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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PROGRESSIVE CASUALTY INS. CO.,

Plaintiff,

No. C 12-04918 JSW

v.

ST. PAUL FIRE AND MARINE INS. CO.,

Defendant.

**ORDER REGARDING MOTIONS
FOR SUMMARY JUDGMENT**

Now before the Court are the cross-motions for summary judgment filed by plaintiff Progressive Casualty Insurance Company (“Progressive”) and defendant St. Paul Fire and Marine Insurance Company (“St. Paul”). Having considered the parties’ pleadings and the relevant legal authority, the Court hereby denies Progressive’s motion for summary judgment and grants St. Paul’s cross-motion.¹

BACKGROUND

The facts at issue are not in dispute. This action concerns a coverage dispute between Progressive and St. Paul regarding their respective rights and obligations to their mutual insured under their respective insurance policies for an underlying lawsuit against the insured. Progressive covered the cost of the defense and settlement of the underlying lawsuit and now seeks some contribution from St. Paul.

Progressive issued its “Directors & Officers/Company Liability Insurance Policy for Financial Institutions” to Sonoma Valley Bancorp, policy number 4548319-08, for an original policy period of July 1, 2008 to July 1, 2011 (“Progressive Policy”). (Joint Stip. of Facts, No.

¹ The Court OVERRULES Progressive’s evidentiary objections.

1 4.) The coverage period of the Progressive Policy was subsequently amended to July 1, 2008 to
 2 July 1, 2010. (*Id.*, No. 5.) St. Paul issued its “Broad Form PLUS+SM Directors and Officers
 3 Liability Insurance Policy” to Sonoma Valley Bancorp, policy number EC09400585, for the
 4 period July 1, 2009 to July 1, 2010 (“St. Paul Policy”). (*Id.*, No. 7.) Shareholders brought
 5 purported class actions against Sonoma Valley Bancorp and certain of its former directors and
 6 officers. (*Id.*, Nos. 9-11.) The defendant officers and directors qualified as insured persons
 7 under both the Progressive Policy and the St. Paul Policy. (*Id.*, No. 13.) For purposes of this
 8 action, both parties agree that the shareholder lawsuit against these insured persons constitutes a
 9 “Claim” for “Wrongful Acts” as defined under both the Progressive Policy and the St. Paul
 10 Policy. (*Id.*, No. 15.)

11 The St. Paul Policy describes the director and officer liability coverage as follows:

12 The Company will pay on behalf of any Insured Person Loss resulting from
 13 Claims first made during the Policy Period for Wrongful Acts by an Insured
 14 Person in his or her capacity as such, except to the extent that such loss is paid by
 15 any other insurance or as indemnification from any source.

16 (*Id.*, Ex. 2.) The Policy also contains the following “other insurance” clause: “The Insured
 17 Person(s) and St. Paul agree that all coverage under this Policy is excess over, and will not
 18 contribute with . . . all other insurance, whenever purchased, whether such insurance is stated to
 19 be primary, excess, contributing, contingent or otherwise” (*Id.*) The St. Paul Policy
 20 defines “Loss” as “any amount, including Defense Expenses, that an Insured Person is obligated
 21 to pay as a result of a Claim. . . .” (*Id.*) St. Paul contends that this Policy provided only excess
 22 and umbrella insurance to the directors and officers and, thus, is not liable for the cost of the
 23 defense and settlement. St. Paul describes the Policy as a “Side A policy” that “functions like a
 24 Difference in Conditions (“DIC”) policy, meaning that the policy ‘drops down’ to provide
 25 coverage for individual directors and officers for a loss that is not covered by the underlying
 26 primary policy, or, if there is underlying coverage, the Side A policy provides coverage on an
 27 excess basis.” (Declaration of William E. Husbands, ¶ 10.)

