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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Lexington Insurance Company,

Plaintiff,

v.

Scott Homes Multifamily, Inc. and Silverbell 290 Limited Partnership,

Defendants.

Silverbell 290 Limited Partnership, individually and as the assignee of Scott Homes Multifamily, Inc.,

Counterclaimants,

v.

Lexington Insurance Company,

Counterdefendant.

No. CV-12-02119-PHX-JAT

ORDER

Pending before the Court are Plaintiff Lexington Insurance Company ("Lexington")'s Motion for Summary Judgment (Doc. 53) and Defendant Silverbell 290 Limited Partnership ("Silverbell")'s Motion to Strike (Doc. 81). The Court now rules on the motions.

I. Motion to Strike

The Court first considers Silverbell's motion to strike because if granted, it would narrow the evidence before the Court in considering Lexington's motion for summary judgment. Lexington's statement of facts in support of its motion for summary judgment

includes several attached exhibits. (Doc. 54 Exs. A-P). Silverbell raised evidentiary objections to these exhibits in its controverting statement of facts, (Doc. 69), and Lexington attempted to bolster their admissibility by attaching an affidavit to its reply in support of its motion. (Doc. 78). In the affidavit, Lexington's counsel attempts to authenticate the exhibits by attesting that they are true and correct copies of what they appear to be. (*Id.* at 2-4). Silverbell then filed a motion to strike both the affidavit as well as the exhibits, objecting to their admissibility. (Doc. 81 at 3-4). Lexington contends Silverbell's motion is procedurally improper. (Doc. 83 at 3).

A. Legal Standard

Arizona Local Rule of Civil Procedure ("Local Rule") 7.2 governs the filing of motions to strike, and provides that "a motion to strike may be filed only if it is authorized by statute or rule . . . or if it seeks to strike any part of a filing or submission on the ground that it is prohibited (or not authorized) by a statute, rule, or court order." L.R.Civ.P. 7.2(m)(1). "An objection to (and any argument regarding) the admissibility of evidence offered in support of or opposition to a motion must be presented in the objecting party's responsive or reply memorandum and not in a separate motion to strike or other separate filing." *Id.* 7.2(m)(2).

B. Analysis

Lexington contends that Silverbell's motion to strike is a motion presenting objections to the admissibility of evidence barred under Local Rule 7.2(m). (Doc. 83 at 3). Silverbell asserts that Local Rule 7.2(m)(1) authorizes a motion to strike part of a filing that is not authorized by a statute, rule, or court order. (Doc. 81 at 3).

The Court need not consider whether Lexington was authorized to file its affidavit with its reply. At the summary judgment stage, a court focuses on the admissibility of the contents of evidence and not its form. *Fraser v. Goodale*, 342 F.3d 1032, 1036-37 (9th Cir. 2003). It is sufficient that the "contents of the [exhibits] are admissible at trial, even if the [exhibits themselves] may be inadmissible." *Id.* at 1036. Lexington's affidavit seeks only to convert the exhibits into an admissible form, (Doc. 78 at 2-4), but the Court must

consider the exhibits on summary judgment regardless of whether they are admissible in their current form. *See Fraser*, 342 F.3d at 1036-37. Accordingly, to the extent that Silverbell's motion to strike seeks to strike Lexington's affidavit, the Court will deny the motion as presenting an advisory question because the Court must consider the exhibits regardless of whether the affidavit is stricken.

Additionally, to the extent that Silverbell's motion to strike seeks to strike Lexington's exhibits themselves, the Court will deny the motion. Local Rule 7.2(m)(2) prohibits motions to strike objecting to the admissibility of evidence. Silverbell's motion objects to the admissibility of Lexington's exhibits and is procedurally improper. *See Pruett v. Ariz.*, 606 F. Supp. 2d 1065, 1074 (D. Ariz. 2009). The Court will consider only those evidentiary objections made in Silverbell's controverting statement of facts.

II. Motion for Summary Judgment

A. Background

Lexington filed this declaratory judgment action seeking a determination that it is not liable to pay Silverbell in satisfaction of a consent judgment Silverbell obtained in prior litigation against Lexington's insured, Scott Homes Multifamily, Inc. ("Scott Homes"). (Doc. 1).

