

IN THE DISTRICT COURT OF GUAM

MAEDA PACIFIC CORPORATION, a Guam corporation,) CIVIL CASE NO. 08-00012
Plaintiff,)
vs.)
GMP HAWAII, INC., a Hawaii corporation)
d.b.a. GMP Associates, *et al.*,)
Defendants.)

as consolidated¹ with

GMP HAWAII, INC., a Hawaii corporation) CIVIL CASE NO. 11-00010
d.b.a. GMP Associates, *et al.*,)
Plaintiffs,)
vs.)
LEXINGTON INSURANCE COMPANY, a) ORDER
Massachusetts corporation,)
Defendant.)

On July 12, 2011, the court heard oral argument on the motions filed by Lexington to stay the direct action claim filed in Civil Case No. 08-00012 and the proceedings in Civil Case No. 11-00010 pending arbitration. Appearing on behalf of movant Lexington was Thomas Sterling. Representing Maeda Pacific Corp. (“Maeda”) was Samuel Teker. Joephet Alcantara

¹ At the hearing held on July 12, 2011, the court orally granted the motion filed by Lexington Insurance Company (“Lexington”) to consolidate the two above-captioned actions. Accordingly, unless further ordered, Civil Case No. 08-00012 shall be the lead case, with all future pleadings in the consolidated actions to be filed therein.

1 appeared on behalf of Jorgensen and Close Associates, Inc. and U.S. Specialty Insurance Co.
2 (collectively “Jorgensen”). Representing GMP Hawaii, Inc. d.b.a. GMP Associates and Ohio
3 Pacific Tech, Inc. d.b.a. GMP Associates, Inc. (collectively “GMP”) were Ignacio Aguigui and
4 Matthew Borden (via telephone). At the conclusion of the hearing, the court took the motions
5 for stay under advisement. Having heard from the parties and based on relevant law and
6 authority, the court hereby GRANTS the motions to stay.

7 **BACKGROUND**

8 The Maeda Action (Civil Case No. 08-00012)

9 The case, filed on August 14, 2008, arises out of a contract for the design and
10 construction of a water supply system at Andersen Air Force Base. A First Amended Complaint
11 (“FAC”) was filed on February 24, 2009. *See* Docket No. 54.² In a nutshell, Maeda was the
12 prime contractor on the project, and the other parties to this action were various subcontractors
13 and their insurers. The project included the construction of a reservoir water tank and
14 appurtenant parts. Unfortunately, the reservoir tank roof collapsed, and thus Maeda brought suit
15 against those it believed were responsible for the collapse.³ The various cross claims,
16 counterclaims, and third party claims were thereafter filed between the parties.

17 According to the FAC, in connection with its duties under the primary contract, Maeda
18 subcontracted with GMP. *See* FAC, Docket No. 54, at ¶9. Maeda and GMP disagree over the
19 exact scope of their contract.⁴ Maeda contends that “GMP agreed to design the large water
20

21 ² All docket references are to documents filed in Civil Case No. 08-00012 unless
22 otherwise specified.

23 ³ The roof of the reservoir tank collapsed on July 12, 2007. *See* FAC (Docket No. 54)
24 and Exh. B thereto at 3. There is controversy over the cause of the collapse. Maeda contends
25 that the collapse was caused by the absence of vents, ventilating systems or ventilators in the
26 tank. *See* FAC (Docket No. 54) at ¶¶20-21 and Ex. B thereto. However, GMP points out that a
study commissioned by the Navy “suggests that operational errors could have been the cause for
the collapse.” Melnyk Decl. (Docket No. 98) at ¶18 and Ex. G thereto.

27 ⁴ The contract between Maeda and GMP is attached as Exhibit A to the FAC (Docket
28 No. 54). This contract and related change orders appear to encompass design, quality control and
value engineering services to be provided by GMP to Maeda. *Id.*

1 reservoir tank to be built pursuant to the prime contract, and agreed to utilize “its best
2 professional skill and knowledge to prepare the Plans and Specifications and other information,
3 and the ultimate design for said tank.” FAC (Docket No. 54) at ¶14. GMP denied that it was
4 responsible for the design of the reservoir tank, *see* GMP’s Answer,⁵ Docket No. 16 at ¶14, and
5 instead asserted that “Maeda contracted with Smithbridge to design and construct the water
6 reservoir tank.” *See* GMP’s Third Party Compl. (Docket No. 17) at ¶7.

7 Another of Maeda’s sub-contracts was with Smithbridge. Maeda contends the
8 subcontract with Smithbridge was for “construction of the reservoir tank and appurtenant
9 sections.” FAC (Docket No. 54) at ¶10. Maeda did not sue Smithbridge, but GMP filed a third
10 party complaint against Smithbridge. *See* GMP’s Third Party Compl. (Docket No. 17).
11 Smithbridge admits that it contracted with Maeda “to design and construct a water reservoir
12 tank structure,” and to that end it “hired Jorgensen . . . to undertake the structural design of the
13 water reservoir tank.” *See* Smithbridge’s Answer to Third Party Compl. (Docket No. 25) at
14 ¶¶7 & 8.

15 The Maeda Action also included a direction action⁶ claim by Maeda against Lexington

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19 ⁵ GMP filed an Answer to the original Complaint. Pursuant to a stipulation between
20 Maeda and GMP, because the FAC contained no new allegations against GMP, the parties agreed
21 that GMP’s Answer would constitute its answer to the FAC. *See* Docket No. 60 at 3.

22 ⁶ Guam’s direction action statute provides:

23 On any policy of liability insurance the injured person or his heirs or
24 representatives shall have a right of direct action against the insurer within the
25 terms and limits of the policy, whether or not the policy of insurance sued upon
26 was written or delivered in Guam, and whether or not such policy contains a
27 provision forbidding such direct action, provided that the cause of action arose in
Guam. Such action may be brought against the insurer alone, or against both the
insured and insurer.

