12. Scottsdale's argument is simple. It argues that ServiceMesh made material misrepresentations when it answered "No" to Questions 7 and 8 on the insurance application, which asked whether ServiceMesh had "been involved with any actual, negotiated or attempted merger, acquisition, or divestment" in the past 18 months and whether it "contemplate[d] transacting any mergers or acquisitions within the next 12 months." *See Insurance Application* at 2. It also argues that ServiceMesh's answer to Question 9 of the Beazley application (which Scottsdale had access to) was inaccurate. The Court discusses only Question 8 of the Scottsdale application because it finds it dispositive.

i. Question 8

Question 8 asked: "Does the Company contemplate transacting any mergers or acquisitions in the next 12 months where such merger or acquisition would involve more than 50% of the total assets of the company?" *Insurance Application* at 2. ServiceMesh answered the question "No." The parties now disagree about the meaning of Question 8.

a. The Parties' Positions

Relying on dictionary definitions, Scottsdale contends that the word "contemplate" should be interpreted to mean "to view or consider with continued attention," "to view as likely or probable or as an end or intention," to "look thoughtfully for a long time at," to "think about," to "think deeply and at length," or to "have in view as a probable intention." *See Pl. Mot.* 20:24–21:5 (quoting Merriam-Webster's Dictionary and the Oxford English Dictionary). In support of a definition along these lines, Scottsdale points the Court to the Southern District of California's decision in *Century Surety Co. v. 350 W.A., LLC*, No. 05-CV-1548-L(BGS), 2011 WL 4506981 (S.D. Cal. Sept. 29, 2011). In that case, a real estate holding company represented in applying for insurance that no structural alterations or demolition exposure were "contemplated" for a property it sought to insure. *Id.*, at *4. In fact, the evidence showed that the company had represented to investors and others that the property could easily be converted into residential condominiums. *Id.*, at *5. The company argued that these communications did not mean that it had "contemplated" making alterations because there had been "no firm determination" of what it planned to do with the building. But the court rejected this argument. It found that the word "contemplate" did not require a firm plan or decision and instead encompassed "the concept of 'some thought was put into the concept of converting the building to condominiums.'" *Id.*, at *6. In affirming the decision, the Ninth Circuit agreed, holding that "to 'contemplate' means to consider the possibility of action; it does not require firm and final decisions." *Century Sur. Co. v. Helleis*, 538 F. App'x 749, 750 (9th Cir. 2013).

Under this understanding of the word "contemplate," Scottsdale argues that ServiceMesh was clearly contemplating being acquired by Computer Sciences at the time it filled out the insurance application in June 2013. It points out that Pulier, ServiceMesh's CEO, had dispatched Shawn Douglass to discuss a potential acquisition with Computer Sciences and that the parties had conducted multiple rounds of due diligence. *See Pl. Reply* 2:18–24. At one point, a Computer Sciences representative flat-out told ServiceMesh officers "We want to acquire you." *See Douglass Dep.* 56:17–23. And on March 18, 2013, ServiceMesh's Executive Vice President of Corporate Development stated that the company and its employees would

"either move forward on the 'Project Seashell' track or [would] revert to partnership and possible investment"—a statement that Scottsdale argues shows that at least by that time, the oft-mentioned "Project Seashell" referred specifically to an acquisition, rather than simply general plans for some sort of business relationship. *See Pl. Reply* 2:24–3:1.

Defendants do not meaningfully dispute most of the underlying facts. They concede that, at a minimum, Computer Sciences "repeatedly called and emailed, and attended meetings with, ServiceMesh executives to discuss its desire to purchase the company." *Def. Opp.* 5:1–3. Instead, they argue that "contemplate" in Question 8 should be interpreted to refer only to consideration of a formal acquisition offer. Under this definition, they argue that answering "No" was not a misrepresentation because ServiceMesh's board of directors was not considering a formal offer from Computer Sciences at the time the insurance application was submitted. *See id.* 5:9–19.

