SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF NAPA

CALISTOGA RANCH OWNER, LLC, CALISTOGA RANCH INVESTORS, LLC, AUBERGE RESORTS, LLC, AND CALISTOGA RANCH CLUB, Plaintiffs, v. AIG SPECIALTY INSURANCE COMPANY, ARCH SPECIALTY INSURANCE COMPANY, LANDMARK AMERICAN INSURANCE COMPANY, HOMELAND INSURANCE COMPANY OF NEW YORK, INTERSTATE FIRE & CASUALTY COMPANY, MARK VARONIN and DOES DOES 1-20, inclusive, Defendants. AND RELATED CROSS-ACTION	Case No. 21CV001530 ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS February 10, 2023, 8:30 a.m., Dept. A Hon. Cynthia P. Smith

The matter originally came on for hearing on February 9, 2023 and was continued, on the Court's own volition, to February 10, 2023. The matter was heard at the same time as Insurers' competing motion for judgment on the pleadings regarding Plaintiffs' Complaint ("Insurers' Motion"). At the February 10, 2023. Attorneys John S. Rossiter, Bradley Dlatt and James Davis appeared on behalf of Plaintiffs Calistoga Ranch Owner, LLC and Calistoga Ranch Investors, LLC. Attorneys Jan Larson and Lindsay Harrison appeared on behalf of Plaintiff Auberge Resorts, LLC. Attorney Ryan Opgenorth appeared on behalf of Plaintiff Calistoga Ranch Club. Attorneys Larry Arnold and Thomas Gilbert appeared on behalf of Landmark American Insurance Company. Attorney Shannen Coffin appeared on behalf of AIG Specialty Insurance Company. Attorney Daniyal Habib appeared on behalf of Defendant Arch Specialty Insurance Company. Attorney Tyler Lindberg and Albert Alikin appeared on behalf of Homeland Insurance Company of New York. Attorney Andrew Downs appeared on behalf of Interstate Fire & Casualty Company. Attorney Sara Parker appeared on behalf of Mark Varonin. At the conclusion of the hearing, the Court took the matter under submission.

On February 16, 2023, the Court granted Landmark's *ex parte* application for leave to file a supplemental memorandum in opposition to Plaintiffs' motion and in support of Insurers' motion. The Supplemental Memorandum was to be filed by February 17, 2023 and Plaintiffs' reply by February 24, 2023. The Court has received and reviewed the Supplemental Memorandum and Plaintiffs' Opposition to the Supplemental Memorandum.

The Court, having considered the papers filed in support of and in opposition to the motions, as well as the oral argument of counsel, now rules as follows.

I. PROCEDURAL MATTERS

Plaintiffs and Cross-Defendants Calistoga Ranch Owner LLC, Calistoga Ranch Investors LLC, Auberge Resorts LLC ("Auberge"), and Calistoga Ranch Club (collectively, "Plaintiffs") move for judgment on the pleadings with respect to Defendants and Cross-Complainants AIG Specialty Insurance Company ("AIG"), Arch Specialty Insurance Company ("Arch"), Landmark American Insurance Company ("Landmark"), Homeland Insurance Company of New York

("Homeland"), and Interstate Fire & Casualty Company's ("Interstate") (collectively, "Insurers") two causes of action for declaratory relief in the Cross-Complaint.

The motion is made "pursuant to California Code of Civil Procedure Section 438, *et seq.* because the Cross-Complaint fails to 'state facts sufficient to constitute a cause of action,' and pursuant to common law as a motion for judgment on the pleadings 'in an action for declaratory relief to obtain a *declaratory judgment on the merits in favor of the [Plaintiffs]* rather than a dismissal of the [Insurer Defendants'] suit.' (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 679.)" (Notice at 3.) The motion is made on the grounds that "each of the Occurrence Limit of Liability Endorsements ("OLL Endorsements") upon which the Insurer Defendants rely apply separately to each 'policy' based on the language and unique formula contained in each OLL Endorsement, and that they do not operate to reduce the overall blanket $100 million 'Program' limit to $58,348,662 based on the purported Statements of Value." (Notice at 3.) "At a minimum, the Insurer Defendants have failed to draft the OLL Endorsements using 'conspicuous, plain and clear' language that reduces the overall Program limit, and consequently, the OLL Endorsements are unenforceable as a matter of law. (*Haynes v. Farmers Ins. Exch.* (2004) 32 Cal.4th 1198, 1204.)" (Notice at 3.) "Furthermore, even if it is assumed that the OLL Endorsements limit the entire insurance Program to the $58,348,662 contained in the purported Statements of Value [], then the Insurer Defendants' policies are, by definition, specific sum 'valued' policies that are in violation of the strict requirements of the California Insurance Code Section 2053." (Notice at 3.)

In opposition to Plaintiffs' motion, Insurers expressly incorporate and cite to points made in Insurers' Motion and reply. (See, e.g., Interstate Opposition at 1:9-10; Homeland Opposition at 4:3-6; AIG Opposition at 1:2 fn 1; Landmark Opposition at 2:16-18.) As such, this ruling takes into consideration all moving and opposing papers to both Plaintiffs' instant motion and Insurers' Motion.

As an initial matter, regarding the subject matter of this motion (the exhibits to the Cross-Complaint), the Court notes that, "exhibits to a complaint should be subject to the same rule as documents of which the court takes judicial notice: on demurrer, courts may not resolve a dispute as to the underlying truth of their statements or the 'proper interpretation' thereof." (*Panterra GP, Inc. v. Superior Court* (2022) 74 Cal.App.5th 697, 712, fn. 13.) Here, Plaintiffs are seeking a determination that their interpretation of the insurance policies attached as exhibits to the Cross-

Complaint is proper. (See Support Memo at 6:4-6 ["[Insurers' two claims for declaratory relief] are purely legal issues involving contractual and/or statutory interpretation that are proper for the Court to decide."]; 12:4-5 ["The interpretation of an insurance policy is a question of law for the court."]; 17:1-3 ["[A determination of whether the policies are conspicuous, plain, and clear] is a question of law for the Court to determine."].) While, *Panterra* restricts a court from resolving the Motion as to the proper interpretation of the exhibits, Insurers agree that the interpretation of the policies is "purely legal question of contract interpretation [which] can be answered now on the basis of the pleadings and the governing Policies." (AIG Opposition at 1:5-6; Arch Opposition at 2:5-6; Landmark Opposition at 1:24-25; Homeland at 4:3-6.)

