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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

AMERICAN STATES INSURANCE
COMPANY,

Plaintiff,

v.

INSURANCE COMPANY OF THE
STATE OF PENNSYLVANIA,

Defendant.

No. 2:12-cv-01489-MCE-AC

**AMENDED MEMORANDUM AND
ORDER¹**

This action proceeds on the first and fourth claim for relief in Plaintiff American States Insurance Company's ("Plaintiff") Corrected Third Amended Complaint. In the first claim for relief, Plaintiff requests that the Court declare that Defendant Insurance Company of the State of Pennsylvania ("Defendant") had an independent duty to defend its insured, Sierra Pacific Industries ("Sierra"), in various lawsuits arising from the "Moonlight Fire." ECF No. 59. In the fourth claim for relief, Plaintiff seeks "equitable contribution or other equitable relief against [Defendant] for reimbursement of those sums [Plaintiff] paid in Sierra's defense in the Moonlight Fire Lawsuits in excess of its equitable share, plus prejudgment interest." Id. at 18.

¹ This Amended Memorandum and Order is identical to its predecessor, filed on March 23, 2016 (ECF No. 156), except that it corrects two inadvertent typographical errors: 1: on page 2, lines 19-20 (substituting "Howell" in place of Sierra such that the quoted language reads "only to the extent [Howell] [is] held liable"); and 2) page 5, line 28 (substituting "Howell" in place of Sierra such that the quoted language reads "only to the extent [Howell] [was] held liable"). Otherwise the two Orders are identical.

1 Pending before the Court are the parties' cross motions for summary judgment.
2 ECF Nos. 85, 89. Plaintiff seeks summary judgment on the first claim for relief and
3 Defendant seeks summary judgment on both claims for relief. For the reasons that
4 follow, Plaintiff's Motion for Summary Judgment (ECF No. 85) is GRANTED and
5 Defendant's Motion for Summary Judgment (ECF No. 99) is DENIED.²

7 BACKGROUND³

8
9 In February 2007, Sierra obtained rights to a timber harvesting operation on a
10 parcel of land in Plumas County, California. Sierra then hired Howell's Forest Harvesting
11 ("Howell") to perform certain timber harvest operations on this land under the terms of a
12 logging agreement. The logging agreement required Howell to obtain Commercial
13 General Liability ("CGL") insurance and to name Sierra as an additional insured under its
14 CGL policy.

15 In July 2007, Plaintiff issued CGL insurance to Howell. Sierra was included as an
16 additional insured under a "Liability Plus Endorsement" page stating that an insured
17 under the CGL policy includes "[a]ny person or organization . . . for whom you are
18 required by written contract, agreement[,.] or permit to provide insurance." However, this
19 insurance coverage for Sierra as an additional insured was limited "only to the extent
20 [Howell] [is] held liable due to: . . . [Howell's] ongoing operations for [Sierra]." Thus,
21 while there is no dispute that Plaintiff's coverage for Sierra was primary in nature, it was
22 limited to Sierra's vicarious liability as to Howell, and Sierra's independent liability was
23 not covered under Plaintiff's CGL Policy with Howell.⁴

24 ² Because oral argument would not have been of material assistance, the Court ordered this
25 matter submitted on the briefs. E.D. Cal. Local R. 230(g).

26 ³ The following statement of facts is taken from the Court's January 24, 2014 Order. ECF No. 54.
27 Although the statement of facts in that Order was based on the allegations in the Plaintiff's Third Amended
28 Complaint, the Court finds it provides sufficient background for the pending cross motions for summary
judgment and is consistent with the parties' statements of undisputed facts.

⁴ This Court will address Defendant's interpretation of the "only to the extent" language in

1 In October 2006, Defendant issued Sierra a commercial umbrella insurance policy
2 that provided both primary and excess coverage. Defendant's policy for Sierra
3 delineates its duty to defend as follows:

4 [Defendant] shall have the right and duty to defend any claim
5 or suit . . . when . . .

6 (a) The applicable limits of insurance of . . . any . . .
7 underlying insurance . . . [have] been exhausted by payment
8 of claims or suits to which this Policy applies; or

9 (b) Damages are sought for . . . property damage . . . covered
10 by this Policy but not covered by . . . any other underlying
11 insurance providing coverage to [Sierra].

