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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

GREAT AMERICAN INSURANCE  
COMPANY,  
  
Plaintiff,  
  
v.  
  
QUINTANA HOMEOWNERS  
ASSOCIATION, et al.,  
  
Defendants.

Case No. [5:17-cv-00693-EJD](#)

**ORDER DENYING DEFENDANTS’  
MOTION TO DISMISS OR STAY  
PROCEEDINGS**

Re: Dkt. No. 21

I. INTRODUCTION

Plaintiff Great American Insurance Company (“GAIC”) initiated this declaratory relief action seeking a judicial determination that it does not owe Defendants Quintana Homeowners Association (“Quintana HOA”) and James Gregg (“Gregg”) a duty to defend or indemnify in the underlying suit entitled GIBCO Partners, LLC v. Quintana Homeowners Association, et al., currently pending in the Monterey County Superior Court. Presently before the Court is Quintana HOA’s motion to dismiss pursuant to Rule 12(b)(6), Fed.R.Civ.P., or to stay the proceedings pending resolution of the underlying state court action. Defendant Gregg has filed a joinder. The motion is scheduled for hearing on August 17, 2017. The Court finds it appropriate to take the matter under submission for decision without oral argument pursuant to Civil Local Rule 7-1(b). For the reasons set forth below, Defendants’ motion to dismiss or to stay the action is denied.

1 II. BACKGROUND

2 A. Underlying Action

3 The plaintiff in the underlying action, GIBCO Partners, LLC (“GIBCO Partners”), is the  
4 purchaser of “Lot 10,” a 91.5 acre plot of land located within a 2070 acre development in Carmel  
5 Valley known as Quintana. Prior to purchasing the property, GIBCO Partner’s manager, Jonathan  
6 Gibson (“Gibson”) reviewed Quintana’s Covenants, Conditions and Restrictions (“CC&Rs”), the  
7 Design Guidelines of Quintana, and the maps of the Quintana lots contained in each of these  
8 documents. Based upon the information contained therein, Gibson determined that the “building  
9 envelopes” (the area of each lot in Quintana in which all residential improvements must be built),  
10 could only be changed in one of three specified ways: (1) the Architectural Review Board  
11 (“ARB”) could make the changes without formally amending the Design Guidelines if certain  
12 findings were made; (2) the ARB could make changes if it received the vote or written consent of  
13 no less than seventy-five percent (75%) of the Quintana HOA; or (3) the developer, Twelfth Tee,  
14 could make changes.

15 On January 30, 2008, prior to purchasing Lot 10, Gibson had a telephone conversation  
16 with Gregg, who is identified in the complaint as a developer of Quintana with an ownership  
17 interest in Twelfth Tee, a member of the Quintana HOA Board from 2003-2011, and a member of  
18 the ARB from approximately 2003-2013.<sup>1</sup> Based on this conversation, Gibson believed that  
19 Gregg was the key person to contact at Quintana to obtain information and guidance about  
20 whether he should purchase Lot 10. GIBCO Partners allege that it reasonably relied upon the  
21 information Gregg provided, as well as the representations in the CC&Rs, the Design Guidelines  
22 and maps, in concluding that Lot 10 would provide Gibson and his family the privacy they  
23 desired, when it decided to purchase Lot 10 for \$2.75 million on February 28, 2008.

24 GIBCO Partners alleges that the information Gregg provided was false and misleading.  
25

26 \_\_\_\_\_  
27 <sup>1</sup> In the Amended Revised Sixth Amended Complaint, which was filed in Monterey County  
28 Superior Court after the instant motion to dismiss or stay was filed, Gregg is also identified as a  
“volunteer” for the HOA in connection with the sales of various lots in Quintana from 2007-2008.  
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1 Further, GIBCO Partners alleges that throughout 2009, 2010 and 2011, the Quintana HOA and  
2 ARB allowed multiple violations of the CC&Rs to exist on eight of the thirteen lots in the  
3 Quintana development, including among other things, building envelope violations. GIBCO  
4 Partners alleges that it notified the ARB and the Quintana HOA of the violations, and was  
5 promised that the CC&Rs would be enforced. The Quintana HOA and ARB, however, allegedly  
6 failed to fulfill their promise. Instead, in approximately June of 2012, the Quintana HOA  
7 president asked the lot owners to approve a series of amendments to the Design Guidelines which  
8 would eliminate several of the violations, and the ARB promised to approve a few of the  
9 violations for some of the lot owners if those lot owners voted to approve the Design Guideline  
10 revisions. Ultimately, the amendments to eliminate several of the longstanding violations received  
11 enough votes to pass, and the ARB approved most of the remaining violations.

