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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CROSS CHECK SERVICES, LLC,
Plaintiff,
v.
OLD REPUBLIC INSURANCE
COMPANY, a Pennsylvania
Corporation,
Defendant.

No. 2:15-cv-02113-MCE-EFB

MEMORANDUM AND ORDER

This matter arises out of Cross Check Services, LLC (“Cross Check” or “Plaintiff”) and Old Republic Insurance Company’s (“ORIC” or “Defendant”) cross Motions for Summary Judgment. ECF Nos. 24, 25. The motions have been fully briefed. For the reasons set forth below, Plaintiff’s motion (ECF No. 25) is DENIED, and Defendant’s motion (ECF No. 24) is thus GRANTED.¹

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¹ Because oral argument would not have been of material assistance, the Court ordered this matter submitted on the briefs. E.D. Cal. Local Rule 78-230(h).

1 **BACKGROUND²**

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3 **A. Factual Background**

4 The Nevada Fire Safe Council (“NVFSC”) was a non-profit corporation formed
5 under the laws of the State of Nevada. According to its bylaws, its purpose was to “work
6 on solutions to reduce the loss of lives and property from the threat of fire in Nevada and
7 Tahoe Basin communities.” ECF No. 24-3 ¶ 2. Among other things, NVFSC applied for
8 grants for fuel reduction efforts and other activities related to the reduction of forest fires.
9 Id. ¶ 3. On February 5, 2009, the United States Department of Agriculture (Forest
10 Service) (“Forest Service”) granted \$6,234,000 in support of the Lake Tahoe Basin Multi-
11 Jurisdictional Fuel Reduction and Wildfire Prevention Strategy (the “Forest Service
12 Grant”). Id. ¶ 4. The Forest Service grant letter stated that funds would be paid to
13 NVFSC only for approved project activities, and only in response to a request for an
14 advance or reimbursement. Id. ¶ 5.

15 In late 2010, the City of South Lake Tahoe (“City”), through a posting by NVFSC,
16 sought bids for the Lake Christopher Fuel Reduction Project (the “Lake Christopher
17 Project” or “Project”) on lands owned by the City as well as other local entities. Id. ¶ 6.
18 On or about December 23, 2010, Cross Check—a California LLC that conducts forest
19 reduction activities throughout the greater Lake Tahoe Basin—submitted a bid to the
20 City to perform the fuel reduction work on the Lake Christopher Project. Id. ¶¶ 1, 7. On
21 or about January 25, 2011, the City Fire Department notified Cross Check that it was the
22 successful bidder on the Lake Christopher Project, and thereafter, NVFSC issued a
23 series of “Purchase Orders,” under which Cross Check would perform. ECF No. 24-3
24 ¶¶ 8, 9.

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27 ² This case presents almost purely legal issues, and as such, the facts for the most part are
28 undisputed. See Joint Statement of Stipulated Facts, ECF No. 24-3; Defendant’s Response to Plaintiff’s
Statement of Additional Undisputed Material Facts (“UMF”), ECF No. 31-1. Unless otherwise noted, this
background is taken, sometimes verbatim, from these documents.

1 Pursuant to its accepted bid, Cross Check agreed to perform fuel reduction work
2 in exchange for \$174,240. ECF No. 24-3 ¶ 9. NVFSC issued a total of three Purchase
3 Orders to Cross Check concerning the Project; each of these Purchase Orders listed the
4 funding source as the Forest Service Grant. Id. ¶¶ 9, 10, 11. Additionally, the second
5 page of each Purchase Order, which was initialed on behalf of Cross Check, contained
6 various contract provisions, including an arbitration clause:

7 2. Dispute Resolution: Arbitration – prevailing party receives
8 fees and costs. Mindful of the high cost of litigation, not only in
9 dollars, but also in time and energy, the parties intend to and
10 do hereby establish the following out-of-court alternate dispute
11 resolution procedure to be followed in the event any
12 controversy or dispute should arise out of, or relating to this
13 contract or relating to any change orders or other changes or
14 addendums to this contract. If a dispute develops between the
15 parties to this contract, the parties will submit to binding
16 arbitration to address any controversy or claim arising out of,
17 or relating to this contract or relating to any change orders or
18 other changes or addendums to this contract. . . . The
19 Arbitration Award shall be binding upon the parties and shall
20 be enforceable in any court of competent jurisdiction