28 The Progressive Policy describes the Insured Persons Liability Coverage as the
 following: “[t]he Insurer will pay on behalf of the Insured Persons, Loss resulting from Claims
 first made during the Policy Period or the Discovery Period against the Insured Persons for

1 which the Insured Persons are legally obligated to pay for Wrongful Acts” (*Id.*, Ex. 1.)
2 The Policy defines “Loss” as “Defense Costs and any amount which the Insured Persons or the
3 Company (if applicable) are legally obligated to pay resulting from a Claim. . . .” (*Id.*) The
4 Progressive Policy also contains the following “other insurance” clause: “This Policy shall not
5 be subject to the terms of any other insurance. All Loss, including Defense Costs, payable
6 under this policy, shall be excess to ... any other existing insurance regardless of whether
7 collectable, including but not limited to, any insurance under which there is a duty to defend,
8 unless such other insurance is written only as specific excess insurance over the Limits of
9 Liability provided by this Policy” (*Id.*)

10 ANALYSIS

11 A. Legal Standards Applicable to Motions for Summary Judgment.

12 A principal purpose of the summary judgment procedure is to identify and dispose of
13 factually unsupported claims. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323-24 (1986).
14 Summary judgment is proper when the “pleadings, depositions, answers to interrogatories, and
15 admissions on file, together with the affidavits, if any, show that there is no genuine issue as to
16 any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R.
17 Civ. P. 56(c). “In considering a motion for summary judgment, the court may not weigh the
18 evidence or make credibility determinations, and is required to draw all inferences in a light
19 most favorable to the non-moving party.” *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir.
20 1997).

21 The party moving for summary judgment bears the initial burden of identifying those
22 portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine
23 issue of material fact. *Celotex*, 477 U.S. at 323. An issue of fact is “genuine” only if there is
24 sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v.*
25 *Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is “material” if it may affect the
26 outcome of the case. *Id.* at 248. If the party moving for summary judgment does not have the
27 ultimate burden of persuasion at trial, that party must produce evidence which either negates an
28 essential element of the non-moving party’s claims or that party must show that the non-moving

1 party does not have enough evidence of an essential element to carry its ultimate burden of
2 persuasion at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir.
3 2000). Once the moving party meets its initial burden, the non-moving party must go beyond
4 the pleadings and, by its own evidence, “set forth specific facts showing that there is a genuine
5 issue for trial.” Fed. R. Civ. P. 56(e).

6 In order to make this showing, the non-moving party must “identify with reasonable
7 particularity the evidence that precludes summary judgment.” *Keenan v. Allan*, 91 F.3d 1275,
8 1279 (9th Cir. 1996). In addition, the party seeking to establish a genuine issue of material fact
9 must take care adequately to point a court to the evidence precluding summary judgment
10 because a court is “not required to comb the record to find some reason to deny a motion for
11 summary judgment.” *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1029 (9th
12 Cir. 2001) (quoting *Forsberg v. Pacific Northwest Bell Telephone Co.*, 840 F.2d 1409, 1418
13 (9th Cir. 1988)). If the non-moving party fails to point to evidence precluding summary
14 judgment, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

15 **B. The Parties’ Cross Motions for Summary Judgment.**

16 Under California law, insurance contracts are to be interpreted in the same manner as
17 any other contract, with the fundamental goal of giving effect to the mutual intention of the
18 parties. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1264 (1992). Interpretation of a
19 contract is a question of law to be determined by the court. *Waller v. Truck Ins. Exchange*, 11
20 Cal. 4th 1, 18 (1995). If the terms of a contract are free from ambiguity, its meaning is a
21 question of law to be determined by the court solely from its language. *Dale v. Preg.*, 204 F.2d
22 434, 435 (9th Cir. 1986). A contract provision is considered ambiguous if the provision is
23 susceptible to more than one reasonable interpretation. *MacKinnon v. Truck Ins. Exchange*, 31
24 Cal. 4th 635, 648 (2003). “[W]ords in an insurance policy are to be read in their plain and
25 ordinary sense. Ambiguity cannot be based on a strained instead of reasonable interpretation of
26 a policy’s terms” *McKee v. State Farm Fire & Cas. Co.*, 145 Cal. App. 3d 772, 776 (1983)
27 (citation omitted).