I. REQUESTS FOR JUDICIAL NOTICE

Plaintiffs' request for judicial notice of Insurers' Cross-Complaint (Exhibit A) and Insurers' OLL Endorsements contained in the policies attached to their Cross-Complaint (Exhibit H) is GRANTED[1]. Plaintiffs' request for judicial notice of the non-party policies (Exhibits B-G) is GRANTED in light of Civil Code section 1642's requirement to read all policies together.

AIG's request for judicial notice of its authenticated policy ("AIG Policy") attached as Exhibit A is GRANTED. The Court notes that Exhibit A "is identical to what was attached as Exhibit 1 to Defendants' Cross Complaint, filed on March 7, 2022, and as Exhibit 1 to Defendant Insurers' Request for Judicial Notice in Support of their Motion for Partial Judgment on the Pleadings, filed November 8, 2022, but includes an additional Endorsement (Endorsement #012, issued in January 2021) that corrected a scrivener's error in the Policy's Named Insured clause to correctly read 'Auberge Resorts LLC.'" (AIG RJN at 1.)

Arch's and Interstate's respective requests for judicial notice of the Schedule of Values that was incorporated in the insurance policies at issue (respective Exhibits "1") are GRANTED.

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[1] The Court acknowledges Plaintiffs' assertion that, for purposes of Insurers' competing motion for judgment on the pleadings, the Court cannot grant the Insurers' request for judicial notice of the insurance policies because they are not attached to Plaintiffs' Complaint (which is at issue on Insurers' competing motion), and their accuracy and completeness are disputed. Although Insurers request judicial notice of the exact same documents in opposition to Plaintiffs' instant motion, Plaintiffs do not object to the Court taking judicial notice thereof for purposes of Plaintiffs' motion.

II. LEGAL STANDARDS

A. MOTION FOR JUDGMENT ON THE PLEADINGS

A motion for judgment on the pleadings may be made on the ground that the complaint fails to state facts sufficient to constitute a legally cognizable claim (Code Civ. Proc., § 438, subd. (c)(1)(B)(ii)) or "in an action for declaratory relief to obtain a *declaratory judgment on the merits in favor of the [Plaintiffs]* rather than a dismissal of the [Insurer Defendants'] suit" (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 679 n.31, emphasis in original). The grounds "shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice." (Code Civ. Proc., § 438, subd. (d).)

B. INTERPRETATION OF INSURANCE POLICY

Because Plaintiffs are seeking a determination that their interpretation of the insurance policies is proper, a review of rules for interpretation of insurance policies is warranted. (See Support Memo at 6:4-6 ["[Insurers' two claims for declaratory relief] are purely legal issues involving contractual and/or statutory interpretation that are proper for the Court to decide."]; 12:4-5 ["The interpretation of an insurance policy is a question of law for the court."]; 17:1-3 ["[A determination of whether the policies are conspicuous, plain, and clear] is a question of law for the Court to determine."].)

"The interpretation of an insurance policy corresponds to the interpretation of contracts generally. The parties' mutual intention when they form the contract governs interpretation; '[t]he fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.' [Citation.] 'If possible, we infer this intent solely from the written provisions of the insurance policy. [Citation.] If the policy language 'is clear and explicit, it governs.' [¶] When interpreting a policy provision, we must give its terms their 'ordinary and popular sense, unless 'used by the parties in a technical sense or a special meaning is given to them by usage.' [Citation.] We must also interpret these terms 'in context' [citation], and give effect 'to every part' of the policy with 'each clause helping to interpret the other.' [Citation.]" (*ACS Systems, Inc. v. St. Paul Fire & Marine Ins. Co.* (2007) 147 Cal.App.4th 137, 146; see also Civ. Code, § 1641 ["The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."]; *Adams v. Explorer Ins. Co.*

(2003) 107 Cal.App.4th 438, 451 ["Endorsements on an insurance policy form a part of the insurance contract, and the policy of insurance with the endorsements and riders thereon must be construed together as a whole."].) Furthermore, "[s]everal contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." (Civ. Code, § 1642.)

Whereas clauses identifying coverage are interpreted broadly, exclusionary clauses are interpreted narrowly. (*Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 406.) "These rules stem from the fact that the insurer typically drafts policy language, leaving the insured little or no meaningful opportunity or ability to bargain for modifications." (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821-22.)

III. INSURERS' CROSS-COMPLAINT

A. CLAIMS AT ISSUE

The claims at issue on the motion are Count One Declaratory Relief Re: Contract and Count Two Declaratory Relief Re: Consistency with California Insurance Code. These are the only claims asserted in Insurers' Cross-Complaint.

By way of Count One, Insurers seek a declaration "that, when properly read as a whole, the Policies provide that each Insurer is responsible for paying no more than its proportionate share of the Resorts $58,348,662 stated value and that payment of that amount satisfied the Insurers' obligations under their respective Policies with the Plaintiffs." (Cross-Complaint ¶ 62.)

By way of Count Two, Insurers seek a declaration "that the Policies are not 'valued policies' as defined in Cal. Ins. Code § 412 and that the loss payment terms in the OLL Endorsements, which limit the Insurers' liability to the value Auberge provided to the Insurers for the Resort, do not violate California law." (Cross-Complaint ¶ 67.)

B. UNDISPUTED FACTS ALLEGED IN CROSS-COMPLAINT

The following facts, alleged in the Cross-Complaint, are not only required to be accepted as true on a motion for judgment on the pleadings, but appear to be undisputed by Plaintiffs: (1) Each Insurer issued insurance policies ("Policies") to Auberge. (Cross-Complaint ¶ 1.); (2) The Policies are part of a $100,000,000 multi-insurer insurance program ("Program") insuring

several properties managed by Auberge, including the Calistoga Ranch Resort ("Resort"). (*Id.* ¶ 4.); (3) The Resort was destroyed in the Glass Fire on September 27, 2020. (*Id.* ¶¶ 8, 21.); and (4) Plaintiffs are companies that claim an insurable interest in the Resort. (*Id.* ¶ 21.)

