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

MICHELLE BURRIS, dba SIERRA)	
BROKERS REAL ESTATE, INC.,)	2:10-cv-01561-GEB-DAD
)	
Plaintiff,)	
)	
v.)	<u>ORDER GRANTING DEFENDANT'S</u>
)	<u>MOTION TO DISMISS PLAINTIFF'S</u>
)	<u>FIRST AMENDED COMPLAINT WITH</u>
AMERICAN SAFETY INDEMNITY)	<u>PREJUDICE</u>
COMPANY, an Oklahoma)	
corporation, and DOES 1 through)	
20, inclusive,)	
)	
Defendants.)	
_____)	

Defendant American Safety Indemnity Company ("ASIC") moves under Federal Rule of Civil Procedure ("Rule") 12(b)(6) for an order dismissing Plaintiff Michelle Burris's ("Burris") First Amended Complaint with prejudice. The issue is whether ASIC has a duty to defend Burris against a third-party complaint which the County of Placer ("Placer County") filed against her in the Superior Court of California in Placer County. Placer County sues Burris based on her alleged unlawful subdivision of real property proscribed by the Subdivision Map Act and the Placer County Code. (First Am. Compl. ("FAC") Ex. 7, ¶¶ 85-163, 83:19-85:19.) Each claim in the third-party complaint incorporates the allegation that Burris **"was a real estate developer in the business of buying, parceling, selling and developing raw land."** Id. ¶ 12 (emphasis added).

1 Burris tendered defense of the Placer County lawsuit to ASIC
2 under an ASIC-issued errors and omissions policy ("Policy"). Id. ¶¶ 7,
3 14. ASIC argues it does not owe Burris a duty to defend under the Policy
4 since the claims in Placer County's third-party complaint are excluded
5 by "Exclusion K" in the Policy. This exclusion prescribes: ASIC "will
6 not defend . . . under this policy for any 'claim' . . . based on or
7 arising out of, or in connection with the activities of an 'Insured' as
8 a . . . property developer." Id. Ex. 1, at 26-27. ASIC argues Exclusion
9 K applies since "the basis for each of the County's [claims] against
10 [Burris] is that she participated in the illegal subdivision of . . .
11 various projects as a developer." (Mem. of P. & A. in Supp. of Mot. to
12 Dismiss Pl.'s FAC 12:18-19.) Burris counters that Exclusion K is
13 inapplicable since she is sued by Placer County as a real estate broker,
14 not a developer. (Pl.'s Mem. in Opp. to Def.'s Mot. to Dismiss Pl.'s FAC
15 5:28-6:1.)

16 We look to the nature and kind of risk covered by
17 the policy as a limitation upon the duty to defend;
18 . . . [T]he insurer is not required to defend an
19 action against the insured when the complaint in
20 that action shows on its face that the injury
21 complained of is not only not covered by, but is
22 excluded from, the policy.

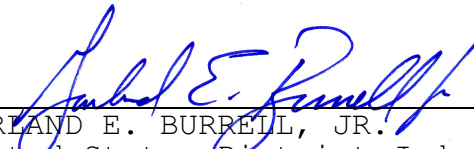
23 California Ins. Guarantee Assn. v. Wood, 217 Cal. App. 3d 944, 947-48
24 (1990) (internal citations and quotation marks omitted). "An insurer can
25 exclude coverage by language which is conspicuous, plain and clear." Id.
26 at 948.

27 Here, Placer County's third-party complaint shows on its face
28 that Exclusion K excludes coverage since each of Placer County's claims
against Burris alleges that she was acting as a property developer who
unlawfully subdivided real property. Therefore, ASIC owes no defense
duty to Burris, and Burris's First Amended Complaint is dismissed.

1 ASIC argues dismissal should be without leave to amend. "The
2 power to grant leave to amend . . . is entrusted to the discretion of
3 the district court, which 'determines the propriety [of allowing
4 amendment] . . . by ascertaining the presence of any of four factors:
5 bad faith, undue delay, prejudice to the opposing party, and/or
6 futility.'" Serra v. Lappin, 600 F.3d 1191, 1200 (9th Cir. 2010)
7 (quoting William O. Gilley Enters. v. Atl. Richfield Co., 588 F.3d 659,
8 669 n.8 (9th Cir. 2009)). It is evident from both Burris's original
9 Complaint and First Amended Complaint that her action against ASIC is
10 dependent upon Placer County's third-party complaint, and Placer
11 County's third-party complaint shows on its face that Burris is not
12 entitled to coverage under the Policy. Accordingly, any further
13 amendment by Burris "would be futile, [and] there [is] no need to
14 prolong the litigation by permitting further amendment." Lipton v.
15 Pathogenesis Corp., 284 F.3d 1027, 1039 (9th Cir. 2002).

16 Therefore, ASIC's motion to dismiss Burris's First Amended
17 Complaint is granted with prejudice, and judgment shall be entered in
18 favor of ASIC.

19 Dated: May 11, 2011

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22 _____
GARLAND E. BURRELL, JR.
United States District Judge