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

D.R. HORTON LOS ANGELES
HOLDING CO., INC.,

Plaintiff,

vs.
AMERICAN SAFETY INDEMNITY
COMPANY,

Defendant.

CASE NO. 10CV443 WQH (WMc)
ORDER

HAYES, Judge:

The matters before the Court are the Motion for Partial Summary Judgment filed by Plaintiff D.R. Horton (ECF No. 25) and the Motion for Summary Judgment, or Alternatively Partial Summary Judgment filed by Defendant American Safety Indemnity Company (ECF No. 33).

I. Procedural Background

This action arises out of an insurance dispute regarding coverage under four insurance policies (the “Policies”) issued by Defendant American Safety Indemnity Company (“ASIC”) to Ebensteiner Co. (“Ebensteiner”).¹ The policies at issue in this litigation are: XGI 01-1261-003 (“03 policy”) effective from August 1, 2001 through August 1, 2002; XGI 02-1261-004 (“04 policy”) effective from August 1, 2002 through August 1, 2003; XGI 03-1261-005 (“05 policy”) effective from August 1, 2003 through August 1, 2004; and ESL 0010410406 (“06

¹ Ebensteiner Co. is not a party to this action.

1 policy”) effective from August 1, 2004 through August 1, 2005.

2 On January 15, 2010, Plaintiff D.R. Horton Los Angeles Holding Co., Inc. (“D.R.
3 Horton”) filed a Complaint against ASIC which was removed to this Court. (ECF No. 1). The
4 Complaint alleges that D.R. Horton was engaged in a real estate development project named
5 Canyon Gate (“Canyon Gate”) and that D.R. Horton entered into a subcontractor agreement
6 with Ebensteiner for grading work on the project. *Id.* at 10. The Complaint alleges that
7 Ebensteiner purchased general liability insurance policies from ASIC and named D.R. Horton
8 as an additional insured and third-party beneficiary of ASIC’s obligations to Ebensteiner. *Id.*
9 at 10-11.

10 The Complaint alleges that D.R. Horton received several notices to builder and several
11 complaints and cross-complaints were filed against D.R. Horton in the following cases: *Chang*
12 *O. Kim, et al. v. City of Santa Clarita, et al.*, Los Angeles Superior Court Case No. BC407614
13 (the “*Kim case*”), *Canyon Gate Maint. Ass’n v. City of Santa Clarita, et al.*, Los Angeles
14 Superior Court Case No. BC415663 (the “*Canyon Gate case*”), and *Warrick, et al. v. City of*
15 *Santa Clarita, et al.*, Los Angeles Superior Court Case No. PC046442 (the “*Warrick case*”)
16 (collectively “the underlying actions”). The Complaint alleges that D.R. Horton made claims
17 for benefits under the policies regarding the underlying actions and that ASIC declined
18 coverage and refused to defend D.R. Horton.

19 D.R. Horton asserts a claim for breach of contract and breach of the implied covenant
20 of good faith and fair dealings against ASIC for failure to provide D.R. Horton with a defense
21 in the underlying actions, for withholding or delaying payments, for failing to properly
22 investigate D.R. Horton’s claims, and for refusing and failing to respond to D.R. Horton’s
23 request for benefits and coverage. D.R. Horton also seeks declaratory relief “that [ASIC is]
24 obligated to defend and indemnify [D.R. Horton] under said Policies; and, [t]hat [ASIC is]
25 obligated to pay for the cost of [D.R. Horton’s] defense in [the underlying actions] and to pay
26 expenses and other settlement costs in connection with [the underlying actions].” *Id.* at 14.

27 On April 12, 2010, ASIC filed an Answer. (ECF No. 4). On October 22, 2010, ASIC
28 filed a Counterclaim against D.R. Horton asserting a claim for declaratory relief. ASIC asserts

1 that there is no potential coverage for Ebensteiner and that there is no potential coverage for
2 Plaintiff D.R. Horton as an additional insured. (ECF No. 17).

3 On April 6, 2011, D.R. Horton filed a Motion for Partial Summary Judgment. (ECF No.
4 25). On May 2, 2011, ASIC filed an Opposition. (ECF No. 41). On May 9, 2011, D.R.
5 Horton filed a Reply. (ECF No. 42). On May 20, 2011, D.R. Horton filed a Request for
6 Judicial Notice in Support of its Motion for Partial Summary Judgment. (ECF No. 44).

7 On April 15, 2011, ASIC filed a Motion for Summary Judgment, or Alternatively
8 Partial Summary Judgment. (ECF No. 33). On May 2, 2011, D.R. Horton filed an Opposition
9 (ECF Nos. 39-40). On May 9, 2011, ASIC filed a Reply. (ECF No. 43).

10 On May 20, 2011, D.R. Horton filed a Request for Judicial Notice. (ECF No. 44). On
11 May 23, 2011, ASIC filed an Opposition. (ECF No. 45).

12 On May 27, 2011, the Court heard oral argument on the motions. (ECF No. 46).

13 On August 31, 2011, ASIC filed a Supplemental Brief.² (ECF No. 54). On September
14 14, 2011, D.R. Horton filed an Opposition to the Supplemental Brief. (ECF No. 55).

15 **II. Factual Background**

16 The 03 policy was issued by ASIC to Ebensteiner and covered the period from August
17 1, 2001 through August 1, 2002. (03 Policy, ECF No. 35-2 at 2). On March 4, 2002,
18 Ebensteiner began performing grading work at the Canyon Gate project. (ASIC Stmt. of
19 Undisputed Facts, ECF No. 33-2 at 3; Compl. ECF No. 1 at 10).

20 The 04 policy was issued by ASIC to Ebensteiner and covered the period from August
21 1, 2002 through August 1, 2003. (04 Policy, ECF No. 35-3 at 2).

22 On January 23, 2003, “certain owners of pre-existing single-family homes in a
23 subdivision which was located ... adjacent to the Canyon Gate development ... instituted
24 lawsuits against three D.R. Horton entities consolidated as [*Fessler*].” (ASIC Stmt. of
25 Undisputed Facts, ECF No. 33-2 at 7; *see also Fessler* Compl. ECF No. 33-9 at 10). “The
26 *Fessler* homeowners alleged damage to their homes due to the grading operations of
27

28 ² In the Opposition, ASIC sought “more time to oppose this motion based on
outstanding discovery issues that may defeat this motion.” (ECF No. 41 at 30). The parties
were permitted to file supplemental briefing.

1 Ebensteiner for D.R. Horton while grading the adjacent Canyon Gate project.” (ASIC Stmt.
2 of Undisputed Facts, ECF No. 33-2 at 7-8). “[T]he homeowners in the *Fessler* action alleged
3 ‘property damage’ to their homes took place in 2002, commencing during the [03] policy
4 [ASIC] issued to Ebensteiner.” *Id.* at 8.

5 The 05 policy was issued by ASIC to Ebensteiner and covered the period from August
6 1, 2003 through August 1, 2004. (05 Policy, ECF No. 35-4 at 2).

7 During the course of the *Fessler* litigation, ASIC received Ebensteiner’s job file which
8 “reflected rough grading daily reports through May 2003.” (Decl. Jean Fisher, ASIC attorney,
9 ECF No. 35 at 4 ¶ 12). During the course of the *Fessler* litigation, ASIC received the
10 Deposition of Jim Jordan who stated that construction of homes could not have begun at the
11 Canyon Gate project until after May 2003 when the final tract map was approved. (Decl. Jean
12 Fisher, ASIC attorney, ECF No. 35 at 4 ¶ 12; Depo. Jim Jordan, City of Santa Clarita, ECF No.
13 35-6 at 2, 5-6).

14 “After May 2003, [D.R. Horton] obtained various bids for the grading of the Canyon
15 Gate lots.” (ASIC Stmt. of Undisputed Facts, ECF No. 41-2 at 28). Ebensteiner was selected
16 to perform the additional work.

17 The 06 policy was issued by ASIC to Ebensteiner and covered the period from August
18 1, 2004 through August 1, 2005. (06 Policy, ECF No. 25-10 at 2).

19 In October 2007, “ASIC paid for the defense of its Named Insured, Ebensteiner, and
20 three D.R. Horton entities as purported ‘additional insureds’ under Ebensteiner’s [03 policy]”
21 to settle the *Fessler* litigation. (ASIC Stmt. of Undisputed Facts, ECF No. 33-2 at 8;
22 Settlement Agmt., ECF No. 35-5 at 2).

23 On November 9, 2007, June Ebensteiner provided a Declaration to ASIC which stated:
24 “The Ebensteiner Co. and the Ebensteiner Family Trust ceased to do business and had no
25 ongoing operations as of July 31, 2004 [the end of the 05 policy period], and was not
26 conducting business” (Decl. June Ebensteiner, ECF No. 35-7 at 2). On November 6, 2008,
27 ASIC and June Ebensteiner entered into an agreement with ASIC to rescind the 06 policy.
28 (ASIC letter, ECF No. 35-8 at 2-4, ASIC 2045-07).

On February 27, 2009, the complaint in the *Kim* case, one of the underlying actions, was

1 filed. (*Kim* Compl., ECF No. 25-12 at 123). The *Kim* plaintiffs are homeowners within the
2 Canyon Gate project who allege that between March 6, 2002 and January 2003, “multiple
3 backcut failures, earth movement, and fissures and cracks in the ground surface occurred
4 during the implementation of the unapproved design change for the shear keys by D.R. Horton,
5 its subcontractors and engineers. During this entire time, D.R. Horton and its grading
6 subcontractor were performing grading of the Canyon Gate project and extension of Golden
7 Valley Road without approval from the City and doing so at ‘their own risk.’” *Id.* at 138. The
8 *Kim* plaintiffs allege that monitors “showed significant movement along the slide planes of
9 these landslides commenced almost immediately after D.R. Horton began the rough grading
10 of Canyon Gate, which movement continues to the present date.” *Id.* at 143. The *Kim*
11 plaintiffs allege that “the geologic hazards ... substantially interfered with the Plaintiffs use and
12 enjoyment of their land.” *Id.* at 161. The *Kim* plaintiffs allege: “As a direct, foreseeable and
13 proximate result of said interference, Plaintiffs have incurred physical damage to their land,
14 improvements and structures located on their residential real properties and/or a diminution-in-
15 value of their residential properties as a result” *Id.* at 161-62.