21 ECF No. 24-3 ¶ 12 (emphasis added).

22 While the parties originally intended for the Project to start in January 2011, it
23 instead began in April 2011 because the City did not obtain the requisite permits before
24 that time. Id. ¶ 15. In mid-April, Cross Check began cutting material to be removed from
25 the Project area, and by the end of that month, realized that the weight of the now water-
26 saturated debris was heavier than if the project had started on-time. Id. ¶ 16. By the
27 end of April, Cross Check determined that the cost to perform the Project was going to
28 be higher than expected; indeed, it incurred cost overruns totaling \$169,844. Id. ¶¶ 17,
18, 23. Despite these cost overruns, Cross Check was nevertheless required to
continue removing all materials that had been cut down due to multiple state and local
regulations. Id. ¶¶ 19, 20.

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1 settlements and Defense Costs which the Insureds become legally obligated to pay . . .”
2 ECF No. 31-1, UMF No. 6. “Claim” included “a written demand for monetary relief, and a
3 civil or arbitration proceeding against an Insured (defined to include the Organization) for
4 monetary, nonmonetary or injunctive relief.” ECF No. 31-1, UMF No. 4. “Wrongful Act”
5 included in part “any actual or alleged breach of duty, neglect, error, misstatement,
6 misleading statement, omission or act . . . , with respect to Insuring Agreement C, by the
7 Organization.” ECF No. 31-1, UMF No. 5. The Policy further provided that ORIC, “shall
8 have the right and duty to defend any Claim covered by this Policy, even if any of the
9 allegations in such Claim are groundless, false or fraudulent.” ECF No. 31-1, UMF
10 No. 9.

11 In addition to the aforementioned terms, the Policy included an exclusion clause
12 (the “Exclusion Clause”) concerning claims against NVFSC as a result of contractual
13 disputes. The Exclusion Clause provided, in relevant part, that:

14 The Insurer shall not be liable under Insuring Agreement C to
15 make payment for Loss as a result of a Claim made against an
16 Organization: ¶¶ 1. For any actual or alleged obligation under
17 or breach of any oral or written contract or agreement,
18 including any liability of others assumed by the Organization
19 under any such contract or agreement; provided, however, the
20 exclusion shall not apply (i) to an actual or alleged breach of
21 an implied contract in an Employment Claim, or (ii) to the
22 extent the Organization would have been liable for such Loss
23 in the absence of such contract or agreement

24 UMF No. 10.

25 **2. Arbitration Action**

26 At Cross Check’s demand, arbitration between the parties began after NVFSC’s
27 refusal to pay the June 2, 2011 invoice (the “Underlying Action”). ECF No. 24-3 ¶¶ 36,
28 37. Cross Check’s Notice of Claim in the Underlying Action included allegations that
beginning in February 2011, Cross Check entered into a series of contracts—i.e., the
Purchase Orders—to conduct fuel reduction services for the Project. ECF No. 24-3
¶ 32. On October 6, 2011, an email chain was sent to an ORIC Claims Representative
detailing Cross Check’s claims, as described by a NVFSC representative. Ex. 62, ECF

1 No. 24-66, JTE 0520–21. NVFSC’s claim description, dated September 29, 2011,
2 included, in part, that:

3 Dave Mercer, owner of Crosscheck Services . . . contracted
4 with [NVFSC] to provide fuels reduction services on what is
5 known as the Lake Christopher Project. Three purchase
6 orders were issued to complete this work . . . [¶] After all
7 work had been completed Mr. Mercer submitted an invoice for
8 approximately \$172,000.00 above and beyond the Not to
9 Exceed amounts listed [in the Purchase Orders]. [NVFSC] had
10 no knowledge that Mr. Mercer continued to work after he had
11 realized the costs covered by his signed purchase orders. [¶]
[The NVFSC Board] denied Mr. Mercer’s request for the
additional payment. Last week, Mr. Mercer requested that
[NVFSC] begin the process of Dispute Resolution as specified
in Item #2 on the rear of the purchase order That is the
current status of the situation. [¶] [NVFSC] is requesting that
you review this situation for possible coverage under one of
our policies issued by your firm.

