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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

CLARENDON AMERICA INS. CO.,  
Plaintiff,  
vs.  
STEADFAST INS. CO.,  
Defendant.

CASE NO. 08cv1429 WQH (AJB)  
**ORDER**

HAYES, Judge:

The matter before the Court is Defendant's Ex Parte Motion to Continue Plaintiff's Motion for Summary Adjudication. (Doc. # 32).

**BACKGROUND**

This action concerns a dispute between two insurance companies about coverage of insureds. On August 6, 2008, Plaintiff initiated this action by filing its complaint. (Doc. # 1). The complaint alleges that both Plaintiff and Defendant issued commercial general liability policies to eight insured construction companies (the "Mutual Insureds"). *Id.* The complaint alleges that the Plaintiff's policies for the Mutual Insureds contains an "'other insurance clause' which calls for an equal or pro-rata share of the sums expended on behalf of an insured with other insurance." *Id.* at ¶ 32. The complaint alleges that Defendant's policies with the Mutual Insureds "contain a self insured retention endorsement" whereby Defendant's "duty

1 to defend and/or indemnify the insured for a potentially covered claim is triggered when the  
2 self insured retention amount has been satisfied by payment of defense costs or settlement.”  
3 *Id.* at ¶ 30. The complaint alleges that “[t]he terms of the endorsement [in Defendant’s  
4 policies] do not limit the source of the self insured retention in any way and do not require that  
5 the self insured retention be paid only from the insured’s own pocket.” *Id.* The complaint  
6 alleges “that retention can be and has been satisfied by payments made by [Plaintiff] on behalf  
7 of the insured” because Defendant’s “self insured retention endorsement does not have specific  
8 wording requiring that the payment must be personally satisfied by the insured.” *Id.* at ¶ 31.

9       The complaint alleges that each of the Mutual Insureds has been named as a defendant  
10 or cross-defendant in multiple construction defect actions which allege, “among other things,  
11 the potential for an occurrence of property damage during the” Defendant’s policy coverage  
12 periods. *Id.* at ¶ 33-34. The complaint alleges Plaintiff has indemnified the Mutual Insureds  
13 and has depleted the aggregate limits for the insureds. *Id.* at ¶ 35. The complaint alleges that  
14 Plaintiff’s payment of defense and/or settlement costs has satisfied the self insured retention  
15 amount and has triggered a right of contribution by Defendant. *Id.* at ¶ 36. The complaint  
16 alleges Defendant has failed to meet this obligation despite Plaintiff’s demands that it do so.  
17 *Id.* at ¶ 37. The complaint alleges Defendant has refused to pay on the grounds that the self  
18 insured retention must be payed by the Mutual Insureds themselves, and not by another  
19 insurance company. *Id.* at ¶ 38.

20       The complaint alleges causes of action for: (1) declaratory relief, (2) equitable  
21 indemnity, (3) equitable contribution, and (4) equitable subrogation. The Court dismissed the  
22 fourth cause of action on December 12, 2008. (Doc. # 14).

23       On September 18, 2009, Plaintiff filed a Motion for Summary Adjudication of Issues  
24 seeking a ruling from the Court determining the meaning of the self insured retention clause  
25 in Defendant’s contracts with the Mutual Insureds. (Doc. # 29). On September 25, 2009,  
26 Defendant filed its Ex Parte Motion to Continue Plaintiff’s Motion for Summary Adjudication.  
27 (Doc. # 32).

