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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

PLANTRONICS, INC.,  
Plaintiff,  
v.  
AMERICAN HOME ASSURANCE  
COMPANY, et al.,  
Defendants.

Case No.: C 07-6038 PVT  
**ORDER DENYING DEFENDANT  
ATLANTIC MUTUAL INS. CO.'S  
MOTION TO DISMISS**

Presently before the court is Defendant Atlantic Mutual Insurance Company motion to dismiss.<sup>1</sup> Based on the briefs and arguments submitted,

IT IS HEREBY ORDERED that, for the reasons discussed herein, the motion of Defendant Atlantic Mutual Insurance Company (“Atlantic Mutual”) to dismiss is DENIED.

**I. LEGAL STANDARDS**

**A. MOTIONS TO DISMISS**

In evaluating a Rule 12(b)(6) motion, courts must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Barron v.*

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<sup>1</sup> The holding of this court is limited to the facts and the particular circumstances underlying the present motion.

1 *Reich*, 13 F.3d 1370, 1374 (9<sup>th</sup> Cir. 1994). A cause of action will be dismissed only where there is  
2 either “a lack of a cognizable legal theory” or “the absence of sufficient facts alleged under a  
3 cognizable theory.” *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1988).

4 Matters outside the pleadings are not usually appropriate on a motion to dismiss. *Cassettari*  
5 *v. County of Nevada*, 824 F.2d 735, 737 (9<sup>th</sup> Cir. 1987). “[A] document is not ‘outside’ the  
6 complaint if the complaint specifically refers to the document and if its authenticity is not  
7 questioned.” *Branch v. Tunnell*, 14 F.3d 449, 453 (9<sup>th</sup> Cir. 1994). “A copy of a written instrument  
8 that is an exhibit to a pleading is a part of the pleading for all purposes.” FED.R.CIV.PRO. 10©.

#### 9 **B. INSURER’S DUTY TO DEFEND**

10 A liability insurer has a broad duty to defend its insured against claims that create a potential  
11 for indemnity. *See Gray v. Zurich Insurance Co.*, 65 Cal.2d 263 (1966). This duty to defend is  
12 broader than the duty to indemnify; an insurer may owe a duty to defend its insured in an action in  
13 which no damages ultimately are awarded. *Id.* at 278.

14 The determination whether the insurer owes a duty to defend is made by comparing the  
15 allegations of the complaint with the terms of the policy. Facts extrinsic to the complaint can also  
16 give rise to a duty to defend if they reveal a possibility that the claim may be covered by the policy.  
17 *Id.* at 276. Similarly, “where the extrinsic facts eliminate the potential for coverage, the insurer may  
18 decline to defend even when the bare allegations in the complaint suggest potential liability.” *Waller*  
19 *v. Truck Ins. Exchange, Inc.*, 11 Cal.4th 1, 19 (1995).

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### 21 **II. THE UNDERLYING PUTATIVE CLASS ACTIONS**

22 The underlying putative class action lawsuits are identified in the complaint as *Schiller et al.*  
23 *v. Plantronics, Inc.*; *Edwards, et al. v. Plantronics, Inc.*; *Raines et al. v. Plantronics, Inc.*; *Wars, et*  
24 *al. v. Plantronics, Inc.*; *Cook et al. v. Plantronics, Inc.*; *Pierce et al. v. Plantronics, Inc.*; and *In re*  
25 *Bluetooth Headset Products Liability Litigation* (collectively referred to as the Underlying Actions”).  
26 (See Complaint at 2:28-3:24, and Exhibits F, G, H, I, J, K, L and M thereto.)

27 The Underlying Actions arise from Plantronics’ marketing, manufacture, and distribution of  
28 “Bluetooth Headsets.” They allege that the Bluetooth Headsets can cause noise induced hearing loss

1 and that the packaging lacks any warning about such potential hearing loss.

2 The complaints in each of the Underlying Actions indicate that the claimants do not seek  
3 damages for physical injury. The putative class members claim that the Bluetooth Headsets were  
4 defectively designed and unfairly marketed. They also claim that the defective design of the  
5 Bluetooth Headsets constitutes a breach of warranty entitling them to a refund of the purchase price  
6 of the product.

