

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF CALIFORNIA

9
10 GREAT WEST CASUALTY COMPANY,
11 Plaintiff,
12 v.
13 GENERAL FIRE & CASUALTY COMPANY,
14 Defendant.

1:06-cv-01326 OWW SMS
ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
(DOC. 15), DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT PURSUANT TO
CALIFORNIA INSURANCE CODE §
11580.9(b) (DOC. 38), AND
DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT (DOC.
14)

15
16
17 I. INTRODUCTION

18 This case concerns an insurance coverage dispute between two
19 insurers, Plaintiff Great West Casualty Company ("Great West")
20 and Defendant General Fire & Casualty Company ("GFC"), over their
21 respective share of defense costs and indemnity payments in
22 defending and settling claims against a mutual insured, Juan J.
23 Mendez Cobian ("Mendez"), in an underlying state court action for
24 wrongful death and injuries, *Villalobos, et al., v. Juan Jose*
25 *Mendez Cobian, et al.*, Fresno County Superior Court, Case No.
26 05CEG03445 MBS ("Underlying Action"). The underlying action
27 involved a motor vehicle accident in which Mendez drove a
28

1 Freightliner truck tractor he owned that was pulling a commercial
2 trailer owned by OHK Transport, LLC ("OHK") to pick up cargo at a
3 cotton-ginning facility. The trailer was provided to Mendez
4 under a written subhaul agreement between OHK and Mendez. OHK
5 provides transportation services to companies that need to
6 transport cargo and/or commodities, including Western Milling
7 Company, LLC ("Western Milling"). On the day of the accident
8 Mendez was driving to pick up a load of cargo for Western Milling
9 as provided for in the subhaul agreement between Mendez and OHK.
10 Mendez was alleged to have struck a vehicle driven by Maria
11 Aviles and carrying three of her children as passengers, causing
12 the death of Maria Aviles and injuries to her three children.
13 Aviles's survivors and the three minors brought the underlying
14 action, naming as defendants Mendez, OHK and Western Milling.

15 On the day of the accident, Mendez was the named insured
16 under a policy of commercial auto liability insurance issued by
17 Great West. At the same time GFC had in effect a policy of
18 liability insurance under which OHK and Western Milling, among
19 others, were named insureds. The trailer Mendez was hauling was
20 specifically scheduled under the GFC policy. As the operator of
21 this trailer, Mendez also became an additional insured under the
22 GFC policy.

23 Before the court for decision are three motions for summary
24 judgment: first, Defendant's motion for summary judgment pursuant
25 to California Insurance Code section 11580.9(b), and second, the
26 parties' cross-motions for summary judgment. Defendant GFC seeks
27 summary judgment that under California Insurance Code section
28 11580.9(b) it is conclusively presumed that GFC's coverage is

1 excess to Great West's coverage because OHK rented or leased a
2 motor vehicle without operator to Mendez. Plaintiff Great West
3 moves for summary judgment on its claims for declaratory relief
4 and equitable contribution. It seeks a declaration that the
5 coverage limits of the GFC policy as to Mendez are \$15 million,
6 inclusive of defense costs, and seeks judgment in its favor on
7 its equitable contribution claim and a determination that Great
8 West is entitled to reimbursement of the approximate \$1 million
9 in defense and indemnity costs it incurred and paid on behalf of
10 Mendez in defending and settling claims against him in the
11 underlying action. GFC moves for summary judgment on the grounds
12 that Mendez was an undeclared driver under the GFC policy and
13 that the policy contains a \$50,000 sub-limit for undeclared
14 drivers. GFC seeks a declaration that, as applied to Mendez, the
15 GFC policy provides coverage in the amount of \$50,000.

16
17 **II. FACTUAL BACKGROUND**

18 **A. The Parties.**

19 Plaintiff Great West Casualty Company is incorporated in the
20 State of Nebraska and its principal place of business is in
21 Nebraska. It is licensed to conduct casualty insurance business
22 in the State of California. Defendant General Fire & Casualty
23 Company is incorporated in the State of Idaho and its principal
24 place of business is in Idaho. It is licensed to do insurance
25 business in the State of California.

26
27 **B. The Accident.**

28 On December 17, 2004, Juan J. Mendez Cobian was involved in

1 a motor vehicle accident while driving a truck tractor that was
2 hauling a trailer to pick up cargo for Western Milling. (Doc.
3 19, Joint Statement of Stipulated Facts In Support Of Reciprocal
4 Motions for Summary Judgment ("JSSF") #5.) Mendez is an
5 individual doing business as Mendez Trucking. (JSSF #1.) He
6 owned the 1996 Freightliner truck tractor that was hauling a
7 trailer owned by OHK ("tractor-trailer"). (JSSF #4.) At the
8 time of the accident, Mendez was operating the tractor-trailer
9 pursuant to a subhaul agreement between Mendez and OHK entered
10 into on February 25, 2004. (JSSF ## 4 & 5.) While driving
11 Mendez collided with an automobile driven by Maria Aviles in
12 Cantua Creek, Fresno County, resulting in the death of Aviles and
13 serious bodily injury to her three children who were passengers
14 in her car. (Doc. 14 at 2.)

15 On November 3, 2005, the survivors and minors brought an
16 action against Mendez, OHK, and Western Milling for wrongful
17 death and injuries arising out of the December 17, 2004 accident.
18 *See Jose Jesus Aviles Villalobos, et al., v. Juan Jose Mendez*
19 *Cobian, et al., Fresno County Superior Court, action No.*
20 *05CECG03445 MBS.* (JSSF #6.) In February 2007, an agreement was
21 reached for settlement of all the claims arising out of the
22 accident for the total sum of \$2 million. (JSSF #16.) Under the
23 settlement agreement, Great West paid the plaintiffs \$1 million
24 on behalf of Mendez. (JSSF #17.) Also under the terms of the
25 settlement, GFC paid the plaintiffs \$1 million on behalf of OHK
26 and Western Milling. (JSSF #18.) The present action was
27 preserved under an agreement between Mendez, OHK, Western
28 Milling, Great West and GFC, who have otherwise released and

1 discharged each other from all claims arising out of the
2 accident. (JSSF #19.)

3 C. The Subhaul Agreement.

4 Mendez and OHK entered into a written subhaul agreement on
5 February 25, 2004. Plaintiff notes that under the agreement,
6 "OHK was to provide to Mendez one of its licensed over-the-road
7 commercial trailers (it apparently owned well over 100 such
8 trailers), and to give Mendez daily instructions as to where and
9 when to deliver cargo or commodities to destinations throughout
10 Central California." (Doc. 14 at 2.) Under the agreement,
11 Mendez was designated an independent contractor. Mendez was also
12 required to indemnify OHK for all losses arising from operations
13 under the agreement.

14
15 D. The Great West Insurance Policy.

16 Great West issued a policy of commercial lines liability
17 insurance, policy No. GWP 19641A, to Mendez, an individual doing
18 business as Mendez Trucking. (JSSF #7.) The Great West policy
19 provides coverage to Mendez as a named insured with indemnity
20 limits of \$1 million per occurrence plus additional coverage for
21 defense costs related to a covered claim. (Doc. 14 at 3.) The
22 truck tractor Mendez owns is listed as a scheduled vehicle under
23 the policy. (JSSF #8.) The terms of the Great West policy are
24 not in dispute.

25 Great West defended Mendez in the underlying action,
26 expending \$79,675.44. (JSSF ## 13-14.) In partial satisfaction
27 of the terms of the settlement, Great West paid \$1 million to
28 plaintiffs on behalf of Mendez as its named insured. (JSSF #17.)