12 Thus, under clause (a), Defendant's policy provides excess insurance when Sierra is
13 vicariously liable with Howell and Plaintiff's policy limits are exhausted by payment of
14 claims. Additionally, Defendant's policy provides umbrella, or primary, insurance under
15 clause (b) when property damage arises from Sierra's non-vicarious liability with Howell
16 pursuant to Plaintiff's CGL policy.

17 In September 2007, "Howell employees were allegedly operating bulldozers . . .
18 pursuant to the [l]ogging [a]greement [with Sierra]," when a fire ignited nearby that
19 "eventually burn[ed] approximately 65,000 acres in the area." Sparks caused by
20 Howell's bulldozers allegedly caused the conflagration, which became known as the
21 Moonlight Fire. Multiple lawsuits were filed against both Sierra and Howell as a result of
22 the fire, all of which Sierra tendered to both Plaintiff and Defendant. Plaintiff accepted
23 Sierra's defense in all of the fire-related lawsuits "without a reservation of rights to deny
24 coverage for any damages awarded against Sierra, subject to available policy limits and
25 California law. . . ." Thus, Plaintiff agreed to defend and indemnify Sierra for not only
26 suits where Sierra was vicariously liable with Howell—which was covered under
27 Plaintiff's CGL policy—but also where Sierra was independently liable.

28 Because Plaintiff's CGL policy only covered Sierra for vicarious liability with
Howell, however, Sierra took the position that Plaintiff had a conflict of interest in
Plaintiff's CGL policy later in this Order.

1 defending Sierra. As a result of this conflict, Sierra argued it was entitled to independent
2 counsel. Sierra maintained this stance throughout the lifetime of the fire-related
3 lawsuits—despite the fact that Plaintiff accepted defense of the lawsuits without
4 reservation—and Sierra obtained outside counsel for its defense. At no time did
5 Defendant defend or attempt to defend Sierra in any of the fire-related lawsuits.

6 In July 2012, the fire-related suits against Sierra settled, exhausting both Plaintiff's
7 and Defendant's respective policy limits. Defendant disputed its defense costs with
8 Sierra, but Defendant and Sierra have settled this dispute. Plaintiff and Sierra also
9 disputed defense costs with one another, but Plaintiff settled that dispute as well and
10 "released all claims against [Sierra] . . . while expressly preserving all [Plaintiff's] rights
11 against [Defendant] with respect to its payments of Sierra's defense costs. . . ."

12 The pending motions for summary judgment present a single issue: whether
13 Defendant had a duty to defend Sierra in each of the Moonlight Fire actions such that
14 Plaintiff was entitled to reimbursement for a portion of the costs it paid to defend Sierra.

15 16 STANDARD

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18 The Federal Rules of Civil Procedure provide for summary judgment when "the
19 movant shows that there is no genuine dispute as to any material fact and the movant is
20 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v.
21 Catrett, 477 U.S. 317, 322 (1986).

22 In a summary judgment motion, the moving party always bears the initial
23 responsibility of informing the court of the basis for the motion and identifying the
24 portions in the record "which it believes demonstrate the absence of a genuine issue of
25 material fact." Celotex, 477 U.S. at 323. If the moving party meets its initial
26 responsibility, the burden then shifts to the opposing party to establish that a genuine
27 issue as to any material fact actually does exist. Matsushita Elec. Indus. Co. v. Zenith
28 Radio Corp., 475 U.S. 574, 586-87 (1986); First Nat'l Bank v. Cities Serv. Co., 391 U.S.

1 253, 288-89 (1968).

2 In attempting to establish the existence or non-existence of a genuine factual
3 dispute, the party must support its assertion by “citing to particular parts of materials in
4 the record, including depositions, documents, electronically stored information,
5 affidavits[,] or declarations . . . or other materials; or showing that the materials cited do
6 not establish the absence or presence of a genuine dispute, or that an adverse party
7 cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1). The
8 opposing party must demonstrate that the fact in contention is material, i.e., a fact that
9 might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby,
10 Inc., 477 U.S. 242, 248, 251-52 (1986); Owens v. Local No. 169, Assoc. of W. Pulp and
11 Paper Workers, 971 F.2d 347, 355 (9th Cir. 1987). The opposing party must also
12 demonstrate that the dispute about a material fact “is ‘genuine,’ that is, if the evidence is
13 such that a reasonable jury could return a verdict for the nonmoving party.” Anderson,
14 477 U.S. at 248.