### 7 8 **III. THE RELEVANT INSURANCE POLICY**

9 Atlantic Mutual issued Commercial General Liability Policy No. 761-00-67-45-0000 to  
10 named insured Plantronics, Inc., effective from June 30, 2002 to June 30, 2003, providing  
11 \$1,000,000 per occurrence with a \$2,000,000 general aggregate limit. (*See* Complaint, Exh. E,  
12 hereinafter “the Policy.”) The Policy includes Commercial General Liability Coverage which  
13 promises to “pay those sums that the insured becomes legally obligated to pay as damages because of  
14 ‘bodily injury’ \* \* \* \* to which this insurance applies.” (Complaint, Exh. E, at Sec. I., Coverage A,  
15 ¶ 1.a.) Atlantic Mutual also agreed to “defend the insured against any ‘suit’ seeking those  
16 damages.” (Complaint, Exh. E, at Sec. I., Coverage A, ¶ 1.a. and Sec. I., Coverage B, ¶ 1.a.)

17 The Policy defines a “suit” as “a civil proceeding in which damages because of ‘bodily  
18 injury’ \* \* \* \* to which the insurance applies are alleged.” (Complaint, Exh. E, at Sec. V., ¶ 18.)  
19 The Policy defines “bodily injury” as “bodily injury, sickness or disease sustained by a person,  
20 including mental anguish or death resulting from any of these at any time.” (Complaint, Exh. E, at  
21 Special General Liability Endorsement, ¶ 15.)

### 22 23 **IV. DISCUSSION**

24 The complaints in the Underlying Actions expressly allege that the intended use of Plaintiff’s  
25 product can cause noise induced hearing loss (“NIHL”). They specifically claim that “[h]earing loss  
26 happens when unsafe levels of noise hurt the hair cells in the inner ear.” There are no allegations  
27 that any of the plaintiffs in the Underlying Actions have actually suffered NIHL. However, an  
28 insurer’s duty to defend is not limited to what is alleged in a complaint against its insured; extrinsic

1 information available to the insurer can trigger the duty to defend. *Waller v. Truck Ins. Exchange,*  
2 *Inc.*, 11 Cal.4th at 19.

3 Here, the complaints in the Underlying Actions clearly informed Defendant Atlantic Mutual  
4 that claims had been made that Plaintiff's Headsets can cause noise induced hearing loss. Noise  
5 induced hearing loss easily fits within the Policy's definition of "bodily injury." If Plaintiff loses in  
6 any of the Underlying Actions, it will become legally obligated to pay damages. The present motion  
7 hinges on two questions. First, absent any finding in the Underlying Actions that actual bodily injury  
8 occurred to any specific individual, would any damages Plaintiff becomes obligated to pay be  
9 "because of" bodily injury? Second, if not, do the Underlying Actions *potentially* seek damages  
10 within the coverage of the policy?

11 The answer to the first question is at least arguably yes because, but for the potential for  
12 bodily injury caused by the Bluetooth Headsets, there would be no viable claims for defective design,  
13 unfair marketing or breach of warranty. Thus, any damages Plaintiff becomes obligated to pay are at  
14 least arguably "because of" bodily injury. However, the court need not decide this question, because  
15 the answer to the second question is clearly yes.

16 Any of the plaintiffs in the Underlying Actions could amend his or her complaint at any time  
17 to allege that he or she has suffered damages due to having suffered noise induced hearing loss as a  
18 result of using the Bluetooth Headsets they purchased. Any such amended complaint would include  
19 covered claims. In *Gray v. Zurich Insurance Co.*, the California Supreme Court found there was a  
20 duty to defend even in a case where the complaint was *never* amended to include a covered cause of  
21 action and the underlying judgment found liability only for conduct that was *excluded* from  
22 coverage. *See Gray v. Zurich Insurance Co.*, 65 Cal.2d 263.

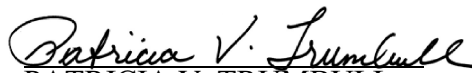
23 Because the duty to defend can be triggered by extrinsic facts, the complaints in the  
24 Underlying Actions, by themselves, cannot form the basis for a finding of *no* duty to defend in the  
25 context of a motion to dismiss. On a motion to dismiss, a plaintiff has no obligation to submit such  
26 extrinsic evidence, so the absence of such evidence from the record does not create any presumption  
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1 that no such evidence exists.<sup>2</sup>

2 **V. CONCLUSION**

3 Because, at a minimum, the Underlying Actions *potentially* seek damages within the  
4 coverage of the policy, dismissal is not warranted.

5 Dated: 10/20/08

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7 PATRICIA V. TRUMBULL  
8 United States Magistrate Judge  
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27 <sup>2</sup> Had Defendants submitted indisputable extrinsic evidence that affirmatively eliminated  
28 the potential for coverage, conversion of this motion to a summary judgment motion might have been warranted. *See Waller v. Truck Ins. Exchange, Inc.*, 11 Cal.4th 1, 19 (1995) (“where the extrinsic facts eliminate the potential for coverage, the insurer may decline to defend even when the bare allegations in the complaint suggest potential liability”). Defendants, however, have not done so.