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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

HOME DEPOT U.S.A., INC.,	)	Case No. 08-2713 SC
	)	
Plaintiff,	)	ORDER DENYING
	)	PLAINTIFF'S MOTION
vs.	)	FOR LEAVE TO FILE
	)	AMENDED COMPLAINT AND
UNITED STATES FIDELITY AND	)	GRANTING DEFENDANT'S
GUARANTY COMPANY, TRAVELERS	)	MOTION FOR SUMMARY
INSURANCE COMPANY, and DOES 1	)	<u>JUDGMENT</u>
through 10, inclusive,	)	
	)	
Defendants.	)	
_____	)	

**I. INTRODUCTION**

On February 19, 2009, Plaintiff Home Depot U.S.A., Inc. ("Home Depot") filed a Motion for Leave to File a First Amended Complaint ("Motion to Amend"). Docket No. 22. Home Depot attached a copy of the proposed Amended Complaint. Docket No. 22-3. Defendant United States Fidelity and Guaranty Company ("USF&G") opposed the Motion to Amend ("USF&G Opposition"). Docket No. 30. Home Depot filed a Reply in support of its Motion to Amend ("Home Depot Reply"). Docket No. 34.

On February 26, 2009, USF&G filed a Motion for Summary Judgment, or Alternatively, Partial Summary Judgment ("Motion for Summary Judgment"). Docket No. 24. Home Depot opposed the Motion for Summary Judgment ("Home Depot Opposition"). Docket No. 33. USF&G filed a Reply in support of its Motion for Summary Judgment

United States District Court  
For the Northern District of California

1 ("USF&G Reply"). Docket No. 35. For the reasons stated herein,  
2 the Motion to Amend is DENIED and the Motion for Summary Judgment  
3 is GRANTED.

4 USF&G also filed a Request for Judicial Notice ("RJN").  
5 Docket No. 27. These documents consist of state court filings,  
6 including a personal injury complaint filed by Sara Lewinstein  
7 against Home Depot in Alameda County Superior Court. See RJN Ex.  
8 6 ("Lewinstein Compl."). The Court may take judicial notice of  
9 proceedings and filings in other courts. See United States ex  
10 rel. Robinson Racheria Citizens Council v. Borneo, Inc., 971 F.2d  
11 244, 248 (9th Cir. 1992) The Court GRANTS USF&G's request.

12  
13 **II. BACKGROUND**

14 On January 27, 2003, Home Depot entered into an agreement  
15 with Glide Rite Corporation ("Glide Rite") for the maintenance and  
16 servicing of carts at Home Depot. See Yeh Decl. Ex. C  
17 ("Maintenance Contractor Agreement").<sup>1</sup> The insurance provision of  
18 this agreement provides that Glide Rite will maintain commercial  
19 general liability insurance naming Home Depot as an "additional  
20 insured." Id. § 8.0. The provision requires Glide Rite to  
21 provide Home Depot with proof of the insurance coverage, and  
22 notice in the event of cancellation or modification. Id.

23 Although Home Depot has not produced the insurance policy  
24 itself, Home Depot alleges that Glide Rite obtained the requisite

25  
26 \_\_\_\_\_  
27 <sup>1</sup> Paige P. Yeh, counsel for Home Depot, filed a declaration in  
28 support of the Opposition to USF&G's Motion for Summary Judgment.  
Docket No. 33-2.

1 insurance from Kemper Insurance Company/Lumbermens Mutual  
2 Casualty. Home Depot Opp'n at 2. Home Depot produced a  
3 Certificate of Insurance Liability naming "Lumbermens Mutual  
4 Casualty" as the insurer, Glide Rite as the insured, and  
5 Grosslight Insurance, Inc. ("Grosslight") as the producer. Yeh  
6 Decl. Ex. D ("Certificate of Liability Insurance").<sup>2</sup> The  
7 certificate names Home Depot as an additional insured under Policy  
8 No. 7RD80416401 with effective dates from March 22, 2003 to March  
9 22, 2004. Id. Home Depot refers to this insurance policy as the  
10 "Kemper Policy." See Mot. to Amend at 4; Home Depot Opp'n at 2.