1 and U.S. Specialty Insurance Company.⁷ Lexington admitted that it issued a policy of insurance
2 to GMP which “afford[ed] coverage consistent with its terms which speak for themselves.” *See*
3 Lexington’s Answer to FAC (Docket No. 67) at ¶4.⁸

4 In response to a motion for summary judgment filed by Jorgensen, on April 1, 2010, the
5 Chief Judge certified certain questions to the Supreme Court of Guam, *see* Docket No. 181, and
6 thereafter vacated the trial date and all associated pretrial conferences and deadlines pending
7 answers to the certified questions.⁹ *See* Order (Docket No. 203) at 13.

8 The GMP-Lexington Relationship and Policy

9 On November 26, 2007, GMP submitted a Renewal Application to Lexington for
10 renewal of its 2006-2007 policy.¹⁰ *See* Sterling Aff. (Docket No. 226), Ex. B¹¹ at ¶28. The
11 Renewal Application contained the following two pertinent questions:

12 36. Has any claim ever been made against the firm or any persons named in
13 Item No. 1 or Item No. 10?
14 37. After the inquiry, is the Applicant, any predecessors in business, or any
15 other person for whom coverage is requested aware of any act, error,
omission or circumstances which may possibly result in a claim being
made against them? . . .

16 *Id.* at ¶29.

17
18 ⁷ U.S. Specialty admitted that it “issued a professional liability insurance policy to
19 Defendant Jorgensen & Close Associates, Inc. . . ., which affords coverage consistent with its
terms and limitations.” *See* U.S. Specialty’s Answer to FAC (Docket No. 62) at ¶6.

20 ⁸ A copy of the insurance policy, which is central to the resolution of the instant motions,
21 can be found as Exhibit A to the Sterling Affidavit (Docket No. 227) and shall hereinafter be
22 referred to as the “Policy.”

23 ⁹ According to Maeda’s May 2011 Status Report, the Supreme Court of Guam scheduled
oral argument on the certified questions matter for June 28, 2011. *See* Docket No. 213.

24 ¹⁰ The 2006-2007 policy covered the period December 17, 2006 to December 17, 2007.
25 *See* Sterling Aff. (Docket No. 226), Ex. B at ¶13. The 2006-2007 policy required GMP to
26 report a claim to Lexington in writing during the policy period or within 60 days thereafter in
order to avail itself of coverage under the 2006-2007 policy. *Id.*

27 ¹¹ Exhibit B to the Sterling Affidavit (Docket No. 226) is Lexington’s Arbitration
28 Statement.

1 In response to question 36, GMP disclosed a claim unrelated to the Maeda Action. *Id.*

2 at ¶30. With regard to question 37, GMP responded “no.” *Id.* at ¶31.

3 Lexington thereafter issued the Policy to GMP, covering the period December 17, 2007,
4 to December 17, 2008.¹² *Id.* at ¶6. The Policy provided coverage for the “Breach of
5 Professional Duty forming the basis of any claim [that] arise[s] out of Professional Services that
6 take place [during the] Policy Period.” *See* Sterling Aff. (Docket No. 226), Ex. A at ¶ I.A.1. As
7 a condition precedent to coverage, the Policy required that “[p]rior to the effective date of [the
8 Policy], no officer, director, principal, partner, insurance manager, or risk manager of the
9 Insured ha[ve] knowledge of the Breach of Professional Duty or circumstance likely to give rise
10 to a Claim under [the Policy].” *Id.* at ¶ I.A.2. The policy defined the term “Claim” as “any
11 written demand received by an Insured seeking Damages and alleging liability or responsibility
12 on the part of the Insured or persons for whose conduct the Insured is legally liable.” *Id.* at
13 ¶ III.D. Additionally, the Policy defined the term “Damages” to mean “any amount which an
14 Insured is legally obligated to pay for any claim to which this insurance applies.” *Id.* at ¶ III.G.

15 Shortly after the Maeda Action was initiated (August 14, 2008), on or about August 27,
16 2008, GMP notified Lexington about the claims asserted against it in the Maeda Action. *See*
17 Sterling Aff. (Docket No. 226), Ex. B at ¶18. On April 2, 2009, Lexington agreed to defend
18 GMP in the Maeda Action subject to “a full and complete reservation of its right to deny
19 coverage for the Maeda claim while it conducted an investigation into the coverage afforded
20 under the Policy for the claims asserted against [GMP].” *Id.* at ¶19.

21 After the FAC adding Lexington as a defendant to the Maeda Action was filed on
22 February 24, 2009, discussions ensued concerning the Calvo Firm’s¹³ representation of both
23

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¹² The Policy is a “claims-made policy” which “applies to only those claims that are first
25 made against the insured and reported to [Lexington] during the same policy period or extended
26 reporting period, if applicable.” *See* Sterling Aff. (Docket No. 226), Ex. A.

27 ¹³ Formerly the Calvo & Clark law firm and now doing business as Calvo Fisher & Jacob
28 LLP. The Calvo Firm had been retained to represent GMP in the Maeda Action. *See* GMP’s
Answer, Docket No. 16.

1 GMP and Lexington in the Maeda Action. *See* Rosenberg Aff. (Docket No. 18 in Civil Case
2 No. 11-00010) at ¶3. As a result of these discussion and because Lexington was still conducting
3 its own investigation into the claims asserted by Maeda, GMP and Lexington executed a
4 Conflict of Interest Waiver and Defense Agreement (hereinafter “Conflict Waiver Agreement”).
5 *Id.* at ¶4 and Ex. A thereto. As a result of the execution of the Conflict Waiver Agreement,
6 Lexington retained the Calvo Firm to defend it, along with GMP, in the Maeda Action. *Id.* at ¶5
7 and Ex. A thereto.

