

2025 WL 211973

Only the Westlaw citation is currently available.

United States District Court, C.D. California.

GUIDED DISCOVERIES, INC., Plaintiff,

v.

NEW HAMPSHIRE INSURANCE COMPANY,

and Does 1-10, inclusive, Defendants.

Case No. 8:22-cv-01889-JWH-KES

I

Signed January 9, 2025

Attorneys and Law Firms

Kevin T. Collins, Phillip Chan, Buchalter, APC, Sacramento, CA, Adam Pierce Smith, Buchalter, APC, Los Angeles, CA, Dawn N. Valentine, Nixon Peabody LLP, San Francisco, CA, for Plaintiff.

Dawn N. Valentine, Matthew A. Richards, Nixon Peabody LLP, San Francisco, CA, Myra A. Benjamin, Pro Hac Vice, Nixon Peabody LLP, Washington, DC, for Defendant New Hampshire Insurance Company.


AMENDED ORDER REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [ECF No. 58]

John W. Holcomb, UNITED STATES DISTRICT JUDGE

*1 The crux of this case is whether Plaintiff Guided Discoveries, Inc. had a liability insurance policy in 1976, pursuant to which Defendant New Hampshire Insurance Company must defend and indemnify Guided Discoveries in connection with an alleged sexual assault that occurred that year. Neither party possesses a physical copy of such a policy.

New Hampshire has moved for summary judgment against Guided Discoveries.¹ Guided Discoveries opposes New Hampshire's Motion,² and the matter is fully briefed.³ After considering the materials of record in this case and conducting a hearing on the matter, the Court **DENIES** New Hampshire's Motion. This case must proceed to trial.




I. BACKGROUND





Guided Discoveries originally filed this action in Orange County Superior Court, and New Hampshire removed the case to this Court in October 2022.⁴ Guided Discoveries filed its operative First Amended Complaint in July 2023.⁵ Guided Discoveries asserts claims for relief for breach of contract, breach of the covenant of good faith and fair dealing, injunctive relief/restitution under  Cal. Bus. & Prof. Code § 17200, and declaratory relief.⁶







Through its instant Motion, New Hampshire seeks summary judgment with respect to each of Guided Discoveries's claims for relief.⁷ New Hampshire raises objections to certain evidence offered by Guided Discoveries.⁸ In its Opposition, Guided Discoveries asserts its own evidentiary objections.⁹

The Court conducted a hearing on the Motion, including the various evidentiary objections, in June 2024.¹⁰ During the hearing the Court ruled upon the evidentiary objections, stated its tentative conclusion with respect to the standard of proof, and directed the parties to submit supplemental briefing in view of the ruling.¹¹ The parties each filed supplemental briefs accordingly.¹²

II. LEGAL STANDARD

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56(a)*. When deciding a motion for summary judgment, the Court construes the evidence in the light most favorable to the non-moving party. *See*  *Barlow v. Ground*, 943 F.2d 1132, 1135 (9th Cir. 1991). “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.”  *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). The substantive law determines the facts that are material. *See*  *id.* at 248. “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Id.* Factual disputes that are “irrelevant or unnecessary” are not counted. *Id.* A dispute about a material fact is “genuine” “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

*2 Under that standard, the moving party bears the initial burden of informing the district court of the basis for its motion and identifying the portions of the pleadings and record that it believes demonstrate the absence of an issue of material fact. See  *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When the non-moving party bears the burden of proof at trial, the moving party need not produce evidence negating or disproving every essential element of the non-moving party's case. See  *id.* at 325. Instead, the moving party need only prove that there is an absence of evidence to support the non-moving party's case. See *id.*;  *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). The party seeking summary judgment must show that “under the governing law, there can be but one reasonable conclusion as to the verdict.”  *Anderson*, 477 U.S. at 250.

If the moving party sustains its burden, the non-moving party must then show that there is a genuine issue of material fact that must be resolved at trial. See  *Celotex*, 477 U.S. at 324. A genuine issue of material fact exists “if the evidence is such that a reasonable jury could return a verdict for the non-moving party.”  *Anderson*, 477 U.S. at 248. “This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence.”  *Oracle Corp. Sec. Litig.*, 627 F.3d at 387 (citing  *Anderson*, 477 U.S. at 252). The non-moving party must make this showing on all matters placed at issue by the motion as to which it has the burden of proof at trial. See  *Celotex*, 477 U.S. at 322;  *Anderson*, 477 U.S. at 252.