The basic facts giving rise to Lexington's action are as follows. Silverbell contracted with Scott Homes for the construction of the Springs at Silverbell Apartments (the "Apartments"). (Doc. 1-1 at 25-26). At all relevant times, Scott Homes was insured under a primary general liability policy (the "Evanston Policy") issued by Evanston Insurance Company ("Evanston").[1] (Doc. 10-2 at 2). Scott Homes was also insured under an excess liability policy issued by Lexington (the "Lexington Excess Policy") that "followed form"[2] to the Evanston policy. (Doc. 1-1 at 2). Additionally, Scott Homes was

[1] The Evanston Policy has policy number 02GLP1003112. (Doc. 10-3 at 4).

[2] An excess liability "follow form" policy is "[e]xcess insurance that is subject to all of the terms and conditions of the policy beneath it." *Excess Liability "Follow Form" Policy*, IRMI Risk Mgmt. & Ins. Educ. & Info., http://www.irmi.com/online/insurance-glossary/terms/e/excess-liability-follow-form-policy.aspx (last visited Nov. 25, 2013). An excess liability policy provides "limits in excess of an underlying liability policy" and

an additional named insured on some of its subcontractors' primary policies. (Doc. 1-4 at 2). After the Apartments were built, Silverbell discovered construction defects in the Apartments. (*Id.* at 30).

Silverbell sued Scott Homes and its subcontractors for damages. (*Id.* at 25-45). Scott Homes tendered its defense to Evanston, who defended subject to a reservation of rights. (Doc. 68-5 at 2). Lexington declined to defend Scott Homes, asserting that it had not been provided with documentation showing all underlying coverage had been exhausted. (*Id.* at 7); (Doc. 54-2 at 5). Silverbell, Scott Homes, and Evanston subsequently entered into a settlement agreement[3] (the "Settlement Agreement") in which (1) Silverbell and Scott Homes stipulated to a $6 million judgment against Scott Homes; (2) Evanston agreed to pay Silverbell its policy limit of $1 million in exchange for a release from further liability; (3) Silverbell agreed not to execute the judgment against Scott Homes; and (4) Scott Homes assigned to Silverbell all of Scott Homes' rights for claims arising out of the Apartments against certain subcontractors, subcontractors' insurers, primary insurers (other than Evanston), and excess insurers. (Doc. 68-5 at 9-10).

The Pima County Superior Court entered judgment for Silverbell and against Scott Homes in the amount of $6 million, as stipulated. (Doc. 54-12 at 2). The judgment stated that the $6 million amount was awarded for "claims related to and/or damages caused by work of" seven subcontractors who Scott Homes had hired to construct the Apartments and provided an itemized breakdown of the award per subcontractor. (*Id.* at 3). After entry of judgment, Lexington filed the present action for a declaration that it is not liable to Silverbell under the terms of its policy. (Doc. 1).

B. Legal Standard

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter

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"its sole purpose is to provide additional limits of insurance." *Excess Liability Policy*, IRMI Risk Mgmt. & Ins. Educ. & Info., http://www.irmi.com/online/insurance-glossary/terms/e/excess-liability-policy.aspx (last visited Nov. 25, 2013).

[3] Pursuant to *Damron v. Sledge*, 460 P.2d 997 (Ariz. 1969). (Doc. 68-5 at 8).

of law." Fed.R.Civ.P. 56(a). "A party asserting that a fact cannot be or is genuinely disputed must support that assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits, or declarations, stipulations . . . admissions, interrogatory answers, or other materials," or by "showing that materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Id.* 56(c)(1)(A), (B). Thus, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Initially, the movant bears the burden of pointing out to the Court the basis for the motion and the elements of the causes of action upon which the non-movant will be unable to establish a genuine issue of material fact. *Id.* at 323. The burden then shifts to the non-movant to establish the existence of material fact. *Id.* The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts" by "com[ing] forward with 'specific facts showing that there is a *genuine* issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (quoting Fed.R.Civ.P. 56(e) (1963) (amended 2010)). A dispute about a fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The non-movant's bare assertions, standing alone, are insufficient to create a material issue of fact and defeat a motion for summary judgment. *Id.* at 247–48. However, in the summary judgment context, the Court construes all disputed facts in the light most favorable to the non-moving party. *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir. 2004).

C. Applicable Underlying Policies

Because the Lexington Excess Policy is an excess liability policy, it provides coverage only after certain underlying policies have been exhausted. The parties dispute which policies must be exhausted before Lexington incurs an obligation to provide

coverage under the Lexington Excess Policy. Lexington contends the applicable underlying policies are the Evanston Policy as well as any policies issued to Scott Homes' subcontractors "under which Scott Homes [qualifies] as an additional insured." (*Id.* at 5). Silverbell argues that the Evanston Policy is the only applicable underlying policy. (Doc. 68 at 19). Accordingly, the Court must first address whether subcontractor policies qualify as underlying policies for the Lexington Excess Policy before determining which, if any, underlying policies have exhausted.

1. Background

The Lexington Excess Policy provides that:

> A. We will pay on behalf of the **Insured** that portion of the loss which the **Insured** will become legally obligated to pay as compensatory damages (excluding all fines, penalties, punitive or exemplary damages) by reason of exhaustion of all applicable underlying limits, whether collectible or not, as specified in Section II of the Declarations, subject to:
>
> 1. the terms and conditions of the **underlying policy** listed in Section IIA of the Declarations, AND
>
> 2. our Limit of Liability as stated in Section 1C of the Declarations.
>
> B. Except as regards: (1) the premium; (2) the obligation to investigate and defend, including costs and expenses thereto; (3) the limit of liability; (4) the renewal agreement, if any; (5) the notice of **occurrence, claim**, or suit provision; (6) any other provision therein inconsistent with this policy; the provisions of the **underlying policy** are hereby incorporated as part of this policy.

(Doc. 1-1 at 4). The Lexington Excess Policy defines the term "underlying policy" as "understood to mean the policy indicated in Section IIA of the Declarations" and defines "underlying insurance" as "the total limits of all insurance including the **underlying policy** and/or any self-insured retentions excess of which this policy is written, whether recoverable or not recoverable." (*Id.* at 7).

Section II of the Declarations to the Lexington Excess Policy provides:

SECTION II – UNDERLYING INSURANCE

A) Underlying Company: Evanston
Policy Number: TBD
Coverage: GENERAL LIABILITY
Eff. Date: 01/01/02 Exp. Date: 01/01/03
Limit: $1,000,000

B) Total limits of all Underlying Insurance including the underlying policy in excess of which this policy applies:

$1,000,000 PER OCCURRENCE / PRODUCTS AGGREGATE
$2,000,000 GENERAL AGGREGATE

(*Id.* at 2).

The parties' dispute concerning these terms in the Lexington Excess Policy arises because the Evanston Policy, although a primary liability policy, provides that it is itself excess insurance under certain conditions:

> 4. Other Insurance.
>
> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:
>
> a. Primary Insurance
>
> This insurance is primary except when b. below applies. . . .
>
> b. Excess Insurance
>
> This insurance is excess over
>
> * * *
>
> (2) Any other valid and collectible insurance available to you covering liability for damages arising out of the premises, operations, products and/or completed operations for which you have been added as an additional insured by an endorsement, or by definition via a contract or agreement, or by any combination thereof.

(Doc. 10-3 at 23).

2. Legal Standard

Under Arizona law, insurance policies, as contracts between insurers and insureds,

are construed "to effectuate the parties' intent." *Liberty Ins. Underwriters, Inc. v. Weitz Co., LLC*, 158 P.3d 209, 212 ¶ 8 (Ariz. Ct. App. 2007). "Insurance policy provisions must be read as a whole, giving meaning to all terms. If the contractual language is clear, [the Court] will afford it its plain and ordinary meaning and apply it as written." *Id.* (citation omitted). But if a policy "presents conflicting reasonable interpretations," its language is ambiguous. *State Farm Mut. Auto. Ins. Co. v. Wilson*, 782 P.2d 727, 733 (Ariz. 1989).

3. Analysis

Lexington argues that the Lexington Excess Policy provides excess coverage only upon the exhaustion of both the Evanston Policy as well as the subcontractor policies by the payment of covered claims. (Doc. 53 at 5); (Doc. 77 at 2-3 & n.2). Lexington first argues, though somewhat implicitly, that the subcontractor policies are primary policies as to Scott Homes. (Doc. 53 at 5); (Doc. 77 at 5). Silverbell argues that the subcontractor policies cannot be underlying policies because Scott Homes' risk differed from those of the subcontractors and the defining characteristic of an excess policy is that it insures for the same risk as the underlying policies. (Doc. 68 at 10, 16).

Although Silverbell is correct that Scott Homes' *overall* risk was broader than the risk to any one subcontractor, a subcontractor policy naming Scott Homes as an additional insured is a primary policy to Scott Homes because it thus provides Scott Homes with the same protection as the subcontractor against the *subcontractor's liability*.[4] *See Wright-Ryan Constr., Inc. v. AIG Ins. Co. of Canada*, 647 F.3d 411, 416 (1st Cir. 2011) (contractor who was added as an additional insured on subcontractor's policy had primary coverage through that policy); *Pecker Iron Works of N.Y., Inc. v. Traveler's Ins. Co.*, 99 N.Y.2d 391, 393 (2003) (same); *Transcon. Ins. Co. v. Ins. Co. of State of Penn.*, 56 Cal. Rptr. 3d 491, 496 (Ct. App. 2007) (same).

[4] The Court is not determining whether all of the subcontractor policies name Scott Homes as an additional insured. Because the Court ultimately concludes that the subcontractor policies cannot be underlying insurance to the Lexington Excess Policy, it is sufficient that the Court discuss whether *any* subcontractor policy could qualify as a primary policy to Scott Homes.

Lexington then contends that because the subcontractor policies are primary policies and all primary policies must be exhausted before triggering excess insurance policies, the subcontractor policies are underlying policies to the Lexington Excess Policy. (Doc. 53 at 6). In support, Lexington cites *American Family Mutual Insurance Co. v. Continental Casualty Co.*, 23 P.3d 664 (Ariz. Ct. App. 2001), which held that an excess policy is not triggered until the exhaustion of all primary policies. 23 P.3d at 667. But the issue in that case was the statutorily-defined order of payment in an automobile liability case as between an excess policy to an exhausted primary policy and a separate primary policy. *Id.* at 664-65. Nor does *Virginia Surety Insurance Co. v. RSUI Indemnity Co.*, 2009 WL 4282198 (D. Ariz. Nov. 25, 2009), also cited by Lexington, hold that primary policies are always underlying policies. 2009 WL 4282198, at *4 (citing *Am. Family Mut. Ins. Co.*, 23 P.3d at 666) ("an excess insurer's duties . . . are normally not triggered until all *applicable* primary insurance has been exhausted." (emphasis added)). In this vein, Silverbell argues that the only applicable primary insurance is the Evanston Policy. (Doc. 68 at 9).

The Ninth Circuit Court of Appeals, applying Arizona law, has declined to establish a bright-line rule for determining whether an excess policy is excess to a particular primary policy or is excess to all primary policies. In *AMHS Insurance Co. v. Mutual Insurance Co. of Arizona*, 258 F.3d 1090 (9th Cir. 2001), the court analyzed two excess policies and concluded that one was excess over only the specific primary policies it enumerated while the other was excess to all primary policies. 258 F.3d at 1096, 1100.

