

1 **BACKGROUND**¹

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3 Plaintiff Silvia Portugal ("Portugal") is a former employee
4 of CareQuest, Inc., which did business as "Real Care."
5 (Plaintiff's Response to Defendant Western World Insurance
6 Company's ("Western") Statement of Undisputed Facts in Support of
7 Motion for Summary Judgment ("P-SUF"), ECF No. 16, Attachment 1,
8 ¶ 1.)² Prior to its insolvency, Real Care provided in-house
9 medical services for elderly and infirm clients. (Id.) Real
10 World was insured by Western, which issued six successive one-
11 year comprehensive general liability ("CGL") insurance policies
12 to Real Care from October 15, 2001 through October 15, 2007.
13 (Id. ¶ 10.) At issue in both the present action and the
14 underlying state court action, currently on appeal, is whether
15 Western's CGL policy covered the claims raised by Portugal,
16 thereby obligating Western to defend Real Care.³

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18 ¹ The facts noted in this section are the Court's
19 determination of what are undisputed material facts based on its
20 review of both Portugal's and Defendant's Statements of Facts and
the Records cited therein. For the purposes of this motion, all
reasonable inferences are drawn in favor of Portugal.

21 ² Pagination is based on the Court's ECF pagination, not the
22 pagination of the original documents.

23 ³ The following provisions of Western's CGL Policies
24 covering Real World are relevant to this action. First, Western
25 provides coverage for "bodily injury" and "property damage"
26 caused by an "occurrence," as those terms are defined under the
27 policies. (Id. at ¶ 11). The policies exclude coverage for
28 "bodily injury" or "property damage" "expected or intended from
the standpoint of the insured" and for which the insured is
obligated by assumption of liability in a contract. The CGL Form
also provides coverage for "personal and advertising" injury, and
excludes coverage for "personal and advertising injury" arising
out of breach of contract. (Id. at ¶ 11.) Next, under the
(continued...)

1 **A. Suit #1: Portugal v. Real Care**

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3 On February 1, 2006, Portugal filed a class-action wage
4 compensation lawsuit against Real Care in Sacramento Superior
5 Court. (Id. at ¶ 4.) On behalf of the class, Portugal alleged:
6 (1) failure to (a) pay overtime, (b) provide meals and (c) pay
7 all hourly wages due to non-exempt employees working for Real
8 Care in violation of various California Labor Code sections;
9 (2) violation of applicable wage orders issued by California's
10 Industrial Welfare Commission; and (3) intentional violation of
11 California's Unfair Business Practices Act, California Business &
12 Professions code Sections 17200, et seq. (Id. at ¶ 4.)

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15 ³(...continued)

16 Employment-Related Practices Exclusion Form) contained in each
17 policy, the CGL Form is modified to exclude "bodily injury" and
18 "personal and advertising injury" to a person arising out of
19 certain enumerated employment-related practices, policies, acts
or omissions. (Id. at ¶ 12.) Under an endorsement form, the
policies provide coverage under Coverage D for "professional
liability" for "bodily injury," "property damage" or "personal
injury" caused by a "professional incident."

20 The policies exclude coverage for "bodily injury," "property
21 damage" or "personal injury" for which the insured is obligated
22 to pay damages through assumption of a contract, and "bodily
23 injury" or "personal injury" to an employee arising out of and in
the course of employment or performing duties related to the
conduct of the insured's business. The policies define
"professional incident" to mean any negligent act or omission "in
the furnishing of healthcare services" or in the rendering of
professional home health care services." (Id. at ¶ 13.) The
24 "professional liability" coverage is incorporated into the CGL
Form and is subject to the CGL provisions except where the
25 endorsement form states a particular CGL provision is being
amended. The endorsement form incorporates the CGL "definitions"
26 for "bodily injury," "property damage," and "personal-injury"
("advertising injury" is not incorporated because the Coverage D
27 - Professional Liability does not cover the harm of "advertising
injury," it only covers the harm of "bodily injury," "property
28 damage," and "personal-injury" as defined in the CGL Form).

1 In addition, Portugal alleged that Real Care misclassified its
2 "Caregiver" employees as "personal attendants" so as to exempt
3 itself from abiding by California labor laws. (First Amended
4 Complaint, Portugal v. Real Care, ECF No. 8, Attachment 3, p. 46
5 at ¶ 6.)

6 On March 28, 2006, Western, Real Care's insurance provider,
7 declined coverage for the tender of defense by Real Care of the
8 Portugal class action on the grounds that the wage claims
9 asserted by Plaintiffs were not protected by the policy.

