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

LAKELAND VILLAGE	)	
HOMEOWNERS ASSOCIATION,	)	2:10-cv-00604-GEB-GGH
	)	
Plaintiff,	)	
	)	
v.	)	<u>ORDER GRANTING PLAINTIFF'S</u>
	)	<u>MOTION FOR PARTIAL SUMMARY</u>
	)	<u>JUDGMENT AND DENYING</u>
GREAT AMERICAN INSURANCE	)	<u>DEFENDANT'S CROSS-MOTION FOR</u>
GROUP, TRAVELERS PROPERTY	)	<u>SUMMARY JUDGMENT</u>
CASUALTY COMPANY OF AMERICA, and	)	
DOES 1 through 50,	)	
	)	
Defendants.	)	
_____	)	

Plaintiff moves for partial summary judgment against its insurer, Defendant Travelers Property Casualty Company of America ("Defendant"), on its third claim for declaratory relief. Specifically, Plaintiff seeks a declaration that Defendant has a duty to defend a cross-complaint filed against it in a pending state court action. Defendant filed a cross motion for summary judgment, arguing it does not owe Plaintiff a defense, and therefore, is entitled to judgment on Plaintiff's claims.

**I. LEGAL STANDARD**

A party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If this burden is satisfied, "the non-moving party must set forth, by affidavit or as

1 otherwise provided in [Federal] Rule [of Civil Procedure] 56, specific  
2 facts showing that there is a genuine issue for trial.” T.W. Elec.  
3 Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th  
4 Cir. 1987) (quotations and citation omitted) (emphasis omitted). When  
5 deciding a summary judgment motion, all reasonable inferences that can  
6 be drawn from the evidence “must be drawn in favor of the non-moving  
7 party.” Bryan v. McPherson, --- F.3d ----, 2010 WL 2431482, at \*2 (9th  
8 Cir. 2010).

## 9 **II. UNDISPUTED FACTS**

### 10 **A. The Underlying Litigation and Tender of Defense**

11 In the underlying state court litigation involved with  
12 Plaintiff’s tender of defense, Kellie Warnick and her mother, Ann  
13 Michael, filed a complaint against Premier Resorts International, Inc.  
14 dba Lakeland Village Beach and Mountain Resort (“PRI”), and Francis  
15 Hollow (“Hollow”) that concerns a wedding reception Ms. Warnick hosted  
16 at Lakeland Village. (Def.’s Response to Pl.’s Separate Statement of  
17 Undisputed Facts (“SUF”) # 1-2.)

18 Hollow, who owns a town home in Lakeland Village, called the  
19 police and complained about noise at the reception. (Pl.’s Evid., Ex. 1,  
20 ¶16, Ex. 7, ¶ 1.) The police responded and took action that resulted in  
21 the termination of the wedding reception. (Id.)

22 Hollow answered the state court action and filed a cross-  
23 complaint against Plaintiff and PRI for indemnity, contribution and  
24 declaratory relief. (Def.’s Response to Pl.’s Separate Statement of  
25 Undisputed Facts (“SUF”) # 3.) Hollow subsequently filed a First-  
26 Amended Cross-Complaint, which added a nuisance claim. (SUF # 10.)  
27 Hollow alleges in the nuisance claim that non-property owners used  
28 Lakeland Village’s common areas for weddings, wedding receptions and

1 similar events, wherein loud music was played that interfered with  
2 Hollow's quiet use and enjoyment of his property. (SUF #11.)

3 Plaintiff tendered its defense of Hollow's First-Amended  
4 Cross-Complaint to Defendant in early 2007. (SUF #18.) Defendant denied  
5 the tender on April 9, 2007. (SUF #19.) Hollow later filed a Second-  
6 Amended Cross-Complaint ("Cross-Complaint"), which deleted his indemnity  
7 claim. (SUF #15.)

### 8 **B. The Applicable Insurance Policy**

9 The insurance policy under which the tender was made provides  
10 in relevant part: "We will pay those sums that the insured becomes  
11 legally obligated to pay as damages because of 'personal injury'... to  
12 which this insurance applies. We will have the right and duty to defend  
13 the insured against any 'suit' seeking those damages." (Pl.'s Evid., Ex.  
14 12, at 1.) "Personal injury" is defined to include "injury, other than  
15 'bodily injury,' arising out of... the wrongful eviction from, wrongful  
16 entry into, or invasion of the right of private occupancy of a room,  
17 dwelling or premises that a person occupies by or on behalf of its  
18 owner, landlord or lessor." (Id., at 3.)

