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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re: THE ROMAN CATHOLIC BISHOP OF OAKLAND, a California corporation sole, Debtor.	Chapter 11 Case No. 23-40523 WJL
THE ROMAN CATHOLIC BISHOP OF OAKLAND, Plaintiff, v. PACIFIC INDEMNITY, *et al.*, Defendants.	Adv. Pro. No. 23-04028 WJL Objections Due: October 4, 2023 Hearing Date: October 18, 2023 Hearing Time: 10:30 a.m. Courtroom: 1300 Clay Street Oakland, CA 94612

CERTAIN EXCESS INSURERS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT FOR BREACH OF CONTRACT AND DECLARATORY JUDGMENT RELIEF

Continental Casualty Company (erroneously sued as CNA Insurance Company),[1] Westport Insurance Corporation (formerly known as Employers Reinsurance Corporation), United States Fire Insurance Company, and Certain Underwriters at Lloyd's, London subscribing severally and not jointly to Slip Nos. CU 1001, K 66034, K 78138, and CU 3061 (misidentified in the caption used by the Debtor as "Certain Underwriters At Lloyd's of London Subscribing to Syndicates 2623 (AFB) and 623 (AFB)") (collectively, "Certain Excess Insurers") hereby move, pursuant to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure and Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the First Amended Complaint for Breach of Contract and Declaratory Judgment Relief (the "Complaint," Dkt. No. 2) for failure to state a claim upon which relief can be granted.

The grounds in support of this Motion are set forth in the accompanying Memorandum of Points and Authorities. In sum: The Complaint fails to state claims for breach of contract or declaratory judgment against Certain Excess Insurers because it alleges that Certain Excess Insurers issued only excess insurance policies, but does not allege that all underlying primary insurance coverage available to Debtor has exhausted. Under *Iolab Corp. v. Seaboard Surety Co.*, 15 F.3d 1500 (9th Cir. 1994), and its progeny, Debtor's claims therefore must be dismissed because the facts alleged do not give rise to the inference that Certain Excess Insurers' obligations under their purported policies have incepted, precluding a claim for breach. Moreover, Debtor's shotgun pleading – lumping together vague and indeterminate allegations against six different alleged excess carriers – is improper and precludes Certain Excess Insurers from responding. Finally, the Complaint fails to state a claim to the extent it alleges that Certain Excess Insurers failed to "confirm coverage" because, as a matter of California law, Certain Excess Insurers have no duty to "confirm coverage" on the facts alleged.

This Motion is based on this Motion, the accompanying Memorandum of Points and Authorities, and the Complaint.

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[1] The Complaint names "CNA Insurance Company" as a defendant, but because the policies at issue were actually issued by Continental Casualty Company, Continental is the proper defendant.

WHEREFORE, Certain Excess Insurers respectfully request that this Court enter an order dismissing the Complaint in its entirety as to Certain Excess Insurers and granting such other and further relief as is just and proper.

Dated: August 31, 2023

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CERTAIN EXCESS INSURERS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT FOR BREACH OF CONTRACT AND DECLARATORY JUDGMENT RELIEF

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Debtor's First Amended Complaint for Breach of Contract and Declaratory Judgment Relief (the "Complaint," Dkt. No. 2) should be dismissed because it fails to state claims against Certain Excess Insurers upon which relief can be granted.

According to the allegations of the Complaint, Certain Excess Insurers issued excess insurance policies to Debtor. Debtor further alleges that Certain Excess Insurers breached their obligations under these policies by "improperly den[ying]" and "fail[ing] to confirm" coverage for underlying sexual abuse lawsuits against Debtor. The Complaint also seeks a declaration that Certain Excess Insurers owe coverage for such suits. But the Complaint fails to allege that underlying primary coverage has been exhausted. Indeed, it alleges the contrary, that Debtor's primary insurers breached their policy obligations by not indemnifying Debtor for the underlying sexual abuse claims. Under controlling Ninth Circuit precedent and California law, the effect of the Complaint's failure to allege exhaustion of primary coverage is that it fails to state a claim against Certain Excess Insurers, and therefore should be dismissed, because excess insurers have no duty to defend or indemnify until all underlying primary insurance coverage has exhausted.

Moreover, Debtor's allegations that Certain Excess Insurers acted wrongfully are impermissibly vague. Debtor alleges that the six "Excess Insurer Defendants" either "denied" or "failed to confirm" defense or indemnity coverage (or both), and failed to "recognize the exhaustion of underlying insurance" through payment, liquidation of the underlying insurance carrier, or some unspecified "other means." Certain Excess Insurers cannot frame responses to these allegations because the Complaint fails to state what Certain Excess Insurers allegedly did or failed to do. Further, the Complaint fails to allege the basis for its passing assertion that Certain Excess Insurers have any obligation to "drop down" in place of primary coverage.

Finally, the Complaint must be dismissed to the extent it asserts that Certain Excess Insurers breached some purported duty to "confirm coverage" under their policies. In fact, Certain Excess Insurers have no duty to "confirm coverage" in response to Debtor's tender of the underlying suits because Debtor has not alleged that primary coverage has exhausted, and California law is clear that an excess carrier has no duty to respond to a tender, much less "confirm" coverage, until all underlying coverage has exhausted.

Background

Debtor alleges that it "has been named in more than 300 complaints primarily filed in the Alameda Superior Court seeking recovery for alleged negligent supervision and hiring of certain clerical and ministerial personnel over a period of decades."[1] The underlying suits are listed, with case numbers but not plaintiff names, in a 14-page exhibit to the Complaint. The Complaint does not assert that any of these lawsuits have been resolved by settlement or judgment.

The Complaint alleges that Debtor "has maintained insurance coverage through a series of primary, excess and umbrella insurers from the early 1960's through the present time."[2] The Complaint divides the defendants into three categories: Primary Insurer Defendants; Excess Insurer Defendants; and Umbrella Insurer Defendants. Certain Excess Insurers, who are categorized as Excess Insurer Defendants, are alleged to have issued Debtor excess insurance policies.[3]

The Complaint alleges that Debtor "has tendered through its broker both RCBO's defense and indemnity of the Suits under all applicable insurance policies to the associated Defendants that issued those policies and were not insolvent."[4] The Complaint further alleges that the Primary Insurer Defendants "received the tender . . . but have improperly denied or failed to confirm coverage and/or indemnity to RCBO in the Suits."[5] The Complaint then alleges that the Excess Insurer Defendants "received the tender on behalf of RCBO but have improperly denied or failed to confirm coverage (including, without limitation, failure to provide both defense and/or indemnity) including failure to recognize the exhaustion of underlying insurance through payment, liquidation or other means thereby requiring the excess insurance to drop down and provide defense and indemnity to RCBO for the Suits."[6]

Although the Complaint alleges that the Excess Insurer Defendants failed "to

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[1] First Amended Complaint ("Complaint"), ¶ 28.

[2] *See* Complaint, ¶ 30.

[3] Complaint, ¶¶ 15-17, 19.

[4] Complaint, ¶ 31.

[5] Complaint, ¶ 32.

[6] Complaint, ¶¶ 33, 34.

recognize the exhaustion of underlying insurance," the Complaint is bereft of any allegation that any underlying insurance has paid indemnity for even a single suit, much less that any underlying insurance has exhausted. Indeed, the allegation that the Primary Insurer Defendants have "improperly denied or failed to confirm coverage and/or provide defense and/or indemnity to RCBO in the Suits," if taken as true, negates any possibility that the primary insurers have exhausted their coverage by paying to resolve any of the Suits. The Complaint also fails to allege that Debtor itself has spent any funds to settle any Suits or pay any judgments entered against it in any of the Suits.

Based on these thin, general, factually devoid, and conclusory allegations, Debtor purports to assert two causes of action against Certain Excess Insurers and all of the other defendants: one for breach of contract; and another for declaratory relief.[7] The breach claim alleges that Defendants breached their policies by "fail[ing] to provide defense and indemnity to RCBO regarding the Suits."[8] Again, there is no allegation that coverage underlying the policies allegedly issued by the Excess Insurer Defendants is exhausted. As for declaratory relief, the Complaint seeks a declaration that "the Defendants have issued insurance policies to RCBO and that RCBO is entitled to both defense and indemnity coverage regarding [the] Suits."[9]

Standard for motions to dismiss

"A motion to dismiss in an adversary bankruptcy proceeding is governed by Federal Rule of Bankruptcy Procedure 7012(b), which incorporates Federal Rule of Civil Procedure 12(b)-(i)."[10] Under Rule 12(b)(6), "a court must dismiss a complaint if it fails to state a claim upon which relief can be granted."[11]

Although the trial court, at the motion to dismiss phase, "must accept as true all facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiff," the court

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[7] Complaint, pp. 6- 8.

[8] Complaint, ¶ 45.

[9] Complaint, ¶ 43. *See also* Complaint, Prayer for Relief, ¶ a.

[10] *Tracht Gut, LLC v. Los Angeles Cty. Treasurer & Tax Collector (In re Tracht Gut, LLC)*, 836 F.3d 1146, 1150 (9th Cir. 2016).

[11] *Kasolas v. Brower (In re Brower)*, 644 B.R. 187, 191-92 (Bankr. N.D. Cal. 2022).

"does not have to accept as true conclusory allegations in a complaint or legal claims asserted in the form of factual allegations."[12] "To survive a Rule 12(b)(6) motion to dismiss, plaintiff must allege 'enough facts to state a claim to relief that is plausible on its face'" and to "support a cognizable legal theory."[13] "This standard requires the plaintiff allege facts that add up to 'more than a sheer possibility that a defendant has acted unlawfully.'"[14] "A plaintiff must provide 'more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'"[15] "A claim has facial plausibility when the plaintiff pleads sufficient factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[16]

Argument

I. Debtor's claims against Certain Excess Insurers fail because the Complaint does not allege that underlying coverage has exhausted.

Under the Ninth Circuit's decision in *Iolab Corp.*, a California policyholder's breach of contract claim against an excess insurer must be dismissed if the complaint fails to allege exhaustion of primary insurance coverage.[17] Because Debtor's Complaint here does not allege exhaustion of the primary coverage underlying Certain Excess Insurers' policies, the Complaint must be dismissed.

The policyholder in *Iolab* sought indemnification from its primary and excess insurers to satisfy a settlement in a patent infringement action. Noting that California law requires that "[a]ll primary insurance must be exhausted before liability attaches under a secondary policy," the Ninth Circuit held that "Iolab could not have sued the excess insurers for breach of contract until the legal obligations of the primary insurers had been determined and the excess policies had

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[12] *Id.*

[13] *Id.* at 191-92 (Bankr. N.D. Cal. 2022), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and *Shroyer v. New Cingular Wireless Services, Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010).

[14] *Id.*, quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[15] *Id.*, quoting *Iqbal*, 556 U.S. at 662.

[16] *In re Theos Fedro Holdings, LLC*, 2022 WL 10685907, at *1 (Bankr. N.D. Cal. Oct. 18, 2022).

[17] *Iolab Corp. v. Seaboard Surety Co.*, 15 F.3d 1500, 1504 (9th Cir. 1994).

been triggered."[18] The circuit court therefore ruled that the district court properly dismissed the breach of contract claims asserted against the excess insurers.

The Ninth Circuit also held that "the district court did not abuse its discretion in refusing to treat Iolab's action as a request for declaratory relief."[19] Observing that it had, in an earlier decision, "rejected the proposition that 'once the excess insurer has been given notice that the . . . claim against its insured might invade the excess coverage, and the amount of potential exposure is reasonably ascertainable, the excess insurer should be obligated to participate immediately in the defense,'" the Ninth Circuit held that "requiring the excess insurers to defend against Iolab's claim would impose on the excess insurers the unnecessary cost of litigating a claim that may never trigger excess coverage and thereby would frustrate the policy adopted by California courts."[20]

Since *Iolab* was issued, federal courts in California have routinely dismissed claims against excess carriers pursuant to *Iolab.*[21] The district court decision in *Webcor Construction* is particularly apposite.[22] There, plaintiffs sought defense and indemnity coverage for an underlying construction defect suit which they settled with their own funds after the defendant insurers denied coverage. An excess insurer moved to dismiss plaintiffs' claims for breach of the duty to defend, breach of the duty to indemnify, breach of contract, and declaratory relief because plaintiffs failed

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[18] *Id.*

[19] *Id.*

[20] *See id.* at 1504-05, quoting *Hartford Acc. & Indem. v. Continental Nat'l Am. Ins.*, 861 F.2d 1184 (9th Cir. 1988).

[21] *See, e.g., Vizio, Inc. v. Navigators Ins. Co.,* 2021 WL 1808612, *2 (C.D. Cal. May 4, 2021) (dismissing excess insurer from an action for breach of contract and declaratory judgment where plaintiff failed to allege that the underlying primary insurer had exhausted its limit of liability (citing *Iolab*)); *Archer Western Contractors, Ltd. v. Liberty Mut. Fire Ins. Co.,* 2014 WL 12607699, * 3 (C.D. Cal. Aug. 13, 2014) (dismissing excess insurer from an action for breach of contract and declaratory judgment where plaintiff failed to allege that the amount of the settlement in question exceeded the limits of the underlying primary insurance (citing *Iolab*)); *Hensel Phelps Const. Co. v. TIG Ins. Co.*, 2011 WL 13130486, *9 (C.D. Cal. Oct. 5, 2011) ("It would be contrary to the policy underlying the *Iolab* rule to permit [the policyholder] to join [an excess carrier] in this case when it may never have any role in the pending dispute"); *County of Santa Clara v. USF&G,* 1994 WL 715657, *1 (N.D. Cal. Dec. 20, 1994) ("*Iolab* makes clear that the actual exhaustion of primary coverage, and not merely the likelihood of exhaustion, is a prerequisite to bringing a declaratory relief action against the excess insurers"); *Bicoastal Corp. v. Aetna Cas. & Surety Co.*, 1994 WL 564539, *3 (N.D. Cal. Oct. 4, 1994) (same).

[22] *Webcor Construction, LP v. Zurich American Ins. Co.*, 2017 WL 4310763 (N.D. Cal. Sep. 28, 2017).

to allege "that their primary insurance coverages were exhausted, and therefore they failed to allege any contractual duty to defend or indemnify arose."[23] The district court agreed, explaining that "[p]laintiffs' failure to allege exhaustion or even facts giving rise to *an inference* of exhaustion of the primary policies is insufficient."[24] The court continued: "A generalized allegation that plaintiffs have satisfied all conditions or are entitled to benefits under the applicable policies does not suffice."[25] The court concluded, "plaintiffs' failure to allege facts indicating that National's duties as an excess insurer were triggered requires dismissal of their claims."[26]

In its Complaint here, Debtor fails to allege exhaustion of any of the primary policies underlying the policies allegedly issued by Certain Excess Insurers. Indeed, the Complaint's allegation that the Primary Insurers "have improperly denied or failed to confirm coverage and/or provide defense and/or indemnity" for the Suits[27] negates any possibility that the Complaint can be read to allege underlying exhaustion. Debtor's claims therefore must be dismissed under *Iolab* and its progeny.

II. What Certain Excess Insurers are alleged to have done (or not done) is indiscernible from the Complaint.

Although the district court in *Webcor* dismissed the complaint with leave to amend, it ordered that any amended complaint "should provide additional detail" because the dismissed complaint "ma[d]e little to no effort to allege facts specific to each defendant" but rather "attribute[d] conduct generically to all defendants."[28] This instruction is consistent with the

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[23] *Id.* at *1.

[24] *Id.* at *3 (emphasis in original).

[25] *Id.*

[26] *Id.* at *4. The court discussed at length the principles of California law that underlie both the Ninth Circuit's ruling in *Iolab* and its own ruling: "California's rule of 'horizontal exhaustion' in liability insurance law requires all primary insurance to be exhausted before an excess insurer must 'drop down' to defend an insured, including in cases of continuing loss. [U]nder California law, it is clear that '[a]ll primary insurance must be exhausted before liability attaches under a secondary policy.' Thus, an insured cannot sue "the excess insurers for breach of contract until the legal obligations of the primary insurers [have] been determined and the excess policies [have] been triggered." *Id.* at *3 (citations omitted) (cleaned up).

[27] Complaint, ¶ 32.

[28] *Webcor Construction*, 2017 WL 4310763 at *4.

principle that shotgun complaints are subject to dismissal under Rule 12(b)(6).[29] Debtor's Complaint runs afoul of this principle, since it fails to make any specific allegation about what individual Certain Excess Insurers allegedly did or failed to do that was wrongful. Accordingly, the Complaint's failure to plead facts specific to the allegedly wrongful actions or inactions of each of the Certain Excess Insurers is an additional reason why the Complaint must be dismissed.

This principle also requires dismissal of the Complaint's allegations that Certain Excess Insurers failed to "drop down." Under California law, whether an excess policy must "drop down" and assume the defense or indemnification obligations of an insolvent underlying insurer is entirely dependent on policy language.[30] Although the Complaint alleges that Commercial Union/Armour Insurance "reported that they had become insolvent," it also alleges that defendant California Insurance Guarantee Association—sued as one of the "Primary Insurer Defendants"—has "assumed the responsibilities of Commercial Union/Armour Insurance regarding the" Commercial Union/Armour Insurance primary policies.[31] Thus, the Complaint fails to allege that any primary coverage is insolvent and also unavailable, which is a precondition to any "drop down" obligation. The Complaint also fails to allege that Certain Excess Insurers' policies contain language that supposedly requires those policies to "drop down" in place of insolvent underlying primary coverage. These omissions are fatal, requiring that the Complaint's "drop down" allegations be dismissed.

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[29] *In re Vitalich*, 2016 WL 1644077, *2 (Bankr. N.D. Cal. Apr. 22, 2016) (dismissing complaint in an adversary proceeding that "repeatedly lump[ed] all defendants into virtually all of the allegations such that no defendant could possibly know whether it, or other defendants, is charged with the actions alleged by the Plaintiff"); *Heidingsfelder v. Ameriprise Auto & Home Ins.,* 2020 WL 5702111, *3 (N.D. Cal. Sept. 24, 2020) ("As it currently stands, the complaint may not go forward. . . . To start, the complaint lumps all of the defendants together, without differentiating between them in a meaningful way").

[30] *See, e.g.*, *Wells Fargo Bank, N.A. v. California Ins. Guar. Ass'n*, 38 Cal. App.4th 936, 942, 944 (1995) ("In *Reserve Insurance Co. v. Pisciotta,* [30 Cal.3d 800 (1982),] the [California] Supreme Court held that we must look to the excess policy's express language to determine whether an excess insurer is obligated to bear the risk of an underlying insurer's insolvency. To paraphrase the Supreme Court: we must ask whether the wording of the excess policy requires the excess insurer to provide the coverage that the underlying insurer would have assumed had it not become insolvent" (citations omitted); finding that drop down was not required under the policy language at issue, which was "markedly different" than the language construed in *Pisciotta*).

[31] Complaint, ¶ 11. *See also id.*, ¶ 12 (identifying California Insurance Guarantee Association as one of the Primary Insurer Defendants).

III. California law imposes no duty to "confirm coverage" under the circumstances alleged.

Finally, the Complaint must be dismissed to the extent it alleges that Certain Excess Insurers "failed to confirm coverage,"[32] because no such duty exists where the primary insurance coverage has not exhausted.

In *Joiras*, the California Court of Appeal rejected an argument that an umbrella carrier was estopped from declining coverage because it had failed to promptly issue a reservation of rights letter until shortly before commencing coverage litigation. The court ruled that the umbrella carrier had no legal obligation to take a coverage position until after the underlying primary coverage had exhausted:

> [A]s a legal matter, there was neither a duty to provide any defense under the umbrella policy *nor any obligation to respond to an alleged tender of the defense* even had one been made, *because an umbrella policy has no duty of defense until the primary policy is exhausted.* Since insurer *had no obligation to reserve its rights under the umbrella policy*, its failure to do so in writing cannot operate to its detriment.[33]

In reliance on *Joiras*, the leading treatise on California insurance law explains that an excess insurer "may wait until the primary insurance is 'off the risk' to assert its reservation of rights because that is when its duty to defend arises."[34] *Joiras* makes clear that excess carriers such as Certain Excess Insurers have no obligation to take a coverage position, *i.e.*, to "confirm coverage," until after underlying primary coverage is exhausted. Because the Complaint fails to allege such exhaustion, Debtor has not stated a claim for breach of any purported duty to "confirm coverage."[35]

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[32] Complaint, ¶¶ 33, 40.

[33] *State Farm Fire & Cas. Co. v. Joiras*, 24 Cal. App. 4th 1619, 1626-27 (1994) (internal citations omitted) (emphasis added). *See also* 3 *New Appleman Ins. Law Practice Guide* 29A.12 (2023) ("Because an excess insurer has no duty to defend its insured, it cannot later be estopped from raising coverage defenses, or be said to have waived those defenses, if it fails to reserve its rights when notified of a claim or suit potentially implicating its coverage") (citing *Joiras*).

[34] Croskey, *et al.*, *Cal. Prac. Guide: Insurance Litigation* Ch. 8:280 (Aug. 2022).

[35] For this same reason, Debtor's request for declaratory relief that Certain Excess Insurers issued it insurance policies is likewise premature. If Certain Excess Insurers' coverage is not even conceivably triggered, there is no basis to force them now to litigate the existence of their alleged insurance policies. *See Iolab*, 15 F.3d at 1504-05 (Ninth Circuit held that "requiring the excess insurers to defend against Iolab's claim would impose on the excess insurers the unnecessary cost of litigating a claim that may never trigger excess coverage and thereby would frustrate the policy adopted by California courts"); *Vizio*, 2021 WL 1808612 at * 3 (dismissing declaratory judgment claim because "[w]hen a [p]arty fails to adequately plead a breach of contract claim, a court may dismiss a request for declaratory relief"),

Conclusion

Under the Ninth Circuit's controlling decision in *Iolab* and decisions like *Webcor* that follow *Iolab*, the Complaint's failure to plead exhaustion of underlying insurance means that the Complaint has not stated a claim against Certain Excess Insurers, requiring that the Complaint be dismissed under Rule 12(b)(6).

Dated: August 31, 2023

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quoting *Blue Novis, Inc. v. United States All. Grp., Inc.*, 2021 WL 346422, * 6 (C.D. Cal. Jan. 27, 2021); *Archer*, 2014 WL 12607699, * 3 (dismissing declaratory judgment claim because "[w]here it appears the primary coverage will not be exhausted, an action for declaratory relief may be dismissed"), citing *Iolab*, 15 F.3d at 1505.

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