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

NORTH AMERICAN CAPACITY	)	
INSURANCE COMPANY,	)	2:11-cv-00521-GEB-EFB
	)	
Plaintiff,	)	
	)	<u>ORDER</u> *
v.	)	
	)	
SPIESS CONSTRUCTION CO., INC.;	)	
TRAVELERS CASUALTY AND SURETY	)	
COMPANY OF AMERICA; GOOD VALUE	)	
CONSTRUCTION, INC; STARWOOD	)	
CAPITAL GROUP GLOBAL I, LLC;	)	
MAMMOTH MOUNTAIN SKI AREA, LLC;	)	
LEXINGTON INSURANCE COMPANY;	)	
TOWN OF MAMMOTH LAKES;	)	
TRIAD/HOLMES ASSOCIATES; PSOMAS;	)	
SIERRA GEOTECHNICAL SERVICES,	)	
INC.; and DOES 1 through 100,	)	
inclusive,	)	
	)	
Defendants.	)	
_____	)	

Defendant Town of Mammoth Lakes ("Mammoth") moves, *inter alia*, for an order dismissing Plaintiff's declaratory relief claims under Federal Rule of Civil Procedure ("Rule") 12(b)(6) for the reasons stated below. Defendants Psomas, Triad/Holmes Associates, and Good Value Construction, Inc. ("Good Value") join Mammoth's dismissal motion.

Defendant Spiess Construction Co. ("Spiess") moves for dismissal of Plaintiff's declaratory relief claims under Rule 12(b)(6)

\* This matter is deemed suitable for decision without oral argument. E.D. Cal. R. 230(g).

1 for the reasons stated below. Defendants Good Value and Mammoth join  
2 Spiess' dismissal motion. Defendant Travelers Casualty and Surety  
3 Company of America ("Travelers") also moves for dismissal under Rule  
4 12(b)(6). Defendants Good Value and Mammoth join Travelers' dismissal  
5 motion.

6 The crux of the dismissal motion is the parties' disagreement  
7 concerning how the following language in Plaintiff's insurance policy  
8 (the "Exclusion") should be interpreted:

9 We will pay those sums that the insured becomes  
10 legally obligated to pay as damages because of  
11 "bodily injury" or "property damage" to which this  
12 insurance applies. We will have the right and duty  
13 to defend the insured against any "suit" seeking  
14 those damages. However, we will have no duty to  
15 defend the insured against any "suit" seeking  
16 damages for "bodily injury" or "property damage" to  
17 which this insurance does not apply. . . .

18 This insurance does not apply to "bodily injury",  
19 "property damage", or "personal and advertising  
20 injury" caused directly or indirectly by, based on  
21 or attributed to, arising out of, resulting from,  
22 or in any manner related to "land or soil  
23 movement". Such "bodily injury", "property damage",  
24 or "personal and advertising injury" is excluded  
25 regardless of any other cause or event contributing  
26 concurrently or in any sequence or manner to the  
27 loss. . . .

28 "Land or soil movement" means all earth or soil  
movement of any kind including, but not limited to,  
the settling, bulging, shrinkage, expansion,  
extension, slippage, erosion, mud flow or  
subsidence of land or soils.

(First Amended Complaint ("FAC") ¶ 21, Ex. A.)

Based upon the Exclusion, Plaintiff "seeks a judicial  
declaration that, in the absence of a potential for coverage, [it] owes  
no duty to defend [and no duty to indemnify] Defendants in connection  
with the Underlying Action" currently pending in California state court.  
Id. ¶¶ 33, 38. Further, Plaintiff argues the Exclusion applies to

1 Defendants' alleged negligence: "that on or about October 10, 2008, as  
2 part of the construction of the Bike Path, [Good Value] was moving earth  
3 in the area of the Tunnel and during this procedure, soils movement  
4 caused severe damage to the Tunnel." Id. ¶ 25. Plaintiff relies upon  
5 City of Carlsbad v. Insurance Co. of the State of Pennsylvania, 180 Cal.  
6 App. 4th 176 (2009), arguing "[a]s written, the [E]xclusion is not  
7 limited to only 'natural phenomena[.]'" (Pl.'s Opp'n to Travelers' Mot.  
8 17:9-10.) In Carlsbad, the language "for any reason whatsoever" was held  
9 to apply "to any causes, man-made or otherwise." Carlsbad, 180 Cal. App.  
10 4th at 179, 182. But see Blackhawk Corp. v. Gotham Insurance Co., 54  
11 Cal. App. 4th 1090, 1094-95 (1997) (holding an exclusion clause applied  
12 to man-made causes when the exclusion specifically included that which  
13 arises out of "any act, error or omission on the part of the insured,  
14 including but not limited to improper grading or site preparation, error  
15 in design, faulty materials or faulty workmanship").