III. STATEMENT OF FACTS

Guided Discoveries alleges that it is the successor in interest to the Elliott-Pope Preparatory School (“Elliott-Pope”), formerly known as the Desert Sun School (“Desert Sun”), by way of a merger in 1994.¹³ In November 2021, a civil lawsuit was filed in the Orange County Superior Court entitled *John Doe BD v. John Doe I*, Case No. 30-2021-01229449-CU-PO-WJC (the “Underlying Action”), in which the plaintiff alleged, *inter alia*, that a student at Desert Sun was sexually assaulted by a teacher in or around 1976.¹⁴ In this case, Guided Discoveries alleges that New Hampshire is obligated

to defend and indemnify Guided Discoveries in connection with the Underlying Action under a liability insurance policy that Guided Discoveries alleges that New Hampshire issued to Desert Sun in the 1970s.¹⁵

Non-party AIG Claims, Inc. is the authorized claims representative for New Hampshire.¹⁶ Guided Discoveries tendered to AIG its claim for defense and indemnification in connection with the Underlying Action in early May 2021.¹⁷ With its tender of the Underlying Action, Guided Discoveries did not provide New Hampshire with a copy of the alleged insurance policy, a policy number, a policy period, nor a description of the alleged policy's terms, but Guided Discoveries stated, “Although we have not located the insurance policy, we have found substantial conclusive secondary evidence that New Hampshire Insurance Company provided [Comprehensive General Liability (“CGL”) insurance] and umbrella coverage to our client in 1976,” and Guided Discoveries enclosed the January 20, 1976, meeting minutes for the Desert Sun School Board of Trustees.¹⁸ Guided Discoveries contends that the 1976 board minutes—including minutes from January 20, January 25, and May 11, 1976—support its claim for coverage, despite the fact that the board minutes do not identify a liability policy number, define the covered provided under any alleged liability policy, or describe any of the provisions of the alleged liability policy or any deductible required or exclusions under the alleged liability policy.¹⁹ Guided Discoveries re-tendered its claim in December 2021 because it had not received a response from AIG.²⁰

*3 In April 2022, AIG responded to Plaintiff's tender by noting that the 1976 board minutes did not “contain any other information concerning specific terms, conditions, or other provisions of the alleged [New Hampshire] coverage, nor do they refer to any policy number(s) or policy period(s), and no additional information of this kind was provided with your correspondence.”²¹ AIG also indicated that it had been unable to “locate any documentation concerning the existence of any policy issued by [New Hampshire] or any other AIG Member Company to Desert Sun during the period of abuse” and that it was continuing its investigation.²² AIG searched its internal databases, but it was not able to identify any hard copy or electronic insurance policy issued to Desert Sun, Elliot-Pope, or Guided Discoveries by New Hampshire or any insurance company affiliate of AIG during and through 1976.²³ To date, AIG has been unable to locate in any such

document.²⁴ The only physical policy document that AIG has been able to locate is a claims-made policy issued by National Union Fire Insurance Company of Pittsburgh to an insured called Desert Sun School with a three-year policy period beginning February 10, 1982.²⁵

Although Guided Discoveries has been unable to locate a copy of the alleged insurance policy, its search has recovered Desert Sun board meeting minutes that Guided Discoveries asserts prove that such a policy existed.²⁶ The January 20, 1976, Desert Sun board meeting minutes that Guided Discoveries discussed in its claim tender state, in pertinent part, as follows:

Mr. Jones [Vice President of C.G. Anderson and Associates, Desert Sun School's insurance broker, who was making a presentation on insurance matters] stated that the school's general liability and property damage insurance, providing \$1,000,000 [*sic*] single limit coverage through New Hampshire Insurance Company, continues to be in effect. Referring to a previous request for information on an umbrella policy to cover additional risks, Mr. Jones stated that this coverage is no longer available except as renewals. He recommended as an alternative that the school increase the limits on its primary liability policy; he indicated that the premium should be slightly less than umbrella coverage, although only primary risks would be covered. He estimated the premium at \$1,500. [*sic*] for one-year extended liability coverage of \$5,000,000.²⁷

