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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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CALIFORNIA DEPARTMENT OF TOXIC
SUBSTANCES CONTROL and the TOXIC
SUBSTANCES CONTROL ACCOUNT,

Plaintiffs,

v.

JIM DOBBAS, INC. a California
corporation; CONTINENTAL RAIL,
INC., a Delaware corporation;
DAVID VAN OVER, individually;
PACIFIC WOOD PRESERVING, a
dissolved California
corporation; WEST COAST WOOD
PRESERVING, LLC., a Nevada
limited liability company; and
COLLINS & AIKMAN PRODUCTS, LLC,
a Delaware limited liability
company,

Defendants.

No. 2:14-CV-00595 WBS EFB

ORDER RE: MOTIONS TO
INTERVENE AND TO VACATE
DEFAULT

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Plaintiffs Department of Toxic Substances Control and
the Toxic Substances Control Account (collectively "DTSC") sought
recovery of costs and interest incurred during the cleanup of a

1 wood preserving operation in Elmira, California against multiple
2 defendants under the Comprehensive Environmental Response,
3 Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et
4 seq. (First Am. Compl. ("FAC") at ¶ 19.) In 2015, DTSC obtained
5 entry of default against a canceled Delaware corporation,
6 defendant Collins & Aikman Products, LLC ("C&A Products") after
7 it failed to respond to DTSC's First Amended Complaint. (Docket
8 No. 129.) Presently before the court are motions to intervene
9 and vacate C&A Products' default filed by The Continental
10 Insurance Company ("Continental"), Century Indemnity Company
11 ("Century"), and Allianz Underwriters Insurance Company, Chicago
12 Insurance Company, and Fireman's Fund Insurance Company
13 (collectively, "Allianz"), insurers of C&A Products. (Docket
14 Nos. 205, 217, 222.)

15 This is not the first time an insurance company has
16 moved to intervene and set aside default in this matter. The
17 Travelers Insurance Company ("Travelers") previously attempted to
18 do so (Docket No. 196), but this court denied the motion after
19 finding that Travelers' refusal to defend C&A Products under a
20 reservation of rights forfeited its interest in the litigation
21 and it could not establish good cause to set aside C&A Products'
22 default.¹ (Order Re: Mot. to Intervene and Set Aside Default at
23 3-4 (Docket No. 221).) The moving parties before the court now
24 offer many of the same arguments Travelers did in its motion,

25
26 ¹ Allstate Insurance Company filed a notice of joinder
27 (Docket No. 218) to Travelers' motion to intervene and did not
28 file a separate motion to intervene. (Docket No. 196.)
Traveler's motion to intervene was denied on October 22, 2019.
(Docket No. 221.) Accordingly, Allstate's joinder fails.

1 with some important differences. (Compare Docket Nos. 205, 217,
2 222, with Docket No. 196.) Each will be discussed in turn.

3 First, the court will consider Continental's motion.
4 Continental's position is distinguishable from that of Travelers
5 in that it did not become aware of this lawsuit until after C&A
6 Products' default was entered. However, it is substantially
7 indistinguishable in that Continental has neither admitted
8 coverage nor agreed to defend C&A Products on a reservation of
9 rights. DTSC offered to stipulate to Continental's intervention
10 if it either (1) accepted coverage without a reservation of
11 rights or (2) defended C&A Products with a reservation of rights.
12 (Decl. of Laura Zuckerman ("Zuckerman Decl."), Ex. B (Docket No.
13 228).) This was the same stipulation DTSC offered to Travelers
14 before its motion was heard. Just as in Travelers' case,
15 Continental did not stipulate, although instead of affirmatively
16 refusing the stipulation, it failed to respond to plaintiffs'
17 offer. (Zuckerman Decl. ¶ 4.) Continental also does not advance
18 any new argument to establish good cause to set aside C&A
19 Products' default. (Compare Docket No. 205, with Docket No.
20 196.) Accordingly, Continental's motion will be denied.

21 Next, the court considers Century's motion. Century,
22 too, offers the same arguments Travelers did in its motion to
23 intervene and set aside default. (Compare Docket No. 217, with
24 Docket No. 196.) Indeed, just like Travelers, Century disclaimed
25 coverage of any claims arising from the DTSC litigation, citing a
26 settlement agreement Century purportedly signed with C&A Products
27 in 2000. (Century Mot. to Intervene at 6 (Docket No. 217).)
28 Like Continental, Century failed to respond to plaintiffs'