11 In May 2003, The St. Paul Companies ("St. Paul") informed  
12 Grosslight that it had purchased the right to seek renewal of  
13 insurance business written by Kemper Insurance Companies. Yeh  
14 Decl. Ex. E ("May 21, 2003, Letter"). Grosslight had three Kemper  
15 insurance policies for Glide Rite. Id. Ex. J ("June 23, 2003,  
16 Email"); Ex. K ("July 25, 2003 Email"). Grosslight wanted all  
17 three policies cancelled and re-written on to one St. Paul policy.  
18 See July 25, 2003 Email. Some time after August 26, 2003, the  
19 three Kemper policies for Glide Rite were rewritten onto St. Paul  
20 paper, St. Paul merged with Travelers Property Casualty  
21 Corporation to become The Travelers Companies, Inc. ("Travelers"),  
22 and the midterm rewrite of the Kemper Policy resulted in Policy

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23  
24 <sup>2</sup> USF&G contends that exhibits D through M attached to the  
25 Declaration of Paige P. Yeh in Support of Home Depot's Opposition  
26 to USF&G's Motion for Summary Judgment are not properly  
27 authenticated and therefore inadmissible. See USF&G Reply at 4-5.  
28 The Court does not need to rule on this issue because taking these  
documents into consideration does not alter the Court's  
determination that USF&G is entitled to prevail on its Motion for  
Summary Judgment.

1 No. BK01741173 between USF&G and Glide Rite. See Mot. to Amend at  
2 4 n.1; Home Depot Opp'n at 5.

3 Insurance Policy No. BK01741173 names USF&G as the insurer,  
4 Glide Rite as the insured, and Grosslight as the insured's agent.  
5 Walker Decl. Ex. 5 ("USF&G Policy") at STP00001.<sup>3</sup> It states a  
6 policy period from September 4, 2003, to September 4, 2004. Id.

7 On September 23, 2003, Sara Lewinstein allegedly suffered an  
8 injury at Home Depot's store in Emeryville, California, when a  
9 flatbed handcart failed, spilling its load on Ms. Lewinstein. See  
10 Lewinstein Compl. at 7. On July 25, 2005, Ms. Lewinstein filed a  
11 personal injury action against Home Depot in Alameda County  
12 Superior Court. See id. Over one year later, on September 13,  
13 2006, Home Depot contacted Grosslight in order to tender its  
14 defense of the personal injury action to "Lumbermans Mutual  
15 Casualty."<sup>4</sup> See Yeh Decl. Ex. N ("September 13, 2006, Letter").

16 On September 15, 2006, Grosslight sent a General Liability  
17 Notice of Occurrence/Claim to "Comm. Liab. Claims., The St. Paul  
18 Travelers." Id. Ex. O ("Grosslight Notice"). The Grosslight  
19 Notice refers to the USF&G Policy, names USF&G as the insurer,  
20 Glide Rite as the insured, and Home Depot's Emeryville store as  
21 the location of occurrence. Id.

22 Joanne M. Chase was assigned the task of reviewing Home  
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24 <sup>3</sup> Karen M. Walker, an underwriter for Travelers, filed a  
25 declaration in support of USF&G's Motion for Summary Judgment.  
Docket No. 26.

26 <sup>4</sup> While the Certificate of Insurance names the insurer as  
27 "Lumbermens," Home Depot's September 13, 2006, letter to Grosslight  
refers to the insurer as "Lumbermans."

1 Depot's tender of defense. See Chase Decl. ¶ 4.<sup>5</sup> Ms. Chase is a  
2 technical specialist for Travelers. Id. ¶ 1. Travelers and USF&G  
3 are affiliated companies. Id. ¶ 3. In the fall of 2006, Ms.  
4 Chase consulted with Karen Walker, the Travelers' underwriter  
5 assigned to the Glide Rite account, to determine if Home Depot was  
6 covered. See Walker Decl. ¶ 3. Ms. Walker testified that "it was  
7 not the intent of St. Paul to provide the same coverage that was  
8 on the Kemper policy," and that to her knowledge "there was no  
9 agreement made that we would provide the same coverages on the  
10 Kemper policy to the St. Paul policy." Yeh Decl. Ex. Q ("Walker  
11 Dep.") at 74:22-24, 83:10-12. On January 2, 2007, Ms. Chase sent a  
12 letter to counsel for Home Depot and to Grosslight denying the  
13 tender. Chase Decl. Ex. 4 ("January 2, 2007, Letter"). The  
14 letter states that "[a] thorough review of the United States  
15 Fidelity and Guaranty Company policy indicates that no Certificate  
16 of Insurance was issued by USF&G naming Home Depot as an  
17 additional insured . . ." Id. Home Depot states it did not  
18 receive this letter until discovery in the present action. See  
19 Mot. to Amend at 5. Before this letter was sent, on December 4,  
20 2006, Home Depot settled the personal injury case at mediation for  
21 \$387,500. See id. Home Depot claims to have expended \$101,129.24  
22 in attorney fees. See id.

