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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CENTURY SURETY COMPANY, an
Ohio Corporation,

Plaintiff,

v.

MO FOODS, LLC, a limited
liability company; MANISH
PATEL, an individual; TMPM,
LLC, a limited liability
company; PRADIP PATEL, an
individual, NEHA PATEL, an
individual; SEAN CANILOA, an
individual; RUBEN MORALES; an
individual; WAYNE PERARANDA;
an individual; DEBORAH
PENARANDA; an individual; and
PATRICK PENARANDA; an
individual,

Defendants.

No. 2:13-cv-01387-GEB-EFB

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

Plaintiff moves for summary judgment on all claims in
its Complaint. Specifically, Plaintiff seeks: 1) declaratory
relief that Plaintiff owes no obligation under a liability
insurance policy to defend or indemnify any Defendant for claims
alleged in the lawsuit pending in the Superior Court of
California, County of El Dorado, entitled Wayne Penaranda, et al.
v. Mo's Place, Inc., et al. (hereinafter referenced as "Penaranda
v. Mo's Place"); and 2) recoupment of defense costs hitherto paid

1 in defending that lawsuit.¹ Defendants Mo Foods, LLC and Manish
2 Patel (hereinafter referenced as "the Mo Foods Defendants"),
3 Wayne, Deborah, and Patrick Penaranda (hereinafter referenced as
4 "the Penaranda Defendants"), and TMPM, LLC, Pradip Patel, and
5 Neha Patel each oppose the motion. The pending motion was argued
6 on March 10, 2014.

7 I. LEGAL STANDARD

8 A party seeking summary judgment under Federal Rule of
9 Civil Procedure ("Rule") 56 bears the initial burden of
10 demonstrating the absence of a genuine issue of material fact for
11 trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "A
12 fact is 'material' when, under the governing substantive law, it
13 could affect the outcome of the case." Thrifty Oil Co. v. Bank of
14 Am. Nat'l Trust & Sav. Ass'n, 322 F.3d 1039, 1046 (9th Cir. 2003)
15 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
16 (1986)). An issue of material fact is "genuine" when "the
17 evidence is such that a reasonable jury could return a verdict
18 for the nonmoving party.'" Id. (quoting Anderson, 477 U.S. at
19 248).

20 If the movant satisfies its "initial burden," "the
21 nonmoving party must set forth, by affidavit or as otherwise
22 provided in Rule 56, 'specific facts showing that there is a
23 genuine issue for trial.'" T.W. Elec. Serv., Inc. v. Pac. Elec.
24 Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (quoting
25 former Fed. R. Civ. P. 56(e)). "A party asserting that a fact
26 cannot be or is genuinely disputed must support the assertion by

27 ¹ Plaintiff's unopposed request that judicial notice be taken of the first
28 amended complaint ("FAC") in Penaranda v. Mo's Place is granted. (Req. for
Judicial Notice Ex. 1, First Amend. Compl. ("FAC"), ECF No. 31-3.)

1 citing to particular parts of material in the record . . . or
2 showing that the materials cited do not establish the absence or
3 presence of a genuine dispute, or that an adverse party cannot
4 produce admissible evidence to support the fact." Fed. R. Civ. P.
5 56(c)(1). Summary judgment "evidence must be viewed in the light
6 most favorable to the nonmoving party, and all reasonable
7 inferences must be drawn in favor of that party." Sec. & Exch.
8 Comm'n v. Todd, 642 F.3d 1207, 1215 (9th Cir. 2011) (citing
9 Johnson v. Paradise Valley Unified Sch. Dist., 251 F.3d 1222,
10 1227 (9th Cir. 2001)).

11 Further, Local Rule 260(b) prescribes:

12 Any party opposing a motion for summary
13 judgment or summary adjudication [must]
14 reproduce the itemized facts in the [moving
15 party's] Statement of Undisputed Facts and
16 admit those facts that are undisputed and
17 deny those that are disputed, including with
18 each denial a citation to the particular
19 portions of any pleading, affidavit,
20 deposition, interrogatory answer, admission,
21 or other document relied upon in support of
22 that denial.