### 19 **III. DISCUSSION**

20 The parties dispute whether or not Defendant owes Plaintiff a  
21 defense of Hollow's Cross-Complaint. Plaintiff seeks a declaration that  
22 Defendant has a duty to defend it, arguing Hollow's nuisance claim is  
23 covered by the policy's coverage for injury arising out of "invasion of  
24 the right of private occupancy of a room, dwelling or premises that a  
25 person occupies by or on behalf of its owner, landlord or lessor...."  
26 (Pl.'s P.&A. in Supp. of Mot. for Partial Summ. J. ("Mot.") 8:9-19.)  
27 Defendant rejoins that it does not owe Plaintiff a defense because  
28 "invasion of the right of private occupancy," requires a physical

1 invasion, and "[n]oise simply is not a physical invasion of the right to  
2 private occupancy in California." (Def.'s P.&A. in Opp'n to Pl.'s Mot.  
3 for Summ. J. ("Opp'n") 9:8-10, 10:20-21.) Defendant further counters  
4 that it does not owe Plaintiff a defense since the clause "by or on  
5 behalf of its owner, landlord or lessor," modifies the word "invasion,"  
6 requiring Plaintiff to own the affected property for there to be  
7 coverage, and Plaintiff does not own Hollow's property. (Opp'n 7:11-15.)

8 **A. An Insurer's Duty to Defend**

9 Under California law,

10 An insurer must defend its insured against claims  
11 that create a potential for indemnity under the  
12 policy. The duty to defend is broader than the duty  
13 to indemnify, and it may apply even in an action  
14 where no damages are ultimately awarded.  
15 Determination of the duty to defend depends, in the  
16 first instance, on a comparison between the  
17 allegations of the complaint and the terms of the  
18 policy. But the duty also exists where extrinsic  
19 facts known to the insurer suggest that the claim  
20 may be covered. Moreover, that the precise causes  
21 of action pled by the third-party complaint may  
22 fall outside policy coverage does not excuse the  
23 duty to defend where, under the facts alleged,  
24 reasonably inferable, or otherwise known, the  
25 complaint could fairly be amended to state a  
26 covered liability.

19 Scottsdale Ins. Co. v. MV Transp., 36 Cal.4th 643, 654 (2005) (citation  
20 omitted). Further, "[a]ny doubt as to whether the facts give rise to a  
21 duty to defend is resolved in the insured's favor." Horace Mann Ins. Co.  
22 v. Barbara B., 4 Cal.4th 1076, 1081 (1993).

23 In a duty to defend case, an insured moving for summary  
24 judgment "need only show 'the existence of a potential for coverage,'  
25 i.e., 'that the underlying claim may fall within policy coverage.'" Cunningham v. Univ. Underwriters, 98 Cal.App.4th 1141, 1147 (2002)  
26 (citing Montrose Chem. Corp. v. Sup. Ct., 6 Cal.4th 287, 300 (1993)).

27 Whereas, an insurer moving for summary judgment "must establish the  
28

1 absence of any ... potential' for coverage, i.e., that the underlying  
2 complaint 'can by no conceivable theory raise a single issue which could  
3 bring it within the policy coverage.'" Id. (citing Montrose Chem. Corp.,  
4 at 300 (1993). "Although the insurer's burden in moving for summary  
5 judgment is greater than the insured's burden in bringing its own  
6 affirmative motion, this disparity merely reflects the substantive law."  
7 Id. (citation omitted).

8           When an insurer owes a duty of defense, "the insurer is  
9 obligated to defend against all of the claims involved in the action,  
10 both covered and noncovered...." Horace Mann Ins. Co. v. Barbara B., 4  
11 Cal.4th 1076, 1081 (1993). "To defend meaningfully, the insurer must  
12 defend immediately. To defend immediately, it must defend entirely. It  
13 cannot parse the claims, dividing those that are at least potentially  
14 covered from those that are not." Buss v. Sup. Ct., 16 Cal.4th 35, 49  
15 (1997).