16 On April 2, 2009, D.R. Horton tendered a request for coverage to ASIC based on the
17 *Kim* case. (D.R. Horton letter, ECF No. 25-12 at 198).

18 On June 11, 2009, the complaint in the *Canyon Gate* case was filed on behalf of a
19 homeowner’s association for the Canyon Gate project. The Complaint asserted essentially the
20 same facts and claims as asserted in the *Kim* case. (*Canyon Gate* Compl., ECF No. 25-13 at
21 2). The *Canyon Gate* case also asserts a claim of private nuisance against D.R. Horton and
22 other builders and stated that: “As a direct, foreseeable and proximate result of said
23 interference, [Plaintiff has] incurred physical damage to its Common Areas.” *Id.* at 34.

24 On September 22, 2009, the complaint in the *Warrick* case was filed asserting
25 essentially the same facts and claims as asserted in the *Kim* case. (*Warrick* Compl., ECF No.
26 25-13 at 61). The *Warrick* plaintiffs are homeowners within the Canyon Gate project who
27 assert a claim of private nuisance against D.R. Horton and other builders and allege: “As a
28 direct, foreseeable and proximate result of said interference, [Plaintiffs] have incurred physical
damage to their land, improvements and structures located on their residential real properties

1 and/or a diminution-in-value of their residential properties.” *Id.* at 93.

2 On October 1, 2009, D.R. Horton tendered a request upon ASIC for coverage regarding
3 the *Kim, Canyon Gate, and Warrick* cases which “concern[ed] the grading and soils
4 stabilization work performed during construction of [the Canyon Gate project].” (D.R. Horton
5 letter, ECF No. 25-13 at 130). D.R. Horton provided copies of several notices to builder
6 received by D.R. Horton from November 14, 2008 through June 5, 2009 as well as copies of
7 the *Kim, Canyon Gate, and Warrick* complaints. *Id.* at 130-31.

8 The insurance policies at issue provide coverage as follows:

9 We will pay those sums that the insured becomes legally obligated to
10 pay as damages because of ‘bodily injury’ or ‘property damage’ to
11 which this insurance applies. We will have the right and duty to defend
12 the insured against any ‘suit’ seeking those damages. However, we will
13 have no duty to defend the insured against any ‘suit’ seeking damages
14 for ‘bodily injury’ or ‘property damage’ to which this insurance does
15 not apply....

16 This insurance applies to ‘bodily injury’ and ‘property damage’
17 only if:

- 18 (1) The ‘bodily injury’ or ‘property damage’ is caused by an
19 ‘occurrence’ that takes place in the ‘coverage territory’;
20 and
- 21 (2) The ‘bodily injury’ or ‘property damage’ occurs during
22 the policy period.

23 (03 Policy, ECF No. 25-8 at 28; 04-05 Policies, ECF No. 25-9 at 4, 66; 06 Policy, ECF No. 25-
24 10 at 4).

25 The term “property damage” is defined as:

- 26 a. Physical injury to tangible property, including all resulting loss
27 of use of that property. All such loss of use shall be deemed to
28 occur at the time of the physical injury that caused it; or
- 29 b. Loss of use of tangible property that is not physically injured.
30 All such loss of use shall be deemed to occur at the time of the
31 ‘occurrence’ that caused it.

32 (03 Policy, ECF No. 25-8 at 40; 04-05 Policies, ECF No. 25-9 at 16, 78; 06 Policy, ECF No.
33 25-10 at 16). The term “occurrence” is defined as: “‘Occurrence’ means an accident, including
34 continuous or repeated exposure to substantially the same general harmful conditions.” (03
35 Policy, ECF No. 25-8 at 39; 04-05 Policies, ECF No. 25-9 at 15, 77; 06 Policy, ECF No. 25-10
36 at 20).

1 On October 29, 2009, ASIC issued a letter to D.R. Horton declining D.R. Horton's
2 request for coverage under the policies. The letter stated that ASIC had "evaluated the job file
3 of the named insured to reaffirm that all of its work was concluded May 13, 2003" (ASIC
4 letter, ECF No. 35-9 at 3). The letter states that ASIC was "not aware of any ... tangible
5 property existing at the plaintiffs' lots during [the 04 policy], and we are informed construction
6 occurred at Canyon Gate after 8/01/03 [during the 05 policy]." *Id.* The letter states:

7 In regard to [the 03 policy], there is no potential for 'property damage'
8 claimed by plaintiffs as there was no 'property damage' existing on the
9 lots during the policy period. The homes at issue in the new lawsuit
10 were not started until after the expiration of [the 03 policy] and
11 therefore, there is no potential for covered 'property damage' under this
12 policy.

13 *Id.* at 5.

14 The letter stated that the 98 10 additional insured endorsement required a project to be
15 "on file" but "a review of the underwriting file shows no indication of this project on file...."

16 *Id.* at 8. The letter stated:

17 As this Additional Insured Endorsement applies to on-going operations
18 only, and the claim filed by the homeowners is for completed
19 operations, there would be no Additional Insured coverage for this
20 claim.... Further, the coverage was intended to provide additional
21 insured coverage for liability arising out of or relating to the Named
22 Insured's sole negligence whereas the complaint of *Kim et. al.* does not
23 pertain to the sole negligence of Ebensteiner Co. While DR Horton may
24 have qualified as an additional insured on the [03] policy issued to
25 Ebensteiner during its work to cover the claims in the *Fessler* matter,
26 there is no coverage available for this claim involving completed
27 operations. In comparison, there is no additional insured coverage
28 available to DR Horton for these claims involving 'property damage'
which potentially first arose at a time when Ebensteiner's operations
were completed and were not ongoing.

Id. The letter does not address coverage under the 06 policy.

23 **III. Contentions of the Parties**

24 D.R. Horton contends that it is an additional insured under two endorsements to the 03,
25 04, 05, and 06 policies. D.R. Horton contends that ASIC improperly relied on policy
26 exclusions to deny coverage and to refuse to defend D.R. Horton. D.R. Horton contends that
27 the damage alleged in the underlying litigation was not Ebensteiner's work product. D.R.
28 Horton contends that the damage alleged in the underlying litigation occurred during
Ebensteiner's ongoing operations. D.R. Horton contends that the damage alleged in the

1 underlying litigation may have arisen out of Ebensteiner's sole negligence. D.R. Horton
2 contends that D.R. Horton's wrap policies do not apply to this case.

3 D.R. Horton further contends that the 03 policy limits were not exhausted by ASIC's
4 payment of \$1,000,000 to settle the *Fessler* suit. D.R. Horton contends that Ebensteiner
5 performed work during the 06 policy period and that the rescission of the 06 policy was barred
6 as a matter of law. D.R. Horton contends that ASIC's duty to defend began when D.R. Horton
7 provided ASIC with a notice to builder. D.R. Horton contends that it has asserted a valid claim
8 of bad faith.

9 ASIC contends that D.R. Horton was not an additional insured under the 03, 04, 05, and
10 06 policies. Even if D.R. Horton was an additional insured, ASIC contends that the work
11 product exclusions eliminate coverage because the property damage arose from Ebensteiner's
12 work. ASIC contends that the ongoing operations restriction eliminates coverage in this case
13 because the property damage alleged in the underlying litigation arose from completed
14 operations. ASIC contends that the sole negligence restriction eliminates coverage in this case
15 because the underlying actions do not allege damage that arose out of Ebensteiner's sole
16 negligence. ASIC contends that the wrap policy provision eliminates coverage in this case
17 because D.R. Horton has not tendered a request to other insurers under the wrap policies.

18 ASIC further contends that the 03 policy was exhausted by ASIC's payment of
19 \$1,000,000 to settle the *Fessler* suit and that the 06 policy was properly rescinded. ASIC
20 contends that a notice to builder did not trigger the duty to defend. ASIC contends that D.R.
21 Horton's bad faith claim fails as a matter of law and that D.R. Horton's declaratory relief claim
22 is redundant.

23 **IV. Discussion**

24 Summary judgment is appropriate if there is no genuine issue as to any material fact and
25 the moving party is entitled to a judgment as a matter of law. *See* FED. R. CIV. P. 56(c). The
26 moving party has the initial burden of demonstrating that summary judgment is proper. *See*
27 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970). The burden then shifts to the opposing
28 party to provide admissible evidence beyond the pleadings to show that summary judgment
is not appropriate. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 324 (1986). "In

1 considering a motion for summary judgment, the court may not weigh the evidence or make
2 credibility determinations, and is required to draw all inferences in a light most favorable to
3 the non-moving party.” *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997); *see also*
4 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

5 To avoid summary judgment, the nonmovant must designate which specific facts show
6 that there is a genuine issue for trial. *See Anderson*, 477 U.S. at 256; *Harper v. Wallingford*,
7 877 F.2d 728, 731 (9th Cir. 1989). A “material” fact is one that is relevant to an element of
8 a claim or defense and whose existence might affect the outcome of the suit. *Matsushita Elec.*
9 *Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The materiality of a fact is
10 thus determined by the substantive law governing the claim or defense. *See Anderson*, 477
11 U.S. at 252; *Celotex*, 477 U.S. at 322; *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

12 Generally, “interpretation of an insurance policy is a question of law.” *Waller v. Truck*
13 *Ins. Exchange, Inc.*, 11 Cal.4th 1, 18 (1995). “Insurance policies are contracts to which
14 ordinary rules of contractual interpretation apply.” *Maryland Casualty Co. v. Nationwide Ins.*
15 *Co.*, 65 Cal. App. 4th 21, 28 (1998). The court should “look first to the language of the
16 contract in order to ascertain its plain meaning ...” *Waller*, 11 Cal.4th at 18. “A policy
17 provision is ambiguous when it is capable of two or more constructions both of which are
18 reasonable.” *Id.* (quotations omitted). “Any ambiguous terms are resolved in the insureds’
19 favor, consistent with the insureds’ reasonable expectations.” *Kazi v. State Farm Fire and*
20 *Cas. Co.*, 24 Cal. 4th 871, 879 (2001).