In support of their interpretation, Defendants submit declarations from Brandt, the ServiceMesh General Counsel who filled out the application, Eric Rosenberg, an expert witness on the subject of directors and officers liability insurance, and deposition testimony from several Scottsdale employees. *See Def. Opp.* 5:20–27. Brandt's declaration states that she subjectively interpreted Question 8 as "asking whether an offer of a merger or acquisition was being considered by ServiceMesh's Board of Directors." *See Declaration of Tamara Brandt*, Dkt. # 70-8 ("*Brandt Decl.*"), ¶ 11. Rosenberg advances several expert opinions, including that "no reasonable D&O underwriter of a technology start-up would interpret an application question asking whether the applicant 'contemplate[d]' being merged out or acquired as requiring the company to answer 'Yes' if the company executive was simply thinking whether the company might be purchased," and that therefore the question "could only have been asking whether ServiceMesh's Board of Directors had considered an offer to buy the company." *See Declaration of Evan Rosenberg*, Dkt. # 70-14 ("*E. Rosenberg Decl.*"), ¶¶ 14, 17.

Defendants also focus on deposition testimony of various Scottsdale underwriters and claim adjusters, each of whom defined Question 8 slightly differently. *See Def. Mot.* 12:18–14:14. For example, Emil Soskin, the claim adjuster who handled Defendants' claim, testified that a company should answer "Yes" to Question 8 "if [a merger] was presented as an option and you thought about it," that "contemplation occurs when there are actual steps taken to put [the] idea into motion," and that the word "contemplate" means to "consider." *Def. SUF* ¶¶ 45–48. Chief underwriter Matthew Parr said the question should be answered in the affirmative "if there is, you know, any shred of thought that there potentially is going to be some sort of a transaction." *Id.* ¶ 49. Michele Riefler-Barrett, the underwriter who underwrote the

ServiceMesh Policy, testified that applicants should answer "Yes" "[i]f they have an inkling of being acquired." *Id.* ¶ 50.

As for *Century Surety*, which Scottsdale relies on, Defendants argue that it is distinguishable because it involved the use of the word "contemplated" in a different industry. *See Opp.* 7:12–8:6 (citing *Century Surety*, 2011 WL 4506981, at *16). They point the Court instead to *Old Republic Insurance Co. v. Rexene Corp.*, No. Civ. A. Nos. 10,970, 10,979, 1990 WL 176791 (Del. Ch. Nov. 5, 1990), where the Delaware Court of Chancery found it at least reasonable to construe a provision asking whether the insured "contemplate[d] any acquisitions, leveraged buyouts, tender offers or mergers," to refer only to "concrete plans for an actual merger." *See id.*, at *1, *6.

b. Discussion

The Court first determines the ordinary meaning of the word "contemplate" in Question 8. "Contemplate" can be defined as "to view mentally with continued thoughtfulness, attention or reflection," or "to view with sustained attention," Webster's Third New International Dictionary 491 (1986), meanings that generally line up with the definitions put forward by Scottsdale and the interpretation adopted by the Ninth Circuit in *Century Surety*. *See Pl. Mot.* 20:24–21:5 (defining "contemplate" as, among other things, "to think deeply and at length" or "to have in view as a probable intention"); *Century Sur.*, 538 F. App'x at 750 ("[T]o 'contemplate' means to consider the possibility of action; it does not require firm and final decisions."). Accordingly, the Court concludes that the ordinary meaning of "contemplate" suggests something more considered and intentional than a stray thought but nonetheless can encompass thinking about something that has not yet formed into a definite plan.

The Court further concludes that this plain-meaning definition clearly encompasses ServiceMesh's actions with regard to a potential acquisition by Computer Sciences. The undisputed evidence shows that ServiceMesh officials, including the company's CEO, had sustained discussions with Computer Sciences over the course of several months that involved talk of a potential acquisition. A potential acquisition was therefore on the collective mind of the company for several months leading up to June 2013 and had been clearly been thought of as something far more than a pie-in-the-sky idea.