Other Desert Sun board meeting minutes from May 11, 1976, note:

An item of old business included securing a limit of up to \$5,000,000. [*sic*] on liability insurance coverage for an authorized premium not to exceed \$1,000. The expanded coverage was obtained and the premium cost totaled [*sic*] \$1,127.... [A motion was passed that t]he Board approve the amount of \$127.00 which exceeded the original board directive [of \$1,000].²⁸

And finally, additional Desert Sun board meeting minutes from January 25, 1977, note that the Board passed the following motion on that date:

The Executive Committee shall have the authority to decide whether or not to add another one million dollars in umbrella liability (over the current general liability of one million dollars), provided the annual fee does not exceed \$3,000. This policy would run to October 20, 1977.²⁹

New Hampshire produced (among other documents) multiple reports for the applicable time period confirming various policies issued to Desert Sun and documents identifying the underlying categories of coverage and product lines.³⁰ The documents show that New Hampshire issued various insurance policies to the Desert Sun School providing coverage during the relevant time period.³¹ Specifically, New Hampshire issued to Desert Sun Policy No. 0908818, which was in effect in 1976 and 1977; the policy expired on October 20, 1977.³² The product line code for Policy No. 0908818 is "44," which is not defined by the product line index that New Hampshire produced.³³ New Hampshire concedes that Policy No. 0908818 was an umbrella policy.³⁴ New Hampshire also issued to Desert Sun Policy No. 0952469, which was likewise in effect in 1976 and 1977.³⁵

The product line code for that policy is “02,” which was used for various “extended coverage” policies.³⁶ New Hampshire notes that Policy No. 0952469 has an “H” prefix, which the documents appear to show refers to personal homeowner lines.³⁷ Finally, New Hampshire insured Desert Sun for worker's compensation for three consecutive years and across the relevant time period for the Underlying Action.³⁸

*4 In sum, the evidence appears to indicate that New Hampshire issued to Desert Sun a general liability insurance policy with policy limits of at least \$1 million that provided coverage during 1976.³⁹ The parties agree that that general liability policy document issued by New Hampshire to Desert Sun may have been lost or destroyed—New Hampshire contends that the policy documents for the policy numbers that it identified were destroyed in a warehouse fire that took place in the 1980s.⁴⁰

New Hampshire also produced an exemplar general liability policy (the “Specimen Policy”) that New Hampshire utilized as a standard policy in the relevant time period.⁴¹ That Specimen Policy suggests that a general liability policy issued by New Hampshire in the relevant time period would, by default, provide insurance coverage for defense and indemnity for a civil action like the Underlying Lawsuit involving causes of action for negligent hiring, retention, and supervision; negligent failure to warn, train, or educate; and gross negligence.⁴² Insurance coverage would be triggered by virtue of New Hampshire's general insuring clause at that time, which would cover the claims in the Underlying Lawsuit.⁴³ New Hampshire has no evidence that commercial general liability policies issued by New Hampshire in 1976 excluded coverage for sexual assault claims.⁴⁴

IV. ANALYSIS

“When [insurance] coverage is in dispute, the initial burden is on the [alleged] insured ... to prove that its claim falls within the scope of potential coverage.” *Yahoo Inc. v. Nat'l Union Fire Ins. Co.*, 14 Cal. 5th 58, 68 (2022). “If the [alleged] insured establishes that the policy provides at least the potential for coverage, the burden shifts to the insurer ... to show the claim falls within one of the policy's exclusions.” *Id.* “In other words, the insured need only show that the underlying claim may fall within policy coverage; the insurer

must prove it cannot.” *Id.* (quoting *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co.*, 5 Cal. 5th 216, 222 (2018), as modified (July 25, 2018)). At the summary judgment stage, therefore, the insurer making the motion must prove the contents of the alleged policy that indicate that it is *not* obligated to cover the asserted claims. See *Certain Underwriters at Lloyd's of London v. Superior Ct.*, 56 Cal. App. 4th 952, 958 (1997). The applicable burden of proof in insurance coverage disputes such as this one is a preponderance of the evidence. See, e.g., *Yahoo Inc.*, 14 Cal. 5th at 68-69 (in the absence of insurance-specific law, contract law governs insurance claims, which imposes the standard civil burden of proof by a preponderance of the evidence).⁴⁵


