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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

DAIRY AMERICA, INC.,  
Plaintiff,

CASE NO. CV F 07-0537 LJO SMS  
**ORDER ON MOTION TO STAY**  
(Doc. 132.)

vs.

NEW YORK MARINE AND GENERAL  
INSURANCE COMPANY, et. al,  
Defendants.

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**INTRODUCTION**

Plaintiff Dairy America, Inc. (“Dairy America”) seeks to stay this action during its appeal of summary judgment in favor of defendant cargo insurer and defendant insurance underwriter<sup>1</sup> that Dairy America’s cargo loss is uncovered by a binder or policy to defeat Dairy America’s breach of contract claim. Defendants, other than Dairy America’s insurance broker, oppose a stay due to prejudice to them from further delay and the absence of sufficient grounds to support a stay. This Court considered Dairy America’s motion to stay on the record and VACATES the January 5, 2010 hearing, pursuant to Local Rule 230(g). For the reasons discussed below, this Court DENIES a stay of this action.

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<sup>1</sup> Defendants who were granted summary judgment are insurer New York Marine and General Insurance Company (“NY Marine”) and underwriter Crump Insurance Services dba Southern Marine & Aviation Underwriters, Inc. (“Southern Marine”).

1 **BACKGROUND**

2 **The Parties**

3 Dairy America, a Fresno corporation, markets and sells powdered milk products for shipment  
4 throughout the United States and foreign countries. Southern Marine is a managing general agent for  
5 cargo insurer NY Marine and is authorized as an underwriter to assess risks and bind NY Marine for  
6 ocean cargo insurance.

7 Defendant Arthur J. Gallagher & Co. (“Gallagher”) is Dairy America’s commercial insurance  
8 broker. Southern Marine is not a direct writer of insurance and places insurance through a broker like  
9 Gallagher.

10 Defendant Hartford Casualty Insurance Company (“Hartford”) issued a property choice policy  
11 (“Hartford policy”) to Dairy America. Summary judgment for NY Marine and Southern Marine did not  
12 address the Hartford policy or Dairy America’s professional negligence claims against Gallagher, which  
13 are the subject of Dairy America’s independent claims.

14 **Ocean Cargo Binder**

15 On August 11, 2005 after negotiation with Gallagher, Southern Marine for NY Marine issued  
16 to Dairy America a 20-page binder (“binder”) for an ocean cargo policy. The binder identifies insured  
17 property as:

18 LAWFUL GOODS AND/OR MERCHANDISE CONSISTING PRINCIPALLY OF,  
19 BUT NOT LIMITED TO, MILK POWDER OF EVERY KIND AND DESCRIPTION  
20 AND OTHER GOODS INCIDENTAL TO THE BUSINESS OF THE ASSURED  
21 SHIPPED BREAK-BULK AND/OR CONTAINERIZED FORM . . . AND/OR ALL  
22 OTHER INTERESTS HANDLED BY THE ASSURED IN THE COURSE OF THEIR  
BUSINESS AND/OR IN THE CARE, CUSTODY AND CONTROL OF THE  
ASSURED WHETHER IN TRANSIT OR STORE OR ELSEWHERE ANYWHERE  
IN THE WORLD . . . (Uppercase in original.)

23 The binder provided that coverage is “BOUND WITH EFFECT FROM AUGUST 11, 2005 TO EXPIRE  
24 OCTOBER 1, 2006, BOTH DAYS AT 12:01 A.M. LOCAL STANDARD TIME AT THE PLACE OF  
25 ISSUANCE, OCEAN CARGO/STOCK THROUGHPUT COVERAGE SUBJECT TO THE  
26 FOLLOWING RATES, PREMIUMS, POLICY TERMS, INSURING CONDITIONS AND LIMITS OF  
27 LIABILITY.” (Uppercase in original.)

28 The binder included a “lost or not lost” clause which states in pertinent part:



1 Hartford invoked a flood exclusion to deny Dairy America’s claims under the Hartford policy  
2 in that a wave created a non-covered loss.

3 **Arrangement Of The Binder And Cargo Policy**

4 In underwriting and placing the cargo policy, Southern Marine senior vice president and  
5 underwriter Andrew Fossler (“Mr. Fossler”) evaluated the risk, assessed the premium, and established  
6 insuring terms and conditions. Mr. Fossler used what he characterizes as a standard cargo policy which  
7 included a standard CAR-000 form declaration section and standard CAR-001 form standard policy  
8 language. NY Marine and Southern Marine characterize the cargo policy as “a standard ocean cargo  
9 form which Southern Marine has used with insureds of Gallagher since 1999.”