21 “An insurer must defend any action that asserts a claim potentially seeking damages
22 within the coverage of the policy.” *Maryland Casualty Co.*, 65 Cal. App. 4th at 32 (quoting
23 *Montrose Chemical Corp. v. Super. Ct.*, 6 Cal. 4th 287, 295 n.3, 300 (1993)); *see also Buss v.*
24 *Superior Court*, 16 Cal. 4th 35, 46 n.10 (1997) (holding that the duty to defend is dependent
25 on “at least potential coverage.”). “[T]he duty to defend may exist even where coverage is in
26 doubt and ultimately does not develop” *Kazi*, 24 Cal. 4th at 879; *see also Quan v. Truck Ins.*
27 *Exchange*, 67 Cal. App. 4th 583 (1998) (explaining that because interpretation of an insurance
28 policy is a question of law based on the contract “writings or memos by insurance company
personnel venturing their opinions as to whether a defense should be afforded do not constitute

1 ‘admissions’ of a defense duty.”). “[F]or an insurer, the existence of a duty to defend turns not
2 upon the ultimate adjudication of coverage under its policy of insurance, but upon those facts
3 known by the insurer at the inception of a third party lawsuit.” *Montrose*, 4 Cal. 4th at 295
4 (internal citations and quotations omitted). “[T]he duty to defend, although broad, is not
5 unlimited; it is measured by the nature and kinds of risks covered by the policy.” *Waller*, 11
6 Cal.4th at 19. “[W]here there is no potential for coverage, there is no duty to defend.” *Infinet*
7 *Marketing Services, Inc. v. American Motorist Ins. Co.*, 150 Cal. App. 4th 168, 177 (2007); *see*
8 *also Hudson Ins. Co. v. Colony Ins. Co.*, 624 F.3d 1264, 1268 (9th Cir. 2010) (holding that the
9 duty to defend does not exist where there is no legal theory or facts in the underlying complaint
10 to potentially give rise to coverage) (citing *Gunderson v. Fire Insurance Exchange*, 37 Cal.
11 App. 4th 1106 (1995)).

12 Accordingly, “[i]n resolving the question of whether a duty to defend exists ... the
13 insurer has a higher burden than the insured.” *American States Ins. Co. v. Progressive Cas.*
14 *Ins. Co.*, 180 Cal. App. 4th 18, 27 (Cal. App. 2009). “[T]he insured need only show that the
15 underlying claim may fall within policy coverage; the insurer must prove it cannot’; the
16 insurer, in other words, must present undisputed facts that eliminate any possibility of
17 coverage.” *Id.* (emphasis and citations omitted).

18 **A. Additional Insured**

19 **i. Additional Insured Endorsement 20 10**

20 D.R. Horton contends that there was “at least a potential” that it was an additional
21 insured under the 03 and 04 policies pursuant to 20 10 endorsements on the grounds that: (1)
22 Ebensteiner’s broker, Baccarella Insurance Services (“Baccarella”), issued Certificates of
23 Insurance stating that D.R. Horton was additional insured under the 03 and 04 policies, and (2)
24 ASIC was aware that Baccarella issued Certificates of Insurance and specifically authorized
25 Baccarella to do so. (ECF No. 25-1 at 18).

26 ASIC contends that D.R. Horton was not an additional insured under any 20 10
27 endorsements on the grounds that the policies did not contain 20 10 endorsements and the
28 purported endorsements that D.R. Horton has produced were created by Ebensteiner’s agent
Baccarella, not ASIC. ASIC contends that the 20 10 endorsements from Ebensteiner’s agent

1 Baccarella to D.R. Horton were unauthorized and were not approved by ASIC. ASIC contends
2 that it cannot be liable for the acts of Bacarella as an “ostensible agent” on the grounds that it
3 did not authorize or provide apparent authority to Baccarella to act as an agent of ASIC. (ECF
4 No. 43 at 10).

5 D.R. Horton has submitted a Certificate of Liability Insurance issued by Ebensteiner’s
6 agent Baccarella to Ebensteiner for the 03 policy which states: “RE: Canyon Gate ... [D.R.
7 Horton is] hereby named as additional insured per CG2010 (11-85) attached.” (ECF No. 25-10
8 at 61). D.R. Horton has also submitted a Certificate of Liability Insurance issued by
9 Ebensteiner’s agent Baccarella to Ebensteiner for the 04 policy which states: “RE: Canyon
10 Gate ... [D.R. Horton is] added as additional insured only as their interest may appear per
11 CG2010 (11-85).” (ECF No. 25-10 at 63). D.R. Horton has also submitted the 20 10
12 additional insured endorsement form issued by Ebensteiner’s agent Baccarella. *Id.* at 64-65.

13 ASIC has submitted a quote for insurance dated July 17, 2002, on “American Safety
14 Insurance Services, Inc.” letterhead from Frank Dunne, ASIC’s Underwriter, to Jack Smith of
15 “Brown & Riding,” ASIC’s surplus line producer, regarding “Insurance Proposal for
16 Ebensteiner Company” which states the terms of the insurance. (ECF No. 35-12 at 2). The
17 quote allows for the enhancement of “additional Insured Wording where required by written
18 contract and as per [ASIC] Additional Insured Endorsements.”³ *Id.* at 3. The quote contains
19 a section titled “Warranties/Requirements” which states:

20 The company has granted the Producer named above the authority to
21 issue certificates of insurance on behalf of the Named Insured.
22 However, in no event does such producer have the authority to issue
23 certificates of insurance which include any addition to or modification
24 of the policy terms and conditions, or to add any additional insureds
and/or change any term, condition, provision of the policy unless such
changes or modifications are first approved by policy endorsement
issued by the company and signed by an officer.

25 *Id.*

26 D.R. Horton has submitted a fax dated July 22, 2002, on “American Safety Insurance
27 Services, Inc” letterhead, from Candy Woodward, Assistant Underwriter for ASIC, to Jack

28 ³ The policies each contain a blank 98 15 Additional Insured endorsement. The policies
do not contain a blank 20 10 Additional Insured endorsement.

1 Smith of "Brown & Riding," ASIC's surplus line producer, with the subject line "Ebensteiner
2 Company" which states: "I spoke with Frank [ASIC's Underwriter] this morning concerning
3 the CG2010's on this account. He said that he didn't have a problem with 15-20 of them but
4 anymore than that he would have to look into I noticed the list has many more than that so
5 I don't know what can be done with such a large list." (ECF No. 25-10 at 67). ASIC has
6 submitted a letter dated July 18, 2002, from "Ron Arody for Jack Smith" of Brown & Riding,
7 ASIC's surplus line producer, regarding Ebensteiner Co. which states: "Attached please find
8 a copy of the list of Additional Insureds regarding the GC 20 10 11/85 on the current policy."
9 (ECF No. 35-16 at 4). The list includes 39 additional insureds. D.R. Horton does not appear
10 on that list.

11 ASIC has submitted a letter dated July 28, 2003, from Kelly Nguyen of Brown &
12 Riding, ASIC's surplus line producer, to Frank Dunn, ASIC's Underwriter, which states:

13 Last year you have (sic) agreed to provide CG 2010 1185 on certain
14 projects. Some of those projects are on going and we need to continue
15 with the CG2010 1185 on the renewed policy. Please endorse the
policy to provide CG2010 1185 for those on going projects. An
updated list of those projects is attached.

16 (ECF No. 35-17 at 2). The attached list includes 39 additional insureds. D.R. Horton does not
17 appear on that list.

18 ASIC has submitted a quote for insurance dated August 13, 2003 regarding the 05
19 policy which states:

20 The company has granted the Producer named above the authority to
21 issue certificates of insurance on behalf of the Named Insured.
22 However, in no event does such producer have the authority to issue
23 certificates of insurance which include any addition to or modification
of the policy terms and conditions, or to add any additional insureds
and/or change any term, condition, provision of the policy unless such
changes or modifications are first approved by policy endorsement
issued by the company and signed by an officer.

24 (ECF No. 35-13 at 4).

25 Under California law a principal may be liable for the acts of an "ostensible agent"
26 where the following three elements are met: "(1) 'the person dealing with the agent must do
27 so with belief in the agents authority and this belief must be a reasonable one,' (2) 'such belief
28 must be generated by some act or neglect of the principal sought to be charged,' and (3) 'the

1 third person in relying on the agent’s apparent authority must not be guilty of negligence.”
2 *Certain Underwriters at Lloyd's of London v. Am. Safety Ins. Servs., Inc.*, 702 F. Supp. 2d
3 1169, 1173 (C.D. Cal. 2010) (quoting *Mejia v. Community Hospital of San Bernardino*, 99 Cal.
4 App. 4th 1448, 1456 (2002)); *see also Am. Cas. Co. of Reading, Penn. v. Krieger*, 181 F.3d
5 1113, 1121 (9th Cir. 1999) (“An agency is ostensible when the principal intentionally, or by
6 want of ordinary care, causes a third person to believe another to be his agent who is not really
7 employed by him.”) (quoting Cal. Civ. Code § 2300). Ostensible agency has been applied to
8 the insurance context as existing “where the principal knows that the agent holds himself out
9 as clothed with certain authority, and remains silent.” *Preis v. Am. Indem. Co.*, 220 Cal. App.
10 3d 752, 760 (1990); *see also Am. Cas. Co. of Reading, Penn.*, 181 F.3d at 1121 (explaining that
11 the principal is liable for the acts of another where it “intentionally or by want of ordinary care
12 has caused or allowed [the third party] to believe the agent possesses such authority....”); *see*
13 *also Alex Robertson Co. v. Imperial Casualty & Indemnity Co.*, 8 Cal. App. 4th 338, 343-46
14 (1992).