23 If the nonmovant does not "specifically . . .
24 [controvert duly supported] facts identified in the [movant's]
25 statement of undisputed facts," the nonmovant "is deemed to have
26 admitted the validity of the facts contained in the [movant's]
27 statement." Beard v. Banks, 548 U.S. 521, 527 (2006).

28 Because a district court has no independent
duty "to scour the record in search of a
genuine issue of triable fact," and may "rely
on the nonmoving party to identify with
reasonable particularity the evidence that
precludes summary judgment," . . . the
district court . . . [is] under no obligation
to undertake a cumbersome review of the
record on the [nonmoving party's] behalf.

Simmons v. Navajo Cnty., Ariz., 609 F.3d 1011, 1017 (9th Cir.

1 2010) (quoting Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir.
2 1996)); see also Fed. R. Civ. P. 56(c)(3) (“The court need
3 consider only the cited materials, but it may consider other
4 materials in the record.”).

5 **II. BACKGROUND**

6 The following allegations in the Penaranda Defendants’
7 FAC in Penaranda v. Mo’s Place are germane to decision on the
8 motion:

9 29. . . . MANISH [Patel] and/or one or more
10 BOUNCERS told DEREK [Penaranda] to leave the
11 bar on or around 12:30 a.m., on May 20, 2012.
12 . . . DEREK [Penaranda] said that he needed
13 to pay his tab at the bar first. . . . MANISH
14 [Patel] agreed, and insisted that one or more
15 BOUNCERS escort DEREK to the bar to pay his
16 tab.

17 30. . . . MANISH [Patel] was yelling at DEREK
18 [Penaranda] as the two walked toward the bar,
19 with PATRICK [Penaranda] DEREK
20 [Penaranda] punched MANISH [Patel] and the
21 two fell to the ground.

22 31. . . . [A bouncer] immediately grabbed
23 PATRICK [Penaranda].

24 32. . . . [A bouncer] pulled DEREK
25 [Penaranda] away from MANISH [Patel], with
26 one arm around DEREK’s neck, applying
27 pressure thereto. . . . DEREK’s body went
28 limp while [the bouncer] held DEREK around
the neck.

. . . .

49. . . . DEREK [Penaranda] died as a
proximate result of the acts of [the
bouncers].

50. . . . PATRICK [Penaranda] suffered
[physical injuries].

(FAC ¶¶ 29-32, 49-50.) The Mo Foods Defendants submitted a
surveillance video showing approximately five minutes of the
above referenced physical interactions. (Not. of Lodging Video

1 Disc, ECF No. 43-5.) The Penaranda Defendants allege the
2 following claims in Penaranda v. Mo's Place: assault, battery,
3 negligence, negligent infliction of emotional distress,
4 intentional infliction of emotional distress, negligent hiring
5 and supervision, and wrongful death. (FAC ¶¶ 62-83, 109-10.)

6 During the time of the above referenced physical
7 interactions, Mo Foods, LLC was insured under a general liability
8 insurance policy (hereinafter referenced as "Insurance Policy")
9 issued by Plaintiff. (Mo Foods' Resp. to Pl.'s Sep. Statement of
10 Undisputed Facts ("Mo Foods' Resp.") ¶ 7, ECF No. 43-1; TPM's
11 Resp. to Pl.'s Sep. Statement of Undisputed Facts ("TPM's
12 Resp.") ¶ 7, ECF No. 31-1.) The Insurance Policy includes an
13 exclusion, stating in pertinent part:

14 [Plaintiff] shall have no duty to defend or
15 indemnify any claim . . . [or] suit . . .
16 seeking damages . . . where . . . any actual
17 or alleged injury arises out of a chain of
18 events which includes assault or battery,
regardless of whether the assault or battery
is the initial precipitating event or a
substantial cause of injury.

19 (Mo Foods' Resp. ¶ 10; TPM's Resp. ¶ 10 (hereinafter referenced
20 as "Assault and Battery Exclusion").)

