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Attorneys for Defendants
American Home Assurance Co.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re:

CHAPTER 11

THE ROMAN CATHOLIC BISHOP OF
 OAKLAND, a California corporation sole,

 Debtor.

Case No. 23-40523 WJL

Adversary Case No. 23-04037

THE ROMAN CATHOLIC BISHOP OF
 OAKLAND,

Plaintiff,

Objections Due: March 13, 2024
 Hearing Date: March 27, 2024
 Hearing Time: 10:30 a.m.
 Courtroom: 1300 Clay Street
 Oakland, CA 94612

v.

AMERICAN HOME ASSURANCE CO., a
 New York corporation; LEXINGTON
 INSURANCE CO., a Delaware corporation

Defendants.

1 **MOTION TO DISMISS THE FIRST AMENDED COMPLAINT**

2 American Home Assurance Company (“American Home”) pursuant to Rule 7012(b) of
3 the Federal Rules of Bankruptcy Procedure and Rule 12(b)(6) of the Federal Rules of Civil
4 Procedure, moves to dismiss the First Amended Complaint for Declaratory Judgment Relief,
5 Breach of Contract, and Breach of Statutory Duty [the Dkt. No. 19] for failure to state a claim
6 upon which relief can be granted.

7 The grounds in support of American Home’s motion are set out in this Motion and the
8 accompanying Memorandum and Points of Authority which adopts and incorporates arguments
9 set out in the Moving Excess Insurers’ Motion to Dismiss the Third Amended Complaint for
10 Failure to State a Cause of Action and the accompanying Memorandum of Points and Authorities
11 (“Moving Insurers’ Motion to Dismiss”), filed in *The Roman Catholic Bishop of Oakland v.*
12 *Pacific Indemnity, et. al.*, Case No. 23-04028. The First Amended Complaint (“FAC”) which,
13 relative to the allegations and claims against RCBO’s excess insurers, is substantially similar to
14 the Third Amended Complaint in Case No. 23-04028 (“TAC”) similarly fails, for the reasons
15 articulated by the Moving Excess Insurers’ Motion to Dismiss, and as set out herein, to state
16 claims for declaratory judgment or breach of contract against American Home because it fails to
17 allege that RCBO’s primary insurance coverage has exhausted, or that there is a likely invasion
18 of the American Home excess policy’s limit. Because the facts alleged do not give rise to the
19 inference that the underlying sexual abuse claims implicate American Home’s coverage, or that
20 American Home breached any current obligations under its insurance policy, Debtor’s claims
21 must be dismissed. Debtor, moreover, fails to plead any facts supporting an alleged obligation
22 by American Home to “drop down,” and the FAC’s allegation that American Home failed to
23 “confirm coverage” does not state a cause of action because, as a matter of California law,
24 American Home has no duty as an excess carrier to “confirm coverage” based on the facts alleged.

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26 ///

27 ///

1 **WHEREFORE**, American Home respectfully request that this Court enter an order
2 dismissing the First Amended Complaint in its entirety and granting such other and further relief
3 as is just and proper.

4 Dated: January 26, 2024

NICOLAIDES FINK THORPE
MICHAELIDES SULLIVAN LLP

6
7 By: /s/ Alison V. Lippa
8 Amy P. Klie
9 Alison V. Lippa
10 Attorneys for Defendant
11 American Home Assurance Co.

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
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In re:

THE ROMAN CATHOLIC BISHOP OF
OAKLAND, a California corporation sole,

Debtor.

THE ROMAN CATHOLIC BISHOP OF
OAKLAND,

Plaintiff,

v.

AMERICAN HOME ASSURANCE CO., a
New York corporation; LEXINGTON
INSURANCE CO., a Delaware corporation

Defendants.