Insurers participated in the Program as excess insurers, whereby they provided specified shares of coverage in defined excess layers above a stated threshold amount as follows:

Insurer	Layer	Company Participation Percentage	Company Limit
AIG	$90,000,000 in excess of $10,000,000	35%	$31,500,000
Arch	$75,000,000 in excess of $25,000,000	10%	$7,500,000
Homeland	$50,000,000 in excess of $50,000,000	18.34%	$9,170,000
Interstate	$90,000,000 in excess of $10,000,000	10%	$9,000,000
Landmark	$75,000,000 in excess of $25,000,000	26.66%	$20,000,000

(*Id.* ¶¶ 4, 24-28.)

Each Insurer's Policy included an OLL Endorsement, which slightly varied from one another, but which generally limited their[2] liability for losses to the lesser of three liability limitation measures, one of those being the actual amount of loss ("Actual Loss Measure"), one being the particular location's Statement of Value ("Statement of Value Measure"), and one being the Limit of Liability of the policy ("Limit of Liability Measure"). (*Id.* ¶¶ 6, 34-38.) For the period in which the covered loss occurred (June 2020 to June 2021), the Resort's Statement of Value with each Insurer was $58,348,662. (*Id.* ¶ 7.) Plaintiffs claimed that the actual amount of loss following the fire was over $100,005,000. (*Id.* ¶ 46.) Insurers each paid their proportionate share of the $58,348,662 Statement of Value of the Resort and contend that such payment satisfies their obligations under their respective Policies. (*Id.* ¶¶ 8, 62.)

[2] The disputed issue at the heart of the Motion and Cross-Complaint is whether the OLL Endorsements limited (1) the Insurers' *collective* liability, (2) the Insurers' *separate* liability, or (3) use a combination of collective and separate liability to determine the maximum each Insurer must pay.

IV. LEGAL ANALYSIS

A. COUNT ONE

Plaintiffs advance two grounds in support of their argument that judgment in their favor on the merits of Count One is appropriate. By the first, Plaintiffs argue that the OLL Endorsements do not operate to reduce the overall blanket $100 million Program limit to $58,348,662 based on the Resort's Statement of Value. By the second, Plaintiffs argue that, should the Insurers' interpretation prevail, Insurers failed to draft the OLL Endorsements using "conspicuous, plain and clear" language, and therefore, the OLL Endorsements are unenforceable as a matter of law. These two grounds are discussed separately below.

1. Analysis of Plaintiffs' Interpretation of the OLL Endorsements

Plaintiffs' interpretation of the OLL Endorsements is that *each* Insurer owes the lesser of: the Actual Loss Measure (i.e., $100,005,000), the Statement of Value Measure (i.e., $58,348,662), or their respective Company Limit (i.e., see Company Limit in chart above). Because each Insurer's Company Limit is the smallest of the three measures, Plaintiffs contend that, under the OLL Endorsements, they are entitled to recover the full Company Limit from each Insurer.

The Insurers interpret the OLL Endorsement to mean that, combined, based on their respective proportionate shares, all Insurers owe the lesser of the Actual Loss Measure (i.e., $100,005,000), the Statement of Value Measure (i.e., $58,348,662), or the $100,000,000 Program limit. Since the Insurers have paid $58,348,662, they have satisfied their obligations under the various policies.

Plaintiffs proffer the following support for their interpretation and against Insurers' interpretation: (1) each OLL Endorsement makes clear that it only "changes the Policy" and does not reference the "Program" and therefore the limitation applies to each Insurer's separate liability, not to their combined coverage under the Program; (2) three of the other policies in the Program by non-parties (i.e., Lloyds, Fidelis, and Great Lakes) do not include any OLL Endorsements, which indicates that the OLL Endorsements must apply separately to each insurer who chose to include that specific language; (3) the OLL Endorsements expressly state that it is only the "Company's" liability which is limited to the lesser of the three options, rather than the

collective insurers' liability; (4) the Limit of Liability or Amount of Insurance referenced in the third limitation measure is defined in the OLL Endorsements as that which is shown on the Declarations Page of each policy, which is the *individual* Insurer's liability limit, not the Program limit; and (5) each OLL Endorsement contains fundamental differences which indicates that they must apply separately to each Insurer.

The Insurers, in their respective Oppositions, address each of Plaintiffs' arguments. The Court addresses each of Plaintiffs' arguments separately below.

i. Grounds for Plaintiffs' Interpretation No. 1: The OLL Endorsements' References to "Policy" and Not "Program"

As an initial matter, the OLL Endorsement attached to Landmark's Policy expressly "modifies insurance provided under the following: ALL COVERAGE PARTS." (Landmark Opposition at 4:18-19; Landmark Policy (Cross-Complaint, Exh. 3) at 68.) The Landmark OLL Endorsement does not state that it "modifies the policy," contrary to Plaintiffs' blanket assertion. Thus, Plaintiffs' argument that the OLL Endorsements are expressly limited to the Policy and not the Program does not apply to Landmark.

Regarding the remaining Insurers' OLL Endorsements, the fact that they reference the Policy and not the Program is not dispositive where the well-established rules of insurance contract interpretation require the whole of a contract, and several contracts made as parts of substantially one transaction, to be taken together. (Civ. Code, §§ 1641, 1642.) Here, the OLL Endorsements are indisputably part of each Insurer's Policy which are clearly part of a larger quota-share Program. Thus, the OLL Endorsements should be construed in the context of the overall Program directing the purpose of the insurance.