But the Court's analysis cannot stop with the term's ordinary meaning. Under California law, it must provisionally receive Defendants' extrinsic evidence to determine whether this otherwise unambiguous definition of "contemplate" contains a "latent ambiguity." *Emps.*

Reinsurance Co. v. Superior Court, 161 Cal. App. 4th 906, 920 (2008). Question 8 cannot be ambiguous "merely because the parties . . . disagree about its meaning." *Abers v. Rounsavell*, 189 Cal. App. 4th 348, 357 (2010); *see also Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 396 (2006) (Baxter, J., concurring) ("[W]ritten agreements whose language appears clear in the context of the parties' dispute are not open to claims of 'latent' ambiguity."). Instead, the Court must determine, in light of the extrinsic evidence, whether the term "contemplate" is "reasonably susceptible" to Defendants' interpretation that it referred only to consideration of a final acquisition offer. *See Pacific Gas*, 69 Cal. 2d at 37.

As detailed above, Defendants' extrinsic evidence consists of declarations from Tamara Brandt and Evan Rosenberg as well as deposition testimony of Scottsdale employees. The Court begins with Brandt's declaration. Brandt, who filled out the insurance application on behalf of ServiceMesh, states that she understood Question 8 "as asking whether an offer of a merger or acquisition was being considered by ServiceMesh's Board of Directors." *See Brandt Decl.* ¶ 11. Importantly, however, Brandt did not reach this understanding based on representations from Scottsdale that were extrinsic to the contract. Instead, it is merely her own subjective reading of the contract's language. The mere fact that parties read a contract differently does not create ambiguity, *see Abers*, 189 Cal. App. 4th at 357, and Brandt's declaration does nothing more than show that Defendants interpreted the contract differently than Scottsdale. Accordingly, it has little relevance to the question before the Court.

The depositions of the various Scottsdale underwriters, who all defined "contemplate" differently, are similarly irrelevant. *See Def. SUF* ¶¶ 45–50. Defendants appear to believe that they serve as evidence that the word "contemplate" is ambiguous. *See Def. Mot.* 20:3–22:3. But the issue is not whether the word is ambiguous in the abstract; it is whether it is reasonably susceptible of the meaning Defendants seek to ascribe to it. Beyond the fact that the definitions of Scottsdale employees are merely subjective party positions, like Brandt's, they have nothing to do with *Defendants'* proposed definition.

That leaves the declaration of Eric Rosenberg, an expert witness who previously served as a high-level officer of a directors and officers ("D&O") liability insurer. *See E. Rosenberg Decl.* ¶¶ 3–10. According to Rosenberg, "no reasonable D&O underwriter of a technology start-up would interpret an application question asking whether the applicant 'contemplate[d]' being merged out or acquired as requiring the company to answer 'Yes' if a company executive was simply thinking about whether the company might be purchased" because executives at start-ups are "constantly thinking about when the company will be purchased so they can cash in on their stock options." *Id.* ¶ 14. He further opines that "no reasonable underwriter would expect a

technology start-up to disclose communications with partners and potential partners about the subject of the acquisition, no matter how often that subject may have arisen." *Id.* ¶ 15. That is because "[i]f an underwriter were to ask a technology start-up applying for D&O coverage to disclose if it has ever discussed with another company the prospect of a sale where no offer was ever made, the response would be useless to the underwriter because such an applicant would answer 'Yes' nearly every time." *Id.* ¶ 16. Against this background, Rosenberg concludes that "[w]hen the Scottsdale underwriter asked whether 'the Company' . . . has 'contemplated' a merger or acquisition, she reasonably could only have been asking whether ServiceMesh's Board of Directors had considered an offer to buy the company." *Id.* ¶ 17.

