IN THE SUPREME COURT OF THE STATE OF NEVADA

NAUTILUS INSURANCE COMPANY, Appellant, v. ACCESS MEDICAL, LLC; ROBERT CLARK WOOD, II; AND FLOURNOY MANAGEMENT LLC, Respondents.	**Supreme Court 79130** United States District Court, for the District of Nevada Case No. 2:15-cv-00321 United States Court of Appeals for the Ninth Circuit: Case Nos. 17-16265 17-16272 17-16273

JOINT APPENDIX VOLUME V

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JOINT APPENDIX

Citations to the joint appendix will include a page number, which refers to the "NV Sup Ct CQ – Joint Appendix00001" page numbering. This is to prevent any confusion, as many of the documents were previously numbered as exhibits in support of the briefing on this issue before the Ninth Circuit. The volumes of the Joint Appendix are labeled in Roman Numerals to prevent confusion with the volumes of the two underlying sets of exhibits. Tabs are only provided for the volumes of the Joint Appendix, not for the underlying sets of exhibits. Indices of the underlying exhibit volumes can be found at NV Sup CT CQ – JointAppendix00053, 00800.

INDEX BY VOLUME		
VOLUME I		
Tab #	Description	Ninth Circuit Case 17-16265 Docket Entry No.
1	Appellant's Opening Brief	15
2	Nautilus Insurance Company's Excerpts of Record Vol. 1 of 4	16-1

VOLUME II		
Tab #	Description	Ninth Circuit Case 17-16265 Docket Entry No.
3	Nautilus Insurance Company's Excerpts of Record Vol. 2 of 4	16-2

VOLUME III		
Tab #	Description	Ninth Circuit Case 17-16265 Docket Entry No.
4	Nautilus Insurance Company's Excerpts of Record Vol. 3 of 4	16-3

VOLUME IV		
Tab #	Description	Ninth Circuit Case 17-16265 Docket Entry No.
4 (Con't)	Nautilus Insurance Company's Excerpts of Record Vol. 3 of 4 (Con't)	16-3
5	Nautilus Insurance Company's Excerpts of Record Vol. 4 of 4	16-4

VOLUME V		
Tab #	Description	Ninth Circuit Case 17-16265 Docket Entry No.
6	Appellee's Principal and Response Brief	24
7	Access Medical, LLC and Robert Clark Wood, II's Supplemental Excerpts of Record Vol. 1 of 2	25-1
8	Access Medical, LLC and Robert Clark Wood, II's Supplemental Excerpts of Record Vol. 1 of 2	25-2
9	Flournoy Management, LLC's Brief on Cross-Appeal	31

VOLUME VI		
Tab #	Description	Ninth Circuit Case 17-16265 Docket Entry No.
10	Nautilus Reply Brief on Cross-Appeal	36
11	Appellees' Reply Brief	43
12	Flournoy Management, LLC's Reply Brief on Cross-Appeal	44
13	Notice of Supplemental Authority Pursuant to FRAP 28(j) and Circuit Rule 28-6	59
14	Memorandum of Decision	62-1
15	Order Certifying Question to the Nevada Supreme Court	63

ALPHABETICAL INDEX			
Document Title	Tab #	Vol. #	Page #[1]
Access Medical, LLC and Robert Clark Wood, II's Supplemental Excerpts of Records, Vol. 1 of 2	7	V	00799
Access Medical, LLC and Robert Clark Wood, II's Supplemental Excerpts of Records, Vol. 2 of 2	8	V	00814
Appellant's (Nautilus) Opening Brief Before the Ninth Circuit	1	I	00001
Appellee's (Access Medical) Reply Brief Before the Ninth Circuit	11	VI	00993
Appellees' Principal and Response Brief	6	V	00743
Flournoy Management, LLC's Brief on Cross-Appeal	9	V	00910
Flournoy Management, LLC's Reply Brief on Cross-Appeal	12	VI	01021
Memorandum of Decision	14	VI	01046
Nautilus Insurance Company's Excerpts of Record in Support of Brief Before the Ninth Circuit, Vol. 1 of 4	2	I	00052
Nautilus Insurance Company's Excerpts of Record in Support of Brief Before the Ninth Circuit, Vol. 2 of 4	3	II	00079
Nautilus Insurance Company's Excerpts of Record in Support of Brief Before the Ninth Circuit, Vol. 3 of 4	4	III & IV	00311
Nautilus Insurance Company's Excerpts of Record in Support of Brief Before the Ninth Circuit, Vol. 4 of 4	5	IV	00578
Nautilus Reply Brief on Cross-Appeal	10	VI	00965
Notice of Supplemental Authority Pursuant to FRAP 28(j) and Circuit Rule 28-6	13	VI	01035
Order Certifying Question to the Nevada Supreme Court	15	VI	01052

[1] NV Sup CT CQ – JointAppendix Numbering

Joint Appendix

Tab #6

Appeal Nos. 17-16265(lead), 17-16272, 17-16273

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAUTILUS INSURANCE COMPANY,
Plaintiff-Appellant-Cross-Appellee

v.

ACCESS MEDICAL, LLC and ROBERT CLARK WOOD, II, FLOURNOY MANAGEMENT, LLC,

Defendants-Appellees-Cross-Appellants,

On Appeal from the United States District Court,
for the District of Nevada
The Honorable Jennifer A. Dorsey, Untied States District Judge
Case No. 2:15-cv-00321-JAD-GWF

APPELLEES' PRINCIPAL AND RESPONSE BRIEF

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rules of Appellate Procedure, Rule 26.1, Defendant/Appellants Access Medical, LLC and Robert Clark Wood, II ("Access") by and through its undersigned counsel, certifies the following information with regard to its corporate parents, subsidiaries or affiliates:

Access hereby declares that there is no such corporation from which is a parent corporation of Access or that owns 10% or more of stock belonging to Access

A supplemental disclosure statement will be filed upon any change in the information provided herein.

Dated this 22 day of December, 2017

Kravitz, Schnitzer & Johnson, Chtd.

By:/s/ Martin J. Kravitz
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page Nos.**

Federal Statutes

State Cases

State Statutes

Rules

I. INTRODUCTION

Access Medical, LLC and Robert "Sonny" Wood, II (collectively the "Insureds") purchased an insurance policy from Nautilus Insurance Company ("Nautilus") and paid the requisite premiums with the expectation that Nautilus would defend them in claims asserted against them that were potentially covered under the insurance policy (hereinafter the "Policy"). However, when a third party brought a legally deficient cross-complaint against the Insureds in a California state action (hereinafter the "Underlying Action"), Nautilus delayed and strategized to use every tactic possible in order to disclaim its duty to defend the Insureds. Even when the Insureds presented Nautilus with additional evidence that further supported Nautilus's duty to defend, Nautilus continued to attempt to disclaim coverage. It was not until four months after the Insureds tendered its defense in the Underlying Action that Nautilus reluctantly agreed to defend its Insureds.

During the time that Nautilus controlled the defense of its Insureds in the Underlying Action, Nautilus never properly investigated the facts behind the legally deficient Cross-Complaint. Moreover while controlling the defense of its Insureds in the Underlying Action, Nautilus failed to file a motion to dismiss and/or motion for a more definite statement in light of the legally deficient

allegations. Instead, Nautilus subsequently brought a declaratory relief action in the district court seeking to immediately disclaim its duty to defend.

In the Complaint from which Nautilus sought declaratory relief, Nautilus indicated that it sought a declaration that it "has no duty to defend Defendant Access Medical and Wood in the [Underlying Action] pursuant to the Nautilus Policy." Nautilus never indicated that it sought reimbursement from its Insureds for defense costs in the Underlying Action in its Complaint. In addition, Nautilus's Policy failed to contain a reimbursement provision. Nautilus also never indicated to the Insureds or the district court that it sought reimbursement from its Insureds for defense costs in the Underlying Action in any motion, pleading, or discovery response before the district court entered a final judgment.

Nautilus filed a Partial Motion for Summary Judgment, from which it sought a judgment in its favor for all allegations it pleaded in its Complaint. On September 27, 2016, the district court erroneously ruled that "Nautilus owes no duty to defend" because the Insureds did not argue that the e-mail at issue contained false statements and the legally deficient Cross-Complaint in the Underlying Action did not specifically allege the same. However, the law clearly holds that an insured does not have to implicate itself in tortious conduct in order to give rise to the duty to defend.

In addition, an insurer cannot rely on a legally deficient cross-complaint in order to deny its duty to defend. Rather, Nautilus was required to investigate the facts behind the legally deficient cross-complaint. If Nautilus had properly investigated the facts behind the legally deficient cross-complaint, Nautilus would have determined that the cross-complaint potentially encompassed independently wrongful actions of slander, libel, and/or business disparagement, which are each covered under the Policy.

Nautilus subsequently filed a Motion for Further Relief and the Insureds filed their Motion for Reconsideration as it related to the district court's order. In this Motion for Further Relief, Nautilus for the first time brought to the district court and parties' attention that it was seeking reimbursement of defense costs from the Underlying Action in the declaratory relief action.

The district court denied Nautilus's Motion for Further Relief because (1) Nautilus never raised a claim for reimbursement in its complaint, (2) the federal statute that Nautilus claimed could award further relief did not solely provide for reimbursement of defense costs in a separate action from which the district court was supposed to interpret state law under diversity jurisdiction, and (3) Nautilus failed to provide that they were entitled to reimbursement under Nevada law.

In the Insureds' Motion for Reconsideration, the Insureds provided new evidence from the Underlying Action that provided further evidence that the

legally deficient Cross-Complaint potentially contained allegations from which Nautilus had the duty to defend in accordance to the Policy. The district court denied the Insureds' Motion for Reconsideration on the basis that the known facts to Nautilus failed to indicate that plaintiff in the Underlying Action alleged claims covered under the Policy. However, Nautilus had the duty to investigate the facts behind the deficient Cross-Complaint in order to ascertain that the allegations potentially included claims covered under the Policy. Trial in the Underlying Action provided further evidence that Nautilus had the duty to defend its Insureds when the claimant attempted to assert a jury instruction for defamation in order to have the jury consider whether the Insureds committed this tort, which was covered under the Policy.

II. JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332(a)(1) due to the fact that it was a civil action between citizens of different states and the amount in controversy exceeded $75,000.00.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1291 and 1294 because this is an appeal from a final decision in the United States District Court for the District of Nevada. The Court denied the Insureds' Motion for Reconsideration and Nautilus's Motion for Further Relief on May 18, 2017. Nautilus subsequently filed its appeal to the district court's order denying its

Motion for Further Relief on June 16, 2017. The Insureds filed a timely notice of cross-appeal on June 19, 2017.

III. STATEMENT OF ISSUES PRESENTED

1. Whether the district court erred when it refused to reconsider its order regarding Nautilus's duty to defend its Insureds in the Underlying Action when a third party pleaded a legally deficient Cross-Complaint against the Insureds, Nautilus failed to properly investigate the facts behind the legally deficient Cross-Complaint, and extrinsic evidence demonstrated that the third party alleged damages against the Insureds brought coverage under the Policy?

2. Whether the district court properly denied Nautilus's Motion for Further Relief when Nautilus(1) failed to indicate in its Complaint for declaratory relief that it sought reimbursement for defense costs in the Underlying Action, (2) failed to indicate in any motion, pleading, and discovery response in the declaratory action that it sought reimbursement for defense costs in the Underlying Action before the district court entered its order regarding Nautilus's duty to defend, (3) failed to indicate in its Policy that it issued to its Insureds that it had the right to seek reimbursement for defense costs, and (4) failed to provide any legal authority under Nevada law granting reimbursement for defense costs in a separate action?

IV. PRIMARY AUTHORITIES

- *United Natl. Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153 (Nev. 2004).

The duty to defend an insured is broader than the duty to indemnify. *United Nat. Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 1158 (Nev. 2004). "[A]n insurer…bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy." *Ibid*. Thus, the duty to defend covers claims where the insured is liable or could become liable. *Id.* at 1153. Potential for coverage exists when there is arguable or possible coverage. *Ibid.* "The purpose behind construing the duty to defend so broadly is to prevent an insurer from evading its obligation to provide a defense for an insured **without at least investigaging the facts behind the compliant."** (emphasis added) *Ibid*.

- Fed. R. Civ. P. 15; Fed. R. Civ. P. 16; 28 U.S.C. § 2202

V. STATEMENT OF THE CASE

A. The Policy

1. The Insureds purchased an insurance policy from which Nautilus had the duty to defend the Insureds against any suit seeking damages that were potentially covered under the Policy.

Access Medical, LLC ("Access Medical") purchased a policy from Nautilus, which was effective from January 15, 2011 to January 15, 2012 (hereinafter the "Policy"). Vol. IV/ ER 615 – 666. In accordance with Policy, Mr. Wood was an

additional insured in his capacity as a shareholder or representative of Access and/or Flournoy. Vol. IV/ ER 630-631. Nautilus drafted the entire language of the Policy with no input by the Insureds. See *Id*.

With this purchase, the Insureds had the expectation that Nautilus would defend them in claims that provided possible or arguable coverage under the Policy. See *Id*. Specifically, the Policy provided coverage to the Insureds for Personal and Advertising Injury as follows:

> **COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY**
>
> **1. Insuring Agreement**
>
> We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. **We will have the right and duty to defend the insured against any "suit" seeking those damages[.]** (emphasis added)
>
> Vol. IV/ ER 627.

Nautilus defined "personal and advertising injury" as an "injury including consequential "bodily injury" arising out of…oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services[.]" Vol. IV/ ER 636.

2. Nautilus failed to include a right to reimbursement in its Policy.

Although Nautilus unilaterally drafted the entire Policy, the Policy's language never indicated that Nautilus had the right to reimbursement if it decided

to defend the Insureds in a legal action where it was later determined that Nautilus did not have the duty to defend its Insureds. Vol. IV/ ER 615-666. Rather than inputting this language in the Policy, Nautilus never provided a provision for reimbursement. *Ibid*.

B. The Underlying Action

On June 3, 2013, Theodore Switzer brought an action in California's state court against the Insureds and Flournoy Management, LLC due to a business partnership that had soured. Vol. IV/ ER 556. In the Underlying Action, Ted Switzer deficiently alleged the intentional interference with prospective economic advantage against the Insureds by alleging the following:

> - Mr. Wood and the businesses that he owns acted to disrupt Flournoy's business by his **wrongful acts** (which includes taking away from Mr. Switzer and keeping for himself lucrative business relationship and income alleged herein;
>
> - The **wrongful acts** resulted in the **complete loss of business and resulted in injury to the personal and business reputation** of Mr. Switzer and Flournoy;
>
> - Mr. Wood, on behalf of Access, engaged in wrongful acts that caused various vendors to stop using Mr. Switzer's business and use Access instead; and
>
> - The **wrongful acts** of Mr. Wood were malicious and were **done with the intent to injure Flournoy's professional and business well-being. (**emphasis added).

> Vol. IV/ ER 555-614, ¶¶ 43, 45, 53, 66, 67, 68, 107, 108, 109, 110, 114, 115, 116, 121, 122, 123, 124, 128, 129, 130, and 131

Mr. Switzer's Cross-Complaint failed to describe any of the wrongful acts that the Insureds allegedly engaged in as required by California law. *Ibid*. The Insureds tendered defense of the Underlying Action to Nautilus. See Vol. II/ SER 62-65. Nautilus took more than four months to communicate an ultimate decision as to whether it was going to defend its Insureds. Vol. II/ SER 76-84. It was not until the Insureds provided an e-mail from Jacqueline Weide and sent countless letters to Nautilus regarding rendering a decision to defend that Nautilus reluctantly decided to defend its Insureds in the Underlying Action on May 19, 2014. *Ibid*.

C. The E-mail

The e-mail at issue, dated July 25, 2011, was written by Jacqueline Weide, a representative of Access and Flournoy Management, LLC. Vol. II/ SER 74-77. In that e-mail, Ms. Weide advised a third party hospital that she was interested in providing spinal implants to the hospital in order to procure business for the Insureds. *Ibid*. Mr. Switzer previously claimed that the hospital used to buy spinal implants from his business. *Ibid*. In an attempt to obtain the third party's business, Ms. Weide indicated the following in an e-mail:

> I believe Dr. Early and Dr. Kahman were using Alphatec's implants but their Distributor in the California area is now banned from selling Alphatec implants. We are in Las Vegas

> and have been using their products here for 2 years. Alphatec recently contacted us and asked that we take over the California region as well. Vol. II/ SER 76.

The Distributor that Ms. Weide referred to in that e-mail was Mr. Switzer. *See* Vol. II/SER 74-75. However, Nautilus never conducted a reasonable investigation to determine Mr. Switzer was the Distributor that Ms. Weide referenced. See Vol. II/SER 76-81.

D. The Declaratory Action

On February 25, 2015, Nautilus filed a Complaint against its Insureds in the district court seeking a declaration that "it has no duty to defend Access Medical and Wood in the [Underlying Action] pursuant to the Nautilus Policy, and in accordance with prevailing legal authority." Vol IV/ ER 545 - 614. In this complaint, Nautilus never alleged that it sought reimbursement for defense costs in the Underlying Action. *Ibid*. Before filing this Complaint, Nautilus failed to further investigate the facts behind the legally deficient Cross-Complaint in the Underlying Action. See Vol. II/SER 87-100.

Nearly a year later on January 15, 2016, Nautilus filed a Partial Motion for Summary Judgment, seeking a judgment in its favor for all allegations asserted in its Complaint. Vol. IV/ ER 670. Specifically, Nautilus sought an order declaring that it has no duty to defend or indemnify its Insureds in the Underlying Action.

Ibid. Since the time that Nautilus filed its Complaint, Nautilus failed to indicate to the district court or the parties that it sought reimbursement for defense costs in the Underlying Action in any pleading, motion, discovery request, or discovery response. See Vol. IV/ ER 555-614; Vol. II/SER 87-100. Nautilus also never sent invoices regarding the defense costs of the Underlying Action to its Insureds. See Vol. II/ER59-95. The Insureds subsequently filed an Opposition to the Motion for Partial Summary Judgment and a competing Counter-Motion for Summary Judgment. Vol. II/SER 94.

1. Mr. Switzer's legally deficient intentional interference with prospective economic advantage cause of action failed to specify the independent tortious acts that the Insureds allegedly committed in accordance with California law.

The Insureds indicated to the district court that the tort of intentional interference with prospective economic advantage, which Switzer repeatedly alleged in the Underlying Action, must specify wrongful acts that are legally independent from the interference itself. See Vol II/SER 94. Mr. Switzer's failure to specify the independent wrongful acts that the Insureds allegedly committed made Switzer's Cross-Complaint legally deficient and subject to dismissal of these claims. See Vol. IV/ ER 555-614. The Insureds also indicated that although Switzer failed specify the alleged and independent wrongful acts in these causes of action, the Insureds should not be bound by a deficiently pleaded Cross-Complaint in order to give rise to Nautilus's duty to defend. See Vol. I/ SER 94.

Moreover, the e-mail at issue created additional evidence that one of the independently wrongful acts alleged in the Underlying Action encompassed allegations of defamation, slander, libel, and/or business disparagement, which are claims that are covered under the Policy. Vol. II/SER 71-55. Specifically, the e-mail provided prima facie evidence that Mr. Switzer filed a suit seeking damages for the actions of the Insureds and their employees, which included Ms. Weide, of disseminating allegedly false statements. *Ibid*; Vol I/ER 555-614.

Due to the fact that Nautilus's Partial Motion for Summary Judgment resolved all allegations indicated in its Complaint, the district court converted Nautilus's Partial Motion for Summary Judgment to a Motion for Summary Judgment. Vol. I/ ER 13-23. The district court subsequently agreed that it could consider the e-mail to determine whether Nautilus owed the Insureds a duty to defend. Vol I/ ER 19-23. However, the district court later claimed that the e-mail did not trigger Nautilus's duty to defend because the Insureds did not argue that this e-mail contained a false statement and thus granted Nautilus's Motion for Summary Judgment. *Ibid*.

Specifically, the district court indicated that "defendants do not argue – let alone offer any facts to show – that the e-mail contains a false statement, i.e. that Switzer was not, at the time, banned from distributing Alphatec spinal implants as the e-mail states." Vol I/ER 21. The district court also indicated that the legally

deficient Cross-Complaint failed to indicate the same. *Ibid*. Nevertheless, Mr. Switzer attempted bring a defamation claim in front of the jury in the Underlying Action due to the very same e-mail at issue after the district court issued its order. Vol. II/SER 37-39.

2. The district court denied Nautilus's Motion for Further Relief and the Insureds' Motion for Reconsideration.

On October 15, 2016, the Insureds filed their Motion for Reconsideration. Vol. II/SER 96. One of the bases for filing the Motion for Reconsideration was the discovery of new evidence, which included discovery responses from Ted Switzer. See *Id*. In these discovery responses, Mr. Switzer did not deny that Mr. Switzer disparaged him when explicitly asked. See *Id*. Thus, the Insureds stated the deficient Cross-Complaint, coupled with Mr. Switzer's discovery responses, resulted in the low bar of Nautilus's duty to defend its Insureds. *Ibid*.

Nautilus also filed a Motion for Further Relief seeking reimbursement of defense costs in the Underlying Action although it failed to claim entitlement to such relief in its Complaint or in its Policy. Vol. II/SER 96-97. Nautilus erroneously contended that it was entitled to reimbursement of defense costs in the Underlying Action because it sent reservation of rights letters to the Insureds. See *Id*. On May 18, 2017, the Court denied the Insureds' Motion for Reconsideration. Vol. II/SER 97. The Court also denied Nautilus's Motion for Further Relief. *Ibid*.

Trial in the Underlying Action subsequently commenced. See Vol. II/ SER11-36. After each party presented its case and defense to the jury, Mr. Switzer's counsel attempted to insert jury instructions for a defamation claim due to the e-mail at issue. Vol. II/ SER 37-39. Due to the fact that the allegations against the Insured always included allegations of defamation and business disparagement, which were covered under the Policy and from which Mr. Switzer attempted to bring before the jury in the Underlying Action, Nautilus always had the duty to defend its Insureds. *Ibid*.

VI. SUMMARY OF THE ARGUMENT

The district court erred when it found that Nautilus did not have the duty to defend because of a deficiently plead Cross-Complaint against the Insureds in the Underlying Action. Nautilus's duty to defend its Insureds in the Underlying Action should not be predicated upon the draftsmanship skills of a third party when the third party filed a legally deficient Cross-Complaint. Rather, Nautilus was required to defend its Insureds whenever the Insureds could potentially become liable in a covered claim.

Moreover, Nautilus was required to investigate the facts behind the legally deficient Cross-Complaint in order to determine whether the claims asserted against the Insureds were potentially covered. This is especially true when the

Insureds presented evidence to the Nautilus that created no doubt that the third party sought damages in his Cross-Complaint against the Insureds that were covered under the Policy.

The district court also erred when it held that the Insureds must implicate themselves in arguing that they committed tortious acts in order to give rise to Nautilus's duty to defend. Due to the overwhelming extrinsic evidence that demonstrates the possibility that Switzer's Cross-Complaint potentially encompassed the independently wrongful actions of slander, libel, and/or business disparagement, Nautilus was required to defend its Insureds. It was further evidenced that Nautilus had the duty to defend its Insureds when Mr. Switzer's counsel attempted to have the jury decide whether the Insureds committed defamation in the e-mail that Ms. Weide sent to a third party. If these defamatory allegations against the Insureds were never asserted against the Insureds in the Underlying Action, Mr. Switzer could not ask the Court for a jury instruction related to a defamatory claim.

Although the Court erred when it found that Nautilus did not have the duty to defend its Insureds in the Underlying Action, the district court properly denied Nautilus's Motion for Further Relief for three reasons. First, "Nautilus never raised a claim for reimbursement or damages in its complaint…Because it never asked for damages or reimbursement, neither party developed discovery or briefing

related to Nautilus's incurred costs, whether those costs should be offset, or whether the parties agreed to shift those costs to those defendants if coverage did not exist." Vol. I/ ER 10.

Second, "even if Nautilus had properly alleged a claim for reimbursement, it has not shown that it is entitled to that relief as a matter of law. Vol. I/ ER 10-11. Specifically, Nautilus "does not offer a single case which a court has reimbursed a party in a state-law diversity case solely under the power of § 2202." *Ibid*. The district court further held "[i]t would make little sense to apply substantive federal legal standards to a state-law case brought under diversity jurisdiction, particularly when "the operation of the Declaratory Judgment Act is procedural only," and "does not create any new substantive right but rather creates a procedure for adjudicating existing rights." Vol. I/ ER 11.

Last, the district court found that "Nautilus has not established that it is entitled to reimbursement under Nevada law…The Policy does not say that Nautilus can recover rights in this situation. And although Nautilus sent the defendants a reservation-of-rights letter indicating that it might seek reimbursement, it has not demonstrated that the letter is enforceable in this case." *Ibid*.

VII. ARGUMENT

A. Standard of Review

This Court reviews district court orders regarding motions for summary judgment *de novo*. *Szajer v. City of Los Angeles*, 632 F.3d 607, 610 (9th Cir. 2011). Motions for reconsideration are viewed for an abuse of discretion. *Benson v. JPMorgan Chase Bank, N.A.*, 673 F.3d 1207, 1211 (9th Cir. 2012). However, "[w]hether such a denial rests on an inaccurate view of the law and is therefore an abuse of discretion requires us to review the underlying legal determination *de novo*. *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1100 (9th Cir. 2004). Whereas motions for summary judgment are reviewed *de novo*, denial of a motion for further relief under § 2202 are reviewed for an abuse of discretion. 28 U.S.C. § 2202; *Besler v. United States Dep't of Agric.*, 639 F.2d 453, 455 (8th Cir. 1981).

B. Nevada law applies to the Policy's interpretation whereas California law applies to the third party's claims in the Underlying Action.

A federal court sitting in diversity must apply the substantive law of the forum state in which it resides. *Vacation Village, Inc. v. Clark County*, 497 F.3d 902, 913 (9th Cir. 2007)(citing *Hanna v. Plumer*, 380 U.S. 460, 465) (1965)). In this matter, the district court correctly held that Nevada law applied in construing the Policy at issue in this matter. *Capitol Indem. Corp. v. Blazer*, 51 F. Supp. 2d 1080, 1084 (D. Nev. 1999); Vol. I/ER 20.

"When interpreting state law, federal courts are bound by the decisions of the state's highest court. In the absence of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *Trishan Air, Inc. v. Fed. Ins. Co.*, 635 F.3d 422, 426-427 (9th Cir. 2011). However, courts will not alter established law when the law is clear. *See Rivera v. Philip Morris*, 209 P.3d 271, 277 (Nev. 2009). In cases where the state's highest court has not decided on a question of law, the Court of Appeals for the Ninth Circuit may certify a question of law to the Nevada Supreme Court. Nev. R. App. P. 5; See *Rivera*, 209 P.3d at 274.

In this matter, the district court properly held that Nevada law applied to the interpretation of the Policy, from which Nautilus never disputed. See Vol. II/ER 93-94. Although Nevada law applied to the interpretation of the Policy, California law applied to the tortious conduct alleged in the Underlying Action. Vol. I/ ER 15-23. Nevada applies the most significant relationship test in interpreting which state law to use in tort actions. *General Motors Corp. v. Eighth Judicial Dist. Court of State of Nev. ex. Rel. County of Clark*, 134 P.3d 111, 116 (Nev. 2006). With this test, the state that has the most significant relationship to the location of the tort will govern the rights and liabilities of the parties. *Id*. at 119. As Switzer argued in his Cross-Complaint that the Insureds injured his reputation in

California, California law applied to the causes of action asserted against the Insureds in the Underlying Action.

C. The district court erred when it found Nautilus had no duty to defend its Insureds when the legally deficient Cross-Complaint created a potential for liability that was potentially covered under the Policy.

In Nevada, the duty to defend is broader than the duty to indemnify. *United Natl. Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 1158 (Nev. 2004). Nevada law provides that "an insurer…bears a duty to defend its insured **whenever it ascertains facts** which give rise to the potential of liability under the policy." (emphasis added) *Ibid*. Thus, the duty to defend covers claims where the insured is liable or could become liable. *Id.* at 1153.