10 According to Southern Marine, in all its dealings with Gallagher involving issuance of cargo  
11 policies, “a binder was issued.” Mr. Fossler describes a binder as a “snapshot of the final policy” and  
12 explains that a binder “establishes that coverage is in force subject to basic insurance terms.”

13 Insurance coverage attorney Erwin Adler (“Mr. Adler”) filed a declaration for Gallagher to  
14 dispute that a binder is a “snapshot” of a final policy. Mr. Adler declares that a “binder establishes the  
15 coverage described in the binder is in force and will cover the insured on the terms stated.” Mr. Adler  
16 characterizes a binder as “a valid and enforceable contract of insurance” that “sets forth the material  
17 terms of the policy” which supersedes the binder “only if the policy contains the same terms and  
18 conditions as the binder.”

19 In his declaration, Dairy America insurance coverage expert John R. Adams (“Mr. Adams”), a  
20 marine and surplus lines insurance executive, characterizes the binder “as temporary evidence of the  
21 insurance coverage” issued by NY Marine/Southern Marine.

22 **Ocean Cargo Insurance Practices**

23 According to Southern Marine’s Mr. Fossler, standard practice for ocean cargo insurance is that  
24 goods in transit at the time of a policy’s inception are not covered by the policy. In his declaration, Mr.  
25 Fossler explains:

26 The business and insurance reason and practice of why goods whose transit  
27 begins prior to the inception of the policy are not covered within the cargo policy is that  
28 the underwriter would never know what goods were in transit or where the transit may  
have begun. Further, the underwriter would have no way of knowing whether or not  
products such as milk powder could have been damaged, adulterated, lost, or stolen.

1 Finally, there would never have been a way for the underwriter to charge a premium for  
2 the risk they [sic] have taken.

3 . . .

4 . . . If the shipment date on a bill of lading is prior to the inception date on the  
5 policy, the cargo is at risk of the insured's prior insurer or at the insured's own risk.

6 Mr. Adler disagrees with Mr. Fossler and opines:

7 The binder demonstrates that New York Marine issued the throughput policy to cover  
8 all damage to all of Dairy America's goods, whether in transit or not, as to which New  
9 York Marine had assumed the risk of loss which would be damaged during the policy  
10 period. The binder did not set forth any limits as to coverage based upon the date of  
11 shipment.

12 . . .

13 Had New York Marine intended to issue a claims-made type of policy, the binder  
14 should have set forth a retroactive date. Like most other insurance policies (and their  
15 binders), this binder did not include any such date.

16 As of the August 29, 2005 loss, Dairy American and Gallagher had received the binder but not  
17 the cargo policy.<sup>2</sup>

#### 18 Dairy America's Claims

19 Dairy America proceeds on its third amended complaint ("TAC") to contend that the binder does  
20 not exclude "goods in transit at the coverage inception date," that "all 59 loads of powdered milk product  
21 are covered by the policy," and that the binder "was the contract in effect" in that the cargo policy had  
22 not been delivered at the time of the loss. The TAC alleges a breach of contract cause of action that NY  
23 Marine and Southern Marine failed to pay Dairy America for 23 lost powder milk loads to breach the  
24 binder. Dairy America seeks to recover \$971,980 for the lost 23 loads.

25 The TAC alleges against Gallagher:

- 26 1. A negligent misrepresentation claim that Gallagher misrepresented that it "would procure  
27 additional coverage for all of Plaintiff [sic] shipments of powdered milk";
- 28 2. A professional negligence claim that Gallagher breached its duty of care to Dairy America  
"by failing to obtain coverage for all of Plaintiff's shipments, namely, for shipments of  
milk product already in transit at the inception of coverage and/or failing to explain to

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<sup>2</sup> As a reminder, NY Marine and Southern Marine note that the cargo policy was sent to Gallagher on August  
23, 2005.

1 Plaintiff that the policy obtained excluded such risks”; and  
2 3. A breach of oral contract claim that Gallagher breached obligations under an oral  
3 contract by failing “to procure additional insurance for Plaintiff, specifically, a marine  
4 cargo/stock throughput policy covering all of Plaintiff’s shipments.”

5 The TAC alleges that Hartford breached the Hartford policy and committed insurance bad faith  
6 by refusing to pay for the 23 lost powdered milk loads.