10 (Defendant's Statement of Undisputed Facts ("SUF"), ECF No. 8,
11 Attachment 2, ¶ 14.) On November 16, 2007, Portugal obtained a
12 default judgment against Real Care for damages in the amount of
13 \$23 million. (Id. at ¶¶ 15, 16.)

14 On December 5, 2007, and again on April 1, 2008, Western
15 reiterated its denial of coverage to Real Care and provided Real
16 Care with written explanations regarding the basis for denial.
17 (Id. at ¶¶ 17-18.) Apparently as a result of the litigation and
18 judgment, Real Care went out of business and became insolvent.
19 (P-SUF at ¶ 63.)

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21 **B. Suit #2: Portugal v. Western in State Court**

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23 On February 11, 2009, Portugal filed a class-action lawsuit
24 in the Sacramento Superior Court against Western, CareQuest and
25 others. (RJN, Complaint, ECF No. 8, Ex. D.)

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1 The class's standing was based on its status as a third party
2 "Judgment Creditor" under California Insurance Code ¶ 11580, due
3 to the \$23 million owed to them by Real Care as a result of the
4 default judgment. (Id. at ¶¶ 1, 3.) In the new action, Portugal
5 claimed that Western had a duty to indemnify Real Care, had a
6 duty to defend Real Care, and had a duty of good faith and fair
7 dealing in connection with investigating whether it had to
8 indemnify Real Care. (Id. at ¶¶ 39-48.)

9 On September 23, 2010, the Superior Court granted Western's
10 Motion for Summary Judgment.⁴ (Order Granting Motion for Summary
11 Judgment, ECF No. 8, Attachment 3, Exhibit E.) In its Order, the
12 Superior Court concluded that "the Portugal class action claims
13 for wages and employment benefits are not potentially covered
14 under the terms of any of the Western World policies." (Id. at
15 83-84.) Specifically, the court made the following findings:
16 (1) that Western's policy only covered "bodily injury, death, or
17 property damage" and that Portugal's wage-based claim against
18 Real Care was therefore not indemnified by Western (id. at 85);
19 (2) that unpaid wages and overtime are not "bodily injury" or
20 "personal and advertising injury" or "property damage" (id. at
21 86);⁵

23 ⁴ Plaintiff's motion to strike this fact "as disputed,
24 irrelevant, and immaterial," (P-SUF, ECF No. 16 at ¶ 25) is
25 denied. The Court concludes there is no reasonable basis to
dispute this fact as it is relevant and it is material.

26 ⁵ Pursuant to Federal Rules of Evidence 201(b) (authorizing
27 judicial notice of adjudicative facts 'capable of accurate and
28 ready determination by resort to sources whose accuracy cannot be
reasonably questioned'), Western requests the Court take judicial
notice of several documents. (Request for Judicial Notice
(continued...))

1 (3) that Real Care's employees were not performing a
2 "professional service" within the meaning of the policies (id.);
3 (4) that failure to pay statutory wage and employment benefits
4 does not constitute an "occurrence" under the policies (id. at
5 87); (5) that the "contractual liability" exclusion applies and
6 therefore excludes liability on behalf of Western (id.); (6) that
7 the "employment related practices" and "employers liability"
8 exclusions also apply (id.); and (7) that the "expected or
9 intended injury" exclusion in the contract applies (id.).⁶

10 Following the Superior Court's order on summary judgment,
11 Portugal filed a notice of appeal. (Western's Reply, ECF No. 20,
12 Att. 1, ¶ 115.) The appeal is currently pending. (Id. at
13 ¶ 116.)

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17 ⁵(...continued)

18 ("RJN") (ECF No. 8, Att. 3, pp. 1-2.)) Specifically, Western
19 asks the Court to take judicial notice of: (1) Portugal's
20 Complaint in this matter (RJN, Ex. A); (2) Portugal's Complaint
21 in the Portugal v. Real Care, Sacramento County Superior Court
22 Action No. 06AS00410 matter (Id., Ex. B); (3) Portugal's First
23 Amended Complaint in the Portugal v. Real Care, Sacramento County
24 Superior Court Action No. 06AS00410 matter (Id., Ex. C);
25 (4) Portugal's Complaint in Portugal v. Apex Care, Inc. et al.,
26 Sacramento County Superior Court Action No. 34-2009-00034576-CU-
27 BT-GDS (Id., Ex. D); (5) Order Granting Motion for Summary
28 Judgment in Sacramento County Superior Court Action No. 34-2009-
00034576-CU-BT-GDS (Id., Ex. E); (6) Western's Answer to
Portugal's Complaint (Id., Ex. F). Western's requests are
unopposed and are the proper subject of judicial notice. See,
e.g., Champlaine v. BAC Home Loans Servicing, LP, 706 F. Supp. 2d
1029, 1040 (E.D. Cal. 2009); Lee v. County of Los Angeles,
250 F.3d 668, 688 (9th Cir. 2001) (court may take judicial notice
of matters of public record). Accordingly, Western's Request for
Judicial Notice (ECF No. 8, Att. 3.) is granted.