15 In this case, the 03, 04, 05, and 06 policies issued by ASIC do not contain generic form
16 20 10 endorsements. The form 20 10 additional insured endorsements that D.R. Horton
17 obtained regarding the 03 and 04 policies were provided by Ebensteiner, who had obtained
18 them from Ebensteiner’s agent Baccarella. ASIC limited the authority of its underwriter to
19 offer certificates of insurance only in circumstances where any additional insured enhancement
20 was first approved by ASIC and the approval was signed by an officer. ASIC’s surplus line
21 producer, Brown & Riding, issued certificates of insurance to a list of purported additional
22 insureds; however, the list did include D.R. Horton or the Canyon Gate project. There is no
23 evidence that ASIC was aware that Ebensteiner’s agent Baccarella issued form 20 10
24 additional insured endorsements to D.R. Horton or that ASIC granted Ebensteiner’s agent
25 Baccarella authority to issue form 20 10 additional insured endorsements to D.R. Horton. The
26 Court concludes that any belief that D.R. Horton may have had regarding its status as an
27 additional insured pursuant to a form 20 10 endorsement was not “generated by some act or
28 neglect of the principal sought to be charged[.]” *Certain Underwriters at Lloyd's of London*,
702 F.Supp.2d at 1173. Accordingly, any action against D.R. Horton could not assert a “claim

1 potentially seeking damages within the coverage of the policy[]” pursuant to any 20 10
2 additional insured endorsement. *Montrose Chemical Corp.*, 6 Cal. 4th at 300. The record
3 shows that ASIC did not have a duty to defend D.R. Horton under the policies pursuant to any
4 20 10 endorsements

5 **ii. Additional Insured Endorsement 98 15**

6 D.R. Horton contends that it “qualified, at least potentially, as an additional insured
7 under the [98 15] endorsement” on the grounds that the subcontractor agreement between D.R.
8 Horton and Ebensteiner required Ebensteiner to name D. R. Horton as an additional insured
9 and the Canyon Gate project was on file with ASIC. (ECF No. 25-1 at 18). D.R. Horton
10 contends that ASIC has “acknowledged the on file requirement can be met by showing
11 anything in writing that is contained in [ASIC’s] own files indicating the project site was
12 covered.” (ECF No. 42 at 8). D.R. Horton contends that a waiver of subrogation form
13 attached to the 03 policy shows that the Canyon Gate project was on file.

14 ASIC contends that D.R. Horton is not an additional insured pursuant to the 98 15
15 endorsement on the grounds that the Canyon Gate project was not on file with ASIC. ASIC
16 contends that “[t]o be on file, there must be some indication of approval by the underwriter
17 and/or within the policy that a project is covered.” (ECF No. 41 at 21.) ASIC contends that
18 the generic endorsements attached to the policies do not name D. R. Horton or the Canyon
19 Gate project so the project was not on file.⁴

20
21 ⁴ D.R. Horton contends that according to the terms of the *Fessler* settlement agreement,
22 it is conclusively presumed to be true that D.R. Horton was named as an additional insured.
23 The settlement agreement states that it was made: “[w]ithout admission by any party hereto
24 of any liability, and for the purpose of settlement of the Action [ASIC] and [D.R. Horton] ...
25 wish to settle existing claims” (ECF No. 25-11 at 125). The settlement agreement states:
26 “American Safety issued policies, [03, 04] and XG-1021261-008 ... to Ebensteiner Co. which
27 named [D.R. Horton] as an additional insured.” *Id.*

28 California Evidence Code section 622 provides: “The facts recited in a written
instrument are conclusively presumed to be true as between the parties thereto, or their
successors in interest; but this rule does not apply to the recital of a consideration.” Cal. Evid.
Code § 622. In *People ex rel. Dept. of Public Works v. Forster*, 58 Cal.2d 257 (1962), the
court held that, “the declaration (in an offer of compromise) of facts involved in the
controversy which are not mere concessions made for the purpose of such offer, but are
statements of independent facts, are admissible against the party making them.” *Id.* at
263(quotations omitted). However, “[t]he rule of the *Forster* case is changed by [California
Evidence Code section 1152(a)] because that rule prevents the complete candor between the
parties that is most conducive to settlement.” *Caira v. Offner*, 126 Cal. App. 4th 12, 33 (2005);
see also Cal. Evid. Code § 1152(a) (“Evidence ... [of] any conduct or statements made in

1 The 03, 04, 05, and 06 policies each contain a generic form 98 15 titled “Additional
2 Insured” endorsement which states: “Name of person or organization: Those parties required
3 to be named as an Additional Insured in a written contract with the Named Insured entered into
4 prior to the loss or occurrence. Name of Project: Those projects on file with the Company.”
5 (ECF No. 25-8 at 27, 57; ECF No. 25-9 at 3, 33, 64, 95; ECF No. 25-10 at 3, 30).

6 D.R. Horton has submitted the subcontract between D.R. Horton and Ebensteiner dated
7 April 12, 2002, which required Ebensteiner provide D.R. Horton with a certificate of insurance
8 that “name[s] D.R. Horton ... as an additional insured.” (ECF No. 25-8 at 24). ASIC does not
9 dispute that the subcontractor agreement between D.R. Horton and Ebensteiner required
10 Ebensteiner to name D. R. Horton as an additional insured.

11 D.R. Horton has submitted a letter dated April 24, 2002, from ASIC to Brown & Riding
12 stating, as the subject line “Ebensteiner Co. Endorsement ES 98 13 08 99 Attached to Policy
13 [“03 ”],” and an “ASIC - ES 98 13 08 99 Endorsement - Waiver of Subrogation” form which
14 lists the organization as D. R. Horton and the Canyon Gate project. (ECF No. 25-15 at 8-11).
15 The waiver of subrogation form states: “In consideration of the payment of premiums, we
16 [ASIC] waive our right to subrogation against the person or organization named above [D.R.
17 Horton] in connection with the sole negligence of the Named Insured [Ebensteiner] in the
18 performance of ‘your work’ on the project described below [Canyon Gate]” *Id.* at 11.

19 In this case, the policies each contain a form 98 15 additional insured endorsement
20 which allow for additional insureds to be added to the policies. The policies provide for
21 additional insurance coverage where the party is required to be named as an additional insured
22 in a written contract with the named insured. The subcontractor agreement between D.R.
23 Horton and Ebensteiner required Ebensteiner to name D. R. Horton as an additional insured
24 under the insurance. The terms of the policies do not define “on file” within the meaning of

25 _____
26 negotiation [of settlement], is inadmissible to prove his or her liability for the loss or damage
27 or any part of it.”).

28 The Court finds that the settlement agreement was entered into for the purpose of
settlement and the settlement agreement did not contain any admissions of liability. To the
extent that there is a factual recital, the Court finds that it is a “mere concession[] made for the
purpose of [settlement]” and inadmissible to prove ASIC’s liability in this case. *See Forster*,
58 Cal.2d at 263; Cal. Evid. Code § 1152(a).

1 form 98 15, which weighs in favor of coverage. *See Golden Eagle Ins. Co. v. Insurance Co.*
2 *of the West*, 99 Cal. App. 4th 837, 845 (2002) (“Ambiguities in insurance contracts are
3 generally construed in favor of coverage.”) (citing *Ins. Co. v. Superior Court*, 51 Cal.3d 807,
4 822 (1990)). The Court finds that there is at least a factual dispute regarding whether the
5 Canyon Gate project was “on file” with ASIC pursuant to the inclusion of the “ASIC - ES 98
6 13 08 99 Endorsement - Waiver of Subrogation” form in the 03 policy. *See Montrose*
7 *Chemical Corp.*, 6 Cal.4th at 295 n.3 (finding that there was a duty to defend although the
8 parties factually disputed whether the plaintiff was a named insured under the policy). There
9 is evidence in the record to support the finding that the Canyon Gate project was on file with
10 ASIC within the meaning of the policies because the waiver of subrogation form identified
11 D.R. Horton and related to work at the Canyon Gate project. The Court concludes that there
12 was a potential for coverage and that ASIC had a duty to defend D.R. Horton as an additional
13 insured pursuant to the 98 15 endorsements. *See Montrose Chemical Corp.*, 6 Cal. 4th at 300.⁵

14 **B. 03 Policy Per Occurrence Limit**

15 ASIC contends that there is no potential for coverage under the 03 policy because the
16 policy was exhausted by the payment of the \$1,000,000 per-occurrence limit in the *Fessler*
17 suit. ASIC contends that it properly allocated the entire \$1,000,000 payment to the 03 policy
18 on the grounds that the policies contained a “deemer provision” that all damage which
19 commenced prior to the inception of the policy is deemed to have occurred in any prior policy,
20 and that the policies contained an exclusion for preexisting injuries. (ECF No. 41 at 28).

21
22 ⁵ D.R. Horton has also requested that the Court take judicial notice of a Declaration
23 dated March 18, 2011 which was submitted by Jean Fisher, ASIC corporate claims counsel,
24 in support of ASIC’s motion for summary adjudication filed in *ASIC v. Admiral Insurance Co.*,
25 Case No. 37-2010-00092157-CU-IC-CTL, Superior Court of California for the County of San
26 Diego. Fisher states: “[D.R. Horton] which contracted with [Ebensteiner] qualified as an
27 additional insured on [the 03 policy].” (ECF No. 44 at 6). Courts may take judicial notice of
28 other courts’ proceedings if they “directly relate to matters before the court.” *Hayes v.*
Woodford, 444 F. Supp. 2d 1127, 1136-37 (S.D. Cal. 2006); *see also United States ex rel.*
Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992); Fed
R. Evid. 210(b). D.R. Horton’s request for judicial notice of the Fisher Declaration is
GRANTED. However, the Court does not rely on the statements contained in the Fisher
Declaration in reaching its decision in this Order. *See Quan v. Truck Ins. Exchange*, 67 Cal.
App. 4th 583, 602 (1998) (explaining that because interpretation of an insurance policy is a
question of law based on the contract “writings or memos by insurance company personnel
venturing their opinions as to whether a defense should be afforded do not constitute
‘admissions’ of a defense duty.”).

1 ASIC contends that the allegations in the *Kim, Canyon Gate*, and *Warrick* cases do not raise
2 a possibility of a second occurrence under the 03 policy on the grounds that the damage alleged
3 in the *Kim, Canyon Gate*, and *Warrick* complaints and the damage alleged in the *Fessler* suit
4 are based on the same proximate cause: Ebensteiner’s grading work at the Canyon Gate
5 project. *See* (ECF No. 33 at 30).