16 Defendants rely upon Davis v. United Services Automobile  
17 Ass'n, 223 Cal. App. 3d 1322 (1990), and Opsal v. United Services  
18 Automobile Ass'n, 2 Cal. App. 4th 1197 (1991), arguing the Exclusion  
19 "defines 'land and soil movement' as something that occurs naturally  
20 and/or unintentionally . . . . It does not apply to the intentional  
21 movement of soil." (Def. Travelers' Mot. 2:14-17.) In Davis, the court  
22 held an exclusion clause did not apply to contractor negligence, since:

23 earth movement and contractor negligence present  
24 different risks; one results from an act of nature,  
25 the other from acts of individuals. . . . The risk  
26 a contractor will fail to adequately prepare the  
27 soils and foundations involves a wholly different  
28 set of factors than those involved in determining  
whether to insure against a naturally occurring,  
difficult to predict earth movement.

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1 Davis, 223 Cal. App. 3d at 1330. The Opsal court similarly held an  
2 exclusion clause to “apply only to naturally occurring earth movement”  
3 since there is a “distinction between natural or unpredictable earth  
4 movement—an excluded risk under the policy—and that sort of earth  
5 movement which would not occur but for the negligence of third  
6 parties[.]” Opsal, 2 Cal. App. 4th at 1203.


7 “When interpreting state law, federal courts are bound by  
8 decisions of the state’s highest court.” Vestar Dev. II, LLC v. Gen.  
9 Dynamics Corp., 249 F.3d 958, 960 (9th Cir. 2001). In State Farm &  
10 Casualty Co. v. Von Der Lieth, 54 Cal. 3d 1123 (1991), the California  
11 Supreme Court “approve[d]” the “[California] Court of Appeals decision  
12 in [Davis]” and reiterated the distinction between contractor negligence  
13 and natural causes as follows: “Here, there was ample evidence that the  
14 third party negligence leading to the landslide was negligence in  
15 planning, approving and building . . . and not negligence in acting to  
16 prevent landslides resulting from natural causes.” Von Der Lieth, 54  
17 Cal. 3d at 1128, 1135; see also B.E. Witkin, Summary of California Law  
18 § 132 (2008) (referencing Opsal and concluding the “exclusion applies  
19 only to naturally occurring earth movement”); Stephen E. Smith, Property  
20 Insurance Coverage for Soil Movement: Understanding the Basics, Orange  
21 County Lawyer, Feb. 2007, at 12 (“Exclusions for soil movement . . . ,  
22 when read in isolation, eliminate coverage only for naturally-occurring  
23 soil movement, not soil movement caused by negligent grading, filling  
24 and compaction.”).

25 Since the California Supreme Court has held that such  
26 exclusion clauses do not apply to third-party or contractor negligence,  
27 Plaintiff’s allegations that “the alleged property damage in the  
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1 Underlying Action is excluded based upon . . . the [Exclusion]" are  
2 without merit. (FAC ¶¶ 32, 36.)

3 Therefore, Plaintiff's declaratory relief claims are dismissed  
4 against all Defendants with prejudice. See Omar v. Sea-Land Serv., Inc.,  
5 813 F.2d 986, 991 (9<sup>th</sup> Cir. 1987) ("A trial court may dismiss a claim sua  
6 sponte under [Rule] 12(b)(6) . . . without notice where the claimant  
7 cannot possibly win relief."); see also Silverton v. Dep't of Treasury,  
8 644 F.2d 1341, 1345 (9th Cir. 1981) (stating court may enter sua sponte  
9 dismissal as to defendants who have not moved to dismiss where such  
10 defendants are in a position similar to that of moving defendants).  
11 Judgment shall be entered in favor of Defendants and this action shall  
12 be closed.

13 Dated: September 22, 2011

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GARLAND E. BURRELL, JR.  
United States District Judge