1 **C. Suit #3: Portugal v. Western World Removed to Federal**
2 **Court**

3 On August 11, 2010, while the Superior Court was considering
4 Western's Motion for Summary Judgment, Portugal filed another
5 class action against Western in the Sacramento Superior Court.
6 (ECF No 1, Ex. 1.) In this action, Portugal stated that she and
7 the other class members were suing in "a new and additional
8 capacity as an assignee through a written assignment" of all of
9 Real Care's rights against Western.⁷ (Id. at ¶ 1.)

10 In the first action (Suit # 2) against Western, Portugal
11 claimed that Western had a duty to indemnify Real Care, had a
12 duty to defend Real Care, and had a duty of good faith and fair
13 dealing in connection with investigating whether it had to
14 indemnify Real Care. (RJN, Complaint, ECF No. 8, Ex. D.,
15 ¶¶ 39-48. In Portugal's second suit against Western (Suit # 3),
16 she raised four claims: (1) that Western had a duty to indemnify
17 Real Care; (2) Western had a duty to defend Real Care;
18 (3) Western failed to investigate and conclusively eliminate the
19 potential for coverage of Real Care. (Defendant's RJN, ECF
20 No. 8, Ex. E, p. 87.) Western thereafter removed to this Court
21 on the basis of diversity jurisdiction (See Notice of Removal,
22 ECF No. 1).

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24 ⁷ Apparently, Portugal purchased the rights from Real Care
25 to pursue this action against Western as an assignee. Notably,
26 Portugal does not provide evidence to show that she or the class
27 are in fact an "assignee," citing only a declaration and their
28 complaint in state court in which they also alleged their
relation to the contract as an assignee. (Response to Statement
of Undisputed Facts, ECF No. 16, No. 38.) However, Western does
not dispute this point and the issue is immaterial to the
judgment in this case.

1 Following discovery, Western filed the instant Motion for
2 Summary Judgment ("MSJ"). (ECF No. 8.) In its MSJ, Western
3 generally contends that summary judgment should be granted on the
4 same basis that the Superior Court granted summary judgment in
5 the state action.

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7 **SUMMARY JUDGMENT STANDARD**
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9 The Federal Rules of Civil Procedure provide for summary
10 judgment when "the pleadings, depositions, answers to
11 interrogatories and admissions on file, together with affidavits,
12 if any, show that there is no genuine issue as to any material
13 fact and that the moving party is entitled to a judgment as a
14 matter of law." Fed. R. Civ. P. 56(c).

15 The standard that applies to a motion for summary
16 adjudication is the same as that which applies to a motion for
17 summary judgment. See Fed. R. Civ. P. 56(a), 56(c); Mora v.
18 ChemTronics, 16 F. Supp. 2d. 1192, 1200 (S.D. Cal. 1998).

19
20 Under summary judgment practice, the moving party
21 always bears the initial responsibility of informing
22 the district court of the basis for its motion, and
23 identifying those portions of 'the pleadings,
24 depositions, answers to interrogatories, and admissions
25 on file together with the affidavits, if any,' which it
26 believes demonstrate the absence of a genuine issue of
27 material fact.

28 Celotex Corp. v. Catrett, 477 U.S. at 323 (quoting Rule 56(c)).

If the moving party meets its initial responsibility, the
burden then shifts to the opposing party to establish that a
genuine issue as to any material fact actually does exist.

1 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
2 585-87 (1986). In attempting to establish the existence of this
3 factual dispute, the opposing party must tender evidence of
4 specific facts in the form of affidavits, and/or admissible
5 discovery material, in support of its contention that the dispute
6 exists. Fed. R. Civ. P. 56(e). The opposing party must
7 demonstrate that the fact in contention is material, i.e., a fact
8 that might affect the outcome of the suit under the governing
9 law, and that the dispute is genuine, i.e., the evidence is such
10 that a reasonable jury could return a verdict for the nonmoving
11 party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 251-
12 52 (1986); Owens v. Local No. 169, Assoc. of Western Pulp and
13 Paper Workers, 971 F.2d 347, 355 (9th Cir. 1987).