12 Ex. 62, ECF No. 24-66, JTE 0520–21. By a letter dated October 18, 2011, ORIC
13 declined to provide a defense and/or indemnify NVFSC with respect to Cross Check’s
14 claim and cited the Exclusion Clause as the basis for this denial. ECF No. 24-3 ¶ 34;
15 ECF No. 31-1, UMF No. 23.

16 In the Underlying Action, the City was granted summary judgment on August 27,
17 2012 on the basis that the Project Manager had no authority to contract on behalf of the
18 City; a hearing was conducted on October 4, 2012 between Cross Check and NVFSC
19 concerning the remaining claims. ECF No. 24-3 ¶¶ 38; Ex. 49, ECF No. 24-53, JTE
20 0361. On October 8, 2012, the arbitrator issued an interim award in favor of Cross
21 Check in the sum of \$169,844, as well as simple interest at the rate of 10% from the date
22 of June 22, 2011. Ex. 49, ECF No. 24-53, JTE 0364. In making his decision, the
23 arbitrator provided, in part, that:

24 At the time that [NVFSC] rejected Cross Check’s request for
25 payment, [the City] was urging payment to Cross Check. At
26 that time, more than \$1 million in allocated grant funds were
27 available for payment for projects in the South Lake Tahoe
28 Division. [NVFSC] abused its discretion in disregarding the
City’s request for payment of Cross Check by re-allocating
grant funds within that Division . . . [¶] . . . It is the law where
a public entity represents to a private contractor-bidder that
certain conditions of the work exist, and during the job more

1 onerous conditions are encountered, causing the contractor
2 extra work, the contractor is entitled to payment for the extra
3 work. (See generally, Los Angeles Unified School Dist. v.
4 Great American Ins. Co. (2010) 49 Cal. 4th 739, 753-754.)
5 Here, it was represented to Cross Check that the work would
6 begin in January. Implicit in that representation was the
7 representation that the work would begin in the dormant period
8 of the forest, when the weight of the vegetation would be
9 minimal. When commencement of the work was delayed until
10 April, Cross Check encountered a changed condition (double
11 the weight of the vegetation) that caused it extra work for which
12 it is entitled to payment. [¶] The reasonable value of Cross
13 Check's extra work is \$169,844.00.

14 Ex. 49, ECF No. 24-53, JTE 0363-64.

15 **A. Procedural Background**

16 In 2012, NVFSC filed for bankruptcy in the United States Bankruptcy Court,
17 District of Nevada. ECF No. 24-3 ¶ 45. On January 10, 2013, Cross Check filed a proof
18 of claim in the bankruptcy proceeding, seeking a total of \$249,954.52, comprised of:
19 \$169,844 for breach of contract; \$24,150.02 for interest on that amount at the rate of
20 10 percent from June 10, 2011 to November 18, 2012; \$39,342.50 for attorneys' fees;
21 \$1,521 for recoverable costs; and \$15,097 for JAMS fees. ECF No. 24-3 ¶ 45. On
22 November 21, 2012 Cross Check demanded payment from ORIC for all amounts due,
23 contending that NVFSC's "Loss" was covered pursuant to the Policy on account of the
24 loss being predicated by a "Wrongful Act." ECF No. 24-3 ¶ 46.