8 The Calvo Firm thereafter filed Lexington’s Answer to the FAC on May 21, 2009. *See*
9 Docket No. 67. Lexington’s Answer denied “that it ha[d] any liability to Plaintiff or any other
10 party,” denied “each and every allegation [of paragraphs 20 through 22] that pertain[ed] to GMP
11 or Lexington, [and denied] that [GMP] or Lexington [were] liable to Plaintiff in the amount
12 alleged or in any amount” *Id.* at ¶18 and 20-22.

13 Lexington continued to conduct its investigation into the claims asserted in the Maeda
14 Action and the coverage afforded to GMP under the Policy. *See* Sterling Aff. (Docket No. 226),
15 Ex. B at ¶20. Some time in March or April 2010, the Calvo Firm provided the McCormack
16 Firm with copies of deposition transcripts and exhibits pertaining to the Maeda Action.
17 Rosenberg¹⁴ Aff. (Docket No. 18 in Civil Case No. 11-00010) at ¶6. During its review of these
18 documents, Lexington discovered a series of correspondence exchanged between Maeda and
19 GMP in the Fall of 2007. *See* Sterling Aff. (Docket No. 226), Ex. B at ¶22. These
20 correspondence consisted of: (1) a letter dated September 25, 2007 from Maeda’s counsel (Larry
21 Teker) to the Executive Vice President of GMP (Peter Melnyk);¹⁵ (2) a letter dated October 26,

22
23 ¹⁴ Mr. Rosenberg is a partner in the McCormack Firm LLC and has served as coverage
24 counsel for Lexington since 2008 with regard to the claims associated with the Maeda Action.
See Rosenberg Aff. (Docket No. 18 in Civil Case No. 11-00010) at ¶2.

25 ¹⁵ This letter asserted that “GMP bears responsibility for all loss, costs and expense in
26 connection with the roof collapse, which include but are not limited to all clean up costs and all
27 costs associated with reconstruction of the roof, as well as any consequential damages sustained
28 (continued...)

1 2007 from GMP's counsel (Jannalyn C. Damian) in response to Mr. Teker's letter;¹⁶ and (3) a
2 letter dated November 16, 2007 from Mr. Teker to Mrs. Damian.¹⁷ *See* Sterling Aff. (Docket
3 No. 226), Ex. B at ¶¶24-26. Based on this series of letters, Lexington believed that GMP was
4 not entitled to coverage under the Policy because GMP knew since September 2007 of the
5 claims asserted against it by Maeda yet it failed to notify Lexington of said claims with 60 days
6 as required by the 2006-2007 policy, and failed to disclose said facts on its Renewal
7 Application, thus falling outside the purview of the 2007-2008 Policy. *See* Sterling Aff.
8 (Docket No. 226), Ex. B at ¶¶20-21.

9 On October 6, 2010, Lexington then advised GMP that it would not indemnify GMP for
10 any judgment or settlement ultimately rendered in the Maeda Action, but Lexington would
11 continue to provide a defense to GMP under a reservation of rights and may seek reimbursement
12 for such defense expenses at a later date. *Id.* at ¶27 and Compl. in Civil Case No. 11-00010
13 (Docket No. 1) at ¶22. Lexington also terminated its engagement with the Calvo Firm and
14 retained separate counsel for itself.¹⁸ *See* Rosenberg Aff. (Docket No. 18 in Civil Case No. 11-
15 00010) at ¶7.

16 ¹⁵(...continued)

17 by Maeda," *See* Sterling Aff. (Docket No. 226), Ex. B at ¶24. Maeda's counsel also requested
18 that GMP provide Maeda with "copies of its insurance certificates or bonds so that the insurers or
bonding companies could be kept advised of the matter." *Id.*

19 ¹⁶ Mrs. Damian's letter stated "GMP is not liable for any loss, costs and or expenses
20 arising from or connected with the AAFB water tank roof collapse. Further, GMP is not liable to
21 [Maeda] for indemnification and is not obligated to defend [Maeda] or its surety from any claims
22 relating to the water tank roof collapse." *See* Sterling Aff. (Docket No. 226), Ex. B at ¶25 and
Larkin Decl. (Docket No. 234) at Exh. 1/Exh. E thereto.

23 ¹⁷ In this letter, Mr. Teker stated that "GMP Associates is the designer of record of this
water tank, including the roof and GMP Associates is responsible for any deficiencies or defects
24 in the drawings." *See* Sterling Aff. (Docket No. 226), Ex. B at ¶26 and Larkin Decl. (Docket No.
25 234) at Exh. 1/Exh. F thereto. The letter concluded by stated that "[s]ince GMP Associates has
failed to recognize its responsibilities, liabilities and obligations in this matter, . . . Maeda . . .
26 will proceed with the repair of the Andersen A.F.B. water tank . . . and, upon completion, Maeda
27 . . . will turn over the full cost of the repair and additional design work . . . to GMP Associates
. . . , and we fully expect your client to pay for same *in toto.*" *Id.*

28 ¹⁸ On November 24, 2010, the law firm of Blair Sterling Johnson & Martinez made its
entry of appearance on behalf of Lexington. *See* Docket No. 206.