14 In resolving a summary judgment motion, the evidence of the
15 opposing party is to be believed, and all reasonable inferences
16 that may be drawn from the facts placed before the court must be
17 drawn in favor of the opposing party. Anderson, 477 U.S. at 255.
18 Nevertheless, inferences are not drawn out of the air, and it is
19 the opposing party's obligation to produce a factual predicate
20 from which the inference may be drawn. Richards v. Nielsen
21 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985),
22 aff'd, 810 F.2d 898 (9th Cir. 1987).

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1 Under California law, collateral estoppel has been found to
2 bar relitigation of an issue decided at a previous proceeding "if
3 (1) the issue necessarily decided at the previous [proceeding] is
4 identical to the one which is sought to be relitigated; (2) the
5 previous [proceeding] resulted in a final judgment on the merits;
6 and (3) the party against whom collateral estoppel is asserted
7 was a party or in privity with a party at the prior
8 [proceeding]." Rodgers v. Sargent Controls & Aerospace,
9 136 Cal. App. 4th 82, 90 (Cal. Ct. App. 2006); see also Lyons v.
10 Security Pacific Nat. Bank, 40 Cal. App. 4th 1001, 1015 (Cal. Ct.
11 App. 1995) ("In addition to these factors, ... the courts
12 consider whether the party against whom the earlier decision is
13 asserted had a 'full and fair' opportunity to litigate the
14 issue.") Collateral estoppel will not be applied "if injustice
15 would result or if the public interest requires that relitigation
16 not be foreclosed." Consumers Lobby Against Monopolies v. Public
17 Utilities Com., 25 Cal.3d 891, 902 (Cal. 1979).

18
19 **A. Collateral Estoppel's First and Third Prongs: Identical**
20 **Issues and Parties**

21 In order to establish collateral estoppel, Western must
22 first demonstrate that the issues decided in the first case are
23 identical to those being presented here. The third prong
24 requires the parties be identical.

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1 Portugal alleges that the claims in state court are based on
2 Section 11580 of the California Insurance Code and are therefore
3 not identical to the federal court claims because Portugal brings
4 the present action as an "assignee" rather than "judgment
5 creditor". (See Opposition, ECF No. 17, pp. 18-20).

6 Before turning to whether the issues are identical, the
7 Court first considers the third prong for determining whether
8 collateral estoppel applies: specifically, whether the parties
9 are identical. The only difference between the parties to the
10 Superior Court action and the present action is that the class
11 now brings the action as assignees rather than as judgment
12 creditors. Portugal does not provide any persuasive authority
13 that clearly differentiate between assignees and judgment
14 creditors (id.), and the Court is not persuaded that this change
15 of status constitutes a material difference. Therefore, the
16 Court concludes that the third prong is satisfied: the parties
17 are identical.

18 Turning to collateral estoppel's second prong—whether the
19 issues in the state court case are identical to those in this
20 case—Portugal contends that, while similar, the claims in this
21 action are not identical. However, whether the claims are
22 identical is not relevant to res judicata analysis; rather, the
23 Court must decide whether the issues are identical. See Rogers,
24 136 Cal. App. 4th 82, 90; see also Lyons, 40 Cal. App. 4th 1001,
25 1015.

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1 On that point, the crucial issue decided by the Superior
2 Court is identical to the fundamental issue underlying each and
3 every one of the claims in the instant case: specifically,
4 whether Western had any potential obligation under the policies
5 at issue to cover Real Care. The Superior Court concluded there
6 was no possibility for coverage. (See Order, ECF No. 8,
7 Attachment 3, Exhibit E, at 83-84.) In the present action,
8 Portugal raises four claims: (1) that Western had a duty to
9 indemnify Real Care; that (2) Western had a duty to defend Real
10 Care; that (3) Western failed to investigate and conclusively
11 eliminate the potential for coverage of Real Care; and (4) that
12 Western failed to interpret the potential for coverage of Real
13 Care. (See Complaint, ECF No. 1, Ex. 1.) Each of these claims
14 also turns on the issue of whether there was a possibility of
15 coverage that would have obligated Western to have defended or
16 indemnified Real Care in the first lawsuit between Portugal and
17 Real Care.