23 On December 4, 2007, Home Depot filed an action in Alameda  
24 County Superior Court against USF&G asserting the following causes  
25 of action: (1) breach of contract; and (2) bad faith breach of the

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27 <sup>5</sup> Joanne M. Chase filed a declaration in support of USF&G's  
28 Motion for Summary Judgment. Docket No. 25.

1 covenant of good faith and fair dealing. See Notice of Removal,  
2 Docket No. 1, Ex. A ("Compl."). On May 29, 2008, USF&G removed  
3 the case to this Court. See Notice of Removal. On August 29,  
4 2008, the parties stipulated to a December 31, 2008, deadline for  
5 amending the pleadings to add new parties. See Joint Case Mgmt.  
6 Statement ("JCMS") at 3. Docket No. 7. At the case management  
7 conference, the Court set March 4, 2009, as the discovery cutoff;  
8 April 3, 2009, as the last day for a hearing on motions; and the  
9 Court set a trial date of May 4, 2009. See Docket No. 14. Home  
10 Depot waited until February 19, 2009, to file its Motion to Amend.  
11 USF&G filed its Motion for Summary Judgment on February 26, 2009.

12  
13 **III. LEGAL STANDARD**

14 **A. Leave to Amend**

15 With leave of the court, a party may amend its pleadings, and  
16 "[t]he court should freely give leave when justice so requires."  
17 Fed. R. Civ. P. 15(a)(2). "In determining whether leave to amend  
18 is appropriate, the district court considers the presence of any  
19 of four factors: bad faith, undue delay, prejudice to the opposing  
20 party, and/or futility." Owens v. Kaiser Found. Health Plan,  
21 Inc., 244 F.3d 708, 712 (9th Cir. 2001) (internal quotation marks  
22 omitted). Undue delay by itself is not sufficient to justify  
23 denying a motion to amend. Bowles v. Reade, 198 F.3d 752, 757-58  
24 (9th Cir. 1999). The party opposing the amendment bears the  
25 burden of showing prejudice. DCD Programs, Ltd. v. Leighton, 833  
26 F.2d 183, 187 (9th Cir. 1987).

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1           **B.     Summary Judgment**

2           Entry of summary judgment is proper "if the pleadings, the  
3           discovery and disclosure materials on file, and any affidavits  
4           show that there is no genuine issue as to any material fact and  
5           that the movant is entitled to judgment as a matter of law." Fed.  
6           R. Civ. P. 56(c). "Summary judgment should be granted where the  
7           evidence is such that it would require a directed verdict for the  
8           moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250  
9           (1986). Thus, "Rule 56(c) mandates the entry of summary judgment  
10          . . . against a party who fails to make a showing sufficient to  
11          establish the existence of an element essential to that party's  
12          case, and on which that party will bear the burden of proof at  
13          trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In  
14          addition, entry of summary judgment in a party's favor is  
15          appropriate when there are no material issues of fact as to the  
16          essential elements of the party's claim. Anderson, 477 U.S. at  
17          247-49.

18  
19          **IV.   HOME DEPOT'S MOTION TO AMEND**

20          Home Depot seeks to amend its Complaint to add Grosslight as  
21          a defendant, and to add four additional causes of action. See  
22          Mot. to Amend at 3. The proposed Amended Complaint contains six  
23          causes of action: (1) reformation of contract and specific  
24          performance (against USF&G); (2) breach of contract (against all  
25          defendants); (3) bad faith breach of the covenant of good faith  
26          and fair dealing (against all defendants); (4) negligent failure  
27          to obtain insurance coverage (against all defendants); (5)

1 negligence (against Grosslight); and (6) negligent  
2 misrepresentation (against Grosslight). Proposed Am. Compl.,  
3 Docket No. 22-3, ¶¶ 16-60.

4 The timing of Home Depot's Motion to Amend presents a  
5 significant hurdle for Home Depot to overcome. See  
6 Schlacter-Jones v. Gen. Tel. of Cal., 936 F.2d 435, 443 (9th Cir.  
7 1991) (abrogated on other grounds) (stating that the "timing of  
8 the motion [for leave to amend], [filed] after the parties had  
9 conducted discovery and a pending summary judgment motion had been  
10 fully briefed, weighs heavily against allowing leave."). Here,  
11 discovery has closed, USF&G's Motion for Summary Judgment is fully  
12 briefed.