1 proposed stipulation, and by implication refuses to offer a
2 defense under a reservation of rights. (Zuckerman Decl. ¶ 4.)
3 Because it has both disclaimed coverage and refused to defend C&A
4 Products under a reservation of rights, Century's motion to
5 intervene and set aside default will also be denied. Finally,
6 the court will consider Allianz's motion. In California, "where
7 the insured is unable to assert its rights, an insurer who seeks
8 to intervene and protect its coverage defenses may provide an
9 explicit reservation of rights to its client and allege that
10 reservation of rights within its pleading to put the plaintiff on
11 notice that the insurance company is reserving those rights and
12 asserting coverage defenses." Kaufman & Broad Communities, Inc.
13 v. Performance Plastering, Inc., 136 Cal. App. 4th 212, 222 (3d
14 Dist. 2006). Allianz expressly stated in its motion that it has
15 "reserved all rights to decline coverage on any applicable ground
16 and expressly ha[s] not waived or otherwise forfeited any direct
17 interest in the instant action that would serve to defeat Allianz
18 Intervenors' claim for intervention of right." (Allianz Mot. to
19 Intervene at 11 (Docket No. 222).) Furthermore, unlike Century
20 and Travelers, Allianz has not disclaimed coverage. Instead, it
21 is purportedly "gathering information regarding coverage and or
22 duties" in the present action.² (Id.)

23 However, Allianz was C&A Products' excess insurer.
24 (Opp. to Mot. to Intervene and Vacate Default at 2 n.2 (Docket
25 No. 227); see also Allianz Reply to Opp. to Mot. to Intervene at

26 ² Like Continental and Century, Allianz failed to respond
27 to DTSC's proposed stipulation to allow them to intervene.
28 (Zuckerman Decl. ¶ 4.)

1 2 (Docket No. 230).) California law recognizes a distinction
2 between primary and excess insurance coverage. "Primary coverage
3 is insurance coverage whereby, under the terms of the policy,
4 liability attaches immediately upon the happening of the
5 occurrence that gives rise to the liability . . . "excess" or
6 "secondary" insurance is coverage whereby, under the terms of
7 that policy, liability attaches only after a predetermined amount
8 of primary coverage has been exhausted." Residence Mut. Ins. Co.
9 v. Travelers Indem. Co. of Conn., 26 F. Supp. 3d 965, 972-73
10 (C.D. Cal. 2014) (quoting Am. Cas. Co. v. Gen. Star Indem. Co.,
11 125 Cal. App. 4th 1510, 1521 (2d Dist. 2005) (emphasis omitted)).

12 Normally, the policy limits of the underlying primary
13 policy must be exhausted before excess insurers have the "right
14 or duty to participate in the defense" of the insured. Ticor
15 Title Ins. Co. v. Employers Ins. of Wausau, 40 Cal. App. 4th
16 1699, 1707 (1st Dist. 1995) (citing Signal Companies, Inc. v.
17 Harbor Ins. Co., 27 Cal. 3d 359, 365 (1980)). In some instances,
18 excess insurers may assume the obligations of the primary insurer
19 before exhaustion occurs. Id. at 1708-09 (finding excess insurer
20 could defend when the primary insurer was insolvent or refused to
21 defend). But in the environmental context, primary coverage
22 cannot be exhausted "until a remediation plan is approved which
23 clearly establishes that the costs of remediation will exceed the
24 primary indemnity limits." Cty. of Santa Clara v. USF & G, 868
25 F. Supp. 274, 280 (N.D. Cal. 1994).

26 While DTSC vaguely seeks to recover cleanup costs from
27 C&A Products' "historic insurers" (Docket No. 197-4), DTSC has
28 yet to obtain judicial approval for C&A Products' portion of the

1 remediation plan³ and failed to determine "which of C&A Products'
2 insurers, if any, to proceed against." (Opp. to Mot. to
3 Intervene and Vacate Default at 6 n.5.) Consequently, because
4 DTSC has yet to determine which primary insurer, if any, will be
5 responsible for C&A Products' damages, the parties and the court
6 do not know what the "primary indemnity limits" are. Absent this
7 information, the court cannot conclude that primary coverage is
8 exhausted and that excess insurers can properly intervene. See
9 Cty. of Santa Clara, 868 F. Supp. at 280. Accordingly, Allianz's
10 motion to intervene and set aside default will also be denied.

11 IT IS THEREFORE ORDERED that the motions to intervene
12 and vacate default filed Continental (Docket No. 205), Century
13 (Docket No. 217), and Allianz (Docket No. 222), be, and the same
14 thereby are, DENIED.

15 Dated: December 3, 2019

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17 WILLIAM B. SHUBB
18 UNITED STATES DISTRICT JUDGE

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25 ³ Plaintiffs did not include the amount they sought to
26 recover in their First Amended Complaint, but have since asserted
27 C&A Products owes them \$3,219,449.85 in their motion for default
28 judgment. (Mot. for Default J. ¶ 5(a) (Docket No. 184).) This
court expresses no opinion as to the merit of that determination
and may hold a "prove-up" hearing in the future.