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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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COUNTY OF STANISLAUS,
Plaintiff,

v.

TRAVELERS INDEMNITY COMPANY;
and DOES 1 through 50,
inclusive,

Defendant.

CIV. NO. 1:14-00666 WBS SMS
ORDER

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This action seeks to resolve disputes regarding a comprehensive general liability policy issued to plaintiff County of Stanislaus by the Insurance Company of the Pacific Coast, which was a former entity of defendant Travelers Indemnity Company. Pursuant to Federal Rule of Civil Procedure 56, both parties moved for summary judgment to establish defendant's obligations under the policy.

An insurer's duty to defend "arises as soon as tender is made" and is "discharged when the action is concluded" unless

1 it is "extinguished earlier" because the insurer shows "that no
2 claim can in fact be covered." Aerojet-Gen. Corp. v. Transp.
3 Indem. Co., 17 Cal. 4th 38, 58 (1997). When, as is the case
4 here, a policy includes a pollution exclusion and reinstates
5 coverage for "sudden and accidental" pollution, the insured
6 "establishes that [the insurer] is obligated to defend . . . if
7 there is any potential that the release or escape of at least
8 some of the pollutants was 'sudden and accidental.'" Vann v.
9 Travelers Cos., 39 Cal. App. 4th 1610, 1616 (1st Dist. 1995); see
10 generally Montrose Chem. Corp. v. Superior Court, 6 Cal. 4th 287,
11 300 (1993).

12 To show the potential of a "sudden and accidental"
13 release of pollutants at the Greer Landfill, plaintiff first
14 relies on the May 23, 2007 "South Area Groundwater Investigation
15 Report," which states:

16 An employee from Stanislaus County, who was present at
17 the landfill in 1985 and 1986, reported that
18 excavations in the landfill area north of Jantzen Road
19 were dug to depths of approximately 80 feet below
20 grade, which would have potentially immersed landfill
21 waste in the groundwater table when groundwater
22 elevations were high. In the southern area, waste
23 cells were also dug in the summer close to
24 groundwater. Again, county staff provided an
25 anecdotal account of a time when rising groundwater
26 was "floating" waste in a cell and additional soil had
27 to be added to ballast the waste.

28 (Syz Decl. Ex. A at STATRAV7233 (Docket No. 32-3).) Defendant
objects to the court's consideration of this evidence because it
contains hearsay that plaintiff would be unable to offer in an
admissible form at trial and plaintiff has not authenticated the
report. (See Docket No. 33-1 at 2:2-3:11.) It is also unclear

1 from the report whether the employee was referring to excavations
2 and immersion of waste that occurred during the coverage period.

3 As this court has previously discussed, the "current
4 law in the Ninth Circuit is arguably that the rule against
5 hearsay, Fed. R. Evid. 802, applies to evidence submitted in
6 support of and in opposition to a motion for summary judgment."
7 Burch v. Regents of Univ. of California, 433 F. Supp. 2d 1110,
8 1122 (E.D. Cal. 2006). Moreover, even if a more lenient standard
9 applies to evidence a non-moving party submits, plaintiff must
10 overcome the pollution exclusion to prevail on its separate
11 motion for summary judgment, and the hearsay rule unequivocally
12 applies to evidence the moving party submits. See id. at 1121.
13 The Ninth Circuit has also "repeatedly held that 'documents which
14 have not had a proper foundation laid to authenticate them cannot
15 support [or defend against] a motion for summary judgment.'" Id.
16 at 1120 (alteration in original).

17 Defendant also objects to Exhibits E and F attached to
18 Benjamin Syz's Declaration on several grounds, including that
19 Exhibit E is not authenticated and Exhibit F is an incomplete
20 copy of the report. (See Docket No. 33-1 at 3:46-24.) Defendant
21 restates these objections, along with raising other more
22 formulaic objections, in its response to plaintiff's statement of
23 undisputed facts. (See Docket No. 33-2.)

24 The court will provide plaintiff with the opportunity
25 to resubmit any evidence to which defendant objects and to show
26 that the evidence "may be presented in an admissible form at
27 trial." See Burch, 433 F. Supp. at 1120 (emphasis omitted).
28 After plaintiff has resubmitted any evidence, the court will give

1 defendant the opportunity to raise any necessary objections to
2 that evidence.

3 IT IS THEREFORE ORDERED that plaintiff shall resubmit
4 any evidence no later than October 9, 2015 and defendant may
5 submit any objections to that evidence no later than October 16,
6 2015. The hearing on the cross-motions for summary judgment set
7 for September 21, 2015 is hereby reset for November 2, 2015.

8 Dated: September 15, 2015

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10 WILLIAM B. SHUBB
11 UNITED STATES DISTRICT JUDGE
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