On February 15, 2011, Lexington filed a Demand for Arbitration with the American Arbitration Association against Maeda and GMP. *See* Sterling Aff. (Docket No. 226), Ex. B. Lexington believed that pursuant to the terms of the Policy and the Conflict Waiver Agreement, Lexington and GMP agreed to seek resolution of the coverage dispute through arbitration. *Id.*

The Lexington Action (Civil Case No. 11-00010)

On April 12, 2011, GMP initiated the Lexington Action. In its complaint, GMP alleged claims of breach of contract and breach of the covenant of good faith and fair dealing against Lexington. Aside from compensatory and punitive damages, GMP sought (1) a declaratory judgment that Lexington is required to provide defense and indemnity coverage to GMP in the Maeda Action; (2) a declaratory judgment that GMP is not required to arbitrate the issues Lexington submitted to arbitration; and (3) an order enjoining Lexington from pursuing the arbitration.

Representing GMP in the Lexington Action was attorney Matthew Borden (of Brauhagey LLP) and the Lujan Firm. The Lexington Action created a non-waivable conflict for the Calvo Firm. *See* Rosenberg Aff. (Docket No. 18 in Civil Case No. 11-00010), Ex. B (email from Calvo Firm) . Accordingly, the Calvo Firm withdrew from further representing GMP in the Maeda Action. *See* Docket Nos. 238 & 250.

On May 5, 2011, Lexington filed an answer in the Lexington Action. *See* Docket No. 2 (in Civil Case No. 11-00010).

On May 20, 2011, Lexington filed the two motions at issue here seeking a stay of proceedings in connection with Maeda's direct action claim against Lexington and a stay of the entire Lexington Action pending arbitration of the issue of whether coverage exists under the Policy for the claims asserted by Maeda. Said motions have been fully briefed by the parties.

ANALYSIS

1. Whether the motion to stay direct action claim is ripe for review

In its opposition, Maeda asserted that Lexington’s motion is not ripe for the court to consider. *See* Docket No. 233 at 2. In light of the certification matter pending before the Supreme Court of Guam, Maeda claimed that the direct action claim was “effectively stayed”

1 since all pretrial and trial dates/deadlines have been vacated. *Id.* Thus, Maeda contended there
2 was no need for the court to rule on said motion at this time.

3 Lexington did not believe its motion was premature. Lexington agreed with Maeda's
4 contention that the Maeda Action is essentially "stayed" while the parties await the Supreme
5 Court of Guam's determination. *See* Docket No. 259 at 5. However, Lexington surmised that
6 the Supreme Court of Guam would likely answer the certified questions in the next few months.
7 *Id.* If that occurred, Lexington asserted it would be forced to move forward on the direct action
8 claim unless the court imposed a stay as requested to permit the parties to participate in
9 arbitration as contemplated under the Policy. Rather than wait for the Supreme Court of
10 Guam's answers to be issued, Lexington believed it would be more appropriate to seek a stay at
11 this stage before further effort was placed toward responding to discovery on the direct action
12 claim. *Id.* at 6.

13 The court concurs with Lexington's position. Although the trial date and pretrial
14 deadlines have been vacated, it would be an inefficient use of time if the court held off for
15 several months its ruling on the motions for stay until the Supreme Court of Guam issued its
16 answers to the certified questions. Regardless of the Supreme Court of Guam's answers, the
17 court believes it is important to get early resolution of the pending motions and the coverage
18 issue before the parties engage in further discovery on the merits, especially if it is later
19 determined that there is no coverage under the Policy. Accordingly, the court concludes that the
20 motion for stay is ripe for consideration.

21 2. Whether Policy's arbitration clause covers dispute at issue here

22 Lexington seeks a stay of Maeda's direct action claim and the Lexington Action under
23 the Policy's terms,¹⁹ the terms of the Conflict Waiver Agreement,²⁰ and Section 3 of the Federal
24

25 ¹⁹ The Policy contains an arbitration provision which provides in pertinent part:

26 Notwithstanding the Service of Suit Condition above, in the event of a
27 disagreement as to the interpretation of this policy, it is mutually agreed that such
28 dispute shall be submitted to binding arbitration before a panel of three (3)
arbitrators, consisting of two (2) party-nominated (non-impartial) arbitrators and a

(continued...)

1 Arbitration Act (“FAA”), 9 U.S.C. § 3.

2 The FAA governs disputes involving contracts which touch upon interstate commerce or
3 maritime law. 9 U.S.C. §§ 1 *et seq.* Section 2 of the FAA provides that “[a] written provision in
4 . . . a contract evidencing a transaction involving commerce to settle by arbitration a
5 controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable,
6 save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C.
7 § 2. The FAA also establishes procedures by which federal courts implement section 2’s
8 substantive rule. For instance, Section 3 provides that a court “shall on application of one of the
9 parties stay the trial of the action” “upon any issue referable to arbitration under an agreement in
10 writing for such arbitration.” 9 U.S.C. § 3.

11 The court’s role under the FAA is to determine “(1) whether a valid agreement to

12
13 ¹⁹(...continued)
14 third (impartial) arbitrator (hereinafter “umpire”) as the sole and exclusive
15 remedy.

16 See Sterling Aff. (Docket No. 226), Ex. A at ¶ V.Q.

17 ²⁰ The Conflict Waiver Agreement contained the following pertinent provisions:

18 2. The parties to this agreement further agree that by consenting to the waiver
19 of any actual or potential conflict of interest, none of the parties are
20 waiving any rights or defenses they may have in connection with the
Lexington policy. Moreover, the parties to this agreement further agree, as
to the Lexington policy, that:

21 a. All disputes concerning coverage under the Lexington
22 policy will be arbitrated pursuant to the applicable
arbitration provisions as set forth in the Lexington policy.

23 b. The parties agree not to file any coverage-related cross
24 claims or otherwise initiate claims against each other of any
kind in the Maeda action.