Once the duty to defend arises, "this duty continues throughout the course of litigation." *Ibid*. The Supreme Court of Nevada's rationale for broadly construing an insurer's duty to defend is to **"prevent an insurer from evading its obligation to provide a defense for an insured without at least investigating the facts behind the Complaint."** (emphasis added) *Ibid.*

"Once the insured raises the possibility of coverage under the policy, the insurer has a 'heavy burden' to show that the insured's complaint '**can by no conceivable theory** raise a single issue which would bring it within the policy coverage.'" (emphasis added) *Anthem Elecs., Inc. v. Pac. Emps. Ins. Co.*, 302 F.3d

1049, 1056 (9th Cir. 2002). Any doubt as to whether there is a duty to defend must be resolved in favor of the insured. *Frontier Ins. Co.*, 99 P.3d at 1158. "Once the duty to defend arises, 'this duty continues throughout the course of the litigation.'" *Home Sav. Ass'n v. Aetna Cas. & Surety*, 854 P.2d 851, 855 (Nev. 1993).

1. Whether an Insurer Must Defend Its Insureds Does Not Hinge on the Draftsmanship Skills of the Claimant Filing a Legally Deficient Cross- Complaint- Especially When the Insureds Presented Evidence that Potentially Brought Claims Covered under the Policy.

The allegations or legal theories in a complaint do not need to be precise in order to trigger the insurer's duty to defend. See *Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir. 2008); See Fed. R. Civ. P. 8. The rationale behind this rule is that "[t]he question of coverage should not hinge on the draftsmanship skills or whims on the plaintiff in the underlying action." *International Ins. Co. v. Rollprint Packaging Prods.*, 728 N.E.2d 680, 689 (1st Cir. 2008).

Moreover, courts have ruled that when a complaint asserted against an insured is legally deficient or ambiguous, the insurer is required to investigate the facts that are not present in the complaint. *Snohomish Cty. v. Allied World Nat'l Assurance Co.*, 2017 U.S. Dist. LEXIS 132595, at *35 (W.D. Wash. Aug. 18, 2017) (the *Snohomish Cty.* court found that the insurer had the obligation to thoroughly investigate extrinsic evidence due to the legal deficiencies of the complaint asserted against the insured). The Nevada Supreme Court has indicated

the same and held that an insurer cannot deny its duty to defend "without at least investigating the facts behind the complaint." *Frontier Ins. Co.*, 99 P.3d at 1158.

In order to plead a claim of intentional interference with prospective business advantage in California, a plaintiff must plead the following elements:

> (1) The existence of a specific economic relationship between plaintiff and third parties that may economically benefit plaintiff;
>
> (2) Knowledge by the defendants of this relationship;
>
> **(3) Intentional acts by the defendants designed to disrupt the relationship;**
>
> - **A plaintiff must prove that the defendant engaged in an independent act that is wrongful by some legal measure, such as defamation and business disparagement.** *Della Penna v. Toyota Motor Sales, U.S.A.*, 902 P.2d 740, 751 (Cal. 1995).
>
> (4) Actual disruption of the relationship; and
>
> (5) Damages to the plaintiff.

(emphasis added) *Rickards v. Canine Eye Registration Foundation FDTN., Inc.*, 704 F.2d 1449, 1456 (9th Cir. 1983).

In order to sufficiently plead and thus survive dismissal of this cause of action, a plaintiff must specifically "plead and *prove*…that the defendant engaged in conduct that was wrongful by some *legal measure* other than the fact of interference itself." (emphasis added) *Della Penna*, 902 P.2d at 751. An act is

independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard. *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 954 (Cal. 2003). Independently actionable acts include "violations of federal or state law or unethical business practices, e.g., violence, misrepresentation, unfounded litigation, **defamation, trade libel or trade mark infringement."** (emphasis added) *PMC, Inc v. Saban Entm't, Inc.*, 52 Cal. Rptr. 2d 877, 891 (Ct. App. 1996). Thus, the tort of intentional interference with prospective economic advantage is a tort encompassing another tort or crime. *Ibid*. Here, the e-mail created the possibility that the Mr. Switzer alleged a defamation claim within tort for intentional interference with prospective business advantage.

In *Accuimage Diagnostics Corp.*, a California court dismissed a plaintiff's intentional interference with economic advantage claim because the plaintiff failed to allege that the defendant engaged in a wrongful act that was "wrongful by some legal measure other than the fact of interference itself." *Accuimage Diagnostics Corp. v. Terarecon, Inc.*, 260 F. Supp. 2d 941, 956 (N.D. Cal. 2003). In that matter, a plaintiff brought a suit against his competitors when the plaintiff believed that the competitors were trying to steal its customer base. *Id.* at 945. One of the causes of action that the plaintiff pleaded was intentional interference with

economic advantage claim, which has primarily the same elements as the cause of action plead by Switzer in the Underlying Action. *See Id*.

The *Accuimage* court held "to successfully bring this claim, plaintiff must allege **specific wrongful acts** that defendant committed that gave rise to the interference with plaintiff's alleged economic relationships." *Id.* at 957. Due to the plaintiff's conclusory recital of the elements of this tort, the court dismissed this cause of action. *Ibid*. As the court in *Accuimage* held that the conclusory recital of the elements in plaintiff's claim was insufficient, Mr. Switzer's conclusory recital of the elements under the intentional interference with prospective business advantage were legally deficient. *Ibid*.

2. The district court failed to recognize that the tort of intentional interference with prospective economic advantage is a tort encompassing another independent tort and thus the Cross-Complaint was deficiently pleaded.

Mr. Switzer was required to specify the independent act that was wrongful by some legal measure that the Insureds allegedly partook in that resulted in interfering with Switzer's prospective businesses, just as the plaintiff was required to do the same in *Accuimage*. *Id*. at 956. Nautilus never disputed this contention. See Vol. II/SER 93-95. However, Mr. Switzer failed to allege any wrongful act in this cause of action that was an independent cause of action and separate from the alleged interference itself. *PMC, Inc.*, 52 Cal. Rptr. at 891. Due to Mr. Switzer's

failure to sufficiently allege an independently wrongful act, Mr. Switzer's cause of action was legally deficient and could not be solely relied upon to ascertain Nautilus's duty to defend. *Ibid*.

Just as the Supreme Court held in *Frontier Ins. Co.*, Nautilus was required to investigate the facts behind the Underlying Action and defend its Insureds if there was arguable or possible coverage. *Frontier Ins. Co.*, 99 P.3d at 1158. Requiring an insurer to investigate the facts in underlying litigation and consider extrinsic evidence in its analysis for its duty to defend protects the insured from an insurer relying on a factually deficient complaint filed by a disinterested third party to disregard its duty to defend. See *Id.* However, Nautilus failed to conduct the requisite investigation by interviewing the proper parties and ascertaining the relevant information that related to the Cross-Complaint in the Underlying Action.

As the district court recognized, possible coverage existed where **Switzer alleged that the Insureds engaged in slander, libel, or business disparagement.** Vol. I/ ER 20. However, the duty to defend extended even further to situations where there is the possibility of such allegations. *Frontier Ins. Co.*, 99 P.3d at 1158.

A thorough investigation of the facts, which Nautilus failed to conduct, revealed that the e-mail at issue serves as prima facie evidence that one of the

independently wrongful acts that Mr. Switzer alleged in his deficient Cross-Complaint included acts of defamation, libel, and/or business disparagement. Vol. IV/ ER 555 – 614. This evidence created the possibility that a **factfinder** may have found that the Insureds were liable for defamation, libel, and/or business disparagement, which are all covered claims under the Nautilus Policy. *Frontier Ins. Co.*, 99 P.3d at 1158. However, Nautilus failed to investigate these facts behind the Cross-Complaint.

Moreover, when Nautilus was in control of the defense in the Underlying Action, Nautilus failed to file either a Motion to Dismiss or a Motion for a More Definite Statement when the legally deficient Cross-Complaint failed to provide the legally independent wrongful acts that the Insureds allegedly committed. Instead, Nautilus turned a blind eye and attempted to disclaim its duty to defend. However, due to Mr. Switzer's allegations in his deficiently plead Cross-Complaint and potential allegations of a covered claim creating the possibility for coverage, Nautilus was required to defend its Insureds. *Ibid*.

3. The district court erred in finding that the Insureds have to implicate themselves in tortious conduct in order to give rise to Nautilus's duty to defend.

An insurer's duty to defend does not rise from an insured implicating itself in a tortious act. Rather, "'[t]he duty to defend is broader than the duty to

indemnify' because it **covers not just claims under which the indemnitor is liable, but also claims under which the indemnitor could be found liable."** *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 255 P.3d 268, 277 (Nev. 2011) (citing *Frontier Ins. Co.*, 99 P.3d at 1158). The duty to defend is present regardless if it is actually determined whether an insured engaged in tortious conduct. See *Allstate Ins. Co, v. Nolte*, 2012 U.S. Dist. LEXIS 94163, at *9 (D. Nev. 2012). In fact, the United States District Court for the District of Nevada held that **"it is immaterial whether the claim asserted is false, fraudulent or unprovable. The potentiality of covered liability is the test."** (emphasis added) *Ibid*.

The district court incorrectly concluded that Nautilus does not have the duty to defend because the Insureds did "not argue - let alone offer any facts to show - that the email contains a false statement[.]" Vol. I/ ER 21. **However as the United States District Court for the District of Nevada indicated, it is immaterial whether Switzer's allegations are false, fraudulent or unprovable.** *Nolte*, 2012 U.S. Dist. LEXIS 94163, at *9. Instead, what mattered was whether the allegations in the Underlying Action, coupled with extrinsic facts, created the **possibility** of coverage. *Frontier Ins. Co.*, 99 P.3d at 1158.

In this matter, it is not the Insureds' duty to implicate themselves in tortious acts to give rise to Nautilus's duty to defend. *Nolte*, 2012 U.S. Dist. LEXIS 94163,

at *9. In fact, Insureds' position of ultimate liability is immaterial as it relates Switzer's claims. *Nolte*, 2012 U.S. Dist. LEXIS 94163, at *9. Rather, Switzer's allegations in the Underlying Action, coupled with extrinsic facts that should have been investigated by Nautilus, determined whether Nautilus was required to defend its Insureds. *Frontier Ins. Co.*, 99 P.3d at 1158.

The e-mail, responses to the propounded discovery, and the deficiently plead Cross-Complaint created the potential for coverage because the allegations in the Cross Complaint had the possibility of including independently wrongful acts of defamation, trade libel, and/or business disparagement, which would possibly cause harm if it were false. Vo. IV/ ER 555-614. Additionally, the legally deficient Cross-Complaint required Nautilus to further investigate the facts behind the Cross-Complaint and/or file a motion to dismiss or motion for a more definite statement in the Underlying Action when it controlled the defense of its Insureds. However, Nautilus did neither.

If Nautilus had completed a proper investigation, it would have found that Mr. Switzer's allegations against the Insureds included claims of defamation, slander, and/or business disparagement in the deficiently plead tort. This is especially true because Mr. Switzer's counsel attempted to add a jury instruction to include a claim for defamation in the Underlying Action. Vol. II/ SER 37-39. Due to Nautilus's failure to duly investigate the facts behind the Cross-Complaint, it left

the possibility that the legally deficient Cross-Complaint included allegations that were covered under the Policy and thus Nautilus was required to defend its Insureds.

D. The Court properly denied Nautilus's Motion for Further Relief because (1) Nautilus failed to allege a right to reimbursement in its Complaint, (2) failed to indicate to the district court and parties that it was seeking reimbursement in the declaratory relief action, and (3) failed to show that it was entitled to reimbursement under Nevada law.

1. Nautilus failed to inform the district court and the parties in this action that it was seeking reimbursement for defense costs in the Underlying Action in any pleading or motion until the district court entered a final judgment.

Rule 8 of the Federal Rules of Civil Procedure require that a plaintiff must provide in its pleading "a short and plain statement of the claim showing that the pleader is entitled to relief" and "a demand for the relief sought, which may include relief in the alternative or different types of relief." Fed. R. Civ. P. 8. The rationale behind providing such statements is to provide fair notice of the nature and basis or grounds of the claim and to provide a general indication of the type of litigation involved so that the defendant can sufficiently prepare a defense. *Immigrant Assistance Project of the L.A. Cty Fed'n of Labor v. INS*, 306 F3d 842, 865 (9th Cir. 2002).

A party is not entitled to seek relief if a party's delay in seeking relief works to the disadvantage of another. See *Mackinstosh v. California Fed. Sav. & Loan*

Ass'n, 935 P.2d 1154, 1161 (Nev. 1997). In fact, the equitable doctrine of laches may be invoked when delay by one party prejudices another party such that granting relief to the delaying party would be inequitable. *Besnilian v. Wilkinson*, 25 P.3d 187, 189 (Nev. 2001). *Baird v. Dassau*, 1 F.R.D. 275, 276 (S.D.N.Y. 1940).

In *Seven Words*, this Court held that a party's claim for money damages was untimely when the party requested declaratory and injunctive relief throughout an action and only asserted a claim for money damages after its request for declaratory and injunctive relief became moot. *Seven Words, LLC v. Network Solutions*, 260 F.3d 1089, 1098 (9th Cir. 2001). The United States District Court for the District of Nevada held the same when a party sought a claim for reimbursement of attorneys' fees when that party failed to indicate such relief in its complaint. *Alliance of Nonprofits for Ins. v. Barratt*, 2013 U.S. Dist. LEXIS 88172, at *10 (D. Nev. June 24, 2013).

Nautilus does not dispute the fact that its complaint, motions, or any other pleading before final judgment was entered failed to inform the district court or parties that it was seeking reimbursement. Thus, just as the plaintiffs in *Seven Words* and *Barratt* were not entitled to reimbursement or money damages because the plaintiffs failed to indicate that it was entitled to such relief in their complaints, Nautilus is not entitled to reimbursement of defense costs because it failed to

indicate such relief in its complaint or any other pleading. *Ibid*; *Seven Words, LLC*, 260 F.3d at 1098. Due to Nautilus's failure to indicate the district court, the Insureds, or any other party that it was seeking such relief in that action, the Insureds were prejudiced from conducting discovery relating to such attorneys' fees and the reasonableness of these attorneys' fees. *Besnilian*, 25 P.3d at 189.

Moreover and contrary to Nautilus's contentions, the Insureds repeatedly objected to the strategy that Nautilus used in retaining different defense counsel in the Underlying Action. Vol. I/ SER 26-35. For example, Nautilus chose to change counsel for the Insureds at least twice in the Underlying Action to the protest and objection of the Insureds. *Ibid*. Nautilus also failed to provide a sufficient explanation as to its decision to repeatedly change counsel. *Ibid*.

By having at least three different firms defend the Insureds, Nautilus unnecessarily increased the costs of litigation because each firm billed for "becoming acquainted" with the Underlying Action rather than properly defending its Insureds. Furthermore, Nautilus's last ditch effort to seek reimbursement after the district court already entered a final judgment prevented the Insureds from ascertaining Nautilus's reasons to unnecessarily increase the defense costs in the Underlying Action. Vol. I/ ER 5-11.

In its brief, Nautilus fails to provide any binding legal authority that supports its contention that it should be entitled to reimbursement when it failed to seek such relief in its complaint. See Dkt. 15. Instead, Nautilus improperly argued that after the district court entered its judgment regarding Nautilus's declaratory relief action, the district court should have awarded additional relief that was not requested in Nautilus's complaint or any other pleading. *Ibid*. However, this Court and United States District Court for the District of Nevada has made clear that a plaintiff that fails to request such monetary relief in its complaint cannot seek such relief after a matter is moot or decided with a final judgment. *Barratt*, 2013 U.S. Dist. LEXIS 88172, at *10; *Seven Words, LLC*, 260 F.3d at 1098.

2. Nautilus is not entitled to reimbursement under Nevada law.

a. Availability of attorneys' fees in diversity cases depends on state law in diversity cases

As indicated above, a district court sitting in diversity must apply state law to substantive issues. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996). "When interpreting state law, federal courts are bound by decisions of the state's highest court." *In re Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990). In deciding whether to award attorneys' fees from a separate action, a federal court sitting in diversity must apply state law when those fees are connected with the substance of the case. *Galam v. Carmel (In re Larry's Apartment, LLC)*, 249 F.3d 832, 837 (9th Cir. 2001). "The availability of attorneys' fees in diversity cases

depends upon state law, and this holds true in declaratory judgment actions." *Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265, 273 (1st Cir. 1990) (citing *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 259 n.31).

In Nevada, a party's fees and costs are not recoverable unless authorized by statute, rule, or contract. *Great W. Cas. Co. v. See*, 185 F. Supp. 2d 1164, 1173 (D. Nev. 2002)(citing *State Dep't of Human Res. v. Fowler*, 858 P.2d 375, 376 (Nev. 1993)); *Great Am. Is. Co. v. Vegas Constr. Co.*, 2008 U.S. Dist. LEXIS 81447, at *27 (D. Nev. Apr. 24, 2008). Thus, Nevada is not entitled to reimbursement of defense costs in the Underlying action unless such reimbursement is authorized by a statute, rule, or the contract. *Ibid*.

b. Nautilus failed to indicate a right to reimbursement in any contract that it provided to its Insureds, including the Policy that the Insureds procured from Nautilus.

"An insurance policy is a contract between a policyholder and an insurer in which the policyholder agrees to pay premiums in exchange for financial protection from foreseeable, yet preventable events." *Benchmark Ins. Co. v. Sparks*, 254 P.3d 617, 620 (Nev. 2011) (citing New Appleman Insurance Law Practice Guide § 1.03). Insurance policies are contracts of adhesion because the policies are drafted by the insurer and are offered to the policyholder without any opportunity for the policy holder to negotiate the policy's terms. *Ibid*. As the insurer is the drafter of an insurance policy and thus can limit its contractual

obligations, any ambiguities in a policy of insurance are "interpreted against the insurer and in favor of the insured." *Frontier*, 99 P.3d at 1156.

In this matter, the Policy governed the obligations of the parties. *Ibid*. As Nautilus was the drafter of the Policy and thus could have limited its contractual obligations, any ambiguities in the Policy were interpreted against Nautilus. *Ibid*. Specifically, Nautilus, as the drafter of the Policy, could have implemented a provision from which it had the right to seek reimbursement of defense costs it pays on behalf of its Insureds. *Ibid*. However, Nautilus failed to do so. Due to Nautilus's failure to provide a reimbursement provision in the Policy that it drafted, Nautilus cannot rely on the Policy in order to seek reimbursement costs.

c. Nevada has never held that reservation of rights letters that are objected by the Insureds create a right to reimbursement as a matter of law.

Nautilus improperly contends that Nevada provides that a reservation of rights letter, from which the Insureds placed an objection, entitled Nautilus to reimbursement of defense costs although Nautilus failed to provide for such a provision in its Policy. Vol. IV/ ER 615-666. However, Nautilus fails to cite any authority from the Nevada Supreme Court that supports this contention. See Dkt. Entry 15. Instead, Nautilus cites district court cases that either referenced or interpreted California law. *Ibid*. Nautilus, however, agrees that Nevada law applies

to the interpretation of the insurance policy, not California law. See Vol. II/SER 92-93.

Moreover, Nautilus erroneously cites *Blazer* for the contention that a reservation of rights letter is sufficient to find that the insured and insurer agree that the insurer has the right to reimbursement of defense costs. Dkt. Entry 15. The district court made no such holding in *Blazer* and only found that the insurer failed to provide evidence that the parties agreed that the insurer could be reimbursed for defense costs. *Capitol Indem. Corp v. Blazer*, 51 F. Supp. 2d 1080, 1090 (D. Nev. 999). In fact, none of these cases provided by *Nautilus* cited any authority from a Nevada state court. The Supreme Court of Nevada has never held that a unilateral reservation of rights letter creates the right to reimbursement when reimbursement is not found in an insurance policy. See *Id*.

In fact, several courts have held that a unilateral reservation of rights letter cannot create rights not contained in the insurance policy itself. *Am. & Foreign Ins. Co. v. Jerry's Sport Ctr. Inc.*, 2 A.3d 526, 539 (Pa. 2010); See *Shoshone First Bank v. Pacific Emplrs. Ins. Co.*, 2 P.3d 510, 510 (Wyo. 2000); *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42 (Tex. 2008). The rationale behind this holding is "an insurer benefits unfairly if it can hedge on its defense obligations by reserving its right to reimbursement while potentially controlling the defense and avoiding a bad faith

claim." *Ibid* (citing *Excess Underwriters at Lloyd's, London, v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 68 (Tex. 2008)); *Shoshone First Bank v. Pacific Emplrs. Ins. Co.*, 2 P.3d 510, 510 (Wuo. 2000).

The Nevada District Court followed this approach in another matter when interpreting an insurance contract under another state law and held that "there is no right to reimbursement of defense costs when the insured has not agreed to reimbursement either in the policy itself or in a separate agreement. *Ohio Cas. Ins. Co. v. Biotech Pharm., Inc.*, 547 F.Supp. 2d 1158, 1160 (D. Nev. 2008). Due to Nautilus's failure to provide any binding legal authority in Nevada that supports its contention that it is entitled to reimbursement when it is not indicated in the Policy and the parties never agreed to such an agreement outside of the Policy, Nautilus cannot establish that it is entitled to reimbursement under Nevada law.

d. 28 U.S.C. § 2202 does not allow reimbursement of attorneys' fees in the Underlying Action when Nautilus made no claim in its Complaint or any other pleading or motion with the district court until final judgment was entered.

The Declaratory Judgment Act authorizes federal courts to grant declaratory relief and is procedural only. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). In fact, this Act "does not create any new substantive right but rather creates a procedure for adjudicating existing rights." *Western Casualty & Surety Co. v. Herman*, 405 F.2d 121, 124 (8th Cir. 1968).

Section 2202 of the Declaratory Judgment Act "does not by itself provide statutory authority to award attorney's fees that would not otherwise be available under state law in a diversity action." *Mercantile Nat'l Bank v. Bradford Trust Co.*, 850 F.2d 215, 218 (5th Cir. 1988); *Schell v. OXY USA, Inc.*, 814 F.3d 1107, 1127 (10 Cir. 2016) ("We have never recognized § 2202 as an independent basis to award attorneys' fees –viz., as an additional ground for such fees beyond the four well-recognized exceptions to the American Rule."); *Jackson v. Mayo*, 975 So. 2d 815, 825 (2nd Cir. 2008)("[I]n the analogous situation of "further relief" under the federal Declaratory Judgment Act, 28 U.S.C. § 2202, attorney fees are disallowed unless provided by contract or substantive statute.").

Nautilus fails to provide any support that § 2202 alone provides the right to reimbursement when it failed to seek relief in its Complaint. Most surprisingly, Nautilus fails to cite its reasons for failing to include a reimbursement claim in its Complaint.

Each case cited by Nautilus regarding the Declaratory Judgment Act fails to discuss a party seeking reimbursement in a separate action and thus Nautilus took each holding out of context. For example, Nautilus cites to *Compass* to contend that the district court held that the Declaratory Judgment Act allows a party to seek money damages in order to effectuate a grant of declaratory relief. Dkt. Entry 15, p. 25. However, the district court held that attorneys' fees cannot be awarded in

actions based on diversity jurisdiction unless such fees are awarded by statute, rule or contract. Vol. I/ ER 10. Even if the district court awarded attorneys' fees pursuant to § 2202, it was for attorneys' fees expended in the declaratory action and not a separate action. See Dkt. Entry 15, p. 25.

Moreover and contrary to Nautilus's interpretation of the law, the United States District Court for the District of Nevada analyzed whether a plaintiff should be entitled to receive damages and attorneys' fees pursuant to 28 U.S.C. § 2202. *Barrat*, 2013 U.S. Dist. LEXIS 88172, at *9. In *Barratt*, the plaintiff sought attorneys' fees and other monetary damages after the district court granted a declaratory judgment in the plaintiff's favor. *Id*, at *3. The district court initially granted the plaintiff attorneys' fees under 42 U.S.C. § 1983, but the Ninth Circuit Court of Appeals vacated the award of fees on the basis that 42 U.S.C. § 1983 did not provide an enforceable right for the plaintiff to seek fees as the prevailing party under another statute. *Id*, at *3-4. This Court subsequently remanded the case for further proceedings consistent with the opinion. The plaintiff subsequently filed a motion with the district court seeking additional damages, including lost profits, and attorneys' fees pursuant to 28 U.S.C. § 2202. *Ibid*. Contrary to Nautilus's representations, the plaintiff filed a motion seeking additional damages, including lost profits and attorneys' fees pursuant to 28 U.S.C. § 2202 because the plaintiff had no other statutory basis for seeking attorneys' fees. *Id*, at *7.

Having no statute that allowed the plaintiff to receive monetary damages, the district court considered awarding such damages under its inherent powers. *Id.*, at *9. However, the *Barrat* court declined to issue attorneys' fees because it was not necessary to effectuate relief. *Ibid.* Most importantly, the district court declined to award monetary relief in the declaratory action because the plaintiff never sought these damages in its complaint. *Id.*, at *10. Rather, the plaintiff only requested these monetary damages after it received a judgment in its favor in the declaratory relief action. *Ibid*. "While the court [was] not blind to the damages plaintiff represents it incurred as a result of defendants' conduct, the court simply does not find that awarding damages under 28 U.S.C. § 2202 as necessary to effectuate the relief this court has already accorded." *Id.*, at *10-11.

Just as in *Barratt*, Nautilus is seeking monetary damages in the form of attorneys' fees in the Underlying Action when it failed to indicate such relief in its complaint or any other pleading. *Barratt*, 2013 U.S. Dist. LEXIS 88172, at *9. However, just as in *Barratt* where the plaintiff was not entitled to seek further relief in the form of damages because it failed to provide notice during litigation that it was seeking such relief before a judgment was entered, Nautilus is not entitled to seek further relief because it failed to provide notice that it was seeking such relief before the judgment seeking declaratory relief was entered. *Ibid*.

Similar to Nautilus's analysis in *Barratt*, Nautilus also erroneously cites California district court cases to contend that it is entitled to reimbursement in the Underlying Action although it never sought such relief in its Complaint. Dkt. Entry 15, pp. 28-30. However, even in the case that Nautilus cited in the California district court, *Omaha Indem. Ins. Co.*, the district court found that "Omaha Indemnity allege[d] the right to reimbursement of legal expenditures in its complaint." *Omaha Indem. Ins. Co. v. Cardon Oil Co.*, 687 F. Supp. 502, 504 (N.D. Cal. 1998).

Thus, the similarity that Nautilus attempts to create between itself and Omaha Indemnity are erroneous because unlike the insurer in *Omaha*, Nautilus never indicated that it sought reimbursement in its Complaint, much less any other pleading or motion until after the declaratory relief was given. Moreover, unlike the insureds in *Omaha*, the Insureds objected to Nautilus's strategy of the defense in the Underlying Action. Vol. II/SER55-59. Due to Nautilus's failure to take the requisite steps in order to seek reimbursement, the district court properly held that Nautilus was not entitled to further relief.

Moreover, Nautilus never sought a declaration, and thus the district court never entered a judgment, that it never had the duty to defend its Insureds. Vol IV/ ER 615-666. Rather, Nautilus only sought a declaration that it has no duty to defend its Insureds. *Ibid*. The Court's role in the declaratory judgment in the

declaratory relief action was to ascertain the rights of the parties to resolve the question of coverage in order to eliminate uncertainty, which the Court already provided. 28 U.S.C. § 2201. After the district court granted the relief Nautilus requested, Nautilus decided to unilaterally alter the judgment without filing the requisite motions, which is an improper overreach of the final judgment. See *Id*.

E. The district court did not abuse its discretion when it declined to set aside the judgment in order to have Nautilus amend its Complaint.

A party cannot amend its complaint in absence of a FRCP 59(e) or FRCP 60(b) motion after a final judgment has been entered because the complaint is merged into the judgment and thus the district court no longer has subject matter to review the complaint. *Cooper v. Shumway*, 780 F.2d 27, 29 (10th Cir. 1985); *FDIC v. Weise Apartments –44457 Corp.*, 192 F.R.D. 100, 103 (S.D.N.Y. 2000) (citing *Paganis v. Blonstein*, 3 F.3d 1067, 1072 (7th Cir. 1993)). Courts properly and routinely deny motions to amend the complaint after a party has filed a motion for summary judgment when discovery has closed and the time to amend pleadings pursuant to the court's scheduling order has lapsed. *John Morrel & Co. v. Royal Caribbean Cruises, Ltd.*, 243 F.R.D. 699, 701 (S.D. Fla. 2007)(denying leave to amend the complaint after the plaintiff failed to show good cause in its failure to amend its complaint before the deadline pursuant to the scheduling order lapsed); *Cooper*, 780F.2d at 20 (finding that the district court did not abuse its discretion in refusing to grant the plaintiff leave to amend his complaint after final judgment).