The Court first notes that Rosenberg's declaration is arguably irrelevant to the question before the Court. His opinions are all based on how a reasonable underwriter would interpret the term "contemplate," but California law is clear that an insurance policy "should be read as a layman would read it and *not* as it might be analyzed by an attorney or insurance expert." *Crane v. State Farm Fire & Cas. Co.*, 5 Cal. 3d 112, 115 (1971) (emphasis added); *Bishel*, 1 Cal. App. 4th at 1176. But even if Rosenberg's opinions are relevant, the Court believes that they create a false dichotomy that skirts the facts of this case. The Court does not disagree with Rosenberg's assertion that a company does not "contemplate" an acquisition within the meaning of Question 8 every time an executive merely ponders an abstract possibility of being acquired at some point in the future. The same goes for Rosenberg's contention that brief, informal discussions about an acquisition may not be encompassed by Question 8. Both of these scenarios likely also fall outside the plain meaning of the word "contemplate," which, as explained above, carries a connotation of serious consideration that goes beyond mere fleeting thoughts. *See* Webster's Third New International Dictionary 491.

But from there, Rosenberg jumps to the conclusion the Question 8 could only be asking "whether ServiceMesh's Board of Directors had considered an offer to buy the company." *E. Rosenberg Decl.* ¶19. This elides the fact that acquisition discussions can have varying levels of seriousness that can fall somewhere between brief, informal discussions and a final, formal offer. While it may be true, as Rosenberg states, that it is pointless to ask whether a start-up company's executives have ever thought about an acquisition in the abstract because such thoughts are ubiquitous, he has not explained why an insurer would care only whether a company has received a formal offer and not whether it was engaged in serious and sustained conversations with a single partner that appeared at least somewhat likely to lead to a formal acquisition offer but had not yet ripen into one. As Defendants acknowledge, it appears that Question 8 was intended to determine ServiceMesh's potential for being taken over. *See Def. Opp.* 22:15–26. Given the intent of the question, the Court can see no reason why Scottsdale

would care only about a final offer but not about serious discussions that meaningfully increased ServiceMesh's takeover risk.

In sum, after evaluating Defendants' proffered extrinsic evidence, the Court concludes that Question 8 is not "reasonably susceptible" to an interpretation that would encompass only consideration of a formal acquisition offer by ServiceMesh's board of directors.[2] Defendants' interpretation of Question 8 is unnatural and appears gerrymandered to evade the facts of this case. Had Scottsdale wished to know only of formal offers, it could have easily asked "Is the Company considering any formal acquisition offers?" Instead it used broader language, asking whether the company "contemplate[d] transacting any mergers or acquisitions." As the Ninth Circuit has held, this language can encompass consideration of a mere *possibility* of future action, a definition that certainly covers ServiceMesh's actions with regard to Computer Sciences. *See Century Sur.*, 538 F. App'x at 750.

Defendants' extrinsic evidence, consisting of subjective interpretations of the language by Scottsdale and ServiceMesh employees and expert opinions about how a reasonable underwriter would view the language, is arguably irrelevant under California law and in any event has not convinced the Court that Defendants' interpretation is reasonable. Accordingly, the Court concludes that Question 8 is capable of only one interpretation, and that under that interpretation, ServiceMesh clearly contemplated being acquired by Computer Sciences at the time it filled out the insurance application in late-June 2013. Therefore, ServiceMesh's answer to Question 8 was inaccurate.

The Court now turns to Defendants' other arguments for why Scottsdale should nevertheless not be permitted to rely on the Policy's Warranty Exclusion to deny coverage.

ii. Materiality

The Policy's Warranty Exclusion provides that if the insurance application "contains any misrepresentation or omission which materially affects either the acceptance of the risk or the

[2] The Court also rejects Defendants' argument that the term "the Company" in Question 8 can only refer to the board of directors acting as a whole. The undisputed evidence shows that ServiceMesh's CEO Pulier was well-aware of the acquisition discussions. Under a common-sense reading of Question 8, a "Company" contemplates something when its CEO contemplates it. In any event, Pulier was a member of the board of directors so his contemplation can arguably be considered contemplation by the board.

hazard assumed by Insurer," the Policy "shall be void ab initio." *Insurance Policy* at 11–12. Under California law, "[t]he fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law." *LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co.*, 156 Cal. App. 4th 1259, 1268 (2007) (quoting *Thompson v. Occidental Life Ins. Co.*, 9 Cal. 3d 904, 916 (1973)).