#### 16           **B.   Applicable Principals of Insurance Policy Interpretation**

17           The principles of insurance policy interpretation are well-  
18 settled under California law:

19                   Interpretation of an insurance policy is a  
20 question of law. While insurance contracts have  
21 special features, they are still contracts to which  
22 ordinary rules of contractual interpretation apply.  
23 Thus, the mutual intention of the parties at the  
24 time the contract is formed governs interpretation.  
25 If possible, [courts] infer this intent solely from  
26 the written provisions of the insurance policy. If  
27 the policy language is clear and explicit, it  
28 governs.

                  When interpreting a policy provision, [courts]  
must give its terms their ordinary and popular sense  
unless used by the parties in a technical sense or  
a special meaning is given to them by usage. We must  
also interpret these terms in context, and give  
effect to every part of the policy with each clause  
helping to interpret the other.

1 Palmer v. Truck Ins. Exchange, 21 Cal. 4th 1109, 1115 (1999) (quotations  
2 and citations omitted).

3 "A policy provision will be considered ambiguous when it is  
4 capable of two or more constructions, both of which are reasonable. But  
5 language in a contract must be interpreted as a whole, and in the  
6 circumstances of the case, and cannot be found to be ambiguous in the  
7 abstract." Waller v. Truck Ins. Exchange, Inc., 11 Cal.4th 1, 18 (1995).  
8 "There cannot be an ambiguity per se, i.e. an ambiguity unrelated to an  
9 application." Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins.  
10 Co., 5 Cal.4th 854, 867 (1993) (quotation and citation omitted).

11 If a policy provision has been judicially construed, "it is  
12 not ambiguous and the judicial construction of the term should be read  
13 into the policy unless the parties express a contrary intent." Lockeed  
14 Corp v. Continental Ins. Co., 134 Cal.App.4th 187, 197 (2005) (quotation  
15 and citation omitted). In applying this rule, however, the policy  
16 provision at issue must be used in a context analogous to the context in  
17 which it was judicially construed. Id. Further, the existence of  
18 conflicting judicial interpretations of a policy provision may support  
19 a finding that a policy provision is ambiguous. Fire Ins. Exchange v.  
20 Sup. Ct., 116 Cal.App.4th 446, 465 (2004).

21 Rules of grammar and punctuation can also be used in deciding  
22 the meaning of words and phrases. See Oak Park Calabasas Condominium  
23 Assn. v. State Farm Fire and Cas. Co., 137 Cal.App.4th 557, 564 (using  
24 the grammatical use of a comma to determine the meaning of an insurance  
25 policy provision); and State Farm General Ins. Co. v. JT's Frames, Inc.,  
26 181 Cal.App.4th 429, 446 (2010) (applying the "rule of the last  
27 antecedent" to determine the scope of a policy provision).

28

1           **C. "Invasion of the Right of Private Occupancy"**

2           Here, the insurance policy covers claims for "personal  
3 injury," which is defined to include injury arising out of "invasion of  
4 the right of private occupancy of a room, dwelling or premises that a  
5 person occupies by or on behalf of its owner, landlord or lessor."  
6 (Pl.'s Evid., Ex. 12, at 3.) Plaintiff contends Hollow's nuisance claim  
7 "fall[s] directly within this definition of 'personal injury'" since  
8 "invasion of the right of private occupancy" does not require a  
9 "tangible interference" with the property. (Mot. 8:18-19, 8:24-26.)  
10 Plaintiff relies primarily upon a First Circuit opinion in Titan  
11 Holdings Syndicate, Inc. v. City of Keene, N.H., 898 F.2d 265 (1<sup>st</sup> Cir.  
12 1990), as support for its argument. In Titan Holdings, the First Circuit  
13 considered New Hampshire law stating, that law "does not require an  
14 allegation of *physical* invasion before a claim comes within coverage for  
15 liability arising from 'other invasion of the right of private  
16 occupancy.'" Id., at 272 (emphasis in original). Titan Holdings relied  
17 upon this principle when construing the clause before it in favor of the  
18 insured and held that the insurer owed the insured a defense of a  
19 complaint, which alleged odor, noise and bright light from the insured's  
20 sewage plant "unreasonably and substantially interfered with [the  
21 plaintiffs'] quiet enjoyment of [their home]." Id., at 267, 272-273.  
22 Plaintiff argues in the alternative, the phrase "invasion of the right  
23 of private occupancy" is ambiguous, and thus, must be interpreted in its  
24 favor. (Mot. 9:7-8.)

