SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

RIDDELL, INC., et al., Plaintiffs, vs. ACE AMERICAN INSURANCE COMPANY, et al., and DOES 1-50, Defendants. AND RELATED CROSS-COMPLAINTS.	Case No.: BC482698 (related to BC528557 and BC660183) ORDER GRANTING IN PART AND DENYING IN PART DEFENDING INSURERS' MOTION FOR SUMMARY ADJUDICATION Hearing Date: June 15, 2021 Time: 2:00 p.m. Dept.: 7

Plaintiffs Riddell, Inc.; All American Sports Corporation; Riddell Sports Groups, Inc.; Easton-Bell Sports, Inc.; Easton-Bell Sports, LLC; EB Sports Corp.; and RBG Holdings Corp. (collectively, "Riddell") design, manufacture, and sell football helmets. Some of the helmets allegedly failed to protect football players wearing them from serious injury. The players seek compensation from Riddell in underlying NFL-MDL Litigation ("Underlying Claims").

In this action, Riddell has sued its insurers, including Arrowood Indemnity Company (f/k/a Royal Indemnity Company, as successor in interest to Globe Indemnity Company); ACE American Insurance Company (as successor to INA Insurance Company of Illinois); Century

Indemnity Company (successor to CCI Insurance Company, successor to Insurance Company of North America); Employers' Fire Insurance Company; and Bedivere Insurance Company (formerly known as OneBeacon Insurance Company, as successor to certain policies issued by Pennsylvania General Insurance Company and its subsidiaries, including American Employers' Insurance Company) (collectively, the "Defending Insurers"). The Defending Insurers are providing a defense to Riddell in the Underlying Claims. Pursuant to the Court's Case Management Order No. 2, all defendant insurers are deemed to have cross-complained against one another for declaratory relief, contribution, indemnity and/or subrogation and raised all affirmative defenses thereto. (Case Management Order No. 2. (Feb. 14, 2014).)

The Defending Insurers now move for summary adjudication of their crossclaim against Transport Indemnity Company ("Transport"), asking the Court to find Transport owes a duty under an excess policy ("Excess Policy") to defend Riddell in connection with the Underlying Claims. Alternatively, Defending Insurers move the Court to adjudicate their crossclaim against Evanston Insurance Company as successor by merger to Associated International Insurance Company ("Associated"), asking the Court to find Associated owes a duty under a primary policy ("Primary Policy") to defend Riddell in connection with the Underlying Claims, if the Court finds that the limits of liability of Associated's primary policy are not exhausted.

As explained in more detail below, the Court finds the policy limits of the Primary Policy have been exhausted and the language of the Primary Policy cannot be reasonably interpreted to impose Riddell's payment or satisfaction of the self-insured retention ("SIR") as a condition precedent to the duty to defend. Whether Riddell paid or satisfied the SIR is therefore irrelevant to Associated's duty to defend and irrelevant to Transport's duty to defend under its excess policy. The Court therefore GRANTS the motion as against Transport and DENIES the motion as against Associated.

I. Legal Standard: Summary Adjudication of an Issue of Duty

"A party may move for summary adjudication as to ... one or more issues of duty, if the party contends that ... one or more defendants either owed or did not owe a duty to the

plaintiff or plaintiffs." (Code Civ. Proc., § 437c, subd. (f)(1).) A motion for summary adjudication "shall be granted only if it completely disposes of ... an issue of duty." (*Ibid.*) "Issue of duty" includes "the existence or nonexistence of a contractual duty." (*Paramount Petroleum Corp. v. Superior Corp.* (2014) 227 Cal.App.4th 226, 244.)

The moving party bears the "initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact" regarding the issue of duty on which the motion is based. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*); Code Civ. Proc., § 437c, subd. (p)(1).) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar,* at p. 851.) If the moving party makes such a showing, the burden shifts to the other party to show that a triable issue of one or more material facts exists as to the litigated issue of duty. (*Id.* at p. 849.)

"Interpretation of a contract is question of law 'when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or when a determination was made based on incompetent evidence.'" (*Oakland-Alameda County Coliseum Authority v. Golden State Warriors, LLC* (2020) 53 Cal.App.5th 807, 819.) Conversely, "if interpreting the contract involves deciding between 'conflicting extrinsic evidence concerning the meaning of ... contractual provisions,' or 'divergent testimony about what the parties understood certain contractual provisions to mean,' then it is a factual question, not a legal one." (*Ibid.*)

II. Rules of Insurance Policy Interpretation

Insurance policies are contracts, and like all contracts, the goal of interpreting them is to effect "the mutual intention of the parties at the time the contract [was] formed...." (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821 (*AIU*) [citing Civ. Code, § 1636].) The parties' intent is to be inferred, if possible, solely from the contract's written provisions. (*Id.* at p. 822 [citing Civ. Code, § 1639].) "If the meaning a layperson would ascribe to the language of a contract of insurance is clear and unambiguous, the court will apply that meaning." (*Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 666-667.)

Interpreting insurance policy language is the court's function if "there is no dispute as to the words used in the policy." (*Jordan v. Allstate Ins. Co.* (2004) 116 Cal.App.4th 1206, 1218.) The "clear and explicit" meaning of policy terms — interpreted in their "ordinary and popular

sense" — controls, "unless used by the parties in a technical sense or a special meaning is given to them by usage." (*AIU, supra,* 51 Cal.3d at p. 822.)

Where there is a conflict in meaning between an endorsement and the body of the policy, the endorsement controls. (*Continental Cas. Co. v. Phoenix Constr. Co.*, (1956) 42 Cal. 2d 423, 437-438; *McConnell v. Underwrites at Lloyds of London* (1961) 56 Cal.2d 637, 640.) But while an insurer is free to limit its responsibility through an endorsement, any such endorsement that purportedly "takes away or limits coverage reasonably expected by an insured must be 'conspicuous, plain and clear.'" (*Haynes v. Farmers Ins. Exch.* (2004) 32 Cal. 4th 1198, 1204.)

III. Basic Facts Established Regarding the Primary and Excess Policies

A. *Riddell Is the Insured.*

Plaintiffs Riddell, Inc.; All American Sports Corporation; Riddell Sports Group, Inc.; Easton-Bell Sports, LLC; EB Sports Corp.; and RBG Holdings Corp. (collectively "Riddell") design, manufacture, and sell football helmets. Riddell has been sued by hundreds of former professional football players who were allegedly injured while playing football wearing Riddell helmets and then developed neurological problems. The players' suits have been coordinated for pretrial purposes before the United States District Court, Eastern District of Pennsylvania in *In re: National Football League Players' Concussion Injury Litigation* ("Underlying Claims"). (UMF, No. 1.)

B. *The Primary Policy*

Associated issued to Riddell a general liability policy (Policy No. PR106742) for the policy period of April 22, 1984 to April 22, 1985 ("Primary Policy"). (UMF No. 5.) The relevant terms of the Primary Policy include a Combined Single Limit of Liability Endorsement (AIIC0057-0058) and insuring language (AIIC00060, AIIC0062-0064). For purposes of discussion, the Court

labels the three relevant sections as "Insuring Language," "CSL Endorsement," and "Claim Expense Provision":

["Insuring Language"]

I. COVERAGE A - BODILY INJURY LIABILITY
COVERAGE B – PROPERTY DAMAGE LIABILITY

The company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of

A. bodily injury or
B. property damage

to which this insurance applies, caused by an occurrence, if the bodily injury or property damage is included within the completed operations hazard or the products hazard, and the company shall have the right and duty to defend any suit against the Insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deemed expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

...

GENERAL POLICY PROVISIONS

DEFINITIONS

When used in this policy (including endorsements forming a part hereof);
...

"bodily injury" means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom;
...

"occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured;
...

"products hazard" includes bodily injury and property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs away from premises

owned by or rented to the named insured and after physical possession of such products has been relinquished to others;

["CSL Endorsement"]

COMBINED SINGLE LIMIT OF LIABILITY[1]

REGARDLESS OF THE NUMBER OF (1) INSURED UNDER THIS POLICY, (2) PERSONS WHO SUSTAIN INJURY OR LOSS, OR (3) CLAIMS MADE OR SUITS BROUGHT, THE COMPANY'S LIABILITY IS LIMITED AS FOLLOWS:

1. THE COMBINED SINGLE LIMIT OF LIABILITY SHOWN BELOW AS APPLICABLE TO "ONE OCCURRENCE" IS THE TOTAL LIMIT OF THE COMPANY'S LIABILITY FOR ALL LOSS AND DAMAGES (INCLUDING DAMAGES FOR CARE AND LOSS OF SERVICES) BECAUSE OF ALL LOSS ARISING OUT OF ANY ONE OCCURRENCE.
2. FOR THE PURPOSE OF DETERMINING THE LIMIT OF THE COMPANY'S LIABILITY, ALL LOSS ARISING OUT OF A CONTINUOUS OR REPEATED EXPOSURE TO SUBSTANTIALLY THE SAME GENERAL CONDITIONS, OR ARISING OUT OF ONE OR MORE SERVICES OR RELATED SERVICES, SHALL BE CONSIDERED AS ARISING OUT OF ONE OCCURRENCE.
3. THE TOTAL LIABILITY OF THE COMPANY UNDER THIS POLICY FOR ALL LOSS AND DAMAGES ARISING OUT OF AN OCCURRENCE DURING THE POLICY PERIOD AS STATED IN THE DECLARATIONS SHALL BE:

   SINGLE LIMITS OF $1,000,000.00 EACH OCCURRENCE BODILY INJURY AND PROPERTY DAMAGE LIABILITY COMBINED AND $1,000,000.00 AGGREGATE EACH POLICY PERIOD IN EXCESS OF A SELF INSURED RETAINED LIMIT OF $100,000.00 EACH OCCURRENCE BODILY INJURY AND PROPERTY DAMAGE LIABILITY COMBINED AND AN UNLIMITED AGGREGATE.

["Claim Expense Provision"]

DEFINITIONS

CLAIM EXPENSE MEANS FEES, COSTS AND EXPENSES RESULTING FROM THE INVESTIGATION, DEFENSE ADJUSTMENT OR APPEAL OF ANY CLAIM

[1] The Court has, for ease of reference, taken license in this Order with the capitalization and bolding of the Primary and Excess Policies. Nothing should be read into this. The Court analyzed the provisions as written.

INCURRED WITH THE CONSENT OF THE COMPANY; AND FEES CHARGED BY AN ATTORNEY DESIGNATED BY THE NAMED INSURED WITH THE WRITTEN CONSENT OF THE COMPANY. CLAIM EXPENSE SHALL CONTRIBUTE TO, AND BE DEEMED TO BE INCLUDED WITHIN, THE RETAINED LIMIT STATED IN THE DECLARATIONS. CLAIM EXPENSE DOES NOT INCLUDE SALARY CHARGES OF REGULAR EMPLOYEES OF THE NAMED INSURED.

DEFENSE, CLAIM EXPENSE, SETTLEMENT

AFTER A SETTLEMENT, ADJUDICATION OR FINAL JUDGMENT IN EXCESS OF THE RETAINED LIMIT THE COMPANY WILL PAY SUCH PROPORTION OF THE CLAIM EXPENSE, AS HEREIN DEFINED, INCURRED WITH ITS WRITTEN CONSENT, AS THE AMOUNT OF LOSS PAYABLE UNDER THIS POLICY BEARS TO THE TOTAL AMOUNT OF THE SETTLEMENT OR JUDGEMENT AGAINST THE INSURED, EXCEPT THAT:

1. CLAIM EXPENSE SHALL BE INCLUDED WITHIN, NOT IN ADDITION TO, THE LIMIT OF LIABILITY STATED IN THIS POLICY.
2. THE NAMED INSURED SHALL PROMPTLY REIMBURSE THE COMPANY FOR ANY AMOUNT OF LOSS PAID ON BEHALF OF THE INSURED WITHIN THE RETAINED LIMIT SPECIFIED IN ITEM #3 ABOVE.
3. THE COMPANY SHALL NOT PAY ANY CLAIM EXPENSE AFTER THE COMPANY'S LIMIT OF LIABILITY HAS BEEN EXHAUSTED DUE TO THE PAYMENT OF LOSSES.
4. CLAIM EXPENSE INCURRED DIRECTLY BY THE INSURED WITH THE WRITTEN CONSENT OF THE COMPANY, SHALL BE APPORTIONED AS FOLLOWS:
   A. SHOULD ANY CLAIM OR CLAIMS BE SETTLED OR REDUCED TO JUDGMENT FOR AN AMOUNT IN EXCESS OF THE RETAINED LIMIT THEN THE COMPANY SHALL CONTRIBUTE TO THE CLAIM EXPENSE INCURRED BY THE INSURED WITH THE WRITTEN CONSENT OF THE COMPANY IN THE RATIO ITS PROPORTION OF THE LOSS AS FINALLY ADJUSTED BEARS TO THE WHOLE AMOUNT OF SUCH LOSS.
   B. IN THE EVENT THAT THE INSURED ELECTS NOT TO APPEAL A JUDGEMENT IN EXCESS OF THE RETAINED LIMIT, THE COMPANY MAY ELECT TO CONDUCT SUCH APPEAL AT ITS OWN COST AND EXPENSE, AND SHALL BE LIABLE FOR THE TAXABLE COURT COSTS AND INTEREST INCIDENTAL THERETO, BUT IN NO EVENT SHALL THE TOTAL LIABILITY OF THE COMPANY EXCEED ITS LIMITS LIABILITY AS STATED ABOVE, PLUS THE EXPENSE OF SUCH APPEAL.

...

(UMF No. 5 [Adams Decl., ¶ 10, Exh. H, AIIC00060, AIC00062].)

C. *The Excess Policy*

Transport issued to Riddell a policy (Policy No. TUL675458) for the policy period of April 22, 1984 to April 22, 1985 ("Excess Policy"). (UMF No. 3.) The Excess Policy's key terms are in the "drop down" endorsement:

"DROP DOWN" COVERAGE CLARIFICATION ENDORSEMENT

NOTWITHSTANDING ANYTHING CONTAINED IN THIS POLICY WORDING OR ENDORSEMENTS ATTACHED THERETO TO THE CONTRARY AND IN CONSIDERATION OF THE PREMIUM PAID, IT IS UNDERSTOOD AND AGREED THAT IN THE EVENT OF EXHAUSTION OF THE ANNUAL AGGREGATE LIMIT OF LIABILITY IN THE UNDERLYING PRODUCTS AND COMPLETED OPERATIONS LIABILITY POLICY ISSUED BY ASSOCIATED INTERNATIONAL INSURANCE COMPANY (HEREINAFTER REFERRED TO AS AIIC) BY REASON OF LOSSES AND/OR EXPENSE PAID THEREUNDER WHICH OCCURRED DURING THE PERIOD OF THIS POLICY, THIS POLICY, EFFECTIVE THE DATE SAID AIIC AGGREGATE IS EXHAUSTED, SHALL CONTINUE SUCH COVERAGE AS IS AFFORDED BY SAID AIIC POLICY FOR REMAINDER OF THIS POLICY PERIOD.

EXCEPT FOR THE LIMITS OF LIABILITY INCLUDING AGGREGATE LIMITS PROVISION OF THIS POLICY, IT IS FURTHER UNDERSTOOD AND AGREED THAT IN THE EVENT THIS POLICY IS CALLED UPON TO CONTINUE COVERAGE AS PROVIDED BY AIIC DUE TO EXHAUSTION OF THEIR ANNUAL AGGREGATE LIMIT OF LIABILITY, THIS POLICY SHALL BE SUBJECT TO THE IDENTICAL INSURING AGREEMENTS, EXCLUSIONS, DEFINITIONS, TERMS, CONDITIONS, INCLUDING THE DEFINITION OF CLAIMS EXPENSE, THE DEFENSE, CLAIMS EXPENSE, SETTLEMENT PROVISIONS, THE SELF INSURED RETAINED LIMIT OF THE INSURED BEING $100,000.00 EACH OCCURRENCE BODILY INJURY AND/OR PROPERTY DAMAGE COMBINED INCLUDING CLAIMS EXPENSE WITH UNLIMITED AGGREGATE LIMIT, AS ARE CONTAINED IN SAID AIIC POLICY.

(UMF No. 4 [Adams Decl., ¶ 5, Exh. C, 10, 71].)[2]

[2] Transport asserts Defending Insurers cannot shift the burden of proof because they have failed to authenticate the Primary and Excess Policies. The Court overrules this contention. The Policies have been authenticated to the satisfaction of the Court. (See, e.g., Transport's Separate Statement in Opposition Nos. 3, 4, 5 and Additional Statement Nos. 1, 2, 3, 5, 6, 7 and Transport's arguments in MSA filings based on the language of the

D. *Riddell's Notice to Transport: 2011 Lawsuits*

Defending Insurers submit evidence that, in September and October 2011, Riddell notified Transport that Riddell was named in four suits against it: *Maxwell v. National Football League* (Los Angeles Superior Court Case No. BC465842); *Pear v. National Football League* (Los Angeles Superior Court Case No. LC094453); *Barnes v. National Football League* (Los Angeles Superior Court Case No. BC468483); and *Hardman v. National Football League.* (Declaration of Reynold L. Siemens in Support ("Siemens Decl."), ¶¶ 4, Exh. 3.) Each lawsuit was on behalf of dozens of plaintiffs, a number of whom alleged they suffered continuing injuries during the relevant policy period. Transport has acknowledged receiving Riddell's notice. (Siemens Decl., ¶ 5, Exh. 4.) Transport initially took the position it had no duty to defend Riddell in connection with the Underlying Claims until all the underlying policies listed in the schedule of insurance were exhausted. (Siemens Decl., ¶ 5, Exh. 4, RID 014811.)[3]

IV. Admissibility of Extrinsic Evidence

A court interpreting an insurance policy or any other written contract may admit extrinsic evidence to construe the meaning. Under the modern rules of contract interpretation, a court does not have to determine that a contract is ambiguous on its face as a prerequisite to admitting extrinsic evidence. Because the contract may contain a latent ambiguity that is not apparent from the face of the document, the court must admit any extrinsic evidence that supports a reasonable interpretation of the contract. (*Pacific Gas & Elec Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 40; *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 389-

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Primary and Excess Policies proffered.) Transport points out that the two versions of the Excess Policy are different, i.e., that the policy produced by Allianz Policy has three additional pages at the end. The Court disregards the "Insuring Agreements" in the ALLIANZ00118-120. Unlike each of the preceding pages, these three pages are not signed by Roger L. Bohning; they are signed by other parties. They also contain no provisions material to the pending motion. The Court therefore disregards them.

[3] The Court has made certain changes requested by Transport in its April 21, 2021 Brief, pp. 8-9. The Court does this without agreeing with Transport's contention that the letter did not "tender" the defense of Riddell because Riddell had hired its own counsel. This contention is rejected by the Court; *see*, Section IV *infra.)* Moreover, Transport's further contention that the letter did not tender a defense (because the letter contained a demand that the insurers "commence paying their costs of defending against these actions") is splitting hairs. Transport's June 11, 2012 letter in response clearly indicate that Transport understood that Riddell's defense was being tendered (and that Transport disclaimed any defense obligation.) (Adams Decl., Exh. M.)

90.) The Court therefore considers whether the extrinsic evidence offered by the parties is admissible.

A. *Evidence Associated Paid at Least $1,000,000 Is Undisputed.*

Defending Insurers present evidence Associated paid, in total, exactly $1,000,000 under the Primary Policy in connection with two lawsuits against Riddell by two former football players, Michael Membrino (*Membrino*) John Wissel (*Wissel*). Documents from records maintained by Associated's claim service (Markel Service, Incorporated) show payment of $1,000,000 under the Primary Policy: $458,210.17 paid in connection with *Membrino* between August and September 1991, and $541,789.83 paid in connection with *Wissel* between December 1989 and September 1991. (Declaration of Michele Prenevost (Apr. 30, 2020) ("Prenevost Decl"), Exh. A, AIIC 00843 – 00900.) These documents are presented through the declaration of Michele Prenevost, a Processing Supervisor for Evanston from 1981 to 2013. ("Prenevost Decl."), ¶ 3.) She oversaw the Claim Service's entry of data recording Associated's payments on its policies, including the Primary Policy. (Prenevost Decl. ¶¶ 3, 5.)

Prenevost identifies the documents as Payment History Reports and Loss Expense Reports "that reflect the total payments made by Associated" on the "specific policies referenced in those documents" and avers they were contemporaneously made. (Prenevost Decl. ¶ 8.) The documents attached as Exhibit A to her declaration provide evidence Associated's payments on *Wissel* and *Membrino* totaled $1,000,000. (AIIC00847, AIIC00850, AIIC00869 and AIIC00871.) Associated agrees it paid $1,000,000 in connection with these lawsuits.

Transport does not dispute that Associated's documents provide evidence Associated paid at least $1,000,000. Although Transport relies on Riddell's loss run (Transport Opposition pp. 12-13) for its contention there was no exhaustion, the loss run confirms Associated paid more than $1,000,000:[4] $1,100,000 paid in indemnity ($450,000 in connection with *Wissel* and $650,000 in

[4] The Associated loss run regarding *Membrino* (Prenevost Decl., Exh. A, at AIIC00850) shows only four payments made around the time of the settlement of that case. This record also does not identify the payees of the individual payments or for what reason the payment was made.

connection with *Membrino*). (Wong Decl., Exh. G.) The Court therefore accepts as undisputed the fact that Associated paid at least $1,000,000 under the Primary Policy.

B. *Evidence Riddell Was Represented by Counsel of Its Choosing in* Wissel *Is Admissible.*

Associated and Transport present admissible evidence Riddell retained counsel in *Wissel*. (Declaration of Robert Tucker ("Tucker Decl."). Tucker avers Riddell's General Counsel retained him in *Wissel* and that he reported to the General Counsel on the case. (*Id.* at ¶ 4.) Tucker's firm sent invoices for services directly to Riddell. (*Ibid.*) Tucker does not recall or know who paid such invoices. (*Ibid.*) He has no recollection "of discussions of the *Wissel* Action with representatives of Associated, Transport or any other insurance company." (*Id.* at ¶ 5.) Associated argues this "confirms that Riddell *was required* to and did defend itself. (Associated Opposition 10:5-6, emphasis added.) Transport makes a similar contention. (Transport Opposition p. 18.)

Associated and Transport also point to a September 9, 2011 letter from Riddell's counsel to Associated stating Riddell has "retained the law firm of Bowman and Brooks LLP to defend them in these cases [that were later made a part of the NFL-MDL]." (Adams Decl., Exh. J.) Associated claims this is evidence Riddell did not cede control of the defense in these cases. (Associated Opposition 11:19-20.) Transport makes a similar contention. (Transport Opposition pp. 17-18.) The Court excludes this evidence because it is hearsay and because Riddell's conduct in 2011 is not relevant to the 1984-1985 policies at issue in this motion.

Jane Vander Velde was an Assistant Vice President for a wholesale insurance broker that she avers was working on behalf of a retail insurance broker engaged to obtain coverage for Riddell. (Declaration of Jane Vander Velde submitted by Transport (Jan. 13, 2021) ("Vander Velde Decl.") ¶ 3.) Her testimony and attached exhibits are inadmissible hearsay, including her statement she "learned" Riddell "had been handling and controlling the defense of suits and claims ... using defense attorneys that it selected and developing its own defense procedures and strategies." (*Id.* at ¶ 7.) Other portions of Vander Velde's Declaration are also inadmissible hearsay:

(1) her repeated references to the SIR in the Primary Policy as including defense costs and having no aggregate (see, e.g., *id.* at ¶¶ 9, 11-12 [inadmissible opinion interpreting the policy]);

(2) her statement "Riddell wished to handle and control its own defense . . . In other words, Riddell would continue to be responsible for the defense costs" (*id.* at ¶ 10 [inadmissible hearsay and opinion testimony]);

(3) her statement, "Mr. Bohning explained to me that Transport did not want to be a 'first dollar' or primary insurer..." (*id.* at ¶¶ 13-14 [hearsay that actually refers to the Excess Policy (calling it the "Transport policy") and not to the Primary Policy]);

(4) her contention the CSL Endorsement "does not seem unusual and would be consistent with the parties' intentions that the insured wanted to handle and control its own defense of suits and claims and would be responsible for defense expenses, pursuant to the Defense, Claim Expense, Settlement endorsement and $100,000 SIR for each and every occurrence, with no aggregate" (*id.* at ¶ 15 and similar statement at ¶16 [inadmissible opinion that lacks foundation]); and

(5) "it was industry custom and practice that endorsements to the policy would supersede any inconsistent provisions within the pre-printed form" (*id.* at ¶ 16 [another inadmissible opinion that lacks foundation]).

The Court rejects Transport's argument her statements are the authorized admissions by Riddell's agent and therefore an exception to the hearsay rule under Evidence Code section 1222. Under that section, a statement offered against a party is not inadmissible hearsay if "(a) [t]he statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and (b) [t]he evidence is offered ...after admission of evidence sufficient to sustain a finding of such authority...." Vander Velde's testimony does not establish she was an agent for Riddell or that she was authorized to make any statements on its behalf. Without foundation for her personal knowledge, she says she worked for Stewart Smith Mid America, Inc. ("Stewart Smith"), a wholesale broker "that worked on behalf of" a retail insurance broker company that "worked to secure insurance for Riddell." (Vander Velde Decl. ¶¶ 4-5.) This fails to establish Riddell authorized her to speak on its behalf in the 1980s. Transport also fails to present evidence that when she signed her 2021 Declaration, Vander Velde was an agent for Riddell or authorized to make the statements on its behalf. Transport therefore fails to establish an exception to the hearsay rule under Evidence Code section 1222.

Transport also refers the Court to a March 22, 1985 letter to Associated's Dan Kotanian from Riddell's Casualty Broker, Thomas Cummane, discussing "the success of plaintiffs' defense tactics in minimizing adverse verdicts in product liability litigation." (Transport's April 21, 2021 brief p. 6:19-22; Declaration of Dan Kotanian ("Kotanian Decl."), Exh. A [submitted by Transport].) Cummane was apparently a colleague of Vander Velde's because he was, according to Kotanian, "a casualty broker for Stewart Smith Mid America Inc. which was serving as an insurance broker for Riddell at that time." (Kotanian Decl., ¶ 4.) This appears to be inaccurate because, according to Vander Velde, Stewart Smith was a wholesale broker working on behalf of a retail broker (Johnson & Higgins) who was working to secure insurance for Riddell. (Vander Velde Decl. ¶ 4.)

Cummane's statements in the letter are hearsay and incorporate additional hearsay from third parties. The Court cannot apply the authorized admissions exception to Cummane's letter because there is no evidence he was an agent for Riddell or that Riddell authorized him to make the statements in the letter. Kotanian's testimony Cummane was "an insurance broker for Riddell" is not sufficient under Evidence Code section 1222.

C. *Summary of Admissible Extrinsic Evidence*

The only admissible and relevant extrinsic evidence is the evidence Associated paid at least $1,000,000 in connection with the *Wissel* and *Membrino* claims, and that Riddell retained Arter & Hadden to defend it in *Wissel.*

V. Positions of the Parties Briefing the Motion

Although the parties generally agree on the pertinent words and provisions of the Primary and Excess Policies and the applicable legal principles (including the principle that the Court interprets a contract as a matter of law), they disagree on the interpretations the Court should apply.

A. *Defending Insurers' Motion*

Defending Insurers contend Transport owes a duty under the Excess Policy to defend Riddell in the Underlying Claims because the limits of liability of the Primary Policy have been exhausted, requiring the Excess Policy, in accordance with its terms, to "drop down." From their point of view, "the question here is whether the 1984 insurance policies issued by Transport and Associated include a duty to defend that is triggered by a potentially covered occurrence within the meaning of those policies"; they contend their "*prima facie* showing that a potential coverage obligation arose under the co-insurer's policy" is enough to shift the burden of proof for purposes of summary adjudication. (Motion, 16:4-5, 24-26.)

Based on the evidence Associated paid $1,000,000 in connection with *Wissel* and *Membrino*, Defending Insurers argue the Primary Policy has been exhausted thereby triggering Transport's duty to defend because Excess Policy incorporates the insuring language of the Primary Policy stating "the [insurance] company shall have the right and duty to defend any suit ... seeking damages on account of bodily injury ... even if the allegations of the suit are groundless, false or fraudulent...."

In the alternative, if the Court finds the policy is not exhausted, Defending Insurers ask the Court to find Associated continues to owe a duty to defend in the Underlying Claims.

B. *Transport's Opposition*

Transport primarily argues that, without evidence the $100,000 per occurrence SIR in the Primary Policy was paid or otherwise satisfied as to *Membrino* and *Wissel*, its duty to defend under the Excess Policy is not triggered. It argues the CSL Endorsement containing the SIR takes precedence over the insuring language cited by Defending Insurers and "makes plain that the [Primary Policy] does not provide a duty to defend" unless or until the SIR has been paid or otherwise satisfied. (Transport Opposition, 15:25-26, 17:5-8, 21-22.) Transport argues the Court must deny the motion because the moving parties have failed to submit evidence the SIR was ever paid or satisfied.

Transport further contends that even if the Excess Policy drops down and the Court determines it has a duty to provide a defense, there is no authority for the proposition it must defend

the Underlying Claims which consolidate hundreds of plaintiffs, most of whom assert claims outside the Excess Policy period. (*Id.* at p. 22.)

Finally, Transport argues the drop down endorsement ended after April 22, 1985, based on language in the endorsement stating that the drop down coverage is continued "for remainder of this policy period." (*Id.* at p. 23.)

C. *Associated's Opposition*

Associated contends Defending Insurers have presented "affirmative evidence establishing Associated paid its full policy limits" of $1,000,000 in connection with *Wissel* and *Membrino*. (Associated Opposition, p. 2.) Based on this evidence, it urges the Court to declare that the Primary Policy is exhausted and it therefore has no further obligations under the Policy. (*Ibid.*) Alternatively, Associated argues if the policy limits have not been exhausted, Defending Insurers fail to establish Associated has a present duty to defend because the CSL Endorsement controls and "effectively amends" the insuring language. (*Id.* at 9:19.) According to Associated, "the CSL endorsement effectively changes Associated's duties from defense to reimbursement of a portion of the insured's defense, in excess of the SIR." (*Id.* at 10:1-2).

D. *Riddell's Position*

On March 4, 2021, Riddell submitted "Plaintiffs' Statement (1) in support of Defending Insurers' Motion for Summary Adjudication re Duty to Defend; and (2) of Non-Waiver of Arguments Relative to Issues Raised" ("Statement").

Riddell argues the CSL Endorsement in the Primary Policy did not withdraw the promised duty to defend in the insuring language, let alone withdraw it through language that is conspicuous, plain, and clear, as required under the applicable case law. It also urges the Court to interpret "claim" and "suit" as separate terms with discrete meanings under the Primary Policy. According to Riddell, the Claim Expense provision in the CSL Endorsement should be narrowly construed to

refer to "claims" but not to "suits," whereas the duty to defend in the insuring language explicitly obligates Associated (and therefore Transport) to defend all "suits." (Statement p. 3-4.)

Further, Riddell cautions against any ruling on what constitutes, under the Primary Policy, an "occurrence" or how many "occurrences" there are. (*Id.* at p. 6.)

VI. The Court Interprets the Primary Policy to Impose a Duty to Defend without Payment of the SIR as a Condition Precedent.

Reducing the parties' contentions to their basics: Transport argues the CSL Endorsement means it had no duty to defend until Riddell paid or otherwise satisfied the $100,000 SIR under the Primary Policy; Defending Insurers and Riddell argue the CSL Endorsement does not vitiate the duty to defend in the Insuring Language and that Associated's payment of $1,000,000 exhausted the limits of the Primary Policy, triggering a duty to defend regardless of whether the SIR was paid or satisfied; and Associated contends the limits of liability under the Primary Policy were exhausted and it therefore has no duty to defend.

The Insuring Language in the Primary Policy plainly imposes a duty to defend, stating "company shall have the right and duty to defend any suit ... even if any of the allegations of the suit are groundless, false or fraudulent...." The question presented is whether the CSL Endorsement and/or Claim Expense Provision make payment of the SIR a condition precedent to that duty. To determine whether Riddell's payment of an SIR was a condition precedent to the duty to defend, the court must examine the language of the policy. "[T]here is no general rule that is applicable without regard to the particular provisions of the policy." (*Legacy Vulcan v. Superior Court* (2010) 185 Cal.App.4th 677, 694 (*Legacy Vulcan*).) "Instead, the impact of a policy reference to a 'self-insured retention' or 'retained limit' on the duty to defend will depend on the language of a particular policy." (*Ibid.*) The Court must also interpret the Primary Policy mindful that "[t]he whole of the contract is to be taken together, so as to give effect to every part, if

reasonably practical, each clause helping to interpret the other." (Civ. Code § 1641; *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal. App. 4th 516, 525.)

Applying the usual canons of contract interpretation, the Court finds the Primary Policy allowed Riddell to either accept Associated's promise to provide a first dollar defense by counsel Associated paid and retained, or to front the costs of defense for counsel Riddell retained. For purposes of discussion, the Court identifies the former as Option A — the typical arrangement where the insurer selects counsel and incurs fees for the defense — and the latter as Option B — allowing Riddell to retain counsel and incur defense fees with a right to seek reimbursement if the insurer consented to Riddell's selection of attorneys.

Option A memorialized the typical arrangement where the insurer fulfills its duty to defend by selecting defense counsel and controlling the defense. "It is a well-known fact that under insurance policies generally the insurer controls the defense it provides its insured [and there is] nothing improper in this customary practice." (*Spindle v. Chubb/Pacific Indemnity Group* (1979) 89 Cal.App.3d 706, 714.) "[T]he insurer characteristically engages and pays the attorney to defend the insured [citations] [and] it is customary for the insurer to control the defense it provides." (*State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co.* (1999) 72 Cal.App.4th 1422, 1429.) The parties memorialized Option A by first defining "claim expense" to mean fees *incurred* with the insurer's consent: "*fees* ... resulting from the investigation, defense, adjustment or appeal of any claim *incurred with the consent of the company*." The terms "investigation" and "adjustment" plainly signify that this first definition of "claim expense" applied when the insurer selected and paid the defense counsel ("consented" to the "fees incurred").

The parties further agreed that Option A claim expense incurred by the insurer would "*contribute to* and be deemed to be *included within* the retained limit stated in the declarations." (Emphasis added.) Interpreting the word "contribute" in its ordinary sense of "to give or supply money as a part or share" (e.g., www.merriamwebster.com), the court interprets this provision to memorialize Associated's promise to credit the claim expense it incurred against Riddell's obligation to pay the $100,000 SIR. In other words, Riddell was entitled to a "first dollar" defense under Option A.

By also agreeing that "fees incurred" constituted "claim expense" within the $1,000,000 policy limits ("Claim expense shall be included within, not in addition to, the limit of liability

stated in this policy"), the parties structured Option A as a burning limits policy. As Associated incurred and paid claim expense under Option A, the $1,000,000 policy limits would be progressively reduced.

The parties memorialized Option B in the second definition of "claim expense," defining it more narrowly to mean fees *charged* by attorneys selected by Riddell with Associated's approval: "fees charged by an attorney *designated by the named insured with the written consent of the company.*" (Emphasis added.) The language specifying claim expense would "contribute to and be deemed to be included within the retained limit" articulated Associated's promise to credit Option B claim expense against the SIR only if the fees were charged by attorneys it approved.

Other language in the Claim Expense Provision evidences the parties' agreement to distinguish between Option A and Option B. For example, the parties agreed that Associated's ultimate proportion of payable claim expense depended on whether Riddell elected Option A or Option B. Associated promised to pay "such proportion of the claim expense ... as the amount of loss payable under this policy bears to the total amount of the settlement or judgement" "*except that*" for "*claim expense incurred directly by the insured,*" Associated would "contribute to the claim expense incurred by the insured . . . in the ratio its proportion of the loss as finally adjusted bears to the whole amount of such loss." (Claim Expense Provision, ¶ 4.A.) Because the parties specified that the latter ratio applied to "claim expense incurred directly by the insured" (Option B), the Court interprets the former ratio as necessarily applying to claim expense incurred by Associated (Option A). This language therefore confirms the parties' intention to distinguish between Option A and Option B.

Option A was attractive to the insurer because it could control defense costs incurred by its designated counsel. It was also attractive to an insured that did not anticipate many claims requiring significant defense costs or payments of settlements or judgments. Option B was attractive to the insurer because the insurer paid nothing unless or until there was a loss. As explained below, Option B was also attractive to an insured who did expected multiple claims with the potential for significant losses.

Option B allowed an insured anticipating multiple claims to avoid the "burning limits" coverage under Option A. It also allowed the insured to manage the defense of multiple claims

with an eye to discouraging future claims, not just minimizing costs. By fronting defense costs and seeking reimbursement for claim expense only *after* any settlement or judgment exceeding the $100,000 retention, the insured could reserve the policy limits for payments of losses or judgments and use any remaining coverage for reimbursement of defense costs. ("After a settlement, adjudication or final judgment in excess of the retained limit the company will pay ... claim expense ..."; "Claim expense" means "fees charged by an attorney designated by the named insured with the written consent of the company"; "Claim expense shall *contribute to*, and be deemed included within, the retained limit stated in the declarations." (Emphasis added.) Thus, for any settlement or judgment over $100,000 in a case where Riddell fronted defense costs under Option B, Riddell could choose to apply its coverage to losses (as it apparently did with the *Wissel* and *Membrino* settlements) or use its coverage to recoup its outlay of defense costs.

If Riddell elected Option B, it assumed full responsibility for paying defense costs incurred on cases that settled for less than $100,000 because Associated's promise to pay claim expense was limited to "settlements, adjudication and final judgment *in excess of the retained limit.*" As explained in detail below, the $100,000 retained limit applied to settlements, judgments or other *losses*, requiring Riddell to pay losses up to $100,000 as an SIR. The parties accordingly agreed that for Option B settlements or judgments under the retained limit of $100,000, Riddell was responsible for paying the loss and paying for its defense.[11]

A. *The SIR Cannot Be a Condition Precedent to the Duty to Defend Because the SIR Applies to Indemnity and Not to Defense.*

The CSL Endorsement addresses the SIR in the third of three numbered paragraphs, each of which contains multiple references to "loss," "loss and damages," and "indemnity." Although "loss" and "damages" are not defined in the Policy, "loss" and "loss and damages" have been regularly interpreted as pertaining to indemnity. (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal. 4th 945, 962-964 [insurer's promise to pay "damages" is part of its duty to indemnify]; *Deere & Co. v. Allstate Ins. Co.* (2019) 32 Cal. App. 5th 499, 518-519 (*Deere*) [discussing "loss" as part of duty to indemnify].) There is no language in the CSL Endorsement

[11] See discussion of *Worthey* p. 25, *infra*.

purporting to delete, modify, or restrict the duty to defend promised in the Insuring Language. Based on the multiple references to loss, damages, and indemnity, and the CSL Endorsement's failure to even allude to "defense" in the three numbered paragraphs, the only reasonable interpretation of these paragraphs, and the one that the Court adopts, is that the SIR applies to indemnity obligations and not to the duty to defend. (*MacKinnon v. Truck Insurance Exchange* (2003) 31 Cal.4th 635, 655.)

The clause in the Claim Expense Provision specifying "named insured shall promptly reimburse the company for any amount of *loss* paid on behalf of the insured within the retained limit" (incorporating paragraph 3 of the CSL Endorsement defining the limits of liability for loss and damages) also plainly identifies the SIR as a payment toward indemnity.

Because the SIR applies to indemnity rather than defense, it is not reasonable to interpret the CSL Endorsement or the Claim Expense Provision as imposing a condition precedent to Associated's duty to defend.

B. *The CSL Endorsement Cannot Be Reasonably Interpreted to Require Satisfaction of the SIR as a Condition Precedent to Associated's Duty to Defend.*

Although the Court's finding the SIR was required for loss and damage rather than defense is dispositive because it vitiates Transport's argument the SIR was a condition precedent to the duty to defend, the Court alternatively finds that even if the SIR somehow applied to defense, the policy cannot be reasonably interpreted to impose the SIR as a condition precedent to that defense.

Like the policy language at issue in *Legacy Vulcan*, the CSL Endorsement contains no language requiring satisfaction of the SIR as a condition precedent to the duty to defend. It merely describes the policy limits, stating that the policy limits are "in excess of a self insured retained limit of $100,000." Transport cites no cases (and the Court has found no cases) interpreting "in excess of" to impose a condition precedent.

The "in excess of" language contrasts with the policy language in *General Star Indemnity Co. v. Superior Court* (1996) 47 Cal.App.4th 1586 that "*expressly* stated that the insurer had no duty to defend unless the retained limit was exhausted." (*Legacy Vulcan, supra,* 185 Cal.App.4th at p. 695 (emphasis in original).) *Legacy Vulcan* distinguished *City of Oxnard v. Twin City Fire Ins. Co.* (1995) 37 Cal.App.4th 1072 on the same basis, concluding that in the absence of an

express limitation, the duty to defend is not limited by the presence of a retained limit provision. (*Id.* at 694-95, 697.)[14] Under the rule as stated in *Legacy Vulcan*, a "'self-insured retention' provision in a primary policy providing primary coverage relieves the insurer of the duty to provide an immediate, 'first dollar' defense *only if the policy expressly so provides*." (*Id.* at p. 682 (emphasis in original); see also *American Economy Insurance Co. v. Scottsdale Insurance Co.* (S.D. Tx. 2015) 2015 WL 12764955, *14 ["You Pay Defense Costs Within SIR .... [I]t is a condition precedent to our liability that you make actual payment of all damages and 'defense costs' for each 'occurrence' or offense until you have paid 'self insured retention'...."]; *Crown Energy Services, Inc. v. Zurich American Insurance Co.* (C.D. Cal. 2021) 2021 WL 75667, *6 ["it is a condition precedent to our liability that you make actual payment of 'self insured retention' ... for each incident..."].)[15] Under the principles enumerated in *Legacy Vulcan*, the Primary Policy's failure to "expressly provide" the SIR was a condition precedent to the duty to defend is determinative.

C. *The Claim Expense Provision Cannot Be Reasonably Interpreted to Require Satisfaction of the SIR as a Condition Precedent to Associated's Duty to Defend.*

As a preliminary matter, the Court is not persuaded by Riddell's contention the Claim Expense Provision applies to "claims" but not to "suits." The words "defense" and "appeal" in the Claim Expense Provision demonstrate the parties used "claim" in to mean "suits and/or claims." While responding to "claims" could reasonably be described as "defense" of claims, "appeal" can only be reasonably interpreted to mean the "appeal" of "suits" after verdict. The Court therefore construes the Claim Expense Provision as addressing "claims" and "suits" interchangeably. (See *Clarendon America Ins. Co. v. North American Capacity Ins. Co.* (2010) 186 Cal.App.4th 556, 570 ["claim" used synonymously with "suit" and "actions"].) This

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[14] *Forecast Homes, Inc. v. Steadfast Ins. Co.* (2011) 181 Cal.App.4th 1466, also cited by Transport, is likewise distinguishable. In that case the policy stated, "you shall be responsible for payment of all damages *and defense costs* for each occurrence or offense, until you have paid self-insured retention amounts." (*Id.* at p. 1471 (emphasis added))

[15] *American Safety Indemnity Company v. Admiral Insurance Company* (2013) 220 Cal.App.4th 1, 11-13 also relied on *Legacy Vulcan* to hold that an SIR which does not expressly make payment of the SIR a condition of. the insurer's defense obligation is only a limitation on the insurer's duty to indemnify against covered damages.

interpretation is consistent with language in the CSL Endorsement setting the policy limits for "claims made or suits brought."

The Claim Expense Provision contains no language requiring Riddell to satisfy the SIR as a pre-condition to Associated's obligation to pay claim expense. Indeed, a close reading of all of the language in the Claim Expense Provision completely undermines Transport's argument Riddell's satisfaction of the SIR was a condition precedent to the duty to defend. Because Option A provides a first dollar defense by the insurer's selected counsel, it contradicts Transport's contention the SIR was a condition precedent to obtaining a defense under the Primary Policy. . The Claim Expense Provision memorialize the parties' express agreement that "claim expense shall contribute to and deemed to be included within the retained limit" while defining "claim expense" to include the "investigation, defense, adjustment or appeal of any claim ... incurred with the consent of the company." Because only the insurer was in a position to "incur" "adjustment" expenses, this clause necessarily applied to Option A. Associated's agreement to incur claim expense under Option A and credit it against Riddell's obligation to pay an SIR contradicts Transport's contention the SIR was a condition precedent to Associated's duty to defend.

Option B is also inconsistent with Transport's contention because the parties expressly conditioned Associated's obligation to reimburse claim expense on resolution of a case ("after a settlement, adjudication or final judgment") rather than on payment of the $100,000 SIR. The Court interprets the phrase "after a settlement, adjudication or final judgment" to impose a condition precedent to Associated's promise to pay claim expense. The parties' express adoption of this condition precedent without mentioning payment of the SIR as an additional or alternative condition precedent is evidence the parties did not intend a second condition precedent.

D. *Although Mostly Inadmissible, Transport's Extrinsic Evidence Does Not Support Its Contention the SIR Was a Condition Precedent to the Duty to Defend.*

Even if it was admissible, Transport's extrinsic evidence would not advance its contention the SIR was a condition precedent to Associated's duty to defend. To the contrary, the evidence supports the Court's interpretation by substantiating Riddell's election to retain counsel under Option B. For example, Transport offers admissible extrinsic evidence that defense counsel in

Wissel were retained by Riddell, rather than by Associated. A former Arter & Hadden attorney, Robert Tucker, avers Riddell retained him to defend Riddell in *Wissel*; he has no recollection of being retained by Associated or any other insurance company or discussing the cases with any insurers. (Tucker Decl, ¶¶ 5-6.) This evidence is consistent with Riddell's election to fund its own defense under Option B. It does not tend to prove the SIR was a condition precedent to the duty to defend.

Transport's argument Riddell failed to satisfy the SIR in *Wissel* also fails to advance its position because Transport provides no evidence Riddell was *obligated* to pay the SIR under the language of the policy and the circumstances of the settlement. If Arter & Hadden was an "approved" law firm and Riddell paid it more than $100,000 in fees by the time of the settlement, Associated was obligated to credit the $100,000 against the SIR because the parties agreed that "[c]laim expense shall contribute to, and be deemed to be included within, the retained limit stated in the declaration." Without affirmative evidence demonstrating Riddell was obligated to contribute $100,000 toward the settlement (i.e., that Arter & Hadden were not approved counsel and/or that Riddell incurred less than $100,000 in fees), there is no basis for any inference supporting Transport's condition precedent argument.

Although it is inadmissible hearsay as presented to the Court, Van Der Velde's testimony she "learned" that Riddell "had been handling and controlling the defense of suits and claims ... using defense attorneys that it selected and developing its own defense procedures and strategies" establishes, at most, that Riddell selected Option B. (Vander Velde Decl., ¶ 7.) It does not tend to prove the SIR was a condition precedent for the duty to defend.

Although it is also hearsay, the March 22, 1985 letter to Associated's Dan Kotanian from Thomas Cummane, Riddell's Casualty Broker, similarly tends to prove Riddell selected Option B and fails to prove the SIR was a condition precedent to the duty to defend. (Declaration of Dan Kotanian ("Kotanian Decl.," Exh. A.) Cummane's letter informed Kotanian that MacGregor Sporting Goods, Inc. had purchased Riddell on January 3, 1985, but would likely keep Associated's products liability coverage in place. (*Id.* at p. 1.) Describing Associated's Primary Policy, Cummane pointed out the "Self-Insured Retention [is] inclusive of allocated claim expenses" and that it applied per occurrence ("not subject to any aggregate.") (*Id.* at p. 2.) He then provided "statistics" that appear to recount amounts Associated paid out on the policies since

1977. Because he gives no indication whether Riddell or Associated selected defense counsel and no indication whether Riddell paid or reimbursed funds to satisfy any SIRs, the statistics have no relevant evidentiary value for purposes of the question before the Court.

Cummane's closing comments suggest Riddell was proceeding under Option B and provides reasons why it did so:

> The nature of the injuries and suits brought against Riddell leave open the potential for a major liability award on almost any of them. However, Riddell's aggressive defense posture has for the most part resulted either in defense verdicts or settlement and expense combinations below or near the insured's current $100,000 retention level. Another feature of the aggressive defense position is that the number of law suits [*sic*] filed against Riddell has dropped dramatically to a single case in the last 2 years. Even the Jaramillo case on which a verdict has just been rendered (and will undoubtedly be appealed) serves to make a point that underwriters considering the risk will want to note. The case was won solely on a "failure to warn" basis. That failure to warn issue has been extensively addressed in recent years – with greater and greater emphasis on warning labels on the helmet, not only from the point of new manufacture, but also from helmet reconditions. Since 1982 over 1,300,000 warning labels have been sent out to schools, reconditioners, sports teams, etc. for inclusion on any helmets that do not have labels or have had the labels removed through wearing out or manufacture .... [A]dd all of this and likelihood for future such verdicts is reduced immensely especially related to claims that might arise out of injuries occurring during current and subsequent renewal policies.

Cummane's assessment is entirely consistent with the Court's interpretation of the policy as allowing Riddell to choose Option B. It does not tend to prove the SIR was a condition precedent to the duty to defend.

The Court is also not persuaded by Transport's contention the absence of any "evidence Riddell ever sought any defense from Associated or Transport for the *Worthey* claim" supports or is even consistent with Transport's contention the parties intended to condition the duty to defend on payment of the SIR. (Transport's Brief re: Tentative, p. 4.) Riddell's loss run shows Riddell paid $73,000 for "indemnity" and $19,697 for "expense" in *Worthey*. This evidence is entirely consistent with the policy language. Because the $73,000 "indemnity" payment was less than $100,000, Associated had no obligation to pay any claim expense in *Worthey*. ("After a settlement ... *in excess of the retained limit* the company will pay ... claim expense ...." Emphasis added.) With no credit against the SIR for claim expense, Riddell was obligated to pay the $73,000 loss as an SIR and pay the $19,697 as non-reimbursable claim expense.

In summary, even if Transport's extrinsic evidence was admissible, it would not support an interpretation of the policy requiring Riddell to satisfy the $100,000 SIR as a condition precedent to obtaining a defense under the Primary Policy.

VII. The Court Finds the Primary Policy Was Exhausted by Payments on the *Membrino* and *Wissel* Cases and that Transport Has a Duty to Defend.

Primary insurance generally provides the insured's "first layer" of coverage. (*Montrose Chemical Corporation v. Superior Court of Los Angeles County* (2020) 9 Cal.5th 215, 222 (*Montrose II*).) Primary insurance liability "attaches *immediately* upon the happening of the occurrence that gives rise to liability." (*Ibid.* [citing *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 597].) Excess insurance, in contrast, "refers to indemnity coverage that attaches upon the exhaustion of underlying insurance coverage for a claim." (*Montrose II*, at p. 222 [citing *County of San Diego v. Ace Property & Casualty Ins. Co.* (2005) 37 Cal.4th 406, 416, fn. 4].)

"There are two principal types of excess insurance coverage: 'umbrella' coverage and 'following form' coverage." (*Deere, supra,* 32 Cal.App.5th at p. 506.) "A following form excess policy has the same terms and conditions as the primary policy but has a different liability limit." (*Ibid.*) An umbrella excess policy "provide[s] coverage in addition to that provided by the underlying insurance," oftentimes providing coverage "for certain losses for which there may be no underlying insurance." (*Ibid.*)

Associated's Primary Policy makes only one mention of "exhaustion" stating, in the third numbered paragraph of the Claim Expense Provision, "[t]he Company shall not pay any Claim Expense after the Company's limit of liability has been *exhausted* due to the payment of losses." (Emphasis added.) This memorializes the agreement by the parties to the Primary Policy that Associated's payment of $1,000,000 in losses was an exhaustion of the policy.

As noted above, there is no dispute Associated paid at least $1,000,000 under the applicable policy. Transport points to evidence suggesting Associated paid more than $1,000,000 under the policy and that some payments were for claim expense. (Transport Br. re: Tentative p. 6-7.) However, for purposes of determining exhaustion, it makes no difference whether Associated paid exactly $1,000,000 or more than $1,000,000. The policy limits, as noted in the Claim Expense

Provision, were $1,000,000 with "claim expense ... included within, not in addition to the limit of liability." Whether Associated paid at least $1,000,000 for defense or indemnity accordingly makes no difference. Transport provides no authority for the proposition that there is a failure to exhaust if the insurer pays policy limits but fails to pursue reimbursement from the insured provided under the policy. Transport fails to raise a triable issue of fact on the question whether the Primary Policy was exhausted.

Nothing in the Transport policy supports a contrary finding. The term "exhaustion" in Transport's "Drop Down" coverage refers to the "exhaustion of their [Associated's] annual aggregate limit of liability" in the Primary Policy. (Second full paragraph of the Drop Down Coverage.) The rest of the paragraph simply reiterates that the Excess Policy has the *same terms and conditions* as the Primary Policy, including the "Self Insured Retained Limit of the Insured being $100,000 each occurrence...with unlimited aggregate limit as are contained in [Associated's Primary Policy.]." In other words, the Excess Policy merely follows the form of the Primary Policy without imposing any additional term or condition requiring Riddell to pay or satisfy the SIR. The Court finds that the only reasonable interpretation of this language is that Transport promised to provide a defense under the same terms and conditions as the defense promised by Associated. As detailed above, it is not reasonable to interpret Associated's Primary Policy to impose the SIR as a condition of the duty to defend.[26] It is likewise not reasonable to interpret the Excess Policy to impose such a condition.

It is also significant that Transport promised a "FIRST DOLLAR DEFENSE" "with respect to any occurrence not covered by the underlying policies listed in the schedule of underlying insurance or any other underlying insurance collections by the insured...."[27] (Adams Decl., Exh.C., TRAN00075; Exh. D, ALLIANZ00113). The SCHEDULE OF UNDERLYING INSURANCE lists six policies, including the Associated "PRODUCTS LIABILITY" policy. (Adams Decl., Exh.C, TRANS00079; Exh. D. ALLIANZ00117.) Transport's First Dollar Defense

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[26] The Court did not consider the Defending Insurers' contention (or cited supporting evidence) that the SIR was satisfied by "other insurers." (Defending Insurer's April 21, 2021 filing pp. 4-6.) It is unnecessary for the Court to reach this contention and, in any event, it appears that the contention was not squarely raised on the motion.

[27] This language contradicts Bohning's supposed (hearsay) statement to Vander Velde that Transport did not want a "first dollar" policy. (Vander Velde Decl. ¶ 13.)

provision thus provides umbrella excess insurance because it provides coverage for certain losses for occurrences not covered by the underlying policies or "any other" policies insuring Riddell. It is not reasonable to interpret Transport's policy as providing a "FIRST DOLLAR DEFENSE" while conditioning the defense on Riddell's requirement to first pay $100,000.

Vander Velde's testimony about conversations with Transport's Roger Bohning also fails to support Transport's contention the SIR was a condition precedent to Transport's duty to defend. According to Vander Velde, Bohning refused to accept Riddell's request for an aggregate limit on the per occurrence SIR, "insisting that the Transport policy would still have to be subject to" the SIR with no aggregate. (Vander Velde Decl., ¶ 13.) She recalls Bohning stating "that since Riddell was so confident in their defense of claims within the SIR, Riddell should be able to continue to defend claims and control their own defense after exhaustion of the primary insurance." (*Ibid.*)

This evidence does not support an interpretation of the Excess Policy to require payment of the SIR as a condition precedent to the duty to defend. It is instead consistent with the Court's interpretation because it explains why Riddell preferred Option B (a continuity of representation if it was forced to defend additional claims after exhausting the policy limits with settlements or losses exceeding $1,000,000) and Transport's understandable reluctance to relax the requirement that Riddell pay a $100,000 SIR against loss for each occurrence.

The Court therefore concludes the Primary Policy was exhausted and Transport has a duty to defend.

VIII. Transport's Other Arguments Are Not Persuasive

Transport argues there is no "binding appellate authority" for the proposition it must defend the Underlying Claims which consolidate hundreds of cases, most of which involve claims outside the Excess Policy period. (Transport Opposition pp. 22-23.) The fact (assuming it is true) that there is no "binding appellate authority" has no persuasive value because there is no evidence any appellate court has been presented with the issue. Further requiring rejection, Transport does not dispute (1) there are plaintiffs in the Underlying Claims who allege claims against Riddell based on injuries suffered during the Excess policy period and (2) in 2015 Judge Wiley determined that the NFL-MDL litigation was to be treated as a single matter, subject to *Buss v. Superior Court*

(1997) 16 Cal.4th 35. (6/19/2015 Hearing Transcript, 8:12-18). While issues may arise related to the number of occurrences, those issues are not presently before the Court.

The Court similarly rejects Transport's argument the cases cited by Defending Insurers "did not address the same 'drop down' language" as the Excess Policy. Transport makes this argument without any showing the differences are material.

Transport's contention the Drop Down endorsement ended after April 22, 1985 based on language in the CSL Endorsement stating drop down coverage continues "for remainder of this policy period" is equally unpersuasive. Transport offers no reason why this language would deny coverage in an "occurrence" policy. (Transport Opposition, p. 23.)

IX. Conclusion

The Court finds, as a matter of law, that Transport owes a duty of defense under the Excess Policy in connection with the Underlying Claims. The Court therefore GRANTS Defending Insurers' motion for summary adjudication against Transport.

The Court DENIES Defending Insurers' motion for summary adjudication as against Associated. Associated paid policy limits of $1,000,000 in connection with *Wissel* and *Membrino*. No party has raised a triable issue of fact suggesting Associated paid less than $1,000,000 under the Primary Policy. Under the Primary Policy's plain language, the "*company's*" obligation to pay for liability and/or defense ended when "*the company's* liability has been exhausted by payment of ... settlements." (Emphasis added.) Associated's liability under the Primary Policy was capped at $1,000,000 and its duty to defend and/or indemnify terminated upon payment of $1,000,000.

Dated: JUN 25 2021

AMY D. HOGUE