Not only do the Policies explain their participation in the overall Program, but each Policy defines "Policy" as "the agreed terms and conditions contained herein, including any subsequent endorsements that define the Company's participation in an overall property insurance Program." (Arch Opposition at 5:7-13; Interstate Opposition at 6:12-25; Homeland Opposition at 4:13 fn 1; Landmark Opposition at 3:22-4:7; AIG Policy (Cross-Complaint, Exh. 1) at 44; Arch Policy (Cross-Complaint, Exh. 2) at 72; Landmark Policy (Cross-Complaint, Exh. 3) at 47; Homeland Policy (Cross-Complaint, Exh. 4) at 40; Interstate Policy (Cross-Complaint, Exh. 5) at 41; Insurers' Motion at 7:28-8:3.) Thus, the definition of "Policy" contemplates each

Insurer's participation in the Program. By extension, the OLL Endorsements' references to "Policy" necessarily include "the Company's participation in an overall property insurance Program."

In addition, "Program" is defined in each policy as "the sum of all policies issued to the Insured, inclusive of any self insurance, which may be arranged in one or more layers that provide coverage up to an agreed Program limit as shown in Clause E. Participation of this form." (AIG Policy (Cross-Complaint, Exh. 1) at 45; Arch Policy (Cross-Complaint, Exh. 2) at 73; Landmark Policy (Cross-Complaint, Exh. 3) at 47; Homeland Policy (Cross-Complaint, Exh. 4) at 40; Interstate Policy (Cross-Complaint, Exh. 5) at 41.) In this context, each Policy is to be construed together as making up the overall Program.

That said, the fact that the Insurers are part of an overall $100 million Program does not resolve the question of whether the total amount due to Plaintiffs is $58.3 million or $100 million.

The Court recognizes that *Orient Overseas Assoc. v. XL Ins. Am., Inc.*, 2016 N.Y. Misc. LEXIS 2048, cited in Insurers' Motion, holds that quota-sharing insurers' liability is capped at each sublimit, which is a single sublimit to be shared and which the insurers must make their applicable pro-rata contribution:

> This makes commercial sense. Generally, neither the insured nor the participating carriers will know how many carriers ultimately will subscribe to a quota share program and, in fact, the nominal number of carriers should not matter. *The total premium paid by the insured is split on a percentage basis among the carriers in exchange for bearing responsibility for an approximately proportional percentage of the covered risk. The scope of coverage and applicable limits and sublimits are supposed to be similar to ensure that the Carriers are indeed covering the same risk. The number of carriers, therefore, should be irrelevant to the total amount of available coverage.* It would not make commercial sense if the result of adding an extra carrier — even one, such as Arch, who only agreed to bear a small percentage (approximately 7%) of the overall risk — is that the insured gets the benefit of an extra, noncumulative, entire sublimit (here, another $5 million), while only paying a premium to that extra carrier based on the carrier's quota share percentage (i.e., approximately 7%). *It makes no economic sense for the premium paid to bear no relation to the marginal amount of coverage being provided by the carrier.* Only an economically irrational carrier would agree to such terms."

(*Id.* at *23, emphasis added.)

However, *Orient Overseas* is not binding authority. Moreover, the sublimits at issue in *Orient Overseas* are more closely analogous to the "sublimits" expressly identified in each Policy at Clauses F.(2), (3), and (4), rather than the liability limitation measures contained in the OLL Endorsements. Consistent with *Orient Overseas*, the Policies state that "the Company's liability shall not exceed its proportionate share of any of the specific sublimits of liability for any one Occurrence designated in Clauses F.(2), F.(3) and F.(4)." (AIG Policy (Cross-Complaint, Exh. 1) at 8; Arch Policy (Cross-Complaint, Exh. 2) at 28; Landmark Policy (Cross-Complaint, Exh. 3) at 13; Homeland Policy (Cross-Complaint, Exh. 4) at 6; Interstate Policy (Cross-Complaint, Exh. 5) at 7.) The sublimits identified in Clauses F.(2), (3), and (4) do not reference the OLL Endorsements, nor do the OLL Endorsements anywhere state that the limitations contained therein constitute "sublimits" within the meaning given to Clauses F.(2), (3), and (4).

In this context, to conclude that each liability limitation measure in the OLL Endorsements is to be construed as the total amount due to Plaintiffs to be shared by the Insurers subject to their pro-rata participation in the Program would be an extension of the meaning of "sublimits" used elsewhere in the Policies, which is not directly contemplated by the Policies or the OLL Endorsements. Thus, the Court finds that this ground supports Plaintiffs' interpretation and not Insurers' interpretation.

ii. Grounds for Plaintiffs' Interpretation No. 2: Not all Insurers in the Program had OLL Endorsements

Insurers argue that the absence of an OLL Endorsement in the Lloyds, Fidelis, and Great Lakes policies is of no consequence to the application and interpretation of Insurers' OLL Endorsements. (See Homeland Opposition at 8:17-28; Reply ISO Insurers' Motion at 5:22-25.) Arch explains that "Fidelis' coverage maxed out at $50 million, and Great Lakes' coverage maxed out at $25 million. In both instances, the OLL would have been useless and of no effect, because the coverage under those policies did not reach the $58.3 million stated value. Therefore, the OLL would never have been invoked, and the absence of it does not support Plaintiffs' argument." (Arch Opposition at 5:22-26.) Interstate contends that "[t]he OLL endorsements do not play a significant role until losses exceed $50,000,000. That's because there is only one insured property whose declared values were more than $10,000,000 and less than

$50,000,000; that is the Auberge de Soliel resort at just under $42,000,000." (Interstate Opposition at 4:20-23; Interstate RJN, Exh. A; see also Homeland Opposition at 9:1-5.) The insurers in the first $10,000,000 layer "are not going to pay any less on those properties with an OLL endorsement than without one." (Interstate Opposition at 7:25-8:1.)