1 E. The GFC Insurance Policy.

2 GFC issued a multi-coverage commercial insurance policy,
3 policy No. RM00961-03, which included commercial automobile
4 coverage, to ten named insured business entities including OHK
5 and Western Milling. (JSSF #9.) OHK is a California limited
6 liability company, as is Western Milling. (JSSF ## 2-3.) The
7 OHK trailer operated by Mendez at the time of the accident is
8 scheduled as an insured vehicle under the GFC policy. (JSSF
9 #10.) As an operator of the OHK trailer with permission, Mendez
10 is an additional insured under the GFC policy. (JSSF #11; Doc.
11 14 at 7.)

12 The maximum liability coverage limits of the GFC policy are
13 \$15 million per occurrence. (Doc. 16 at 6.) The coverage limit
14 with respect to Mendez, who was not listed in the "Declared
15 Operators or Drivers" section of the policy, is in dispute and is
16 the subject of this action. (JSSF ##11-12.)

17 GFC defended OHK and Western Milling in the underlying
18 action, expending \$142,644.11 in the process. (JSSF #15.) It
19 also paid \$1 million to the plaintiffs on behalf of OHK and
20 Western Milling in partial satisfaction of the settlement. (JSSF
21 #18.) GFC did not participate in the defense of Mendez in the
22 underlying action. (JSSF #13.) It has offered to pay \$50,000 in
23 combined defense and indemnity coverage to Great West, which it
24 claims is the limit on Mendez's coverage under the GFC policy.
25 (Doc. 24 at 2.)

26 The GFC policy provides wide-ranging coverage, including
27 property loss, business interruption, and legal liability. It
28 covers over 250 vehicles, over 100 named insureds and additional

1 insureds, and various items of real and personal property.

2 1. Extension of Coverage to Permissive Users:
3 Additional Insureds Under the GFC Policy

4 The GFC policy at issue, policy No. RM00961-03, was in
5 effect from October 10, 2004 to October 10, 2005. (Doc. 19, Ex.
6 D at GFC 1.) The Policy Declarations and Schedules make up the
7 first 62 pages of the policy materials and the policy booklet
8 makes up the rest of the total 120 pages. On the first page of
9 the policy, the "Blanket Legal Liability and Defense Limit" is
10 listed as \$15 million in bold-faced type. On the second page,
11 OHK is listed as a named insured. Coverage is extended to named
12 insureds on page 63 of the policy materials, which is also the
13 first page of the policy booklet, under the section "INSURED,"
14 which appears to be in approximately 14 point font. (Doc. 19,
15 Ex. D at GFC 63.) The next section listed, in the same font, is
16 "ADDITIONAL INSURED" (also approximately 14 point font), and in
17 section A under that heading, coverage is extended to "any person
18 operating your vehicles or watercraft with your permission..."
19 (Doc. 19, Ex. D at GFC 63.) Mendez was driving the OHK trailer
20 at the time of the accident with OHK's express permission, as he
21 was acting within the scope of the subhaul agreement. The
22 vehicles scheduled in the GFC policy are listed on pages 22 to 27
23 and include the OHK trailer pulled by Mendez at the time of the
24 accident. (Doc. 19, Ex. D at GFC 22-27.) As such, section A
25 under "ADDITIONAL INSUREDS" extends coverage to Mendez as a
26 permissive user of a scheduled vehicle under the GFC policy.
27 This is undisputed.
28

1 2. Liability Insuring Agreement

2 On page 32 of the policy booklet is the section entitled
3 "LEGAL LIABILITY AND DEFENSE SECTION" (in approximate 14 point
4 font) which contains the following liability insuring agreement
5 language:

6 A. INSURING AGREEMENT

7 Subject to all the terms and conditions of this policy, we
8 will pay your legal liability and defense costs up to the
9 ***blanket legal liability and defense limit***, or up to the
10 ***legal liability and defense sub-limit*** for ***Covered Legal***
Liability and Defense Causes of Loss or from ***Sub-limited***
Legal Liability and Defense Causes of Loss - Consequential
Loss or Damage that first occurs during the policy period.

11 (Doc. 19, Ex. D at GFC 94.)¹

12 3. Legal Liability and Defense Sub-Limit Section

13 The sub-limit referred to in the preceding insuring
14 agreement language, which GFC argues applies to Mendez, is found
15 on the same page, further down in section E, which is titled
16 "LEGAL LIABILITY AND DEFENSE WITHIN POLICY LIMITS." (Doc. 19, Ex.
17 D at GFC 94.) As number 2 listed within section E, the "LEGAL
18 LIABILITY AND DEFENSE SUB-LIMIT" reads:

19 ***2. LEGAL LIABILITY AND DEFENSE SUB-LIMIT:*** Certain causes of
20 loss, consequential loss or damages are sub-limited and have
21 a lower limit than the ***blanket legal liability and defense***
limit. These lower limits are stated in the Policy
22 Declarations and Schedules and are defined in ***Sub-limited***
Legal Liability and Defense Causes of Loss - Consequential
23 ***Loss or Damage***. Losses paid under this coverage part will
24 reduce the available ***blanket legal liability and defense***
limit and do not represent additional limits of coverage.

25
26
27 ¹ The typeface replicated here is exactly as it appears in
28 the policy with respect to bolding, capitalization and italics
but not font size.

1 (Doc. 19, Ex. D at GFC 94.)²

2 The lower limits discussed in the section above are
3 referenced on page 30 of the Policy and Declarations Schedule,
4 which then does not list the lower limits but refers the reader
5 back to pages 43 and 44 of the policy booklet for "definition and
6 limitation" for "Vehicle Liability-Undeclared Drivers." (Doc. 19,
7 Ex. D at GFC 30.) The section detailing the lower limits for
8 permissive users of scheduled vehicles under the policy are then
9 found at page 43 of the policy booklet, which is also page 105 in
10 the packet of policy materials:

11
12 **33. VEHICLE LIABILITY - UNDECLARED DRIVERS** means all
13 liability and defense claims arising out of the operation or
14 use of your **vehicles** by undeclared operators or drivers
15 (other than employees). The maximum liability limits
16 available to the undeclared operators or drivers (other than
17 employees) for the accident is as follows according to the
18 type of **vehicles** involved:

19 a. Automobiles, pick-ups, motorcycles, and trucks not
20 subject to Federal Department of Transportation motor
21 carrier regulations; are limited to the statutorily required
22 minimum coverage amount as defined by the automobile
23 financial responsibility laws of the state where the
24 accident occurs;

25 b. Trucks subject to Federal Department of
26 Transportation motor carrier regulations are limited to the
27 statutorily required minimum coverage amount as defined in
28 Part 387 of the Federal Department of Transportation motor
carrier regulations;

c. Snowmobiles, all terrain vehicles (ATV), golf carts,
forklifts, trailers, and other mobile equipment such as
construction or farm machinery that is not permanently
installed, attached or in service to a **building** or **dwelling**
are limited to \$50,000 per accident.

27 ² The typeface replicated here is exactly as it appears in
28 the policy with respect to bolding, capitalization and italics
but not font size.

1 These **vehicle liability-undeclared drivers** coverage
2 limitations apply regardless of whether you have selected a
higher liability limit than the limitations listed above.

3 **Vehicles** mean automobiles, motorcycles, trucks, trailers,
4 forklifts, snowmobiles, all terrain vehicles (ATV), and golf
5 carts. **Vehicles** also include other mobile equipment such as
construction or farm machinery that is not permanently
6 installed, attached or in service to a **building** or **dwelling**.