Motions to amend the judgment and motions to amend the complaint are reviewed by this Court for abuse of discretion. *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1014 (9th Cir. 1985).

In this matter, Nautilus failed to file a Rule 59(e) or Rule 60(b) motion to reopen the judgment to amend its complaint. For that reason alone, the district court properly disallowed Nautilus to amend its complaint. Moreover, in the year after Nautilus filed its Complaint, Nautilus failed to indicate to the parties or other district court that it sought reimbursement of its attorneys' fees in the Underlying Action in its declaratory relief action. Thus, none of the parties were able to conduct the requisite discovery as it related to the reasonableness of defense costs procured in the Underlying Action. In fact, Nautilus failed to inform the district court and the parties of its reimbursement claim until after the district court already entered final judgment, nearly two years after Nautilus filed its complaint. Due to Nautilus's dilatory tactics of failing to inform the parties of its claims, the district court properly denied Nautilus's request to amend its complaint. *Ibid*.

F. Nautilus is not entitled to pre-judgment or post-judgment interest because the district court properly denying Nautilus's claim for reimbursement.

In actions from which diversity jurisdiction is invoked, such as this, prejudgment interest is a substantive matter governed by state law. *United States Fid. & Guar. Co. v. Lee Invs., LLC*, 641 F.3d 1126, 1139 (9th Cir. 2011). Contrary

to Nautilus's assertions, NRS 17.130 only allows prejudgment interest from the filing of the Complaint if a party was awarded damages. Similarly, post judgment interest is only allowed where a money judgment has been recovered. 28 U.S.C. § 1961. Due to Nautilus's failure to receive a monetary judgment or specify in its appellate brief the monetary judgment that it believes it received in this action, Nautilus is not entitled to receive prejudgment or post judgment interest in this matter.

VIII. CONCLUSION

The Insureds respectfully requests that this Court reverse the district court's order denying the Insureds' Motion for Reconsideration and affirm the district court's order denying Nautilus's Motion for Further Relief.

Dated this 22nd day of December, 2017.

Kravitz, Schnitzer & Johnson, Chtd.

By:/s/ L. Renee Green,
MARTIN J. KRAVITZ
L. RENEE GREEN

JORDAN P. SCHNITZER
THE SCHNITZER LAW FIRM

Attorneys for Defendants, Appellants
ACCESS MEDICAL, LLC and
ROBERT CLARK WOOD, II

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Access Medical, LLC and Robert Clark Wood, II hereby provide the following related cases pending before the United States Court of Appeals for the Ninth Circuit:

- *Nautilus Insurance Co. v. Access Medical, LLC et al* (Case No. 17-16840):
- Nautilus Ins. Co. v. Access Medical, LLC et al (Case No. 17-16842)

Dated this 22nd day of December, 2017.

Kravitz, Schnitzer & Johnson, Chtd.

By:/s/ L. Renee Green,
MARTIN J. KRAVITZ
L. RENEE GREEN

Attorneys for Defendants, Appellants
ACCESS MEDICAL, LLC and
ROBERT CLARK WOOD, II

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2017, I electronically filed Access Medical, LLC and Robert Clark Wood, II's Principal and Response Brief in addition to the Supplemental Appendix to the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated this 22nd day of December, 2017 Kravitz, Schnitzer & Johnson, Chtd.

By: /s/ Cyndee Lowe

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-16265, 17-162

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is 9,940 words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: /s/ L. Renee Green, Esq.

Date: 12/22/2017

("s/" plus typed name is acceptable for electronically-filed documents)

Joint Appendix

Tab #7

Appeal Nos. 17-16265(lead), 17-16272, 17-16273

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAUTILUS INSURANCE COMPANY,
Plaintiff-Appellant-Cross-Appellee

v.

ACCESS MEDICAL, LLC and ROBERT CLARK WOOD, II, FLOURNOY MANAGEMENT, LLC,

Defendants-Appellees-Cross-Appellants,

On Appeal from the United States District Court,
for the District of Nevada
The Honorable Jennifer A. Dorsey, Untied States District Judge
Case No. 2:15-cv-00321-JAD-GWF

ACCESS MEDICAL, LLC and ROBERT CLARK WOOD, II'S, SUPPLEMENTAL EXCERPTS OF RECORD VOLUME 1 OF 2

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5	37	Exhibit "E"" in Support of the Application for an Order Directing or Indicating to the United States Court of Appeals for the Ninth Circuit that the District Court will Grant or Entertain Defendants Access Medical, LLC and Robert Clark Wood, II's Motion for Relief from Judgment Pursuant to Rule 60(b)(2)-Excerpt of Trial Testimony of Mr. Carrigan	128-5
6	40	Exhibit "B" to Access Medical, LLC and Robert Wood, II's Reply to Nautilus Insurance Company's Opposition to the Insureds' Motion for Reconsideration	99-2
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16	82	Exhibit "Q" to the Index of Exhibits in Support of Defendants Access Medical, LLC and Robert "Sonny" Wood, II's Opposition to Plaintiff's Motion for Partial Summary Judgment and Countermotion for Summary Judgment – Electronic Correspondence to Nautilus dated February 24, 2014	41-17
17	84	Declaration of Jordan P. Schnitzer, Esq. In Support of Access Medical, LLC and Robert "Sonny" Wood, II's Opposition to the Partial Motion for Summary Judgment and Countermotion for Summary Judgment	41-22
18	87	Docket Sheet from the District Court of Nevada	N/A
19	101	Certificate of Service	N/A

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NAUTILUS INSURANCE COMPANY, Plaintiff, v. ACCESS MEDICAL, LLC; ROBERT CLARK WOOD, II; FLOURNOY MANAGEMENT, LLC; and DOES 1-10, Inclusive, Defendants.	Case No. 2:15-cv-00321-JAD-GWF **NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that, pursuant to Fed. R. App. P. 3, Defendants ACCESS MEDICAL, LLC and ROBERT CLARK WOOD, II ("Defendants") in the above named case, *NAUTILUS INSURANCE COMPANY v. ACCESS MEDICAL, LLC, et al*, hereby appeal to the United States Court of Appeals for the Ninth Circuit the United States District Court for the District of Nevada's Order Denying Request for Consideration of Motion for Relief from

Judgment (ECF No. 118) entered in this action on the 11th day of August, 2017("Order") (a copy of which is attached hereto as **Exhibit "A"**).

Defendants' Motion is timely pursuant to Fed. R. App. P. 4 as this Notice of Appeal was filed within thirty (30) days after entry of the Order.

Pursuant to Circuit Rule 3-2 of the United States Court of Appeals for the Ninth Circuit, Defendants' Representation Statement is attached to this Notice of Appeal.

DATED this 8th day of September, 2017.

KRAVITZ, SCHNITZER & JOHNSON, CHTD.

/s/ L. Renee Green

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REPRESENTATION STATEMENT

The undersigned represents Defendants ACCESS MEDICAL, LLC and ROBERT CLARK WOOD, II, in this matter and no other party. Pursuant to Rule 12(b) of the Federal Rules of Appellate Procedure and Circuit Rule 3-2(b), Defendants ACCESS MEDICAL, LLC and ROBERT CLARK WOOD, II submit this Representation Statement. The following list identifies all parties to the action, and it identifies their respective counsel by name, firm, address, telephone number, and e-mail, where appropriate:

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DATED this 8th day of September, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of KRAVITZ, SCHNITZER & JOHNSON, CHTD., and pursuant to Local Rule 5.1, service of the foregoing **NOTICE OF APPEAL** was served this 8th day of September, 2017 via the Court's CM/ECF electronic filing system addressed to all parties on the e-service lists, as follows:

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EXHIBIT "A"

EXHIBIT "A"

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Nautilus Insurance Company,

Plaintiff

v.

Access Medical, LLC, et al.,

Defendants

2:15-cv-00321-JAD-GWF

Order denying request for consideration of motion for relief from judgment

[ECF Nos. 115, 117]

Nautilus Insurance Company sued for a declaration that it did not owe a duty to defend or indemnify its insureds for a state lawsuit they are defending. I granted summary judgment in favor of Nautilus,[1] after concluding that its policy extends coverage only to claims arising from slander or libel and that the state-court claims asserted against the defendants did not allege either. The defendants asked me to reconsider my order, but I declined because their arguments for reconsideration merely repackaged the arguments in their prior briefing.[2] The defendants now ask me to reconsider my decision again, this time in the guise of a motion for relief from judgment under Federal Rule of Civil Procedure 60. Because this case is on appeal, the defendants first ask that I issue an order stating that I will entertain their Rule 60 motion. But because their arguments have no merit, I decline to do so.

The problem is that the defendants' Rule 60 argument is self-defeating. They argue that they meet the requirements of Rule 60 because they discovered brand new evidence that neither I nor Nautilus has seen before. But brand new evidence has no relevance to this case. Nautilus's complaint sought a declaration that the insurer had no coverage based on the evidence it had *when it filed this case*. It did not seek a declaration about whether it would owe coverage in the future based on newly-discovered evidence. And in any event, this new evidence does not appear to trigger

[1] ECF No. 70.

[2] ECF Nos. 80, 81.

coverage. I thus decline the defendants' request to consider their Rule 60 motion.[3]

Discussion

Nautilus's policy requires it to defend the defendants against claims arising from "oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services[.]"[4] Nautilus's duty to defend arises not only when there is clear coverage, but also whenever it "ascertains facts [that] give rise to the potential of liability under the policy."[5] Defendants thus needed to point to allegations or evidence that Nautilus knew of, which amounts to a potential claim of a "publication" of "material that slanders or libels."

The defendants have argued throughout this case that the claims asserted against them in the state-court action could potentially include an allegation of slander or libel in the future, so Nautilus should defend them. They rely on (1) the fact that the intentional-interference claim asserted against them could, theoretically, be based on a allegations that the defendants committed slander or libel; and (2) that the plaintiff in the underlying state case is likely to allege slander or libel because he discovered an email in which one of the defendants lied to customers about the plaintiff being banned from selling certain products.

When I addressed these same arguments in my previous orders, I explained that because the plaintiff in the state action has never alleged that he is suing the defendants for defamation (either on its own or as part of the intentional-interference claim) coverage under Nautilus's policy has not been triggered. I held that the email did not put Nautilus on notice of coverage because no allegations in the state case, nor any other independent evidence, suggested that the statements made

---

[3] The defendants separately file an "emergency" motion for an order shortening time. ECF No. 115. Our local rules explain that emergency motions "are not intended for requests for procedural relief, e.g., a motion to extend time." LR 7-4. Our rules further clarify that emergency motions will not be entertained unless the moving part attaches a declaration detailing what efforts were made to confer with the other party. The defendants run afoul of both of these requirements, so I deny their emergency motion.

[4] *Id.* at 22.

[5] *Id.* (quotation omitted).

in the email were the sort of false statements that could support a slander or libel claim.

Defendants now argue that they have discovered new evidence in the state case that confirms this email is likely to contain a false statement that will expose them to potential slander liability. When the plaintiff in the underlying case was recently deposed, he said that he was not banned from selling products, but only that he was threatened with a potential future ban. The defendants conclude that this testimony indicates that the defendant's email is at least arguably a slanderous statement—which would trigger Nautilus's duty to defend.

The biggest problem with the defendants' theory is procedural. Nautilus's complaint sought a declaration that it owed no duty to defend based on the information it had at the time it filed this case. It did not seek a declaration about whether it might owe a duty to defend in the future—such as if it were presented with new evidence that triggers coverage under its policy. And that is what my prior orders say: Nautilus owed no duty because there were not yet any allegations or evidence triggering coverage.[6] So even if the defendants are right that there is newly-discovered evidence warranting relief under Rule 60, newly-discovered evidence is not relevant to the relief that Nautilus requested in this case.[7]

And in any event, this new evidence probably does not trigger Nautilus's coverage. Although the plaintiff in the underlying case suggests that the defendants exaggerated in an email about whether he was banned from selling products, it remains unclear that the statements in the email are false and meet the other elements of slander or disparagement under the applicable state law (e.g., there is no evidence that the communications were unprivileged).[8] Not to mention that nowhere in the plaintiff's complaint in the state case is it alleged that the defendants made any false statement; indeed, this email is not even mentioned. Even if I were able to get to the merits here, I

---

[6] ECF No. 70.

[7] To be sure, there is another sort of new evidence that would be relevant here. If the defendants discovered evidence triggering coverage and showed that Nautilus knew of it before, that evidence would potentially implicate this case.

[8] *Shivley v. Bozanich*, 80 P.3d 676, 682–83 (Cal. 2003).

would continue to hold that Nautilus has no coverage obligation.[9]

Conclusion

Accordingly, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the **defendants' application for an order indicating that the district court will entertain a motion for relief from judgment [ECF No.117] is DENIED.**

IT IS FURTHER ORDERED that **the defendants' motion for emergency order shortening time [ECF No. 115] is DENIED.**

Dated this 11th day of August, 2017

Jennifer A. Dorsey
United States District Judge

[9] The proper course would likely be for the defendants to file a new case based on these new events.

Joint Appendix

Tab #8

Appeal Nos. 17-16265(lead), 17-16272, 17-16273

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAUTILUS INSURANCE COMPANY,
Plaintiff-Appellant-Cross-Appellee

v.

ACCESS MEDICAL, LLC and ROBERT CLARK WOOD, II, FLOURNOY MANAGEMENT, LLC,

Defendants-Appellees-Cross-Appellants,

On Appeal from the United States District Court,
for the District of Nevada
The Honorable Jennifer A. Dorsey, Untied States District Judge
Case No. 2:15-cv-00321-JAD-GWF

ACCESS MEDICAL, LLC and ROBERT CLARK WOOD, II'S, SUPPLEMENTAL EXCERPTS OF RECORD VOLUME 2 OF 2

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18	87	Docket Sheet from the District Court of Nevada	N/A
19	101	Certificate of Service	N/A

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NAUTILUS INSURANCE COMPANY,

Plaintiff,

v.

ACCESS MEDICAL, LLC; ROBERT CLARK WOOD, II; FLOURNOY MANAGEMENT, LLC; and DOES 1-10, Inclusive,

Defendants.

Case No. 2:15-cv-00321-JAD-GWF

ACCESS MEDICAL, LLC AND ROBERT CLARK WOOD, II'S APPLICATION FOR AN ORDER DIRECTING OR INDICATING TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT THAT THE DISTRICT COURT WILL GRANT OR ENTERTAIN ACCESS MEDICAL, LLC AND ROBERT CLARK WOOD, II'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(2)

Pursuant to the United States Court of Appeals for the Ninth Circuit's holding in *Smith v. Lujan*, 588 F.2d 1304, 1307 (9th Cir. 1979), Access Medical, LLC and Robert Clark Wood, II

(hereinafter the "Insureds") request that this Court issue an order determining its inclination to grant or entertain the Insureds' Motion for Relief from Judgment Pursuant to Rule 60(b)(2) (hereinafter the "Motion"), which is attached as **Exhibit A** to this Application. If the Court is inclined to grant and/or entertain this Motion, the Insureds will move for the United States Court of Appeals for the Ninth Circuit to remand this case to this Court to decide the Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION AND FACTS

This Court should entertain or grant the Insureds' Motion for Relief from Judgment because less than a month ago, the Insureds received newly discovered evidence that further substantiates Nautilus Insurance Company's duty to defend the Insureds in the Underlying Action. The main concern of the Court in this matter was whether the e-mail at issue, which states that Ted Switzer was banned from selling Alphatec products, contained an allegedly false statement that created Nautilus Insurance Company's duty to defend.

The newly discovered evidence, which consists of trial testimony in the Underlying Action, reveals that Mr. Switzer believes that Sonny Wood made a false statement about him that affected Mr. Switzer's business. Moreover, counsel for Mr. Switzer explicitly asked the court in the Underlying Action to include a jury instruction for false representation due to the statements made by Ms. Weide in the e-mail at issue. Due to the fact that the trial testimony was not available at the time the Court entered its orders regarding the Insureds' Motion for Reconsideration and initial Application, but the newly discovered evidence relates to the same facts alleged in the Underlying Action, the Insureds request that the Court grant the Insureds Relief from the judgment pursuant to Rule 60 of the Federal Rules of Civil Procedure and enter judgment in their favor.

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II.

LEGAL ANALYSIS

A. This Court has the power to indicate to the United States Court of Appeals for the Ninth Circuit whether it will grant or entertain the Insureds' Application for Relief from Judgment Pursuant to Rule 60(b).

In *Smith v. Lujan*, the United States Court of Appeals for the Ninth Circuit outlined the procedure for a district court hearing a Rule 60(b) motion after a party files a notice of appeal. *Smith v. Lujan*, 588 F.2d 1304, 1306 (9th Cir. 1979). In that matter, the appellant filed a motion under Rule 60(b) for relief from judgment before the appeal was filed, which the Ninth Circuit Court of Appeals found was the proper procedure. *Ibid.* However, the party filed another Rule 60(b) motion after it filed notice of appeal, which the district court denied. *Ibid.* The party then appealed the district court order denying second the Rule 60(b) motion. *Ibid.* The Ninth Circuit Court of Appeals held that, unless remanded to a district court, a district court lacks jurisdiction to adjudicate a Rule 60(b) motion after a notice of appeal has been filed. *Id.* at 1307. Instead, the proper procedure is to ask the district court to indicate if it wishes to entertain or grant the motion. *Ibid.* If the district court is indicates that it is so inclined, then the party must ask the Ninth Circuit Court of Appeals to remand the case. *Ibid.*

B. This Court should grant the Insureds' Motion for Relief from Judgment due to the fact newly discovered evidence further demonstrates Nautilus Insurance Company's duty to defend.

As outlined in *Smith v. Lujan*, the Insureds ask this Court to indicate if it wishes to entertain or grant the Insureds' Motion for Relief from Judgment Pursuant to Rule 60(b), which is attached as an exhibit hereto, due to the Insureds' receipt of new evidence. See *Id.* at 1306. Appellate courts consider "evidence pertain[ing] to facts in existence at the time of trial, and not to facts that have occurred subsequently" as newly discovered evidence as indicated in Rule 60(b) of the Federal Rules of Civil Procedure. *Kettenbach v. Demoulas*, 901 F. Supp.486, 494

(D. Mass. 1995) (referring to *Chilson v. Metropolitan Transit Auth.*, 496 F.2d 69, 72 (5th Cir. 1986)). "[W]hether the evidence itself came into existence after trial is immaterial." *Id.* at *498..

C. The Court has the authority to consider newly discovered evidence in accordance to Rule 60(b) that pertains to facts in existence at the time of judgment but were developed after the judgment.

In *Chilson v. Metropolitan Transit Authority*, the plaintiff brought an action against his former employer alleging he was discharged in retaliation for criticism of his employer's decision to contract with a third party. *Chilson v. Metro. Transit Auth.*, 796 F.2d 69, 69 (5th Cir. 1986). The jury found that the plaintiff's criticism, which encompassed critiques that the contract wasted public funds, was not the reason for the plaintiff's termination. *Ibid.*

After the verdict, the employer performed an internal audit of the company that revealed excessive overpayments on the questioned contract. *Ibid.* The plaintiff filed a Rule 60(b)(2) motion citing newly discovered evidence of the findings in in the internal audit. *Id.* at 70. The district court judge denied the plaintiff's motion "on the ground that the audit was not 'newly discovered evidence' within the meaning of the rule" but was instead 'new' evidence. *Ibid.*

On appeal, the appellate court reversed the district court's decision and found that although the audit occurred after the verdict, the overpayments from which the audit uncovered predated the judgment. *Ibid.* Thus, the evidence from the audit encompassed the "newly discovered evidence" as indicative of the term in Rule 60(b). *Ibid.*

Just as the *Chilson* court found that the evidence from the audit was newly discovered evidence as found in Rule 60(b) because that evidence concerned matters in the plaintiff's action although the audit itself occurred after the jury trial, the Insureds uncovered newly discovered evidence in trial testimony, which occurred after this Court entered its order, that concerned the same matters in Nautilus's duty to defend. *Ibid.* Thus, this Court should consider this newly discovered evidence in deciding Nautilus's duty to defend. *Ibid.* Moreover, this Court is better

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inclined to decide the Insureds' Motion because of the Court's knowledge of the record and its ability to decide this matter on the merits. Moreover if appellate consideration is needed, then the appellate record can be based on all the evidence reviewed by the trial court.

III.

CONCLUSION

This Court should consider the newly discovered evidence that is based on Nautilus's duty to defend in the Underlying Action because this newly discovered evidence further substantiates Nautilus Insurance Company's duty to defend. Based upon the foregoing, the Insureds file this Application to request that this Court will grant or entertain their Motion for Relief from Judgment Pursuant to Rule 60(b).

DATED this 3rd day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of KRAVITZ, SCHNITZER & JOHNSON, CHTD., and pursuant to Local Rule 5.1, service of the foregoing **ACCESS MEDICAL, LLC AND ROBERT CLARK WOOD, II'S APPLICATION FOR AN ORDER DIRECTING OR INDICATING TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT THAT THE DISTRICT COURT WILL GRANT OR ENTERTAIN ACCESS MEDICAL, LLC AND ROBERT CLARK WOOD, II'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(2)** was served this 3rd day of November, 2017 via the Court's CM/ECF electronic filing system addressed to all parties on the e-service lists, as follows:

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NAUTILUS INSURANCE COMPANY,

Plaintiff,

v.

ACCESS MEDICAL, LLC; ROBERT CLARK WOOD, II; FLOURNOY MANAGEMENT, LLC; and DOES 1-10, Inclusive,

Defendants.

Case No. 2:15-cv-00321-JAD-GWF

INDEX OF EXHIBITS IN SUPPORT OF DEFENDANTS ACCESS MEDICAL, LLC AND ROBERT CLARK WOOD, II'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

COME NOW, Defendants ACCESS MEDICAL, LLC and ROBERT CLARK WOOD II, by and through their attorneys of record, the law firm of KRAVITZ, SCHNITZER & JOHNSON, CHTD. and THE SCHNITZER LAW FIRM, and hereby submits the following

Index of Exhibits in Support of its Motion for Relief from Judgment Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

EXHIBIT	DESCRIPTION
A.	Defendants Access Medical, LLC and Robert Clark Wood, II's Motion for Relief from Judgment Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure
B.	Excerpt of Trial Testimony of Jacqueline Weide
C.	Excerpt of Trial Testimony of Theodore Switzer
D.	Excerpt of Trial Testimony of Dixie Switzer
E.	Excerpt of Trial Testimony of Mr. Carrigan

DATED this 3rd day of November, 2017.

KRAVITZ, SCHNITZER & JOHNSON, CHTD.

/s/ L. Renee Green

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of KRAVITZ, SCHNITZER & JOHNSON, CHTD., and pursuant to Local Rule 5.1, service of the foregoing **INDEX OF EXHIBITS IN SUPPORT OF DEFENDANTS ACCESS MEDICAL, LLC AND ROBERT CLARK WOOD, II'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE** was served this 3rd day of November, 2017 via the Court's CM/ECF electronic filing system addressed to all parties on the e-service lists, as follows:

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EXHIBIT A

DEFENDANTS ACCESS MEDICAL, LLC AND ROBERT CLARK WOOD, II'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

EXHIBIT A

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NAUTILUS INSURANCE COMPANY,

Plaintiff,

v.

ACCESS MEDICAL, LLC; ROBERT CLARK WOOD, II; FLOURNOY MANAGEMENT, LLC; and DOES 1-10, Inclusive,

Defendants.

Case No. 2:15-cv-00321-JAD-GWF

DEFENDANTS ACCESS MEDICAL, LLC AND ROBERT CLARK WOOD, II'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

COME NOW, Defendants ACCESS MEDICAL, LLC and ROBERT CLARK WOOD II, by and through their attorneys of record, the law firm of KRAVITZ, SCHNITZER & JOHNSON, CHTD. and THE SCHNITZER LAW FIRM, and hereby submit to this Court their

Motion for Relief from Judgment Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure ("Motion").

DATED this 3rd day of November, 2017.

KRAVITZ, SCHNITZER & JOHNSON, CHTD.

/s/ L. Renee Green

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Access Medical, LLC and Robert Clark Wood, II (collectively the "Insureds") recently obtained newly discovered evidence in the form of trial testimony from the California state-court action from which Ted Switzer alleged that the Insureds intentionally interfered with his prospective business advantage (hereinafter the "Underlying Action"). This newly discovered evidence leaves no doubt that Nautilus Insurance Company ("Nautilus") must defend its Insureds in the Underlying Action. The Insureds immediately presented this newly discovered

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information to Nautilus. However, Nautilus disclaimed its duty to defend the Insureds less than a month ago.

In regards to the declaratory action before this Court, the Court's main concern was whether the e-mail at issue stating Mr. Switzer was banned from selling Alphatec products was allegedly false in order to trigger allegations of defamation, slander, libel, or disparagement - which would create Nautilus's duty to defend. As a result of this concern, the Court denied the Insureds' Motion for Reconsideration. The Court subsequently denied the Insureds' Application for an Order Directing or Indicating to the United States Court of Appeals for the Ninth Circuit that the District Court Will Grant or Entertain Access Medical, LLC And Robert Clark Wood, II's Motion For Relief From Judgment Pursuant To Rule 60(b)(2) (hereinafter the "Original Application") when the Insureds presented newly discovered evidence in the form of deposition testimony from Mr. Switzer because, in part, "it remains unclear that the statements in the email are false." The Insureds subsequently received trial testimony in the Underlying Action clearly indicating that Mr. Switzer believed the Insureds made false statements that damaged his business and which clearly give rise to Nautilus's duty to defend.

Moreover, appellate courts have held that district courts can consider newly discovered evidence that pertains to facts in existence at the time judgment was entered - regardless if the evidence that pertains to those facts came into existence after the judgment was entered. In this matter, newly discovered evidence in the form of trial testimony from the Underlying Action further substantiates that defamation and/or business disparagement was *always* alleged against the Insureds, which further give rise to Nautilus's duty to defend. Due to the fact that the trial testimony was not available at the time the Court entered its Judgment, but relates to the facts that encompass this declaratory action, the Insureds request that the Court grant the Insureds relief from the judgment pursuant to Rule 60 of the Federal Rules of Civil Procedure.

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II.

FACTS

A. The Insureds purchased an insurance policy from which Nautilus had the duty to defend the Insureds against any suit seeking damages from which the Insureds were accused of slander, libel, and/or disparagement.

The Insureds purchased an insurance policy from Nautilus from which provided a defense and indemnification for personal and advertising injury effective January 15, 2011, to January 15, 2012, (hereinafter the "Policy"). Specifically, the Policy provided the following regarding its coverage to the Insureds for Personal and Advertising Injury:

> COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY
>
> 1. Insuring Agreement
>
> We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. **We will have the right and duty to defend the insured against any "suit" seeking those damages[.]** (emphasis added)
>
> (*See* Policy, ECF No. 1, Exhibit 2, at p. 9.)

Nautilus defined "personal and advertising injury" as "injury including consequential "bodily injury" arising out of...oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services[.]" *Id.* at p. 22.

Ted Switzer subsequently brought an action in California's state court against the Insureds, including Mr. Wood, Access Medical, LLC, and Flournoy, due to a business partnership that had soured. In the Underlying Action, Ted Switzer deficiently alleged the intentional interference with prospective economic advantage against the Insureds. After the Insureds' repeated requests to accept tender of defense in a span of nearly four months, Nautilus reluctantly decided to defend its Insureds under a reservation of rights.

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On January 15, 2016, Nautilus filed a Motion for Partial Summary Judgment in order to relieve itself of its duty to defend in the Underlying Action. ECF No. 32. The Insureds filed an Opposition to the Motion for Partial Summary Judgment and a competing Counter-Motion for Summary Judgment. ECF No. 42; ECF No. 45. After Nautilus filed an Opposition to the Counter-Motion, the Insureds filed their Reply on July 25, 2016. ECF No. 65.

B. Mr. Switzer's legally deficient intentional interference with prospective economic advantage cause of action failed to specify the independent tortious acts that the Insureds allegedly committed in accordance with California law.

In the Insureds' motions, the Insureds indicated that the tort of intentional interference with prospective economic advantage, which Switzer repeatedly alleged in the Underlying Action, must specify wrongful acts that are legally independent from the interference itself. *See* ECF No. 42, pp. 15:22- 16:11; *Id.* at p. 17:6-26; ECF No. 65 pp. 8:3 – 10:28. Switzer's failure to specify the independent wrongful acts that the Insureds allegedly committed made Switzer's Cross-Complaint deficient and subject to dismissal of these claims. The Insureds also stated that although Switzer failed specify the alleged and independent wrongful acts in these causes of action, the Insureds should not be bound by a deficiently plead Cross-Complaint in order to give rise to Nautilus's duty to defend. ECF No. 42, pp. 15:22- 17:4; ECF No. 65, p. 14:9-18.

