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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Prosight–Syndicate 1110 At Lloyd’s,  
  
Plaintiff,  
  
vs.  
  
American Builders and Developers  
LLC,  
  
Defendant.

No. CV-17-04662-PHX-SPL

**ORDER**

Plaintiff Prosight-- Syndicate 1110 At Lloyd’s (the “Plaintiff”) filed suit against American Builders and Developers LLC (“ABD”) seeking a declaratory judgment that it is not liable to indemnify ABD for any damages awarded pursuant to Maria Virginia Huizache and Florenciano Axinicuilteco’s (the “Claimants”) lawsuit. The Claimants filed their Second Motion for Summary Judgment (the “Claimants’ MSJ”) (Doc. 197), and the Plaintiff filed a separate Motion for Summary Judgment (the “Plaintiff’s MSJ”) (Doc. 199). Both motions were fully briefed on October 15, 2019, and oral argument was requested. (Docs. 206, 209, 213, 214) Because it would not assist in resolution of the instant issues, the Court finds the pending motions are suitable for decision without oral argument. See LRCiv. 7.2(f); Fed. R. Civ. P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998). The Court’s ruling is as follows.

1       **I. Background**

2           The Plaintiff issued an owner controlled insurance policy (the “Policy”), often  
3 referred to as a wrap policy, to ABD. (Doc. 197 at 3) Wrap policies allow for a general  
4 contractor to purchase an insurance policy for a construction project and enroll multiple  
5 subcontractors for insurance coverage under the policy. (Doc. 188 at 11) ABD’s wrap  
6 policy was originally effective from March 31, 2013 to March 31, 2016, and the Policy  
7 covered two separate construction sites, the Trio Condominium property located in  
8 Scottsdale, Arizona, and the Clearwater Hills property located in Paradise Valley,  
9 Arizona. (Doc. 197 at 3) ABD hired Paladin Risk Management Limited, LLC  
10 (“Paladin”) to be the administrator of the Policy. (Doc. 188 at 11) ABD enrolled  
11 subcontractor Diamond House Painting, LLC (“DHP”) in the Policy in November 2014.  
12 (Doc. 197 at 5)

13           In January 2016, one of DHP’s employees was killed in an incident at the Trio  
14 Condominium property. (Doc. 197 at 2) The Claimants, as the decedent’s parents,  
15 brought a wrongful death action against ABD, among others, in Arizona state court.  
16 (Doc. 197 at 2) ABD settled the Claimants’ lawsuit against it by turning over its rights  
17 against the Plaintiff and Paladin to the Claimants. (Doc. 197 at 8) ABD also agreed for a  
18 stipulated judgment to be entered against it for \$3.5 million. (Doc. 197 at 8)

19           The Plaintiff initiated this lawsuit for declaratory judgment seeking a  
20 determination that it is not liable to indemnify ABD for any damages awarded pursuant to  
21 the Claimants’ lawsuit. (Doc. 1) The Claimants filed counterclaims against the Plaintiff  
22 and Paladin, arguing that they were each liable for the \$3.5 million stipulated judgment.  
23 (Doc. 188) However, in July 2019, the Claimants and Paladin entered into a settlement  
24 agreement (the “Settlement Agreement”) in which the Claimants agreed to dismiss their  
25 claims against Paladin in exchange for a settlement payment of approximately \$37,500.  
26 (Doc. 203 at 51–57) On August 30, 2019, the Plaintiff and the Claimants filed cross-  
27 motions for summary judgment on all claims and counterclaims before the Court. (Doc.  
28 197; Doc. 199)

1       **II.    Legal Standard**

2           A court shall grant summary judgment if the pleadings and supporting documents,  
3 viewed in the light most favorable to the non-moving party, “show that there is no  
4 genuine dispute as to any material fact and the movant is entitled to judgment as a matter  
5 of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23  
6 (1986). Material facts are those facts “that might affect the outcome of the suit under the  
7 governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine  
8 dispute of material fact arises if “the evidence is such that a reasonable jury could return a  
9 verdict for the nonmoving party.” *Id.*

10          The party moving for summary judgment bears the initial burden of informing the  
11 court of the basis for its motion and identifying those portions of the record, together with  
12 affidavits, which it believes demonstrate the absence of a genuine issue of material fact.  
13 *Celotex*, 477 U.S. at 323. If the movant is able to do such, the burden then shifts to the  
14 non-movant who, “must do more than simply show that there is some metaphysical doubt  
15 as to the material facts,” and instead must “come forward with ‘specific facts showing  
16 that there is a genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,  
17 475 U.S. 574, 586–87 (1986).