25 c. The parties further agree that, for purposes of any coverage-
26 related arbitration, no party will be bound by any rulings,
admissions, or statement that may be made in the Maeda
27 action. Rather, all facts relating to coverage shall be
determined by the arbitrators in connection with the
arbitration.

28 See Rosenberg Aff. (Docket No. 18 in Civil Case No. 11-00010), Ex. A.

1 arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.”

2 *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d. 1126, 1130 (9th Cir. 2000) (citation
3 omitted). Here, the parties do not dispute that a valid agreement to arbitrate existed. The
4 Policy between Lexington and GMP had an arbitration provision, *see* Sterling Aff. (Docket
5 No. 226), Ex. A at ¶ V.Q, and so did the Conflict Waiver Agreement. *See* Rosenberg Aff.
6 (Docket No. 18 in Civil Case No. 11-00010), Ex. A at ¶2. Accordingly, the court must
7 determine whether the parties’ dispute falls within the scope of their arbitration agreement.

8 “Generally, when examining an arbitration contract, ‘the FAA establishes that, as a
9 matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in
10 favor of arbitration’” *Momot v. Mastro*, ____ F.3d ___, 2011 WL 2464781 *4 (9th Cir. June
11 22, 2011) (*quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 at 24–25
12 (1983)). In light of this strong federal policy, enforcement of an arbitration agreement “should
13 not be denied unless it can be said with positive assurance that the arbitration clause is not
14 susceptible of an interpretation that covers the asserted dispute.” *AT & T Technologies, Inc. v.*
15 *Comm’ns Workers*, 475 U.S. 643, 650 (1986); *see also United Food and Comm. Workers*
16 *Union v. Geldin Meat Co.*, 13 F.3d 1365, 1368 (9th Cir. 1993) (“Doubts should be resolved in
17 favor of coverage.”).

18 Despite Lexington’s assertion that this dispute involves “interpretation of the Policy” as
19 contemplated in ¶ V.Q, both Maeda and GMP argue that the Policy’s “narrow” arbitration
20 clause does not apply to the disputes at issue here concerning coverage and bad faith. *See*
21 Maeda Opp’n (Docket No. 233) at 8 and GMP Opp’n (Docket No. 16 in Civil Case No. 11-
22 00010) at 8. GMP asserts that since Lexington “elected to limit the scope of its arbitration
23 clause to ‘interpretation of [the P]olicy,’” Lexington can not now broaden this provision to
24 encompass the coverage dispute at issue here. GMP Opp’n (Docket No. 16 in Civil Case No.
25 11-00010) at 9. According to GMP, the disagreement here does not involve the interpretation of
26 any term of the Policy. “Rather, it concerns (1) the factual question of whether notice was
27 given; (2) the legal effect of any supposed lack of notice, and (3) whether Lexington Insurance
28 has engaged in bad faith.” *Id.* at 10.

1 In response to this argument, Lexington maintains that “the determination of a coverage
2 dispute involves an interpretation of the policy to determine what coverage it provides.”
3 Lexington Reply (Docket No. 17 in Civil Case No. 11-00010) at 12. Although the scope of the
4 Policy’s arbitration provision is not as broad as the language contained in the American
5 Arbitration Association’s standard clause, the court is not convinced that the Policy’s arbitration
6 provision is as narrow as Maeda and GMP argue it is. Because it can not be said with certainty
7 that ¶ V.Q of the Policy is not susceptible to an interpretation that encompasses the asserted
8 coverage dispute here, the court agrees with Lexington. The disagreement between GMP and
9 Lexington requires interpretation of the Policy, specifically whether GMP complied with the
10 conditions precedent set forth in ¶ I.A. If GMP failed to do so, as Lexington contends, then
11 there is no coverage provided to GMP under the terms of the Policy. The court’s role is not to
12 express an opinion on the merits of whether a claim was timely made.²¹ However, the court can
13 not conclude that resolving the issue of whether a claim was timely made is independent of any
14 interpretation of the Policy. The Policy’s provision concerning “knowledge [by GMP] of the
15 [b]reach of [p]rofessional [d]uty or circumstance likely to give rise to a [c]laim” will have to be
16 interpreted to determine whether the correspondence exchanged between counsel for Maeda and
17 GMP in the Fall of 2007 constituted such knowledge. Additionally, determining when a
18 “claim” was made may well involve interpretation of the Policy. GMP’s claim of bad faith
19 against Lexington is also an issue which is arbitrable under the Policy since, if Lexington is
20 correct that the conditions precedent of ¶ I.A have not been satisfied, then Lexington could not
21 have acted in bad faith in denying GMP coverage under the Policy. Thus, this dispute over
22 coverage involves “a disagreement as to the interpretation of [the P]olicy,” which is subject to
23 arbitration under ¶ V.Q of the Policy. The court’s conclusion is bolstered by the language of the
24 Conflict Waiver Agreement. Said agreement specifically provides that “[a]ll disputes
25 concerning coverage under the Lexington policy will be arbitrated pursuant to the applicable

26
27 ²¹ There would appear to be some unfairness to the strict timing requirements of a
28 claims-made policy. At the hearing held on July 12, 2011, Mr. Sterling briefly discussed with the
court the advantages and disadvantages between a claims-made policy and an occurrence policy.

1 arbitration provisions as set forth in the Lexington policy.” *See* Rosenberg Aff. (Docket No. 18
2 in Civil Case No. 11-00010), Ex. A at ¶2a.