The Insureds also offered an e-mail that indicated that one of the independently wrongful acts alleged in the Underlying Action encompassed allegations of defamation, slander, libel, and/or business disparagement, which are claims that are covered under the Policy. ECF No. 41-5. Specifically, the e-mail provided prima facie evidence that Mr. Switzer filed a suit seeking damages for the actions of the Insureds and their employees, which includes Ms. Weide, of disseminating allegedly false statements. See *Id.* The Court agreed that it can consider the e-mail to determine whether Nautilus owed the Insureds a duty to defend. ECF No. 70, pp. 7:4 -

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8:2. However, the Court later claimed that the e-mail did not trigger Nautilus's duty to defend because the Insureds did not argue that this e-mail contained a false statement. *Id.* at p. 9:11-15.

On October 15, 2016, the Insureds filed their Motion for Reconsideration. ECF No. 98. One of the bases for filing the Motion for Reconsideration was the discovery of new evidence, which included discovery responses from Ted Switzer. In these discovery responses, Mr. Switzer refused to deny that Mr. Switzer disparaged him when explicitly asked. Thus, the Insureds stated the deficient Cross-Complaint, coupled with Mr. Switzer's discovery responses, resulted in the low bar of Nautilus's duty to defend its Insureds.

On May 18, 2017, the Court denied the Insureds' Motion for Reconsideration. ECF No. 102. The Court also denied Nautilus's Motion for Further Relief that it sought in order to receive reimbursement of defense costs in the Underlying Action. Nautilus thereafter filed its appeal on June 16, 2017, and the Insureds' filed their Notice of Appeal on June 19, 2017, in the United States Court of Appeals for the Ninth Circuit.

C. The Insureds filed its Application on the basis of newly discovered evidence.

On July 28, 2017, the Insureds were presented with newly discovered evidence that further substantiated Nautilus's duty to defend. Specifically, the deposition testimony of Ted Switzer, Dixie Switzer, and Jacqueline Weide proved that Mr. Switzer believes that Ms. Weide's e-mail was false. Moreover, Mrs. Switzer testified that contrary to Mr. Wood's representations, Mr. Switzer never informed a third party that he wanted to terminate their business relationship. *Ibid.* The Court subsequently denied this Application because, in part, it did not consider the deposition transcripts newly discovered evidence as provided in Rule 60(b).

The Insureds subsequently obtained newly discovered evidence in the form of trial testimony in the Underlying Action that further substantiated that Mr. Switzer believed that the Insureds defamed and/or disparaged his business. **Exh. C.** Specifically, Mr. Switzer iterates on

at least two occasions during his trial testimony that he did not believe that Ms. Weide's statements regarding being banned from selling products to a third party were true. *Ibid.* Dixie Switzer testified to the same. **Exh. D**. Not only did Mr. Switzer and Mrs. Switzer testify that Mr. Wood made false statements regarding Mr. Switzer's business dealings, counsel for Mr. Switzer asked the Court for a jury instruction for false representation because it was a "Ted Switzer individual claim" against Mr. Wood for "the representations that were made by Ms. Weide in all those e-mails that [Mr. Switzer's counsel] was reading off." **Exh. E.**

III.

LEGAL ANALYSIS

A. Legal Standard for Further Relief While an Action is Pending Appeal in the United States Court of Appeals for the Ninth Circuit

Rule 60 of the Federal Rules of Civil Procedure allows a party relief from final judgment when the Court is presented with newly discovered evidence that was not available in time to move for a new trial under Rule 59(b) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 60. Specifically, Rule 60 of the Federal Rules of Civil Procedure provides the following:

> Rule 60. Relief from a Judgment or Order
>
> ...
>
> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> ...
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); [or]
>
> ...
>
> (6) any other reason that justifies relief.
>
> Fed. R. Civ. P. 60.

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In *Creamette Co., v. Merlino*, the United States Court of Appeals for the Ninth Circuit determined the proper procedure a party must take when filing a motion for relief from judgment if newly discovered evidence is discovered while an appeal is pending. *Creamette Co. v. Merlino*, 289 F.2d 569, 570 (9th Cir. 1961). In that matter, the appellant sought to supplement the appellate record with new evidence that the district court did not consider because the evidence was not created until after the district court entered its judgment. *Ibid.* The Ninth Circuit Court of Appeals held that an "appellant may, notwithstanding the pendency of the present appeal, present to the district court its application for an order of that court directing or indicating that it will entertain a motion under Rule 60(b)(2) providing that this court makes a remand of the case for that purpose." *Id.* at 570.

If the district court orders that it will entertain or grant a motion under Rule 60(b)(2), then the party may file a motion to remand in the Ninth Circuit Court of Appeals. *Ibid.* In the alternative, "[i]f the district court refuses to make such order indicating it will entertain such motion, the appellant may appeal therefrom and appellee may appeal from an order of the district court granting relief under said motion, and any such appeals may be consolidated with the pending appeal." *Ibid.*

In *Canadian Ingersoll-Rand Co. v. Peterson Prods. of San Mateo, Inc.*, the United States Court of Appeals for the Ninth Circuit further analyzed the procedure a party must take before a motion for relief from judgment pursuant to Rule 60 was appealable. *Canadian Ingersoll-Rand Co. v. Peterson Prods. of San Mateo, Inc.*, 350 F.2d 18, 26-27 (9th Cir. 1965). In that matter, an appellant simultaneously filed a motion for a new trial on the ground of newly-discovered evidence pursuant to Rule 60(b) and a motion for an order directing or indicating that it will "entertain and consider" its motion made under Rule 60(b) to the district court. *Ibid.*

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The district court denied the motion for an order directing or indicating that the court will entertain a motion under Rule 60(b) because the newly-discovered evidence did not cause the district court to change its opinion. *Id.* at 27. However, the district court never entered an order denying the Rule 60(b) motion.[1] *Ibid.* The Ninth Circuit Court of Appeals determined that because the district court never made a judgment as to whether it would grant or deny the Rule 60(b) motion, and instead only indicated that it would not entertain the motion, the district court's previous order was interlocutory in nature and thus not final and appealable. *Id.* at 27-28.

Just as in *Creamette*, the Insureds in this matter have obtained newly discovered evidence that was not available to them at the time the district court made its final judgment. *Id. at 570.* Specifically, the trial testimony was also not available to the Insureds in the time that they could have moved for a new trial. *Ibid*; Fed. R. Civ. P. 60.

Due to the fact that the Insureds now have evidence that was unavailable to it at the time of moving for a new trial, the Insureds move for an application that this Court grant this Motion. In contrast to *Canadian Ingersoll-Rand Co.* where the appellant did not receive a final determination if the Court would entertain and grant the Rule 60(b) motion, the Insureds request the Court to make a final determination whether it would entertain and grant the Insureds' Rule 60(b) motion.

B. The Court may consider newly discovered evidence as indicated in Rule 60(b) that pertains to facts in existence at the time of judgment but were formed after the judgment.

In *Chilson v. Metropolitan Transit Authority*, the *Chilson* court differentiated between new evidence, which is inappropriate to consider in a motion for relief from judgment, versus

[1] Nevertheless, the district court did not have jurisdiction to enter an order under Rule 60(b) of the Federal Rules of Civil Procedure because that matter was pending appeal before the United States Court of Appeals for the Ninth Circuit. *See Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir. 1976). "The most the District Court could do was either indicate that it would "entertain" such a motion or indicate that it would grant such a motion. If appellant had received such an indication, its next step would have been to apply to this Court for a remand." *Ibid.*

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newly discovered evidence, which a district court may consider in a motion for relief from judgment in accordance to Rule 60(b). *Chilson v. Metro Transit Auth.*, 796 F.2d 69, 71 (5th Cir. 1986). In that matter, the plaintiff brought an action against his former employer alleging he was discharged in retaliation for criticism of his employer's decision to contract with a third party. *Id.* at 69. The jury found that the plaintiff's criticism, which encompassed critiques that the contract wasted public funds, was not the reason for the plaintiff's termination. *Ibid.*

After the verdict, the employer performed an internal audit of the company that revealed excessive overpayments on the questioned contract. *Ibid.* The plaintiff filed a Rule 60(b)(2) motion citing newly discovered evidence of the findings in in the internal audit. *Id.* at 70. The district court judge denied the plaintiff's motion "on the ground that the audit was not 'newly discovered evidence' within the meaning of the rule" but was instead 'new' evidence. *Ibid.*

The appellate court reversed the district court's decision and found that although the audit occurred after the judgment, the overpayments from which the audit uncovered predated the judgment. *Id.* at 72. Thus, the evidence from the audit encompassed the "newly discovered evidence" as provided in Rule 60(b). *Ibid.* Other courts have also found that the evidence that was created after trial but pertains to facts that existed at the time of trial can be considered "newly discovered evidence" as provided Rule 60(b). *Rosebud Sioux Tribe v. A&P Steel, Inc.*, 733 F.2d 509 (finding that grand jury testimony taken after the trial was newly discovered evidence as provided by Rule 60(b) because the perjury that the testimony uncovered existed at the time of trial and therefore could be the basis of a Rule 60(b)(2) motion).

Just as the *Chilson* court found that the evidence from the audit was newly discovered evidence as found in Rule 60(b) because that evidence concerned facts in the plaintiff's action although the audit itself occurred after the jury trial, the Insureds received newly discovered evidence in trial testimony, which occurred after this Court entered its order, that concerned the

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same matters in Nautilus's duty to defend. *Chilson*, 796 F.2d at 71. This trial testimony, although developed after the Court's order, is based on the facts of Mr. Switzer's allegations that were present at the time Nautilus disclaimed its duty to defend. Thus, this Court should consider this newly discovered evidence in deciding Nautilus's duty to defend. *Ibid.*

C. The trial testimony in the Underlying Action creates no doubt that Nautilus must defend its Insureds in the Underlying Action.

The duty to defend is broader than the duty to indemnify. *United Natl. Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 1158 (Nev. 2004). Nevada law provides that "an insurer…bears a duty to defend its insured **whenever it ascertains facts** which give rise to the potential of liability under the policy." (emphasis added) *Ibid.* Thus, **the duty to defend covers claims where the insured is liable or could become liable.** *Id.* at 1153. Moreover, "[o]nce the insured raises the possibility of coverage under the policy, the insurer has a 'heavy burden' to show that the insured's complaint '**can by no conceivable theory** raise a single issue which would bring it within the policy coverage.'" (emphasis added) *Gemini Ins. Co. v. N. Am. Capacity Ins. Co.*, 2015 U.S. Dist. LEXIS 44234 at *8 (D. Nev. 2015). Any doubt as to whether there is a duty to defend must be resolved in favor of the insured. *Frontier Ins. Co.*, 99 P.3d at 1158. "Once the duty to defend arises, 'this duty continues throughout the course of the litigation.'" *Home Sav. Ass'n v. Aetna Cas. & Surety*, 854 P.2d 851, 855 (Nev. 1993).

The trial testimony clearly evidence that one of the wrongful acts, which must be an independent tort under Mr. Switzer's cause of action for intentional interference with prospective economic advantage, includes allegations of Ms. Weide making a false statement that disparaged Mr. Switzer. See **Exh. B; Exh. C; Exh. D.** Specifically, Mr. Switzer's denied during trial that a third party banned him from selling products, which completely contradicts the e-mail at issue that Ms. Weide sent to a third party. *Ibid.* However, Ms. Weide, (who worked for Access

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Medical, LLC and Flournoy) stated to a third party that Mr. Switzer was *in fact* banned from selling medical implants in California. See *Id.* Based off Mr. Switzer's trial testimony, he believes the Insureds made disparaging and/or defamatory comments concerning him and the state of his business dealings. *Ibid.*

Moreover at trial in the Underlying Action, Mr. Carrigan, who was counsel for Mr. Switzer, proposed a jury instruction instructing the jury to ascertain whether Mr. Wood made any false representations concerning Mr. Switzer. **Exh. D**. The court in the Underlying Action specifically asked Mr. Switzer's counsel about this jury instruction by indicating:

> THE COURT: All right. So let's skip ahead to 1900, intentional misrep. You both have that.
> And so intentional misrep---let's see. Made a false representation that harmed them; so this is a Ted Switzer individual ?
>
> MR. CARRIGAN: Yes, Your Honor. Against Mr. Wood, so…
>
> THE COURT: Okay. So we have got intentional misrepresentation, and then we have got concealment. Which ---which one are you going on?
> …
> MR. CARRIGAN: Well, no. Then the next one. Ted also has one; so I think we are going with, You Honor, there was both false representation and concealment.
>
> THE COURT: What was – again, what was the false representation?
>
> MR. CARRIGAN: Well, the – I'll be honest with you. I won't cheat you.
>
> THE COURT: Uh-huh.
>
> MR. CARRIGAN: And then also the –the representations that were made by Ms. Weide in all those e-mails that I was reading off.

Ibid.

During trial in the Underlying Action, counsel for Mr. Switzer made clear that Mr. Switzer was seeking damages against Mr. Wood for claims of defamation and/or business disparagement. *Ibid.* Unless Mr. Switzer made these claims in its complaint in the Underlying

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Action, Mr. Switzer would be unable to assert these false misrepresentations claims at trial.[2] Thus just as the Policy provided that Nautilus has the "duty to defend the insured against any "suit" seeking [personal and advertising injury] damages," coupled with the fact that Switzer's counsel represented to the Court that Switzer was making these claims based on alleged false representations of Ms. Weide, Nautilus always had the duty to defend its Insureds in the Underlying Action. It does not matter if Mr. Switzer was ultimately successful in proving his claims of false representation, what mattered is if Mr. Switzer sought those damages against Nautilus's Insureds, from which all of the evidence points to that Mr. Switzer sought damages for claims covered under the Policy. *Ibid*; *Gemini Ins. Co.*, 2015 U.S. Dist. LEXIS 44234 at *8.

The trial testimony from Mr. Switzer, Mrs. Switzer, Ms. Weide, and representations of Mr. Carrigan eliminates the Court's concerns in regards to whether the damages sought against the Insureds included allegations that the Insureds made a false statement in order to support a claim for libel, slander or disparagement in accordance to the Policy. Although this evidence was created after this Court entered its judgment, the newly discovered evidence pertains to the same facts that encompass Nautilus's duty to defend at the time it filed this declaratory action. *Chilson*, 796 F.2d at 71. Specifically, Mr. Switzer's own words during trial in the Underlying Action indicated that he believed that any representation that he in fact was terminated was not true. **Exh. C.** As Nautilus agreed in the Policy to "defend the insured against any "suit" seeking those damages," Nautilus is required to defend its Insureds because Mr. Switzer sought damages, as it relates to his intentional interference with prospective business advantage claim, that were covered under the Policy. *Frontier Ins. Co.*, 99 P.3d at 1158.

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[2] California law, from which the Underlying Action is based, does not allow a party to seek damages at trial for damages not sought in the party's complaint. *Emerald Bay Cmty. Ass'n v. Golden Eagle Ins. Corp.*, 130 Cal. App. 4th 1078, 1092 (2005) (refusing to allow recovery on a claim for equitable contribution, based on an assignor's contribution rights, where plaintiff had pled only its own breach of contract claim).

Even if this Court decides to only consider whether the duty to defend existed at the time Nautilus filed its Complaint, the duty to defend has always existed. As indicated in Mr. Carrigan's claims to the court in the Underlying Action, Mr. Switzer believed that the Insureds made false representations about him throughout the Underlying Action. **Exh. D.** These allegation, although imperfectly identified, were alleged in the complaint through the "wrongful acts" as imperfectly identified in Mr. Switzer's action against the Insureds.

If Mr. Switzer did not always seek damages against the Insureds for false representations in the Underlying Action, Mr. Carrigan could not ask the court for jury instructions related to alleged false representations made to Mr. Switzer in the form of Ms. Weide's e-mails. *Emerald Bay Cmty. Ass'n*, 130 Cal. App. 4th at 1092. As the duty to defend arises when there is a possibility of allegations of a covered claim, Mr. Switzer's claim for damages due to false representations at trial clearly establish that these claims against the Insureds existed at the time Mr. Switzer filed his action against the Insureds. Thus, Nautilus always had the duty to defend its Insureds.

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III.

CONCLUSION

Based upon the foregoing, the Court should grant the Insureds' Motion for Relief from the Judgment Pursuant to Rule 60(b).

DATED this 3rd day of November, 2017.

KRAVITZ, SCHNITZER & JOHNSON, CHTD.

/s/ L. Renee Green

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of KRAVITZ, SCHNITZER & JOHNSON, CHTD., and pursuant to Local Rule 5.1, service of the foregoing **DEFENDANTS ACCESS MEDICAL, LLC AND ROBERT CLARK WOOD, II'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE** was served this 3rd day of November, 2017 via the Court's CM/ECF electronic filing system addressed to all parties on the e-service lists, as follows:

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/s/ Walter M. R. Knapp

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EXHIBIT E

EXCERPTS OF TRIAL TESTIMONY OF MR. CARRIGAIN

EXHIBIT E

I see that as confusing the case.

All right. So let's skip ahead to 1900, intentional misrep. You both have that.

And so intentional misrep -- let's see. Made a false representation that harmed them; so this is a Ted Switzer individual claim?

MR. CARRIGAN: Yes, Your Honor. Against Mr. Wood, so....

THE COURT: Okay. So we have got intentional misrepresentation, and then we have got concealment.

Which -- which one are you going on?

MR. JONES: 1900, okay.

MR. ALTOUNIAN: Concealment is Flournoy's claim.

MR. CARRIGAN: Well, no. Then the next one. Ted also has one; so I think we are going with, Your Honor, there was both false representation and concealment.

THE COURT: What was -- again, what was the false representation?

MR. CARRIGAN: Well, the -- I'll be honest with you. I won't cheat you.

THE COURT: Uh-huh.

MR. CARRIGAN: And then also the -- the representations that were made by Ms. Weide in all

those e-mails that I was reading off.

THE COURT: All right. Then what was the concealment then?

MR. CARRIGAN: The concealment was getting money from the hospitals, including Augusta and the Las Vegas hospitals, and not -- not turning that over. And also not telling Flournoy that -- that that was what was going on.

Yeah. And, also, there is the Cottage takeover, the clandestine effort there, the successful one, while showing up at Fresno and picking up a quarter of a million dollars and then going back to Atascadero and picking up $50,000 from Dr. Early and Dr. Maguire to buy into Timberline.

MR. JONES: Are you making that up as you go or what?

MR. CARRIGAN: No. Haven't you been paying attention?

MR. JONES: I heard Atascadero. I didn't hear anybody connecting dots like that. It is a whole new string.

THE COURT: All right. So what is -- has the defense had a chance to look at their 1901 -- their 1900 and their 1901?

MR. JONES: We are just doing it right now, Your Honor.

EXHIBIT B

EXHIBIT B

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

CENTRAL DIVISION – UNLIMITED CIVIL CASE

TED SWITZER; Plaintiff, v. FLOURNOY MANAGEMENT, LLC, et. al.; Defendants. And Related Cross-Action	Case No: 11 CE CG 04395 MWS PLAINTIFF, TED SWITZER'S RESPONSES TO REQUESTS FOR ADMISSIONS, SET #1, PROPOUNDED BY CROSS-DEFENDANT WOOD Complaint Filed: December 27, 2011 Trial Date: May 15, 2017

PROPOUNDING PARTY: Cross-Defendant, ROBERT "SONNY" WOOD

RESPONDING PARTY: Plaintiff, TED SWITZER

SET NUMBER: One (1)

REQUEST FOR ADMISSIONS NO. 1:

Admit that Sonny Wood did not defame you.

RESPONSE TO REQUEST FOR ADMISSION NO. 1:

Objection. This request exceeds the scope of permissible discovery (Code of Civil Procedure §2017.010 and §2033.010) in that Mr. Switzer has not alleged any claim for defamation against Mr. Wood, as recognized by Judge Dorsey's September 27, 2016 summary judgment ruling and judgment for the plaintiff in *Nautilus Insurance Company v. Access Medical, LLC, et al.*, United States District Court, District of Nevada, case number 2:15-cv-00321-JAD-GWF.

REQUEST FOR ADMISSIONS NO. 2:

Admit that Sonny Wood did not commit any action or inaction which resulted in personal injury to your reputation.

RESPONSE TO REQUEST FOR ADMISSION NO. 2:

Objection. This request is compound and disjunctive and thus violates Code of Civil Procedure §2033.060(f). This request is also vague and ambiguous in its use of the phrase "personal injury to your reputation" in that Mr. Switzer does not know what the propounding party means by use of the word "personal" and so does not know what types of injury are not meant to be included in the subject matter of the request.

REQUEST FOR ADMISSIONS NO. 3:

Admit that Sonny Wood did not commit any action or inaction which resulted in injury to your business reputation.

RESPONSE TO REQUEST FOR ADMISSION NO. 3:

Objection. This request is compound and disjunctive and thus violates Code of Civil Procedure §2033.060(f).

REQUEST FOR ADMISSIONS NO. 4:

Admit that Sonny Wood did not commit any wrongful act that resulted in injury to your personal reputation, as alleged in paragraph 109 of your Complaint.

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RESPONSE TO REQUEST FOR ADMISSION NO. 4:

Objection. This request is not full and complete in and of itself and thus violates Code of Civil Procedure §2033.060(d). This request is also vague, ambiguous, unintelligible and nonsensical in that Mr. Switzer's complaint consists of only 17 paragraphs.

REQUEST FOR ADMISSIONS NO. 5:

Admit that Sonny Wood did not commit any wrongful act that resulted in injury to your business reputation, as alleged in paragraph 109 of your Complaint.

RESPONSE TO REQUEST FOR ADMISSION NO. 5:

Objection. This request is not full and complete in and of itself and thus violates Code of Civil Procedure §2033.060(d). This request is also vague, ambiguous, unintelligible and nonsensical in that Mr. Switzer's complaint consists of only 17 paragraphs.

REQUEST FOR ADMISSIONS NO. 6:

Admit that Sonny Wood did not commit any wrongful act that resulted in injury to your personal reputation, as alleged in paragraph 110 of your Complaint.

RESPONSE TO REQUEST FOR ADMISSION NO. 6:

Objection. This request is not full and complete in and of itself and thus violates Code of Civil Procedure §2033.060(d). This request is also vague, ambiguous, unintelligible and nonsensical in that Mr. Switzer's complaint consists of only 17 paragraphs.

REQUEST FOR ADMISSIONS NO. 7:

Admit that Sonny Wood did not commit any wrongful act that resulted in injury to your business reputation, as alleged in paragraph 110 of your Complaint.

RESPONSE TO REQUEST FOR ADMISSION NO. 7:

Objection. This request is not full and complete in and of itself and thus violates Code of Civil Procedure §2033.060(d). This request is also vague, ambiguous, unintelligible and nonsensical in that Mr. Switzer's complaint consists of only 17 paragraphs.

REQUEST FOR ADMISSIONS NO. 8:

Admit that Sonny Wood did not commit any wrongful act that resulted in injury to your personal reputation, as alleged in paragraph 123 of your Complaint.

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RESPONSE TO REQUEST FOR ADMISSION NO. 8:

Objection. This request is not full and complete in and of itself and thus violates Code of Civil Procedure §2033.060(d). This request is also vague, ambiguous, unintelligible and nonsensical in that Mr. Switzer's complaint consists of only 17 paragraphs.

REQUEST FOR ADMISSIONS NO. 9:

Admit that Sonny Wood did not commit any wrongful act that resulted in injury to your business reputation, as alleged in paragraph 123 of your Complaint.

RESPONSE TO REQUEST FOR ADMISSION NO. 9:

Objection. This request is not full and complete in and of itself and thus violates Code of Civil Procedure §2033.060(d). This request is also vague, ambiguous, unintelligible and nonsensical in that Mr. Switzer's complaint consists of only 17 paragraphs.

REQUEST FOR ADMISSIONS NO. 10:

Admit that Sonny Wood did not commit any wrongful act that resulted in injury to your personal reputation, as alleged in paragraph 130 of your Complaint.

RESPONSE TO REQUEST FOR ADMISSION NO. 10:

Objection. This request is not full and complete in and of itself and thus violates Code of Civil Procedure §2033.060(d). This request is also vague, ambiguous, unintelligible and nonsensical in that Mr. Switzer's complaint consists of only 17 paragraphs.

REQUEST FOR ADMISSIONS NO. 11:

Admit that Sonny Wood did not commit any wrongful act that resulted in injury to your business reputation, as alleged in paragraph 130 of your Complaint.

RESPONSE TO REQUEST FOR ADMISSION NO. 11:

Objection. This request is not full and complete in and of itself and thus violates Code of Civil Procedure §2033.060(d). This request is also vague, ambiguous, unintelligible and nonsensical in that Mr. Switzer's complaint consists of only 17 paragraphs.

REQUEST FOR ADMISSIONS NO. 12:

Admit that Sonny Wood did not commit any action or inaction which constituted slander as to your personal reputation.

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RESPONSE TO REQUEST FOR ADMISSION NO. 12:

Objection. This request exceeds the scope of permissible discovery (Code of Civil Procedure §2017.010 and §2033.010) in that Mr. Switzer has not alleged any claim for defamation against Mr. Wood, as recognized by Judge Dorsey's September 27, 2016 summary judgment ruling and judgment for the plaintiff in *Nautilus Insurance Company v. Access Medical, LLC, et al.*, United States District Court, District of Nevada, case number 2:15-cv-00321-JAD-GWF. This request is also compound and disjunctive and thus violates Code of Civil Procedure §2033.060(f).

REQUEST FOR ADMISSIONS NO. 13:

Admit that Sonny Wood did not commit any action or inaction which resulted in slander as to your business reputation.

RESPONSE TO REQUEST FOR ADMISSION NO. 13:

Objection. This request exceeds the scope of permissible discovery (Code of Civil Procedure §2017.010 and §2033.010) in that Mr. Switzer has not alleged any claim for defamation against Mr. Wood, as recognized by Judge Dorsey's September 27, 2016 summary judgment ruling and judgment for the plaintiff in *Nautilus Insurance Company v. Access Medical, LLC, et al.*, United States District Court, District of Nevada, case number 2:15-cv-00321-JAD-GWF. This request is also compound and disjunctive and thus violates Code of Civil Procedure §2033.060(f).

REQUEST FOR ADMISSIONS NO. 14:

Admit that Sonny Wood never made any false statements about you.

RESPONSE TO REQUEST FOR ADMISSION NO. 14:

Objection. This request exceeds the scope of permissible discovery (Code of Civil Procedure §2017.010 and §2033.010) in that Mr. Switzer has not alleged any claim for defamation against Mr. Wood, as recognized by Judge Dorsey's September 27, 2016 summary judgment ruling and judgment for the plaintiff in *Nautilus Insurance Company v. Access Medical, LLC, et al.*, United States District Court, District of Nevada, case number 2:15-cv-00321-JAD-GWF.

Dated: November 7, 2016

GREGORY L. ALTOUNIAN,
Attorney for Plaintiff/Cross-Defendant/Cross-Complainant, Ted Switzer, and Cross-Defendants, Dixie Switzer, Switzer Medical, Inc., Epsilon Distribution I, LLC and Charlie Medical, LLC

PROOF OF SERVICE BY MAIL - 1013a, 2015.5 C.C.P.

STATE OF CALIFORNIA, COUNTY OF FRESNO

I am a resident of/employed in the aforesaid County, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 295 West Cromwell Avenue, Suite 104, Fresno, California 93711. On November 7, 2016, I served:

PLAINTIFF, TED SWITZER'S RESPONSES TO REQUESTS FOR ADMISSIONS, SET #1, PROPOUNDED BY CROSS-DEFENDANT WOOD

on the parties listed below in this action by placing a true copy thereof, enclosed in a sealed envelope with postage fully prepaid, in the United States mail at Fresno, California, addressed as follows:

see attached Service List

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Fresno, CA.