7 **Summary Judgment For NY Marine And Southern Marine**

8 NY Marine and Southern Marine sought summary judgment that the attachment clause barred  
9 coverage for shipments in transit prior to the cargo policy’s August 11, 2005 inception in that the binder  
10 neither expresses an intent to cover goods already in transit nor contradicts the cargo policy. This Court  
11 identified the key issue as “whether the binder’s scope includes the 23 pre-August 11, 2005 transit  
12 loads.” Relying on cargo insurance points raised by Southern Marine’s Mr. Fossler, this Court granted  
13 NY Marine and Southern Marine summary judgment and concluded that shipments in transit prior to  
14 cargo policy inception were at Dairy America’s risk and that the declarations of Dairy America and  
15 Gallagher’s experts raised no factual issues to defeat summary judgment.

16 This Court denied Dairy America reconsideration of summary judgment for NY Marine and  
17 Southern Marine.

18 This Court granted Dairy America relief to seek an immediate appeal of the summary judgment  
19 for NY Marine and Southern Marine.<sup>3</sup> In seeking such relief, Dairy America argued that its claims  
20 against NY Marine and Southern Marine are distinct from its claims against Gallagher and Hartford.  
21 Dairy America’s appeal was recently processed and is in initial filing stage before the Ninth Circuit  
22 Court of Appeals.

23 **Status Of This Action**

24 Dairy America’s claims against Gallagher and Hartford remain pending before this Court.

25 Upcoming dates include:

26 \_\_\_\_\_  
27 <sup>3</sup> This Court’s order granting Dairy America an immediate appeal of summary judgment noted that Dairy  
28 America’s breach of insurance contract claim against NY Marine and Southern Marine “is unique to those parties and does not directly affect the other parties in that legal issues and factual issues surrounding the claim are dissimilar to Dairy America’s claim against the other defendants.”

- 1 1. A December 18, 2009 non-expert discovery cutoff;
- 2 2. A January 15, 2010 expert disclosure;
- 3 3. An April 23, 2010 expert discovery cutoff;
- 4 4. A May 10, 2010 settlement conference;
- 5 5. A June 25, 2010 dispositive motion hearing deadline;
- 6 6. A July 15, 2010 pretrial conference; and
- 7 7. An August 31, 2010 jury trial.

### 8 DISCUSSION

9 Dairy America seeks to stay this action, that is, its claims against Gallagher and Hartford, on  
10 grounds that it is likely to prevail on its appeal and will suffer “irreparable injury” if required to conduct  
11 separate trials on its claims against Gallagher and Hartford, on one hand, and NY Marine and Southern  
12 Marine, on the other hand. Dairy America argues that its claims against NY Marine, Southern Marine  
13 and Gallagher are related in that if NY Marine and Southern Marine breached the “contract of insurance  
14 with Dairy America,” its claims against Gallagher “would be likely moot.”

15 Gallagher joins in Dairy America’s motion to stay and points out that without a stay, settlement  
16 among Dairy America, Gallagher and Hartford is unrealistic given the uncertainty of NY Marine and  
17 Southern Marine’s potential liability.

18 NY Marine and Southern Marine oppose a stay in that Dairy America contradicts its position to  
19 seek an immediate appeal and argues that its claims against all defendants are “largely duplicative.”  
20 Hartford opposes a stay in that further delay subjects it to increased interest on a potential judgment  
21 against it.

### 22 Stay Factors

23 A district court’s “power to stay proceedings is incidental to the power inherent in every court  
24 to control the disposition of the causes on its docket with economy of time and effort for itself, for  
25 counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must  
26 weigh competing interests and maintain an even balance.” *Landis v. North American Co.*, 299 U.S. 248,  
27 254-255, 57 S.Ct. 163 (1936). “The power to stay proceedings is incidental to the power inherent in  
28 every court to schedule disposition of the cases on its docket so as to promote fair and efficient

1 adjudication. How this can best be done is a decision properly vested in the trial courts.” *Gold v.*  
2 *Johns-Manville Sales Corp.*, 723 F.2d 1068, 1077 (3<sup>rd</sup> Cir. 1983).