When an alleged insurance policy is lost or destroyed, the parties may rely upon secondary evidence to support their claims or defenses. See *Dart Indus., Inc. v. Com. Union Ins. Co.*, 28 Cal. 4th 1059, 1068 (2002); see also *Rogers v. Prudential Ins. Co.*, 218 Cal. App. 3d 1132, 1137 (1990); cf. *Certain Underwriters at Lloyd's of London*, 56 Cal. App. 4th at 958-59 (holding that when the alleged policy is lost or destroyed, the insurer may use secondary evidence to meet its burden at summary judgment).

A. Initial Burden Before Introducing Secondary Evidence

The parties agree that, pursuant to *Dart Indus.*, in order to rely upon secondary evidence, Guided Discoveries must first show “ ‘that a bona fide and diligent search has been unsuccessfully made for [the lost policy] in the place where it was most likely to be found;’ and ... [that Guided Discoveries] ‘has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to [it].’ ” *Dart Indus.*, 28 Cal. 4th at 1068 (quoting *Folsom's Executors v. Scott*, 6 Cal. 460, 461 (1856)). The purpose of that showing is to convince the Court that the document was not “designedly withheld” and otherwise dispel any “suspicion hang[ing] over ... the reasons for its non-production.” *Id.* at 1069 (quoting *Kenniff v. Caulfield*, 140 Cal. 34 (1903)). New Hampshire argues that Guided Discoveries cannot overcome that initial burden.⁴⁶

*5 Here, it is undisputed that Guided Discoveries has been unable to locate a copy of the alleged insurance policy,

but that, in the course of its search for that policy, Guided Discoveries has identified Desert Sun board meeting minutes that Guided Discoveries asserts prove that such a policy existed.⁴⁷ And the parties agree that the alleged policy may have been lost or destroyed.⁴⁸

Furthermore, Guided Discoveries appears to have expended ample resources in conducting its search. New Hampshire does not dispute that Guided Discoveries retained two separate insurance archeology firms to assist in its efforts.⁴⁹ Rather, New Hampshire objected to the *legal conclusions* of Guided Discoveries's retained expert regarding the extent of that search, and the Court sustained those objections.⁵⁰ The sufficiency of Guided Discoveries's search is for the Court to determine, *see*  *Dart Indus.*, 28 Cal. 4th at 1069, and, here, the Court concludes that Guided Discoveries has met its initial burden and that it may introduce secondary evidence with respect to the lost insurance policy.

B. Based Upon the Secondary Evidence, Questions of Fact Remain with Respect to the Contents of the Missing Insurance Policy

The Court concludes that Guided Discoveries has adduced sufficient admissible evidence to prove that a triable issue of fact exists with respect to the *contents* of the missing policy.⁵¹ Specifically, whether the so-called specimen policy proves the material substance of the lost policy by a preponderance of the evidence is a question for the trier of fact at trial. The resolution of that fact determines the outcome of all claims for relief at issue in this case. Therefore, New Hampshire is not entitled to summary judgment on any of Guided Discoveries's claims for relief.

V. DISPOSITION

For the foregoing reasons, the Court hereby **ORDERS** that Guided Discoveries's instant Motion for summary judgment is **DENIED**.

IT IS SO ORDERED.

All Citations

Slip Copy, 2025 WL 211973

Footnotes

- 1 Def.'s Mot. for Summ. J. (the "Motion") [ECF No. 58].
- 2 Pl.'s Opp'n to Motion (the "Opposition") [ECF No. 61]
- 3 See Def.'s Reply in Supp. of Motion (the "Reply") [ECF No. 62]
- 4 See *generally* Notice of Removal [ECF No. 1].
- 5 First Am. Compl. (the "First Amended Complaint") [ECF No. 36].
- 6 See *generally id.*
- 7 See *generally* Motion.
- 8 Objs. to Pl.'s Evid. ("New Hampshire's Evidentiary Objections") [ECF No. 58-2].
- 9 Pl.'s Objs. to Def.'s Evid. ("Guided Discoveries's Evidentiary Objections") [ECF No. 61-1]; Pl.'s Resp. to New Hampshire's Evidentiary Objections ("Guided Discoveries's Evidentiary Response") [ECF No. 61-2].
- 10 Minute Order re Hr'g re Motion (the "Minute Order") [ECF No. 64].