The Court posed the following questions for discussion at oral argument:

1. Even though a Statement of Value Measure would not have reduced the other insurers coverage here, because their coverage attached at less than $58,348,662, it seems to the Court that the excess Insurers are benefitted vis-à-vis the underlying insurers who paid their full limits of liability which reduced the overall amount owed by the excess Insurers? It does not seem that the underlying insurers would have negotiated for that.
2. If Auberge de Soliel resort (with a Statement of Value of $41,817,061) had been destroyed, how would that amount be paid by all 11 insurers in the Program, if the actual adjusted loss was $48,000,000? It seems there would be an inconsistent application of coverage.
3. Related to both points above, is it really true, as Insurers contend, that requiring each Insurer to pay the full amount of the Statement of Value would read that measure entirely out of the policy because it would never be the least amount? (AIG Opposition at 10:12-11:2; Arch Opposition at 5:15-17; Homeland Opposition at 8:8-13; Insurers' Motion at 14:1-7.) What about the circumstance, which Plaintiffs raise, of only the Auberge Du Soleil building (which has a Statement of Value of $21,000,000) being destroyed? Wouldn't this mean that AIG would be bound to only pay $21,000,000 instead of their Company Limit of $31,500,000, in which case the Statement of Value would have meaning?

At oral argument, Plaintiffs' counsel agreed with the above conclusions reached by the Court on each question.

Insurers' counsel argued, with respect to the first question, that the scenario posed by the Court is exactly what the underlying insurers negotiated as primary insurers who are obligated to provide coverage before the excess layer kicks in. In this context, what the excess insurers negotiate for their coverage would not affect the primary insurers' obligation. However, the Court notes that, according to the chart on page 11 of Plaintiffs' opposition to Insurers' Motion, Fidelis and Great Lakes are at the same excess layer as AIG and Interstate. Thus, Insurers'

rationale does not completely explain how Insurers are not benefited at the expense of these non-party insurers.

With respect to the second question, Insurers' counsel implicitly agreed that there would be an inconsistent application of coverage by explaining the different methods by which each Insurer would reach its proportionate amounts and that the end result would be different from the Statement of Value.

With respect to the third question, counsel argued that AIG would never owe only the value of the Auberge Du Soleil building because the Statement of Value measure in their OLL Endorsement provides that they owe "one hundred percent 100% of the *total combined stated values* for all categories of covered property (e.g. building, contents) . . . on the latest statement of values." (AIG Policy (Cross-Complaint, Exh. 1).) Looking at the statement of values, the *total* value if the Auberge Du Soleil building was destroyed is $41,817,061. (Arch RJN, Exh. 1.) Thus, under the scenario posed by the Court, AIG would still be liable for their Company Limit of $31,500,000 under Plaintiffs' interpretation. Thus, AIG reiterated that there is no case, under Plaintiffs' interpretation, where the Statement of Value measure would have meaning.

The Court finds that the fact that other insurers in the Program did not include OLL Endorsements with their policies is significant to the overall intention of the OLL Endorsements and to understand how the Statement of Value Measure in Insurers' OLL Endorsements should be interpreted. The Court finds that the inconsistency among the policies of including OLL Endorsements supports Plaintiffs' interpretation, rather than Insurers' interpretation.

iii. Grounds for Plaintiffs' Interpretation No. 3: OLL Endorsement's Use of "Company"

As an initial matter, AIG's OLL Endorsement is not expressly limited to the "Company's liability," contrary to Plaintiffs' blanket assertion. Rather, AIG's endorsement states that the "liability of the Insurer[s]" shall be limited by its terms. (AIG Opposition at 7:10-26; AIG Policy (Cross-Complaint, Exh. 1) at 67.) Plaintiffs suggest that the term "Insurer[s]" refers to AIG as noted on the Declarations Page of the policy. (Support Memo at 14 n.6, citing AIG Policy (Cross-Complaint, Exh. 1) at 2.) However, as AIG contends, the Declarations Page of the policy defines AIG as "the Company," not "Insurer[s]." (AIG Opposition at 8:2-8, citing AIG Policy (Cross-Complaint, Exh. 1) at 2.) AIG argues that its distinct use of the term "Insurer[s]" in the

OLL Endorsement, as opposed to the term "Company" which is used throughout the Policy, specifically contemplates that liability determined under the OLL Endorsements applies collectively to multiple insurers within the Program. (AIG Opposition at 7:26-8:1, 8:9-24.) While Plaintiffs' argument that the OLL Endorsement is expressly limited to the "Company's liability" does not apply to AIG because AIG's OLL Endorsement uses the term "Insurer[s]", the Court notes that the AIG Policy does not define "Insurer[s]", and therefore, does not specifically contemplate the collective liability of the Insurers, contrary to AIG's contention.

Thus, with respect to AIG, there is still a question as to whether the OLL Endorsement is meant to apply to AIG's separate liability or the Insurers' collective liability under the Program.

With respect to Arch, Interstate, Landmark, and Homeland, the OLL Endorsements respectively state that "our liability," "liability of the company," and "liability of this Company . . . shall be limited to the least of the following [three liability limitation measures]." (Arch Policy (Cross-Complaint, Exh. 2) at 15; Interstate Policy (Cross-Complaint, Exh. 5) at 71; Homeland Policy (Cross-Complaint, Exh. 4) at 63.) Insurers seem to recognize that these OLL Endorsements specifically refer to a single Insurer's liability; however, they argue that these endorsements must be considered in the context of the Program.

However, to conclude—in direct contradiction with the actual language used in the OLL Endorsements—that it is the collective Insurers' liability which is limited to the Statement of Value Measure requires much cross-referencing and linking several parts of the Policies, which are not *actually* referenced in the OLL Endorsements and which do not *directly* stand for the Insurers' interpretation. For example, the Court acknowledges the "Participation" clause,[3] "Excess Participation" clause,[4] and "Application of Sublimits Endorsement" clause[5] in each

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[3] The "Participation" clause in each Policy states, in relevant part, that "[t]he Company shall not be liable for more than its proportionate share of each layer shown in the Participation Clause, for any one Occurrence (the Company's participation) except *the Company's liability shall not exceed its proportionate share of any of the specific sublimits of liability for any one Occurrence* designated in Clauses F.(2), F.(3) and F.(4)" (Cross-Complaint ¶ 30; AIG Policy at 8; Arch Policy at 27-28; Landmark Policy at 13; Homeland Policy at 6; Interstate Policy at 7.)