Dated: November 7, 2016

GREGORY L. ALTOUNIAN

Service List

Stephen T. Clifford, Esq. John R. Szewezyk, Esq. *Clifford & Brown* 1430 Truxtun Avenue, Suite 900 Bakersfield, CA 93301-5230	Counsel for:	McCormick, Barstow, Sheppard, Wayte & Carruth, LLP; Gordon M. Park; Dana B. Denno; Irene V. Fitzgerald
Jay A. Hieatt, Esq. Stephanie A. Bowen, Esq. *Hall, Hieatt & Connelly, LLP* 1319 Marsh Street, Second Floor San Luis Obispo, CA 93401	Counsel for:	Flournoy Management, LLC
Amy R. Lovegren-Tipton, Esq. *Law Office of Amy R. Lovegren-Tipton* 5703 North West Avenue, Suite 103 Fresno, CA 93711	Counsel for:	Flournoy Management, LLC
Calvin E. Davis, Esq. Eleanor M. Welke, Esq. *Gordon & Rees LLP* 633 West Fifth Street, 52nd Floor Los Angeles, CA 90071	Counsel for:	Robert Clark Wood, II; Access Medical, LLC
John Phillips, Esq. *Wild, Carter & Tipton* 246 West Shaw Avenue Fresno, CA 93704	Counsel for:	Robert Clark Wood, II; Access Medical, LLC
Tim M. Agajanian, Esq. Pascale Gagnon, Esq. *Ropers Majeski Konn Bentley* 445 South Figueroa Street, Suite 3000 Los Angeles, CA 90071-1619	Counsel for:	Kravitz, Schnitzer, Sloan & Johnson Jordan P. Schnitzer

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

CENTRAL DIVISION – UNLIMITED CIVIL CASE

TED SWITZER; Plaintiff, v. FLOURNOY MANAGEMENT, LLC, et. al.; Defendants. And Related Cross-Action	Case No: 11 CE CG 04395 MWS PLAINTIFF, TED SWITZER'S RESPONSES TO FORM INTERROGATORIES, SET #1, PROPOUNDED BY CROSS-DEFENDANT WOOD Complaint Filed: December 27, 2011 Trial Date: May 15, 2017

PROPOUNDING PARTY: Cross-Defendant, SONNY WOOD

RESPONDING PARTY: Plaintiff, TED SWITZER

SET NUMBER: One (1)

RESPONSE TO FORM INTERROGATORY NO. 2.1:

Theodore Bernard (Ted) Switzer, since birth.

RESPONSE TO FORM INTERROGATORY NO. 4.1:

None that is presently known to plaintiff, whose complaint seeks only to enforce plaintiff's rights under the California Corporations Code to obtain from the defendants general business information and access to records for inspection and copying.

RESPONSE TO FORM INTERROGATORY NO. 12.1:

Ted Switzer and Robert "Sonny" Wood, and their respective attorneys, Gregory Altounian and Gary Schnitzer, witnessed the unjustified refusal of Flournoy Management, LLC and Mr. Wood to provide Mr. Switzer with any of the information or access to any of the records requested by Mr. Switzer pursuant to his rights under the California Corporations Code. Plaintiff also believes that Mr. Wood's accountant or "operations manager," Jacquie Weide has knowledge, and perhaps some involvement, in the unjustified refusal as well.

The parties and their present attorneys also have knowledge of the continued malicious efforts of Mr. Wood to thwart and deny at all costs and to the fullest extent possible plaintiff's access to information concerning Mr. Wood's management of Flournoy. Plaintiff suspects that the former attorneys for Mr. Wood and Flournoy, theKravitz firm, the McCormick firm and the Emerson firm, also have knowledge of this subject.

Mr. Wood and his present and former attorneys also know, or should know through their preparation, review and service of Mr. Wood's and Flournoy's and Access Medical's discovery responses, of Mr. Wood's fraudulent and bad faith conduct in the management and operations of Flournoy.

Plaintiff believes that the general counsel for Alphatec Spine, Inc., Ebun Garner, and at least one other Alphatec employee, Rich Cuellar, have knowledge of Mr. Wood's improper business proclivities and history in general and have knowledge regarding Mr. Wood's actions with respect to plaintiff specifically.

Discovery and investigation are continuing.

RESPONSE TO FORM INTERROGATORY NO. 12.2:

Not to plaintiff's knowledge, other than Mr. Altounian's brief telephone conversation with Mr. Garner at the end of January 2013. Discovery and investigation are continuing.

RESPONSE TO FORM INTERROGATORY NO. 12.3:

Not to plaintiff's knowledge. Discovery and investigation are continuing.

RESPONSE TO FORM INTERROGATORY NO. 12.6:

Plaintiff believes that the current and former attorneys for Mr. Wood, Access Medical and Flournoy have prepared and sent one or more reports to Nautilus Insurance Company and to one another, but said attorneys have refused to provide any information concerning such reports. Discovery and investigation are continuing.

RESPONSE TO FORM INTERROGATORY NO. 14.1:

Mr. Wood violated, and caused Flournoy to violate, California Corporations Code §17453 and §17106.

RESPONSE TO FORM INTERROGATORY NO. 14.2:

Mr. Wood has been cited or charged with those violations in the complaint and cross-complaint filed by Mr. Switzer in this litigation.

RESPONSE TO FORM INTERROGATORY NO. 15.1:

This interrogatory is not applicable since it is directed to the plaintiff, whose complaint does not contain denials or defenses.

RESPONSE TO FORM INTERROGATORY NO. 17.1:

All of the requests for admissions were responded to with self-explanatory and self-evident objections.

Dated: November 7, 2016

GREGORY L. ALTOUNIAN,
Attorney for Plaintiff/Cross-Defendant/Cross-Complainant, Ted Switzer, and Cross-Defendants, Dixie Switzer, Switzer Medical, Inc., Epsilon Distribution I, LLC and Charlie Medical, LLC

VERIFICATION

[Code Civ. Proc. §§ 2015.5 and 2030.250(a)]

I, Ted Switzer, declare:

I am the Plaintiff in the foregoing action or proceeding.

I have read the foregoing **Plaintiff, Ted Switzer's Responses to Form Interrogatories, Set #1, Propounded by Cross-Defendant Wood** and know the contents thereof, and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Verification was executed on November 7, 2016, at Fresno, California.

Ted Switzer

PROOF OF SERVICE BY MAIL - 1013a, 2015.5 C.C.P.

STATE OF CALIFORNIA, COUNTY OF FRESNO

I am a resident of/employed in the aforesaid County, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 295 West Cromwell Avenue, Suite 104, Fresno, California 93711. On November 7, 2016, I served:

PLAINTIFF, TED SWITZER'S RESPONSES TO FORM INTERROGATORIES, SET #1, PROPOUNDED BY CROSS-DEFENDANT WOOD

on the parties listed below in this action by placing a true copy thereof, enclosed in a sealed envelope with postage fully prepaid, in the United States mail at Fresno, California, addressed as follows:

see attached Service List

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Fresno, CA.

Dated: November 7, 2016

GREGORY L. ALTOUNIAN

Service List

Stephen T. Clifford, Esq. John R. Szewezyk, Esq. *Clifford & Brown* 1430 Truxtun Avenue, Suite 900 Bakersfield, CA 93301-5230	Counsel for:	McCormick, Barstow, Sheppard, Wayte & Carruth, LLP; Gordon M. Park; Dana B. Denno; Irene V. Fitzgerald
Jay A. Hieatt, Esq. Stephanie A. Bowen, Esq. *Hall, Hieatt & Connelly, LLP* 1319 Marsh Street, Second Floor San Luis Obispo, CA 93401	Counsel for:	Flournoy Management, LLC
Amy R. Lovegren-Tipton, Esq. *Law Office of Amy R. Lovegren-Tipton* 5703 North West Avenue, Suite 103 Fresno, CA 93711	Counsel for:	Flournoy Management, LLC
Calvin E. Davis, Esq. Eleanor M. Welke, Esq. *Gordon & Rees LLP* 633 West Fifth Street, 52nd Floor Los Angeles, CA 90071	Counsel for:	Robert Clark Wood, II; Access Medical, LLC
John Phillips, Esq. *Wild, Carter & Tipton* 246 West Shaw Avenue Fresno, CA 93704	Counsel for:	Robert Clark Wood, II; Access Medical, LLC
Tim M. Agajanian, Esq. Pascale Gagnon, Esq. *Ropers Majeski Konn Bentley* 445 South Figueroa Street, Suite 3000 Los Angeles, CA 90071-1619	Counsel for:	Kravitz, Schnitzer, Sloan & Johnson Jordan P. Schnitzer

EXHIBIT A

EXHIBIT A

From: Quyen Thi Le [mailto:qle@selmanlaw.com]
Sent: Wednesday, March 23, 2016 11:28 AM
To: Jordan Schnitzer
Subject: RE: Access

That's news to me. Let me investigate.

Quyen Thi Le
Associate

Direct 415.979.2066
qle@selmanlaw.com

SELMAN

SELMAN BREITMAN LLP

www.SelmanLaw.com
33 New Montgomery, Sixth Floor
San Francisco, CA 94105

From: Jordan Schnitzer [mailto:jschnitzer@ksjattorneys.com]
Sent: Wednesday, March 23, 2016 11:27 AM
To: Quyen Thi Le
Subject: RE: Access

Oops... Fire, not first. Insurance defense counsel informed us Nautilus pulled the file. What's going on?

Jordan P. Schnitzer, Esq.

** Please Note The New Email Address And Website **

KSJ
Kravitz, Schnitzer & Johnson
LAS VEGAS
www.KSJattorneys.com

CKDJS
Christian, Kravitz, Dichter, Johnson & Sluga
LAS VEGAS PHOENIX
www.ckdlclaw.com

8985 South Eastern Avenue, Suite 200
Las Vegas, Nevada 89123
Direct: 702.222.4140
Office: 702.362.6666
KSJ Fax: 702.362.2203
CKDJS Fax: 702.992.1000
JSchnitzer@KSJattorneys.com

From: Quyen Thi Le [mailto:qle@selmanlaw.com]
Sent: Wednesday, March 23, 2016 11:26 AM
To: Jordan Schnitzer
Subject: RE: Access

Sorry, I don't understand your question.

Quyen Thi Le
Associate

Direct 415.979.2066
qle@selmanlaw.com

SELMAN

SELMAN BREITMAN LLP

www.SelmanLaw.com
33 New Montgomery, Sixth Floor
San Francisco, CA 94105

From: Jordan Schnitzer [mailto:jschnitzer@ksjattorneys.com]
Sent: Wednesday, March 23, 2016 11:25 AM
To: Quyen Thi Le
Subject: Access

Why did Nautilus first Eric Lamhofer?

Jordan P. Schnitzer, Esq.

** Please Note The New Email Address And Website **

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CKDJS
Christian, Kravitz, Dichter, Johnson & Sluga
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Office: 702.362.6666
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JSchnitzer@KSJattorneys.com

Spam

Phish/Fraud
Not spam
Forget previous vote

Spam
Phish/Fraud
Not spam
Forget previous vote

DECLARATION OF JORDAN P. SCHNITZER IN SUPPORT OF ACCESS MEDICAL, LLC AND SONNY WOOD, II'S OPPOSITION TO NAUTILUS INSURANCE COMPANY'S MOTION FOR FUTHER RELIEF AND IN THE ALTERNATIVE MOTION TO STAY PENDING RESOLUTION OF ACCESS MEDICAL, LLC., SONNY WOOD, II, AND FLOURNOY MANAGEMENT, LLC'S MOTION FOR RECONSIDERATION

I, Jordan P. Schnitzer, declare as follows:

1. I am a licensed attorney in good standing and am admitted to practice law in all Courts in the State of Nevada.

2. I am one of the partners at the law firm of Kravitz, Schnitzer & Johnson, Chtd.

3. I have personal knowledge of the matters stated forth in this affidavit and could testify as a competent witness if called upon to do so.

4. This firm has been retained to represent Access Medical, LLC and Robert Clark Wood, II (collectively the "Insureds") in the instant action.

5. The Underlying Action titled "Cross-Complaint of Ted Switzer for Legal and Equitable Relief On Individual Claims on His Behalf and Derivative Claims on Behalf of Nominal Defendant Flournoy Management, LLC," Case No. 11 CE 04395 JH, was filed in Fresno County Superior Court on or about June 3, 2013 against Access Medical, LLC and Robert Clark Wood, II (hereinafter the "Underlying Action").

6. As part of the issue surrounding the duty to defend its Insureds, Nautilus finally accepted tender of defense in the Underlying Action on March 25, 2014.

7. On March 31, 2016, I received correspondence from Nautilus's counsel, Quyen Thi Le of Selman Breitman, LLP, that indicated Nautilus decided to change counsel for Mr. Wood in the Underlying Action without notifying his counsel in this action. The timing of changing counsel at this time detrimentally affected my client in the Underlying Action because depositions of the opposing parties were scheduled to take place. Moreover, upcoming motions

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were calendared as well. A true and correct copy of my electronic correspondence to Quyen Thi Le expressing my objections to Nautilus's defense, and a response thereof, is attached hereto as **Exhibit A** and **Exhibit B**.

8. The case that Nautilus cites to support its contention of being awarded additional attorneys' fees is *Probuilders Specialty Ins. Co. v. Double M. Constr.*, 116 F. Supp. 3d 1173 (D. Nev. 2015). ECF No. 73, p. 8. However in *Probuilders*, the plaintiff amended its Complaint to seek such reimbursement from the Court. A true and correct copy of the plaintiff in *Probuilders Specialty Ins. Co.*'s initial complaint that was found on the Public Access to Court Electronic Records (PACER), excluding the attachments that accompanied the complaint, is attached hereto as **Exhibit C**. The plaintiff in the same action subsequently filed a first amended complaint, which was also found on PACER, which was amended to specifically seek reimbursement is attached hereto as **Exhibit D.**

9. I declare under penalty of perjury that the foregoing is true and correct.

DATED this 14 day of November, 2016.

JORDAN P. SCHNITZER

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Las Vegas, Nevada 89123
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EXHIBIT B

EXHIBIT B

From: Quyen Thi Le [mailto:qle@selmanlaw.com]
Sent: Thursday, March 31, 2016 7:57 AM
To: Jordan Schnitzer
Cc: Erin Adams; Linda Wendell Hsu
Subject: RE: Sonny Wood

Jordan,

Nautilus is waiting on a firm to clear conflicts to take over the defense. As soon as I get any more information, I will let you know.

Please be assured that Nautilus is in no way trying to delay anything. If you want an extension of time to respond to our MSJ in the Federal coverage action, let me know and I will discuss it with my client.

Quyen Thi Le
Associate

Direct 415.979.2066
qle@selmanlaw.com

SELMAN

SELMAN BREITMAN LLP

www.SelmanLaw.com
33 New Montgomery, Sixth Floor
San Francisco, CA 94105

From: Jordan Schnitzer [mailto:jschnitzer@ksjattorneys.com]
Sent: Wednesday, March 30, 2016 5:33 PM
To: Quyen Thi Le
Cc: Erin Adams
Subject: Sonny Wood

Quyen,

I just found out Nautilus is getting Sonny yet another new counsel. Yet, no one from Nautilus has bothered to call me or my client to explain what is going on our why his attorneys keep changing. This is extremely detrimental to my client given the upcoming motions and depositions in the case. Nautilus' actions appear in bad faith and an attempt to harm his case, delay depositions to succeed on your motion for summary judgment and generally disrupt the underlying litigation. Please explain Nautilus' actions immediately.

Sent from my Verizon Wireless 4G LTE smartphone

Spam
Phish/Fraud
Not spam
Forget previous vote

DECLARATION OF JORDAN P. SCHNITZER IN SUPPORT OF ACCESS MEDICAL'S REPLY TO NAUTILUS INSURANCE COMPANY'S MOTION FOR RECONSIDERATION

I, JORDAN P. SCHNITZER, declare as follows:

1. I am a licensed attorney in good standing and am admitted to practice law in all Courts in the State of Nevada.

2. I am a partner at the law firm of Kravitz, Schnitzer & Johnson, Chtd.

3. I have personal knowledge of the matters stated forth in this affidavit and could testify as a competent witness if called upon to do so.

4. This firm has been retained to represent Access Medical, LLC ("Access") and Robert Clark Wood, II in the instant action.

5. The Underlying Action titled "Cross-Complaint of Ted Switzer for Legal and Equitable Relief On Individual Claims on His Behalf and Derivative Claims on Behalf of Nominal Defendant Flournoy Management, LLC," Case No. 11 CE 04395 JH, was filed in Fresno County Superior Court on or about June 3, 2013 against Access Medical, LLC and Robert Clark Wood, II (hereinafter the "Underlying Action"). This Underlying Action is still active and in the discovery phase.

6. I received previously received Interrogatories and Requests for Admission that Access and Wood each propounded on Ted Switzer in the action that was filed in the Underlying Action.

7. I subsequently received the Ted Switzer's responses to Access's First Set of Form Interrogatories and First Set of Requests for Admission after Access and Mr. Wood filed their Motion for Reconsideration in this Court. A true and correct copy of the received documents is attached hereto as Exhibit A.

8. I also received Ted Switzer's responses to Mr. Wood's First Set of Form Interrogatories and Requests for Admissions after Access and Mr. Wood filed their Motion for Reconsideration in this Court. A true and correct copy is attached hereto as Exhibit B.

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I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 21 day of November, 2016.

Jordan P. Schnitzer

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JORDAN P. SCHNITZER, ESQ.
Nevada Bar No. 10744
California Bar No. 255726
L. RENEE GREEN, ESQ.
Nevada Bar No. 12755
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Email: jschnitzer@ksjattorneys.com
Email: rgreen@ksjattorneys.com
Attorneys for Defendants,
ACCESS MEDICAL, LLC and
ROBERT CLARK WOOD, II

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(702) 362-6666

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NAUTILUS INSURANCE COMPANY, Plaintiff, v. ACCESS MEDICAL, LLC; ROBERT CLARK WOOD, II; FLOURNOY MANAGEMENT, LLC; and DOES 1-10, Inclusive, Defendants.	Case No. 2:15-cv-00321-JAD-GWF **Filed concurrently with: Defendants' Access Medical, LLC and Robert Clark Wood, II's Opposition to Plaintiff's Motion for Partial Summary Judgment and Counter-Motion for Partial Summary Judgment**

INDEX OF EXHIBITS IN SUPPORT OF DEFENDANTS' ACCESS MEDICAL, LLC AND ROBERT CLARK WOOD, II'S OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND COUNTER-MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants Access Medical, LLC and Robert Clark Wood, II hereby submits the following Index of Exhibits in support of its Opposition to Plaintiff's Motion for Partial Summary Judgment and Counter-Motion for Partial Summary Judgment.

EXHIBIT	DESCRIPTION
A.	Ted Switzer's original Complaint against Flournoy dated December 27, 2011.

B.	Flournoy Management, LLC's Second Amended Cross-Complaint against Switzer dated November 16, 2012.
C.	Sonny Wood's Second Amended Cross-Complaint dated March 14, 2013.
D.	Ted Switzer's Cross-Complaint against Flournoy Management dated June 3, 2013.
E.	Email from Jacquie Weide dated July 25, 2011 to Deborah Fanning advising Cottage Hospital Access was interested in providing spinal implants to this facility.
F.	Ms. Weide's Declaration.
G.	Nautilus Policy.
H.	Nautilus's letter regarding its refusal to defend dated January 8, 2014.
I.	Email correspondence dated March 25, 2014 wherein Nautilus accepted defense.
J.	Email dated January 23, 2014
K.	February 7, 2014, Access received correspondence from Flournoy's counsel that questioned Nautilus when the parties should expect a coverage decision from Nautilus.
L.	February 10, 2014 counsel for Nautilus responded that it should provide a decision regarding coverage for the Cross-Complaint soon.
M.	February 18, 2014, Access received electronic correspondence from Flournoy's counsel that indicated that it has been more than three months since Access tendered the defense to Nautilus and Access has yet to receive a response regarding Nautilus's decision to defend the Cross-Complaint. This electronic correspondence also indicated that time is of the essence for Nautilus to issue its decision.
N.	February 20, 2014, Access received electronic correspondence form Nautilus that indicated that Nautilus will keep Access and Flournoy advised as to its coverage position.
O.	February 20, 2014, Access sent correspondence to Nautilus as to why it is taking Nautilus so long to decide whether to defend its insured.
P.	February 21, 2014, Nautilus sent correspondence to Access that indicated that Nautilus is still deciding whether to defend its insured for Switzer's Cross-Complaint.
Q.	February 24, 2014, Access sent correspondence to Nautilus regarding Nautilus' failure to provide a position as to whether it would defend Access.
R.	February 25, 2014, Access received correspondence from Nautilus form which Nautilus stated that it would provide its position on defending Access "within the next day or two."

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S.	March 5, 2014 letter Nautilus sent to its insured indicating that it needed additional time to make a coverage determination as to whether Nautilus will defend.
T.	Access sent a letter dated March 17, 2014 that indicated that Nautilus had nearly four months to decide whether it would defend Access and Flournoy and it still has yet to make a decision. The letter also indicated that Nautilus was in possession of an email from Ms. Weide that triggered coverage. Access indicated in the letter that if Nautilus refused to defend its insured, Access will file a bad faith Complaint against its insurer.
U.	Declaration in Support of Continuing Further Discovery.
V.	Declaration of Jordan P. Schnitzer, Esq.

DATED this 9th day of May, 2016.

KRAVITZ, SCHNITZER & JOHNSON, CHTD.

BY: /s/L. Renee Green, Esq.
JORDAN P. SCHNITZER, ESQ.,
Nevada Bar No. 10744
California Bar No. 255726
L. RENEE GREEN, ESQ.
Nevada Bar No. 12755
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Email: rgreen@ksjattorneys.com
Attorneys for Defendants,
ACCESS MEDICAL, LLC and
ROBERT CLARK WOOD, II

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of KRAVITZ, SCHNITZER & JOHNSON, CHTD., and pursuant to Local Rule 5.1, service of the foregoing ***INDEX OF EXHIBITS IN SUPPORT OF DEFENDANTS' ACCESS MEDICAL, LLC and ROBERT CLARK WOOD, II'S OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND COUNTER-MOTION FOR PARTIAL SUMMARY JUDGMENT***, was served this 9th day of May, 2016 via the Court's CM/ECF electronic filing system addressed to all parties on the e-service lists, as follows:

James E. Harper, Esq.
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Las Vegas, NV 89134
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Email: james@harperlawlv.com
Attorneys for Defendant,
FLOURNOY MANAGEMENT, LLC

Galina Kletser Jakobson, Esq.
Linda W. Hsu, Esq.
Quyen Thi Le, Esq.
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Email: qle@selmanlaw.com
Attorneys for Plaintiff,
NAUTILUS INSURANCE COMPANY

/s/Susan Clokey
An Employee of KRAVITZ, SCHNITZER & JOHNSON, CHTD.

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(702) 362-6666

EXHIBIT "E"

EXHIBIT "E"

Karen Jones

From: Jacquie Weide <jacquie.weide@gmail.com>
Sent: Monday, July 25, 2011 6:15 PM
To: Deborah Fanning
Subject: Re: Contract Information

Hi Deborah-

We use Alphatec Spine products. Alphatec Spine is located in Carlsbad, CA and manufactures all of their products onsite. I believe Dr. Early & Dr. Kahmann were using Alphatec's implants but their Distributor in the California area is now banned from selling Alphatec implants. We are in Las Vegas and have been using their products here for 2 years. Alphatec recently contacted us and asked that we take over the California region as well.

I am currently contracted with all of the large facilities in Las Vegas and I know that the Materials Managers here can attest to our affordability (we are always lower than Stryker, Medtronics, etc.) and professionalism. I would be happy to send you anything you need regarding 501k, etc. if you are not familiar with Alphatec.

I know many of the hospitals I work with now have construct pricing. If so, can you please send me that information and I will be happy to put together a price catalog, W9, and liability insurance package for your review. Thank you very much!

Jacquie Weide

On Mon, Jul 25, 2011 at 5:22 PM, Deborah Fanning <dfanning@sbch.org> wrote:

Hello Jacquie,

I am the Clinical Manager of Materials for Surgery at SBCH. Which Doctor is interested in using your spinal implants? I would like to see information related to the products you carry, FDA approval, cost analysis and so forth. Which company (manufacturer) are you representing, we are familiar with most, have not heard of your organization Access Orthopedic Medical Group.

Have a good evening,

Deborah

Deborah Fanning, RN, CNOR

Clinical Manager Materials, Surgery

Santa Barbara Cottage Hospital

Tel: 805-569-7482

Fax 805-569-7483

dfanning@sbch.org

From: Jacquie Weide [mailto:jacquie.weide@gmail.com]
Sent: Monday, July 25, 2011 4:27 PM
To: Deborah Fanning
Subject: Contract Information

Hi Ms. Fanning-

I am interested in obtaining a contract with your facility to provide spinal implants. Would you be the person I need to speak with? Thank you!

Jacquie Weide

Access Orthopedics Medical Group

Operations Manager

2

000408

NIC-000350

EXHIBIT "F"

EXHIBIT "F"

DECLARATION OF JACQUELINE WEIDE

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

MS. WEIDE, being duly sworn upon oath, deposes and says:

1. On or around July 5, 2011 I was Operations Manager of Access Medical, LLC and was also doing work for Flournoy Management, LLC.

2. I have personal knowledge of the matters stated forth in this declaration and could testify as a competent witness if called upon to do so.

3. On July 5, 2011, I sent electronic correspondence with Cottage Hospital in order to procure business of selling spinal implants.

4. In the correspondence dated July 5, 2011, I indicated that a "Distributor in the California area is now banned from selling Alphatec implants."

5. The distributor that I referred to in this electronic correspondence was Ted Switzer.

6. Nobody from Nautilus Insurance Company contacted me to inquire that the identity of the distributor mentioned in my electronic correspondence dated July 5, 2011.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED this 11th day of May, 2016.

JACQUELINE WEIDE

KRAVITZ, SCHNITZER & JOHNSON, CHTD.
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Las Vegas, Nevada 89123
(702) 362-6666

EXHIBIT "M"

EXHIBIT "M"

Jordan Schnitzer

From: Dana Denno <Dana.Denno@mccormickbarstow.com>
Sent: Tuesday, February 18, 2014 3:30 PM
To: 'Joel A. Morgan'
Cc: Gordon Park; Jordan Schnitzer; Linda Wendell Hsu; Tim Buchanan
Subject: RE: Switzer v Flournoy/Sonny Wood

Joel,
We are still waiting for a decision from Nautilus. It has been almost a month since you came to review the file and took copies of only a small handful of documents for further review. It has been over 3 months since we tendered the defense and indemnity of Wood, Flournoy and Access. Time is of the essence. We have just been notified that Switzer's counsel is moving to disqualify this firm as counsel for Flournoy and the Kravitz Schnitzer firm as counsel for Wood by way of ex parte application on Thursday, February 20, 2014. As you likely noticed in reviewing the banking records for Flournoy in the file, Flournoy has no assets with which to secure new counsel. If the motion is successful in disqualifying our firm, your insured will be unrepresented. Any further delay by Nautilus will jeopardize Flournoy's defense of these claims. Please advise immediately of Nautilus' decision.
Dana

EXHIBIT "O"

EXHIBIT "O"

From: Jordan Schnitzer [mailto:jschnitzer@ksjattorneys.com]
Sent: Thursday, February 20, 2014 3:38 PM
To: Joel A. Morgan
Cc: Gordon Park; Linda Wendell Hsu; 'Dana Denno'; Tim Buchanan; Marty Kravitz
Subject: RE: Switzer v Flournoy/Sonny Wood

Joel,

Why has it taken so long to meet with Nautilus? As Dana indicated, it has been a month since you went to her office to retrieve a few selected records and much longer than that since the initial tender.

Jordan P. Schnitzer, Esq.

** Please Note The New Email Address And Website **

KSJ
Kravitz, Schnitzer & Johnson
LAS VEGAS

EXHIBIT "P"

EXHIBIT "P"

Jordan Schnitzer

From: Joel A. Morgan <jmorgan@SelmanBreitman.com>
Sent: Friday, February 21, 2014 3:34 PM
To: Jordan Schnitzer
Cc: Gordon Park; Linda Wendell Hsu; 'Dana Denno'; Tim Buchanan; Marty Kravitz
Subject: RE: Switzer v Flournoy/Sonny Wood

Hello Mr. Schnitzer:

You assume that we have only had one meeting with Nautilus since I visited Ms. Denno's office last month. To the contrary, we have discussed this matter at length with our client, have carefully reviewed tens of thousands of pages of documents, and have been taking extra time to try to find any possibility of coverage for the insured since the cross-complaint does not trigger coverage.

We appreciate your continued patience in this matter. You should expect to hear from us soon with Nautilus' determination.