6 D.R. Horton contends that “ASIC has not eliminated the potential for coverage” on the
7 grounds that ASIC had a duty to split the settlement in *Fessler* of \$1,000,000, between the 03
8 and 04 policies instead of exhausting the ‘per occurrence’ limit for the 03 policy. (ECF No.25-
9 1 at 23). D.R. Horton contends that the damages alleged in the *Fessler* suit arose during the
10 03 policy and continued into the 04 policy; therefore, ASIC’s “implied covenant ... to give at
11 least as much consideration to [D.R. Horton’s] interests as [ASIC did] to its own[] ... required
12 ASIC to split the settlement between [the 03 and 04] policies.” *Id.* at 23. D.R. Horton
13 contends that even if ASIC properly allocated the entire \$1,000,000 payment to the 03 policy,
14 the property damage alleged in the underlying litigation arose out of a different occurrence
15 than the damage in the *Fessler* case because the damaged properties were located on a different
16 slope. D.R. Horton contends that the 03 policy’s aggregate limit of \$2,000,000 is available,
17 because the damage in the underlying litigation arose out of a separate occurrence.

18 It is undisputed that the homeowners in the *Fessler* action alleged that there was
19 property damage to their homes beginning in 2002 and that the damage was ongoing. It is
20 undisputed that ASIC paid \$1,000,000 to settle the *Fessler* litigation.

21 The 03 and 04 policies provided \$1,000,000 of coverage for each occurrence limited
22 to a general aggregate total of \$2,000,000 of coverage. (ECF No. 25-8 at 26, 62; ECF No. 25-9
23 at 2, 38). The 03 and 04 policies contain a provision that states: “‘Occurrence’ means an
24 accident, including continuous or repeated exposure to substantially the same general harmful
25 conditions that happens during the term of this insurance.” (ECF No. 25-8 at 39; ECF No. 25-
26 9 at 15). The “Amended Definitions Endorsement - Occurrence or Duty to Defend” form
27 attached to the 03 and 04 policies adds: “‘Property damage’, ‘bodily injury’ or ‘personal and
28 advertising injury’ which commenced prior to the effective date of this insurance will be
deemed to have happened prior to, and not during, the term of this Insurance.” (ECF No. 25-8

1 at 47; ECF No. 25-9 at 23). The “Pre-existing Injury or Damage Exclusion” form attached to
2 the 03 and 04 policies state:

3 This insurance does not apply to:

- 4 1. Any ‘occurrence’, incident or ‘suit’ whether known or
5 unknown to any officer of the Named Insured:
 - 6 a. Which first occurred prior to the inception date of this
7 policy ...; or
 - 8 b. Which is, or is alleged to be, in the process of occurring
9 as of the inception date of this policy ... even if the
10 ‘occurrence’ continues during this policy period.

11 (ECF No. 25-8 at 52; ECF No. 25-9 at 28).

12 The Court finds that the 03 and 04 policies allowed for ASIC to assign property damage
13 that commenced in one term and continued into another term to the first term. The Court
14 concludes that the 03 policy limit per occurrence has been exhausted. However, the 03 policy
15 also provided an aggregate limit of \$2,000,000 where there are separate occurrences.

16 “The *number* of relevant occurrences for the purpose of interpreting the per occurrence
17 limitation of liability is different from the question of *when* the relevant occurrence happens
18 for the purpose of determining if there is coverage at all, or whether coverage should be
19 allocated to a particular policy period.” *Whittaker Corp. v. Allianz Underwriters, Inc.*, 11 Cal.
20 App. 4th 1236, 1242 (1992). With regard to whether there is a single or multiple occurrences,
21 the court looks to the “underlying proximate cause.” *Id.* (citing *Appalachian Ins. Co. v. Liberty*
Mut. Ins. Co., 676 F.2d 56, 61 n.11 (3rd Cir. 1982)); *see also EOTT Energy Corp. v.*
Storebrand Internat. Ins. Co., 45 Cal. App.4th 565, 577-78 (1996).

22 The 03 policy was effective from August 2001 through August 2002. At the time that
23 ASIC denied tender of the defense in this case, ASIC had Ebensteiner’s job file and job logs
24 which ended in May 2003. ASIC had information regarding Ebensteiner’s work during the 03
25 policy period which consisted of grading at the Canyon Gate project.

26 The *Fessler* complaint and the *Kim, Canyon Gate*, and *Warrick* complaints each allege
27 damage caused by the grading work at the Canyon Gate project. To the extent that some of
28 the damage alleged by the *Kim, Canyon Gate*, and *Warrick* plaintiffs occurred during the 03
policy, the damage would have arisen out of the same grading work that ASIC had already

1 determined was an “occurrence” and had paid the \$1,000,000 per occurrence policy limit. The
2 damage alleged by the *Kim, Canyon Gate*, and *Warrick* plaintiffs arose out of the same
3 proximate cause and does not constitute a second occurrence because the damaged property
4 is located on a different slope. *See Whittaker Corp.*, 11 Cal. App. 4th at 1242 (holding that the
5 number of occurrences under a policy is determined by the “underlying proximate case” of the
6 injury).

7 The Court concludes that ASIC has presented undisputed facts and has eliminated any
8 possibility of coverage under the 03 policy. *See American States Ins. Co.*, 180 Cal. App. 4th
9 at 27. The Court concludes there was no potential for coverage and no duty to defend D.R.
10 Horton under the 03 policy on the grounds that any action against D.R. Horton could not assert
11 a “claim potentially seeking damages within the coverage of the policy.” *Montrose Chemical*
12 *Corp.*, 6 Cal. 4th at 300; *see also Whittaker Corp.*, 11 Cal. App. 4th at 1242.⁶

13 C. 06 Policy

14 D.R. Horton contends that Ebensteiner performed work during the 06 policy period as
15 shown by certain change orders, a waiver, and an invoice dated in August 2004. D.R. Horton
16 contends that “[a]t minimum ... there is a factual dispute about whether Ebensteiner was
17 performing ‘ongoing operations’ during the 06 policy.” (ECF No. 40 at 15).

18 ASIC contends that Ebensteiner “had no ongoing operations [during the 06 policy] to
19 give rise to new accidents and exposures....” (ECF No. 41 at 29).

20 D.R. Horton has submitted a daily log report dated August 2, 2004 which states:
21 “[quantity] 4 inlet structures \$150.00 each ... [quantity] 4 outlet structures \$150.00 each ... 1
22 month rental and back flow device ... July 1 - July 31 \$1,000” (ECF No. 25-11 at 67). D.R.
23 Horton has submitted a change order dated August 4, 2004 and a change order dated August
24 11, 2004, from D.R. Horton to Ebensteiner authorizing certain work identified in daily log

26 ⁶ ASIC also seeks to apply the “per occurrence” limit across the policies. ASIC
27 contends that the California Supreme Court is considering this issue. *See State v. Continental*
28 *Ins. Co./ (Employers Ins. of Wausau)*, 91 Cal. Rptr. 3d 106 (2009) (granting the petition for
review by the Supreme Court of California). In this case, the policies provide: “The Limits of
Insurance of this Coverage Part apply separately to each consecutive annual period” (ECF
No. 35-2 at 11). The policies do not otherwise expressly apply the per occurrence limit across
consecutive policies.

1 reports dated between June 2004 and July 2004 as well as the daily log report dated August 2,
2 2004. *Id.* at 69, 71. D.R. Horton has submitted an invoice from Ebensteiner to D.R. Horton
3 dated August 31, 2004. *Id.* at 77. D.R. Horton has also submitted an “Unconditional Waiver
4 and Release Upon Final Payment” dated January 7, 2005, stating that Ebensteiner had been
5 paid by D.R. Horton for the work done at the Canyon Gate project. *Id.* at 79.

6 The Court finds that D.R. Horton has failed to submit evidence to show that Ebensteiner
7 performed work during the 06 policy period. The invoice and unconditional waiver and release
8 upon final payment submitted by D.R. Horton do not show that Ebensteiner performed work
9 after July 31, 2004. The daily log report dated August 2, 2004 records the use of materials and
10 the “1 month rental” of a back flow device from “July 1 - July 31” (ECF No. 25-11 at 67).
11 The change orders dated August 4 and 11, 2004 approve work performed between June 2004
12 and July 2004 and approve the daily log report dated August 2, 2004 for the rental of
13 equipment in July 2004. The Court concludes that D.R. Horton has failed to carry its burden
14 to show that there is no genuine issue as to any material fact and that D.R. Horton is entitled
15 to a judgment as a matter of law that ASIC owed a duty to defend D.R. Horton under the 06
16 policy.⁷ *See* FED. R. CIV. P. 56(c); *see also Adickes*, 398 U.S. at 152.

17 **D. Exclusions for Property Damage Arising Out of “Your Work”**

18 ASIC contends that the work product exclusions of j(5) and j(6) eliminate coverage for
19 property damage arising from Ebensteiner’s work from all policies. (ECF No. 33 at 20). ASIC
20 contends that “Ebensteiner graded the entire site so the site is its work product and therefore
21 is not covered.” (ECF No. 43 at 2). ASIC asserts that the “subcontract agreement” between
22 D.R. Horton and Ebensteiner shows that Ebensteiner’s work encompassed the entire tracts
23 because the subcontract agreement provides that the contract is for “rough grading” of tracts
24 “48892, 48892-02.” (ECF No. 25-8 at 2). ASIC asserts that a letter dated September 7, 2007,
25 to ASIC from D.R. Horton shows that Ebensteiner’s work encompassed the entire tracts
26 because it states that Ebensteiner “conducted the grading of the Canyon Gate project.” (ECF
27 No. 25-12 at 2). ASIC also asserts that Ebensteiner’s job file with entries dating from February
28

⁷ ASIC has not moved for summary judgment on the 06 policy. The issue remains pending. The Court makes no ruling on whether rescission of the 06 policy was proper.

1 12, 2002 through March 4, 2003 shows that Ebensteiner performed rough grading work on the
2 entire Canyon Gate project.⁸ (ECF No. 25-10 at 69-116).