12 Based on the foregoing, GIBCO Partners alleges the following causes of action in its  
13 Amended Revised Sixth Amended Complaint<sup>2</sup> pertinent to the instant insurance coverage action:  
14 breach of contract against the Quintana HOA for failure to enforce the CC&Rs and Design  
15 Guidelines, for which it seeks injunctive relief and an award of attorney's fees; fraud and negligent  
16 misrepresentation against Gregg, acting in the capacity of "a volunteer on behalf of the HOA," for  
17 which it seeks damages, including punitive damages, as well as attorney fees; violation of  
18 California Corporations Code §§8320, 8321, 8333 against the Quintana HOA, for which it seeks  
19 injunctive relief and attorney fees; violation of the Davis-Stirling Act, California Civil Code  
20 §§1363, 1363.05, 1365 and 1363.840, for which it seeks injunctive relief and attorney fees; and  
21 declaratory relief against the Quintana HOA with respect to an alleged building envelope violation  
22 on Lot 11, and attorney fees. By order of the Monterey County Superior Court filed June 25,  
23 2015, GIBCO Partners is precluded from recovering monetary damages from the HOA.<sup>3</sup>

24  
25  
26 <sup>2</sup> GAIC acknowledges receipt of the Amended Revised Sixth Amended Complaint. In GAIC's  
27 view, the new allegations in this pleading do not alter its coverage position as outlined in its  
28 complaint or in its opposition brief to the instant motion to dismiss or stay proceedings.

<sup>3</sup> GAIC's Request for Judicial Notice of the Superior Court's order is granted.

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B. The Coverage Action

According to GAIC’s complaint, Quintana HOA and Gregg (hereinafter collectively referred to as “Insureds”) are presently receiving a defense in the underlying action from Quintana HOA’s primary insurer, Travelers Casualty and Surety Company of America (“Travelers”) under a primary liability insurance policy issued to Quintana HOA (“Travelers Policy”), the limits of which have not been exhausted. GAIC initiated the instant action seeking a judicial declaration that it will have no obligation under the umbrella liability policy it issued to the Quintana HOA (“Umbrella Policy”), to defend and indemnify the Quintana HOA and Gregg in the underlying action upon the exhaustion of the Travelers Policy.

The GAIC Umbrella Policy provides “Claims Made Coverage” for the coverage period of September 21, 2011 to September 21, 2012, and contains a limit of \$5 million for each occurrence and a \$5 million general aggregate limit. The GAIC Umbrella Policy provides “follow form umbrella coverage” over Quintana HOA’s primary policies, such as the Travelers Policy.

In the present declaratory relief action, GAIC seeks confirmation that it owes no defense and indemnity to the Insureds on the following grounds:

10. As it relates to Quintana [HOA], the Underlying Action seeks only injunctive and declaratory relief. Since the Underlying Action does not assert a claim for damages, and there is no coverage under the Great American Umbrella Policy for the cost of complying with injunctive or other equitable relief, there is no covered Loss alleged in the Underlying Action from which a defense or indemnity obligation can arise in the event the applicable limit of the Travelers Policy is exhausted.

\* \* \*

12. Although Gregg also served as a developer-appointed member of the “pre-turnover” Board of Directors of Quintana, the alleged representation was made when he was not a member of Quintana’s Board of Directors. Under such circumstances, exclusions contained or incorporated in the Great American Umbrella Policy bar coverage for the alleged acts or omissions of Gregg. Consequently, Great American can have no obligation with respect to the defense or indemnity of Gregg in the Underlying Action in the event the applicable limit of the Travelers Policy is exhausted.

GAIC Complaint, ¶¶10, 12. More specifically, with respect to Gregg, GAIC alleges that it has no

1 obligation to defend and indemnify “based on the application of the Builder, Developer or Sponsor  
2 Wrongful Act exclusion” contained in the GAIC Umbrella Policy and/or Claims Against  
3 Builder/Developer exclusion contained in the Travelers Policy. The GAIC Builder, Developer or  
4 Sponsor exclusion provides as follows:

5 **Builder, Developer or Sponsor Wrongful Act**

6 Any “wrongful act” which is directly or indirectly related in whole  
7 or in part to actual or alleged ‘wrongful act’ on the part of a builder,  
8 developer or sponsor or anyone affiliated with a builder, developer  
9 or sponsor. This exclusion shall not apply to claims while such an  
10 “Insured” is a member on the “Insured’s board of directors and in  
11 the capacity of such.

12 As used in this endorsement, “wrongful act” means any actual or  
13 alleged error, misstatement, misleading statement, act or omission,  
14 neglect or breach of duty.