- 11 *Id.*
- 12 See Def.'s Suppl. to Motion ("New Hampshire's Supplemental Brief") [ECF No. 65]; Pl.'s Suppl. to Opposition ("Guided Discoveries's Supplemental Brief") [ECF No. 66].
- 13 Joint Separate Statement of Undisputed Material Facts (the "Statement of Facts") [ECF No. 59-1] No. 1.
- 14 *Id.* at No. 2.
- 15 *Id.* at No. 3.
- 16 See Joint Compendium of Evid. (the "Exhibits") [ECF No. 57-1], Exhibit E 90:21.
- 17 Statement of Facts No. 4.
- 18 See *id.* at ¶¶ 5-8.
- 19 See *id.* at ¶¶ 21, 24-26, 28, & 29.
- 20 See *id.* at ¶ 13.
- 21 *Id.*
- 22 *Id.* at ¶ 14.
- 23 *Id.* at ¶ 18.
- 24 See *id.* at ¶ 15.
- 25 *Id.* at ¶ 19.
- 26 See *id.* at ¶ 52 (those elements are undisputed; New Hampshire disputes only that Guided Discoveries asserts that it "is able to identify the material terms of the insurance policy essential to the particular coverage that Plaintiff claims").
- 27 *Id.* at ¶¶ 13 & 22; see also *id.* at ¶ 35 (Desert Sun's general liability coverage through New Hampshire continued to be in effect); *id.* at ¶ 36 (Desert Sun's general liability coverage was effective year-round).
- 28 *Id.* at ¶ 41; see also Exhibit J-1 112.
- 29 *Id.* at ¶ 47.
- 30 *Id.* at ¶ 45.
- 31 *Id.* at ¶¶ 45 & 46.
- 32 *Id.* at ¶¶ 37 & 38.
- 33 *Id.*
- 34 *Id.* ¶ 42.
- 35 *Id.* at ¶ 39.
- 36 *Id.* at ¶ 40.

- 37 See *id.* at ¶ 42.
- 38 *Id.* at ¶ 44; see also *id.* at ¶ 54 (a report from the Workers' Compensation Insurance Rating Bureau of California revealed that Desert Sun was insured for worker's compensation insurance coverage under multiple policies issued by New Hampshire, including Policy No. WC155991 between January 1, 1976, and January 1, 1977; Policy No. WC262539 between January 1, 1977, and January 1, 1978; and Policy No. WC262750 between January 1, 1978, and January 1, 1979).
- 39 *Id.* at ¶¶ 49, 50, & 64.
- 40 *Id.* at ¶¶ 51, 53, & 63.
- 41 See *id.* at ¶¶ 52, 55, & 56.
- 42 *Id.* at ¶¶ 58 & 59.
- 43 *Id.* at ¶ 60.
- 44 *Id.* at ¶ 62.
- 45 See also Minute Order.
- 46 Motion 7:20-9:8; Reply 2:16-3:6; New Hampshire's Supplemental Brief 2:11-26.
- 47 See *supra* Part III (Statement of Facts); see also Statement of Facts ¶ 52 (those elements are undisputed; New Hampshire disputes only the legal conclusion that Guided Discoveries asserts that it "is able to identify the material terms of the insurance policy essential to the particular coverage that Plaintiff claims").
- 48 See *supra* Part III (Statement of Facts); see also Statement of Facts ¶¶ 51 & 63.
- 49 See Opposition 6:19-7:20; Guided Discoveries's Supplemental Brief 9:17-10:23; see also *generally* Motion; Reply; New Hampshire's Supplemental Brief.
- 50 See Minute Order.
- 51 See *supra* Part III (Statement of Facts).