7 (Doc. 19, Ex. D at GFC 105.)³

8
9 **III. STANDARD OF REVIEW**

10 Summary judgment is warranted only "if the pleadings,
11 depositions, answers to interrogatories, and admissions on file,
12 together with the affidavits, if any, show that there is no
13 genuine issue as to any material fact." Fed. R. Civ. Pro. 56(c);
14 *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998).
15 Therefore, to defeat a motion for summary judgment, the non-
16 moving party must show (1) that a genuine factual issue exists
17 and (2) that this factual issue is material. *Id.* A genuine
18 issue of fact exists when the non-moving party produces evidence
19 on which a reasonable trier of fact could find in its favor
20 viewing the record as a whole in light of the evidentiary burden
21 the law places on that party. See *Triton Energy Corp. v. Square*
22 *D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995); see also *Anderson v.*
23 *Liberty Lobby, Inc.*, 477 U.S. 242, 252-56 (1986). The evidence
24 must be viewed in a light most favorable to the nonmoving party.
25 *Indiana Lumbermens Mut. Ins. Co. v. West Oregon Wood Products*,

26
27 ³ The typeface replicated here is exactly as it appears in
28 the policy with respect to bolding, capitalization and italics
but not font size.

1 *Inc.*, 268 F.3d 639, 644 (9th Cir. 2001), amended by 2001 WL
2 1490998 (9th Cir. 2001). Facts are "material" if they "might
3 affect the outcome of the suit under the governing law."
4 *Campbell*, 138 F.3d at 782 (quoting *Liberty Lobby, Inc.*, 477 U.S.
5 at 248).

6 The moving party bears the initial burden of demonstrating
7 the absence of a genuine issue of fact. *Devereaux v. Abbey*, 263
8 F.3d 1070, 1076 (9th Cir. 2001). If the moving party fails to
9 meet this burden, "the nonmoving party has no obligation to
10 produce anything, even if the nonmoving party would have the
11 ultimate burden of persuasion at trial." *Nissan Fire & Marine*
12 *Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102-03 (9th
13 Cir. 2000). However, if the nonmoving party has the burden of
14 proof at trial, the moving party must only show "that there is an
15 absence of evidence to support the nonmoving party's case."
16 *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the
17 moving party has met its burden of proof, the non-moving party
18 must produce evidence on which a reasonable trier of fact could
19 find in its favor viewing the record as a whole in light of the
20 evidentiary burden the law places on that party. *Triton Energy*
21 *Corp.*, 68 F.3d at 1221. The nonmoving party cannot simply rest
22 on its allegations without any significant probative evidence
23 tending to support the complaint. *Devereaux*, 263 F.3d at 1076.

24 [T]he plain language of Rule 56(c) mandates the
25 entry of summary judgment, after adequate time
26 for discovery and upon motion, against a party
27 who fails to make a showing sufficient to
28 establish the existence of an element essential
to the party's case, and on which that party
will bear the burden of proof at trial. In such
a situation, there can be "no genuine issue as
to any material fact," since a complete failure

1 of proof concerning an essential element of the
2 nonmoving party's case necessarily renders all
other facts immaterial.

3 *Celotex Corp.*, 477 U.S. at 322-23.

4 "In order to show that a genuine issue of material fact
5 exists, the nonmoving party must introduce some 'significant
6 probative evidence tending to support the complaint.'" *Rivera v.*
7 *AMTRAK*, 331 F.3d 1074, 1078 (9th Cir. 2003) (quoting *Liberty*
8 *Lobby, Inc.*, 477 U.S. at 249). If the moving party can meet his
9 burden of production, the non-moving party "must produce evidence
10 in response....[H]e cannot defeat summary judgment with
11 allegations in the complaint, or with unsupported conjecture or
12 conclusory statements." *Hernandez v. Spacelabs Med., Inc.*, 343
13 F.3d 1107, 1112 (9th Cir. 2003). "Conclusory allegations
14 unsupported by factual data cannot defeat summary judgment."
15 *Rivera*, 331 F.3d at 1078 (citing *Arpin v. Santa Clara Valley*
16 *Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001)).

17
18 IV. DISCUSSION

19 A. GFC'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO CALIFORNIA
20 INSURANCE CODE § 11580.9(b)

21 Defendant GFC moves for summary judgment on grounds that,
22 under California Insurance Code section 11580.9(b), GFC's
23 coverage is excess to Great West's coverage because OHK rented or
24 leased a motor vehicle without operator to Mendez and section
25 11580.9(b) conclusively presumes that a policy covering such a
26 renter or lessor is excess over any other insurance applicable to
27 the same loss. (Doc. 38.) Plaintiff Great West opposes,
28

1 contending that section 11580.9(b) is inapplicable because OHK
2 neither leased nor rented its trailer to Mendez or, at minimum, a
3 triable issue of fact remains as to whether a lease or rental
4 existed.

5 Since the accident, section 11580.9(b) has been amended. At
6 the time of the accident on December 17, 2004, the prior version
7 of section 11580.9(b) provided:

8
9 Where two or more policies apply to the same loss, and
10 one policy affords coverage to a named insured *in the*
11 *business of renting or leasing motor vehicles without*
12 *operators*, it shall be conclusively presumed that the
13 insurance afforded by that policy to a person other
14 than the named insured or his or her agent or employee,
15 shall be excess over and not concurrent with, any other
16 valid and collectible insurance applicable to the same
17 loss covering the person as a named insured as an
18 additional insured under a policy with limits at least
19 equal to the financial responsibility requirements
20 specified in Section 16056 of the Vehicle Code. The
21 presumption provided by this subdivision shall apply
22 only if, at the time of the loss, the involved motor
23 vehicle either:

24 (1) Qualifies as a "commercial vehicle" as that term is
25 used in the Section 260 of the Vehicle Code;

26 (2) Has been leased for a term of six months or longer.
27 (Emphasis added.)

28
29 In August 2006, the California Legislature amended section
30 11580.9(b), effective January 1, 2007, to read:

31
32 Where two or more policies apply to the same loss, and
33 one policy affords coverage to a named insured *who in*
34 *the course of his or her business rents or leases motor*
35 *vehicles without operators*, it shall be conclusively
36 presumed that the insurance afforded by that policy to
37 a person other than the named insured or his or her
38 agent or employee, shall be excess over and not
39 concurrent with, any other valid and collectible
40 insurance applicable to the same loss covering the
41 person as a named insured or as an additional insured .

1 . . (Emphasis added.)

2 Prior to the amendment, there was a split of authority in
3 California appellate courts as to how to determine whether an
4 insured is "engaged in the business of renting or leasing motor
5 vehicles without operators" under section 11580.9(b). As the
6 Ninth Circuit noted in certifying the question to the California
7 Supreme Court on the interpretation of section 11580.9(b),
8 California's second appellate district looked at the insured's
9 primary business purpose to determine whether or not it is
10 "engaged in the business of" leasing motor vehicles while the
11 first and fifth appellate districts examined the specific
12 transaction at issue. *Sentry Select Insurance Co. v. Fidelity &*
13 *Guaranty*, 455 F.3d 956, 957 (9th Cir. 2006).

14 Citing *Progressive Casualty Insurance Co. v. Peerless*
15 *Insurance Co.*, 2007 WL763229 (E.D. Cal. 2007), GFC contends that
16 amended section 11580.9(b) applies retroactively to the loss at
17 issue because the amendment was a clarification of the statute's
18 prior wording. "A statute that merely clarifies, rather than
19 changes, existing law is properly applied to transactions
20 predating its amendment." *Carter v. Calif. Dept. Of Veterans*
21 *Affairs*, 38 Cal.4th 914, 922 (2006). But a statute may not apply
22 retroactively if "it substantially changes the legal consequences
23 of past actions, or upsets expectations based in prior law."
24 *Carter*, 38 Cal.4th at 922.