3 Another argument raised by Maeda and GMP is that the Service of Suit provision set
4 forth in ¶ V.P of the Policy is much broader than the arbitration clause set forth in ¶ V.Q. The
5 Service of Suit provision²² covers the failure to pay “any amount claimed to be due” under the
6 Policy, whereas the arbitration clause covers only interpretations of the Policy. GMP asserts
7 that under the broader Service of Suit clause, Lexington agreed to submit itself to the
8 jurisdiction of a court of competent jurisdiction. GMP contends the “narrow” arbitration clause
9 is in conflict with the Service of Suit clause and creates ambiguity. According to GMP, because
10 it is unclear whether the instant dispute is required to be submitted to arbitration or can be
11 brought in this court, GMP requests the court construe the Policy against Lexington and find the
12 arbitration clause to be superseded by the Service of Suit provision. *See* GMP Opp’n (Docket
13 No. 16 in Civil Case No. 11-00010) at 11-12.

14 In so arguing, GMP cited to the case of *Monticelli v. Homestead Ins. Co.*, 1997 WL
15 88379 (N.D. Cal. Feb. 14, 1997), to support its proposition that the Service of Suit provision
16 trumps the arbitration clause of the Policy. As Lexington notes, the *Monticelli* case is easily
17 distinguishable from the facts of the instant dispute. The *Monticelli* case concerned a policy for
18 patent infringement abatement insurance and what appeared to be two contradictory clauses: the
19 arbitration clause contained in the policy and the service of suit provision, which was later
20 added as an endorsement to the original contract. *Id.* at *1. The district court eventually found
21 that the subsequent service of suit provision superseded the earlier arbitration clause because it
22 came later in time. *Id.* Unlike the facts of this case, both the Service of Suit provision and the
23 arbitration clause are contained in a single Policy which was issued by Lexington to GMP at the
24 same time.

25

26 ²² The Policy’s Service of Suit provision in pertinent part provides: “In the event of
27 failure of the Company to pay any amount claimed to be due hereunder, the Company, at the
28 request of the Insured, will submit to the jurisdiction of a court of competent jurisdiction within
the United States.” *See* Sterling Aff. (Docket No. 226), Ex. A at ¶ V.P.

1 In its motion, Lexington cites to a number of cases that rejected the notion that a service
2 of suit provision overrode a policy's arbitration clause. *See* Lexington's Motion (Docket No. 3
3 in Civil Case No. 11-00010) at 4-5. The court has reviewed these cited cases supporting
4 Lexington's contention that instead of conflicting with one another, a service of suit clause can
5 be interpreted to be harmonious with an arbitration clause, specifically because the service of
6 suit provision permits policyholders to bring suit in a court of competent jurisdiction in order to
7 enforce compliance with an arbitration award. *See also NS Holdings LLC, Inc. v. American*
8 *Intern. Group Inc.*, 2010 WL 4718895 at *3 (C.D. Cal. Nov. 15, 2010) (relying on the decision
9 in *Borghos v. Certain Underwriters at Lloyd's of London*,²³ 36 Cal.4th 495, 115 P.3d 68 (Cal.
10 Ct. App. (2005)), the district court read the service of suit provision in plaintiff's insurance
11 policy in accordance with the presumption favoring arbitration and found no conflict between
12 said provision and the arbitration provision in the policy).

13 The court is persuaded by these line of cases and adopts Lexington's argument on the
14 matter. The court finds no conflict between ¶ V.P and ¶ V.Q. Just as the *NS Holdings* and
15 *Borghos* courts found no conflict in similar provisions, there can be no conflict here since
16 arbitration clause set forth in ¶ V.Q specifically includes the phrase “[n]otwithstanding the
17 Service of Suit Condition” of ¶V.P. The court reads these provisions in harmony with one
18 another in light of the strong federal policy favoring arbitration.

19 3. Whether Lexington waived its right to arbitrate

20 Having found that the arbitration provision encompasses the dispute at issue here, the
21 court will next address the argument raised by Maeda and GMP that Lexington waived its right
22 to arbitration. *See* Maeda Opp'n (Docket No. 233) at 3-6 and GMP Opp'n (Docket No. 16 in
23 Civil Case No. 11-00010) at 12-13.

24 The parties all agree that to demonstrate waiver of the right to arbitrate, a party must

25
26 ²³ The *Borghos* court, after surveying case law from federal and state courts around the
27 country standing for the general proposition that service of suit and arbitration provisions similar
28 to those at issue in its case do not conflict, stated that “the service of suit clause should be
interpreted, in view of the presumption favoring arbitration, as intended to facilitate enforcement
of the arbitration clause.” *Id.* at 502..

1 show: “(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that
2 existing right; and (3) prejudice to the party opposing arbitration resulting from such
3 inconsistent acts.” *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir.1986).
4 However, the Ninth Circuit has also emphasized that “waiver of the right to arbitration is
5 disfavored because it is a contractual right, and thus ‘any party arguing waiver of arbitration
6 bears a heavy burden of proof.’” *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 758
7 (9th Cir.1988).

8 Maeda and GMP assert that all three prongs of the waiver analysis have been satisfied
9 here. With regard to the first factor, Maeda and GMP contend that, as the drafter of the Policy,
10 Lexington was well aware of its right to compel arbitration, yet it never sought to enforce the
11 arbitration clause. *See* Maeda Opp’n (Docket No. 233) at 4 and GMP Opp’n (Docket No. 16 in
12 Civil Case No. 11-00010) at 12.