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

22 23 ANALYSIS

24 25 A. Defendant’s Duty to Defend Sierra

26 Defendant had a primary duty to defend Sierra in the Moonlight Fire lawsuits.
27 Under Plaintiff’s CGL policy with Howell, Plaintiff was required to defend Sierra for
28 lawsuits “only to the extent [Howell] [was] held liable due to: . . . [Howell’s] ongoing

1 operations for [Sierra].” Thus, Plaintiff was only required to defend Sierra for lawsuits in
2 which Sierra was vicariously liable with Howell. See Acceptance Ins. Co. v. Syufy
3 Enters., 69 Cal. App. 4th 321, 330 (1999) (“Insurance companies are free to, and
4 commonly have, issued additional insured endorsements that specifically limit coverage
5 to situations in which the additional insured is faced with vicarious liability for negligent
6 conduct by the named insured.”).

7 Conversely, Defendant’s umbrella policy stated that:

8 [Defendant] shall have the right and duty to defend any claim
9 or suit . . . when . . . [d]amages are sought for . . . property
10 damage . . . covered by this Policy but not covered by . . .
any other underlying insurance providing coverage to [Sierra].

11 Defendant’s umbrella policy therefore covered Sierra for any claim or suit seeking
12 damages for property damage which was not covered by Plaintiff’s policy or any other
13 underlying insurance policy. Defendant’s policy therefore drops down and becomes
14 primary coverage for suits in which Sierra is independently liable for property damage.

15 In the Moonlight Fire lawsuits filed against Sierra, the plaintiffs alleged that Sierra
16 could have been independently liable for the fire because of Sierra’s responsibility to
17 suspend operations in certain weather conditions. See ECF Nos. 87-1, 87-2, 87-3.⁵
18 Thus, Defendant’s duty to drop down and defend as a primary insurer under the
19 umbrella policy could have been triggered by claims in the fire-related lawsuits.

20 Umbrella coverage, like that Defendant promised to provide in clause (b) of its
21 defense agreement, may provide primary insurance coverage for damages not covered
22 by any underlying insurance. See, e.g., Powerine Oil Co., Inc. v. Superior Court, 37 Cal.
23 4th 377, 398 (2005) (“[T]he policies here . . . are not merely intended to operate as
24 excess insurance . . . [T]hese policies provide umbrella coverage, i.e., ‘alternative
25 primary coverage as to losses ‘not covered by’ the primary policy.’”). As the California
26 Court of Appeal explained:

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28 ⁵ Plaintiff’s Requests for Judicial Notice (ECF No. 87) are GRANTED.

1 Primary insurance provides coverage immediately upon the
2 occurrence of a loss or an event giving rise to liability, while
3 excess insurance provides coverage only upon the
4 exhaustion of specified primary insurance. Insurance policies
5 sometimes include both excess and umbrella insurance.
6 Umbrella insurance provides coverage for claims that are not
covered by the underlying primary insurance. An umbrella
insurer “drops down” to provide primary coverage in those
circumstances. Thus, a policy that provides both excess and
umbrella insurance provides both excess and primary
coverage.

7 Legacy Vulcan Corp. v. Superior Court, 185 Cal. App. 4th 677, 692 (2010) (internal
8 citations omitted).

9 Here, as in Legacy Vulcan, Defendant’s policy contains both excess and umbrella
10 coverage; to the extent its umbrella coverage is invoked, that coverage is primary.

11 Legacy Vulcan— and particularly its explanation that an umbrella carrier has a primary
12 duty to defend under umbrella coverage “for claims not within the terms of the coverage
13 of underlying insurance”—is instructive for purposes of the present case and mandates
14 against any finding that Defendant’s policy provided no defense obligations.⁶

15 Accordingly, Plaintiff’s Motion for Summary Judgment is GRANTED, as
16 Defendant had a primary and independent duty to defend Sierra in the Moonlight Fire
17 lawsuits.