25 In concluding that "the Legislature recognized a split in
26 judicial interpretation, not a substantive law change, and
27 clarified the correct interpretation" through its amendment of
28

1 section 11580.9(b), the *Progressive* court pointed to legislative
2 history indicating an intent to clarify the language of the code
3 section. Specifically, the Assembly Committee on Insurance
4 report stated the amendment was "necessary to avoid uncertainty
5 and unnecessary litigation in these cases, and to restore
6 legislative intent after several conflicting court decisions."
7 Assembly Committee on Insurance, Analysis of Assembly Bill No.
8 1909 (2005-2006 Reg. Sess.), as introduced January 26, 2006.
9 Further, the Assembly Committee on Insurance issued a summary
10 statement on the amendment, explaining that it "[c]larifies that
11 a policy covering an insured who in the course of his or her
12 business rents or leases motor vehicles for either commercial
13 purposes or for at least a six-month term is considered excess to
14 other insurance policies covering the same loss." *Id.*

15 The *Progressive* court analyzed the legislative history and
16 found that the California Legislature intended to clarify section
17 11580.9(b) through its amendment, not to change existing law.
18 Amended section 11580.9(b) applies retroactively because it is a
19 clarification that does not "substantially [change] the legal
20 consequences of past actions, or [upset] expectations based in
21 prior law." *Carter*, 38 Cal.4th at 922.

22 Applicability of Section 11580.9(b)

23 GFC argues section 11580.9(b) establishes its policy as
24 excess because the arrangement between Mendez and OHK is properly
25 characterized as a "rent" or "lease" within the meaning of the
26 section. It is undisputed that the trailer supplied by OHK is a
27 "motor vehicle without operators" as provided in section
28 11580.9(b). It is also undisputed that the trailer is a

1 commercial vehicle within the meaning of California Vehicle Code
2 § 260, was used in Mendez's business, and was leased for six
3 months or more.

4 Neither the term "rent" or "lease" is defined in section
5 11508.9. Under California law, the terms must be interpreted
6 using their "plain and common sense meaning." *MacIsaac v. Waste*
7 *Management Collection and Recycling, Inc.*, 134 Cal.App.4th 1076,
8 1083 (2005). GFC offers the following definitions of the terms
9 from Webster's New World College Dictionary, 4th Edition (2005):

10
11 Lease: A contract by which one party (landlord, or
12 lessor) gives to another (tenant, or lessee) the use
13 and possession of lands, buildings, property, etc. for
14 a specified time and for fixed payments.

15 Rent: To get the temporary use of (a car, tool,
16 furniture, etc.) by paying a fee.

17 GFC contends the undisputed facts demonstrate that OHK is in
18 the business of renting or leasing its trailers within the
19 meaning of section 11580.9(b). It argues that under the subhaul
20 agreement between OHK and Mendez, Mendez as subhauler contracted
21 to pull OHK-owned trailers using his own tractor. As such,
22 Mendez contracted to act as the operator of the tractor-trailer
23 and was given temporary possession of the OHK trailer for the
24 duration of the subhaul relationship. GFC further maintains
25 that, under the terms of the subhaul agreement, Mendez paid 25
26 percent of the amount he received for a particular haul to OHK as
27 a form of "rent" for the use of the trailer.

28 Plaintiff Great West counters that the facts demonstrate
that the Mendez-OHK arrangement does not qualify as a lease or

1 rental, or at minimum, the facts are in dispute. Plaintiff also
2 offers a statutory definition of "hiring" which is analogous to
3 leasing or renting personal property from California Civil Code §
4 1925:

5 Hiring is a contract by which one gives to another the
6 temporary possession and use of property, other than
7 money, for reward, and the latter agrees to return the
8 same to the former at a future time.

9 In *Entremont v. Whitself*, 13 Cal.2d 290 (1939), the California
10 Supreme Court interpreted the meaning of section 1925: "The chief
11 characteristic of a renting or a leasing is the giving up of
12 possession to the hirer, so that the hirer and not the owner uses
13 and controls the rented property." See also *Rice Brothers, Inc.*
14 *v. Glens Falls Indemnity Co.*, 121 Cal.App.2d 206 (1953).

15 Great West argues that even if Mendez had possession of the
16 OHK trailer, which it argues was limited, Mendez was not vested
17 with control of the trailer. First, Great West points out that
18 the subhaul agreement does not address the providing of OHK's
19 trailer to Mendez but does address that Mendez will provide his
20 own tractor. The agreement does not describe the arrangement in
21 terms of a hiring, rental or lease. On the issue of control,
22 Great West asserts that while Mendez was assigned a specific
23 trailer from the OHK fleet, he was required to use other trailers
24 at OHK's discretion when the assigned trailer was out of service
25 for repair or other reasons. Further, Mendez was only allowed to
26 use the OHK trailer for transportation of product at OHK's
27 direction and OHK exclusively dictated pickup and delivery points
28 of these shipments. Mendez was prohibited from using the OHK
trailer to haul any other loads and was required to operate the

1 tractor that pulled the OHK trailer himself. Mendez was not
2 allowed to affix any signage to the OHK trailer. When he was on
3 vacation or otherwise unavailable to haul for OHK, Mendez was
4 expected to relinquish his assigned trailer to OHK for that
5 period. Finally, after the accident, OHK retook possession of
6 the trailer without notice to Mendez and without requesting or
7 obtaining his consent.

8 Great West further argues that Mendez did not pay rent or
9 otherwise compensate OHK for use of the trailer. It argues that
10 Mendez was required to forfeit 25 percent of the payment for each
11 haul for use of the required OHK trailer, which was arranged as
12 an offset in the subhaul agreement. Thus, Great West argues
13 Mendez never made any payment to OHK but merely received his
14 compensation structured as 75 percent of the amount listed in an
15 attachment to the subhaul agreement. This is sophistry. Mendez
16 paid 25 percent of his hauling fees to OHK to use its trailer

17 GFC disputes Great West's application of *Entremont*, arguing
18 that the limitations OHK imposed on Mendez's use of the trailer
19 do not alter the nature of the arrangement as a lease or rental.
20 Specifically, GFC argues that Great West's position requires the
21 lessor be "given full flexibility as to the use of the rented
22 property." (Doc. 47 at 4.) GFC asserts that "[i]t is a matter
23 of common knowledge that [lessors] of property, whether it be
24 real property or cars, often place parameters as to the
25 [lessee's] use of the property." (*Id.* at 5.)

26 This argument fails to address the *Entremont* court's
27 explanation that "giving up of possession to the hirer" requires
28 "that the hirer not the owner uses and controls the rented

1 property." 13 Cal.2d at 295(emphasis added.) Great West lists a
2 number of facts that tend to show that OHK was heavily involved
3 in controlling the use of the OHK trailers. GFC does not dispute
4 these facts or provide additional facts that would demonstrate
5 that it was Mendez who exercised control over the OHK trailer.
6 Moreover, GFC cites no caselaw that would support its position
7 that OHK's direction of Mendez's use of the trailer is simply a
8 common parameter placed on the lessee's use of the property that
9 does not constitute "control" of the property by the owner in the
10 manner described in *Entremont*.

11 Because the nature of Mendez's use of OHK's trailer is
12 factually and legally disputed, it cannot be determined as a
13 matter of law that the agreement was a lease. GFC's motion for
14 summary judgment pursuant to California Insurance Code § 11580.9
15 is DENIED.

16
17 B. CROSS-MOTIONS FOR SUMMARY JUDGMENT: PLAINTIFF SEEKS A
18 DECLARATION THAT THE GFC POLICY LIMIT AS APPLIED TO MENDEZ
19 IS \$15 MILLION; DEFENDANT SEEKS A DECLARATION THAT THE GFC
20 POLICY LIMIT AS TO MENDEZ IS \$50,000

21 Plaintiff Great West moves for summary judgment on its
22 claims for declaratory relief and equitable contribution. (Doc.
23 14.) It seeks a declaration that the coverage limits of the GFC
24 policy as to Mendez are \$15 million, inclusive of defense costs.
25 Plaintiff also seeks judgment in its favor on its equitable
26 contribution claim, requesting a judicial determination that
27 Great West is entitled to reimbursement of the approximate \$1
28 million in defense and indemnity costs it incurred and paid on
behalf of Mendez in defending and settling claims against him in

1 the underlying action and a declaration that it owes no further
2 indemnity or contribution to GFC.