Notwithstanding this presumption, Defendants argue that there is a genuine dispute of material fact as to whether their "No" answer to Question 8 materially affected Scottsdale's decision to cover the company at the agreed upon rate. *See Def. Opp.* 21:23–24:16. They point to an internal Scottsdale underwriting file that shows that a "debit"—i.e. an increase in premium—had been applied the ServiceMesh Policy in the category of "Takeover Potential." *See Def. Genuine Disputes*, ¶¶ 157–58. Defendants argue that this shows that Scottsdale was already pricing the possibility of an acquisition into the Policy, so a "Yes" answer to Question 8 would not have increased the premium price. *Def. Opp.* 21:23–24:16.

However, Paul Tomasi, the president of the entity in charge of underwriting the policy, testified in a deposition that the debit in the "Takeover Potential" category is not what the name suggests. *See Deposition of Paul Tomasi*, Dkt. # 69-3 ("*Tomasi Dep.*"), 140:1–23. According to Tomasi, Takeover Potential is a misnomer because the company used that category "as a general bucket for rate increases for accounts in California." *Id.* Accordingly, Tomasi testified, it had no relation to the actual takeover potential of ServiceMesh. *Id.*

Defendants argue that a jury should be entitled to determine at trial whether to credit the somewhat counterintuitive explanation that the debit in the Takeover Potential category had nothing to do with ServiceMesh's takeover potential. *See Def. Opp.* 23:15–22. But the Court disagrees. Even assuming that Tomasi was lying and that the debit in the Takeover Potential category *did* reflect Scottsdale's estimate of ServiceMesh's takeover potential, Defendants have produced no evidence that suggests that Scottsdale would not have increased the debit—and consequently the premium—*even higher* had ServiceMesh itself admitted that it contemplated being acquired in the next 12 months. Any inference that could be drawn from the Takeover Potential debit in Scottsdale's internal files is not enough to overcome the presumption that answers to questions on insurance applications are material. *See LA Sound*, 156 Cal. App. 4th at 1268. Accordingly, the Court concludes that Scottsdale has established materiality as a matter of law.

iii. Waiver and Estoppel

Defendants argue that there is a genuine issue of fact as to whether Scottsdale waived its right to enforce the Warranty Exclusion or should otherwise be estopped from doing so. *See Def. Opp.* 11:14–21:20.

a. Waiver

California law provides that "[t]he right to information of material facts may be waived . . . by neglect to make inquiries as to such facts, where they are distinctly implied in other facts of which information is communicated." Cal. Ins. Code § 336. Pursuant to this provision, an insurer "may not blindly ignore evidence of misrepresentation, collect premiums, and then opportunistically rescind once a claim is filed." *Star Ins. Co. v. Sunwest Metals, Inc.*, 691 F. App'x 358, 360 (9th Cir. 2017). That said, "[a]n insurer has no independent duty to investigate facts in an insurance application." *Philp v. Jackson Nat. Life Ins. Co*, 107 F.3d 878 (9th Cir. 1997) (table). The duty to investigate is triggered only when an insurer has before it "information that plainly indicate[s] that the insured's statements were not true." *Rutherford v. Prudential Ins. Co. of Am.*, 234 Cal. App. 2d 719, 733 (1965); *accord. Star Ins.*, 591 F. App'x at 360–61.

Defendants argue that the duty to investigate was triggered in October 2013—seven weeks after the Policy went into effect—when Scottsdale learned of the ServiceMesh-Computer Sciences merger as a result of ServiceMesh's broker contacting Scottsdale to purchase run-off coverage relating to the merger. *See Def. Opp.* 13:15–16:7. Alternatively, they argue that the duty to investigate was triggered in November 2013, when Scottsdale issued the run-off policy. *See id.* 16:10–18:14. Defendants contend that the fact that ServiceMesh was acquired only a few months after it answered "No" to a question about whether it "contemplate[d]" being acquired should have put Scottsdale on notice that its answer could be false. In support, they proffer expert testimony from Ty Sagalow, the former Chief Underwriting Officer for National Union Insurance Company, who opines that a reasonably prudent underwriter who received a request for run-off coverage less than two months after issuing a policy would have investigated further. *See Declaration of Ty Sagalow*, Dkt. # 70-15 ("*Sagalow Decl.*"), ¶¶ 19–22.