3 D.R. Horton contends that ASIC had a duty to defend and that the work product
4 exclusions do not eliminate potential coverage because they “only apply to the ‘particular part’
5 of the property on which the insured was working” (ECF No. 40 at 24). D.R. Horton
6 contends that the damage, which consisted of cracking and fissures, may have occurred on
7 portions of the property where Ebensteiner had not worked. D.R. Horton contends that the
8 damage alleged relates to property that was not Ebensteiner’s work product. D.R. Horton
9 contends that to eliminate potential coverage under ASIC’s interpretation of the j(5) and (6)
10 exclusions, “ASIC must prove that Ebensteiner actually worked on all of the land that suffered
11 damage.” *Id.* at 19.

12 The insurance policies at issue provide for coverage as follows:

13 We will pay those sums that the insured becomes legally obligated to
14 pay as damages because of ‘bodily injury’ or ‘property damage’ to
which this insurance applies....

15 This insurance applies to ‘bodily injury’ and ‘property damage’
16 only if:

- 17 (1) The ‘bodily injury’ or ‘property damage’ is caused by an
‘occurrence’ that takes place in the ‘coverage territory’;
18 and
19 (2) The ‘bodily injury’ or ‘property damage’ occurs during
the policy period.

20 (ECF No. 25-8 at 28; ECF No. 25-9 at 4, 66; ECF No. 25-10 at 4).

21 The term “property damage” is defined as:

- 22 a. Physical injury to tangible property, including all resulting loss
23 of use of that property. All such loss of use shall be deemed to
occur at the time of the physical injury that caused it; or

24
25 ⁸ ASIC also asserts that Ebensteiner’s job file with entries dating from January through
26 August 2, 2004, two change orders dated August 11 and 18, 2004, and a final billing statement
27 dated August 31, 2004, as well as statements in the Deposition of Glen Longarini which was
28 taken on February 24, 2011 show that Ebensteiner performed rough grading work on the entire
Canyon Gate project. (ECF No. 28-11 at 2-77; 36-3 at 2). However, ASIC has failed to show
that it was aware of this evidence at the time it denied D.R. Horton’s tender. As discussed
above, “a duty to defend turns not upon the ultimate adjudication of coverage under its policy
of insurance, but upon those facts known by the insurer at the inception of a third party
lawsuit.” *Montrose*, 4 Cal. 4th at 295.

1 b. Loss of use of tangible property that is not physically injured.
2 All such loss of use shall be deemed to occur at the time of the
 ‘occurrence’ that caused it.

3 (ECF No. 25-8 at 40; ECF No. 25-9 at 16, 78; ECF No. 25-10 at 16).

4 The policies contain work product exclusions j(5) and j(6) which state that there is no
5 coverage for: “‘property damage’ to ... (5) That particular part of real property on which you
6 or any contractors or subcontractors working directly or indirectly on your behalf are
7 performing operations, if the ‘property damage’ arises out of those operations; or (6) [t]hat
8 particular part of any property that must be restored, repaired, or replaced because ‘your work’
9 was incorrectly performed on it.” (ECF No. 33-2 at 20-21).

10 The j(5) and j(6) exclusions “preclude coverage for deficiencies in the insured’s work.”
11 *Clarendon Am. Ins. Co. v. Gen. Sec. Indem. Co. of Ariz.*, 193 Cal. App. 4th 1311, 1325 (2011)
12 (explaining that defect and deficiencies in the insured’s work would be excluded by j(5) and
13 j(6)) (citation omitted). “Generally, liability policies ... are not designed to provide contractors
14 and developers with coverage against claims *their work* is inferior or defective.” *Maryland*
15 *Casualty Co. v. Reeder*, 221 Cal. App.3d 961, 967 (1990) (citation omitted) (emphasis added).
16 Work product exclusions such as those contained in exclusions j(5) and j(6) exclude “repair
17 and replacement losses” and are intended to provide “incentive to exercise care in
18 workmanship thereby reducing the risk that is covered.” *Western Employers Ins. Co. v.*
19 *Arciero & Sons, Inc.*, 146 Cal. App. 3d 1027, 1031-32 (1983) (quotation and citation omitted).
20 “Rather, the effect of the policy is to make the contractor stand its own replacement and repair
21 losses while the insurer takes the risk of injury to the property of others.” *Id.* at 31. “The risk
22 intended to be insured is the possibility that the ... work of the insured, once relinquished or
23 completed, will cause bodily injury or damage to property *other than to the product or*
24 *completed work itself ...*” *Id.* (quotation and citation omitted) (emphasis added).

25 In this case, the *Kim*, *Canyon Gate*, and *Warrick* plaintiffs are homeowners and
26 landowners within the Canyon Gate project. The *Kim* plaintiffs allege that between March 6,
27 2002 through January 2003, “multiple backcut failures, earth movement, and fissures and
28 cracks in the ground surface occurred during the implementation of the unapproved design
change for the shear keys by D.R. Horton, its subcontractors and engineers.” (ECF No. 25-12

1 at 138). The *Kim* plaintiffs allege that monitors were installed during the rough grading
2 process which “showed significant movement along the slide planes of these landslides
3 commenced almost immediately after D.R. Horton began the rough grading of Canyon Gate,
4 which movement continues to the present date.” *Id.* at 143. The *Kim* plaintiffs allege that “the
5 geologic hazards ... substantially interfered with the Plaintiffs use and enjoyment of their land.”
6 *Id.* at 161. The *Kim* plaintiffs allege that the interference with the use and enjoyment of their
7 land is “indefinite and unreasonable, in that their properties have sustained permanent physical
8 injury, measures taken in remediation of the current geological hazards are not likely to restore
9 their property to its original market value, and the geologic conditions present an ongoing and
10 significant risk of additional future harm.” *Id.* The *Kim* plaintiffs allege: “As a direct,
11 foreseeable and proximate result of said interference, Plaintiffs have incurred physical damage
12 to their land, improvements and structures located on their residential real properties and/or
13 a diminution-in-value of their residential properties as a result” *Id.* at 161-62. The *Canyon*
14 *Gate* plaintiff also asserts a claim of private nuisance against D.R. Horton and other builders
15 and states that: “As a direct, foreseeable and proximate result of said interference, [Plaintiff
16 has] incurred physical damage to its Common Areas.” (ECF No. 25-13 at 34). The *Warrick*
17 plaintiffs allege: “As a direct, foreseeable and proximate result of said interference, [Plaintiffs]
18 have incurred physical damage to their land, improvements and structures located on their
19 residential real properties and/or a diminution-in-value of their residential properties.” *Id.* at
20 93.

21 The *Kim*, *Canyon Gate*, and *Warrick* plaintiffs allege damage beyond the repair and
22 replacement of the grading work. The *Kim*, *Canyon Gate*, and *Warrick* plaintiffs allege
23 damage to their land and property caused by the grading work at the Canyon Gate project. A
24 claim for repair of damage to land or property other than the grading work itself is not
25 excluded by j(5) and j(6). There is a potential for coverage and the j(5) and j(6) work product
26 exclusions did not eliminate a duty to defend.

27 Even if the Court presumed that the j(5) and j(6) exclusions preclude coverage for
28 damage to land or property upon which Ebensteiner had performed any work, the Court does
not conclude that ASIC has eliminated any possibility of coverage under the 04 and 05

1 policies. ASIC has failed to show that at the time it declined to provide a defense, ASIC relied
2 upon information that showed that Ebensteiner had graded all of the land within the Canyon
3 Gate project. The subcontractor agreement identified the location of work as tracts “48892,
4 48892-02.” (ECF No. 25-8 at 2). However, the subcontractor agreement does not show that
5 Ebensteiner graded the entire tracts. The letter dated September 7, 2007, to ASIC from D.R.
6 Horton states that Ebensteiner “conducted the grading of the Canyon Gate project.” (ECF No.
7 25-12 at 2). The letter describes the work done by Ebensteiner; the letter does not show that
8 Ebensteiner performed work on the *entire* tracts. Finally, Ebensteiner’s job file entries dating
9 from February 12, 2002 through March 4, 2003 list material and equipment used as well as
10 hours spent, but the job file entries do not show whether Ebensteiner performed work on the
11 entire tracts.

12 The Court finds that the *Kim, Canyon Gate, and Warrick* plaintiffs allege damage to
13 their land and property other than the repair and replacement of the grading work by
14 Ebensteiner. The Court finds that the *Kim, Canyon Gate, and Warrick* complaints assert claims
15 potentially seeking to recover for damage to land or property located within the Canyon Gate
16 project, but built on portions of the Canyon Gate project which Ebensteiner had not performed
17 grading work. ASIC has failed to show that there was no “potential” that Ebensteiner’s
18 grading work caused damage to land or property which would not be excluded by j(5) and j(6).
19 *Montrose Chemical Corp.*, 6 Cal. 4th at 300. At the time of the denial of coverage, the Court
20 concludes that the j(5) and j(6) work product exclusions in the 04 and 05 policies did not
21 eliminate a duty to defend. *See Kazi*, 24 Cal. 4th at 879.

22 **E. Limitation of Coverage to “Ongoing Operations”**

23 ASIC contends that the additional insured endorsements restrict coverage to
24 Ebensteiner’s ongoing operations which would only include liability that arises while
25 Ebensteiner’s work was in progress. ASIC contends that the underlying actions do not allege
26 that damage occurred while Ebensteiner was performing grading work. ASIC contends that
27 the underlying actions allege exclusively completed operations damages because they “seek
28 damages from the sale of the completed homes and structures” purchased in 2005-2006. (ECF
No. 33 at 25). ASIC contends that there was no potential for coverage for damage to homes

1 under the 05 policy because “nothing ... could be built on any lot or other area of the project
2 unless and until Ebensteiner’s grading operations on that lot or area was completed.” *Id.* ASIC
3 further contends that there was no potential for coverage for damage to land under the 04 and
4 05 policies because “graded dirt” is not tangible property. (ECF No. 41 at 25).

5 D.R. Horton contends that the policies provide for coverage where the property damage
6 in the underlying litigation occurred during the policy period. D.R. Horton contends that “the
7 underlying complaints do not allege when the property damage occurred. Therefore, there was
8 at least a potential that property damage occurred during each policy period.” (ECF No. 25-1
9 at 20). D.R. Horton contends that there was a potential for coverage during each of the 04 and
10 05 policies on the grounds that damage could have occurred to the land during Ebensteiner’s
11 ongoing operations. D.R. Horton contends that there was also a potential for coverage under
12 the 05 policy on the grounds that damage could have occurred to home which were built during
13 Ebensteiner’s ongoing operations.