13 Second, Maeda and GMP claim that Lexington acted in a manner inconsistent with its
14 supposed right to arbitration by litigating the Maeda Action for two years (including
15 participation in document discovery, depositions, and dispositive motions practice) before filing
16 an arbitration demand. *Id.*

17 As to the third factor, Maeda and GMP allege that they have been and will be further
18 prejudiced if Lexington is allowed to arbitrate its dispute. Maeda states that it has invested
19 years of time and hundreds of thousands of dollars in extensive document discovery, depositions
20 and motion practice, so it would be prejudiced if it were forced to arbitrate its claims in
21 Massachusetts or wait until GMP and Lexington have completed their arbitration. *See* Maeda
22 Opp’n (Docket No. 233) at 5-6. GMP, too, contends that it will be “substantially prejudiced if it
23 is forced into a duplicative arbitration proceeding in a remote jurisdiction far from where the
24 evidence is located and the witnesses reside.” GMP Opp’n (Docket No. 16 in Civil Case
25 No. 11-00010) at 12. GMP further claims prejudice in that granting the request to stay would
26 require GMP to self-finance its defense in the Maeda Action while simultaneously defending
27 against the arbitration claims. *Id.*

28 Lexington counters these arguments by asserting that neither party has established a

1 single prong of the three-part test. Although it is indisputable that Lexington was aware of the
2 arbitration provision in the policy, Lexington contends the critical issue is *when* Lexington knew
3 there was a coverage issue which then triggered the right to demand arbitration. Contrary to
4 Maeda's assertions, Lexington maintains that it first realized the potential dispute over coverage
5 some time in March or April 2010 when it was provided with the exhibits to depositions that
6 showed a series of communications between Maeda and GMP which occurred in the Fall 2007.
7 Lexington contends that upon this discovery it did not sit on its rights or take actions
8 inconsistent therewith, but rather acted diligently when in October 2010 – a mere six or seven
9 months after discovery of the communications – it discharged the Calvo firm, retained new
10 counsel, and advised GMP that it was declining coverage under the Policy. Four months
11 thereafter, Lexington filed its demand for arbitration as required by the Policy. Finally,
12 Lexington argues that neither Maeda nor GMP have established the crucial element of prejudice.
13 Lexington asserts that all the time, effort and expense associated with pretrial discovery and
14 litigation maneuvers is insufficient to constitute “prejudice” as required by Ninth Circuit case
15 law. *See Fisher*, 791 F.2d at 697 (rejecting claim of prejudice based on extensive discovery
16 undertaken by the parties in a securities case). As Lexington notes, whether it made an
17 arbitration demand or not, all the parties would have had to undertake the discovery thus far
18 conducted. Furthermore, neither Maeda nor GMP can show that a significant portion of the
19 “extensive” discovery and litigation had anything to do with the coverage dispute and the
20 demand for arbitration.

21 As for GMP's assertion that it will suffer prejudice by having to arbitrate in
22 Massachusetts, Lexington correctly notes that GMP was well aware of the arbitration site since
23 the Policy specifically states that the “arbitration proceeding shall take place in or in the vicinity
24 of Boston, Massachusetts.” As to GMP's argument about duplicative proceedings, the Ninth
25 Circuit has found that “the possibility that there will be some duplication from the parallel
26 proceedings” is not prejudicial since the FAA requires courts to “compel arbitration even where
27 the result would be the possibly inefficient maintenance of separate proceedings in different
28 forums. *See Fisher*, 791 F.2d at 698.

1 In light of the heavy burden placed on parties opposing arbitration and the strong policy
2 favoring arbitration, the court overrules the Maeda and GMP's objections and adopts
3 Lexington's arguments. The court finds that Maeda and GMP have failed to satisfy the three-
4 prong test to establish that Lexington waived its right to arbitration.

5 4. Whether Maeda is bound by the arbitration agreement

6 Maeda's final argument is that because it is not a signatory to the Policy containing the
7 arbitration clause, Lexington can not require Maeda to arbitrate its direct action claim. *See*
8 Maeda Opp'n (Docket No. 233) at 6-8. Additionally, Maeda contends that because the
9 arbitration provision only applies to disagreements as to the interpretation of the Policy itself,
10 the arbitration provision would not apply to core issues such as the breach of contract and
11 professional negligence claims it has asserted against GMP.

12 The case of *Arthur Anderson LLP v. Carlisle*, 129 S. Ct. 1896 (2009), is instructive with
13 regard to Maeda's contention that it can not be compelled to arbitrate its claim since it was not a
14 party to the Policy. In *Arthur Anderson*, a litigant who was not a party to the relevant arbitration
15 agreement sought a stay of the proceedings in order to invoke Section 3 of the FAA and the
16 relevant arbitration provision in the investment agreements. The Supreme Court eventually held
17 "that a litigant who was not a party to the relevant arbitration agreement may invoke [Section 3
18 of the FAA] if the relevant state contract law allows him to enforce the agreement." *Id.* at 1903.
19 The Supreme Court stated "that, where state law permit it, a third-party claim is 'referable to
20 arbitration under an agreement in writing.'" *Id.* at 1902, n.6. Thus, the court must examine
21 Guam law and determine whether Maeda, as a direct action claimant, can be required to
22 participate in the arbitration proceeding envisioned by the Policy.

23 Lexington does not cite to any Guam cases on this issue but its motion and reply briefs
24 make reference to several cases which hold that claimants who bring direct actions against
25 insurers are considered third party beneficiaries to said insurance policies and are thus bound by
26 an arbitration agreement in said policy. *See* Docket Nos. 225 at 6-7 and 259 at 9-11. Normally,
27 a party cannot be compelled to arbitrate a dispute that it has not elected to submit to arbitration.
28 Under California law, however, a nonsignatory can be compelled to arbitrate under two sets of

1 circumstances: (1) where the nonsignatory is a third party beneficiary of the contract containing
2 the arbitration agreement; and (2) where “a preexisting relationship existed between the
3 nonsignatory and one of the parties to the arbitration agreement, making it equitable to compel
4 the nonsignatory to also be bound to arbitrate his or her claim.” *County of Contra Costa v.*
5 *Kaiser Foundation Health Plan, Inc.*, 47 Cal. App.4th 237 at 242 (1996), 54 Cal. Rptr.2d 628;
6 *see Matthau v. Superior Court*, 151 Cal. App.4th 593, 599–600 (2007). Lexington urges the
7 court to hold likewise here and find that Maeda is a third party beneficiary to the Policy and thus
8 must be bound by the arbitration provision.