18 **B. Defendant’s Arguments**

19 Defendant advances several arguments in its Motion for Summary Judgment and
20 its Opposition to Plaintiff’s Motion for Summary Judgment. The Court will address each
21 in turn.

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24 ⁶ It should also be noted, as set forth above, that the duty to defend provisions contained in
25 Defendant’s policy obligate Defendant to defend either under the “excess” or the “umbrella” clauses. In
26 MGA Entertainment, Inc. v. Hartford Ins. Group, 869 F. Supp. 2d 1117 (C.D. Cal. 2012), the Central
27 District found that where the defense clause is disjunctive rather than conjunctive (triggering a duty to
28 defend under either excess or umbrella coverage) a primary duty to defend is imposed on the umbrella
carrier. Id. at 1134. While Defendant relies on the decision in Padilla Construction Co., v. Transportation
Ins. Co., 150 Cal. App. 4th 984 (2007) in contending otherwise, the duty to defend language at issue in
Padilla called for a defense when there was no underlying coverage under both the excess and the
umbrella coverage. The present case is distinguishable because Defendant’s policy uses the disjunctive
“or,” and therefore provides a broader duty to defend.

1 Defendant first argues that a condition to its coverage—specifically, that there be
2 no “other underlying insurance”—was not met because both Plaintiff and Defendant
3 “provided coverage for the damages alleged in the Moonlight Fire Lawsuits.” Def.’s Mot.
4 Summ. J., ECF No. 99, at 9. Defendant contends that “[b]ecause the Moonlight Fire
5 Lawsuits sought damages for property damage that were covered by [Plaintiff’s] policy,”
6 Defendant’s duty to defend under the umbrella coverage was never triggered. Id.

7 Defendant is incorrect in asserting that “both policies covered the same damages
8 sought” in the Moonlight Fire actions. Id. at 10. As explained above, Plaintiff was only
9 required to defend Sierra in lawsuits in which Sierra was vicariously liable for Howell,
10 and Defendant’s policy dropped down and became primary coverage for suits in which
11 Sierra was independently liable for property damage. Contrary to Defendant’s argument,
12 there was no “other underlying insurance” with respect to Sierra’s independent liability;
13 consequently, that condition to Defendant’s duty to defend was met, and Defendant had
14 a duty to defend Sierra in the Moonlight Fire actions.

15 Defendant next argues that Plaintiff’s policy “broadly provided that [Plaintiff] would
16 defend Sierra against any ‘suit’ seeking damages because of property damage.” Id. at
17 13. Defendant, however, acknowledges that the “Liability Plus Endorsement” to
18 Plaintiff’s policy limits Plaintiff’s obligations to Sierra:

19 The Endorsement does say that Sierra is an insured ‘only to
20 the extent’ Howell is held liable due to Howell’s ongoing
21 operations for Sierra. But that only means that there is no
22 coverage if Sierra, but not Howell, is found liable. It does not
mean that coverage is precluded where Howell is liable for its
negligence, and Sierra’s own conduct related to Howell’s
operations also makes Sierra liable.

23 Id. at 14.

24 Defendant’s reading of Plaintiff’s policy is not persuasive. Contrary to
25 Defendant’s suggestion, the “only to the extent [Howell] is held liable” language in
26 Plaintiff’s policy limits coverage solely to Sierra’s liability for Howell’s conduct. In
27 Maryland Casualty Co. v. Nationwide Mutual Insurance Co., the California Court of
28 Appeal addressed an insurance policy that provided: “this insurance with respect to

1 [Nielsen] applies only to the extent that [Nielsen] is held liable for your acts or omissions
2 arising out of and in the course of operations performed for [Nielsen]” 81 Cal. App.
3 4th 1082, 1087, 1090-91 (2000). The Court of Appeal determined that “basic additional
4 insured provision created the limited vicarious liability coverage for the additional
5 insured”. Id. Here, it is not just the “to the extent” language in Plaintiff’s policy that limits
6 Plaintiff’s coverage of Sierra. Plaintiff’s policy also provides: “Coverage shall be limited
7 to the extent of [Howell’s] negligence or fault according to the applicable principles of
8 comparative fault.” That language, read in conjunction with the “to the extent” provision,
9 further indicates that Plaintiff’s policy limits coverage solely to Sierra’s liability for
10 Howell’s conduct.