Best regards,

Joel

Joel A. Morgan | Associate | Selman Breitman LLP | 33 New Montgomery, Sixth Floor | San Francisco, CA 94105

direct: 415.979.2064 | fax: 415.979.2099 | email: jmorgan@selmanbreitman.com | web: www.selmanbreitman.com

EXHIBIT "Q"

EXHIBIT "Q"

From: Jordan Schnitzer [mailto:jschnitzer@ksjattorneys.com]
Sent: Monday, February 24, 2014 3:53 PM
To: Joel A. Morgan
Cc: Gordon Park; Linda Wendell Hsu; 'Dana Denno'; Tim Buchanan; Marty Kravitz
Subject: RE: Switzer v Flournoy/Sonny Wood

Joel,

I never heard back from you with respect to what you meant by "soon." Your email on February 10, 2014, two weeks ago, also indicated we would have a decision "soon." Despite the fact that two weeks have gone by, and the statutory deadline has gone by, we still do not have a decision. Please let me know what Nautilus needs to do before it can make a decision and exactly how long you expect that to take. Thank you.

Jordan P. Schnitzer, Esq.

** Please Note The New Email Address And Website **

KSJ
Kravitz, Schnitzer & Johnson
LAS VEGAS
www.KSJattorneys.com

DECLARATION OF JORDAN P. SCHNITZER, ESQ.

I, JORDAN P. SCHNITZER, ESQ., being duly sworn upon oath, deposes and says:

1. I am a licensed attorney in good standing and am admitted to practice law in all Courts in the State of Nevada.

2. I am one of the partners at the law firm of Kravitz, Schnitzer & Johnson, Chtd.

3. I have personal knowledge of the matters stated forth in this affidavit and could testify as a competent witness if called upon to do so.

4. This firm has been retained to represent Access Medical, LLC and Robert Clark Wood, II in the instant action.

5. I wrote and received correspondence as it related to the issue of Access Medical, LLC, Flournoy Mangement, LLC and Robert Clark Wood, II tendering defense to its insurer, Nautilus Insurance Company.

6. As part of the issue surrounding tendering defense to Nautilus, I received correspondence from Nautilus dated January 8, 2014. A true and correct copy of this correspondence is attached to Access Medical, LLC's Index of Exhibits as Exhibit I.

7. As part of the issue surrounding tendering defense to Nautilus, I received correspondence from Nautilus dated March 25, 2014. A true and correct copy of this correspondence is attached to Access Medical, LLC's Index of Exhibits as Exhibit J.

8. As part of the issue surrounding tendering defense to Nautilus, I received correspondence from Nautilus dated January 23, 2014. A true and correct copy of this correspondence is attached to Access Medical, LLC's Index of Exhibits as Exhibit K.

9. As part of the issue surrounding tendering defense to Nautilus, I received correspondence from Flournoy Management, LLC dated February 7, 2014. A true and correct copy of this correspondence is attached to Access Medical, LLC's Index of Exhibits as Exhibit L.

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Las Vegas, Nevada 89123
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10. As part of the issue surrounding tendering defense to Nautilus, I received correspondence from Nautilus dated February 10, 2014. A true and correct copy of this correspondence is attached to Access Medical, LLC's Index of Exhibits as Exhibit M.

11. As part of the issue surrounding tendering defense to Nautilus, I received correspondence from Flournoy Management, LLC dated February 18, 2014. A true and correct copy of this correspondence is attached to Access Medical, LLC's Index of Exhibits as Exhibit N.

12. As part of the issue surrounding tendering defense to Nautilus, I received correspondence from Nautilus dated February 20, 2014. A true and correct copy of this correspondence is attached to Access Medical, LLC's Index of Exhibits as Exhibit O.

13. As part of the issue surrounding tendering defense to Nautilus, I sent correspondence to Nautilus dated February 20, 2014. A true and correct copy of this correspondence is attached to Access Medical, LLC's Index of Exhibits as Exhibit P.

14. As part of the issue surrounding tendering defense to Nautilus, I received correspondence from Nautilus dated February 21, 2014. A true and correct copy of this correspondence is attached to Access Medical, LLC's Index of Exhibits as Exhibit Q.

15. As part of the issue surrounding tendering defense to Nautilus, I sent correspondence to Nautilus dated February 24, 2014. A true and correct copy of this correspondence is attached to Access Medical, LLC's Index of Exhibits as Exhibit R.

16. As part of the issue surrounding tendering defense to Nautilus, I received correspondence from Nautilus dated February 25, 2014. A true and correct copy of this correspondence is attached to Access Medical, LLC's Index of Exhibits as Exhibit S.

17. As part of the issue surrounding tendering defense to Nautilus, I received correspondence from Nautilus indicating that it needed additional time to make a coverage determination as to whether Nautilus will defend dated March 5, 2014 attached to Access Medical, LLC's Index of Exhibits as Exhibit T.

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18. As part of the issue surrounding tendering defense to Nautilus, I sent correspondence to Nautilus dated March 17, 2014. A true and correct copy of this correspondence is attached to Access Medical, LLC's Index of Exhibits as Exhibit U.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 9th day of May, 2016.

JORDAN P. SCHNITZER, ESQ.

KRAVITZ, SCHNITZER &JOHNSON, CHTD.
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(702) 362-6666

CLOSED,APPEAL

United States District Court
District of Nevada (Las Vegas)
CIVIL DOCKET FOR CASE #: 2:15-cv-00321-JAD-GWF

Nautilus Insurance Company v. Access Medical, LLC et al
Assigned to: Judge Jennifer A. Dorsey
Referred to: Magistrate Judge George Foley, Jr
Demand: $75,000
Case: 2:17-cv-02393-MMD-CWH
Case in other court: Ninth Circuit, 17-16273
Ninth Circuit, 17-16840
Ninth Circuit, 17-16842
Cause: 28:1332 Diversity-Declaratory Judgement

Date Filed: 02/24/2015
Date Terminated: 09/27/2016
Jury Demand: Plaintiff
Nature of Suit: 110 Insurance
Jurisdiction: Diversity

Plaintiff

Nautilus Insurance Company represented by **Galina Kletser Jakobson**
Selman Breitman
3993 Howard Hughes Parkway, Suite 200
Las Vegas, NV 89169
702-228-7717
Fax: 702-228-8824
Email: galinajakobson@hotmail.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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TERMINATED: 06/02/2016
PRO HAC VICE

V.

Defendant

Access Medical, LLC

represented by **Jordan P Schnitzer**
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Defendant

Robert Clark Wood, II

represented by **Jordan P Schnitzer**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

L. Renee Green
(See above for address)
ATTORNEY TO BE NOTICED

Martin J. Kravitz
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Flournoy Management, LLC

represented by **Taylor G. Selim**
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Email: eservice@harperselim.com
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
02/24/2015	1	COMPLAINT against All Defendants (Filing fee $400 receipt number 0978-3568876), filed by Nautilus Insurance Company. Certificate of Interested Parties due by 3/6/2015. Proof of service due by 6/24/2015. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (Jakobson, Galina) (Entered: 02/24/2015)
02/24/2015	2	CIVIL COVER SHEET re 1 Complaint,, filed by Nautilus Insurance Company. Related document: 1 Complaint, filed by Nautilus Insurance Company. (Jakobson, Galina) (Entered: 02/24/2015)
02/24/2015	3	Certificate of Interested Parties re 1 Complaint, ; by Plaintiff Nautilus Insurance Company. (Jakobson, Galina) Incorrect event selected by counsel. Corporate parents Admiral Insurance Company, Berkley Insurance Company, and W.R. Berkley Corporation added. (Entered: 02/24/2015)
02/24/2015	4	PROPOSED SUMMONS to be issued , filed by Plaintiff Nautilus Insurance Company. (Jakobson, Galina) (Entered: 02/24/2015)
02/24/2015		Case assigned to Judge Jennifer A. Dorsey and Magistrate Judge George Foley, Jr. (EDS) (Entered: 02/24/2015)
02/24/2015	5	NOTICE PURSUANT TO LOCAL RULE IB 2-2: In accordance with 28 USC § 636(c) and FRCP 73, the parties in this action are provided with a link to the "AO 85 Notice of Availability, Consent, and Order of Reference - Exercise of Jurisdiction by a U.S. Magistrate Judge" form on the Court's website - www.nvd.uscourts.gov. **AO 85 Consent forms should NOT be electronically filed.** Upon consent of all parties, counsel are advised to manually file the form with the Clerk's Office. (A copy of form AO 85 has been mailed to parties not receiving electronic service.) NOTICE OF GENERAL ORDER 2013-1 AND OPPORTUNITY FOR EXPEDITED TRIAL SETTING: The parties in this action are provided with a link to General Order 2013-1 and the USDC Short Trial Rules on the Court's website - www.nvd.uscourts.gov. If the parties agree that this action can be ready for trial within 180 days and that a trial of this matter would take three (3) days or less, the parties should consider participation in the USDC Short Trial Program. If the parties wish to be considered for entry into the Court's Short Trial Program, they should execute and electronically file with USDC Short Trial Form 4(a)(1) or Form 4(a)(2). **(no image attached)** (EDS) (Entered: 02/24/2015)
02/24/2015	6	**NOTICE: Attorney Action Required** to 4 Proposed Summons to be issued. **ERROR**: Summons not issued as multiple defendants are listed on summons. **CORRECTION**: Pursuant to FRCP 4 summons are issued for each named defendant to be served. Attorney **Galina Kletser Jakobson** advised to download and complete updated "AO 440 (Rev. 06/12/) Summons in a Civil Action" form from Court's Website **www.nvd.uscourts.gov**;, listing only one defendant per summons and refile as a separate event using "Proposed Summons to be Issued" event. Please contact the

		Court at 464-5402 for any assistance pertaining to the filing of Summons form. **(no image attached)**(EDS) (Entered: 02/24/2015)
02/24/2015	7	PROPOSED SUMMONS to be issued *to Robert Clark Wood, II*, filed by Plaintiff Nautilus Insurance Company. (Jakobson, Galina) (Entered: 02/24/2015)
02/24/2015	8	PROPOSED SUMMONS to be issued *To Flournoy Management, LLC*, filed by Plaintiff Nautilus Insurance Company. (Jakobson, Galina) (Entered: 02/24/2015)
02/24/2015	9	PROPOSED SUMMONS to be issued *To Access Medical, LLC*, filed by Plaintiff Nautilus Insurance Company. (Jakobson, Galina) (Entered: 02/24/2015)
02/25/2015	10	Summons Issued as to All Defendants. (MAJ) (Entered: 02/25/2015)
03/23/2015	11	ORDER for Certificate of Interested Parties. IT IS ORDERED that counsel for Plaintiff shall have a period of 10 calendar days from the filing date of this order within which to fully comply with the provisions of Local Rule 7.1-1. Certificate of Interested Parties due by 4/1/2015. Signed by Magistrate Judge George Foley, Jr on 3/20/15. (Copies have been distributed pursuant to the NEF - MMM) (Entered: 03/23/2015)
03/23/2015	12	MINUTE ORDER IN CHAMBERS of the Honorable Magistrate Judge George Foley, Jr, on 3/23/2015. By Judicial Assistant: Julia Wright. RE: 11 Order for Certificate of Interested Parties, **IT IS HEREBY VACATED. (no image attached)** (Copies have been distributed pursuant to the NEF - JBW) (Entered: 03/23/2015)
04/06/2015	13	WAIVER OF SERVICE Returned Executed by Nautilus Insurance Company. Access Medical, LLC waiver sent on 3/23/2015, answer due 5/22/2015. (Jakobson, Galina) (Entered: 04/06/2015)
04/06/2015	14	WAIVER OF SERVICE Returned Executed by Nautilus Insurance Company. Robert Clark Wood, II waiver sent on 3/23/2015, answer due 5/22/2015. (Jakobson, Galina) (Entered: 04/06/2015)
04/06/2015	15	WAIVER OF SERVICE Returned Executed by Nautilus Insurance Company. Flournoy Management, LLC waiver sent on 3/23/2015, answer due 5/22/2015. (Jakobson, Galina) (Entered: 04/06/2015)
04/13/2015	16	VERIFIED PETITION for Permission to Practice Pro Hac Vice by Linda Wendell Hsu and DESIGNATION of Local Counsel Galina Kletser Jakobson (Filing fee $ 250 receipt number 0978-3626793) filed by Plaintiff Nautilus Insurance Company . (Jakobson, Galina) (Entered: 04/13/2015)
04/13/2015	17	VERIFIED PETITION for Permission to Practice Pro Hac Vice by Quyen Thi Le and DESIGNATION of Local Counsel Galina Kletser Jakobson (Filing fee $ 250 receipt number 0978-3626825) filed by Plaintiff Nautilus Insurance Company . (Jakobson, Galina) (Entered: 04/13/2015)
04/14/2015	18	ORDER Granting 16 Verified Petition for Permission to Practice Pro Hac Vice for Attorney Linda Wendell Hsu and approving Designation of Local Counsel Galina Kletser Jakobson for Nautilus Insurance Company. Signed by Judge Jennifer A. Dorsey on 4/14/15. Any Attorney not yet registered with the Court's CM/ECF System shall submit a Registration Form on the Court's website www.nvd.uscourts.gov (Copies have been distributed pursuant to the NEF - MMM) (Entered: 04/14/2015)
04/14/2015	19	ORDER Granting 17 Verified Petition for Permission to Practice Pro Hac Vice for Attorney Quyen Thi Le and approving Designation of Local Counsel Galina Kletser Jakobson for Nautilus Insurance Company. Signed by Judge Jennifer A. Dorsey on 4/14/15. Any Attorney not yet registered with the Court's CM/ECF System shall submit a Registration Form on the Court's website www.nvd.uscourts.gov (Copies have been distributed pursuant to the NEF - MMM) . (Entered: 04/14/2015)

05/22/2015	20	ANSWER to 1 Complaint, filed by Flournoy Management, LLC. Certificate of Interested Parties due by 6/1/2015. Discovery Plan/Scheduling Order due by 7/6/2015.(Harper, James) (Entered: 05/22/2015)
05/22/2015	21	ANSWER to 1 Complaint, filed by Access Medical, LLC.(Schnitzer, Jordan) (Entered: 05/22/2015)
06/12/2015	22	ORDER for Certificate of Interested Parties. ORDERED that Defendant Flournoy Management, LLC shall file its Certificate as to Interested Parties, which fully complies with LR 7.1-1 no later than June 22, 2015. Failure to comply may result in the issuance of an order to show cause why sanctions should not be imposed. Signed by Magistrate Judge George Foley, Jr on 6/12/15. (Copies have been distributed pursuant to the NEF - MMM) (Entered: 06/12/2015)
06/22/2015	23	CERTIFICATE of Interested Parties filed by Flournoy Management, LLC. There are no known interested parties other than those participating in the case . (Harper, James) (Entered: 06/22/2015)
07/06/2015	24	PROPOSED Discovery Plan/Scheduling Order filed by Plaintiff Nautilus Insurance Company *(JOINT)*. (Le, Quyen) (Entered: 07/06/2015)
07/07/2015	25	SCHEDULING ORDER re 24 Proposed Discovery Plan/Scheduling Order. Discovery due by 11/18/2015. Motions due by 12/18/2015. Proposed Joint Pretrial Order due by 1/18/2016. Signed by Magistrate Judge George Foley, Jr on 7/7/15. (Copies have been distributed pursuant to the NEF - MMM) (Entered: 07/08/2015)
08/03/2015	26	ERRATA re: Discovery; filed by Defendants Access Medical, LLC, Robert Clark Wood, II. (Schnitzer, Jordan) (Entered: 08/03/2015)
08/17/2015	27	STIPULATION to Continue re: Discovery; filed by Plaintiff Nautilus Insurance Company. (Hsu, Linda) (Entered: 08/17/2015)
08/18/2015	28	ORDER ON STIPULATION Granting 27 STIPULATION to Continue Expert Disclosure and Expert Discovery Deadlines Only re 25 SCHEDULING ORDER. Signed by Magistrate Judge George Foley, Jr on 7/7/15. (Copies have been distributed pursuant to the NEF - MMM). Signed by Magistrate Judge George Foley, Jr on 8/18/15. (Copies have been distributed pursuant to the NEF - MMM) (Entered: 08/19/2015)
09/21/2015	29	Interim STATUS REPORT *(Joint)* by Plaintiff Nautilus Insurance Company. (Le, Quyen) (Entered: 09/21/2015)
12/11/2015	30	STIPULATION FOR EXTENSION OF TIME (Second Request) re 25 Scheduling Order, by Plaintiff Nautilus Insurance Company. (Le, Quyen) (Entered: 12/11/2015)
12/14/2015	31	ORDER ON STIPULATION Granting 30 Stipulation to Continue Scheduling Order Deadlines (Second Request). Motions due by 1/18/2016. Proposed Joint Pretrial Order due by 2/17/2016. Signed by Magistrate Judge George Foley, Jr on 12/14/2015. (Copies have been distributed pursuant to the NEF - NEV) (Entered: 12/14/2015)
01/15/2016	32	MOTION for Partial Summary Judgment by Plaintiff Nautilus Insurance Company. Responses due by 2/8/2016. (Hsu, Linda) (Entered: 01/15/2016)
01/15/2016	33	DECLARATION of Dennis Curran re 32 Motion for Partial Summary Judgment; by Plaintiff Nautilus Insurance Company. (Hsu, Linda) (Entered: 01/15/2016)
01/15/2016	34	DECLARATION of Linda Wendell Hsu re 32 Motion for Partial Summary Judgment by Plaintiff Nautilus Insurance Company. (Hsu, Linda) (Entered: 01/15/2016)
01/15/2016	35	REQUEST for Judicial Notice re 32 Motion for Partial Summary Judgment ; by Plaintiff Nautilus Insurance Company. (Hsu, Linda) (Entered: 01/15/2016)
01/15/2016	36	EXHIBIT(s) to 32 Motion for Partial Summary Judgment ; filed by Plaintiff Nautilus

		Insurance Company. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11)(Hsu, Linda) (Entered: 01/15/2016)
01/29/2016	37	THIRD STIPULATION FOR EXTENSION OF TIME re: 32 Summary Judgment Motion and Discovery Deadlines; filed by Plaintiff Nautilus Insurance Company. (Le, Quyen) (Entered: 01/29/2016)
02/01/2016	38	ORDER ON STIPULATION Granting 37 THIRD STIPULATION FOR EXTENSION OF TIME to Respond re: 32 Summary Judgment Motion and Suspend Deadline for Joint Pre-Trial Order. Responses due by 4/8/2016. Signed by Magistrate Judge George Foley, Jr on 2/1/16. (Copies have been distributed pursuant to the NEF - MMM) (Entered: 02/02/2016)
04/07/2016	39	FOURTH STIPULATION FOR EXTENSION OF TIME to Respond to Summary Judgment Motion, Suspend Deadline for Joint Pre-Trial Order by Defendant Access Medical, LLC. (Green, L.) (Entered: 04/07/2016)
04/11/2016	40	ORDER ON STIPULATION Granting 39 FOURTH STIPULATION FOR EXTENSION OF TIME (Second Request) to Respond to Summary Judgment Motion and Suspend Deadline for Joint Pre-Trial Order. Responses due by 5/9/2016. Signed by Judge Jennifer A. Dorsey on 4/11/16. (Copies have been distributed pursuant to the NEF - MMM) (Entered: 04/11/2016)
05/09/2016	41	EXHIBIT(s) Index of Exhibits **to 42 Response** to 32 Motion for Partial Summary Judgment ; filed by Defendant Access Medical, LLC., **Robert Clark Wood, II** (Attachments: # 1 Exhibit Ted Switzer's original Complaint dated Dec. 27, 2011, # 2 Exhibit Flournoy's Second Amended Cross-Complaint dated Nov. 16, 2012, # 3 Exhibit Sonny Wood's Second Amended Cross Complaint datd March 14, 2013, # 4 Exhibit Ted Switzer's Cross-Complaint daed June 3, 2013, # 5 Exhibit Email from Jacque Weide dated July 25, 2011, # 6 Exhibit Ms. Weide's Declaration, # 7 Exhibit Nautilus Policy, # 8 Exhibit Nautilus's letter dated Jan. 8, 2014, # 9 Exhibit Email dated March 25, 2014, # 10 Exhibit Email dated Jan. 23, 2014, # 11 Exhibit February 7, 2014 correspondence from Flounoy's counsel, # 12 Exhibit February 10, 2014 email, # 13 Exhibit Letter dated February 18, 2014, # 14 Exhibit Email dated February 20, 2014 Access recived from Nautilus, # 15 Exhibit February 20, 2014 email Access sent to Nautilus, # 16 Exhibit February 21, 2014 email, # 17 Exhibit February 24, 2014 email, # 18 Exhibit February 25, 2014 email, # 19 Exhibit Letter dated March 25, 2014 Nautilus sent to insured, # 20 Exhibit Leter dated March 17, 2014 from Access, # 21 Exhibit Declaration in Support of Continuing Further Discovery, # 22 Exhibit Declaration of Jordan P. Schnitzer, Esq.)(Green, L.) Modified on 5/10/2016 to add filing party and docket entry relationship (DKJ). (Entered: 05/09/2016)
05/09/2016	42	RESPONSE to 32 Motion for Partial Summary Judgment, filed by Defendant Access Medical, LLC. Replies due by 5/19/2016. (Green, L.) (Entered: 05/09/2016)
05/09/2016	43	RESPONSE to 32 Motion for Partial Summary Judgment, filed by Defendant Flournoy Management, LLC. Replies due by 5/19/2016. (Harper, James) (Entered: 05/09/2016)
05/10/2016	44	NOTICE: Attorney Action Required to 42 Response to Motion. ERROR: Documents should have been filed as a separate entries by attorney L. Green pursuant to LR IC 2-2(b): "For each type of relief requested or purpose of the document, a separate document must be filed and a separate event must be selected for that document" . CORRECTION: Attorney is advised to file the additional Motion contained in document 42 Response as a separate Motion for Summary Judgment using the

		appropriate event found under the MOTIONS category pursuant to LR IC 2-2(b). (no image attached)(DKJ) (Entered: 05/10/2016)
05/10/2016	45	Counter MOTION for Partial Summary Judgment by Defendant Access Medical, LLC. Responses due by 6/3/2016. (Green, L.) (Entered: 05/10/2016)
05/10/2016	46	NOTICE: Attorney Action Required to 43 Response to Motion. ERROR: Documents should have been filed as separate entries by attorney James Harper pursuant to LR IC 2-2(b): "For each type of relief requested or purpose of the document, a separate document must be filed and a separate event must be selected for that document". CORRECTION: Attorney is advised to file the additional Joinder contained in document 43 Response as a separate entry using the appropriate event found under the "Other Documents" category pursuant to LR IC 2-2(b). (no image attached)(DKJ (Entered: 05/10/2016)
05/10/2016	47	RESPONSE to 32 Motion for Partial Summary Judgment, filed by Defendant Flournoy Management, LLC. Replies due by 5/20/2016. (Harper, James) (Entered: 05/10/2016)
05/10/2016	48	JOINDER to 42 Response to Motion, 45 Motion for Partial Summary Judgment filed by Defendant Flournoy Management, LLC. (Harper, James) Modified on 5/11/2016 to add docket entry relationships (DKJ). (Entered: 05/10/2016)
05/11/2016	49	**FIRST NOTICE: of Non-Compliance with Local Rule IC 5-1** that **James Harper** is in violation of Local Rule LR IC 5-1 The signatory must be the attorney or pro se party who electronically files the document. No action is required at this time. Attorney advised in the future to file documents in accordance with Local Rules governing *Electronic Case Filing.* **(no image attached)** (DKJ) (Entered: 05/11/2016)
05/11/2016	50	CERTIFICATE of Interested Parties filed by Access Medical, LLC. **Robert Clark Wood, II** There are no known interested parties other than those participating in the case. (Green, L.) Modified on 5/11/2016 to add other filing party (DKJ). (Entered: 05/11/2016)
05/11/2016	51	STIPULATION FOR EXTENSION OF TIME (First Request) re 32 , 45 Motions for Partial Summary Judgment by Plaintiff Nautilus Insurance Company. (Hsu, Linda) Modified on 5/11/2016 to add docket entry relationships (DKJ). (Entered: 05/11/2016)
05/12/2016	52	ORDER ON STIPULATION Granting 51 STIPULATION FOR EXTENSION OF TIME (First Request) to Reply re 32 MOTION for Partial Summary Judgment; Replies due by 6/3/2016; and to Respond/Reply re 45 Counter MOTION for Partial Summary Judgment; Responses due by 6/3/2016. Replies due by 6/10/2016. Signed by Judge Jennifer A. Dorsey on 5/12/16. (Copies have been distributed pursuant to the NEF - JM) (Entered: 05/13/2016)
05/25/2016	53	**FIRST NOTICE: of Non-Compliance with Local Rule IC 4-1:** that **Quyen T. Le** is in violation of LR IC 4-1(a). **VIOLATION** : Turning off the email notification. 1. *Pursuant to Local Rule IC 4-1(a): Registration as a filing user constitutes consent to receive service through the Electronic Filing System.* **CORRECTION** : The Court reactivated your email notification and retransmitted documents # 52 ORDER ON STIPULATION.

		Attorney advised in the future to comply with Local Rules governing *Electronic Case Filing.* **(no image attached)** (RFJ) (Entered: 05/25/2016)
05/26/2016	54	NOTICE of Appearance by Nautilus Insurance Company. (Hsu, Linda) **Modified on 5/27/2016 to reflect correct event (DKJ).** (Entered: 05/26/2016)
05/27/2016	55	NOTICE: Attorney Action Required to 54 Notice (Other). **ERROR:** (1) Wrong event selected by attorney. Court modified entry to reflect Notice of Appearance. (2) Request is not in compliance with LR IA 11-6(b) "No attorney may withdraw after appearing in a case except by leave of the court after notice has been served on the affected client and opposing counsel. (3) Document should have been filed as a separate entry pursuant to LR IC 2-2(b). **CORRECTION:** Attorney Linda W. Hsu advised to refile request pursuant to LR IA 11-6(b). **(no image attached)**(DKJ) (Entered: 05/27/2016)
06/01/2016	56	MOTION to remove attorney(s) Quyen Thi Le from the Electronic Service List in this case, by Plaintiff Nautilus Insurance Company. (Hsu, Linda) (Entered: 06/01/2016)
06/02/2016	57	ORDER granting 56 Motion to Remove Attorney Quyen Thi Le from Electronic Service List. Signed by Magistrate Judge George Foley, Jr on 6/2/2016. (Copies have been distributed pursuant to the NEF - AF) (Entered: 06/03/2016)
06/03/2016	58	STIPULATION FOR EXTENSION OF TIME (Second Request) re 32 , 45 Motions for Partial Summary Judgment by Plaintiff Nautilus Insurance Company. (Hsu, Linda) Docket entry relationships added on 6/3/2016 (DKJ). (Entered: 06/03/2016)
06/06/2016	59	ORDER ON STIPULATION Granting 58 STIPULATION FOR EXTENSION OF TIME (Second Request) to Respond/Reply re 32 MOTION for Partial Summary Judgment (Replies due by 6/24/2016); and 45 Counter MOTION for Partial Summary Judgment (Responses due by 6/24/2016. Replies due by 7/25/2016). Signed by Judge Jennifer A. Dorsey on 6/6/16. (Copies have been distributed pursuant to the NEF - JM) (Entered: 06/06/2016)
06/24/2016	60	RESPONSE to 45 Motion for Partial Summary Judgment, filed by Plaintiff Nautilus Insurance Company. Replies due by 7/4/2016. (Hsu, Linda) (Entered: 06/24/2016)
06/24/2016	61	REQUEST for Judicial Notice to 60 Response re 45 Motion for Partial Summary Judgment ; by Plaintiff Nautilus Insurance Company. (Hsu, Linda) Modified on 6/27/2016 to add docket entry relationship (DKJ). (Entered: 06/24/2016)
06/24/2016	62	EXHIBIT(s) 12 to Index of Exhibits In Support of Nautilus' to 60 Response to 45 Motion for Partial Summary Judgment ; filed by Plaintiff Nautilus Insurance Company. (Attachments: # 1 Exhibit 12)(Hsu, Linda) Modified on 6/27/2016 to add docket entry relationship (DKJ). (Entered: 06/24/2016)
06/24/2016	63	REPLY to Response to 32 Motion for Partial Summary Judgment filed by Plaintiff Nautilus Insurance Company. (Hsu, Linda) (Entered: 06/24/2016)
06/24/2016	64	REPLY to Response to 32 Motion for Partial Summary Judgment filed by Plaintiff Nautilus Insurance Company. (Hsu, Linda) (Entered: 06/24/2016)
07/25/2016	65	REPLY to Response to 45 Motion for Partial Summary Judgment filed by Defendant Access Medical, LLC. (Green, L.) (Entered: 07/25/2016)
07/25/2016	66	REQUEST for Judicial Notice re 60 Response to Motion ; by Defendant Access

		Medical, LLC. (Green, L.) (Entered: 07/25/2016)
07/25/2016	67	DECLARATION of Jordan P. Schnitzer, Esq. by Defendant Access Medical, LLC. (Green, L.) (Entered: 07/25/2016)
07/25/2016	68	EXHIBIT(s) filed by Defendant Access Medical, LLC. (Attachments: # 1 Exhibit A-Order, # 2 Exhibit Emails)(Green, L.) (Entered: 07/25/2016)
07/26/2016	69	REPLY to Response to 45 Motion for Partial Summary Judgment filed by Defendant Access Medical, LLC. (Green, L.) (Entered: 07/26/2016)
09/27/2016	70	ORDER that 32 Nautilus's Motion for Summary Judgment is GRANTED and that 45 defendants' Motion for Summary Judgment is DENIED. The Clerk of Court is instructed to enter judgment for Nautilus and against defendants accordingly and CLOSE THIS CASE. Signed by Judge Jennifer A. Dorsey on 9/27/16. (Copies have been distributed pursuant to the NEF - MMM) (Entered: 09/27/2016)
09/27/2016	71	CLERK'S JUDGMENT in favor of plaintiff Nautilus Insurance Company against defendants Access Medical, LLC, Flournoy Management, LLC, and Robert Clark Wood, II. Signed by Clerk of Court, Lance S. Wilson on 9/27/16. (Copies have been distributed pursuant to the NEF - MMM) (Entered: 09/27/2016)
10/11/2016	72	BILL OF COSTS by Plaintiff Nautilus Insurance Company. Objection to Bill of Costs due by 10/28/2016. Tax Bill of Costs by 11/4/2016. (Jakobson, Galina) (Entered: 10/11/2016)
10/25/2016	73	FIRST MOTION for Relief re 71 Clerk's Judgment, filed by Plaintiff Nautilus Insurance Company. Responses due by 11/11/2016. (Hsu, Linda). (Entered: 10/25/2016)
10/25/2016	74	DECLARATION of Richard Conrad re 73 FIRST MOTION for Relief re 71 Clerk's Judgment; filed by Plaintiff Nautilus Insurance Company. (Hsu, Linda) (Entered: 10/25/2016)
10/25/2016	75	DECLARATION of Linda Wendell Hsu re 73 FIRST MOTION for Relief re 71 Clerk's Judgment; filed by Plaintiff Nautilus Insurance Company. (Hsu, Linda) (Entered: 10/25/2016)
10/25/2016	76	DECLARATION of Kenneth Richard re 73 FIRST MOTION for Relief re 71 Clerk's Judgment; filed by Plaintiff Nautilus Insurance Company. (Hsu, Linda) (Entered: 10/25/2016)
10/25/2016	77	EXHIBIT(s) to 73 FIRST MOTION for Relief re 71 Clerk's Judgment; filed by Plaintiff Nautilus Insurance Company. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6 - Part 1, # 7 Exhibit 6 - Part 2, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Exhibit 9, # 11 Exhibit 10, # 12 Exhibit 11 - Part 1, # 13 Exhibit 11 - Part 2, # 14 Exhibit 12, # 15 Exhibit 13, # 16 Exhibit 14, # 17 Exhibit 15)(Hsu, Linda) (Entered: 10/25/2016)
10/25/2016	78	NOTICE of In Camera Review Submission re: 73 FIRST MOTION for Relief re 71 Clerk's Judgment; filed by Nautilus Insurance Company. (Hsu, Linda) (Entered: 10/25/2016)
10/25/2016	79	**ERROR:** Document filed in error, wrong event selected by attorney. **CORRECTION:** Attorney correctly refiled document as Objection 80 . Document 79 terminated as filed in error. ~~MOTION for Magistrate Judge to Reconsider Magistrate Judge Order; filed by Defendants Access Medical, LLC, Robert Clark Wood, II. Responses due by 11/11/2016. (Green, L.)~~ **Modified on 10/27/2016 (RFJ).** (Entered: 10/25/2016)
10/25/2016	80	OBJECTIONS re LR IB 3-1 or MOTION for District Judge to Reconsider Order by Defendants Access Medical, LLC, Robert Clark Wood, II. Responses due by

		11/11/2016. (Attachments: # 1 Exhibit Exhibit A - Access's First Set of Form Interrogatories, # 2 Exhibit Exhibit B - Access's First Set of Requests for Admission, # 3 Exhibit Exhibit C - Mr. Wood's First Set of Form Interrogatories, # 4 Exhibit Mr. Wood's First Set of Requests for Admission)(Green, L.) (Entered: 10/25/2016)
10/27/2016		**NOTICE: of Docket Correction** to 79 Motion: **ERROR:** Wrong Motion event selected by Attorney **L. Renee Green**. CORRECTION: Motion was correctly refiled as 80 OBJECTIONS. Motion 79 was terminated as filed in error. **(no image attached)**(RFJ) (Entered: 10/27/2016)
10/27/2016	81	OBJECTIONS re LR IB 3-1 or MOTION for District Judge to Reconsider Order; filed by Defendant Flournoy Management, LLC. Responses due by 11/13/2016. (Harper, James) (Entered: 10/27/2016)
10/27/2016	82	OBJECTION to 72 Bill of Costs ; filed by Defendants Access Medical, LLC, Robert Clark Wood, II. Response to Objection to Bill of Costs due by 11/6/2016. (Green, L.) (Entered: 10/27/2016)
10/27/2016	83	MOTION to Stay by Defendants Access Medical, LLC, Robert Clark Wood, II. (Green, L.) (Entered: 10/27/2016)
11/02/2016	84	JOINDER to 82 Objection to Bill of Costs, 83 Motion to Stay ; filed by Defendant Flournoy Management, LLC. (Harper, James) (Entered: 11/02/2016)
11/04/2016	85	REPLY to 72 Bill of Costs ; filed by Plaintiff Nautilus Insurance Company. (Hsu, Linda) (Entered: 11/04/2016)
11/04/2016	86	RESPONSE to 83 Motion to Stay, filed by Plaintiff Nautilus Insurance Company. Replies due by 11/14/2016. (DKJ) (Entered: 11/07/2016)
11/07/2016		NOTICE of Docket Correction to 85 Reply - Other: **ERROR:** Document should have been docketed as a separate entry pursuant to LR IC 2-2(b) which states: "For each type of relief requested or purpose of the document, a separate document must be filed and a separate event must be selected for that document". . **CORRECTION:** Court docketed the additional cause of action as 86 RESPONSE to 83 Motion to Stay. **(no image attached)**(DKJ) Modified docket text on 11/7/2016 (DKJ). (Entered: 11/07/2016)
11/11/2016	87	RESPONSE to 80 Objections re LR IB 3-1 or Motion for District Judge to Reconsider Order,, filed by Plaintiff Nautilus Insurance Company. Replies due by 11/21/2016. (Hsu, Linda) (Entered: 11/11/2016)
11/11/2016	88	DECLARATION **of Linda Wendell Hsu** re 80 Objections re LR IB 3-1 or Motion for District Judge to Reconsider Order, filed by Plaintiff Nautilus Insurance Company. (Hsu, Linda) (Entered: 11/11/2016)
11/11/2016	89	EXHIBIT(s) to 87 Response to Motion ; filed by Plaintiff Nautilus Insurance Company. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Hsu, Linda) (Entered: 11/11/2016)
11/14/2016	90	RESPONSE to 81 Objections re LR IB 3-1 or Motion for District Judge to Reconsider Order, filed by Plaintiff Nautilus Insurance Company. Replies due by 11/24/2016. (Hsu, Linda) (Entered: 11/14/2016)
11/14/2016	91	RESPONSE to 73 Motion, filed by Defendants Access Medical, LLC, Robert Clark Wood, II. Replies due by 11/24/2016. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit)(Green, L.) **Modified docket entry relationship on 11/15/2016 (DKJ).** (Entered: 11/14/2016)

11/14/2016	92	DECLARATION of Jordan Schnitzer by Defendants Access Medical, LLC, Robert Clark Wood, II. (Green, L.) (Entered: 11/14/2016)
11/14/2016	93	**ERROR** Incorrect event selected by attorney. **CORRECTION:**Attorney advised to refile using the appropriate event. ~~RESPONSE to 73 Motion, filed by Defendants Access Medical, LLC, Robert Clark Wood, II. Replies due by 11/24/2016. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit)(Green, L.)~~ (Entered: 11/14/2016)
11/14/2016	94	DECLARATION of Jordan Schnitzer by Defendants Access Medical, LLC, Robert Clark Wood, II. (Green, L.) (Entered: 11/14/2016)
11/14/2016	95	REPLY to Response to 83 Motion to Stay filed by Defendants Access Medical, LLC, Robert Clark Wood, II. (Green, L.) (Entered: 11/14/2016)
11/15/2016	96	NOTICE: Attorney Action Required to 93 Response to Motion. **ERROR** Incorrect event selected by attorney. **CORRECTION:** Attorney L. Renee Green advised to refile using the appropriate event "Motion for Reconsideration". **(no image attached)** (DKJ) (Entered: 11/15/2016)
11/15/2016	97	RESPONSE to 73 FIRST MOTION for Relief filed by Defendants Access Medical, LLC, Robert Clark Wood, II. Replies due by 11/25/2016. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Declaration)(Green, L.) Modified docket entry relationship on 11/15/2016 (DKJ). (Entered: 11/15/2016)
11/15/2016	98	RESPONSE to 81 Objections re LR IB 3-1 or Motion for District Judge to Reconsider Order, filed by Defendants Access Medical, LLC, Robert Clark Wood, II. Replies due by 11/25/2016. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Declaration)(Green, L.) (Entered: 11/15/2016)
11/21/2016	99	REPLY to Response to 80 Objections re LR IB 3-1 or Motion for District Judge to Reconsider Order filed by Defendants Access Medical, LLC, Robert Clark Wood, II. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Declaration)(Green, L.) **Modified docket entry relationship on 11/22/2016 (DKJ).** (Entered: 11/21/2016)
11/22/2016	100	JOINDER **re: 99 REPLY to Response to 80 Objections**; filed by Defendant Flournoy Management, LLC. (Harper, James) **Court Modified entry to properly establish docket entry relationship pursuant to LR IC 2-2(d) on 11/22/2016 (RFJ).** (Entered: 11/22/2016)
11/23/2016	101	REPLY to Response to 73 Motion filed by Plaintiff Nautilus Insurance Company. (Hsu, Linda) (Entered: 11/23/2016)
05/18/2017	102	ORDER. IT IS HEREBY ORDERED, ADJUDGED, and DECREED that 80 , 81 the defendants' motions for reconsideration are DENIED. IT IS FURTHER ORDERED that 73 Nautilus's motion for relief is DENIED. IT IS FURTHER ORDERED that 83 defendants' motion to stay is DENIED as moot. Signed by Judge Jennifer A. Dorsey on 5/18/17. (Copies have been distributed pursuant to the NEF - ADR) (Entered: 05/18/2017)
06/02/2017	103	COSTS TAXED in amount of $420.00 against Defendants re 72 Bill of Costs. (AF) (Entered: 06/02/2017)
06/02/2017	104	CLERK'S MEMORANDUM regarding taxation of costs - 103 Costs Taxed, 72 Bill of Costs. (AF) (Entered: 06/02/2017)
06/16/2017	105	NOTICE OF APPEAL as to 102 ORDER, filed by Plaintiff Nautilus Insurance Company. Filing fee $ 505, receipt number 0978-4653309. E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. (Hsu, Linda) (Entered: 06/16/2017)
06/16/2017	106	NOTICE of Association of Counsel by Jordan P Schnitzer on behalf of Defendants Access Medical, LLC, Robert Clark Wood, II. (Schnitzer, Jordan) (Entered:

		06/16/2017)
06/19/2017	107	NOTICE OF APPEAL as to 102 ORDER, filed by Defendants Access Medical, LLC, Robert Clark Wood, II. Filing fee $ 505, receipt number 0978-4655488. E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. (Kravitz, Martin) (Entered: 06/19/2017)
06/19/2017	108	NOTICE OF APPEAL as to 102 ORDER, filed by Defendant Flournoy Management, LLC. Filing fee $ 505, receipt number 0978-4655719. E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. (Harper, James) (Entered: 06/19/2017)
06/19/2017	112	USCA ORDER for Time Schedule as to 105 Notice of Appeal filed by Nautilus Insurance Company. **USCA Case Number 17-16265**. (MR) (Entered: 06/28/2017)
06/20/2017	109	USCA ORDER for Time Schedule as to 105 Notice of Appeal filed by Nautilus Insurance Company, 108 Notice of Appeal filed by Flournoy Management, LLC, 107 Notice of Appeal filed by Access Medical, LLC, Robert Clark Wood, II. **USCA Case Number 17-16265, 17-16272 Cross Appeals**. (JM) (Entered: 06/21/2017)
06/20/2017	114	USCA ORDER for Time Schedule as to 105 107 108 Notices of Appeal/Cross-Appeals. **USCA Case Numbers 17-16273 and 17-16265**. (MMM) (Entered: 06/30/2017)
06/21/2017	110	TRANSCRIPT DESIGNATION by Defendants Access Medical, LLC, Robert Clark Wood, II re 107 Notice of Appeal. Transcripts are **NOT** required for this appeal. (Kravitz, Martin) (Entered: 06/21/2017)
06/27/2017	111	TRANSCRIPT DESIGNATION by Defendant Flournoy Management, LLC re 108 Notice of Appeal. Transcripts are **NOT** required for this appeal. (Harper, James) (Entered: 06/27/2017)
06/29/2017	113	TRANSCRIPT DESIGNATION by Plaintiff Nautilus Insurance Company re 105 Notice of Appeal. Transcripts are **NOT** required for this appeal. (Hsu, Linda) (Entered: 06/29/2017)
08/08/2017	115	Emergency MOTION APPLICATION AN ORDER DIRECTING NINTH CIRCUIT TO GRANT OR ENTERTAIN MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(2) by Defendants Access Medical, LLC, Robert Clark Wood, II. Responses due by 8/22/2017. (Green, L.) **Corrected image 116 attached on 8/8/2017 (DKJ).** (Entered: 08/08/2017)
08/08/2017	116	NOTICE of Corrected Image/Document re 115 Motion, by Defendants Access Medical, LLC, Robert Clark Wood, II. (Service of corrected image is attached). (Attachments: # 1 Declaration L. Renee Green, # 2 Exhibit A - Ltr from Linda Hsu dated 11/7/2016, # 3 Exhibit B - Ltr from Renee Green dated 7/28/17, # 4 Exhibit C - Emails, # 5 Exhibit D- Ltr from Linda Hsu dated 7/6/17)(Green, L.) (Entered: 08/08/2017)
08/08/2017	117	MOTION Application for Order Directing or Indicating to the United States Court of Appeals for the 9th Circuit that the District Court Will Grant or Entertain Motion for Relief From Judgment Pursuant to Rule 60(b)(2) by Defendants Access Medical, LLC, Robert Clark Wood, II. Responses due by 8/22/2017. (Attachments: # 1 Declaration L. Renee Green, # 2 Exhibit A - Motion for Relief from Judgment, # 3 Exhibit A - Ltr from Linda Hsu dated 11/7/2016, # 4 Exhibit B- Ltr from Renee Green dated 7/28/2017, # 5 Exhibit C - Emails, # 6 Exhibit D - Ltr from Linda Hsu dated 7/6/2017)(Green, L.) (Entered: 08/08/2017)
08/11/2017	118	ORDER that 117 Application for an order indicating that the district court will entertain a motion for relief from judgment is DENIED. FURTHER ORDERED that 115 Motion for emergency order shortening time is DENIED. Signed by Judge Jennifer A. Dorsey on 8/11/17. (Copies have been distributed pursuant to the NEF - MMM) (Entered: 08/14/2017)

08/14/2017	119	JOINDER to ~~116~~ 115 Emergency MOTION APPLICATION AN ORDER DIRECTING NINTH CIRCUIT TO GRANT OR ENTERTAIN MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(2), filed by Defendant Flournoy Management, LLC. (Harper, James) **Modified docket entry relationship on 8/15/2017 (TR).** (Entered: 08/14/2017)
09/08/2017	120	NOTICE OF APPEAL as to 118 Order on Motion,,,,,, by Defendants Access Medical, LLC, Robert Clark Wood, II. Filing fee $ 505, receipt number 0978-4766302. E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. (Kravitz, Martin) (Entered: 09/08/2017)
09/11/2017	121	NOTICE OF APPEAL as to 118 Order on Motion,,,,,, by Defendant Flournoy Management, LLC. Filing fee $ 505, receipt number 0978-4767543. E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. (Harper, James) (Entered: 09/11/2017)
09/12/2017	122	USCA ORDER for Time Schedule as to 121 Notice of Appeal filed by Flournoy Management, LLC. **USCA Case Number 17-16842**. (JM) (Entered: 09/12/2017)
09/12/2017	123	USCA ORDER for Time Schedule as to 120 Notice of Appeal, filed by Access Medical, LLC, Robert Clark Wood, II. **USCA Case Number 17-16840**. (MR) (Entered: 09/13/2017)
09/15/2017	124	NOTICE of Appearance by attorney Eric Sebastian Powers on behalf of Plaintiff Nautilus Insurance Company. (Powers, Eric) (Entered: 09/15/2017)
09/15/2017	125	NOTICE OF RELATED CASES 2:17-cv-02393 by Plaintiff Nautilus Insurance Company. (Powers, Eric) (Entered: 09/15/2017)
11/03/2017	126	MOTION for an Order Directing or Indicating the United States Court of Appeals for the Ninth Circuit that the District Court Will Grant or Entertain Access Medical, LLC and Robert Clark wood, II's Motion for Relief from Judgment Pursuant to Rule 60(b)(2) by Defendants Access Medical, LLC, Robert Clark Wood, II. Responses due by 11/17/2017. (Kravitz, Martin) (Entered: 11/03/2017)
11/03/2017	127	MOTION for An Order Shortening Time for the Hearing on the Application for an Order Directing or Indicating to the United States Court of Appeals for the Ninth Circuit that the District Court will Grant or Entertain Defendants Access Medical, LLC and Robert Cark Wood, II's Motion for Relief from Judgment Pursuant to Rule 60(b)(2) by Defendants Access Medical, LLC, Robert Clark Wood, II. Responses due by 11/17/2017. (Kravitz, Martin) Modified event on 11/3/2017 (DKJ). (Entered: 11/03/2017)
11/03/2017	128	~~MOTION Relief from Judgment~~ Index of Exhibits in Support of 126 Defendants Access Medical LLC and Robert Clark Wood II's Motion for Relief from Judgment Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure by Defendants Access Medical, LLC, Robert Clark Wood, II. Responses due by 11/17/2017. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit)(Kravitz, Martin) **Modified to reflect correct event and to add docket entry relatoinship on 11/3/2017 (DKJ).** (Entered: 11/03/2017)
11/03/2017	129	~~MOTION Relief from Judgment~~ Declaration of L. Renee Gren, Esq. In Support of the 127 Motion for an Order Shortening Time for the Hearing on the Application for an Order Directing or Indication to the United States Court of Appeals for the Ninth Circuit that the District Court will Grant or Entertain Defendants Access Medical, LLC and Robert Clark Woo, II's Motion for Relief from Judgment Pursuant to Rule 60(b)(2) ("Application") and in Support of the Application by Defendants Access Medical, LLC, Robert Clark Wood, II. Responses due by 11/17/2017. (Kravitz, Martin) **Modified on 11/3/2017 to add docket entry relationship and to reflect correct event (DKJ).** (Entered: 11/03/2017)
11/03/2017		Motions terminated: 129 Motion, filed by Access Medical, LLC, Robert Clark Wood,

		II. Incorrect event selected by Attorney. Court modified event to a Declaration and added the correct docket entry relationship. (DKJ) (Entered: 11/03/2017)
11/06/2017	130	JOINDER to 126 Motion, filed by Defendant Flournoy Management, LLC. (Harper, James) (Entered: 11/06/2017)
11/17/2017	131	RESPONSE to 126 Motion, by Plaintiff Nautilus Insurance Company. Replies due by 11/24/2017. (Attachments: # 1 Affidavit Request for Judicial Notice, # 2 Exhibit Index of Exhibits) (Hsu, Linda) (Entered: 11/17/2017)
11/17/2017	132	RESPONSE to 127 Motion, by Plaintiff Nautilus Insurance Company. Replies due by 11/24/2017. (Hsu, Linda) (Entered: 11/17/2017)
11/22/2017	133	REPLY to Response to 127 Motion, by Defendants Access Medical, LLC, Robert Clark Wood, II. (Kravitz, Martin) (Entered: 11/22/2017)
11/22/2017	134	REPLY to Response to 126 Motion, by Defendants Access Medical, LLC, Robert Clark Wood, II. (Kravitz, Martin) (Entered: 11/22/2017)

PACER Service Center

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PACER Login:	Kravitz8985:2583200:0	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	2:15-cv-00321-JAD-GWF
Billable Pages:	12	**Cost:**	1.20

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2017, I electronically filed Access Medical, LLC and Robert Clark Wood, II's Principal and Response Brief in addition to the Supplemental Appendix to the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated this 22nd day of December, 2017 Kravitz, Schnitzer & Johnson, Chtd.

By: /s/ Cyndee Lowe

Joint Appendix

Tab #9

Nos. 17-16265, 17-16272, 17-16273

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NAUTILUS INSURANCE COMPANY, Plaintiff – Appellant/ Cross-Appellee, v. ACCESS MEDICAL, LLC; ROBERT CLARK WOOD, II; FLOURNOY MANAGEMENT, LLC; Defendants – Appellees/ Cross-Appellants.	Nos. 17-16265, 17-16272, 17-16273 D.C. No. 2:15-cv-00321-JAD-GWF U.S. District Court of Nevada, Las Vegas

On Appeal from the United States District Court
for the District of Nevada
No. 2:15-cv-00321-JAD-GWF
Hon. Jennifer A. Dorsey

FLOURNOY MANAGEMENT, LLC's BRIEF ON CROSS-APPEAL

JAMES E. HARPER
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HARPER | SELIM
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Las Vegas, Nevada 89134
(702) 948-9240

Counsel for Flournoy Management LLC

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26-1, undersigned counsel for Flournoy Management, LLC certifies that no corporation owns 10% or more of its stock.

Date: January 12, 2018.

HARPER | SELIM

/s/ James E. Harper

Counsel for Flournoy Management, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

TREATISES

I. INTRODUCTION

The United States District Court for the District of Nevada clearly erred in holding that Nautilus Insurance Company ("Nautilus") does not owe Flournoy Management, LLC ("Flournoy") the duty to defend Flournoy in the underlying business litigation related to medical device sales. The duty to defend is broad and arises whenever there is a mere **possibility** of coverage. The allegations in the underlying complaint and other facts reasonably available to Nautilus make clear that there is a possibility of coverage for the underlying litigation claims brought against Flournoy. Nautilus therefore has a duty to provide a defense to Flournoy.

Moreover, the district court correctly concluded that Nautilus was not entitled to reimbursement of defense fees and costs in the declaratory action. Nautilus improperly attempted to change its declaratory relief action into one for money damages after a judgment had already been entered. This attempt to change course midstream cannot succeed. Contrary to Nautilus's position, Nevada law has not held that a mere reservation of rights letter entitles an insurer to compensation, nor has it held that an insurer has an automatic right to reimbursement of attorneys' fees and costs that it paid in another action. In the limited cases where an insurer's request for reimbursement has been granted, Nevada courts have relied on provisions in the insurance policy which **specifically authorized** reimbursement

for a reservation of rights defense. No such provision is present in the insurance policy at issue here.

The insurance policy also strictly limits how its provisions may be amended, requiring a formal endorsement to be adopted into the policy. Nautilus's attempt to amend the contract through an informal letter violated this provision, making the purported letter amendment unenforceable.

Finally, the district court correctly concluded that Nautilus was not entitled to reimbursement under 28 U.S.C. § 2202. The Declaratory Judgment Relief Act merely creates procedural rights, and a party can only obtain reimbursement pursuant to § 2202 if a substantive source of law (e.g., Nevada law) provides for such relief. Nevada law does not provide such relief under the facts at bar, and reimbursement is therefore improper.

In short, Flournoy respectfully requests reversal of the district court's declaration of no duty to defend. Flournoy does not challenge the district court's denial of reimbursement to Nautilus.

II. JURISDICTIONAL STATEMENT

Pursuant to Circuit Rule 28-2.2, Flournoy concurs with Access Medical, LLC ("Access") and Robert Clark Wood, II's ("Wood") Jurisdictional Statement in their Second Brief on Cross-Appeal. *See* Court of Appeals ECF No. 24 in Case No. 17-16265, at pages 4-5 (ECF pages 15-16).

III. STATEMENT OF ISSUES PRESENTED

1. Under Nevada law, does an insurer have a duty to defend its insured when the complaint does not expressly assert claims covered under the policy, but does allege conduct which creates potential liability for the covered claims?

2. Under Nevada law, is an insurer entitled to reimbursement of defense costs when (1) the insurer provided a defense subject to a unilateral reservation of rights, (2) the insurer obtained a no-coverage declaratory judgment, and (3) the insurance policy did not authorize the insurer to tender a defense subject to a reservation of rights, did not reserve the right to reimbursement, and expressly forbade the insurer from informally amending the insurance contract between the parties?

IV. STATEMENT OF CASE

A. The Underlying Lawsuit

Ted Switzer ("Switzer") filed suit against Flournoy and Wood in California state court on December 27, 2011, initiating litigation among participants and entities in a medical business venture that had turned contentious. The litigation ballooned into a multi-faceted case with numerous claims and parties ER 74-75.

On June 3, 2013, Switzer filed a Cross-Complaint ("Switzer Cross-Complaint") against Flournoy, Access, Wood, and various third parties on June 3, 2013. ER 102-160. Switzer alleged that he and Wood had formed a partnership that would sell medical implants in Tennessee and Georgia, but that Wood allegedly breached this agreement by converting funds that should have been placed in Flournoy's bank account for Woods' own personal use. Switzer also allegedly did not receive the agreed-upon distribution from Flournoy. Instead, Wood allegedly engaged in wrongful actions that "took away from Mr. Switzer ... lucrative business relationships and income" that Switzer had developed and enjoyed." The Switzer Cross-Complaint alleged four causes of action for interference with prospective economic advantage against Wood, Access, and Flournoy. The four causes of action are similar except that each one refers to different entities that allegedly discontinued their relationships with Switzer due to allegedly disruptive conduct of Flournoy, Access, and Mr. Wood. Specifically, Mr. Switzer alleged the following:

- that Wood and businesses Wood owns acted to disrupt Flournoy's business by wrongful acts (including depriving Switzer and keeping for himself lucrative business relationships and income);
- That such allegedly wrongful acts caused the complete loss of business and injury to the personal and business reputation of Switzer and Flournoy;
- That Wood, on behalf of Access, engaged in wrongful acts causing various vendors to stop using Switzer's business and use Access instead; and

- That Wood's allegedly wrongful acts were malicious and committed with the intent to injure Flournoy's professional and business well-being.[1]

B. The July 25, 2011 Email

On July 25, 2011, Jacqueline Weide, a representative of Access and Flournoy, advised Cottage Hospital in Santa Barbara, California, that she was interested in providing spinal implants to their facility.[2] ER 166-167. In an attempt to obtain Cottage Hospital's business, Ms. Weide indicated the following in an email:

> I believe Dr. Early and Dr. Kahmann were using Alphatec's implants but their Distributor in the California area is now banned from selling Alphatec implants. We are in Las Vegas and have been using their products here for 2 years. Alphatec recently contacted us and asked that we take over the California region as well.

The "Distributor in the California area" referred to in that email was Switzer. However, Nautilus never conducted a reasonable investigation to determine that Switzer was the Distributor that Weide referenced. Due to Switzer's allegations in his Cross-Complaint involving Access allegedly ruining Switzer's business reputation and stealing his customers, Access produced this key information to

[1]ER 120-144, ¶¶ 43, 45, 53, 66, 67, 68, 107, 108, 109, 110, 114, 115, 116, 121, 122, 123, 124, 128, 129, 130, and 13l.