28

1 ANALYSIS

2 I. Contentions of the Parties

3 In its Motion for Summary Adjudication, Plaintiff contends that one of the types of Self  
4 Insured Retention forms, “SIR Endorsement Form A,” does not require that the Mutual  
5 Insureds pay the amount of the SIR out of pocket before Defendant’s duty to defend and  
6 indemnify is triggered. (Doc. # 29 at 2). Plaintiff seeks a ruling from the Court that SIR  
7 Endorsement Form A does not require the Mutual Insureds covered by this type of SIR policy  
8 to personally pay the SIR amount and that Plaintiff’s payment pursuant to their contracts with  
9 the mutual insureds satisfies the SIR amounts. (Doc. # 29 -1 at 2). Plaintiff contends that  
10 California courts have held that “the policy must make clear . . . that the named insured alone,  
11 and not other insurers, must pay the stated amount of the SIR.” *Id.* at 18 (*citing The Vons*  
12 *Companies v. U.S. Fire Insurance Co.*, 78 Cal. App. 4th 52, 64 (2000)). Plaintiff contends  
13 that “if a policy’s terms [are] ambiguous” as to whether an insured could use other insurance,  
14 California law allows other insurance coverage to fulfill a SIR requirement. *Id.* at 14. Plaintiff  
15 contends that the Mutual Insureds can satisfy the SIR obligation with money from Plaintiff,  
16 because the language of the SIR Endorsement Form A does not specifically state that other  
17 insurance cannot be used to fulfill the SIR obligation. (Doc. # 29-2 at 12).

18 Defendant’s Ex Parte Motion to Continue Motion for Summary Adjudication contends  
19 that summary adjudication of the meaning of SIR Endorsement Form A is premature because  
20 the parties have not yet conducted discovery. (Doc. # 32). Defendant contends that discovery  
21 is necessary to uncover “course of performance” evidence which will be admissible to show  
22 the meaning of the form. (Doc. # 32-1 at 3). Defendant contends that Plaintiff’s motion  
23 implicitly argues that the contract clauses at issue are ambiguous, which requires looking to  
24 extrinsic evidence to determine the parties’ mutual understanding of the meaning of the clauses  
25 under California law. *Id.* at 6.

26 Plaintiff contends that it is not raising ambiguity, rather it is arguing “that the  
27 endorsement is silent on the subject.” (Doc. # 35 at 5). Therefore, Plaintiff contends “the  
28 proposed discovery concerning course of performance is of no consequence with respect to the

1 issues raised by [Plaintiff’s] motion.” *Id.* at 9. Plaintiff further contends that even if *some*  
2 discovery might be relevant, Defendant has failed to carry its burden to establish that “the facts  
3 it seeks to discover actually exist.” *Id.*

## 4 **II. Applicable Legal Standard**

5 Pursuant to Federal Rule of Civil Procedure 56(f), “If a party opposing the motion  
6 shows by affidavit that, for specified reasons, it cannot present facts essential to justify its  
7 opposition, the court may: (1) deny the motion; (2) order a continuance to enable affidavits to  
8 be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any other  
9 just order.” Rule 56(f) “provides a device for litigants to avoid summary judgment when they  
10 have not had sufficient time to develop affirmative evidence.” *United States v. Kitsap*  
11 *Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002). A Rule 56(f) ““continuance of a motion  
12 for summary judgment for purposes of conducting discovery should be granted almost as a  
13 matter of course unless the non-moving party has not diligently pursued discovery of  
14 evidence.”” *Burlington N. Santa Fe R.R. Co. v. The Assiniboine and Souix Tribes of the Ft.*  
15 *Peck Reservation*, 323 F.3d 767, 773-74 (9th Cir. 2003) (*citing Wichita Falls Assoc. v. Banc*  
16 *One Corp.* 978 F.2d 915, 919 n.4 (5th Cir. 1992)). “Where . . . no discovery whatsoever has  
17 taken place, the party making a Rule 56(f) motion cannot be expected to frame its motion with  
18 great specificity as to the kind of discovery likely to turn up useful information, as the ground  
19 for such specificity has not yet been laid.” *Id.* at 774. “Although Rule 56(f) facially gives  
20 judges discretion to disallow discovery when the non-moving party cannot yet submit evidence  
21 supporting its opposition, the Supreme Court has restated the rule as requiring, rather than  
22 merely permitting, discovery ‘where the non-moving party has not had the opportunity to  
23 discover information that is essential to its opposition.’” *Metabolife Intn’l, Inc. v. Wornick*,  
24 264 F.3d 832, 846 (9th Cir. 2001) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250  
25 n. 5 (1986)).