[4] The "Excess Participation" clause in each Policy states, in relevant part, that "[t]here will be no coverage hereunder until the amount of direct physical loss, damage or destruction arising out of any one Occurrence exceeds the underlying layer above which the *Company's participation* attaches, as shown in the Participation Clause E. of the Declarations." (Cross-Complaint ¶ 31; AIG Policy at 33; Arch Policy at 57-58; Landmark Policy at 36; Homeland Policy at 29; Interstate Policy at 30.)

[5] The "Application of Sublimits Endorsement" states that "[e]ach sublimit stated in this Policy applies as part of, and not in addition to, the overall Policy limit for an occurrence Insured hereunder. *Each sublimit is the maximum amount potentially recoverable from all insurance layers combined for all Insured loss*,

Policy which Insurers argue support their interpretation. However, the only helpful clause which is arguably applicable to the OLL Endorsements is the Sublimits Endorsement's language that "[e]ach sublimit is the maximum amount potentially recoverable from all insurance layers combined for all Insured loss." Even though the Statement of Value Measure is arguably a "sublimit" as that term is commonly used (a limit within a limit), there is no indication from either the Policy or the OLL Endorsements that the Statement of Value Measure was intended to be construed as a sublimit governed by the Sublimits Endorsement.

On this point, the Court asked the parties: Is there anything in the Manuscript Form—used by all 11 insurers—that supports the position that the Insurers are only obligated to pay their pro-rata share of the Statement of Value Measure (when, as here, the loss exceeds the Statement of Value and the Program limit) rather than their pro-rata share of the overall Program limit? The parties answered in the negative (other than directing the Court to the many cross-references mentioned above).

Without anything directly in support, the Court finds that this ground supports Plaintiffs' interpretation.

iv. Grounds for Plaintiffs' Interpretation No. 4: OLL Endorsement's Reference to "Limit of Liability"

Plaintiffs' contention that the OLL Endorsements define the Limit of Liability Measure as the amount shown on the declarations page as the *individual* Insurer's liability limit, not the Program limit, is an overstatement.

As an initial matter, as AIG contends, the Limitation of Liability Measure contained in its OLL Endorsement does not refer to its Declaration Page, but instead provides that the amount is "[a]ny other Limit of Liability or Sublimit of Insurance or Amount of Insurance specifically stated in this Policy to apply to any particular insured loss or coverage or location." (AIG Opposition at 9:1-7; AIG Policy (Cross-Complaint, Exh. 1) at 67.) AIG argues that "any *other* Limit or Sublimit" naturally excludes any Limits or Sublimits already referenced in the OLL

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damage, expense, time element or other Insured interest arising from or relating to that aspect of the occurrence, including but not limited to type of property, construction, geographic area, zone, location, or peril. . . . *This endorsement takes precedent over and, if in conflict with any other wording in the contract bearing on the application of sublimits, replaces that wording.*" (Cross-Complaint ¶ 32; AIG Policy at 55; Arch Policy at 83; Landmark Policy at 58; Homeland Policy at 51; Interstate Policy at 52.)

Endorsement. (AIG Opposition at 9:20-22.) "Because Paragraph 1 of AIG's OLL Endorsement already discusses the 'Company's' limit (noting that it cannot exceed the 'amount shown on the face of this Policy'), Paragraph 2(c)'s reference to any 'other' limit of liability" necessarily excludes the 'Company's' $ 31.5 million quota share limit." (AIG Opposition at 9:22-25.) The only "other Limit" relevant to this particular loss is the overall Program Limit of $100 million. (AIG Opposition at 10:9-10.) Thus, AIG contends that its OLL Endorsement is properly interpreted to compare: the *actual* loss ($100,005,00 million), to the stated value of the Ranch ($58.3 million), to the overall Program Limit ($100 million). (AIG Opposition at 10:7-11.) In this instance, AIG concluded that the $58.3 million stated value was the least of the three relevant amounts under the OLL Endorsement. (*Ibid.*) Thus, this ground advanced by Plaintiffs does not apply to AIG.

Insurers further argue that Plaintiffs' reading of the Limit of Liability Measure in the OLL Endorsements—that it means each Insurer's Company Limit—is nonsensical because it would mean the OLL Endorsements require the comparison of apples (the *aggregate* loss of $100,005,000 and the *aggregate* Statement of Value of $58.3 million) to oranges (each Insurer's *individual* participation limit). (AIG Opposition at 9:7-18; Arch Opposition at 4:14-19; Homeland Opposition at 7:28-8:7; Landmark Opposition at 6:5-10; Insurers' Motion at 13:9-21.) In order to compare apples to apples, the Insurers contend that this limitation measure is actually the Program Limit of Liability of $100 million. (Arch Opposition at 4:25-5:2 ["The Program limit of liability is US $100,000,000 blanket."]; Insurers' Motion at 13:22-27.) However, all Insurers' OLL Endorsements, other than AIG's, specifically state that it is *that company's* liability which shall not exceed the Limit of Liability. To construe "Limit of Liability" as the overall Program limit of $100 million would not make sense.

Thus, with respect to Arch, Interstate, Landmark, and Homeland, this ground supports Plaintiffs' interpretation.

v. *Grounds for Plaintiffs' Interpretation No. 5: Differences Between Each OLL Endorsement*

As shown above, the slight differences in each Insurer's OLL Endorsements lead to inconsistent interpretations of the three limitation measures and importantly the Statement of Value Measure stated therein, thus precluding a uniform application. This makes it even more

difficult and confusing to grasp the overall intention of the endorsements, which suggests each endorsement should be interpreted as applicable to each Insurer separately. Thus, this ground supports Plaintiffs' interpretation.

2. Analysis of Whether Insurers' Interpretation of the OLL Endorsements is Conspicuous, Plain, and Clear

Language excluding or limiting coverage in an insurance policy must be both conspicuously placed and plain and clear. (*Jauregui v. Mid-Century Ins. Co.* (1991) 1 Cal.App.4th 1544, 1550.) Plaintiffs do not appear to dispute that the OLL Endorsements or language therein were conspicuously placed. Plaintiffs instead argue that the OLL Endorsements do not plainly and clearly state that, in the case of a catastrophic, above-Program limit loss, the effect of the OLL Endorsements is to limit the recoverable amount to the Statement of Value, paid on a pro rata basis by each Insurer.