3 Defendant GFC moves for summary judgment on the grounds that
4 Mendez was an undeclared driver under the GFC policy and that the
5 policy contains a \$50,000 sub-limit for undeclared drivers.

6 (Doc. 15.) It seeks a declaration that, as applied to Mendez,
7 the GFC policy provides coverage in the amount of this \$50,000
8 sub-limit.

9 Plaintiff Great West contends that GFC's attempt to limit
10 coverage to Mendez fails to meet the "conspicuous, plain and
11 clear" standard under California law that applies to provisions
12 in insurance policies that attempt to reduce coverage. As such,
13 Plaintiff argues the coverage limit as applied to Mendez is \$15
14 million and that, according to rules of contribution, it should
15 recover much of the amount it paid on behalf of Mendez.

16 Defendant argues the policy language covering undeclared
17 drivers that allows for a coverage limit of \$50,000 is
18 conspicuous within the GFC policy. It further argue the language
19 is plain and clear and, as such, is enforceable.

20
21 1. General Principles of California Insurance Law Regarding
22 Policy Interpretation

23 Under California law, an insurance company must defend its
24 insured against a suit that seeks damages potentially within the
25 coverage of its policy. *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263,
26 275 (1966); *Montrose Chem. Corp. v. Superior Court*, 6 Cal. 4th
27 287, 295 (1993). In determining whether a duty to defend is
28 owed, the insurer must look to the facts of the complaint and

1 extrinsic evidence, if available, to determine whether there is a
2 potential for coverage. *Waller v. Truck Ins. Exchange, Inc.*, 11
3 Cal. 4th 1, 19 (1995). Where extrinsic facts show there is no
4 potential for coverage, the insurer has no duty to defend the
5 action as a matter of law. *Reagan's Vacuum Truck Service Inc. v.*
6 *Beaver Ins. Co.*, 31 Cal. App. 4th 375, 384 (1994). To establish
7 it has no duty to defend, a carrier is entitled to rely not only
8 on the facts alleged in the complaint, but also extrinsic facts
9 it learns which establish the absence of coverage. *Montrose*
10 *Chem.*, 6 Cal. 4th at 296-297, 300-301.

11 [W]here the extrinsic facts eliminate the
12 potential for coverage, the insurer may decline to
13 defend even when the bare allegations of the
14 complaint suggest potential liability.

15 *Waller*, 11 Cal. 4th at 19.

16 In California, the interpretation of an insurance policy
17 follows a well-established set of rules. As a general matter,
18 "the mutual intention of the parties at the time the contract is
19 formed governs [contract] interpretation." *MacKinnon v. Truck*
20 *Ins. Exch.*, 31 Cal. 4th 635, 647-48 (2003) (citing Cal. Civ. Code,
21 § 1636). To discern the mutual intent of the parties, a court
22 should apply the following rules, in sequence. See generally,
23 *Croskey, et al.*, *Cal. Prac. Guide: Insurance Litigation*, Ch. 4-A
24 (The Rutter Group 2005).

25 Rule 1: The Plain Meaning. If possible, the mutual intent
26 of the parties is to be "inferred...solely from the written
27 provisions of the contract." *MacKinnon*, 31 Cal. 4th at 647
28 (citing Cal. Civ. Code § 1638). If an examination of contractual
language reveals a "clear and explicit" meaning, this meaning

1 controls. *Id.* at 647. A court must interpret contractual
2 language in its "ordinary and popular sense," unless terms are
3 "used by the parties in a technical sense or a special meaning is
4 given to them by usage." *Id.* (citing Cal. Civ. Code § 1638;
5 1644). A court must, "attempt to put itself in the position of a
6 layperson and understand how he or she might reasonably interpret
7 the [] language." *Id.*

8 A policy provision will be considered ambiguous, and
9 therefore without a "clear and explicit meaning," when it is
10 "capable of two or more constructions, both of which are
11 reasonable." *Id.* But, "language in a contract must be
12 interpreted as a whole, and in the circumstances of the case, and
13 cannot be found to be ambiguous in the abstract." *Id.*; *Waller v.*
14 *Truck Ins. Exch. Inc.*, 11 Cal. 4th 1, 19 (1995). The lack of a
15 policy definition does not necessarily render a term ambiguous.
16 *Foster-Gardner, Inc. v. National Union Fire Ins. Co.*, 18 Cal. 4th
17 857, 868 (1998). It is appropriate to consider extrinsic evidence
18 for the purpose of determining whether an ambiguity exists, *Pac.*
19 *Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d.
20 33, 37 (1968), or to show that the parties attached a special
21 meaning to certain terms, *ACL Tech., Inc. v. Northbrook Prop. &*
22 *Cas. Ins. Co.*, 17 Cal. App. 4th 1773, 1794 (1993).

23 Rule 2: The Insured's Objectively Reasonable Expectations.

24 If a provision has no "clear and explicit meaning," ambiguity is
25 "resolved by interpreting the ambiguous provisions in the sense
26 the insurer believed the insured understood them at the time of
27 formation." *E.M.M.I., Inc. v. Zurich Am. Ins. Co.*, 32 Cal. 4th
28 465, 470 (2004).

1 Rule 3: The Contra-Insurer Rule. If application of the
2 first two rules still does not eliminate the ambiguity,
3 “ambiguous language is construed against the party who caused the
4 uncertainty to exist.” *E.M.M.I.*, 32 Cal. 4th at 470. This third
5 “contra-insurer rule” as applied to an insurance policy,
6 “protects not the subjective beliefs of the insurer but, rather,
7 the objectively reasonable expectations of the insured.” *Id.* at
8 470-71. At this stage, “any ambiguous terms are resolved in the
9 insured’s favor, consistent with the insured’s reasonable
10 expectations.” *Id.* at 471.

11 Rule 4: Exclusions Must be Conspicuous, Plain and Clear

12 The law requires that an exclusionary clause in an insurance
13 policy be conspicuous, plain and clear. *E.M.M.I. v. Zurich Amer.*
14 *Ins. Co.*, 84 P.3d 385, 471 (2004); *MacKinnon v. Truck Ins. Co.*,
15 73 P.3d 1205, 1213 (2003). This is especially true when the
16 coverage portion of the policy would lead an insured to
17 “reasonably expect coverage” for the claim purportedly excluded.
18 *MacKinnon*, 73 P.3d at 1213; *E.M.M.I.*, 84 P.3d at 471. Further,
19 the burden rests upon the insurer to phrase such provisions in
20 “clear and unmistakable language.” *Id.*

21
22 2. Is the Permissive User Limitation Conspicuous?

23 Great West contends that the permissive user limitation in
24 the GFC policy is not conspicuous, arguing “buried at the bottom
25 of the one-hundred-and-fifth page of its 120-page policy package,
26 is small-print, inconspicuous and opaque language....” (Doc. 14
27 at 3.) Great West points to both the length of the policy and
28 the placement of the permissive user limitation for support,

1 asserting "[t]he supposed coverage restriction is literally over
2 one-hundred densely written (in 9-point print) pages away from
3 the place on the face of the policy where the \$15 million
4 coverage promise is so prominently made; the restriction is
5 tucked in after provisions that are guaranteed to lull a reader
6 into torpor." (*Id.* at 4.) Great West argues that similar
7 efforts to restrict permissive users' coverage have not
8 succeeded, pointing to *Thompson v. Mercury Casualty Co.*, 84
9 Cal.App.4th 90 (2000), and *Jauregui v. Mid-Century Insurance Co.*,
10 1 Cal.App.4th 1544 (1991).

11 In *Thompson*, the California Court of Appeal held that a
12 limitation on liability for "permissive users" of the insured's
13 automobile was inconspicuous because it did not appear in the
14 "Liability" section of the policy, "where an average layperson
15 would expect to find it." *Thompson*, 84 Cal.App.4th at 97. There
16 permissive users were included in the definition of insured
17 persons on page one of the six page policy and the limitation was
18 obliquely referred to on the first page as "Condition 23," which
19 was explained later on the policy's last page. *Id.* On this
20 page, "Condition 23" was listed in a miscellaneous section that
21 contained 30 random and unrelated subsections. *Id.* It was "not
22 **bolded**, *italicized*, enlarged, underlined, in different font,
23 CAPITALIZED, boxed, set apart, or in any other way distinguished
24 from the rest of the fine print." *Id.*

25 The *Jauregui* court found a permissive user limitation
26 inconspicuous where the definition of an insured on the first
27 page of the policy included permissive drivers but language
28 limiting permissive user coverage was found in the "Other

1 Insurance" section on the second page. *Jauregui*, 1 Cal.App.4th
2 at 1549-50. There were five sections set forth in bold in the
3 policy, including the "Other Insurance" section and sections
4 entitled "Exclusions" and "Limits on Liability." *Id.* Ruling
5 that the insurer did not meet its obligations "by hiding the
6 disfavored language in an inconspicuous portion of the policy,"
7 the court held:

8 The coverage limitation for permissive drivers is not
9 contained within one of the subheadings that might
10 alert the reader to a partial exclusion. Rather it
11 appears within a subsection whose ordinary language
12 would not encompass the limitation and is surrounded by
13 language that has nothing to do with exclusions or
14 limitations on coverage.

15 *Jauregui*, 1 Cal.App.4th at 1549-50.

16 In *Haynes v. Farmers Ins. Exchange*, 32 Cal.4th 381 (2004),
17 the California Supreme Court found two limitations on liability
18 for permissive users in the same policy inconspicuous, one in the
19 main policy and one in an endorsement. There the first page of
20 the policy, the declarations page, listed dollar amounts for
21 coverage limits and, two-thirds of the way down the page, a box
22 was displayed that contained "endorsement numbers," including one
23 listed as "S9064." *Id.* at 384. No explanation or definition of
24 "endorsement" was given and no information was provided as to the
25 location or subject matter of any of the endorsements. *Id.* On
26 page 7, the definition of an insured person included permissive
27 users. *Id.* On page 24, "Endorsement S9064" was listed and
28 described as a permissive user limitation, detailing the specific
29 dollar amounts that applied. *Id.* at 384-85.

30 In the main policy, the "Liability" section consisted of 4
31 subsections: "Coverage," "Exclusions," "Limits of Liability," and

1 "Other Insurance." *Id.* at 384. On page 10 of the policy, under
2 the heading "Other Insurance," language was included that limited
3 permissive user coverage to the minimum limits of the financial
4 responsibility law of the state. *Id.* In finding this language
5 inconspicuous, the *Haynes* court noted that the heading "Other
6 Insurance" did not alert a reader to its contents, the permissive
7 user coverage limit. *Id.* at 386. Further, nothing in the
8 section attracted attention to the limiting language. *Id.*

9 As to the endorsement, *Haynes* first observed that nothing on
10 the declarations page alerted a reader to the content of
11 endorsement S9064, nor was there any reference to coverage limits
12 for permissive users consisting of amounts less than the specific
13 dollar amounts displayed on the first page. *Id.* at 387. Next it
14 noted that within the endorsement, the limiting language was
15 "'not bolded, italicized, enlarged, underlined, in different
16 font, capitalized, boxed, set apart, or in any other way
17 distinguished from the rest of the fine print.'" *Id.* (citing
18 *Thompson*, 84 Cal.App.4th at 97). Moreover, the definition of the
19 insured still "'gives every indication that a permissive driver
20 stands in the same position as the insured and receives the same
21 coverage'" and the language "in endorsement S9064 remains
22 'surrounded by language that has nothing to do with exclusions or
23 limitations on coverage.'" *Id.* at 388 (citing *Jauregui*, 1
24 Cal.App.4th at 1549-50).

25 a) Extension of Coverage to Permissive Users

26 As in *Thompson*, *Jauregui*, and *Haynes*, the GFC policy lists
27 permissive users on the same page where the insured is defined,
28 without any language specifying that coverage limits for such

1 users are different than those for other insured persons. Ex. D,
2 GFC 63. The three cited cases are otherwise distinguishable. In
3 the GFC policy, permissive users are distinctly defined as
4 "additional insureds" in a later section following where "the
5 insured" are defined at the top half of the page. *Id.* The words
6 "[t]he following are insureds under this policy" appear at the
7 top of page GFC 63 under the capitalized heading "THE INSURED"
8 before a list that includes named persons in the policy
9 declarations and schedules and their family, legal
10 representative, employees and others. In a separate section
11 headed "ADDITIONAL INSUREDS" at the bottom of the same page,
12 permissive users are included as additional insureds: "The
13 following are ADDITIONAL INSUREDS: A. Any person operating your
14 vehicles or watercraft with your permission , but only with
15 respect to their operation of covered vehicles or watercraft."
16 Thus, although perhaps a minor difference with the California
17 cases discussed above, coverage is extended under the GFC policy
18 to permissive users specifically as "additional insureds" in a
19 different section and paragraph from where the original insureds
20 are set forth.

21 b) Notice of the Existence of Coverage Limitation

22 More significant differences exist. At the outset, on the
23 first page of the policy booklet, the insured is notified that
24 the policy is composed of five sections, including one entitled
25 "Legal Liability and Defense," and is directed to pay special
26 attention to "[w]ords or phrases in *bold face italic script.*"
27
28

1 Ex. D, GFC 60.⁴ This page begins with a notice to the insured:
2 "Please read this Policy and the Declarations and Schedules
3 carefully." *Id.* The fourth paragraph informs the reader that
4 the policy booklet is composed of five sections: "the Covered
5 Property Section, the Business Income or Extra Expense Section,
6 the Legal Liability and Defense Section, the Uninsured Risks
7 Section, and the Common Section. Words or phrases in **bold face**
8 **italic script** are key terms defined in that section. The meaning
9 of these key terms remains consistent throughout each section."
10 *Id.*

11 On the second page of the policy booklet, the concept of a
12 liability sub-limit is introduced in the Table of Contents, under
13 the section entitled "Legal Liability and Defense" as subsection
14 "I. Sub-Limited Legal Liability and Defense Causes of Loss -
15 Consequential Loss or Damage," listed as page 35. Ex. D, GFC 61.
16 More specifically, the second and third pages of the policy
17 booklet encompass and are entitled "Table of Contents" and set
18 forth eight bolded, capitalized, unnumbered section headings in
19 the following order: THE INSURER, THE INSURED, ADDITIONAL
20 INSUREDS, COVERED PROPERTY, LOSS OF BUSINESS INCOME OR EXTRA
21 EXPENSE, LEGAL LIABILITY AND DEFENSE, UNINSURED RISKS, COMMON
22 POLICY TERMS AND CONDITIONS. Ex. D, GFC 61-62. The sixth bolded

23
24 ⁴ The 120 page GFC policy consists of two parts: 1) the
25 Policy Declarations and Schedules, which is presented in Exhibit
26 D as the first 59 pages of the entire policy (GFC 1-59), and 2)
27 the policy form or booklet, presented as 61 pages long (GFC 60-
28 120), which appears to be a separate document as it contains a
table of contents, an index, and its own internal numbering of
pages 1-54 which does not include the table of contents or index.

1 heading is "LEGAL LIABILITY AND DEFENSE" and this heading appears
2 on the first page of the table of contents. *Id.* at GFC 61. It
3 lists nine subsections marked A-I and appears as follows:

4		
5	LEGAL LIABILITY AND DEFENSE	32
6		
7	A. INSURING AGREEMENT	32
8	B. OUR DUTY TO INVESTIGATE, DEFEND AND SETTLE	32
9	C. LEGAL COUNSEL	32
10	D. PRIOR WRITTEN CONSENT REQUIRED	32
11	E. LEGAL LIABILITY AND DEFENSE WITHIN POLICY LIMITS	32
12	F. YOUR DUTIES IN THE EVENT OF A LEGAL LIABILITY AND DEFENSE LOSS	32
13	G. COVERED LEGAL LIABILITY AND DEFENSE COSTS	33
14	H. COVERED LEGAL LIABILITY AND DEFENSE CAUSES OF LOSS	33
15	I. SUB-LIMITED LEGAL LIABILITY AND DEFENSE CAUSES OF LOSS- CONSEQUENTIAL LOSS OR	
16	DAMAGE	35
17		

18 On the second page of the policy booklet, the contents of
19 the Legal Liability and Defense Section are outlined for the
20 reader, including a subsection on sub-limits, and the
21 corresponding page numbers are explicitly referenced.

22 The actual "LEGAL LIABILITY AND DEFENSE SECTION" begins on
23 what is internally numbered as page 32 in the policy form. Ex.
24 D, GFC 94. The first line at the top of the page, which is a
25 heading, reads "LEGAL LIABILITY AND DEFENSE SECTION" in font size
26 that is capitalized and bigger than that on the rest of the page.
27 The first two subsections within this section read:

1 A. INSURING AGREEMENT

2 Subject to all the terms and conditions of this policy,
3 we will pay your legal liability and defense costs up
4 to the **blanket legal liability and defense limit**, or up
5 to the **legal liability and defense sub-limit** for
6 **Covered Legal Liability and Defense Causes of Loss** or
7 from **Sub-limited Legal Liability and Defense Causes of**
8 **Loss - Consequential Loss or Damage** that first occurs
9 during the policy period.

10 Exposure to substantially the same cause or causes of
11 loss or damage or a series of related acts or omissions
12 shall be considered a single claim. In the event a
13 claim relates to two or more of our policy periods,
14 such claim shall be deemed to have originated in the
15 earliest policy period in which the loss first
16 occurred. If that claim is covered, all damages
17 related to that claim shall be included in the
18 applicable **blanket legal liability and defense limit** or
19 **legal liability and defense sub-limit** of the earliest
20 policy period during which the claim first began to
21 occur.

22 This coverage applies to covered claims that take place
23 anywhere in the world during the policy period. Please
24 be aware that many foreign countries (including Mexico)
25 do not accept or recognize any coverage (including
26 vehicle liability coverage) issued by an insurance
27 company not domiciled in that country. We are
28 domiciled in the United States of America.

18 B. OUR DUTY TO INVESTIGATE, DEFEND AND SETTLE

19 We have the duty to investigate, defend or settle any
20 covered claim or suit. Our duty to investigate, defend
21 or settle is completed when we have paid the applicable
22 **blanket legal liability and defense limit** or **legal**
23 **liability and defense sub-limit** of insurance in
24 investigation, attorney's fees, settlement, defense
25 costs, interest or payment of claims.

26 (Doc. 19, Ex. D at GFC 94.)

27 In these first two sub-sections of the "Legal Liability and
28 Defense Section," there are three references to the "legal
liability and defense sub-limit" at issue here and all of them
are in bolded, italicized type. While these references do not
explain what this sub-limit is, they do describe the "blanket

1 legal liability and defense limit" and the "legal liability and
2 defense sub-limit" as contrasting alternatives, with section A
3 stating: "we will pay your legal liability and defense costs up
4 to" the blanket limit or the sub-limit. In section B, the
5 insurer's duty is explained as "completed when we have paid the
6 applicable *blanket legal liability and defense limit* or *legal*
7 *liability and defense sub-limit*," also providing the two limits
8 as two different options.

9 The nature of the sub-limit is explained a few lines later
10 on the same page, in section E2:

11 **2. LEGAL LIABILITY AND DEFENSE SUB-LIMIT:** Certain
12 causes of loss, consequential loss or damages are sub-
13 limited and have a lower limit than the ***blanket legal***
14 ***liability and defense limit***. These lower limits are
15 stated in the Policy Declarations and Schedules and are
16 defined in ***Sub-limited Legal Liability and Defense***
Causes of Loss - Consequential Loss or Damage. Losses
17 paid under this coverage part will reduce the available
blanket legal liability and defense limit and do not
18 represent additional limits of coverage.

19 (Doc. 19, Ex. D at GFC 94.)

20 The existence of sub-limits is mentioned upfront in the
21 liability section of the policy, where an insured would go to
22 find details of coverage after having an accident that resulted
23 in a lawsuit. The language is bolded and italicized to attract a
24 reader's attention and makes clear that the blanket limit is not
25 applicable to all causes of loss. Taken as a whole, on the first
26 page of the "Legal Liability and Defense Section," the sub-limit
27 is mentioned four times in bold type and a paragraph, subsection
28 E2, is devoted to explaining it. The paragraph explicitly
references "lower limits" than the blanket limit, detailing that
some losses "are sub-limited and have a lower limit than the

1 blanket legal liability and defense limit" in its first sentence.
2 The lower limits are not specified in this section, rather, the
3 reader is put on notice that the lower limits are detailed in two
4 separate places: 1) the Policy Declarations and Schedules, and 2)
5 "Sub-limited Legal Liability and Defense Causes of Loss-
6 Consequential Loss or Damage."

7
8 c) Locating the Coverage Limitation

9 Accordingly, there are two alternate approaches a reader can
10 take to find the \$50,000 undeclared drivers sub-limit that GFC
11 claims applies to Mendez. First, the reader can begin with the
12 Policy Declarations and Schedules and locate the listing of the
13 sub-limit for "Vehicle Liability-Undeclared Drivers" on page 30
14 of the declarations. Ex. D, GFC 30. To do this, because there
15 is no table of contents to the Policy Declarations and Schedules,
16 from page 1 a reader has to read through the first six pages
17 listing insureds and additional insureds, to reach the "Covered
18 Property Section" on page 7 and the "Loss of Business Income or
19 Extra Expense Section" on page 19 - because these sections do not
20 relate to the type of loss incurred - to reach the "Legal
21 Liability and Defense Section" on page 22. Ex. D, GFC 1-22. The
22 first seven pages of the "Legal Liability and Defense Section"
23 consists of listings of declared vehicles and drivers. *Id.* at
24 GFC 22-28. A reader who is a permissive user would, after
25 reading through these 7 pages, discover that a permissive user is
26 not included on the list of declared drivers.