15 The Travelers Policy exclusion for Claims Against Builder/Developer states as follows:

16 1. For purposes of this endorsement, the following terms have the  
17 following meanings:

18 a. “Builder/Developer Board Member” means any person  
19 appointed or elected to serve on the board of directors of the Parent  
20 Organization by the builder, developer or sponsor of the Parent  
21 Organization, and who was both a director or officer of the Parent  
22 Organization and a director, officer, employee or agent of such  
23 builder, developer, or sponsor of the Parent Organization;

24 b. “Policy Year” means each year of the Policy Period  
25 beginning with the Policy Inception Date and ending one year  
26 thereafter and each successive year until canceled or non-renewed.

27 2. The Insurer shall not be liable to make any payment for Loss in  
28 connection with any Claim made against any Builder/Developer  
Board Member after the end of the Policy Year in which such  
Builder/Developer Board Member ceases to serve on the board of  
directors of the Parent Organization.

See GAIC Complaint, ¶32.

**III. LEGAL STANDARD**

Under Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed if it fails to state a claim upon which relief can be granted. In deciding whether to grant a motion to dismiss, the court generally “may not consider any material beyond the pleadings.” Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). In considering a motion

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1 pursuant to Rule 12(b)(6), the court must accept as true all “well-pleaded factual allegations.”  
2 Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1950 (2009). The court must also construe the  
3 alleged facts in the light most favorable to the plaintiff. Love v. United States, 915 F.2d 1242,  
4 1245 (9th Cir. 1988). “[T]o survive a motion to dismiss, a complaint must contain sufficient  
5 factual matter, accepted as true, ‘to state a claim to relief that is plausible on its face.’” Iqbal, 556  
6 U.S. at 678 (internal citations omitted); see also Fed.R.Civ.P. 8(a).

#### 7 IV. DISCUSSION

##### 8 A. Motion to Dismiss

9 The Insureds contend that GAIC’s complaint fails to state a claim upon which relief may  
10 be granted because the GAIC Policy clearly requires GAIC to defend and indemnify. The  
11 Insureds raise essentially four arguments to support coverage. First, the Insureds contend that the  
12 underlying complaint alleges numerous “wrongful acts” within the meaning of the GAIC Policy:  
13 “errors, misstatements, misleading statements, acts, omissions, neglects, and breaches of duty in  
14 the way [the Quintana HOA] allegedly did not follow the CC&Rs or Design Guidelines, has  
15 neglected to provide the sublime, pastoral residential community that was allegedly promised to  
16 GIBCO, failed to produce records and meeting minutes, thereby violating the Davis-Stirling Act,  
17 among other wrongful acts.” Defendants’ Motion, pp.13-14. Second, the Insureds contend that  
18 the Policy does not exclude claims for injunctive relief. Rather, the Insureds construe the GAIC  
19 Policy as requiring only that a “claim” be made for a “wrongful act.” Third, the Insureds contend  
20 that the requests for attorney fees accompanying the state law claims for injunctive relief are  
21 compensable “Losses,” and that the term “damages” in the GAIC Policy should be construed in  
22 favor of the insured to include attorney fees. Fourth, the Insureds contend that with respect to  
23 Gregg, the underlying state court complaint now identifies him as a “volunteer,” and therefore the  
24 Builder/Developer exclusion does not apply.

25 The Insureds’ various substantive arguments do not support dismissal under Rule 12(b)(6),  
26 Fed.R.Civ.P. With respect to the Insureds’ first argument, GAIC’s complaint for declaratory relief  
27 is not predicated upon the absence of a “claim” or “wrongful act” in the underlying state court

1 action. Instead, GAIC alleges that the state law claims for injunctive and declaratory relief do not  
2 constitute a covered “Loss” within the meaning of the GAIC Umbrella Policy.

3 The Insureds’ second argument with respect to injunctive relief similarly fails. GAIC’s  
4 position is that the cost of complying with an injunction is barred from coverage under the Cost of  
5 Injunctive Relief Exclusion in the Travelers Policy, which “follows form” to the Travelers Policy.  
6 See GAIC’s Opposition, p. 14. The Travelers Policy Cost of Injunctive Relief Exclusion provides  
7 as follows:

8 The Insurers shall not be liable to make any payment for Loss, other  
9 than Defense Costs, in connection with any Claim made against any  
10 of the Insureds which constitute costs and expenses incurred or to be  
11 incurred to comply with an order, judgment or award of injunctive  
or other equitable relief of any kind, or that portion of a settlement  
encompassing injunctive or other equitable relief. . . .

12 See GAIC’s Opposition, p. 9.

13 The Insureds’ third argument regarding coverage for prevailing party attorney fees is also  
14 unavailing. Under the GAIC Policy, a compensable “Loss” is defined as follows:

15 the total amount excess of the applicable Retention which any  
16 Insured becomes legally obligated to pay as the result of all Claims  
17 first made against any Insured during the Policy Period for  
Wrongful Acts including, but not limited to, damages (including  
18 punitive or exemplary damages where insurable under applicable  
law), judgments, settlements and Defense Costs. . . .