18 Although Portugal's status has changed from judgment
19 creditor to assignee of rights, her claims remain essentially
20 identical to those raised in the prior action, and each of these
21 claims turns on the issue of Western's obligation to defend or
22 indemnify Real Care. In granting summary judgment for Western,
23 the Superior Court definitively ruled out any potential for both
24 a Duty to Defend or Duty to Indemnify claim, stating:

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1 Plaintiff has failed to demonstrate that a disputed
2 issue of material fact remains for trial as to whether
3 the claims in the underlying action were potentially
4 covered by the policies of insurance, or that moving
party in any manner waived the right to assert its
policy defenses.

5 (Id.)

6 The Superior Court held that, without any possible potential
7 for coverage, Portugal could not establish that Western owed any
8 duty to Real Care. (Id. at 83-84.) The fundamental issue in the
9 present action is also whether Western owed any duty to Real
10 Care. Portugal's first two claims assert that Western had a duty
11 to defend or indemnify Real Care, both issues which have been
12 conclusively decided in the parallel state court case.
13 Portugal's third and fourth claims (failure to investigate and
14 failure determine the potential for coverage) both also turn on
15 Western's potential duty to cover Real Care, which, again, was
16 effectively decided by the Superior Court when it found no
17 potential for coverage.

18 Therefore, the first and third prongs of the collateral
19 estoppel test are satisfied as the issues and parties in both
20 actions are identical.

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1 **B. Collateral Estoppel's Second Prong: Final Judgment**

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3 Portugal contends that there is no final judgment on the
4 merits because the state court ruling is currently under appeal.
5 (Opposition at 13-14.) Western argues that the Superior Court's
6 summary judgment order constitutes a final judgment on the
7 merits, therefore this action is barred by collateral estoppel.
8 (MSJ, ECF No. 8, Att. 1, p. 14 n.7.)

9 Again, the Court must refer to California law to determine
10 whether a summary judgment on appeal is considered a "final
11 judgment". In People ex rel. Gow v. Mitchell Bros.' Santa Ana
12 Theater, 101 Cal. App. 3d 296, 306 (Cal. Ct. App. 1980), the
13 court held that, "It is an elemental principle of res judicata
14 that the doctrine applies only to judgments and orders which are
15 final. A judgment is not final while an appeal therefrom is
16 pending." Other California appellate courts have confirmed that
17 cases under appeal are not final. See People v. Burns,
18 198 Cal. App. 4th 726, 731 (Cal. Ct. App. 2011) ("The final
19 judgment prerequisite requires that the time for seeking a new
20 trial or appealing the judgment has expired and any appeal is
21 final. In other words, the judgment is not final and preclusive
22 if it is still subject to direct attack." (citing People v.
23 Summerville, 34 Cal. App. 4th 1062, 1067-1068 (Cal. Ct. App.
24 1995); Abelson v. National Union Fire Ins. Co., 28 Cal. App. 4th
25 776, 787 (Cal. Ct. App. 1994)).

26 Because the Superior Court's decision is currently on
27 appeal, the second collateral estoppel prong requiring there be a
28 final judgment on the merits is not satisfied.

1 Furthermore, the outcome of the appeal may have a material effect
2 on the issues being litigated in this action.

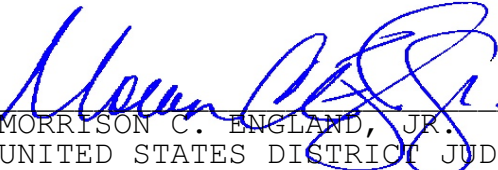
3 The Court will therefore stay this proceeding, pending the
4 resolution of the state court action.

5
6 **CONCLUSION**

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8 As a matter of law, and for the reasons set forth above,
9 this case is STAYED, pending final judgment in Portugal v.
10 Western World Insurance Company, et al., Case No: 34-2009-
11 0034576-CU-BT-GDS, currently on appeal in California state court.
12 Western's Motion for Summary Judgment (ECF No. 8) is therefore
13 MOOT, as are any other motions currently before the Court. The
14 Clerk of the Court is directed to close this case pending any
15 future motion to reopen. The Parties are directed to file a
16 joint notice every 90 days as to the status of the state case
17 and, upon exhaustion of the related state court appeals, one or
18 both parties may file a motion to reopen this case.

19 IT IS SO ORDERED.

20 Dated: August 21, 2012

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23 MORRISON C. ENGLAND, JR.
24 UNITED STATES DISTRICT JUDGE
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