25 On August 5, 2013, Cross Check filed a Petition to Confirm Contractual Arbitration
26 Award in the California Superior Court, El Dorado County, including interest at the
27 statutory rate, and on October 8, 2013 the Petition was granted. ECF No. 24-3 ¶¶ 43,
28 44. Judgment was entered in Cross Check's favor and against NVFSC for \$169,884,
plus interest on that amount at the rate of 10 percent from June 22, 2011, and the sum
of \$55,960.50, plus interest on that amount at the rate of 10 percent from October 8,
2012. ECF No. 24-3 ¶ 44. On August 28, 2015, the bankruptcy court approved an
assignment of rights agreement between NVFSC and Cross Check, such that any of
NVFSC's claims under the Policy were assigned to Cross Check. Id. ¶ 47. Cross Check
then initiated the present action against ORIC on October 8, 2015. ECF No. 1.

1 not establish the absence or presence of a genuine dispute, or that an adverse party
2 cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1). The
3 opposing party must demonstrate that the fact in contention is material, i.e., a fact that
4 might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby,
5 Inc., 477 U.S. 242, 248, 251-52 (1986); Owens v. Local No. 169, Assoc. of W. Pulp and
6 Paper Workers, 971 F.2d 347, 355 (9th Cir. 1987). The opposing party must also
7 demonstrate that the dispute about a material fact “is ‘genuine,’ that is, if the evidence is
8 such that a reasonable jury could return a verdict for the nonmoving party.” Anderson,
9 477 U.S. at 248. In other words, the judge needs to answer the preliminary question
10 before the evidence is left to the jury of “not whether there is literally no evidence, but
11 whether there is any upon which a jury could properly proceed to find a verdict for the
12 party producing it, upon whom the onus of proof is imposed.” Anderson, 477 U.S. at 251
13 (quoting Improvement Co. v. Munson, 81 U.S. 442, 448 (1871)) (emphasis in original).
14 As the Supreme Court explained, “[w]hen the moving party has carried its burden under
15 Rule [56(a)], its opponent must do more than simply show that there is some
16 metaphysical doubt as to the material facts.” Matsushita, 475 U.S. at 586. Therefore,
17 “[w]here the record taken as a whole could not lead a rational trier of fact to find for the
18 nonmoving party, there is no ‘genuine issue for trial.’” Id. at 587.

19 In resolving a summary judgment motion, the evidence of the opposing party is to
20 be believed, and all reasonable inferences that may be drawn from the facts placed
21 before the court must be drawn in favor of the opposing party. Anderson, 477 U.S. at
22 255. Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s
23 obligation to produce a factual predicate from which the inference may be drawn.
24 Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d,
25 810 F.2d 898 (9th Cir. 1987).

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1 that” the insurer did not owe a duty to defend will be dispositive of a claim that the
2 insurer had a duty to indemnify. Delgado v. Interinsurance Exch. of Auto. Club of S.
3 Cal., 47 Cal. 4th 302, 308 n.1 (2009) (citations omitted).

4 “In resolving the question of whether a duty to defend exists—tendered in the
5 context of a summary adjudication/summary judgment motion in a declaratory relief
6 action—the insurer has a higher burden than the insured.” Am. States Ins. Co. v.
7 Progressive Cas. Ins. Co., 180 Cal. App. 4th 18, 27 (2009). While the insured “need
8 only show that the underlying claim may fall within policy coverage,” the insurer “must
9 present undisputed facts that eliminate any possibility of coverage.” Id. (emphasis in the
10 original). Thus, under California law, the duty to defend “may exist even where coverage
11 is in doubt and ultimately does not develop.” Saylin v. Cal. Ins. Guarantee Ass’n,
12 179 Cal. App. 3d 256, 263 (1986). “Any doubt as to whether the facts give rise to a duty
13 to defend is resolved in the insured’s favor.” Horace Mann Ins. Co., 4 Cal. 4th at 1081.