13 As grounds for allowing the amendments, Home Depot contends  
14 that it learned new information during two depositions conducted  
15 in December 2008. See Mot. to Amend at 5-7. Also, Home Depot  
16 contends that it first learned in February 2009 that Grosslight  
17 acted as an insurance agent for USF&G rather than an insurance  
18 broker. Id. at 6. The Court is not persuaded by Home Depot's  
19 reasons for seeking amendment. Home Depot has been aware since  
20 before this litigation began that Grosslight was involved in  
21 obtaining liability insurance for Glide Rite. For example, on  
22 September 13, 2006, Home Depot contacted Grosslight in order to  
23 tender its defense of the personal injury action to Glide Rite's  
24 insurer. See September 13, 2006, Letter. On August 29, 2008,  
25 Home Depot stipulated to a December 31, 2008, deadline for  
26 amending the pleadings to add new parties. See JCMS at 3. Home  
27 Depot was therefore aware of the need to conduct discovery  
28

1 diligently in order to meet that deadline. Instead, Home Depot  
2 waited until December 9, 2008, to conduct its first deposition.  
3 See Mot. to Amend at 5. Home Depot waited until December 11,  
4 2008, to subpoena Grosslight for documents. See Home Depot Reply  
5 at 5. Home Depot did not act diligently to obtain the information  
6 necessary to meet its own self-imposed deadline. The Court finds  
7 these delays unreasonable.

8 In addition, USF&G has met its burden of showing prejudice if  
9 Home Depot were permitted to amend the Complaint to add a new  
10 defendant and four new causes of action. Undue prejudice occurs  
11 when proposed amendments add new claims that would require  
12 additional discovery. See Jackson v. Bank of Haw., 902 F.2d 1385,  
13 1387-88 (9th Cir. 1990). Here, if the Court allowed the  
14 amendments Home Depot proposes, the Court would have to reopen  
15 discovery because Home Depot seeks to add negligence-based claims  
16 to a lawsuit that, up to this point, has been focused on  
17 allegations of breach of contract. The costs and delays  
18 associated with additional discovery are not insignificant. See  
19 Frye v. Wine Library, Inc., No. 06-5399, 2007 WL 4357596, at \*8  
20 (N.D. Cal. Dec. 11, 2007). The factors of undue delay and  
21 prejudice to USF&G weigh strongly against granting leave to amend.  
22 The Court DENIES Home Depot's Motion to Amend.

23  
24 **V. USF&G'S MOTION FOR SUMMARY JUDGMENT**

25 **A. Breach of Contract Claim**

26 USF&G contends it is entitled to summary judgment in its  
27 favor on Home Depot's breach of contract claim because the parties  
28

1 to the USF&G Policy are USF&G and Glide Rite, and Home Depot is  
2 neither a named insured nor an additional insured on the USF&G  
3 Policy. See Motion for Summary Judgment at 6.

4 **1. The USF&G Policy**

5 The USF&G Policy provided Glide Rite with insurance coverage  
6 from September 4, 2003 to September 4, 2004, and it lists USF&G as  
7 the insurer, Glide Rite as the "Named Insured," and Grosslight as  
8 "Your Agent." See USF&G Policy at STP00001. The "Liability  
9 Coverage Part Declarations" identify Glide Rite as a corporation.  
10 See id. at STP00069. The Liability Coverage Part provides that:

11 Throughout this Liability Coverage Part the  
12 words "you" and "your" refer to the Named  
13 Insured shown in the Declarations, and any  
14 other person or organization qualifying as a  
15 Named Insured under this Liability Coverage  
16 Part. The words "we," "us" and "our" refer to  
17 the Company providing this insurance. The word  
18 "insured" means any person or organization  
19 qualifying as such under SECTION II - WHO IS  
20 AN INSURED.

21 Id. at STP00073. In Section 1, entitled "Coverage," it provides  
22 that:

23 We will pay those sums that the insured  
24 becomes legally obligated to pay as damages  
25 because of 'bodily injury,' 'property damage,'  
26 'personal injury' or 'advertising injury' to  
27 which this insurance applies . . . No other  
28 obligation or liability to pay sums or perform  
acts or services is covered unless explicitly  
provided for.