25           Defendant rejoins this policy language is not ambiguous, and  
26 requires a "physical entry upon real property." (Opp'n 9:9-10.)  
27 Defendant argues since noise is not "physical," Hollow's Cross-  
28 Complaint does not fall within the policy's "personal injury" coverage.

1 (Opp'n 10:20-22.) Defendant relies solely upon Sterling Builders, Inc.  
2 v. United National Insurance Co., 79 Cal.App.4th 105 (2000), as support  
3 for its position. In Sterling Builders, an insured filed a declaratory  
4 relief action against its insurer, after the insurer refused to defend  
5 the insured in a third party action, which alleged the fraudulent  
6 procurement of an easement. The insured argued the clause in its  
7 policy, which defined "personal injury" to include "wrongful entry or  
8 eviction or other invasion of the right of private occupancy," "afforded  
9 at least the possibility of coverage of the [third party] action, and  
10 hence gave rise to a duty to defend." Id., at 108. The Sterling  
11 Builders Court disagreed, holding "there is no such thing as a  
12 nonphysical invasion of a right of private occupancy. 'Occupancy'  
13 requires a physical entry upon real property." Id., at 109. Sterling  
14 Builders addressed the notion of obtaining an easement interest in real  
15 property through fraud, and found "[t]hese facts constitute a  
16 transaction, not a trespass." Id., at 112.

17 Sterling Builders is distinguishable from the facts involved  
18 in this case since Hollow's Cross-Complaint does not involve a  
19 "misrepresentation" or "transaction." Therefore, the issue is whether  
20 the "invasion of the right of private occupancy" provision applies to  
21 Hollow's allegations that he heard loud amplified music emanating from  
22 Non-Owner events, which interfered with the quiet use and enjoyment of  
23 his property. (Pl.'s Evid., Ex. 4, ¶¶ 26-27.)

24 A California Court of Appeal stated in Martin Marietta Corp v.  
25 Ins. Co. of North America, 40 Cal.App.4th 1113, 1134 (1995) that  
26 "[i]nvasion of the right of private occupancy, resembles the definition  
27 of nuisance, an interference with the interest in the private use and  
28 enjoyment of the land." (Quotations and citations omitted). Further,



1 the Martin Marietta Corp court stated: it need "not determine the entire  
2 scope of coverage under the term" since the clause before it, "'other  
3 invasion of the right of private occupancy'" is susceptible to numerous  
4 interpretations, and under California's rules of contract  
5 interpretation, it must be construed in favor of the insured." Id.; See  
6 also Hirschberg v. Lumbermens Mutual Casualty, 798 F.Supp. 600, 604  
7 (N.D. Cal. 1992) (applying California law and holding that the clause  
8 "other invasion of the right of private occupancy," is ambiguous). As  
9 stated in Martin Marietta Corp, the clause "invasion of the right of  
10 private occupancy" is subject to more than one reasonable  
11 interpretation. Therefore, the clause is ambiguous and must be construed  
12 in favor of the insured.

13 **D. "By or on behalf of Its Owner, Landlord or Lessor"**

14 The parties also dispute the effect of the clause "by or on  
15 behalf of its owner, landlord or lessor," in the policy's definition of  
16 "personal injury" for "invasion of the right of private occupancy."  
17 Defendant argues the clause "by or on behalf of its owner, landlord or  
18 lessor," modifies the word "invasion," and therefore requires Plaintiff  
19 to own the affected property for there to be coverage. Defendant argues  
20 since Plaintiff does not own Hollow's property, Defendant does not have  
21 a duty to defend Hollow's Cross-Complaint, notwithstanding how the  
22 phrase "invasion of the right of private occupancy" is interpreted.  
23 (Opp'n 7:11-15.)