9 The court notes that both Maeda and Lexington cite to the case of *Flexi-Van Leasing*
10 *Inc. v. through Transp. Mut. Ins. Ass'n.*, 108 Fed. Appx. 35 (3d Cir. 2004) to support their
11 respective positions on this matter. In *Flexi-Van*, the plaintiff obtained a default judgment
12 against one of the world’s largest container shipping lines, who had procured an insurance
13 policy from a mutual indemnity insurance association. Said insurance policy contained a
14 provision that stated “[i]f any difference or dispute shall arise between you (or any other person)
15 and the Association arising out of or in connection with any insurance provided by the
16 Association ..., it shall be referred to arbitration in London.” *Id.* at 37. The plaintiff eventually
17 brought suit against the insurance association under New Jersey’s direct action statute. The trial
18 court ordered the plaintiff to submit to arbitration, and in affirming that decision, the Third
19 Circuit stated:

20 Generally speaking, a party cannot be required to participate in arbitration, rather
21 than adjudication, of a dispute unless it has agreed to submit that dispute, or
22 disputes of like nature, to the arbitral process. *Flexi-Van* was not a signatory to
the insurance policy, nor was it listed in the policy as an “Assured,” a “Joint
Assured,” or a “Co-Assured.” However, **we have recognized that**
non-signatories to an arbitration agreement may be bound by that
agreement through the application of “traditional principles of contract and
agency law.” One such traditional principle, applicable in the arbitration
context, is the principle that a third-party beneficiary is bound by the terms
of a contract where its claim arises out of that contract.

26 *Id.* at 40 (internal citations omitted; emphasis added).

27 Although there is no Guam case directly on point, in applying the above analysis, it
28 would appear that Maeda is a third party beneficiary to the Policy. Under Guam law, Maeda is

1 entitled to bring a direct action against Lexington but such action must be “within the terms and
2 limits of the policy.” In this instance, the terms of the Policy require arbitration when there is
3 disagreement as to the interpretation of the Policy. Because there is a disagreement as to
4 whether GMP is entitled to coverage under the Policy, Maeda – as a third party beneficiary to
5 the Policy – is equally bound by the arbitration provision of the Policy.

5. Whether Lexington's "misconduct" precludes the granting of a stay

Finally, GMP argued that Lexington's act of "engineering" the withdrawal of the Calvo Firm as counsel for GMP in the Maeda Action constitutes bad faith on its part. Although the Calvo Firm had represented GMP from the inception of the Maeda Action, GMP contended that Lexington refused to waive any potential conflict of interest the Calvo Firm faced "in an effort to undermine GMP's litigation strategy and to drive up its costs." *See* GMP Opp'n (Docket No. 16 in Civil Case No. 11-00010) at 13-14. Because of Lexington's improper and unfair litigation tactics, GMP asserted Lexington was precluded from obtaining the stay it sought.

14 Lexington denied the allegations of misconduct. *See Lexington Reply* (Docket No. 17 in
15 Civil Case No. 11-00010) at 14-15. Lexington implied that it was GMP’s misconduct in failing
16 to timely notify Lexington of the likelihood of the Maeda claim and in failing to disclose this
17 fact when Maeda renewed its insurance policy that resulted in Lexington’s late discovery of the
18 coverage issue. Lexington asserted that the Calvo Firm’s conflict resulted not because of
19 Lexington’s actions but because GMP refused to honor its commitments to arbitrate coverage
20 disputes as contemplated by the Policy and the conflict Waiver Agreement.

21 The court notes that GMP's opposition brief cites to no authority for the proposition that
22 the court may refuse to enforce an arbitration provision based on misconduct on the part of the
23 party asserting such a right. The court is not persuaded by GMP's arguments and finds no
24 misconduct on the part of Lexington. Accordingly, the court overrules GMP's argument on this
25 issue.

CONCLUSION

27 Based on the above analysis, the court rules as follows: (1) the motions are ripe for
28 consideration; (2) the coverage dispute at issue here involves a disagreement as to the

1 interpretation of the Policy, thus falling within the scope of the Policy's arbitration provision;
2 (3) Lexington has not waived its right to arbitrate; (4) Maeda, as a third party beneficiary to the
3 Policy, is bound by the arbitration agreement; and (5) there was no misconduct on the part of
4 Lexington concerning the Calvo Firm's eventual withdrawal so as to preclude the granting of a
5 stay. In light of the strong federal policy favoring arbitration, the court hereby grants both of
6 Lexington's motions for stay.²⁴ The direction action claim in Civil Case No. 08-00012 and
7 GMP's claims in Civil Case No. 11-00010 are hereby stayed pending arbitration on the issue of
8 whether coverage for such claims exist under the Policy.

9 In light of the imposed stay, the court hereby vacates the scheduling conference set for
10 August 3, 2011. The requests²⁵ to participate telephonically are deemed moot.

11 Finally, Lexington shall file a report with the court on November 1, 2011, and every
12 three (3) months thereafter, advising it of the status of the arbitration proceedings.

13 IT IS SO ORDERED.



14 /s/ Joaquin V.E. Manibusan, Jr.
15 U.S. Magistrate Judge
16 Dated: Aug 02, 2011
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26 ²⁴ These motions are Docket No. 225 in Civil Case No. 08-00012 and Docket No. 3 in
27 Civil Case No. 11-00010.

28 ²⁵ These requests are Docket Nos. 263 and 267.