21 "Mo Foods, LLC, Manish Patel, TPM, LLC, Pradip Patel,
22 Neha Patel, Sean Caniloa and Ruben Morales all tendered" their
23 defense of Penaranda v. Mo's Place to Plaintiff. (Mo Foods' Resp.
24 ¶ 5; TPM's Resp. ¶ 5.) "[Plaintiff] accepted the tenders and
25 assumed their defense [but] reserve[ed] its rights to establish
26 the absence of coverage and to obtain reimbursement of defense
27 costs incurred on their behalf." (Mo Foods' Resp. ¶ 6; TPM's
28 Resp. ¶ 6.)

1 reference into Plaintiff's Complaint, does not define the term
2 "battery." (See Decl. of Daniel Mayer in Supp. of Pl.'s Mot. for
3 Summ. J., Ex. 9, p. 31-35 (hereinafter referenced as "Insurance
4 Policy Definitions Section"), ECF No. 31-5.) However, under
5 California case law,

6 [i]t has long been established, both in tort
7 and criminal law, that 'the least touching'
8 may constitute battery. In other words[;]
9 force against the person is enough, it need
not be violent or severe, it need not cause
bodily harm or even pain, and it need not
leave any mark.

10 People v. Colantuono, 7 Cal. 4th 206, 214 n.4 (1994) (quoting
11 People v. Rocha, 3 Cal. 3d 893, 899 (1971)). Therefore, the
12 Insurance Policy's lack of definition for the term "battery" does
13 not render the term ambiguous.

14 Nor does the Insurance Policy define the phrase "arises
15 out of." (See Insurance Policy Definitions Section.) However,
16 under California case law,

17 "[a]rising out of" is a broad concept
18 requiring only a "slight connection" or an
19 "incidental relationship" between the injury
20 and the excluded risk. Cont'l Cas. Co. v.
21 City of Richmond, 763 F.2d 1076, 1081 (9th
22 Cir. 1985) [(stating "California courts
23 consistently have adopted broad definitions
24 of . . . 'arising out of'" and collecting
cases to that effect)]. Such language
"requires [the court] to examine the conduct
underlying the . . . lawsuit, instead of the
legal theories attached to the conduct."
Guaranty Nat'l Ins. Co. v. Int'l Ins. Co.,
994 F.2d 1280, 1284 (7th Cir. 1993).

25 Century Transit Sys., Inc. v. Am. Empire Surplus Lines Ins. Co.,
26 42 Cal. App. 4th 121, 127 n.4 (1996); see also Southgate
27 Recreation & Park Dist. v. Cal. Ass'n Park & Recreation Ins., 106
28 Cal. App. 4th 293, 301 (2003) ("As this court has noted, the

1 'arising out of' connective . . . broadly links' the
2 exclusionary operative events with the exclusion." (citing State
3 Farm Fire & Cas. Co. v. Salas, 222 Cal. App. 3d 268, 274 n.4
4 (1990)).

5 The following allegations in the Penaranda Defendants'
6 FAC in Penaranda v. Mo's Place are germane to whether the
7 "alleged injur[ies] ar[o]se[] out of a chain of events which
8 includes . . . battery." (Assault and Battery Exclusion.)

9 29. . . . MANISH [Patel] and/or one or more
10 BOUNCERS told DEREK [Penaranda] to leave the
11 bar on or around 12:30 a.m., on May 20, 2012.
12 . . . DEREK [Penaranda] said that he needed
13 to pay his tab at the bar first. . . . MANISH
14 [Patel] agreed, and insisted that one or more
15 BOUNCERS escort DEREK to the bar to pay his
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21 two fell to the ground.

22 31. . . . [A bouncer] immediately grabbed
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25 [Penaranda] away from MANISH [Patel], with
26 one arm around DEREK's neck, applying
27 pressure thereto. . . . DEREK's body went
28 limp while [the bouncer] held DEREK around
the neck.

. . . .

49. . . . DEREK [Penaranda] died as a
proximate result of the acts of [the
bouncers].

50. . . . PATRICK [Penaranda] suffered
[physical injuries].