Id. In Section II, entitled "Who Is an Insured," it provides that  
if you are designated in the Liability Coverage Part Declarations  
as:

d. An organization other than a partnership,  
joint venture or limited liability company,

1           you are an insured. Your "executive officers"  
2           and directors are insureds, but only with  
3           respect to their duties as your officers or  
4           directors. Your stockholders are also insured,  
5           but only with respect to their liabilities as  
6           stockholders.

7           Id. at STP00084. The policy goes on to state that each of the  
8           following is also an insured:

9           a. Your "employees" other than either your  
10           "executive officers" (if you are an  
11           organization other than a partnership, joint  
12           venture or limited liability company) . . .  
13           but only for acts within the scope of their  
14           employment by you or while performing duties  
15           related to the conduct of your business . . .

16           c. Any person (other than your "employee" or  
17           volunteer worker), or any organization while  
18           acting as your real estate manager.

19           \*\*\*

20           g. An architect, engineer or surveyor engaged  
21           by you but only with respect to liability  
22           arising out of your premises or "your work."

23           Id. at STP00084-86. Home Depot is not designated as a named  
24           insured, does not fall into any of the above categories, and there  
25           is no additional insured provision in the contract.

26           **2. Whether the USF&G Policy is Integrated**

27           Home Depot contends that the insurance contract between USF&G  
28           and Glide Rite is not an integration, or that it is only partially  
29           integrated, and that extrinsic evidence is admissible to show that  
30           the parties intended for Home Depot to be an additional insured  
31           under the USF&G Policy. See Home Depot Opp'n at 11-15. The parol  
32           evidence rule generally prohibits the introduction of extrinsic  
33           evidence to vary or contradict the terms of an integrated written  
34           instrument. Cal. Code Civ. P. § 1856. Applying the parol

1 evidence rule, the court must determine 1) whether the writing was  
2 intended to be an integration, i.e., a complete and final  
3 expression of the parties' agreement, precluding extrinsic  
4 evidence, see Masterson v. Sine, 68 Cal. 2d 222, 225-26 (1968);  
5 and 2) whether the agreement is susceptible of the meaning  
6 contended for by the party offering the evidence. See Pac. Gas &  
7 Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 37  
8 (1968) ("PG&E").

9 In determining whether the parties intended the writing to be  
10 an integration, the Court can look at the instrument itself, which  
11 may contain an integration clause, any collateral agreements, and  
12 the circumstances at the time of the writing. Masterson, 68 Cal.  
13 2d at 225-26. Here, the USF&G policy contains an integration  
14 clause. It provides:

15 This policy contains all the agreements  
16 between you and us concerning the insurance  
17 afforded. The first Named Insured shown in  
18 the Declarations is authorized to make changes  
19 in the terms of this policy with our consent.  
20 This policy's terms can be amended or waived  
21 only by endorsement issued by us and made a  
22 part of this policy.

23 USF&G Policy at STP00004. Home Depot has not presented any  
24 evidence of a collateral agreement that Home Depot was an  
25 additional insured under the USF&G Policy.

26 Instead, Home Depot relies on Wagner v. Glendale Adventist  
27 Medical Center, 216 Cal. App. 3d 1379, 1385-86 (Ct. App. 1989), to  
28 contend that the USF&G Policy is either not integrated, or a  
partial integration, expressing only certain terms of the  
agreement rather than the agreement in its entirety. See Opp'n at

1 11-12. Home Depot's reliance on Wagner is misplaced. In Wagner,  
2 there were two writings at issue: an employment application and an  
3 acknowledgment form attached to an employee handbook. 216 Cal.  
4 App. 3d at 1383-84. The court found that the "at will" provision  
5 in plaintiff's employment application was "a partial integration,  
6 i.e., a complete and final expression of this term of the parties'  
7 agreement, thus precluding any evidence of a prior or  
8 contemporaneous collateral agreement at variance with or in  
9 contradiction of this term." 216 Cal. App. 3d at 1388. The court  
10 found that the acknowledgment form was not integrated because it  
11 was a standardized form missing key elements of the employment  
12 agreement, and it indicated that the terms and conditions of  
13 employment remained subject to change. 216 Cal. App. 3d at 1393.  
14 Here, unlike the writings at issue in Wagner, the USF&G Policy  
15 contains an express integration clause, and key elements of the  
16 agreement are not missing from the document. It makes no sense  
17 for Home Depot to argue that the USF&G Policy is partially  
18 integrated because then it would be the parties' complete and  
19 final expression regarding the parties to the agreement.