11 Defendant further argues that the claims against Sierra in the Moonlight Fire
12 actions were “vicarious liability” claims and therefore within the scope of Plaintiff’s policy
13 because breach of non-delegable duties is a form of vicarious liability. Def.’s Mot.
14 Summ. J., ECF No. 99, at 16. This argument is also not persuasive. As Plaintiff notes in
15 its Opposition to Defendant’s Motion for Summary Judgment, the California Supreme
16 Court has made clear that the negligent hiring and supervision claims asserted against
17 Sierra in the Moonlight Fire actions are forms of independent, non-vicarious liability. See
18 Pl.’s Req. for Judicial Notice, ECF No. 87-4, Ex. M at 75 (a filing from one of the
19 Moonlight Fire actions in which the plaintiff United States of America argued that “Sierra
20 Pacific is also liable for its own negligent supervision and retention of Howell’s”); Minkler
21 v. Safeco Ins. Co. of Am., 49 Cal. 4th 315, 325 (2010) (explaining a claim that “clearly
22 depends upon allegations that [a defendant] herself committed an independent tort” was
23 not “merely vicarious or derivative”).

24 Defendant’s next argument is based on the logging agreement between Sierra
25 and Howell. Defendant emphasizes that this agreement required Howell to obtain
26 insurance which was primary and non-contributory with any insurance held by Sierra.
27 Defendant’s argument fails for three reasons. First, Plaintiff’s policy with Howell does
28 not contain any provision indicating that its additional insured coverage for Sierra is

1 primary to and non-contributory with Sierra's own coverage. Second, Plaintiff was not a
2 party to the logging agreement between Sierra and Howell, and Plaintiff's policy with
3 Howell should not be rewritten to comply with the logging agreement. See E.E.O.C. v.
4 Waffle House, Inc., 534 U.S. 279, 294 (2002) ("It goes without saying that a contract
5 cannot bind a nonparty."). Third, as Plaintiff notes: Sierra accepted Howell's non-
6 compliant insurance by failing to exercise its power to terminate the logging agreement
7 or purchase complaint insurance and charging Howell.

8 Finally, Defendant emphasizes the "other insurance" provision in its policy, which
9 provides:

10 If other valid and collectible insurance applies to a claim or
11 suit that is also covered by this Policy, this Policy will apply
12 excess of the other insurance. However, this provision will
not apply if the other insurance is specifically written to be
excess of this Policy.

13 Defendant claims that Plaintiff's policy is "valid and collectible" and applied to the
14 Moonlight Fire actions. Def.'s Mot. Summ. J., ECF No. 99, at 19. The Court rejects this
15 argument because the "other insurance" provision in Defendant's policy did not apply to
16 the Moonlight Fire actions. Again: Plaintiff was only required to defend Sierra in
17 lawsuits in which Sierra was vicariously liable for Howell, and Defendant's policy
18 dropped down and became primary coverage for suits in which Sierra was independently
19 liable for property damage. Thus, the "other insurance" provision in Defendant's policy
20 did not eliminate Defendant's duty to defend Sierra in the Moonlight Fire actions.

21 Defendant's arguments do not undermine the Court's finding that Defendant had
22 a primary and independent duty to defend Sierra in the Moonlight Fire lawsuits.

23 Defendant's Motion for Summary Judgment is accordingly DENIED.

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CONCLUSION

Plaintiff's Motion for Summary Judgment (ECF No. 85) is GRANTED, and Defendant's Motion for Summary Judgment (ECF No. 99) is DENIED. Plaintiff is entitled to summary judgment on its first claim for relief, as Defendant had a primary and independent duty to defend Sierra in the Moonlight Fire lawsuits.

IT IS SO ORDERED.

Dated: March 27, 2017


MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE