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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: [March 13, 2024] Hearing Date: [March 27, 2024] Hearing Time: 10:30 a.m. Courtroom: 1300 Clay Street Oakland, CA 94612

EXCESS INSURERS'
MOTION TO DISMISS THE THIRD AMENDED COMPLAINT

Continental Casualty Company, 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 (collectively, the "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 Third Amended Complaint for Declaratory Judgment Relief, Breach of Contract, and Breach of Statutory Duty (the "Complaint," Dkt. No. 163) 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 declaratory judgment or breach of contract against Excess Insurers because it alleges that Excess Insurers issued only excess insurance policies, but does not allege that the primary insurance coverage has exhausted, or even a likely invasion of the excess policies' limit. Debtor's claims therefore must be dismissed because the facts alleged do not give rise to the inference that the underlying sexual abuse claims implicate Excess Insurers' coverage, nor that any Excess Insurers breached any current obligations under their insurance policies. Moreover, Debtor fails to plead any facts supporting Excess Insurers' obligation to "drop down" and provide primary coverage in place of an allegedly insolvent primary carrier, and the Complaint's shotgun pleading regarding Excess Insurers' alleged "drop down" obligations is improper and precludes Excess Insurers from framing a response. Finally, the Complaint fails to state a claim to the extent it alleges that Excess Insurers failed to "confirm coverage" because, as a matter of California law, Excess Insurers have no duty to "confirm coverage" on the facts alleged.

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

WHEREFORE, Excess Insurers respectfully request that this Court enter an order dismissing the Complaint in its entirety as to Excess Insurers[1] and granting such other and further relief as is just and proper.

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[1] Only the first and second causes of action, for declaratory relief and breach of contract, are asserted against Excess Insurers. The third cause of action, breach of statutory duty, applies only to CIGA.

Dated: January 26, 2024

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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF EXCESS INSURERS'
MOTION TO DISMISS THE THIRD AMENDED COMPLAINT

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Debtor's Third Amended Complaint ("the Complaint," Dkt. No. 163) is its fourth bite at the apple. Yet, the Complaint still fails to state claims against Excess Insurers for declaratory relief or breach of contract and should, therefore, be dismissed.

In dismissing Debtor's prior complaint, the Court made clear that, to state a claim for declaratory relief under *Ludgate*,[1] Debtor must allege facts showing "a likely invasion of the excess policies . . . and have some basis for doing it."[2] Debtor's new Complaint fails to meet this requirement, however, because it merely rehashes Debtor's prior insufficient allegations—save for a short conclusory sentence averring that Debtor presently faces "in excess of 400 Suits seeking a total amount of damages which has the substantial likelihood of being in excess of" Debtor's insurance limits.[3] But Debtor alleges no facts even approximately quantifying the amount of Debtor's potential liability for the claims, how the Suits could be aggregated to exceed Debtor's primary coverage, nor the amount of such primary coverage.

Moreover, Debtor once again fails to plead that its primary underlying primary coverage has been exhausted. This, coupled with the Complaint's affirmative allegations (which at this stage must be taken as true) that the primary insurers "improperly denied" coverage (*i.e.*, they have not paid anything), sinks Debtor's breach of contract claim. Absent actual primary exhaustion, Excess Insurers have no present duties under their insurance policies.

The Complaint also fails to allege the basis for its passing assertion that Excess Insurers have any obligation to "drop down" in place of primary coverage. Excess Insurers also cannot frame responses to these allegations because the Complaint is vague and indeterminate regarding the extent to which any claims allegedly tendered to Debtor's insolvent primary insurer have been "picked-up" by CIGA and/or any of the other primary insurers to whom the claims were also tendered.

Finally, the Complaint must be dismissed to the extent it asserts that Excess Insurers breached some purported duty to "confirm coverage" under their policies. In fact, Excess Insurers

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[1] *Ludgate Ins. Co. v. Lockheed Martin Corp.*, 82 Cal. App.4th 592, (2000).

[2] November 14, 2023 Hearing Transcript ("Tr.") at 64:1-7.

[3] Third Amended Complaint (the "Complaint"), Dkt. 163, ¶ 30.

have no duty to "confirm coverage" in response to Debtor's tender of the underlying claims 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.

These deficiencies are not trivial pleading technicalities, but rather cut to the heart of the problem with Debtor's complaint: Debtor lacks any factual or legal basis to drag Excess Insurers into this suit to pursue claims for declaratory relief or breach of contract.

Background

The Court dismissed Debtor's First Amended Complaint for failing to allege a "likely invasion" of the excess coverage and the Third Amended Complaint should fare no better. Debtor's First Amended Complaint alleged causes of action for breach of contract and declaratory relief against the insurer defendants based on generic allegations, which the Court found wanting, that Debtor is "named in more than 300" lawsuits seeking to recover for clerical sexual abuse "over a period of decades,"[4] and that Debtor's excess insurers "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 and umbrella] insurance to drop down and provide defense and indemnity to RCBO for the Suits."[5]

Excess Insurers moved to dismiss that complaint because Debtor failed to allege exhaustion of the underlying coverage, asserted vague allegations against clusters of defendants without distinguishing among them, and there is no "duty to confirm coverage" as a matter of law.[6]

The Court granted Excess Insurers' motion.[7] Although Excess Insurers' motion

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[4] First Amended Complaint, Dkt. No. 2, ¶ 28.

[5] First Amended Complaint, ¶¶ 33, 34.

[6] 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, Dkt. No. 69-1, at 1.

[7] Docket Order, November 14, 2023.

relied significantly on *Iolab*[8] and its progeny, the Court found "greater flexibility" with respect to declaratory relief actions under the California Court of Appeal's *Ludgate* decision.[9] Nonetheless, the Court held, with respect to Debtor's declaratory relief claim, that "I don't believe that the plaintiff has yet alleged anything with respect to any kind of likelihood that there's going to be a likely invasion of the excess policies" and that "[Debtor] should be required to do that and ***have some basis for doing it***."[10] Similarly, as to Debtor's breach of contract claim, the Court wondered whether Debtor "want[ed] to allege that there's some immediate breach, other than what [Debtor] suggest[ed] in the dec. relief, failure to respond" because "if [Debtor] ha[s] that in mind, I don't think that's been plead yet. And I think that [Debtor] would need to do so."[11] The Court advised Debtor that if it "ha[s] something else to say about a breach of a current duty, I think the complaint needs to be amended to say that because I don't think it – it doesn't say it clearly to me right now."[12]

Debtor's new Complaint addresses none of the deficiencies identified by the Court. As before, Debtor lumps the insurer defendants into one of three groups based on the coverage they purportedly provided: the "Primary Defendants," "Excess Defendants," and "Umbrella Defendants."[13] Excess Insurers, who are categorized as Excess Defendants, are alleged to have issued Debtor excess insurance policies.

Debtor alleges that it "has been named in more than 400 complaints primarily filed in the Alameda Superior Court as well as proofs of claim filed in this Court seeking recovery for alleged negligent supervision and hiring of certain clerical and ministerial personnel over a period of decades" (the "Suits").[14] Debtor then alleges that these Suits seek "a total amount of damages which has the substantial likelihood of being in excess of the available limits of insurance available

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

[9] Tr. at 63:5-11.

[10] *Id.* at 64:3-7 (emphasis added).

[11] *Id.* at 65:18-24.

[12] *Id.* at 66:3-6.

[13] Complaint, ¶¶ 10, 17, 22.

[14] Complaint, ¶ 25.

under the PRIMARY DEFENDANTS', EXCESS DEFEDENDANTS' [sic], and UMBRELLA DEFENDANTS' respective insurance policies."[15]

Debtor purportedly tendered the "defense and indemnity of the Suits under all applicable insurance policies to the associated Defendants that issued those policies and were not insolvent" through its broker.[16] The Primary Defendants are alleged to have "improperly denied or failed to confirm coverage and/or provide defense or indemnity to RCBO for the Suits" as reflected in Exhibit A to the Complaint.[17] Debtor avers that those Primary Defendants "who did accept RCBO's tender did so while refusing to pay full defense rates" or "issued onerous guidelines which were not part of the applicable policies."[18] Similarly, Debtor asserts that the Excess Defendants "received the tenders of the Suits . . . 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."[19]

Excess Insurers' policies are allegedly "responsive to certain" of these Suits, some of which are listed in the specific paragraphs identifying each insurer.[20] These allegations are keyed to Exhibit "A," which lists each claimant and their corresponding proof of claim and/or case number, the years of alleged abuse, the date (if any) that Debtor provided the claim to its broker, the date (if any) Debtor's broker tendered the claim to various insurers, and the insurers' alleged

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[15] Complaint, ¶ 30.

[16] Complaint, ¶ 28. Exhibit "A" seemingly undercuts this allegation as the Suits by Claimants 310 through 411 (and others) are not noted as having been provided to Debtor's broker or as having been tendered to defendants despite many of them allegedly asserting abuse during years in which Debtor contends it was covered by defendants' policies. *See* Exhibit "A," Dkt. No. 163-1, at p. 56-61. Additionally, despite naming United States Fire Insurance Company as a defendant in this action, it is not listed on Exhibit "A" as receiving a tender for any claims that have been attributed to its alleged policy period. Similarly, Exhibit "A" does not identify any claims tendered to "Lloyd's" as defined in the Complaint in paragraph 16. *Id.* at pp. 1-61.

[17] Complaint, ¶ 29.

[18] *Id.*

[19] Complaint, ¶ 30.

[20] *See, e.g.,* Complaint, ¶¶ 11-16.

response.[21]

While the Complaint adds new details about the Suits, still missing from the Complaint is any new ***factual*** allegation giving rise to the inference that Excess Insurers' coverage is implicated under the Court's more "flexible" approach based on *Ludgate*. Nor is there any factual allegation that Excess Insurers have breached any current duty to Debtor. The Complaint contains no allegations regarding the amount of available primary coverage. The Complaint pleads no ***facts***—just conclusions—regarding even the potential amount of Debtor's underlying liabilities, nor any facts suggesting these separate Suits can be aggregated to reach Excess Insurers' coverage. Debtor's continued failure to plead primary exhaustion, combined with its allegation that the Primary Defendants have "improperly denied or failed to confirm coverage and/or provide defense and/or indemnity to RCBO in the Suits," forecloses the possibility that Excess Insurers breached a present contractual obligation.[22]

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)."[23] Under Rule 12(b)(6), "a court must dismiss a complaint if it fails to state a claim upon which relief can be granted."[24]

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 "does not have to accept as true conclusory allegations in a complaint or legal claims asserted in the form of factual allegations."[25] "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

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[21] *See generally* Exhibit "A."

[22] Complaint, ¶ 29.

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

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

[25] *In re Tracht Gut, LLC*, 836 F.3d at 1150.

cognizable legal theory."[26] "This standard requires the plaintiff allege facts that add up to 'more than a sheer possibility that a defendant has acted unlawfully.'"[27] "A plaintiff must provide 'more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'"[28] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[29]

Argument

I. Debtor's new Complaint is insufficient because it does not allege that underlying primary coverage will likely be or has exhausted.

Because Debtor still has not sufficiently alleged actual exhaustion of underlying coverage, or even the potential for such exhaustion, the Complaint does not assert plausible claims for declaratory relief or breach of contract. Absent any obligation to "drop down" and provide primary coverage—which Debtor also fails to plead, as discussed below—it is uncontested that Excess Insurers' policies do not attach until the underlying primary insurance is fully and properly exhausted. Debtor's allegations would need, therefore, to include facts establishing actual exhaustion to allege breach of contract, and the likelihood of underlying exhaustion to state a declaratory relief claim. Debtor does neither.

A. Debtor fails to plead any potential for underlying exhaustion supporting a declaratory judgment claim.

The Third Amended Complaint adds new allegations but still fails to allege concrete and particularized facts in support of a cognizable theory of primary exhaustion. The Court made clear that Debtor not only needed to allege a "likelihood that there's going to be a likely invasion of the excess policies," but also that Debtor "have some basis for doing it."[30] The closest Debtor comes is the allegation that

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[26] *In re Brower,* 644 B.R. at 191-192, quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and *Shroyer v. New Cingular Wireless Serv., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010).

[27] *Id.* at 191, quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

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

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

[30] Tr. at 64:3-7

> RCBO contends that it is presently facing in excess of 400 Suits seeking a total amount of damages which has the substantial likelihood of being in excess of the available limits of insurance available under the PRIMARY DEFENDANTS', EXCESS DEFENDANTS', and UMBRELLA DEFENDANTS' respective insurance policies. Therefore, the EXCESS DEFENDANTS owe RCBO both defense and indemnity for the Suits.[31]

However, there is no ***factual*** basis supporting Debtor's assertion respecting the "total amount of damages," *i.e.*, what the claims might cost to resolve either individually or collectively, nor that those damages will exceed the available primary coverage (the amount of which is not pled). As such, the allegation is conclusory and vague. By comparison, the pleadings in *Ludgate* included actual dollar figures for the available primary coverage and the policyholder's potential liabilities.[32] In *Fremont*, the complaint alleged that the insured had suffered a loss of more than $30 million due to fraudulent mortgage loans, whereas the applicable primary insurance allegedly had a limit of $15 million, making it clear from the face of the complaint that the alleged loss exceeded the amount of allegedly available primary coverage.[33]

Moreover, primary exhaustion cannot be assumed or inferred, even in the face of over 400 Suits. Debtor has not pled any facts suggesting that 400 separate Suits, none of which have been resolved, could be aggregated to trigger excess coverage; and Debtor expressly pleads that many of the Suits allege abuse spanning multiple years, implicating multiple years of primary coverage. Debtor's previous complaint alleged that it was "named in more than 300" lawsuits seeking to recover for clerical sexual abuse "over a period of decades."[34] Nonetheless, the Court dismissed the complaint. While Debtor may not need to plead the amount of its expected loss "down to the penny" to show a "reasonable possibility" that Excess Insurers' policies are

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[31] Complaint, ¶ 30.

[32] *Ludgate Ins. Co. v. Lockheed Martin Corp.*, 82 Cal. App.4th 592 607 (2000) (noting that the pleadings included exhibits "indicat[ing] that the underlying limits of Lockheed's primary policies totaled less than $90 million" and the allegation that "claims totaled $340 million in indemnity costs and were likely to reach the Ludgate policies").

[33] *Fremont Reorganizing Corp. v. Federal Ins. Co.*, 2010 WL 444718, *1-2 (C. D. Cal. Feb. 1, 2010). *See also Hensel Phelps Constr. Co. v. TIG Ins. Co.*, 2011 WL 13130486, *8 (C.D. Cal. Oct. 5, 2011) (discussing *Fremont*).

[34] First Amended Complaint, Dkt. No. 2, ¶ 28.

implicated, merely pleading that it faces a large number of claims is plainly insufficient.[35]

Debtor's other new allegations—that its tenders were timely, the Suits all seek recovery for "bodily injury" within the meaning of the policies, and there are no applicable exclusions (including based on RCBO's prior knowledge of the alleged events)—do not cure the Complaint's fundamental failure to plead facts indicating any likelihood that the excess policies will be reached.[36] Similarly, any facts that can be gleaned from Exhibit A's two-word characterizations of certain insurers' alleged coverage positions, tender dates, and the dates of alleged abuse, do not pertain to the threshold issue of primary exhaustion. Put another way, Excess Insurers do not owe obligations under excess policies merely based on the position that a claim was promptly tendered and falls within the policy period. Underlying exhaustion is a prerequisite.

B. Debtor fails to plead actual exhaustion supporting a breach of contract claim.

Debtor's breach of contract claim, asserted against all insurer defendants, states that "Defendants' failure to provide defense and indemnity to the RCBO for the Suits is contrary to the coverages and benefits promised RCBO under the respective policies and constitutes a breach of those policies."[37] However, Debtor's failure to plead actual exhaustion of underlying coverage, and its overt assertion that the Primary Defendants "improperly denied or failed to confirm coverage and/or provide defense and/or indemnity to RCBO,"[38] is fatal to its breach of contract claim.[39] This is because, absent underlying exhaustion, an excess insurer has no contractual

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[35] *See* Tr. at 64:8-16 ("I think there needs to be some statement consistent with Ludgate where the reasonable possibility . . . they're looking to get to something implicating the excess policies, I don't think that has to be necessarily down to the penny. But I do think that Ludgate suggests that there can be a declaratory relief action, but it does require some pleading beyond what we have here.").

[36] Complaint, ¶ 30.

[37] Complaint, ¶ 51.

[38] Complaint, ¶ 29.

[39] *See, e.g.*, *Vizio, Inc. v. Navigators Ins. Co.*, 2021 WL 1808612, *2 (C.D. Cal. May 4, 2021) ("[Policyholder's] contention that [excess insurer] breached [its] Policy by not paying for its defense or indemnifying the company fails because there are no allegations demonstrating exhaustion of the Underlying Limit."); *Archer Western Contractors, Ltd. v. Liberty Mut. Fire Ins. Co.*, 2014 WL 12607699, * 4 (C.D. Cal. Aug. 13, 2014) ("Since [policyholder] failed to allege the exhaustion of its primary insurance, the Motion to Dismiss the claim for breach of contract as to National Union is GRANTED" (citing Iolab)); *Hensel Phelps*, 2011 WL 13130486 at *9 ("In the absence of authority allowing a plaintiff to pursue a breach of contract claim against an excess insurer because it may someday exhaust its primary coverage, the Court views the claim as premature.").

obligation to defend or indemnify the policyholder and, as a result, could not have breached any such obligation.[40]

Debtor's First Amended Complaint contained the same allegations[41] yet the Court dismissed Debtor's breach of contract claim. In doing so, the Court instructed Debtor that "if you have something else to say about a breach of a current duty, I think the complaint needs to be amended to say that because I don't think it—it doesn't say it clearly to me right now."[42] Debtor's Complaint confirms that it has nothing more to say. As before, Debtor's breach of contract claim should be dismissed.

II. Debtor fails to plead facts showing Excess Insurers were obligated 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.[43] But the Complaint fails to allege that Excess Insurers' policies contain language that supposedly requires those policies to "drop down" in place of insolvent underlying primary coverage. These omissions require that the Complaint's "drop down" allegations be dismissed.

Moreover, shotgun complaints are subject to dismissal under Rule 12(b)(6),[44] and Debtor "ma[d]e little to no effort to allege facts specific to each defendant" regarding its "drop

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[40] *See, e.g., Webcor Constr., LP v. Zurich Am. Ins. Co.*, 2017 WL 4310763 (N.D. Cal. Sep. 28, 2017) ("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.").

[41] First Amended Complaint, ¶¶ 45, 46.

[42] Tr. at 66:3-6.

[43] *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*.).

[44] *In re Vitalich*, 2016 WL 1644077, *2 (Bankr. N.D. Cal. Apr. 22, 2016), *aff'd,* 2017 WL 4224679 (N.D. Cal. Sept. 22, 2017) (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, [was] 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,

down" allegations, but rather "attribute[d] conduct generically to all" Excess Defendants.[45] The Complaint alleges that Commercial Union/Armour Insurance "reported that they had become insolvent," but it also alleges that defendant California Insurance Guarantee Association—sued as one of the "Primary Defendants"—has "assumed the responsibilities of Commercial Union/Armour Insurance regarding the" Commercial Union/Armour Insurance primary policies.[46] It also alleges that the Suits tendered to Commercial Union were tendered to other, solvent, Primary Defendants, and that certain Primary Defendants have accepted the defense of certain Suits.[47] Thus, the Complaint fails to allege that any primary coverage is unavailable, and which claims were (or were not) being defended by another Primary Defendant, leaving Excess Insurers in the dark about who is being targeted by Debtor's "drop down" allegation.

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 Excess Insurers "failed to confirm coverage,"[48] because no such duty exists where the primary insurance coverage has not exhausted.

In *Jioras*, 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

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the complaint may not go forward. . . . To start, the complaint lumps all of the defendants together, without differentiating between them in a meaningful way.").

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

[46] Complaint, ¶ 9. *See also* Complaint, ¶ 10 (identifying California Insurance Guarantee Association ("CIGA") as one of the Primary Insurer Defendants).

[47] Complaint, ¶ 29.

[48] Complaint, ¶¶ 30, 41.

> 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.[49]

In reliance on *Jioras*, 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."[50] *Jioras* makes clear that excess carriers such as 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."[51]

Conclusion

Debtor's Complaint fails to allege any facts supporting the potential invasion of Excess Insurers' policies, nor that the underlying primary insurance actually exhausted. Nor does the Complaint allege facts supporting any inference that Excess Insurers were obligated to "drop down" and replace insolvent primary coverage. Baring actual exhaustion of primary coverage, Excess Insurers had no duty under their policies to "confirm coverage." For these reasons, Debtor's Complaint must be dismissed for failing to state a claim under Rule 12(b)(6).

Dated: January 26, 2024

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[49] *State Farm Fire & Cas. Co. v. Jioras*, 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 *Jioras*).

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

[51] For this same reason, Debtor's request for declaratory relief that Excess Insurers issued it insurance policies is likewise premature. If 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 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"), 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").

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