It is a "fundamental principle that an insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear." (*State Farm Mut. Auto. Ins. Co. v. Jacober* (1973) 10 Cal.3d 193, 201.) "[A]ny exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect." (*Ibid.*, citing *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 269.) "[T]hus, 'the burden rests upon the insurer to phrase exceptions and exclusions in clear and unmistakable language.' (*Jacober*, *supra*, 10 Cal.3d at 202, citing *Harris v. Glens Falls Ins. Co.* (1972) 6 Cal.3d 699, 701.) The requirement that the language itself be plain and clear "means more than the traditional requirement that contract terms be 'unambiguous.' Precision is not enough. Understandability is also required. To be effective in this context, the exclusion must be couched in words which are part of the working vocabulary of average lay persons." (*Jauregui*, *supra*, 1 Cal.App.4th at 1550, citing *National Auto. & Casualty Ins. Co. v. Stewart* (1990) 223 Cal.App.3d 452, 458.)

Insurers raised at oral argument and in their Supplemental Memorandum that the "conspicuous, plain and clear" standard does not apply where, as here, Plaintiffs are highly sophisticated policyholders. (Suppl. Memo. at 2:19-24, citing Complaint ¶¶ 24-44, 54-59 and Cross-Complaint ¶ 43.) Insurers contend that the rule has been applied exclusively in the consumer insurance context where insurers write standardized form policies which are mass-marketed to a multitude of consumers with varying levels of sophistication, primarily including the average layperson. (*Ponder v. Blue Cross of So. California* (1983) 145 Cal.App.3d 709, 719-

20 [applying rule to "adhesion contract[s]" and "standard insurance contract[s] marketed with the general public"].) Insurers further argue that the authority relied on by Plaintiffs—*Jauregui*,[6] *Haynes*,[7] and *Fields*[8]—did not expand this application. Insurers rely on *Feurzeig v. Insurance Co. of the West* (1997) 59 Cal.App.4th 1276, 1283 for the proposition that courts may consider the fact that the policyholder was a sophisticated buyer of insurance represented by a professional broker in rejecting the policyholder's argument that a policy exclusion was not "conspicuous, plain and clear."

However, Plaintiffs, at oral argument and in their Opposition to Insurers' Supplemental Memorandum, provide argument showing that their own previously cited authority does not limit the application of the "conspicuous, plain and clear" standard in the manner that Insurers suggest. With respect to *Ponder*, *Jauregui*, and *Haynes*, Plaintiffs argue that, while those cases happen to involve adhesion contracts with unsophisticated consumers, the fact that courts applied the rule in that context does not provide that the rule applies *only* in that context. With respect to *Fields*, Plaintiffs show that it rejected Insurers' argument and found that "the plain, clear conspicuous rule still applies" to an insurance policy that "is not an adhesion contract." (*Fields*, *supra*, 163 Cal.App.3d at 579, fn. 5, 582.) With respect to *Feurzeig*, Plaintiffs argue that, while the court stated that it *may* consider the sophistication of the policyholder, it applied the traditional rules of construction, found the plain language of the policy to be ambiguous under a layperson standard, and cast doubt on whether the policyholder's sophistication was relevant or admissible. (*Feurzeig*, *supra*, 59 Cal.App.4th 1276, 1284, fn. 2 ["We question whether an agent's subjective interpretation of policy language is admissible. [Citation.] Indeed, the admissibility of an insurance agent's interpretation of a policy appears inconsistent with the general interpretive rule that policy language is ordinarily given the construction accorded by a layperson rather than the construction accorded by an insurance expert."].)

Moreover, Plaintiffs provide additional authority in support of their position that the "conspicuous, plain and clear" rule is not limited in the manner that Insurers suggest. (See *Essex Ins. Co. v. City of Bakersfield* (2007) 154 Cal.App.4th 696, 703, 708 [applying "average layperson" standard of the "conspicuous, plain and clear" rule to render the exclusions of an

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[6] *Jauregui v. Mid Century Ins. Co.* (1991) 1 Cal.App.4th 1544.
[7] *Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198.
[8] *Fields v. Blue Shield of California* (1985) 163 Cal.App.3d 570.

insurance policy that was purchased via a broker unenforceable]; *Venoco, Inc. v. Gulf Underwriters Ins. Co.* (2009) 175 Cal.App.4th 750, 759 [applying the "conspicuous, plain and clear" rule to determine the enforceability of exclusions where the policyholder had utilized two insurance brokers to negotiate the exclusions]; *Travelers Prop. Cas. Co. v. Superior Court* (2013) 215 Cal.App.4th 561 [applying the "conspicuous, plain and clear" rule to determine whether a policy exclusion was enforceable where the policy had been placed by an insurance broker]; *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648.)

The Court has reviewed the authorities cited by the parties and concludes that the application of the "conspicuous, plain, and clear" rule is not limited in the manner Insurers suggest. Rather, the rule applies generally to insurance contracts as a traditional rule of construction. (See also 2 Witkin, Summary of California Law (11th ed. 2017) Insurance, §§ 85-87, pp. 150-156.)

The Court has spent significant time attempting to ascertain the plain and clear meaning of the OLL Endorsements, as guided by principles of insurance policy interpretation. However, it has been unable to come to one clear conclusion, as demonstrated above. Assuming *arguendo* that Insurers' interpretation is the proper interpretation, the Court does not find that the Policies plainly and clearly state as such. As discussed above, there are indications from the Policies that significantly undermine Insurers' interpretation and leave questions as to what was actually intended. This cannot be "clear and unmistakable" as a matter of law. Based on the foregoing, the Court finds that the limitations in the OLL Endorsements are not plain and clear.