CHAPTER 11

Case No. 23-40523 WJL

Adversary Case No. 23-04037

Objections Due: March 13, 2024
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Courtroom: 1300 Clay Street
Oakland, CA 94612

MEMORANDUM AND POINTS OF AUTHORITY IN SUPPORT OF AMERICAN HOME'S
MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

1 **MEMORANDUM AND POINTS AND AUTHORITIES IN SUPPORT OF AMERICAN**
2 **HOME'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT**

3 For its Memorandum and Points of Authority, American Home adopts and incorporates
4 certain of the arguments asserted by the Moving Excess Insurers in their Memorandum and Points
5 of Authority in Support of the Motion to Dismiss the Third Amended Complaint ("TAC") in Case
6 No. 23-04028 WJL [Dkt. No. 163], which, due to the substantial similarities between the two
7 complaints, apply with equal force to Debtor's First Amended Complaint ("FAC") [Dkt. No. 19]
8 in the instant proceeding.¹

9 As the Moving Excess Insurers' Motion notes, in dismissing Debtor's prior complaint in
10 Case No. 23-04028 WJL, the Court made clear that, to state a claim for declaratory relief under
11 *Ludgate*,² Debtor must allege facts showing "a likely invasion of the excess policies . . . and have
12 some basis for doing it."³ Debtor's latest pleadings – the TAC and the FAC – fall far short of this
13 requirement. Except for a short conclusory sentence averring that Debtor presently faces "in
14 excess of 400 Suits seeking a total amount of damages which has the substantial likelihood of
15 being in excess of" Debtor's insurance limits, the FAC merely rehashes the prior, insufficient
16 allegations.⁴ The FAC is devoid of facts even approximately quantifying (1) the amount of
17 Debtor's potential liability for the claims, (2) how the Suits could be aggregated to exceed
18 Debtor's primary coverage, or (3) the amount of such primary coverage. Debtor also fails to plead
19 that its primary underlying primary coverage has been exhausted. This, coupled with affirmative
20 allegations, set out in the TAC, that the primary insurers have declined coverage (and, by
21 implication, have not been exhausted), precludes Debtor's breach of contract claim against
22 American Home. As an excess insurer, American Home has no present duties under its insurance
23 policies absent any alleged facts that the primary insurance has been exhausted. The FAC also

24 _____
25 ¹ While Lexington Insurance Company ("Lexington") was also originally named as a defendant in
the FAC, Debtor has voluntarily dismissed its claims against Lexington. [Dkt. 16].

26 ² *Ludgate Ins. Co. v. Lockheed Martin Corp.*, 82 Cal. App. 4th 592 (2000).

27 ³ November 14, 2023 Hearing Transcript ("Tr.") Dkt. No. 158 at 64:1-7.

28 ⁴ FAC, ¶ 16.

1 fails to allege any factual basis for the assertion that American Home may have, among other
2 things, failed to “drop down” in place of primary coverage. The FAC also must be dismissed to
3 the extent it asserts that American Home breached a purported duty to “confirm coverage.”
4 California law is clear that an excess carrier has no duty to respond to a tender, much less “confirm”
5 coverage, until all underlying coverage has exhausted. Accordingly, American Home has no duty
6 to “confirm coverage” in response to Debtor’s tender of the underlying claims.

7 **BACKGROUND**

8 Debtor identifies excess liability policy no. CE 35-60094, issued by American Home for
9 the policy period October 26, 1971 to October 26, 1974 (“AHAC Excess Policy”), as being among
10 the excess insurance policies under which RCBO asserts a right to defense and indemnity in
11 connection with lawsuits filed against it following the passage of AB 218, seeking recovery for
12 allegedly negligent supervision of certain clerical and ministerial personnel (referred to by Debtor
13 and herein as “the Suits”). Other insurers identified by Debtor as having issued primary, umbrella,
14 or excess liability insurance between the 1960s and 1980s, under which RCBO asserts a right to
15 defense and indemnity for the Suits are named as defendants in Case No. 23-04028 WJL.
16 Although Debtor asserts the same factual allegations and maintains the same causes of action
17 against American Home as the excess insurers in Case No. 23-04028 WJL (the “Other Excess
18 Insurers”), American Home is named in a separate proceeding because general bankruptcy
19 counsel, Foley & Lardner LLP, is unable to represent Debtor in matters adverse to American
20 Home’s parent company, AIG, necessitating separate counsel relative to claims against American
21 Home.