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1 Extrinsic evidence may be offered when a contract term is ambiguous on its face and to
2 expose a latent ambiguity. *Southern Pac. Transp. v. Santa Fe Pac. Pipelines, Inc.*, 74 Cal. App.
3 4th 1232, 1241 (1999). “The test of admissibility of extrinsic evidence to explain the meaning
4 of a written instrument is not whether it appears to the court to be plain and unambiguous on its
5 face, but whether the offered evidence is relevant to prove a meaning to which the language of
6 the instrument is reasonably susceptible.” *Pacific Gas & E. Co. v. G. W. Thomas Drayage &
7 Rigging Co., Inc.*, 69 Cal. 2d 33, 37 (1968); accord *Wilson Arlington Company v. Prudential
8 Insurance Co. of America*, 912 F.2d 366, 370 (9th Cir. 1990) (acknowledging that California
9 law permits extrinsic evidence to demonstrate the existence of ambiguity even when the
10 language of the a contract is “perfectly clear”).

11 Here, on the first page of the St. Paul policy, it clearly provides that coverage is for “any
12 Insured Person Loss resulting from Claims first made during the Policy Period for Wrongful
13 Acts by an Insured Person . . . , except to the extent that such loss is paid by any other insurance
14” (Joint Stip. of Facts, Ex. 2.) Progressive argues that the Court should strike the second
15 half of the sentence as a disfavored “other insurance” clause. However, there are two obstacles
16 to Progressive’s position.

17 First, the second half of the sentence is not a typical “other insurance” clause. Instead, it
18 appears on the first page of the policy in the sentence describing the scope of coverage in the
19 first instance. Although the St. Paul Policy does contain an “other insurance” provision, St.
20 Paul is not relying on that clause. Progressive argues that St. Paul’s Policy does not qualify as
21 an excess policy because it does not identify the Progressive Policy or establish a predetermined
22 amount of primary coverage before liability will attach. However, to the extent there is any
23 ambiguity, the extrinsic evidence demonstrates that St. Paul and the insured intended the policy
24 to be excess to Progressive’s primary policy.

25 Second, courts will only proceed to determine whether “other insurance” clauses
26 conflict and require equitable contribution if the policies at issue insure the same risk at the
27 same level of coverage. See *Carmel Development Co. v. RLI Ins. Co.*, 126 Cal. App. 4th 502,
28 513 (2005) (It is a basic principal of California insurance law “that an ‘other insurance’ issue

1 can only arise between carriers on the same level of coverage.”). In *Carmel*, the court carefully
 2 compared the two insurance policies at issue and determined that they did not provide the same
 3 level of coverage. One policy provided in the insuring clause that it was excess to that of a
 4 named primary insurer. The other policy provided that it was obligated to provide coverage
 5 only after the limits of another named policy, as well as all other coverage – primary and excess
 6 – was exceeded. *Id.* at 510-511; *see also id.* at 516 (explaining that the second policy
 7 “expressly conditioned the insurer’s obligation on the exhaustion of not only [a specially named
 8 policy] limits but also those of ‘any insurance policies available to any insured (whether
 9 primary, excess, excess-contingent, or otherwise).”). Although the first policy contained an
 10 “other insurance” clause, the second policy “was more explicit in its limitations . . .”, setting
 11 forth on the first page of the policy that the coverage was excess over scheduled (specifically
 12 named) and unscheduled underlying insurance. *Id.* at 511. Therefore, the court in *Carmel*
 13 found that it was not necessary “to resort to proration based on the competing ‘other insurance’
 14 clauses in the two policies.” *Id.* at 514.

15 Similarly, here, St. Paul’s Policy provides in the insuring clause that it is an excess and
 16 umbrella policy. St. Paul is only obligated to provide coverage if the loss is not paid by any
 17 other insurance or other source. Progressive’s Policy, on the other hand, is a primary policy.
 18 The only relevant limitation is provided in an “other insurance” provision. Therefore, the two
 19 policies do not insure the same risk at the same level of coverage. Accordingly, proration and
 20 equitable contribution is not warranted.

21 The Court finds Progressive other arguments to be unpersuasive as well. Accordingly,
 22 the Court finds that St. Paul did not breach any duties under its Policy to the insured and
 23 Progressive is not entitled to any equitable contribution or reimbursement from St. Paul.

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CONCLUSION

For the foregoing reasons, the Court DENIES Progressive’s motion for summary judgment and GRANTS St. Paul’s cross-motion for summary judgment.

IT IS SO ORDERED.

Dated: May 28, 2014



JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