But even if Sagalow is correct, the Court disagrees with Defendants' argument that a failure to follow industry best practices *ipso facto* amounts to a waiver of rights. The question is not whether Scottsdale acted as a reasonable insurer would have done, it is whether it was confronted with "information that plainly indicated that [ServiceMesh's] statements were not

true." *See Rutherford*, 234 Cal. App. 24 at 733. The Court concludes as a matter of law that the mere fact that Scottsdale learned of ServiceMesh's acquisition as early as October 2013 is not enough to "plainly indicate[]" that ServiceMesh lied in June 2013 when it said that it did not contemplate being acquired. Accordingly, the duty to investigate was not triggered in October or November of 2013, and therefore Scottsdale did not waive its right to deny coverage based on the Policy's Warranty Exclusion.

b. Estoppel

Defendants' estoppel argument fails for similar reasons. Defendants contend that California law required Scottsdale to inform ServiceMesh at the time it issued the run-off policy in November 2013 that it knew ServiceMesh's answer to Question 8 was incorrect and that it therefore could deny coverage under the Warranty Exclusion. *See Def. Opp.* 18:17–21:20. However, even assuming for the sake of argument that this accurately states the law—and there are good reasons to think that it may not, *see Pl. Reply* 11:2–17—the fact remains that Scottsdale did not know in November 2013 that the answer to Question 8 was inaccurate. Therefore, Scottsdale had no reason at that time to remind ServiceMesh that it could exclude coverage based on material misrepresentations, and accordingly, its failure to do so then does not estop it from denying coverage based on misrepresentations now.

iv. Summary of Conclusions on Scottsdale's Claims

For the reasons stated above, the Court concludes as a matter of law that Scottsdale was within its rights to deny coverage based on the Warranty Exclusion because ServiceMesh's answer of "No" to Question 8 on the insurance application was a material misrepresentation. The Court further concludes that Scottsdale did not waive its right to enforce the Warranty Exclusion and is not estopped from doing so.

Accordingly, the Court **GRANTS** Plaintiff Scottsdale's motion for summary judgment on its claims and **DENIES** Defendants' motion for summary judgment on these claims. The Court **GRANTS** Scottsdale's requested declaratory relief and **DECLARES** (1) that there is no coverage under the Policy for the Computer Sciences Action or the Investigations by virtue of the Warranty Exclusion; (2) that Scottsdale has no obligation to pay to Defendants any "Loss" for which any Defendants have indemnified or will indemnify Mr. Pulier in connection with the Computer Sciences Action or the Investigations; and (3) Defendants are obligated to reimburse Scottsdale for the payments it has made under the Policy.

B. ServiceMesh's Counterclaim

Scottsdale also moves for summary judgment on ServiceMesh's counterclaim, which alleges that Scottsdale breached the Policy by failing to promptly pay ServiceMesh for Pulier's defense costs. *See Pl. Mot.* 17:21–28. Defendants did not oppose this motion in their opposition, and in any event, the Court has concluded that Scottsdale had no obligation to pay anything under the policy in light of ServiceMesh's material misrepresentation. Accordingly, the Court **GRANTS** summary judgment in favor of Scottsdale on the counterclaim.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS** summary judgment in favor of Plaintiff Scottsdale on its claims and Defendant ServiceMesh's counterclaims. The Court **DENIES** Defendants' motion for summary judgment.

The Court **GRANTS** Scottsdale's requested declaratory relief and **DECLARES** (1) that there is no coverage under the Policy for the Computer Sciences Action or the Investigations by virtue of the Warrant Exclusion; (2) that Scottsdale has no obligation to pay to Defendants any "Loss" for which any Defendants have indemnified or will indemnify Mr. Pulier in connection with the Computer Sciences Action or the Investigations; and (3) Defendants are obligated to reimburse Scottsdale for the payments it has made under the Policy.

IT IS SO ORDERED.