19  
20 See GAIC’s Opposition, p.8. “Defense Costs” are defined as “that part of Loss consisting of  
21 “reasonable costs, charges and expenses (including but not limited to attorney fees) incurred in  
22 defending or investigating Claims, including appeals therefrom.” Although “Loss” includes  
23 “attorney fees,” the “attorney fees” must have been “incurred in defending or investigating  
24 Claims.” An award of attorney fees as a prevailing party falls outside the scope of insurable  
25 “Loss.” As for the Insureds’ alternative argument that attorney fees are a form of damages, GAIC  
26 contends that California law is to the contrary, citing Cutler-Orosi Unified School District v.  
27 Tulare County School Dist., 31 Cal.App.4th 617, 632 (1994). Thus, GAIC’s position is not

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1 foreclosed by California law.

2 Lastly, the Insureds contend that with respect to Gregg, the underlying state court  
3 complaint now identifies him as a “volunteer,” and therefore the Builder/Developer exclusion does  
4 not apply. GAIC’s allegations, however, are sufficient at the pleading stage. GAIC alleges as  
5 follows:

6 42. Great American seeks a declaration that it can have no  
7 obligation to defend and indemnify Gregg under the Great American  
8 Umbrella Policy based on the application of the Builder, Developer  
9 or Sponsor Wrongful Act exclusion contained in the [Umbrella]  
10 Policy and/or the Claims Against Builder/Developer exclusion  
contained in the Travelers Policy. Given that Gregg was no longer  
serving as a developer-appointed member of Quintana’s Board of  
Directors on January 30, 2008, which is the date of the telephone  
call during which the alleged misrepresentation was made, one or  
both of the exclusions apply to bar coverage for Gregg.

11 See GAIC’s Complaint, ¶42. The GAIC Builder/Developer exclusion bars coverage for any  
12 wrongful act “which is directly or indirectly related in whole or in part to actual or alleged  
13 ‘wrongful act’ on the part of the . . . developer . . . or anyone affiliated with a builder, developer or  
14 sponsor,” except “while such an ‘Insured’ is a member on the ‘Insured’s’ board of directors and in  
15 the capacity as such.” Id. at ¶25. The Travelers Builder/Developer exclusion similarly bars  
16 coverage for a developer-appointed board member of Quintana where a claim is made “after the  
17 end of the Policy Year” in which the developer-appointed board member “ceases to serve on the  
18 board of directors” of Quintana. GAIC’s allegations must be accepted as true at the pleading  
19 stage (see Ashcroft v. Iqbal, 556 U.S. at 1950) and are sufficient to state a claim for declaratory  
20 relief. Accordingly, the Insureds’ motion to dismiss is denied.

21 B. Motion to Stay

22 In general, a stay of a declaratory action to determine insurance coverage is appropriate  
23 when the coverage question turns on facts to be litigated in the underlying action. Montrose  
24 Chemical Corp. v. Superior Court, 6 Cal.4th 287, 301-302 (1983). In this case, however, GAIC’s  
25 positions with respect to the defense and indemnity of Quintana HOA and Gregg largely turn on  
26 policy interpretation. The Insureds identify two categories of potential factual overlap between the  
27 issues to be resolved in the underlying state court action and the present case; however, the

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1 potential overlap is not a sufficient basis to delay this case. The Insureds first contend that there  
2 remain factual issues regarding the “nature of relief” available in the underlying action. The  
3 Monterey County Superior Court, however, has already determined that “the only relief Plaintiff  
4 may seek in this action as against the HOA is injunctive.” See Monterey County Superior Court  
5 Order filed June 25, 2015. Second, the Insureds contend that there remain unresolved issues with  
6 respect to the nature of Gregg’s relationship with the Quintana HOA and the developer entities.  
7 The GAIC contends, however, that it has already been established that Gregg was no longer a  
8 member of Quintana’s board at the time he allegedly made misrepresentations, which is the only  
9 evidence needed to determine the applicability of the Builder/Developer exclusion. Therefore, a  
10 stay of the instant action is unwarranted. See GGIS Ins. Serv., Inc. v. Superior Court (Capitol  
11 Indem. Corp.), 168 Cal.App.4th 1493, 1505 (2008).

12 V. CONCLUSION

13 For the reasons set forth above, GAIC has pled sufficient facts upon which relief may be  
14 granted. Accordingly Defendants’ motion to dismiss or stay the proceedings is DENIED.  
15 Nothing in this Order should be construed as a decision on the underlying merits of the coverage  
16 issues.

17  
18 **IT IS SO ORDERED.**

19 Dated: August 11, 2017

20   
21 EDWARD J. DAVILA  
22 United States District Judge