20 Home Depot also argues that they and Glide Rite could not  
21 have intended the new policy to be an integration because they  
22 were never informed or notified of any change to the policy. See  
23 Opp'n at 11-12. The Court does not find this argument convincing.  
24 First, it is Glide Rite who was required to notify Home Depot of  
25 any change in Glide Rite's insurance policy, not USF&G. See  
26 Maintenance Contractor Agreement § 8.0. It appears that Glide  
27 Rite failed to do so. Second, as the party seeking to show the

1 USF&G Policy was not an integration, the burden falls on Home  
2 Depot to come forward with evidence of a collateral agreement or  
3 circumstances to show that Home Depot was supposed to be an  
4 additional insured under the USF&G Policy. Home Depot's evidence  
5 suggests the opposite. Ms. Walker, the underwriter assigned to  
6 the Glide Rite account in the fall of 2006, testified that she was  
7 not aware of any agreement to provide the same coverage under the  
8 new policy. See Walker Dep. at 83:10-12. While Home Depot, Glide  
9 Rite, and Grosslight may have intended for Home Depot's coverage  
10 to be the same under the new policy, Ms. Walker testified that St.  
11 Paul did not intend to match prior coverage as part of the rewrite  
12 process. See id. at 74:11-16, 74:22-24. Based on this evidence  
13 and the express integration clause in the contract, the Court  
14 finds the USF&G Policy to be an integration.

15 **3. Home Depot's Extrinsic Evidence**

16 Even if the Court were to consider the extrinsic evidence  
17 presented by Home Depot, it would not alter the Court's  
18 determination that Home Depot is not an additional insured under  
19 the express terms of the USF&G Policy. Under California law,  
20 parties may introduce extrinsic evidence to prove a latent  
21 ambiguity in the terms of a contract. "The test of admissibility  
22 of extrinsic evidence to explain the meaning of a written  
23 instrument is not whether it appears to the court to be plain and  
24 unambiguous on its face, but whether the offered evidence is  
25 relevant to prove a meaning to which the language of the  
26 instrument is reasonably susceptible." PG&E, 69 Cal. 2d at 37.  
27 Here, Home Depot offers extrinsic evidence intended to show that  
28

1 Grosslight, the party named on the USF&G Policy as Glide Rite's  
2 insurance agent, was really acting during the rewrite process as  
3 St. Paul's agent. See Opp'n at 12-13. Home Depot argues that  
4 Grosslight intended for Home Depot to be covered under the new  
5 policy, and because of its agency relationship with St. Paul,  
6 Grosslight's acts, omissions, and intentions are binding on USF&G.  
7 See Opp'n at 13.

8 This argument is flawed. First, for Home Depot to argue that  
9 Grosslight was really acting as St. Paul's agent is inconsistent  
10 with the plain language of the USF&G Policy which identifies  
11 Grosslight as Glide Rite's agent. See USF&G Policy at STP00001.  
12 Second, and more importantly, this extrinsic evidence is of no  
13 import because the USF&G Policy is not reasonably susceptible to  
14 an interpretation according to which Home Depot is an insured.  
15 The USF&G Policy clearly and explicitly states that Glide Rite is  
16 the named insured. See id. The policy contains no provision  
17 regarding additional insureds. Home Depot has presented no  
18 evidence that a new certification of insurance naming Home Depot  
19 as an additional insured was ever obtained under the new policy.  
20 Home Depot offers its extrinsic evidence not to interpret terms  
21 that currently exist in the USF&G Policy, but rather to add a new  
22 provision identifying Home Depot as an insured. However,  
23 "extrinsic evidence is not admissible to add to, detract from, or  
24 vary the terms of a written contract." See PG&E, 69 Cal. 2d at  
25 37; see also Appling v. State Farm Mut. Auto. Ins. Co., 340 F.3d  
26 769, 777-78 (9th Cir. 2003) (prohibiting insurance agents from  
27 using extrinsic evidence to add term to termination provision

1 because extrinsic evidence can only be used to interpret specific  
2 terms already existing in contract).

3 Furthermore, Home Depot's claims of insurance coverage under  
4 the USF&G Policy are directly contradicted by statements in Home  
5 Depot's Motion to Amend. For example, in the Motion to Amend,  
6 Home Depot states "the underwriter rewriting the policy should  
7 have but failed to name Plaintiff as an additional insured on the  
8 rewritten policy; and Grosslight . . . failed to observe or  
9 rectify the omission." Mot. to Amend at 5. Home Depot states  
10 that "Plaintiff's coverage was terminated during the 'rewriting'  
11 of Glide Rite's Kemper Policy onto Defendant's paper." Id. at 9.  
12 The Court finds that Home Depot was not an insured under the USF&G  
13 Policy.