27 The reader has reached the heading of "SUB-LIMITED LEGAL
28 LIABILITY AND DEFENSE CAUSES OF LOSS - CONSEQUENTIAL LOSS OR
DAMAGE" at the top of page 29, which is bolded, capitalized and

1 highlighted between two lines. Ex. D, GFC 29. Listed in
2 alphabetical order, the reader can review one and a half pages to
3 reach the bottom of page 30 to find "Vehicle Liability -
4 Undeclared Drivers." *Id.* at GFC 30. Here the reader is referred
5 to the pages in the policy booklet which list the undeclared
6 driver limits by the following statement in parentheses: "See
7 pages 43 and 44 of the policy form for definition and
8 limitation." Turning to these pages in the policy booklet, the
9 reader encounters a section numbered 33 dealing with undeclared
10 drivers:

11
12 **33. VEHICLE LIABILITY - UNDECLARED DRIVERS** means all
13 liability and defense claims arising out of the operation or
14 use of your **vehicles** by undeclared operators or drivers
15 (other than employees). The maximum liability limits
16 available to the undeclared operators or drivers (other than
17 employees) for the accident is as follows according to the
18 type of **vehicles** involved:

19 a. Automobiles, pick-ups, motorcycles, and trucks not
20 subject to Federal Department of Transportation motor
21 carrier regulations; are limited to the statutorily required
22 minimum coverage amount as defined by the automobile
23 financial responsibility laws of the state where the
24 accident occurs;

25 b. Trucks subject to Federal Department of
26 Transportation motor carrier regulations are limited to the
27 statutorily required minimum coverage amount as defined in
28 Part 387 of the Federal Department of Transportation motor
carrier regulations;

c. Snowmobiles, all terrain vehicles (ATV), golf carts,
forklifts, trailers, and other mobile equipment such as
construction or farm machinery that is not permanently
installed, attached or in service to a **building** or **dwelling**
are limited to \$50,000 per accident.

These **vehicle liability-undeclared drivers** coverage
limitations apply regardless of whether you have selected a
higher liability limit than the limitations listed above.

Vehicles mean automobiles, motorcycles, trucks, trailers,
forklifts, snowmobiles, all terrain vehicles (ATV), and golf
carts. **Vehicles** also include other mobile equipment such as
construction or farm machinery that is not permanently

1 installed, attached or in service to a *building* or *dwelling*.

2 GFC argues section 33(c) as it appears in the policy applies to
3 Mendez because he was hauling a "trailer" that is "limited to
4 \$50,000 per accident."

5 The alternative route to reach the sub-limit section is to
6 look for "Sub-limited Legal Liability and Defense Causes of Loss-
7 Consequential Loss or Damage." This listing is found in the
8 table of contents of the policy booklet, which refers the reader
9 to page 35, subsection I. Ex. D, GFC 61. It is also separately
10 listed in the index of the policy booklet. *Id.* at 120. Page 35
11 sets forth a list of definitions of sub-limits for 37 different
12 causes of loss, numbered as 1-37 under section I and spanning 10
13 pages. *Id.* at GFC 97-108. The sub-limit GFC claims applies to
14 Mendez is listed on page 43 as number 33, "Vehicle Liability -
15 Undeclared Drivers." *Id.* at GFC 105. This requires a reader to
16 thumb through 8 pages, from page 35 to 43 of the policy booklet,
17 to find the relevant sub-limit.

18 A third way to find the undeclared drivers sub-limit is by
19 referencing the policy booklet index. If a reader understood he
20 was an undeclared driver, the reader finds the provision by
21 looking under "V" in the index, where "Vehicle Liability -
22 Undeclared Drivers" is listed and page 43 is cited as the
23 location of this provision. Ex. D, GFC 120.

24 Whichever method a reader uses to find the "Vehicle
25 Liability - Undeclared Drivers" provision on page 43, the
26 provision is clearly highlighted to make it conspicuous. The
27 heading "VEHICLE LIABILITY - UNDECLARED DRIVERS" is capitalized,
28 numbered (as number 33), bolded, and italicized to distinguish it

1 from the rest of the print on the page. This heading and the
2 language of the provision itself are in type that is the same
3 size as the print on the rest of the page. This provision is
4 located in a section, "Sub-limited Legal Liability and Defense
5 Causes of Loss- Consequential Loss or Damage," that is named to
6 reflect its content and is highlighted through capitalization,
7 bold font, and lines drawn above and below the title of the
8 section that emphasize it as a heading. See *National Ins.*
9 *Underwriters v. Carter*, 17 Cal.3d 380, 385 (1976) (exclusion was
10 conspicuous when located in section of policy under boldface
11 heading, "EXCLUSIONS," notwithstanding print was of the same size
12 and density as the rest of the policy).

13 Unlike in *Thompson*, this disputed provision is located in
14 the section of the policy "where an average layperson would
15 expect to find it" - the Legal Liability and Defense Section, and
16 within that, the subsection on sub-limits. *Thompson*, 84
17 Cal.App.4th at 97. Similarly, the limitation here is
18 distinguished from *Jauregui* because it is contained within a sub-
19 heading that alerts the reader to an exclusion and is not
20 "surrounded by language that has nothing to do with exclusions or
21 limitations on coverage." 1 Cal.App.4th at 1549-50.

22 The way the limiting language is designed to attract the
23 reader's attention is entirely different from the language found
24 inconspicuous in *Thompson* and *Haynes*, where none of the language
25 at issue was "bolded, italicized, enlarged ...capitalized" or
26 otherwise set apart from the print on the rest of the page.
27 *Thompson*, 84 Cal.App.4th at 97; *Haynes*, 32 Cal.4th at 387.

28 This conclusion is reinforced by the fact that Plaintiff
declares the extension of coverage to permissive users in the

1 "additional insured" section on the first page of the policy
2 booklet "relatively accessible and easy-to-read" and also states
3 coverage for permissive users "is explicitly and prominently
4 promised." (Doc. 14 at 4, 7.) Interestingly, the print used for
5 the undeclared driver limitation on page 43 of the same booklet
6 is the exact same size and font type as the section extending
7 coverage to permissive users. Compare Ex. D at GFC 63 to Ex. D
8 at GFC 105. All this contradicts Plaintiff's argument that the
9 coverage limitation is inconspicuous.

10
11 3. Is the Limitation Plain and Clear?

12 A coverage limitation is plain and clear when, from the
13 perspective of an average layperson, it is communicated in clear
14 and understandable language. *MacKinnon*, 31 Cal.4th at 649; *Nat'l*
15 *Auto & Cas. Ins. Co. v. Stewart*, 223 Cal.App.3d 452, 457 (1990).

16 Great West contends that the language of the limitation is
17 unclear, claiming "undeclared driver" is defined nowhere in the
18 policy nor is it listed in the policy's index. This contention
19 is inaccurate as the "Vehicle Liability - Undeclared Drivers"
20 provision is located under "V" in the index. Plaintiff argues
21 that Mendez's tractor is not a "trailer" within the meaning of
22 section c of the "33. Vehicle Liability - Undeclared Drivers"
23 section.

24 An examination of the "33. Vehicle Liability - Undeclared
25 Drivers" provision reveals that the liability limits are listed
26 "according to the type of vehicles involved." Sub-section "a"
27 deals with automobiles, pick-ups, motorcycles and trucks not
28 subject to federal regulations, while sub-section "b" deals with
trucks subject to federal regulations. Sub-section "c" deals

1 with snowmobiles, ATVs, golf carts, forklifts, trailers and other
2 mobile equipment not permanently attached to a building or
3 dwelling.

4 The OHK trailer Mendez was hauling is listed as a trailer in
5 the schedule of vehicles in the GFC policy and the sub-haul
6 agreement between OHK and Mendez also references "trailers." In
7 the undeclared driver limit, "trailer" is among those vehicles
8 listed in section c as "limited to \$50,000 per accident." This
9 is clear and understandable to an average layperson.
10 Accordingly, the undeclared driver provision is plain and clear.

11
12 4. Conclusion

13 For the foregoing reasons, Plaintiff's motion for summary
14 judgment is DENIED. Defendant's motion for summary judgment is
15 GRANTED.

16 Defendant shall submit a proposed order consistent with the
17 above decision within 5 days of service of this order.

18
19 SO ORDERED

20 Dated: September 30, 2008

21 /s/ Oliver W. Wanger
22 Oliver W. Wanger
23 United States District Judge
24
25
26
27
28