3 Factors “regulating the issuance of a stay” include: “(1) whether the stay applicant has made a  
4 strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably  
5 injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested  
6 in the proceeding; and (4) where the public interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776, 107  
7 S.Ct. 2113 (1987). Nonetheless, “[s]ince the traditional stay factors contemplate individualized  
8 judgments in each case, the formula cannot be reduced to a set of rigid rules.” *Hilton*, 481 U.S. at 777,  
9 107 S.Ct. 2113. A “party seeking a stay may be entitled to prevail if it can demonstrate a ‘substantial  
10 case on the merits’ and the second [irreparable injury] and fourth [public interest] factors militate in its  
11 favor.” *Natural Resources Defense Council, Inc. v. Winter*, 502 F.3d 859, 863 (9<sup>th</sup> Cir. 2007).

12 As fellow district court summarized: “Whether or not to grant a stay is within the court’s  
13 discretion and it is appropriate when it serves the interests of judicial economy and efficiency.” *Rivers*  
14 *v. Walt Disney Co.*, 980 F.Supp. 1358, 1360 (C.D. 1997).

### 15 Merits

16 Dairy America claims it “is likely to prevail on the merits” on appeal. Dairy America notes that  
17 interpretation of its “contract for insurance” is reviewed de novo. “The interpretation of a contract  
18 presents a mixed question of fact and law subject to de novo review.” *Hanson by and through Hanson*  
19 *v. Prudential Ins. Co. of America*, 783 F.2d 762, 764 (9<sup>th</sup> Cir. 1985). Dairy America argues that its  
20 “contract for insurance” is ambiguous on its fact to create a material issue of fact for trial. “When the  
21 meaning of an agreement is ambiguous on its face and contrary inferences as to intent are possible, an  
22 issue of material fact exists for which summary judgment ordinarily is inappropriate.” *International*  
23 *Brotherhood of Elec. Workers, AFL-CIO Local 47 v. So. Cal. Edison Co.*, 880 F.2d 104, 107 (9<sup>th</sup> Cir.  
24 1989).

25 According to Dairy America, the binder and cargo policy “create ambiguity because they contain  
26 mutually conflicting terms.” Dairy America notes that the binder lacked the cargo policy’s attachment  
27 clause to limit coverage to shipments commencing on or after coverage inception. Dairy America argues  
28 that the cargo policy’s attachment clause’s exclusion of coverage for “shipments in transit” is



1 “irreconcilable” with the cargo policy’s “lost or not lost” clause<sup>4</sup> which evidences “intent to include  
2 shipments already in transit but not yet declared.”

3 Dairy America further challenges this Court’s handling of the parties’ competing expert opinions  
4 on application of the binder to Dairy America’s loss. Dairy America accuses this Court of “weighing  
5 the opinions.” Dairy America argues that the opinions of its Mr. Adams and Gallagher’s Mr. Adler  
6 “support a verdict for Dairy America because they support the inference that Defendants NY Marine and  
7 Southern Marine were obligated” to cover the 23 pre-cargo policy inception loads.

8 Dairy America concludes that “the Binder was the valid contract of insurance in effect at the time  
9 of loss, and Dairy America’s claim should have been adjusted based on the Binder” to raise triable issues  
10 of material fact whether the 23 pre-cargo policy inception loads are “covered.”

11 NY Marine and Southern Marine challenge Dairy America to make a “strong showing that it is  
12 likely to prevail on the merits of its appeal.” *See Virginia Petroleum Jobbers Ass’n v. Federal Power*  
13 *Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958). NY Marine and Southern Marine point to this Court’s  
14 careful consideration of the evidence, legal authority and parties’ relationships to correctly conclude that  
15 “Dairy America offers no meaningful authority that it was entitled to rely on New York Marine or  
16 Southern Marine ‘to explain the limitations and exclusions of its coverage.’” NY Marine and Southern  
17 Marine note that “Dairy America failed to refute New York Marine and Southern Marine’s point that  
18 binders are governed by terms, conditions and exclusions customarily contained in its standard insurance  
19 policies.” Hartford notes the absence of evidence “that this Court abused its discretion in granting  
20 summary judgment.”

21 Dairy America reiterates its points to oppose summary judgment and to support reconsideration  
22 of summary judgment. The bottom line is that Dairy America is dissatisfied with and disagrees with  
23 summary judgment and this Court’s analysis to support summary judgment. This Court is confident in  
24 having granted summary judgment despite that Dairy America’s appeal and the underlying summary  
25 judgment motion raise unsettled issues regarding application and interpretation of a binder and cargo  
26 policy. Dairy America has failed to convince this Court on two prior occasions that Dairy America is

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27 <sup>4</sup> The cargo policy includes a “Geographical Limits” provision, the first sentence of which is identical to the  
28 binder’s corresponding provision.