#### 14 4. Implied-In-Fact Contract

15 Alternatively, Home Depot contends the conduct of the parties  
16 created an implied-in-fact contract between Home Depot and USF&G.  
17 See Opp'n at 15-17. Home Depot contends that Glide Rite and  
18 Grosslight acted as though Home Depot was an additional insured.  
19 See id. at 16. Home Depot contends that USF&G "acted as though it  
20 were possible that Home Depot was an additional insured." Id.  
21 However, entertaining the possibility that Home Depot might have  
22 been covered, and investigating Home Depot's tender of insurance  
23 to see if Home Depot was covered, cannot be construed as conduct  
24 showing there was an implied-in-fact contract extending coverage  
25 to Home Depot. Home Depot's only evidence in support of the  
26 contention that USF&G acted as though it were possible Home Depot  
27 was insured is a statement by Ms. Chase, the Travelers technical

1 specialist, who testified that she did not know if Home Depot's  
2 status as an additional insured under the Kemper policy carried  
3 over to the USF&G policy. See Chase Decl. 37:19-23. This  
4 statement does not show that USF&G acted as though there was a  
5 contract between Home Depot and USF&G. Finally, "[t]here cannot  
6 be a valid express contract and an implied contract, each  
7 embracing the same subject matter, but requiring different  
8 results. Camp v. Jeffer, Mangels, Butler & Marmaro, 35 Cal. App.  
9 4th 620, 630 (2d Dist. 1995) (citations omitted); see also Guz v.  
10 Bechtel Nat'l, Inc., 24 Cal. 4th 317, 340 n.10 (2000). Here,  
11 there was an express insurance contract between USF&G and Glide  
12 Rite which does not name Home Depot as an additional insured. The  
13 Court finds there was no implied-in-fact contract between USF&G  
14 and Home Depot.

#### 15 **5. Equitable Estoppel**

16 Home Depot contends that USF&G should be equitably estopped  
17 from denying that Home Depot is an additional insured under the  
18 USF&G Policy. See Opp'n at 17. The elements of estoppel are (1)  
19 a representation or concealment of material fact; (2) made with  
20 actual or constructive knowledge of the fact; (3) made to a party  
21 without knowledge of the fact; (4) made with the actual or  
22 constructive intent that the other party rely on it; and (5)  
23 reliance thereon by the other party. See, e.g. San Diego Mun.  
24 Credit Union v. Smith, 176 Cal. App. 3d 919, 922-23 (Ct. App.  
25 1986). Home Depot contends that Grosslight was acting as St.  
26 Paul's agent during the rewrite process. See Opp'n at 18. Home  
27 Depot implies that USF&G was therefore required to tell Home Depot

1 that it was not covered under the USF&G Policy, and that USF&G's  
2 failure to do so estops USF&G from denying coverage to Home Depot.

3 The Court is not persuaded by this argument. Here, there is  
4 no evidence of a representation or concealment of material fact by  
5 USF&G that it would have been reasonable for Home Depot to rely  
6 on. There is no evidence that USF&G was even aware that Home  
7 Depot was an additional insured under the prior policy. The  
8 parties to the USF&G Policy were USF&G and Glide Rite, so the  
9 Court fails to understand why USF&G should have contacted Home  
10 Depot about the terms of the contract. Home Depot's contention  
11 that Grosslight was St. Paul's agent during the rewrite process is  
12 not consistent with the express terms of the USF&G Policy, which  
13 lists Grosslight as Glide Rite's agent. See USF&G Policy at  
14 STP00001. Nonetheless, even if Grosslight were St. Paul's agent  
15 during the rewrite process, Home Depot has not explained why that  
16 fact would have obliged USF&G to inform Home Depot about the new  
17 policy. Surely this obligation belonged to Glide Rite, the party  
18 contractually bound to maintain an insurance policy covering Home  
19 Depot. See Maintenance Contractor Agreement § 8.0.