24 Plaintiff counters that Defendant's argument violates the  
25 "fundamental grammatical 'Rule of the Last Antecedent' which requires  
26 that qualifying words or phrases be applied to the words immediately  
27 preceding them." (Pl.'s Reply Brief in Support of Mot. For Partial Summ.  
28 J. ("Reply") 1:25-26.) Further, Plaintiff argues "by or on behalf of its

1 owner, landlord or lessor" must modify the word "occupies," requiring  
2 only that Hollow rightfully occupied his town home to trigger coverage.  
3 (Reply 5:15-21.) Plaintiff argues in the alternative, "by or on behalf  
4 of its owner..." is ambiguous and must be interpreted in its favor.  
5 (Reply 6:20-21.)

6 The parties have not provided any binding authority, which is  
7 dispositive of this issue. Defendant cited Mirpad, LLC v. Cal. Ins.  
8 Guarantee Assoc., 132 Cal.App.4th 1058 (2005), which contains dicta  
9 concerning the clause "by or on behalf of its owner..." since the  
10 parties did not dispute its construction. Mirpad, LLC, 132 Cal.App.4th  
11 at 1064 n.3.

12 Further, the out-of-state authority cited by the parties is  
13 conflicting. A Maine District Court held "by or on behalf of its owner,"  
14 "clearly refers to the person committing the wrongful entry and not the  
15 person who occupies the room, dwelling, or premises." U.S. Fidelity and  
16 Guar. Co. v. Goodwin 950 F.Supp. 24, 26 (D.Me. 1995). The court  
17 explained,

18 The key to determining the meaning of this  
19 provision lies in the word "its." The Court is  
20 persuaded that the word "its" modifies the words  
21 "room, dwelling or premises." The word "its" does  
22 not modify the word "person." Unlike a room,  
23 dwelling, or premises, a person obviously cannot  
24 have an owner. Accordingly, the provision  
25 unambiguously requires that the wrongful entry be  
26 committed by the owner, landlord, or lessor of the  
27 room, dwelling, or premises.

24 Id., at 27.

25 In contrast, the Third and Eighth Circuits have held "by or on  
26 behalf of its owner" is ambiguous. New Castle County, Delaware v.  
27 National Union Fire Ins. Co. of Pittsburgh, PA, 174 F.3d 338, 344-351  
28 (3<sup>rd</sup> Cir. 1999); Royal Ins. Co. of America v. Kirksville College of

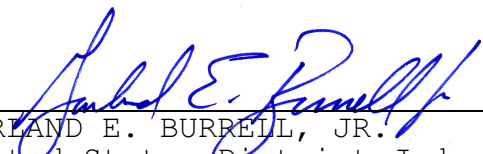
1 Osteopathic Medicine, 191 F.3d 959, 963 (8<sup>th</sup> Cir. 1999). In New Castle  
2 County, the Court criticized the Goodwin Court's analysis and held the  
3 grammatical "Rule of the Last Antecedent" rendered the clause subject to  
4 more than one reasonable interpretation. New Castle County, Delaware,  
5 174 F.3d at 344-351.

6           The Goodwin court found that the word "its"  
7 modifies "room, dwelling or premises," and not  
8 "person." Yet, replacing "its" with any of the  
9 words the court found "its" to modify does not  
10 foreclose either [the insurer] or [the insured's]  
11 reading of the provision. For example, consider the  
12 following: "The wrongful eviction from a room that  
13 a person occupies by or on behalf of the room's  
14 owner, landlord or lessor." Or, consider this: "The  
15 invasion of the right of private occupancy of a  
16 premises that a person occupies by or on behalf of  
17 the premises' owner, landlord or lessor." Both  
18 examples illustrate the flaw in the Goodwin court's  
19 reasoning; that is, neither clarifies whether "by  
20 or on behalf of" requires the offense to be  
21 committed by the owner, landlord, or lessor, or  
22 whether it defines the possessory interest of the  
23 claimant. Thus, determining what "its" modifies  
24 neither strengthens nor undermines either of the  
25 competing interpretations of [the clause]....

17 Id., at 345 (citation omitted).

18           Since the clause "by or on behalf of its owner, landlord or  
19 lessor," is reasonably susceptible to more than one interpretation, it  
20 is ambiguous and must be construed in Plaintiff's favor. Therefore,  
21 Plaintiff's partial motion for summary judgment is granted and  
22 Defendant's cross motion for summary judgment is denied.

23 Dated: July 21, 2010

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26 \_\_\_\_\_  
27 GARLAND E. BURRELL, JR.  
28 United States District Judge