14 The policies at issue state: “We will pay those sums that the insured becomes legally
15 obligated to pay as damages because of ... ‘property damage’ to which this insurance applies
16” (ECF No. 33-2 at 10-11). The policies state: “This insurance applies to ‘bodily injury’
17 and ‘property damage’ only if: ... (2) the ‘bodily injury’ or ‘property damage’ occurs during
18 the policy period.” *Id.* The policies define “property damage” as “physical injury to tangible
19 property, including all resulting loss of use of that property” *Id.* at 11-12. The 04 and 05
20 additional insured endorsements form 98 15 state: “This Endorsement applies only to *ongoing*
21 operations performed by the Named Insured” (ECF No. 25-9 at 33, 95) (emphasis added).⁹
22 Insurance policies which “expressly restrict coverage for an additional insured to the ‘ongoing
23 operations’ of the named insured” ... “effectively preclude[s] application of the endorsement’s

24
25 ⁹ D.R. Horton also contends that the word “ongoing” was not present in the additional
26 insured endorsement to the 03 policy and ASIC could not insert the word “ongoing” into the
27 04, 05, and 06 policies on the grounds that the term restricts coverage beyond what D.R.
28 Horton reasonably expected, and ASIC did not make the limitation in liability sufficiently clear
to D.R. Horton. (ECF No.25-1 at 24; ECF No. 40 at 21). ASIC contends that it was not
required to notify D. R. Horton of the insertion of the term “ongoing” into its policies on the
grounds that insurance code excludes surplus line insurance, additional insured, and third party
beneficiaries from the notice requirements. (ECF No. 43 at 7-8). Presuming that the 04, 05,
and 06 policies contained a restriction on coverage to Ebensteiner’s ongoing operations, ASIC
has failed to eliminate coverage as discussed below.

1 coverage to completed operations losses.” *Pardee Const. Co. v. Insurance Co. of the West*, 77
2 Cal. App. 4th 1340, 1359 & n.16 (2000) (explaining that coverage restrictions to “your
3 ongoing operations” restricts liability to “work in progress only”).

4 The California Supreme Court has held: “‘Tangible property’ is not ambiguous, and
5 coverage therefore does not turn on alternative meanings. Consistent with an insured's
6 reasonable expectations, ‘tangible property’ refers to things that can be touched, seen, and
7 smelled.” *Kazi*, 24 Cal.4th at 880 (distinguishing tangible property from an easement which
8 is an intangible legal interest in real property). As discussed above, the *Kim*, *Canyon Gate*, and
9 *Warrick* plaintiffs each allege damage to their “land” or “Common Areas.” (ECF No. 25-12
10 at 161; ECF No. 25-13 at 2, 93).

11 With respect to the alleged damage to “graded dirt” or land during the 04 and 05
12 policies, the Court does not find, as a matter of law, that “graded dirt” or land is not tangible
13 property. The *Kim*, *Canyon Gate*, and *Warrick* plaintiffs have alleged damage to their land
14 which could have occurred during the 04 or 05 policy periods. The parties do not dispute that
15 Ebensteiner was performing work at the Canyon Gate project during the 04 and 05 policies.
16 ASIC has failed to show that at the time it denied D.R. Horton’s tender, there was no
17 “potential” that Ebensteiner’s grading work could have damaged land on areas of the Canyon
18 Gate project during the time in which Ebensteiner’s work was ongoing in another part of the
19 project. *Montrose Chemical Corp.*, 6 Cal. 4th at 300. The Court concludes that at the time of
20 the denial of coverage the “ongoing operations” limitation of coverage did not eliminate a duty
21 to defend. *See Kazi*, 24 Cal. 4th at 879.

22 With respect to the alleged damage to homes or property during the 05 policy, at the
23 time that ASIC denied tender, ASIC stated that “we are informed construction occurred at
24 Canyon Gate after 8/01/03 [during the 05 policy],” and that “homes in the ‘Canyon Gate’
25 development were completed starting in ‘late 2004 [during the 06 policy].’” (ECF No. 35-9 at
26 3). The parties do not dispute that Ebensteiner was performing work at the Canyon Gate
27 project during the 05 policy.

28 The *Kim*, *Canyon Gate*, and *Warrick* plaintiffs have alleged damage to their homes or
property which could have occurred during the 05 policy period. The Court finds that ASIC

1 has failed to show that at the time it denied D.R. Horton’s tender, there was no “potential” that
2 Ebensteiner’s grading work could have damaged homes or property built on portions of the
3 Canyon Gate project during the time in which Ebensteiner’s work was ongoing in another part
4 of the project. *Montrose Chemical Corp.*, 6 Cal. 4th at 300. The Court concludes that at the
5 time of the denial of coverage the “ongoing operations” limitation of coverage did not
6 eliminate a duty to defend. *See Kazi*, 24 Cal. 4th at 879.

7 **F. Ebensteiner’s Sole Negligence**

8 ASIC contends that there is no coverage under the policies on the grounds that the
9 underlying actions do not arise out of Ebensteiner’s sole negligence. ASIC contends that
10 “[f]rom a brief review of the first thirty paragraphs of the underlying complaint, it is clear that
11 the claims asserted against [D.R. Horton] are based on its own conduct, decisions and
12 engineering shortcuts, and/or those geotechnical consultants who it retained (who are also
13 sued).” (ECF No. 41 at 21).

14 D.R. Horton contends that ASIC had a duty to defend it in the underlying actions on the
15 grounds that ASIC has not “conclusively established that the property damage could not have
16 arisen out of Ebensteiner’s sole negligence.” (ECF No. 25-1 at 26). D.R. Horton contends that
17 ASIC did not determine who was negligent with respect to the grading prior to denying a
18 defense in this case.

19 In this case, the forms 98 15 state: “Coverage under this Endorsement applies ... only
20 for liability arising out of or relating to [Ebensteiner’s] sole negligence” (ECF No. 25-8 at
21 27, 57; ECF No. 25-9 at 3, 33, 64, 95; ECF No. 25-10 at 3, 30). The *Kim* plaintiffs allege that
22 “in an effort to reduce the cost of developing the Canyon Gate project, Zephyr, Draper, and
23 D.R. Horton cut corners in the geotechnical engineering, design, grading and excavation for
24 these tracts” (ECF No. 25-12 at 132). The *Kim* plaintiffs allege that on March 20, 2002,
25 “D.R. Horton, its grading subcontractor and [its engineers] resumed rough grading on [a tract
26 in the Canyon Gate project] despite the fact that the City had not approved their revised shear
27 key design.” *Id.* at 138. The *Kim* plaintiffs allege: “As a direct, foreseeable and proximate
28 result of said interference, Plaintiffs have incurred physical damage to their land,
improvements and structures located on their residential real properties and/or a diminution-in-

1 value of their residential properties as a result” *Id.* at 161-62.

2 The *Canyon Gate* case asserts essentially the same facts and claims as asserted in the
3 *Kim* case. (ECF No. 25-13 at 2). The *Canyon Gate* plaintiff alleges that: “As a direct,
4 foreseeable and proximate result of said interference, [Plaintiff has] incurred physical damage
5 to its Common Areas.” *Id.* at 34. The *Warrick* case asserts essentially the same facts and
6 claims as asserted in the *Kim* case. (ECF No. 25-13 at 61). The *Warrick* plaintiffs allege: “As
7 a direct, foreseeable and proximate result of said interference, [Plaintiffs] have incurred
8 physical damage to their land, improvements and structures located on their residential real
9 properties and/or a diminution-in-value of their residential properties.” *Id.*

10 The *Kim*, *Canyon Gate*, and *Warrick* complaints allege damage to the plaintiff’s homes
11 and property resulting from the grading work performed at the Canyon Gate project.
12 Ebensteiner performed the grading work at the Canyon Gate project. The Court finds that the
13 *Kim*, *Canyon Gate*, and *Warrick* cases assert facts to show that the damage could have been
14 caused by Ebensteiner’s sole negligence. The Court finds that the *Kim*, *Canyon Gate*, and
15 *Warrick* cases present a “legal theory or facts” that potentially give rise to coverage. *See*
16 *Hudson Ins. Co.*, 624 F.3d at 1268 (citation omitted). The Court finds that ASIC has failed to
17 show that at the time it denied D.R. Horton’s tender, there was no “potential” that
18 Ebensteiner’s sole negligence gave rise to the damage allege in the underlying actions.
19 *Montrose Chemical Corp.*, 6 Cal. 4th at 300.

20 **G. Notice to Builder**

21 D.R. Horton asserts that ASIC’s duty to defend began when D.R. Horton provided
22 ASIC with a notice to builder on November 19, 2008. D.R. Horton contends that a California
23 Civil Code section 910 notice to builder is a civil proceeding within the meaning of the policies
24 coverage of “suits.” (ECF No.25-1 at 28-29; ECF No. 40 at 28).

25 ASIC contends that at the time it declined to defend D.R. Horton based on the notice
26 to builder, no case had held that a notice to builder was a legal proceeding. ASIC contends that
27 later cases indicating that a notice to builder is a legal proceeding “were not and could not have
28 been known or binding on ASIC in December 2008” (ECF No. 41 at 29).

The policies in this case provide that ASIC has the duty to defend the insured against

1 any suit seeking damages because of bodily injury or property damage to which the insurance
2 policies apply. The policies state that: “‘Suit’ means a civil proceeding in which damages
3 because of... ‘property damage’... to which this insurance applies are alleged. ‘Suit’ includes:
4 (a) An Arbitration proceeding ...; or (b) Any other alternative dispute resolution proceeding
5 in which such damages are claimed and to which the insured submits with our consent.” (ECF
6 No. 25-9 at 16).