20 **6. Standing to Sue for Breach of Contract**

21 Since Home Depot was not a party to the insurance contract  
22 between USF&G and Glide Rite, Home Depot has no standing to sue  
23 USF&G for breach of contract. See Republic Indem. Co. of Am. v.  
24 Schofield, 47 Cal. App. 4th 220, 225-26 (Ct. App. 1996)  
25 (appellants who were not insured persons under terms of policy had  
26 no standing to maintain suit for breach of contract and bad faith  
27 against insurer); Gantman v. United Pac. Ins. Co., 232 Cal. App.

1 3d 1560, 1567-68 (Ct. App. 1991) (grant of summary judgment  
2 against individual homeowners affirmed because they were not  
3 insureds and hence lacked standing to enforce policy of  
4 homeowners' association).

5 Alex Robertson Company v. Imperial Casualty & Indemnity  
6 Company is a case that is particularly on point. 8 Cal. App. 4th  
7 338, 340 (Ct. App. 1992). Alex Robertson Company ("Robertson")  
8 entered into contracts with William E. Skinner & Associates  
9 ("Skinner"), an architectural firm, to provide Robertson with  
10 architectural plans for stores Robertson was building for Melvin  
11 and Stephen Jaffee ("the Jaffees"). Id. at 341. Through  
12 Robertson's insurance broker, Skinner obtained professional  
13 liability insurance from Imperial Casualty & Indemnity Company  
14 ("Imperial"). Id. The insurance indemnified Robertson for  
15 judgments arising out of Skinner's negligence. Id. The Jaffees  
16 sued Robertson for defective roofs at two stores, and Robertson  
17 tendered its defense to Imperial. Id. at 341-42. Imperial  
18 refused to defend Robertson, and the Jaffees won a judgment  
19 against Robertson. Id. Thereafter, Robertson sued Imperial for  
20 breach of contract, but the trial court granted summary judgment  
21 in favor of the insurer. Id. The trial court noted that  
22 Robertson was not an insured under the policy, and the insurer had  
23 no present duty to indemnify Robertson for any loss resulting from  
24 the Jaffee litigation because Skinner's liability for such loss  
25 had not been determined. Id. at 342. On appeal, Robertson argued  
26 that it was the intention of Robertson and Skinner that Robertson  
27 be a named insured under the policy. Id. at 346. The Court of  
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1 Appeal determined that "[p]arol evidence of the subjective,  
2 uncommunicated intent of one of the parties is not admissible to  
3 contradict the express terms of the contract." Id. The Court of  
4 Appeal affirmed the grant of summary judgment noting that "[i]n  
5 essence, Robertson has sued the wrong party." Id. at 346-47.

6 Here, the Court is also left with the impression that Home  
7 Depot has sued the wrong party. Glide Rite was obliged under the  
8 Maintenance Contractor Agreement to maintain insurance covering  
9 Home Depot as an additional insured. It appears that Glide Rite  
10 failed to live up to that obligation. For reasons unknown to the  
11 Court, Home Depot brought a breach of contract action against  
12 USF&G, not Glide Rite. Since Home Depot is not an insured under  
13 the USF&G Policy, a jury could not reasonably find in favor of  
14 Home Depot on its breach of contract claim against USF&G. The  
15 Court GRANTS summary judgment in favor of USF&G.

16 **B. Breach of Covenant of Good Faith and Fair Dealing**

17 Breach of contract is an essential element of a bad faith  
18 claim. See Kransco v. Am. Empire Surplus Lines, 23 Cal. 4th 390,  
19 408 (2000) ("without coverage, there can be no liability for bad  
20 faith on the part of the insured."); see also Waller v. Truck Ins.  
21 Exch., Inc., 11 Cal. 4th 1, 36 (1995) ("if there is no *potential*  
22 for coverage, and hence, no duty to defend under the terms of the  
23 policy, there can be no action for breach of the implied covenant  
24 of good faith and fair dealing because the covenant is based on  
25 the contractual relationship between the insured and the  
26 insurer.") (italics in original). As explained above, Home Depot  
27 is not an insured under the USF&G policy, and therefore Home Depot  
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cannot prevail on a breach of contract claim against USF&G. Because this essential element of a bad faith claim is missing, Home Depot cannot prevail on its bad faith claim. The Court GRANTS summary judgment in USF&G's favor on Home Depot's claim for breach of the covenant of good faith and fair dealing.

**VI. CONCLUSION**

For the reasons stated above, the Court DENIES Home Depot's Motion to Amend, and GRANTS USF&G's Motion for Summary Judgment.

IT IS SO ORDERED.

Dated: April 13, 2009



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UNITED STATES DISTRICT JUDGE