1 correct. Dairy America fails again to demonstrate a strong likelihood of success on appeal. As such,  
2 the merits factor weighs in favor to deny a stay.

### 3 **Irreparable Injury**

4 Dairy America equates its potential to prepare for and present two separate trials as irreparable  
5 injury. Dairy America identifies 12 witnesses which it claims would be called at separate trials. The  
6 witnesses include experts, Dairy America and Gallagher executives, and persons who presumably  
7 investigated Dairy America’s claim. Dairy America claims that it could needlessly spend resources on  
8 expert discovery if its claims against Gallagher are rendered moot with Dairy America’s success on  
9 appeal. Dairy America concludes that “there is no compensatory relief available to Dairy America for  
10 the resources it will waste in putting on two separate and duplicative trials” in the absence of  
11 “reimbursement of this expense from any of the defendants.”

12 NY Marine and Southern Marine dispute irreparable harm to Dairy America in that potential  
13 separate trials “is at most an economic inconvenience and hardly qualifies as irreparable harm.” NY  
14 Marine and Southern Marine point out that separate trials is consistent with “Dairy America’s own  
15 position in seeking a separate judgment in the first place” from which to appeal.

16 “Mere injuries, however substantial, in terms of money, time and energy necessarily expended  
17 in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective  
18 relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim  
19 of irreparable harm.” *Virginia Petroleum Jobbers*, 259 F.2d at 925. Moreover, “case management  
20 standing alone is not necessarily a sufficient ground to stay proceedings.” *Dependable Highway*  
21 *Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9<sup>th</sup> Cir. 2007).

22 Although this Court strives to avoid duplicity, the present situation is of Dairy America’s own  
23 making. Dairy America chose to pursue distinguishable claims against NY Marine, Southern Marine,  
24 Gallagher and Hartford in one action. Dairy America’s failure to consider or to accept the ramifications  
25 of summary judgment for NY Marine and Southern Marine does not amount to irreparable harm despite  
26 Dairy America’s new notion of overlap in its claims against Gallagher, on one hand, and NY Marine and  
27 Southern Marine, on the other hand, to require calling identical witnesses in separate trials. At most,  
28 Dairy America points to additional monetary expenditures – its risk when suing multiple defendants.

1 Dairy America’s would be success on appeal does not eliminate its claims against Gallagher, especially  
2 if the Ninth Circuit finds issues of material fact to require trial. In other words, Dairy America will need  
3 to try its claims against Gallagher sooner or later and potential evidence overlap fails to justify further  
4 delay, especially since trial has been pushed back several times already. Dairy America fails to establish  
5 irreparable harm, and such factor weighs in favor to deny a stay.

### 6 Substantial Harm To Defendants

7 Dairy America argues that Gallagher “will have a better defense” if NY Marine and Southern  
8 Marine remain in the case in that the negligence claims against Gallagher “arise out of NY Marine and  
9 Southern Marine’s breach of contract.” Dairy America reiterates that its success on its breach of contract  
10 claim against NY Marine and Southern Marine “likely” moots its claims against Gallagher. As to  
11 Hartford, Dairy America merely notes it “will not suffer any prejudice if made to wait until resolution  
12 of the appeal.”

13 Hartford faults Dairy America’s request for an “indefinite stay” which if granted, would subject  
14 Hartford to “tens of thousands of dollars” in “additional interest at 10 percent per annum” for a contract  
15 damages judgment favorable to Dairy America to “drastically increase the potential damages owed” to  
16 Dairy America. Hartford concludes that a stay will cause it “severe” economic damage. Hartford further  
17 notes that it “should not be punished due to NY Marine and Southern Marine’s success on summarily  
18 adjudicating the claim against them.”

19 Dairy America responds that since Hartford earns interest on money to be used to pay a  
20 judgment, “accrued interest will not come out of its pocket, but out of the interest that has accrued from  
21 the time of damage to the time of judgment.”

22 NY Marine and Southern Marine note Dairy America’s claims against them are “simple and  
23 straight forward.” NY Marine and Southern Marine argue that with a stay and joint trial, they “would  
24 be dragged into a trial involving professional negligence claims” against Gallagher and would face a  
25 “lengthier, costlier trial involving numerous witnesses and much evidence surrounding factual issues”  
26 as to Gallagher’s professional negligence.

27 A court must consider whether “issuance of a stay substantially harms other parties interested  
28 in the proceedings.” *Virginia Petroleum Jobbers*, 259 F.2d at 925. “[I]f there is even a fair possibility