14 “Whether the insurer owes a duty to defend usually is made in the first instance by
15 comparing the allegations of the complaint with the terms of the policy and extrinsic
16 facts known by the insurer at the inception of the third-party lawsuit.” Palp, Inc. v.
17 Williamsburg Nat’l Ins. Co., 200 Cal. App. 4th 282, 289 (2011) (internal citations and
18 quotation marks omitted) (emphasis in the original). “[T]he duty to defend arises when
19 the facts alleged in the underlying complaint give rise to a potentially covered claim
20 regardless of the technical legal cause of action pleaded by the third party.” Barnett v.
21 Fireman’s Fund Ins. Co., 90 Cal. App. 4th 500, 510 (2001). In addition, “facts extrinsic to
22 the complaint also give rise to a duty to defend when they reveal a possibility that the
23 claim may be covered by the policy.” Horace Mann Ins. Co., 4 Cal. 4th at 1081.

24 While the duty to defend is broad, an insurer “will not be compelled to defend its
25 insured when the potential for liability is . . . tenuous and farfetched.” Lassen Canyon
26 Nursery v. Royal Ins. Co., 720 F.2d 1016, 1018 (9th Cir. 1983) (citation omitted). In
27 other words, the duty to defend does not require an insurer to undertake a defense as to
28 claims that are “factually and legally untethered from the third-party’s complaint.”

1 Storek v. Fld. & Guar. Ins. Underwriters, Inc., 504 F. Supp. 2d 803, 812 (N.D. Cal. 2007).

2 Thus, “[t]he insurer’s defense duty is obviated where the facts are undisputed and
3 conclusively eliminate the potential the policy provides coverage for the third-party’s
4 claim.” Palp, 200 Cal. App. 4th at 289; see also We Do Graphics, Inc. v. Mercury Cas.
5 Co., 124 Cal. App. 4th 131, 136 (2004) (“If, at the time of tender, the allegations of the
6 complaint together with extrinsic facts available to the insurer demonstrate no potential
7 for coverage, the carrier may properly deny a defense.”). “An insurer is entitled to
8 summary judgment that no potential for indemnity exists if the evidence establishes no
9 coverage under the policy as a matter of law.” Palp, 200 Cal. App. 4th at 289.

10 Here, the Policy had a clear and unambiguous Exclusion Clause barring coverage
11 for any loss “as a result of” a claim “for any actual or alleged obligation under . . . any
12 oral or written contract or agreement.” ECF No. 31-1, UMF No. 10. Yet, as Plaintiff
13 correctly contends, the Court’s inquiry begins with an assessment of ORIC’s knowledge
14 of Cross Check’s claims against NVFSC as of October 18, 2011, the date ORIC declined
15 to provide a defense and/or indemnify NVFSC in the Underlying Action. See CNA Cas.
16 of Cal. v. Seaboard Sur. Co., 176 Cal. App. 3d 598, 610 (1986) (“The duty to defend
17 cannot be adjudged on the basis of hindsight. It must be determined from the facts and
18 inferences known to an insurer from the pleadings, available information and its own
19 investigations at the time of the tender of defense.”); see also ECF No. 24-3 ¶ 34; ECF
20 No. 31-1, UMF No. 23.

21 All information available to ORIC about the Cross Check’s claim was submitted in
22 this proceeding as Exhibit 62 (“Claims File”). ECF No. 24-3 ¶ 34. The Claims File
23 shows that ORIC received a Claim Notice via email on July 22, 2011 articulating
24 potential legal action by a third-party non-winning bidder on account that the Board “did
25 not follow the Fair Bid Process in awarding the [Lake Christopher Project] contract” to
26 Cross Check. Ex. 62, ECF No. 24-66, at JTE 0533. The Claim Notice articulated other
27 potential liabilities related to NVFSC’s annual audits and cash management compliance
28 issues regarding federal grants. Id. at JTE 0534.

1 In a subsequent letter dated July 25, 2011, ORIC acknowledged to NVFSC
2 receipt of the Claim Notice; the "CLAIMANT" in this letter was listed as an "UNKNOWN
3 CONTRACT BIDDER." Ex. 62, ECF No. 24-66, at JTE 0526–28. On September 29,
4 2011, ORIC received notice of Cross Check's request to go to binding arbitration with
5 NVFSC "regarding [Cross Check's] cost overrun on the Lake Christopher Project." Id. at
6 JTE 0522. On October 6, 2011, ORIC was provided NVFSC's description of Cross
7 Check's arbitration claims, which included, in part, that Cross Check "contracted with
8 [NVFSC] to provide fuel[] reduction services on what is known as the Lake Christopher
9 Project. Three purchase order[s] were issued to complete this work After all work
10 had been completed [Cross Check] submitted an invoice for approximately \$172,000.00
11 above and beyond the Not To Exceed amounts [the Board] denied [Cross Check's]
12 request for additional payment. Last week [Cross Check] requested that [NVFSC] begin
13 the process of Dispute Resolution as specified in Item #2 on the rear of the purchase
14 order" Id. at JTE 0520–21. ORIC's denial of defense letter was sent thereafter.

15 From a review of the Claim File, the Court finds that ORIC had sufficient
16 knowledge of Cross Check's claims against NVFSC by October 18, 2011 to determine
17 that these claims fell within the Exclusion Clause of the Policy. The July 22, 2011 Claim
18 Notice detailed potential challenges to the fair bidding process for the Lake Christopher
19 Project; such claims, if materialized, arguably may not have arisen outside of NVFSC's
20 actual or alleged contractual obligations, and therefore may also have not fallen outside
21 the Policy's Exclusion Clause. However, by the time that ORIC received notice of Cross
22 Check's actual arbitration claims, the only remaining issues concerned cost overruns on
23 the Lake Christopher Project Purchase Orders. It is undisputed that the three Purchase
24 Orders set forth the scope of Cross Check's contractual obligation to perform regarding
25 the Project. ECF No. 24-3 ¶ 14. That Cross Check encountered cost overruns, and
26 sought payment for these increased costs, does not bring its claims for payment outside
27 the purview of these underlying contracts. Indeed, the Underlying Action ensued after
28 Cross Check's demand pursuant to the arbitration clause within these very contracts.

1 NVFSC's own description of Cross Check's arbitration claims would have led any
2 reasonable insurer to conclude that these claims were related to "actual or alleged"
3 obligations under an "oral or written contract or agreement." ECF No. 31-1, UMF No. 10.

4 The events occurring after ORIC's October 18, 2011 denial of coverage support
5 that its assessment of Cross Check's claims in the Underlying Action were correct.
6 These undisputed facts include, in part, that: Cross Check's asserted claims in the
7 arbitration related to breach of contract (Ex. 48, PI's Arbitration Brief, ECF No. 24-52;
8 ECF No. 24-3 ¶ 32); in finding for Cross Check in the Interim Award, the arbitrator cited
9 Los Angeles Unified School Dist. v. Great American Ins. Co., 49 Cal.4th 739, 753-54
10 (2010) as the basis for his decision, which concerned contractual issues in the public-
11 entity, private-contractor-bidder cost overrun context (Ex. 62, ECF No. 24-66, JTE 0520-
12 21); and Cross Check's proof of claim in NVFSC's bankruptcy proceeding related to
13 monies owed for "breach of contract" (ECF No. 24-3 ¶ 45). While these
14 post-October 18, 2011 facts cannot be used in hindsight to justify ORIC's denial of
15 coverage, they nonetheless support that Cross Check's claims have been treated as
16 contractual in nature for the entirety of this dispute.

17 Defendant has met its burden in proving that Underlying Action arose as a result
18 of a contract between NVFSC and Cross Check. The factual record supports that when
19 ORIC made its October 18, 2011 decision to not defend NVFSC in the Underlying
20 Action, it had enough factual knowledge to determine that Cross Check's claims were
21 related to NVFSC's actual or alleged contractual obligations under the Purchase Orders.
22 Having successfully shifted its burden, the Court finds that Cross Check failed to carry it,
23 such that it did not show that the Underlying Action concerned anything other than
24 claims arising from of a contractual dispute. Accordingly, Plaintiff's motion is DENIED,
25 and Defendant's is GRANTED on that basis.

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