(FAC ¶¶ 29-32, 49-50.)

The Penaranda Defendants have alleged that Derek
Penaranda's battery on Manish Patel precipitated each bouncer's

1 respective physical interaction or interactions with Derek and/or
2 Patrick Penaranda. Therefore, the “alleged injur[ies]” to Derek
3 and Patrick Penaranda “ar[ose] out of a chain of events which
4 includes . . . battery.” (Assault and Battery Exclusion.)
5 Accordingly, the Insurance Policy’s Assault and Battery Exclusion
6 prescribes that Plaintiff “ha[s] no duty to defend or indemnify
7 any claim” in Penaranda v. Mo’s Place. (Id.) Therefore, this
8 portion of the motion is granted.

9 **B. Concurrent Cause Doctrine**

10 Nevertheless, Defendants argue that Plaintiff must
11 continue defending Penaranda v. Mo’s Place under the concurrent
12 cause doctrine since the Penaranda Defendants’ claims include
13 negligence, which is a liability theory that the Assault and
14 Battery Exclusion does not specifically exclude from coverage.
15 Under the concurrent cause doctrine, “when two . . . risks
16 constitute concurrent proximate causes of an accident [or
17 injury], the insurer is liable so long as one of the causes is
18 covered by the policy.” State Farm Mut. Auto. Ins. Co. v.
19 Partridge, 10 Cal. 3d 94, 102 (1973) (emphasis added). Here, the
20 concurrent cause doctrine is inapposite since the Assault and
21 Battery Exclusion excludes from coverage not just certain causes
22 of injury, but certain injuries themselves—specifically, “any
23 actual or alleged injury [that] arises out of a chain of events
24 which includes assault or battery.” (Assault and Battery
25 Exclusion.) Therefore, the concurrent cause doctrine does not
26 provide a basis for coverage. See also 101 Ocean Condo.
27 Homeowners Ass’n v. Century Sur. Co., 407 Fed. App’x 129, 131
28 (9th Cir. 2010) (holding that where an insurance policy excluded

1 from coverage "any actual or alleged injury aris[ing] out of a
2 chain of events which includes assault or battery, regardless of
3 whether assault or battery is the initial or precipitating event
4 or a substantial cause of injury," the insurance company would
5 have no duty to defend an otherwise-covered false imprisonment
6 claim since "that injury would have arisen out of a chain of
7 events that included an assault or battery").

8 **C. Recoupment**

9 Plaintiff also argues it is entitled to summary
10 judgment on its recoupment claim since it "expressly reserved the
11 right to seek recoupment of defense costs if it were determined
12 that no defense was owed," and "there [is] no potential for
13 coverage of the Penarandas' claims." (Pl.'s Mot. 12:18-20.)

14 "California law clearly allows insurers to be
15 reimbursed for attorney's fees' and other expenses 'paid in
16 defending insureds against claims for which there was no
17 obligation to defend.'" Scottsdale Ins. Co. v. MV Transp., 36
18 Cal. 4th 643, 659-60 (2005) (quoting Buss v. Super. Ct., 16 Cal.
19 4th 35, 50-51 (1997)). Since Plaintiff has no obligation to
20 defend any party in Penaranda v. Mo's Place, this portion of
21 Plaintiff's motion is also granted.

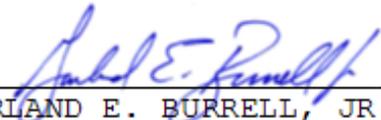
22 **IV. CONCLUSION**

23 For the stated reasons, Plaintiff's summary judgment
24 motion is granted. Further, Plaintiff shall file a proposed
25 judgment and a separate document in which it explains its
26 recoupment calculations and conclusions no later than seven days
27 after the date on which this order is filed. Objections, if any,
28 shall be filed no later than seven days after Plaintiff's

1 proposed judgment and separate document is filed. Plaintiff may
2 reply to any objection within five days after it is filed.

3 Dated: April 23, 2014

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GARIAND E. BURRELL, JR.
Senior United States District Judge