18       **III.   Analysis**

19          In the Claimants’ MSJ, the Claimants request for the Court to make certain  
20 findings of law, including (i) that the Plaintiff’s insurance policy provided coverage to  
21 ABD for the Claimants’ lawsuit, (ii) that the Plaintiff breached its duty to indemnify  
22 ABD, and (iii) that the Plaintiff is obligated to pay the \$3.5 million judgment against  
23 ABD. (Doc. 197 at 2) In the Plaintiff’s MSJ, the Plaintiff argues that (i) the Claimants  
24 are judicially estopped from pursuing claims against the Plaintiff, (ii) by the plain terms  
25 of the Policy, DHP was not enrolled under the Policy, and (iii) the Plaintiff has no duty to  
26 indemnify ABD for the result of the Claimants’ lawsuit. (Doc. 199-1 at 5–8)

27          The Plaintiff argues that the Claimants cannot recover against the Plaintiff as a  
28 matter of law because the Claimants successfully recovered on their claims for relief

1 against Paladin. (Doc. 206 at 4; Doc. 199-1 at 9–10) The Plaintiff identifies the  
2 Settlement Agreement between Paladin and the Claimants, in which Paladin sought to  
3 settle the Claimants’ negligence and breach of contract claims against it. (Doc. 203 at 51)  
4 The Plaintiff argues that the Claimants are judicially estopped from pursuing their claims  
5 against the Plaintiff because they obtained a favorable settlement against Paladin on a  
6 mutually exclusive theory of liability. (Doc. 199-1 at 14) In response, the Claimants argue  
7 that they have not asserted inconsistent positions against Paladin and the Plaintiff. (Doc.  
8 209 at 10) The Claimants argue that they have simply asserted alternative theories of  
9 liability against Paladin and the Plaintiff, which is permissible pursuant to Federal Rule of  
10 Civil Procedure 8(d). (Doc. 209 at 10)

11 Plaintiffs are allowed to plead alternative and even inconsistent claims, but parties  
12 are not allowed to disavow claims and then argue from them. Fed. R. Civ. P. 8(d);  
13 *Martinez v. Maricopa Cty. Cmty. Coll. Dist.*, 2018 WL 2119338, at \*4 (D. Ariz. May 8,  
14 2018); *Revive You Media LLC v. Esquire Bank*, 2018 WL 2164379, at \*5 (D. Ariz. May  
15 10, 2018). Judicial estoppel precludes a party from gaining an advantage by taking one  
16 position and then seeking a second advantage by taking an incompatible position. *Gagne*  
17 *v. Zodiac Mar. Agencies, Ltd.*, 274 F. Supp. 2d 1144, 1148 (S.D. Cal. 2003) (citing  
18 *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir.1996)). Judicial  
19 estoppel is used “because of ‘general consideration[s] of the orderly administration of  
20 justice and regard for the dignity of judicial proceedings,’ and to ‘protect against a litigant  
21 playing fast and loose with the courts.’” *Id.* (citing *Hamilton v. State Farm Fire & Cas.*  
22 *Co.*, 270 F.3d 778, 782 (9th Cir. 2001)). Further, double recovery is disfavored, and it  
23 should be particularly avoided where punitive and compensatory damages are assessed.  
24 *Kissell Co. v. Gressley*, 591 F.2d 47, 51 (9th Cir. 1979); *Hosp. Mktg. Concepts, LLC v. Six*  
25 *Continents Hotels, Inc.*, 2016 WL 9045621, at \*6 (C.D. Cal. Jan. 28, 2016) (stating double  
26 recovery is precluded when alternative theories seeking the same relief are pleaded and  
27 tried together).

28 The Supreme Court of the United States has established certain factors that district

1 courts may take into consideration when deciding whether judicial estoppel is appropriate  
2 in a given case: (1) a party's later position is "clearly inconsistent" with its earlier  
3 position; (2) the first tribunal accepted and relied upon the prior inconsistent position; and  
4 (3) the party maintaining the inconsistent position stands to gain an unfair advantage over  
5 the opposing party. *Id.* (citing *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001)).  
6 These factors, however, are not exhaustive. *Id.* The inconsistent positions need not come  
7 from the same litigation, and a favorable settlement constitutes judicial reliance. *Id.* (citing  
8 *Hamilton*, 270 F.3d at 783; *Rissetto*, 94 F.3d at 605). The purpose of judicial estoppel is  
9 to protect the courts' integrity, not necessarily the parties' interests; the doctrine is  
10 equitable, and its application discretionary. *Id.* (citing *Russell v. Rolfs*, 893 F.2d 1033,  
11 1037 (9th Cir. 1990)); *Rissetto*, 94 F.3d at 601.

12 The Court finds that the Claimants are judicially estopped from pursuing their  
13 claims against the Plaintiff. The Claimants asserted claims against Paladin for negligence  
14 and breach of contract on the basis that Paladin negligently failed to enroll DHP under the  
15 Policy. (Doc. 188 at 18) The Claimants settled their claims against Paladin for  
16 approximately \$37,500 pursuant to the Settlement Agreement. (Doc. 203 at 52) The  
17 Claimants also moved to dismiss Paladin from this action with prejudice as a result of the  
18 Settlement Agreement. (Doc. 87) Now, the Claimants continue to seek summary  
19 judgment against the Plaintiff under the theory that DHP was enrolled under the Policy.  
20 (Doc. 197 at 5)

21 In addressing the first factor, the Court finds that the Claimants' current position  
22 against the Plaintiff is clearly inconsistent with their position against Paladin, for which it  
23 obtained a favorable settlement. The Claimants have recovered on the theory that Paladin  
24 was liable for failing to register DHP under the Policy; therefore, the Claimants cannot  
25 now seek to recover from the Plaintiff under the theory that DHP was registered under the  
26 Policy. *Samson v. NAMA Holdings, LLC*, 637 F.3d 915, 935 (9th Cir. 2011) (stating  
27 judicial estoppel "generally prevents a party from prevailing in one phase of a case on an  
28 argument and then relying on a contradictory argument to prevail in another phase.") The

1 United States Court of Appeals for the Ninth Circuit has found that obtaining a favorable  
2 settlement constitutes judicial reliance, which satisfies the second factor of the Court's  
3 reliance on the prior inconsistent position. *Rissetto*, 94 F.3d at 605. Finally, the Court  
4 finds that allowing the Claimants to proceed against the Plaintiff to obtain an additional  
5 recovery on a mutually exclusive theory of liability would be unfair to the Plaintiff and  
6 result in the Claimants obtaining a double recovery for the issues presented in their  
7 counterclaims. Therefore, the Court finds that the Plaintiff's MSJ must be granted, and  
8 summary judgment must be issued in favor of the Plaintiff on all claims.

9 Accordingly,

10 **IT IS ORDERED:**

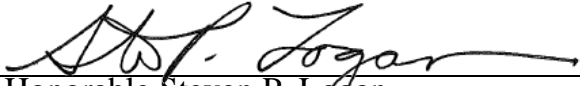
11 1. That Plaintiff's Motion for Summary Judgment (Doc. 199) is **granted**, and  
12 judgment shall be entered in favor of the Plaintiff on all claims and counterclaims;

13 2. That Claimants' Second Motion for Summary Judgment (Doc. 197) is  
14 **denied**;

15 3. That Claimants' Rule 37 Motion to Exclude Declaration and Trial  
16 Testimony of Jake Morin (Doc. 211) is **denied as moot**; and

17 4. That the Clerk of Court shall terminate this case and enter judgment  
18 accordingly.

19 Dated this 14th day of November, 2019.

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24 Honorable Steven P. Logan  
United States District Judge  
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