## 26 **III. Ruling of the Court**

27 The relevant provisions of SIR Endorsement Form A in Defendant’s policies are as  
28 follows:

1           **I.     Self Insured Retention and Defense**

2                   **Costs -- Your Obligations**

3           A.     The “self insured retention amounts” stated in the Schedule of  
4                   endorsement apply as follows:

5                   1.     If a Per Occurrence “self insurance retention amount” is  
6                   shown in the schedule of this endorsement, you shall be  
7                   responsible for payment of all damages and defense costs for  
8                   each occurrence or offense until you have paid “self insured  
9                   retention amounts” and “defense costs” equal to the Per  
10                  Occurrence amounts shown in the schedule . . . .

11          F.     Representations

12                  By acceptance of this policy you agree that you will not procure  
13                  insurance for all or any part of the “self insured retention amounts”  
14                  shown in the Schedule of this endorsement. If such insurance is  
15                  procured, there will be no coverage under this policy.

16          . . .

17           **IV.   Definitions**

18          A.     “Self insured retention” means:

19                  The amount or amounts which you or any insured must pay for all  
20                  compensatory damages which you or any insured shall become legally  
21                  obligated to pay because of “bodily injury,” “property damage,”  
22                  advertising injury,” “personal injury,” medical payments or any other  
23                  such coverage included in the policy, sustained by one or more persons  
24                  or organizations.

25          (Doc. # 29-2 at 7).

26                  Plaintiff relies on two cases, *Vons* and *General Star*, in an attempt to establish that  
27                  these contract terms, as a matter of law, do not require the Mutual Insureds to pay the SIR  
28                  amount out of pocket. *Vons*, 78 Cal. App. 4th 52; *General Star National Ins. Co. v. World Oil*  
29                  *Co.*, 973 F. Supp. 943 (C.D. Cal. 1997). In *Vons*, the California Court of Appeals adopted the  
30                  reasoning from the Federal District Court’s order in *General Star*. In *General Star*, the court  
31                  addressed a SIR endorsement form which did not explicitly state that other insurance could not  
32                  be used to fulfill the insured’s SIR obligation. The court looked to extrinsic evidence to  
33                  determine whether “World Oil understood that it could not seek coverage for the amount of  
34                  the General Star deductible under the terms of the General Star policy.” 973 F. Supp. at 946.  
35                  In concluding that the contract did not prohibit World Oil from using other insurance coverage


1 to satisfy the SIR amount, the court determined that the contract did not “unambiguously  
2 prohibit World Oil from obtaining deductible coverage” *and* that General Star failed to raise  
3 a genuine issue of material fact as to whether World Oil understood that the contract did not  
4 allow other insurance to cover the deductible amount. *Id.* at 947.

5 Course of performance evidence or testimony by representatives of the Mutual Insureds  
6 may be relevant to determine whether Plaintiff is entitled to summary adjudication. Therefore,  
7 the Court will permit discovery to allow Defendant to respond to Plaintiff’s Motion for  
8 Summary Adjudication of Issues. Plaintiff’s motion is therefore denied pursuant to Rule 56(f).

9  
10 **ORDER**

11 IT IS HEREBY ORDERED that Defendant’s Ex Parte Motion to Continue Plaintiff’s  
12 Motion for Summary Adjudication (Doc. # 32) is **GRANTED**. IT IS FURTHER ORDERED  
13 that Plaintiff’s Motion for Summary Adjudication (Doc. # 29) of issues is **DENIED** without  
14 prejudice pursuant to Federal Rule of Civil Procedure 56(f).

15 DATED: January 29, 2010

16   
17 **WILLIAM Q. HAYES**  
United States District Judge

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