22 Debtor filed its initial Complaint against American Home shortly before the Other Excess
23 Insurers moved to dismiss the First Amended Complaint in Case No. 23-04028. The Court
24 subsequently granted that motion to dismiss.⁵ Thereafter, Debtor filed the TAC in Case No. 23-
25

26 ⁵ Docket Order, November 14, 2023.
27
28

04028 WJL. Debtor also filed the FAC in this proceeding “to address the issues raised on the motions to dismiss and the Court’s order in the Debtor’s companion case No. 23-04028 WJL.”⁶

The allegations asserted against the Other Excess Insurers in the TAC and against American Home in the FAC are substantially similar. Paragraphs 11 through 16 of the FAC correspond to paragraphs 25 through 30 of the TAC; paragraphs 17, and 19 through 29 of the FAC correspond with paragraphs 32, and 34 through 46 of the TAC; and paragraphs 32 through 39 of the FAC correspond with paragraphs 48 through 55 of the TAC. Like the TAC, the FAC alleges that the American Home excess policies are “responsive to certain claims,” with a reference to Exhibit “A,” which lists each claimant, their corresponding proof of claim and/or case number, the years of alleged abuse, the date (if any) that Debtor provided the claim to its broker, the date (if any) Debtor’s broker tendered the claim to various insurers, and the insurers’ alleged response.⁷

As the Other Excess Insurers note in support of their Motion to Dismiss the TAC, although the prior motion to dismiss relied significantly on *Iolab*⁸ and its progeny, the Court found “greater flexibility” with respect to declaratory relief actions under the California Court of Appeal’s *Ludgate* decision.⁹ Nevertheless, the Court held that with respect to Debtor’s declaratory relief claim: “I don’t believe that the plaintiff has yet alleged anything with respect to any kind of likelihood that there’s going to be a likely invasion of the excess policies” and that “[Debtor] should be required to do that and *have some basis for doing it*.”¹⁰ Similarly, as to Debtor’s breach of contract claim, the Court questioned whether Debtor “want[ed] to allege that there’s some immediate breach, other than what [Debtor] suggest[ed] in the dec. relief, failure to respond” because “if [Debtor] ha[s] that in mind, I don’t think that’s been plead yet. And I think that

⁶ FAC at 10.

⁷ FAC ¶ 7.

⁸ *Iolab Corp. v. Seaboard Sur. Co.*, 15 F.3d 1500 (9th Cir. 1994).

⁹ Tr. at 63:5-11.

¹⁰ *Id.* at 64:3-7 (emphasis added).

1 [Debtor] would need to do so.”¹¹ The Court advised Debtor that if it “ha[s] something else to say
2 about a breach of a current duty, I think the complaint needs to be amended to say that because I
3 don’t think it – it doesn’t say it clearly to me right now.”¹²

4 While the FAC includes some new details about the Suits, it does not include any *factual*
5 allegations giving rise to the inference that American Home’s coverage is implicated under the
6 Court’s more “flexible” approach based on *Ludgate*. Nor does the FAC contain factual
7 allegations that American Home, an excess insurer, breached any current duty to Debtor. In this
8 regard, the FAC contains no allegations regarding the amount of available primary coverage, and
9 pleads only conclusions – not facts – regarding even the potential amount of Debtor’s underlying
10 liabilities. The FAC also is devoid of any facts suggesting the separate Suits can be aggregated
11 to reach the American Home Excess Policy’s coverage. Further, Debtor’s failure to plead primary
12 exhaustion, together with its allegation in the TAC that the Primary Insurer Defendants have
13 “improperly denied or failed to confirm coverage and/or provide defense and/or indemnity to
14 RCBO in the Suits,” forecloses the possibility that American Home breached a present contractual
15 obligation.¹³

16 **STANDARD FOR MOTIONS TO DISMISS**

17 “A motion to dismiss in an adversary bankruptcy proceeding is governed by Federal Rule
18 of Bankruptcy Procedure 7012(b), which incorporates Federal Rule of Civil Procedure 12(b)-
19 (i).”¹⁴ Under Rule 12(b)(6), “a court must dismiss a complaint if it fails to state a claim upon
20 which relief can be granted.”¹⁵

21 ///

23 ¹¹ *Id.* at 65:18-24.

24 ¹² *Id.* at 66:3-6.

25 ¹³ TAC, Dkt. 163, ¶ 29.

26 ¹⁴ *Tracht Gut, LLC v. Los Angeles Cty. Treasurer & Tax Collector (In re Tracht Gut, LLC)*, 836 F.3d
1146, 1150 (9th Cir. 2016).

27 ¹⁵ *Kasolas v. Brower (In re Brower)*, 644 B.R. 187, 191 (Bankr. N.D. Cal. 2022).

1 Although the trial court, at the motion to dismiss phase, “must accept as true all facts
2 alleged in the complaint and draw all reasonable inferences in favor of the plaintiff,” the court
3 “does not have to accept as true conclusory allegations in a complaint or legal claims asserted in
4 the form of factual allegations.”¹⁶ “To survive a Rule 12(b)(6) motion to dismiss, plaintiff must
5 allege ‘enough facts to state a claim to relief that is plausible on its face’” and to “support a
6 cognizable legal theory.”¹⁷ “This standard requires the plaintiff allege facts that add up to ‘more
7 than a sheer possibility that a defendant has acted unlawfully.’”¹⁸ “A plaintiff must provide ‘more
8 than labels and conclusions, and a formulaic recitation of the elements of a cause of action will
9 not do.’”¹⁹ “A claim has facial plausibility when the plaintiff pleads factual content that allows
10 the court to draw the reasonable inference that the defendant is liable for the misconduct
11 alleged.”²⁰

12 ARGUMENT

13 **I. The FAC is Insufficient Because it Does Not Allege that Underlying Primary** 14 **Coverage will Likely be or has Been Exhausted.**

15 Because Debtor does not sufficiently allege actual exhaustion of underlying coverage, or
16 even the potential for such exhaustion, the FAC, like the TAC in Case No. 23-04028 WJL, does
17 not assert plausible claims for declaratory relief or breach of contract. Absent any obligation to
18 “drop down” and provide primary coverage – which Debtor also fails to sufficiently plead – it is
19 uncontested that the American Home Excess Policy is not implicated until the underlying primary
20 insurance is fully and properly exhausted.

21 ///

23 ¹⁶ *In re Tracht Gut, LLC*, 836 F.3d at 1150.

24 ¹⁷ *In re Brower*, 644 B.R. at 191-192, quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570
(2007), and *Shroyer v. New Cingular Wireless Services, Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010).

25 ¹⁸ *Id.* at 191, quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

26 ¹⁹ *Id.*, quoting *Iqbal*, 556 U.S. at 662.

27 ²⁰ *In re Theos Fedro Holdings, LLC*, 2022 WL 10685907, at *1 (Bankr. N.D. Cal. Oct. 18, 2022).

1 **A. Debtor Fails to Plead any Potential for Underlying Exhaustion Supporting a**
2 **Declaratory Judgment Claim.**

3 The FAC adds allegations not included in its previous complaints against the insurers, but
4 none of these allegations provide concrete and particularized facts in support of a cognizable
5 theory of primary exhaustion. In ruling on the Other Excess Insurers' prior motion to dismiss in
6 Case No. 23-04028, the Court made clear that Debtor not only needed to allege a "likelihood that
7 there's going to be a likely invasion of the excess policies," but also that Debtor "have some basis
8 for doing it."²¹ Yet, in the FAC, Debtor merely makes the conclusory allegation:

9 RCBO contends that it is presently facing in excess of 400 Suits seeking a total amount of
10 damages which has the substantial likelihood of being in excess of the available limits of
insurance available under Defendants' insurance policies.²²

11 The allegation is conclusory and vague. There is no *factual* basis supporting Debtor's assertion
12 regarding the "total amount of damages," *i.e.*, what the claims might cost to resolve either
13 individually or collectively, nor that those damages will exceed the available primary coverage
14 (the amount of which is not pled). By comparison, the pleadings in *Ludgate* included actual
15 dollar figures for the available primary coverage and the policyholder's potential liabilities.²³ In
16 *Fremont*, the complaint alleged the insured had suffered a loss of more than \$30 million due to
17 fraudulent mortgage loans, whereas the applicable primary insurance allegedly had a limit of \$15
18 million, making it clear from the face of the complaint that the alleged loss exceeded the amount
19 of allegedly available primary coverage.²⁴

20 ///

21 ²¹ Tr. at 64:3-7

22 ²² FAC, ¶ 16.

23 ²³ *Ludgate Ins. Co. v. Lockheed Martin Corp.*, 82 Cal. App. 4th 592, 607 (2000) (noting that the
24 pleadings included exhibits "indicat[ing] that the underlying limits of Lockheed's primary policies totaled
25 less than \$90 million" and the allegation that "claims totaled \$340 million in indemnity costs and were
likely to reach the Ludgate policies").

26 ²⁴ *Fremont Reorganizing Corp. v. Federal Ins. Co.*, 2010 WL 444718, *1-2 (C. D. Cal. Feb. 1, 2010).
27 See also *Hensel Phelps Construction Co. v. TIG Ins. Co.*, 2011 WL 13130486, *8 (C.D. Cal. Oct. 5, 2011)
(discussing *Fremont*).

1 Moreover, primary exhaustion cannot be assumed or inferred, even in the face of over 400
2 Suits. Debtor has not pled any facts suggesting that 400 separate Suits, none of which have been
3 resolved, could be aggregated to trigger excess coverage; and Debtor expressly pleads that many
4 of the Suits allege abuse spanning “a period of decades.”²⁵ Although Debtor may not need to
5 plead the amount of its expected loss “down to the penny” to show a “reasonable possibility” that
6 the American Home Excess Policy is implicated, merely pleading that it faces a large number of
7 claims is plainly insufficient.²⁶

8 Debtor’s other allegations – that its tenders were timely, that the Suits all seek recovery
9 for “bodily injury” within the meaning of the policies, and that there are no applicable exclusions
10 (including based on RCBO’s prior knowledge of the alleged events) do not cure the fundamental
11 failure to plead facts indicating any likelihood that the American Home Excess Policy will be
12 reached.²⁷ Similarly, any facts that can be gleaned from Exhibit A’s two-word characterizations
13 of certain insurers’ alleged coverage positions, tender dates, and the dates of alleged abuse, do
14 not pertain to the threshold issue of primary insurance exhaustion. American Home does not owe
15 obligations under the American Home Excess Policy merely because a claim was promptly
16 tendered and falls within the policy period. Exhaustion of underlying insurance limits is a
17 prerequisite.

18 **B. Debtor Fails to Plead Actual Exhaustion Supporting a Breach of**
19 **Contract Claim.**

20 Debtor’s breach of contract claim, states that “Defendants’ failure to provide defense and
21 indemnity to the RCBO for the Suits is contrary to the coverages and benefits promised RCBO
22 under the respective policies and constitutes a breach of these policies.”²⁸ However, Debtor’s

23 ²⁵ FAC, ¶ 11.

24 ²⁶ See Tr. at 64:8-16 (“I think there needs to be some statement consistent with Ludgate where the
25 reasonable possibility . . . they’re looking to get to something implicating the excess policies, I don’t think
that has to be necessarily down to the penny. But I do think that Ludgate suggests that there can be a
declaratory relief action, but it does require some pleading beyond what we have here.”).

26 ²⁷ FAC, ¶ 16.

27 ²⁸ FAC, ¶ 51.

1 failure to plead actual exhaustion of underlying coverage, and its overt assertion in the TAC that
2 the Primary Defendants “improperly denied or failed to confirm coverage and/or provide defense
3 and/or indemnity to RCBO,”²⁹ is fatal to its breach of contract claim.³⁰ This is because, absent
4 underlying exhaustion, an excess insurer has no contractual obligation to defend or indemnify the
5 policyholder and, as a result, could not have breached any such obligation.³¹

6 Debtor’s earlier complaint in Case No. 23-04028 contained the same allegations,³² yet the
7 Court dismissed Debtor’s breach of contract claim. In doing so, the Court instructed Debtor that
8 “if you have something else to say about a breach of a current duty, I think the complaint needs
9 to be amended to say that because I don’t think it—it doesn’t say it clearly to me right now.”³³
10 Since the FAC still fails to address this shortcoming, the breach of contract claim against
11 American Home should be dismissed.

12 **C. Debtor Fails to Plead Facts Showing Excess Insurers were Obligated to “Drop**
13 **Down.”**

14 Under California law, whether an excess policy must “drop down” and assume the defense
15 or indemnification obligations of an insolvent underlying insurer is entirely dependent on policy
16 language.³⁴ The FAC, however, fails to allege that the American Home Excess Policy contains

17 ²⁹ [Dkt. 163 at ¶ 29].

18 ³⁰ See, e.g., *Vizio, Inc. v. Navigators Ins. Co.*, 2021 WL 1808612, *2 (C.D. Cal. May 4, 2021)
19 (“[Policyholder’s] contention that [excess insurer] breached [its] Policy by not paying for its defense or
20 indemnifying the company fails because there are no allegations demonstrating exhaustion of the
21 Underlying Limit”); *Archer Western Contractors, Ltd. v. Liberty Mut. Fire Ins. Co.*, 2014 WL 12607699,
22 * 4 (C.D. Cal. Aug. 13, 2014) (“Since [policyholder] failed to allege the exhaustion of its primary
23 insurance, the Motion to Dismiss the claim for breach of contract as to National Union is GRANTED”
24 (citing *Iolab*)); *Hensel Phelps*, 2011 WL 13130486 at *9 (“In the absence of authority allowing a plaintiff
25 to pursue a breach of contract claim against an excess insurer because it may someday exhaust its primary
26 coverage, the Court views the claim as premature.”).

27 ³¹ See, e.g., *Webcor Construction, LP v. Zurich American Ins. Co.*, 2017 WL 4310763 (N.D. Cal.
28 Sep. 28, 2017) (“Thus, an insured cannot sue “the excess insurers for breach of contract until the legal
obligations of the primary insurers [have] been determined and the excess policies [have] been triggered”).

³² First Amended Complaint, Dkt. 2 ¶¶ 45, 46.

³³ Tr. at 66:3-6.

³⁴ See, e.g., *Wells Fargo Bank, N.A. v. California Ins. Guar. Ass’n*, 38 Cal. App.4th 936, 942, 944
(1995) (“In *Reserve Insurance Co. v. Pisciotto*, [30 Cal.3d 800 (1982),] the [California] Supreme Court

1 language purportedly requiring the American Home Policy to “drop down” in place of insolvent
2 underlying primary coverage. These omissions require that the FAC’s “drop down” allegations
3 be dismissed.

4 **D. California Law Imposes No Duty to “Confirm Coverage” Under the**
5 **Circumstances Alleged.**

6 Finally, the FAC must be dismissed to the extent it alleges that American Home “failed
7 to confirm coverage,”³⁵ because no such duty exists where the primary insurance coverage has
8 not been exhausted.

9 In *Jioras*, the California Court of Appeal rejected an argument that an umbrella carrier
10 was estopped from declining coverage because it had failed to promptly issue a reservation of
11 rights letter until shortly before commencing coverage litigation. The court ruled that the
12 umbrella carrier had no legal obligation to take a coverage position until after the underlying
13 primary coverage had exhausted:

14 [A]s a legal matter, there was neither a duty to provide any defense under the umbrella
15 policy ***nor any obligation to respond to an alleged tender of the defense*** even had one
16 been made, because an umbrella policy has no duty of defense until the primary policy is
17 exhausted. Since insurer ***had no obligation to reserve its rights under the umbrella***
policy, its failure to do so in writing cannot operate to its detriment.³⁶

18 *Jioras* makes clear that excess carriers such as American Home have no obligation to take
19 a coverage position, *i.e.*, to “confirm coverage,” until after underlying primary coverage is
20

21 held that we must look to the excess policy’s express language to determine whether an excess insurer is
22 obligated to bear the risk of an underlying insurer’s insolvency. To paraphrase the Supreme Court: we
23 must ask whether the wording of the excess policy requires the excess insurer to provide the coverage that
the underlying insurer would have assumed had it not become insolvent” (citations omitted); finding that
drop down was not required under the policy language at issue, which was “markedly different” than the
language construed in *Pisciotta*).

24 ³⁵ FAC, ¶¶ 16, 25.

25 ³⁶ *State Farm Fire & Cas. Co. v. Jioras*, 24 Cal. App. 4th 1619, 1626-27 (1994) (internal citations
26 omitted) (emphasis added). *See also* 3 *New Appleman Ins. Law Practice Guide* 29A.12 (2023) (“Because
27 an excess insurer has no duty to defend its insured, it cannot later be estopped from raising coverage
defenses, or be said to have waived those defenses, if it fails to reserve its rights when notified of a claim
or suit potentially implicating its coverage”) (citing *Jioras*).

1 exhausted. Because the FAC fails to allege such exhaustion, Debtor has not stated a claim for
2 breach of any purported duty to “confirm coverage.”³⁷

3 **CONCLUSION**

4 The FAC fails to allege any facts supporting the potential invasion of the American Home
5 Excess Policy, nor that the underlying primary insurance actually exhausted. Nor does the FAC
6 allege facts supporting any inference that American Home was obligated to “drop down” and
7 replace insolvent primary coverage. Barring actual exhaustion of primary coverage, American
8 Home had no duty under their policies to “confirm coverage.” For these reasons, Debtor’s FAC
9 against American Home must be dismissed for failing to state a claim under Rule 12(b)(6).

10 Dated: January 26, 2024

NICOLAIDES FINK THORPE
MICHAELIDES SULLIVAN LLP

11
12 By: /s/ Alison V. Lippa
13 Amy P. Klie
14 Alison V. Lippa
15 Attorneys for Defendant
16 American Home Assurance Co.
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23 ³⁷ For this same reason, Debtor’s request for declaratory relief that Excess Insurers issued it
24 insurance policies is likewise premature. If Excess Insurers’ coverage is not even conceivably triggered,
25 there is no basis to force them now to litigate the existence of their alleged insurance policies. *See Vizio*,
26 2021 WL 1808612 at * 3 (dismissing declaratory judgment claim because “[w]hen a [p]arty fails to
27 adequately plead a breach of contract claim, a court may dismiss a request for declaratory relief”), quoting
Blue Novis, Inc. v. United States All. Grp., Inc., 2021 WL 346422, * 6 (C.D. Cal. Jan. 27, 2021); *Archer*,
2014 WL 12607699, * 3 (dismissing declaratory judgment claim because “[w]here it appears the primary
coverage will not be exhausted, an action for declaratory relief may be dismissed”).