There, the two primary policies at issue were the "Samaritan policy" and the "MICA policy." *Id.* at 1097. The court began by noting that excess policies that are excess to all primary policies are "written under circumstances where rates were ascertained after giving due consideration to known existing and underlying basic or primary policies." *Id.* (quoting *St. Paul Fire & Marine Ins. Co. v. Gilmore*, 812 P.2d 977, 980 (Ariz. 1991)). The court then noted that the first excess policy at issue applied "to losses resulting from an occurrence and exceeding $1 million" and referred to specific

underlying policies, including the Samaritan policy, which had a $1 million limit, but did not mention the MICA policy. *Id.* Because the excess policy named specific primary policies and its coverage began upon the exhaustion of the limits of those policies, the court concluded that the excess policy was intended to provide excess coverage of only those policies and not also of the MICA policy. *Id.*

The court reached the opposite conclusion with respect to the second excess policy. That policy "repeatedly state[d] that it applie[d] only to losses in excess of $10 million" and unlike the other excess policy, did not "purport to attach upon the exhaustion of a specific underlying policy." *Id.* at 1099. Because coverage attached "only after exhaustion of a specified policy amount," the court concluded it was excess of all insurance, including the MICA policy. *Id.* at 1099-1100.

In this case, the plain language of the Lexington Excess Policy shows Lexington intended to provide excess coverage of only the Evanston Policy. First, the Lexington Excess Policy in section IIA of its Declarations specifically names only the Evanston Policy as underlying insurance. (Doc. 1-1 at 4). Second, it defines the term "underlying policy" as the policy listed in Section IIA of the Declarations, namely the Evanston Policy. (*Id.* at 7). This alone is sufficient to conclude that the Lexington Excess Policy is excess over only the Evanston Policy.[5]

Lexington argues that the Lexington Excess Policy's definition of "underlying insurance" expressly includes other primary policies in addition to the Evanston Policy.

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[5] Silverbell submitted the affidavit of Stephen Prater in connection with its response to Lexington's motion. (Doc. 68-3). Mr. Prater opines on the interpretation of the Lexington Excess Policy. (*Id.* at 5-6). Lexington asks the Court to disregard this affidavit because the policy is "undisputedly unambiguous." (Doc. 77 at 5 n.3). The Court agrees with Lexington that the policy is unambiguous and accordingly disregards the affidavit. For the same reasons, the Court also disregards the declaration of Peter Gerstman. (Doc. 68-4).

Lexington also correctly points out that to the extent Silverbell frames the legal standard for interpreting the Lexington Excess Policy as not "so as to defeat reasonable expectations of coverage," *see* (Doc. 68 at 9, 15, 16), this standard is inapplicable because the policy is not ambiguous. *See Phoenix Control Sys., Inc. v. Ins. Co. of N. Am.*, 796 P.2d 463, 466 (Ariz. 1990); *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 389 (Ariz. 1984).

(Doc. 77 at 3). But Lexington misreads the plain language of the definition, which provides that underlying insurance is "the total limits of all insurance including the **underlying policy** and/or any self-insured retentions excess of which this policy is written, whether recoverable or not recoverable." (Doc. 1-1 at 7). The phrase "the total limits of all insurance . . ." is narrowed by the qualification that the insurance is that "excess of which this policy is written." Thus, this definition does not independently define the scope of coverage. Accordingly, the Court rejects this argument.

Lexington also argues that excess coverage is transitive: if the Evanston Policy is excess to the subcontractor policies and the Lexington Excess Policy is excess to the Evanston Policy, then the Lexington Excess Policy must be excess to the subcontractor policies. (Doc. 53 at 5). This interpretation is unreasonable because, again, it would contradict the Lexington Excess Policy's plain language.

Specifically, although the Lexington Excess Policy identifies the Evanston Policy as underlying insurance, it conditions Lexington's obligation to pay solely on the exhaustion of underlying *limits* (the limits equal those of the Evanston Policy). *See* (Doc. 1-1 at 4). These limits are established in the Declarations as $1 million per occurrence and $2 million general aggregate, and are defined as the "[t]otal limits of all Underlying Insurance including the underlying policy in excess of which this policy applies[.]" (*Id.* at 2).

Because the Lexington Excess Policy triggers Lexington's coverage only upon the exhaustion of $1 million in underlying limits, the policy cannot be interpreted as excess over the subcontractor policies. Unlike the primary policies at issue in *AMHS Insurance*, each of which provided primary insurance coverage, 258 F.3d at 1093-94, the Evanston Policy and the subcontractor policies *cannot* overlap in coverage: To the extent that a subcontractor policy provides complete coverage for a particular occurrence, the Evanston Policy's "other insurance" clause excludes coverage under the Evanston Policy for that same occurrence. *See* (Doc. 10-3 at 23).

Consequently, Lexington's interpretation defeats its obligations under its policy

because as long as subcontractor policies paid covered claims, the Evanston Policy could not be exhausted, precluding Lexington's coverage. Even if a subcontractor policy was exhausted in payment of a covered claim, the Evanston Policy provided excess coverage, *and* the Evanston Policy was exhausted, Lexington's suggested interpretation would still defeat Lexington's coverage obligations. In such a case, the total exhausted underlying limits would be greater than $1 million because the Evanston Policy had a $1 million per-occurrence limit and any subcontractor policy must have a limit greater than $0. This would defeat Lexington's obligation to provide coverage after the exhaustion of $1 million in underlying limits. Thus, Lexington's interpretation contradicts the plain language of the Lexington Excess Policy.

Accordingly, the subcontractor policies are not underlying policies to the Lexington Excess Policy. The Lexington Excess Policy is excess to only the Evanston Policy.[6]

D. Exhaustion of the Evanston Policy

Because the Evanston Policy is the only applicable underlying policy to the Lexington Excess Policy, to recover under the Lexington Excess Policy, Silverbell must prove that the Evanston Policy was exhausted for covered losses. *See Associated Aviation Underwriters v. Wood*, 98 P.3d 572, 595 ¶ 71 (Ariz. Ct. App. 2004). Lexington contends that Silverbell cannot prove the exhaustion of the Evanston Policy because Evanston's $1 million payment was in settlement of both covered and uncovered claims. (Doc. 53 at 7).

1. Background

The Settlement Agreement between Silverbell, Scott Homes, and Evanston provided that Evanston's tender of its policy limits was in full exhaustion of the Evanston Policy:

> 4.1.3 It is understood and agreed by SCOTT, SILVERBELL and EVANSTON that the EVANSTON PAYMENT is made in response to SCOTT'S demand that EVANSTON Policy No. 02 GLP 1003112 respond to

[6] Lexington's arguments that Silverbell cannot prove that the subcontractor policies have exhausted are therefore without merit. (Doc. 53 at 8-10).

> SILVERBELL's claims relating to the PROJECT and that said payment is applicable to the CLAIMS and the payment fully exhausts all of EVANSTON'S coverage applicable to the PROJECT, including but not limited to the Products/Completed Operations aggregate limit of Evanston Policy No. 02 GLP 1003112 . . . .

(Doc. 68-5 at 11).[7] The term "CLAIMS" is defined as follows:

> 1.7 SILVERBELL filed an action in Pima County Superior Court against SCOTT and various parties involved in the PROJECT captioned *Silverbell 290 Limited Partnership, an Arizona Limited Partnership v. Scott Homes Multifamily, Inc. et al.*, Case No. C20101632 (the "ACTION"), to recover damages arising out of the PROJECT, including repair and replacement of defective construction and resulting damage (the "CLAIMS").

(*Id.* at 7). Additionally, in its response to Lexington's motion, Silverbell has submitted the affidavit of Phyllis Modlin, an Executive Claims Examiner at Evanston's claims services manager, who executed the Settlement Agreement on behalf of Evanston. (*Id.* at 1). She declares in her affidavit that Evanston tendered its policy limit to Scott Homes "pursuant to its obligations under Policy No. 02 GLP 1003112." (*Id.* at 2).

2. Analysis

Because the Settlement Agreement explicitly provided that Evanston tendered its policy limit in exhaustion of the Evanston Policy and Ms. Modlin's affidavit confirms that Evanston paid for covered damages (". . . pursuant to its obligations . . ."), the Court

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[7] Lexington omits the latter half of this sentence in its statement of facts in support of its motion as well as in the motion itself. (Doc. 54 at 5); (Doc. 53 at 7-8). Lexington places a period following "CLAIMS" such that the sentence, as Lexington quotes it, appears to not contain the language concerning the payment fully exhausting Evanston's coverage under the Evanston Policy. There is no ellipsis to indicate this omission.