7 California Civil Code section 910 requires a claimant to provide written notice to a
8 builder of any claimed violation and states that the notice: “[S]hall have the same force and
9 effect as a notice of commencement of a legal proceeding.” Cal. Civ. Code § 910 (effective
10 Jan. 1, 2003). In *Clarendon Am. Ins. Co. v. StarNet Ins. Co.*, 113 Cal. Rptr. 3d 585 (Cal. App.
11 2010), the California Court of Appeal found “as a matter of first impression” that a proceeding
12 under the Caldren Act was an alternative dispute resolution proceeding as defined by the
13 commercial general liability insurance policy. *Id.* at 586, *Clarendon Am. Ins. Co. v. Starnet*
14 *Ins. Co.*, 117 Cal. Rptr. 3d 613, 614 (Cal. 2010) (granting the petition for review but deferring
15 the matter pending the disposition of *Ameron Int’l Corp. v. Ins. Co. of the State of Penn.*, 50
16 Cal. 4th 1370 (Cal. 2010)), *Clarendon Am. Ins. Co. v. Starnet Ins. Co.*, 121 Cal. Rptr. 3d 879,
17 879 (Cal. 2011) (dismissing review); *see also Ameron Int’l Corp.*, 50 Cal. 4th at 1383 (holding
18 as a matter of “first impression” that a federal adjudicative administrative agency board
19 proceeding triggered the duty to defend where an insurance policy did not define the term
20 “suit”). The Caldren Act is similar to California Civil Code section 910 because it requires a
21 homeowners association to serve the respondent with a “Notice of Commencement of Legal
22 Proceedings.” Cal. Civ. Code § 1375.

23 At the time ASIC denied tender for the notices to builder, California Civil Code section
24 910 expressly stated that notices to builder: “[S]hall have the same force and effect as a notice
25 of commencement of a legal proceeding.” Cal. Civ. Code § 910. The Court finds that ASIC
26 has failed to show that at the time it denied D.R. Horton’s tender of the notices to builder, there
27 was no “potential” for coverage. *Montrose Chemical Corp.*, 6 Cal. 4th at 300. The Court
28 concludes that ASIC had a duty to defend D.R. Horton pursuant to the notices to builder.

1 **H. Wrap Policies**

2 ASIC contends that it sought information from D.R. Horton regarding any wrap policies
3 for the Canyon Gate Project since 2003. (ECF No. 54 at 2). ASIC contends that it has recently
4 discovered that D.R. Horton has wrap policies which apply from March 1, 2003 through
5 August 1, 2006. *Id.* ASIC contends that there is a wrap exclusion in the policies which
6 applies to D.R. Horton. ASIC contends that coverage in this case is precluded on the grounds
7 that tender to other insurance carriers is a condition precedent to coverage under the ASIC
8 policies and the wrap policies issued to D.R. Horton “cover [D.R. Horton] in connection with
9 claims regarding Canyon Gate....” *Id.* at 4. .

10 D.R. Horton contends that the wrap policies do not apply to this case on the grounds
11 that D.R. Horton was insured under the wrap policies; not Ebensteiner or Ebensteiner’s work.
12 D.R. Horton contends that this case relates only to liability arising out of Ebensteiner’s work.
13 In addition, D.R. Horton contends that “ASIC presents no evidence that [D.R. Horton] did not
14 tender the claims to other insurers.” (ECF No. 55 at 4). D.R. Horton contends that it was not
15 required to disclose the wrap policies when ASIC requested the information during the *Fessler*
16 litigation on the grounds that the wrap policies took effect after the *Fessler* complaint was filed
17 and could not have possibly applied to the damage alleged in the *Fessler* litigation. D.R.
18 Horton contends that even if the policies require D.R. Horton to tender the claim to other
19 insurers, D.R. Horton was relieved of that duty because ASIC anticipatorily repudiated the
20 policy by denying coverage; ASIC is estopped from enforcing the term because it failed to
21 raise the issue while it was investigating the claim; the provision is an unenforceable “escape
22 clause”; and the term is unenforceable on the grounds that it is not “conspicuous, plain, and
23 clear.” (ECF No. 55 at 5).

24 The 04, 05, and 06 policies contain a “Wrap-up Exclusion” which provides: “This
25 insurance does not apply to *any work* insured under a consolidated (Wrap up) Insurance
26 Program” (ECF No. 25-10 at 43; ECF No. 35-3 at 45; ECF No. 35-4 at 53) (emphasis
27 added). The “Wrap-up” policies insure D.R. Horton, not Ebensteiner. (ECF No. 54-9 at 4
28 DRH 00874; 64 DRH 934; 124 DRH 994; 185 DRH 1055). The work at issue in this case is
Ebensteiner’s grading work.

1 The Court finds that ASIC has failed to show there was no “potential” for coverage on
2 the grounds that the “Wrap-up” policy applies to D.R. Horton’s work and this case involves
3 Ebensteiner’s work. *Montrose Chemical Corp.*, 6 Cal. 4th at 300. The Court concludes that
4 at the time of the denial of coverage the “Wrap-up” policy did not eliminate a duty to defend.

5 **I. Bad Faith and Punitive Damages**

6 ASIC contends that D.R. Horton’s bad faith claim fails as a matter of law because there
7 was a genuine dispute regarding coverage. ASIC contends that even if ASIC is not entitled to
8 summary judgment on D.R. Horton’s bad faith claim, ASIC is entitled to partial summary
9 judgment on the request for punitive damages because ASIC had “more than reasonable
10 support for its position.” (ECF No. 33 at 35).

11 D.R. Horton contends that bad faith is shown by ASIC’s failure to investigate
12 information indicating that Ebensteiner performed work during the 05 and 06 policies and by
13 ASIC’s failure to investigate the issue of Ebensteiner’s sole negligence. D.R. Horton contends
14 that ASIC’s “after-the-fact changes to the policies, and its attempt to conceal how and when
15 those changes were made, alone are sufficient to defeat summary judgment on the punitive
16 damages claim.” (ECF No. 40 at 30).

17 “The genuine issue rule in the context of bad faith claims allows a [trial] court to grant
18 summary judgment when it is undisputed or indisputable that the basis for the insurer’s denial
19 of benefits was reasonable—for example, where even under the plaintiff’s version of the facts
20 there is a genuine issue as to the insurer’s liability under California law.” *Wilson v. 21st*
21 *Century Ins. Co.*, 42 Cal.4th 713, 724 (Cal. 2007) (citing *Amadeo v. Principal Mut. Life Ins.*
22 *Co.*, 290 F.3d 1152, 1161-62 (9th Cir. 2002)). “On the other hand, an insurer is not entitled
23 to judgment as a matter of law where, viewing the facts in the light most favorable to the
24 plaintiff, a jury could conclude that the insurer acted unreasonably.” *Id.* “[A] bad faith claim
25 should be dismissed on summary judgment if the defendant demonstrates that there was ‘a
26 genuine dispute as to coverage.’ ” *Feldman v. Allstate Insurance Co.*, 322 F.3d 660, 669 (9th
27 Cir.2003) (citation omitted). However, an insurer is not relieved of its “obligation to
28 thoroughly and fairly investigate, process, and evaluate the insured’s claim.” *Wilson*, 42 Cal.
4th at 723.

1 In this case, D.R. Horton’s claim of bad faith includes assertions that ASIC did not
2 “thoroughly and fairly investigate, process, and evaluate the insured’s claim.” *See Wilson*, 42
3 Cal. 4th at 723. D.R. Horton’s claim for punitive damages includes assertions that ASIC
4 belatedly attempted to revise the policies. The Court finds that, viewing the facts in the light
5 most favorable to the D.R. Horton, there are disputed issues of fact regarding whether ASIC
6 acted unreasonably and whether the evidence supports an award of punitive damages in this
7 case. Accordingly, ASIC’s Motion for Summary Judgment of D.R. Horton’s bad faith and
8 punitive damages claims is DENIED.

9 **J. Declaratory Relief**

10 ASIC contends that D.R. Horton’s declaratory relief claim is “redundant.” (ECF No.
11 33 at 35). D.R. Horton has not addressed this issue.

12 Declaratory relief is “unnecessary and superfluous” where “[t]he issues invoked in that
13 cause of action already were fully engaged by other causes of action.” *Hood v. Superior*
14 *Court*, 33 Cal. App. 4th 319, 324 (1995). In this case, D.R. Horton has asserted three claims:
15 (1) breach of the implied covenant of good faith and fair dealings for ASIC’s failure to provide
16 a defense in the underlying actions; (2) breach of contract for ASIC’s failure to provide
17 benefits under the contract; and (3) declaratory relief seeking judicial determination “(1) that
18 Defendants are obligated to defend and indemnify D.R. Horton under said policies with respect
19 to the [underlying actions]; and (2) that Defendants are obligated to pay for the cost of D.R.
20 Horton’s defense in the [underlying actions] and to pay expenses for repairs and other
21 settlement costs in connection with the [underlying actions].” (ECF No. 1 at 15).


22 The Court finds that the declaratory relief claim “unnecessary” on the grounds that the
23 issues raised in the declaratory relief claim are fully raised in the other claims. *Hood*, 33 Cal.
24 App. 4th at 324. ASIC’s Motion for Summary Judgment is GRANTED as to the claim for
25 declaratory relief.

26 **V. Conclusion**

27 IT IS HEREBY ORDERED that Plaintiff D.R. Horton’s Motion for Partial Summary
28 Judgment (ECF No. 25) is GRANTED as to Plaintiff D.R. Horton’s claims that ASIC had a
duty to defend D.R. Horton under the XGI 02-1261-004 and XGI 03-1261-005 policies in the

1 *Chang O. Kim, et al. v. City of Santa Clarita, et al.*, Los Angeles Superior Court Case No.
2 BC407614; *Canyon Gate Maint. Ass'n v. City of Santa Clarita, et al.*, Los Angeles Superior
3 Court Case No. BC415663; and *Warrick, et al. v. City of Santa Clarita, et al.*, Los Angeles
4 Superior Court Case No. PC046442 cases and related notices to builder and DENIED in all
5 other respects. Defendant ASIC's Motion for Summary Judgment (ECF No. 33) is GRANTED
6 as to Plaintiff D.R. Horton's third claim for declaratory relief and DENIED in all other
7 respects.

8 DATED: January 5, 2012

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10 **WILLIAM Q. HAYES**
11 United States District Judge
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