Plaintiffs contend that, because the OLL Endorsements are not in clear and unmistakable language, they are unenforceable. Other than arguing there are no ambiguities or uncertainties in the Policies, Insurers do not address the consequence of a finding that the OLL Endorsements are uncertain. The Court had noted in its previous tentative ruling that it is aware of authority allowing for parol evidence to be considered in determining a policy's meaning in the event that an insurance policy is ambiguous, rather than deeming it unenforceable. (*George v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1121.) The Court asked the parties: Is there authority that requires the Court to consider parol evidence, such that the Cross-Complaint survives this Motion, or whether the uncertainty renders the OLL Endorsements unenforceable?

Insurers provided no authority on this point either at oral argument or in their supplemental brief. The authorities cited by Plaintiffs seem to uniformly hold that, if

exclusionary clauses do not meet the heightened standard of "conspicuous, clear and plain," such clauses cannot defeat an insured's objectively reasonable expectation of coverage and are strictly construed against the insurer as unenforceable. (See *Haynes*, *supra*, 32 Cal.4th at 1204, 1214 ["It is not our role to speculate on the policyholder's abstract expectations, but rather to consider reasonable expectations defined by the insurer's policy language."]; *Winet v. Price* (1992) 4 Cal.App.4th 1159, fn. 3 ["[T]he only evidence which was in 'conflict' was Winet's testimony as to what he subjectively understood and intended the release to encompass. While this 'subjective intent' evidence was conflicting, it was not competent extrinsic evidence, because evidence of the undisclosed subjective intent of the parties is irrelevant to determining the meaning of contractual language."]; *MacKinnon*, *supra*, 95 Cal.App.4th at 241; *Essex Ins. Co.*, *supra*, 154 Cal.App.4th at 707; *Venoco, Inc.*, *supra*, 175 Cal.App.4th 750, 758.) This is consistent with the rule to resolve ambiguities in favor of coverage and in accordance with the insured's objectively reasonable expectations. (*Elliott v. Geico Indemnity Co.* (2014) 231 Cal.App.4th 789, 795; *Mah See v. North American Acc. Ins. Co. of Chicago, Ill.* (1923) 190 Cal. 421, 424-25; see also *Continental Cas. Co. v. Phoenix Constr. Co.* (1956) 46 Cal.2d 423, 437 ["If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against the amount of liability or the person or persons protected, the language will be understood in its most inclusive sense, for the benefit of the insured."].)

Based on the foregoing, the OLL Endorsements are unenforceable. Thus, Plaintiffs are entitled to judgment in their favor on the first declaratory relief cause of action in Insurers' Cross-Complaint.

B. COUNT TWO

Although the Court's above conclusion renders a determination on Count Two unnecessary, the Court elects to consider Plaintiffs' Motion as to Count Two. Plaintiffs argue that, if the OLL Endorsements are interpreted to limit Plaintiffs' recovery to $58,348,662, the Policies are classified as "valued" policies under Insurance Code section 412, in which case the Policies are required to include a "Valuation Clause" to give notice that the value of insurance has been fixed. (Support Memo at 19:28-20:6, citing Ins. Code, § 2053; *Ellian v. Assurance Co.*

of America (1975) 45 Cal.App.3d 170, 180.) Plaintiffs contend that Insurers' Policies do not contain a "Valuation Clause" and are therefore unenforceable.

In California, insurance policies are either "open" or "valued." (Ins. Code, § 410.) "An open policy is one in which the value of the subject matter is not agreed upon, but is left to be ascertained in case of loss." (*Id.*, § 411.) "A valued policy is one which expresses on its face an agreement that the thing insured shall be valued at a specified sum." (*Id.*, § 412.)

Insurers contend that the Policies are not "valued" policies because they determine the value of a loss on an actual cash value or replacement cost basis *after* the loss occurred, not in advance, as Plaintiffs concede in their complaint. (Complaint ¶¶ 39-40.) The actual amount of loss is one of the three liability limitation measures in the OLL Endorsements. Insurers thus argue that, because of this measure in the OLL Endorsements, the Policies are "open policies" regardless of the Statement of Value measure. Insurers argue that stated value limits do not transform an "open" policy into a "valued" policy. (*George v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1129; *Elliano*, *supra*, 45 Cal.App.3d at 180 180; *National Union Fire Ins. Co. of Pittsburgh, Pa. v. California Cotton Credit Corp*, (9th Cir. 1935) 76 F.2d 279, 287.)

Although, as Plaintiffs contend, the cases relied upon by Insurers involve more general property value limitations, they nonetheless involve predetermined valuation measures as limits of liability. Where "the amount of insurance applying in case of loss is to be subsequently determined, but in any event not exceeding the amount set forth in said application," a policy is "clearly intended to be an open policy." (*National Union*, *supra*, 76 F.2d at 287 ["[T]he term 'not exceeding' in a policy of insurance denotes that uncertainty of amount which is the chief characteristic distinguishing an open from a valued policy."].) The Policies here allow for the value of actual loss to be subsequently determined, but in any event, may not exceed the schedule of values selected by Plaintiffs. The Court agrees that the OLL Endorsements do not convert the open policy into a valued policy.

Even assuming *arguendo* that the Policies are considered "valued" policies, the OLL Endorsements give notice that, should the Statement of Value be the least amount of measures, liability is fixed at 100% of the stated value for each item of interest on file. Plaintiffs do not explain how this fails to comply with the required "Valuation Clause" under Insurance Code section 2053.

Thus, Plaintiffs are not entitled to judgment in their favor on the second declaratory relief cause of action in Insurers' Cross-Complaint. However, this cause of action is moot given the Court's conclusion on Count One.

V. CONCLUSION

For the reasons set forth above, the Motion is GRANTED as to Count One. The motion on Count Two is DENIED. However, Count Two is moot given the Court's ruling on Count One.

March 23, 2023

Cynthia P. Smith, Judge

Superior Court of California

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Case #: 21CV001530 **Calistoga Ranch Owner LLC et al vs AIG Specialty Insurance Company et al**

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at Napa, California on this date and that this certificate is executed at Napa, California this Date. I am readily familiar with the Court's standard practice for collection and processing of correspondence for mailing within the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the United States Postal Service on the day on which it is collected at the Courthouse.

Date: 3/28/2023

Robert E Fleshman, Court Executive Officer

Yolanda O'Donnell, Deputy Court Executive Officer