In *Rice v. Hamilton Oil Corp.*, 658 F. Supp. 446 (D. Colo. 1987), similar conduct was sanctioned under Federal Rule of Civil Procedure ("Rule") 11. There, the plaintiffs selectively omitted the last clause of a sentence, and the court granted sanctions against counsel, noting that the attorney "knew or should have known that his partial quotes, taken out of context would mislead the Court if left uncorrected." 658 F. Supp. at 450. Because Silverbell has not raised this issue, the Court merely admonishes Lexington to ensure its quotations are truthful.

concludes that the Evanston Policy has been exhausted.[8]

Lexington attempts to construe the Settlement Agreement as including payment for uncovered damages because the term "CLAIMS" is defined as including "repair and replacement of defective construction and resulting damage." (Doc. 53 at 8); (Doc. 77 at 4-5). Lexington argues that construction defects of this type cannot satisfy the definition of "occurrence" in the Evanston Policy; thus, Evanston must have paid on uncovered claims. Therefore, Lexington concludes that the Evanston Policy was not exhausted. (Doc. 53 at 8). Although Lexington is bound by the terms of the Evanston Policy because the Lexington Excess Policy incorporates those terms, Lexington is not bound by Evanston's coverage decision. *See Shy v. Ins. Co. of the State of Penn.*, 528 F. App'x 752, 754 (9th Cir. 2013). But similarly, Lexington may not attempt to relitigate Evanston's coverage decision. *See Edward E. Gillen Co. v. Ins. Co. of the State of Penn.*, 2011 WL 1694431, at *4 (E.D. Wis. May 3, 2011) ("[A]n excess liability insurer cannot avoid or reduce liability under its own policy by challenging a separate insurer's decision to settle or pay out claims at a prior layer of insurance."). Lexington's attempt to draw legal conclusions from a few words ("defective construction and resulting damage") fails to establish as a matter of law that Evanston paid on uncovered claims. The Evanston Policy has exhausted by Evanston's payment of covered claims.

E. Coverage under the Lexington Excess Policy

Finally, Lexington argues that even if all underlying insurance policies have been exhausted, triggering the Lexington Excess Policy, Silverbell is not entitled to recover the portion of the judgment allocable to Scott Homes' liability for subcontractors Design

[8] Lexington disputes the propriety of Ms. Modlin's affidavit, labeling it "self-serving" and as setting forth only a legal conclusion. (Doc. 77 at 5). The Evanston Policy's exhaustion is a fact, not a legal conclusion, because whether the Evanston Policy has been exhausted is not an ultimate issue in this case. Rather, the ultimate legal issue is whether Lexington is liable to Silverbell under the Lexington Excess Policy. Thus, the affidavit is not the kind of "self-serving" affidavit that should be disregarded in ruling on a motion for summary judgment. *Cf. Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993). Moreover, the affidavit does not summarily state that the Evanston Policy is exhausted but instead sets forth facts of which Ms. Modlin has personal knowledge as the claims handler for the claim that caused payment of full policy limits of the Evanston Policy.

Plastering, Inc. ("Design"); Gypsum Floor Masters, Inc. ("Gypsum"); Littleton Roofing Company of Arizona ("Littleton"); and Structural I Company of Arizona ("Structural"). (Doc. 53 at 10).

1. Background

The Evanston Policy limits coverage for property damage arising out of the act of independent contractors:

> It is hereby understood and agreed that no Insurance coverage is provided under this policy to defend or indemnify any insured for "bodily injury" or "property damage" arising out of acts of Independent Contractors unless you meet the following conditions:
>
> > You will obtain certificates of insurance from all independent contractors providing evidence of:
> >
> > 1. Limits of liability equal to or greater than the coverages provided by this policy;
> >
> > 2. Commercial General Liability coverage equal to or broader than the coverages provided by this policy.
> >
> > 3. Workers Compensation Insurance in compliance with the statutes of the applicable states.
> >
> > 4. Independent Contractors must name the Named Insured as an additional insured.
>
> Failure to comply with this condition will exclude coverage for acts of Independent Contractors.

(Doc. 10-2 at 19). Scott Homes obtained certificates of insurance from Design, Gypsum, Littleton, and Structural, providing evidence of insurance in amounts necessary to satisfy the Evanston Policy's requirements and naming Scott Homes as an additional insured.[9] (Doc. 68-2 at 6-7, 9-10, 12-13, 15, 17-19). Despite the certificates of insurance, not all of the subcontractors' insurers defended Scott Homes against Silverbell's claims. The recitals to the Settlement Agreement state:

[9] Some of the certificates do not provide evidence of workers' compensation insurance. (Doc. 68-2 at 7, 9-10, 12-13, 15, 19). Because Lexington does not allege that the claims for damages involved workers' compensation, this has no bearing on the merits of Lexington's motion.

> To date, none of the SUBCONTRACTORS' INSURERS has accepted unconditionally its defense and indemnity obligations owed to SCOTT pursuant to its respective insurance policies. Certain of SUBCONTRACTORS' INSURERS have agreed to share a portion of SCOTT'S defense costs to date with EVANSTON under reservation, those insurers are set forth in **Exhibit "5"** to this Agreement.

(Doc. 1-4 at 3). Exhibit 5 to the Settlement Agreement is captioned "Table of Subcontractors' Insurers Accepting the Defense of SCOTT" and lists subcontractors and their insurers. Design, Gypsum, Littleton, and Structural are not listed.

The consent judgment against Scott Homes provided that of the $6 million judgment amount, $2,337,945 was allocated to the work of Design, $371,142 for Gypsum, $1,499,145 for Littleton, and $700,542 for Structural. (Doc. 54-12 at 3).

2. Analysis

Lexington contends that, even if all policies have been exhausted, the failure of Design, Gypsum, Littleton, and Structural to "procure insurance" for Scott Homes excludes their liability from coverage under the Evanston Policy. (Doc. 53 at 10-11). Because the Lexington Excess Policy follows form to the Evanston Policy, Lexington asserts that $4,908,774, the portion of the judgment allocable to property damage arising out of the acts of Design, Gypsum, Littleton, and Structural, is not covered under the Lexington Excess Policy. (*Id.* at 11).

This argument is an attempt to add terms to the Evanston Policy. The policy provides that Scott Homes must "obtain certificates of insurance" from independent contractors providing evidence of primary insurance covering Scott Homes. (Doc. 10-2 at 19). The subcontractors insurers' failure to defend Scott Homes does not equate to Scott Homes not obtaining certificates of insurance, the latter being all that the Evanston Policy requires. Accordingly, the Court rejects this argument.[10]

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[10] The Court notes that Silverbell has failed to provide Gypsum's certificate of insurance for July 1, 2002 to July 1, 2003, which overlaps with the period from January 1, 2002 to January 1, 2003 during which the Evanston Policy and Lexington Excess Policy were effective. *See* (Doc. 1-1 at 2); (Doc. 10-2 at 2); (Doc. 68 at 12). But because Lexington confines its argument to the interpretation of the Evanston Policy and does not claim any defects in the certificates themselves, (Doc. 77 at 8-9), Silverbell's omission

F. Silverbell's Evidentiary Objections

In its response, Silverbell raises numerous objections to Lexington's evidence submitted in support of its motion for summary judgment. *See* (Doc. 69). Because the Court has not found any of the evidence to which Silverbell objects to be relevant to its ruling on Lexington's motion, the Court need not address these objections.

III. CONCLUSION

For the foregoing reasons,

IT IS ORDERED denying Silverbell's Motion to Strike (Doc. 81).

IT IS FURTHER ORDERED denying Lexington's Motion for Summary Judgment (Doc. 53).

Dated this 22nd day of January, 2014.

James A. Teilborg
Senior United States District Judge

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does not undermine its arguments.