[2] Switzer claimed that Cottage Hospital used to buy spinal implants from one of his businesses. ER 121, 124, 144.

Nautilus for coverage purposes and to Switzer during discovery in the Underlying Lawsuit.

C. The Insurance Policy

Nautilus issued Policy No. BN952426 to Access, which was effective January 15, 2011 to January 15, 2012 ("Policy"). ER 57-65, SER 615-666. An endorsement of the Policy named Flournoy as an additional insured. SER 630-631. Wood was also an insured under the policy in his capacity as a shareholder and manager of Access or Flournoy. The Policy required Nautilus to defend and indemnify its insureds for personal and advertising injury liability according to Section I, Coverage B:

> SECTION I - COVERAGES
> . . .
> COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any suit seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result.
>
> . . .
>
> (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

> No other obligation or liability to pay sums or perform acts or service is covered unless explicitly provided for under Supplementary Payments- Coverages A and B.
>
> b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period

ER 59-60.

The Policy defined "personal and advertising injury" as follow:

> SECTION V - DEFINITIONS
> . . .
> 14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:
> . . .
>
> a. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a persons or organization's goods, products or services.
>
> In addition, the Common Policy Conditions contains the following provision

regarding changes to the Policy's terms:

> B. Changes
>
> This policy contains all the agreements between you and us concerning the insurance afforded…. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

ER 64, SER 615-666. The Policy language required Nautilus to defend Access for any personal injury, even if not titled in a cause of action, which Access allegedly caused within the Policy period. The Switzer Cross-Complaint's allegations and the reasonable inference to be drawn from them has triggered the duty to defend. Moreover, the July 25, 2011 Weide email serves as *prima facie* evidence that one

of the wrongful acts alleged in the Switzer Cross-Complaint includes the email that allegedly slandered him. Thus, Nautilus was and is required to defend its insureds from allegations in the Switzer Cross-Complaint. The Policy also prohibits unilateral changes to the contract, making Nautilus's attempt to amend through its unilateral reservation of rights letters ineffective.

D. The Coverage Decision

Before Nautilus conducted any investigation regarding the facts of the Cross-Complaint, it hastily disclaimed coverage. SER 62-84. Flournoy and Access wrote Nautilus that it was incorrect in its position and was required to investigate the facts behind the Switzer Cross-Complaint before rendering a decision on its duty to defend. SER 62-65. After Nautilus received this correspondence, it continued to delay its decision regarding its duty to defend. SER 76-84. Meanwhile, Switzer continued to litigate his Cross-Complaint against Nautilus's insureds.

Three months passed, and Nautilus still had not decided whether to defend its insureds. By this time, Nautilus's insureds had told Nautilus in writing several times that it was not legally permitted to strictly construe the allegations of a third-party complaint against its insureds. SER 76-84. The insureds further communicated to Nautilus that it could not deny coverage on the basis that the existing allegations were not phrased in strict accordance with the language of the

Policy. SER 76-84. Another month passed, and Nautilus failed to communicate to its insureds whether it would defend them in the Underlying Lawsuit. Nautilus finally advised it would defend its insureds on March 25, 2014, but only after Access's counsel gave Nautilus an ultimatum to make a decision. SER 76-84. Nautilus wrote that it would reserve its right to cease providing a defense and obtain reimbursement if it obtained a no=coverage determination. SER 76-84.

E. The Declaratory Relief Action

On February 24, 2015, Nautilus filed a declaratory relief action in the U.S. District Court, District of Nevada, seeking a court ruling that it owed Flournoy and other insureds no duty to defend or indemnify under the Switzer Cross-Complaint. ER 46-55. On September 27, 2016, the district court granted Nautilus's motion for summary judgment, ER 1-11, holding that Nautilus owed no duty to defend or indemnify because, in pertinent part, the insureds had not demonstrated that the statements in the July 25, 2011 email from Weide were false. ER 5-10. The insureds filed a motion for reconsideration of the September 27, 2016 order, and Nautilus filed a request for further relief, demanding reimbursement of defense costs incurred on behalf of Flournoy and others. ER 198-214, SER 96-97.

On May 18, 2017, the district court denied the insureds' motion for reconsideration and denied Nautilus's motion for further relief. ER 12-18. In denying reconsideration, the district court stated that "there is no indication that the

plaintiff [Switzer] in the [California] state action has alleged that the predicate wrongful act for the intentional-interference claim is a defamatory publication that would trigger Nautilus's coverage." ER 15-16. In denying Nautilus' motion for further relief, the district court concluded that Nevada law did not permit reimbursement under these circumstances and that 28 U.S.C. § 2202 did not grant any independent basis for Nautilus to be reimbursed. According to the district court, Nevada law did not allow reimbursement because (1) the parties did not agree to it, (2) the Policy did not authorize it, and (3) Nautilus's reservations of rights letters purporting to amend the Policy were not demonstrated to be enforceable. ER 16-18.

F. The Appeal

On June 16, 2017, Nautilus appealed the district court's May 18, 2017 order, and on June 19, 2017, Flournoy did the same. ER 19-23. This is Flournoy's opening brief challenging the district court's finding of no coverage and respectfully requesting affirmance of the district court's denial of reimbursement to Nautilus.

V. SUMMARY OF THE ARGUMENT

The district court erred in ruling that Nautilus has no duty to defend Flournoy against the Switzer Cross-Complaint. The district court concluded that the allegations in the Switzer Cross-Complaint and other extrinsic evidence were

not sufficient to trigger potential coverage for the covered claims of defamation and disparagement. But the district court demanded a level of precise correlation between Policy and pleading language not warranted by Nevada law.

Triggering the duty to defend requires only a bare potential or possibility of coverage, a standard met even when the covered theories of recovery are not included and every element of the offense is not alleged. The Switzer Cross-Complaint meets this modest standard and activates Nautilus's duty to defend. The allegations state that defendants engaged in "wrongful actions" that "disrupted" Switzer's relationships with his clients such that his clients gave their business to cross-defendants instead of Switzer, causing Switzer reputational injury and embarrassment. Moreover, it is clear from the Switzer Cross-Complaint that the defendants allegedly perpetrated these wrongful acts and disrupted these relationships while engaged in a highly communicative act—sales. As explained below, some evidence also suggests that the sales tactics employed included undermining the credibility of Switzer and his ability to conduct business. Based on these facts, Switzer's cross-complaint theorizes that cross-defendants wrongfully lured clients away by maligning Switzer and his business. Such allegations make out potential claims for defamation and disparagement and therefore give rise to Nautilus's duty to defend. The district court's no-coverage ruling should, Flournoy respectfully submits, be reversed.

But even if this Court upholds the district court's no-coverage determination, its analysis denying reimbursement should be affirmed. The Policy governs Nautilus's duty to defend, its options in how it carries out that duty, and its payment obligations in fulfilling that duty. The Policy does not authorize Nautilus to provide a defense subject to a reservation of rights, and it does not give Nautilus the right to reimbursement upon a no-coverage determination. To enjoy such rights, Nautilus would have had to bargain for those benefits by obtaining a formal amendment to the Policy.

Nautilus's attempt to unilaterally create such an amendment by providing a reservation of rights letter was ineffective for two reasons. First, the Policy expressly forbade either party from using such informal procedures to amend the Policy. Second, the Policy made clear that it included the entirety of the agreement between the parties. Accordingly, the reservation of rights letter was an ineffective attempt to modify the Policy, which is also a contract. In the absence of an enforceable modification, Nautilus is not entitled under Nevada law to provide a conditional defense and obtain reimbursement because it did not bargain for that benefit.

The district court similarly had no authority to authorize any reimbursement award under 28 U.S.C. § 2202 because Section 2202 is merely a procedural vehicle used to effectuate substantive rights created by other laws. As there was no

substantive right to reimbursement under Nevada law, Section 2202 has no application.

VI. ARGUMENT

A. Standards of Review

The district court's order holding that Nautilus owes no duty to defend Flournoy under Nevada law is subject to *de novo* review. *Pac. Grp. v. First State Ins. Co.*, 70 F.3d 524, 527 (9th Cir. 1995) (citing *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir.1994)). A district court's interpretation of state law is reviewed *de novo*. *Flores v. City of Westminster*, 873 F.3d 739, 748 (9th Cir. 2017). Motions for reconsideration are reviewed for an abuse of discretion. *Benson v. JPMorgan Chase Bank, N.A.*,673 F.3d 1207, 1211 (9th Cir. 2012). But where an order denying a motion for reconsideration is based on an inaccurate view of the law, we review the underlying legal determination *de novo*. *See Smith v. Pac. Props & Dev't Corp.*, 358 F.34d 1097, 1100 (9th Cir. 2004).

To prevail on the reimbursement appeal, Nautilus must overcome both *de novo* and abuse of discretion review. First, whether Nautilus is entitled to reimbursement is a question of state law subject to *de novo* review. *See Flores v. City of Westminster*, 873 F.3d at 748. But even if Nautilus were entitled to reimbursement under substantive Nevada law, it would further need to demonstrate

that the district court abused its discretion in declining to grant "further necessary or proper relief" under the procedural vehicle of 28 U.S.C. § 2202. Ultimately, Section 2202 vests in the district court broad discretion in determining relief, providing that "[f]urther necessary or proper relief based on a declaratory judgment or decree *may* be granted[.]" 28 U.S.C. § 2202 (emphasis added). The Ninth Circuit has held in similar cases that its review of decisions under the Declaratory Judgment Act "is deferential, under the abuse of discretion standard." *Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1223 (9th Cir. 1998); *see also Noatex Corp. v. King Const. of Houston, L.L.C.*, 732 F.3d 479, 487–88 (5th Cir. 2013) (explaining that "we review a district court's decision to grant or deny such monetary damages [under 28 U.S.C. § 2202] for abuse of discretion"). "An abuse of discretion occurs when 'no reasonable person could take the view adopted by the trial court. If reasonable persons could differ, no abuse of discretion can be found.'" *Stone v. City & Cty. of San Francisco*, 968 F.2d 850, 861, n.19 (9th Cir. 1992) (quotation omitted).

B. Nautilus has a Duty to Defend Flournoy Because the Switzer Cross-Complaint Raises at least a Possibility of Coverage, Notwithstanding the Precise Theories of Recovery Identified in the Policy.

To determine whether a duty to defend exists under Nevada law, the court must "consider the underlying complaint and any other facts the insurer learns of." *Great Am. Ins. Co. of New York v. N. Am. Specialty Ins. Co.*, No. 03:06-cv-136-

LRH-RAM, 2008 WL 1774981, at *2 (D. Nev. Apr. 15, 2008); *see also Allstate Prop. & Cas. Ins. Co. v. Yalda*, No. 2:14-cv-50-APG, 2015 WL 1344517, *4 (D. Nev. Mar. 20, 2015). Indeed, the insurer cannot rely on the complaint alone because it has an affirmative duty under Nevada law to "investigat[e] the facts behind a complaint" to assess its duty to defend. *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 1158 (Nev. 2004).

"Even if—after this inquiry—doubts remain about the insurer's duty to defend, these uncertainties do not negate the insurer's duty to defend." *Great Am. Ins. Co. of New York*, 2008 WL 1774981, at *2. Disputed facts that bear on the duty to defend "question must be resolved on the basis of the factual version which supports coverage." *Ticor Title Ins. Co. of California v. Am. Res., Ltd*., 859 F.2d 772, 776 (9th Cir. 1988). This interpretative rule flows from the axiom that if "there is any doubt about whether the duty to defend arises, this doubt must be resolved in favor of the insured." *Frontier Ins. Co*., 99 P.3d at 1158.

The duty-to-defend inquiry does not depend on the theories of recovery in the complaint. *Great Am. Ins. Co. of New York.*, 2008 WL 1774981, at *2 (citing *Gray v. Zurich Ins. Co*., 419 P.2d 168, 176 (1966)); *see also KM Strategic Mgmt., LLC v. Am. Cas. Co. of Reading PA*, 156 F. Supp. 3d 1154, 1165 (C.D. Cal. 2015) (finding duty may be triggered even where "the tendered complaint does not plead formal causes of action for 'slander' or 'libel'"). As the U.S. District Court of

Nevada put it, "[i]t would be entirely unreasonable to make an insurer's duty to defend hinge upon whether a third party's allegations fortuitously meet every condition set forth in the insurer's policy." *Great Am. Ins. Co. of New York*, 2008 WL 1774981, at *6 (citing *Frontier Ins. Co.*, 99 F.3d at 1158) .

Rather, the inquiry focuses on the *conduct* the insurer learns about from "the complaint, the insured, or other sources." *Great Am. Ins. Co. of New York*, 2008 WL 1774981, at *4-5 (quoting *Gray v. Zurich*, 419 P.2d at 176-77). If the conduct described "give[s] rise to the potential of liability under the policy," the duty to defend is triggered. *Frontier Ins. Co*., 99 P.3d at 1158. Put another way, "in order to hold the duty to defend inapplicable, a court must find that the only possible interpretation of the *conduct* at issue places it outside the policy's coverage." *Ticor Title Ins. Co. of Calif*., 859 F.2d at 776, n.6 (citing *International Paper Co. v. Continental Cas. Co*., 35 N.Y.2d 322, 325 (1974)) (emphasis original in *Ticor Title*).

Even if the complaint does "not allege each and every element" of the cause of action covered under the policy, the duty to defend still applies "if there is any potential that a claim [asserted] includes allegations of covered conduct." *Pension Tr. Fund for Operating Engineers v. Fed. Ins. Co*., 307 F.3d 944, 952 (9th Cir.

2002)[3]; *see also Assurance Co. of Am. v. Ironshore Specialty Ins. Co.*, No. 2:13-cv-2191-GMN-CWH, 2015 WL 4579983, *8 (D. Nev. July 29, 2015), *reconsideration denied in part*, No. 2:13-cv-2191-GMN-CWH, 2016 WL 1169449 (D. Nev. Mar. 22, 2016) (evaluating whether a "reasonable inference" could be drawn from the facts alleged that would eliminate the insurer's duty to defend).

For example, in *Barnett v. Fireman's Fund Ins. Co.*, the insured sought coverage under a policy insuring against suits for defamation, among other things. 108 Cal. Rptr. 2d 657, 662 (Cal. Ct. App. 2001). The underlying complaint contained claims for breach of fiduciary duty, intentional interference with contractual relations, breach of the implied covenant of good faith and fair dealing, and fraud, but not defamation. *Id.* at 660. In the context of these claims, the complaint alleged that the defendant had told third parties that plaintiffs' businesses would fail. *Id.* at 664. The insurer argued that it had no obligation to defend because the underlying complaint did not contain all of the elements of

[3] *See also KM Strategic Mgmt., LLC*, 156 F. Supp. 3d at 1165; *Scottsdale Ins. Co. v. MV Transp.*, 36 Cal. 4th 643, 654 (2005) (explaining that even when every element of the covered theory of recovery is not included, the duty to defend still applies "where, under the facts alleged, reasonably inferable, or otherwise known, the complaint could fairly be amended to state a covered liability").

Although Nevada law governs the duty to defend under the contract here, Nevada courts would likely adopt these cases' reasoning. Nevada has consistently adopted California's approach to the duty to defend inquiry. *See Frontier Ins. Co.*, 99 P.3d at 1158-59 (relying on California law to explain the "possibility of coverage" standard and the requirement that doubts be resolved in favor of finding coverage).

defamation, such as an assertion that the injurious statements were false. *Id.* at 664, n.5. The California Court of Appeal rejected this argument, finding that the failure to allege falsity was not fatal because "the plaintiff need not specially allege the statements were false" to trigger an insurer's duty to defend, even though falsity is a necessary element of the defamation tort. *Id.* Only a "potential for coverage" is necessary to trigger the duty to defend, and such potential exists even when all elements of the claim are not present. *Id.* at 664.

Similarly, in *KM Strategic Mgmt., LLC*, under a similar fact pattern, the insurer argued that it had no duty to defend "because the complaint fails to allege precisely how the alleged statement that Prime Partners is in financial distress was published, as well as when [the defamatory] statement was allegedly made and/or whether it was during the ... effective policy period." 156 F. Supp. 3d at 1167 (brackets in original) (internal quotation marks omitted). The U.S. District Court for the Central District of California flatly rejected this argument:

> These arguments miss the mark . . . because they place upon plaintiffs an impermissibly heavy burden that is unsupported by the relevant caselaw. Plaintiffs need not submit in their initial tender evidence conclusively establishing that allegedly defamatory statements occurred during the policy period in order to trigger American Casualty's duty to defend. Rather, when a suit alleges facts that create even the "bare 'potential" or "possibility" that the insured may be subject to liability for damages covered under the insurance policy, an insurer like American Casualty must defend unless and until it can point to "undisputed facts" demonstrating that the claim is not covered. . . . In fact, the insured, in submitting tender for a defense, need not demonstrate that coverage is likely or even "reasonably" likely. . . .

> Thus, even where, as here, the allegations in the underlying complaint are primarily focused on non-covered claims, the Court "look[s] not to whether noncovered acts predominate in the third party's action, but rather to whether there is any potential for liability under the policy."

KM Strategic Mgt. at 1167-68 (quoting *Montrose Chem. Corp. v. Superior Court*, 861 P.2d 1153, 1160-61 (Cal. 1993) and J. Croskey, et al. Cal. Prac. Guide: Ins. Lit. at ¶ 7:525 (Rutter 2014)).

Here, the district court's September 27, 2016 order held that Nautilus did not owe coverage on the premise that the Switzer Cross-Complaint and the June 25, 2011 email failed to "give rise to a potential claim for slander, libel or disparagement." Specifically, the district court found that no such claim could arise because there was no evidence of a "false statement," an element of each tort. On reconsideration, the district court reiterated its position that the Switzer Cross-Complaint did not contain the theory of defamation or disparagement, nor did it include a factual allegation amounting to a defamatory publication.

Under California law, which governs the Underlying Lawsuit, libel and slander require proof of a false and unprivileged communication that injures the plaintiff's reputation. *Shivley v. Bozanich*, 80 P.3d 676, 682–83 (Cal. 2003). Similarly, a disparagement claim requires the plaintiff to show a false or misleading statement about the plaintiff's product or business which clearly derogates that product or business. *Hartford Cas. Ins. Co. v. Swift Distribution, Inc.*, 326 P.3d 253, 256 (Cal. 2014).

Despite the district court's conclusion to the contrary, the allegations and facts known have created a potential for coverage under these theories of recovery. That the defendants allegedly made false statements is abundantly clear from the Switzer Cross-Complaint, which contains numerous allegations of dishonesty and perfidy. That some of this falsity was allegedly employed in disrupting Switzer's business relations and causing Switzer reputational injury among his clients is also apparent from the Switzer Cross-Complaint. For instance, Switzer alleges that:

> Mr. Wood took away from Mr. Switzer and kept for himself the lucrative business relationships and income Mr. Switzer had developed and enjoyed with [California] hospitals . . . includ[ing] . . . Alta Bates . . . [and] Alameda in Oakland, [] Hollywood Presbyterian in Los Angeles, [] and Cottage Hospital in Santa Barbara . . . . Mr. Wood, intentionally and without justification or privilege, and for his own individual benefit and to promote his own individual personal interests acted to *disrupt* the[se] relationship[s]."[4]

While the Switzer Cross-Complaint does not meaningfully explicate how defendants allegedly "disrupted" these relationships, the pleading makes clear that the professed disruption went beyond merely usurping profits. Indeed, the "wrongful acts" underlying the ostensible disruption caused Switzer injury to his "personal and business reputation"—an injury distinct from mere economic harm and the precise type of injury contemplated in defamation cases. *See Nat'l Fire Ins. Co. of Hartford v. OMP, Inc.*, 2012 WL 13009136, *3 (C.D. Cal. Aug. 2,

[4] Switzer Cross-Complaint at ¶¶ 43-131, ER 120-144.

2012) (noting that "defamation invades the interest in personal or professional reputation and good name"). Defendants' allegedly fraudulent acts also purportedly "damage[d] [Mr. Switzer's] ability to do business" and caused him "embarrassment, annoyance and worry."[5] Because the unspecified "wrongful acts" were stated to have caused reputational injury and embarrassment and to have occurred in the context of a very communicative act—sales— the plainly reasonable inference to be drawn is that Switzer believes or expects to learn that defendants expressed or implied something false to disparage his character, products, or services. Thus, falsity is fairly encompassed within the Switzer Cross-Complaint's allegations, creating the possibility of coverage and triggering Nautilus' duty to defend.

As mentioned, the facts known to Nautilus for assessing potential coverage include the July 25, 2011 email solicitation from Jacqueline Weide, an Access and Flournoy representative, to Cottage Hospital, Switzer's former client. The email confirms Flournoy's reasonable understanding of the Switzer Cross-Complaint's allegations. Ms. Weide advised Cottage Hospital she was interested in providing spinal implants to their facility, stating:

> I believe Dr. Early and Dr. Kahmann were using Alphatec's implants but their Distributor in the California area is now banned from selling Alphatec implants. We are in Las Vegas and have been using their

[5] ER 166-167.

> products here for 2 years. Alphatec recently contacted us and asked that we take over the California region as well.

ER 166-167 (emphasis added). Thus, Weide had communications with Switzer's former clients about Switzer's business that potentially damaged Switzer's reputation.

Even assuming these allegations and the reasonable inferences to be drawn from them do not demonstrate how each element of the covered torts will be satisfied, the duty to defend is nevertheless triggered because the claims asserted includes allegations of covered conduct. Indeed, if the failure to allege that the injurious statements were false in *Barnett*, and the failure to specify how a statement was published to third parties in *KM Strategic Mgmt.*, were not fatal to coverage, the alleged omissions identified by the district court in this case do not preclude the potential for coverage, either.[6]

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[6] Although the district court did not address this argument, Nautilus also argued unconvincingly that the claims against Flournoy are derivative in nature, Nautilus has no duty to defend or indemnify Flournoy. In Nevada, to preclude coverage under an insurance policy, "an insurer must (1) draft the exclusion in obvious and unambiguous language, (2) demonstrate that the interpretation excluding coverage is the only reasonable interpretation of the exclusionary provision, and (3) establish that the exclusion plainly applies to the particular case before the court." *Century Sur. Co. v. Casino W., Inc*., 329 P.3d 614, 616 (Nev. 2014).

Here, there is nothing in the insurance policy that eliminates the duty to defend for a derivative action. The policy simply states that Nautilus will "pay those sums that the insured becomes legally obligated to pay as damages because of personal and advertising injury to which this insurance applies" and that it will "have the right and duty to defend the insured against any 'suit' seeking those

C. The District Court Correctly Concluded that Nautilus Is Not Entitled to Reimbursement of Defense Costs.

Nautilus first contends that it is entitled to defense costs because Flournoy did not respond to Nautilus's motion for further relief in the district court. ER 12-18. However, because Nautilus had the burden to demonstrate entitlement to reimbursement and failed to do so, no default is appropriate. Next, Nautilus contends that it is entitled to reimbursement under Nevada law. But Nevada law does not grant reimbursement unless it is authorized by the insurance contract or other source of substantive law. Because the original insurance contract did not authorize reimbursement and Nautilus's attempt to unilaterally amend the contract ran afoul of the insurance policy's change provisions, no right to reimbursement exists. Finally, Nautilus argues that 28 U.S.C. § 2202 provides an independent basis for awarding fees. But federal courts have consistently held that § 2202 is a procedural vehicle to effectuate substantive rights otherwise created. Because no substantive right to reimbursement exists under Nevada law, § 2202 does not authorize an award.

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damages." This provision stands for the unremarkable proposition that the insurer has the duty to defend the insured for covered claims. Even if the claims against Flournoy can be considered derivative, Nautilus still has the duty to defend Flournoy against them.

1. Flournoy's Choice Not to File a Formal Opposition to Nautilus's Summary Judgment Motion Does Not Warrant Reversal Because Nautilus Bore the Burden of Proof On Its Motion.

Nautilus identifies only one basis for reversing the District Court's refusal to reimburse fees unique to Flournoy—that Flournoy did not respond to Nautilus's motion for summary judgment. The district court's denial of an unopposed motion is not a sufficient basis for reversal. A moving party that bears the burden of proof must demonstrate its entitlement to the relief sought, even if its request is unopposed. *See, e.g., Cristobal v. Siegel*, 26 F.3d 1488, 1494–95 (9th Cir. 1994) ("Interpreting Federal Rule of Civil Procedure 56 the Ninth Circuit has held that it is the burden of the moving party to demonstrate the absence of any material fact. . . . This is true, even when the party against whom the motion for summary judgment is directed has not filed any opposition.") (citations and internal quotations omitted); *J.I.P., Inc. v. Reliance Ins. Co.*, 173 F.3d 860 (9th Cir. 1999) ("Accordingly, Reliance is entitled to reimbursement for defense costs incurred after undertaking the defense that are attributable solely to claims not even potentially covered. *It must prove these costs by a preponderance of the evidence*.") (emphasis added).

Here, Petitioner sought reimbursement through Declaratory Judgment Act procedure but had no substantive-law basis for the requested relief. Because "the burden of proof is a substantive aspect of a claim" and the Supreme Court has

"long considered the operation of the Declaratory Judgment Act to be only procedural," the burden of proof inquiry must focus on Petitioner's reimbursement demand. *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 849 (2014). This Court has clearly held that "the insurer must carry the burden of proof when seeking reimbursement of defense costs." *J.I.P., Inc. v. Reliance Ins. Co.*, 173 F.3d 860 (9th Cir. 1999). Accordingly, Flournoy's decision not to formally oppose Nautilus's request for reimbursement was not grounds for granting the motion, nor is it grounds for reversing the district court's decision on appeal. *See Cristobal v. Siegel*, 26 F.3d at 1494-95. Nautilus had the burden to persuade the district court that it was entitled to reimbursement, and it failed to do so. Flournoy's choice to not file a formal opposition does not cure that defect.

2. Nautilus Is Not Entitled to Reimbursement Under Nevada Law.

Nautilus next contends it is entitled to reimbursement because the "[i]nsureds impliedly agreed to the defense under a reservation of rights by accepting the payment of defense costs on their behalf for years." App. Brief, at 14. But a request for reimbursement of fees and costs is tantamount to a request for fees, and under Nevada law, attorney fees are generally "not recoverable absent a statute, rule, or contractual provision to the contrary." *Horgan v. Felton*, 170 P.3d 982, 986 (Nev. 2007) (citation omitted). Nautilus's reservation of rights letter

did not create an enforceable contract entitling it to reimbursement, and no statute or rule otherwise creates the right.

"[I]insurance policies are contracts, which must be enforced according to their terms." *Keife v. Metro. Life Ins. Co*., 797 F. Supp. 2d 1072, 1075 (D. Nev. 2011) (citing *Continental Cas. Co. v. Summerfield*, 482 P.2d 308, 310 (Nev. 1971)). Because insurance policies are contracts of adhesion, "Nevada construes any ambiguity or uncertainty in an insurance policy against the insurer and in favor of the insured." *Prime Ins. Syndicate, Inc. v. Damaso*, 471 F. Supp. 2d 1087, 1095 (D. Nev. 2007) (citing *Frontier Ins. Co.*, 99 P.3d at 1156–57, and applying Nevada law).

While Nevada precedent regarding the precise issue on appeal is scant, well-established contract law in Nevada makes clear that Nautilus is not entitled to reimbursement. Nevada law indicates:

> (1) an insurance contract governs whether a party is entitled to reimbursement, even when the insured is not eligible for coverage;
> (2) an insurer cannot obtain reimbursement under a reservation of rights if the insurance contract does not authorize this practice;
> (3) if an insurer seeks to modify an insurance contract to obtain additional rights—such as the right to reimbursement under a reservation of rights defense—the insurer must comply with any explicit modification procedures outlined in the existing agreement; and
> (4) an express contract cannot be modified by an implied agreement governing the same subject matter.

These principles are confirmed in courts around the country that have more frequently and directly addressed the issue on appeal.

Here, an express insurance contract governs the parties' dealings. It does not authorize Nautilus to provide a defense while reserving its right to reimbursement. Nautilus's attempt to modify the contract to allow the approach is ineffective as it contravenes the express modification procedures required by the policy. And Flournoy's acceptance of payments on its behalf could not have formed an informal side agreement because an express insurance contract governed Nautilus's options in responding to potentially covered claims.

i. The Insurance Contract Governs Whether Nautilus Is Entitled to Reimbursement, Even When Nautilus Disputes Coverage

An insurance contract governs whether an insurer may tender a defense subject to a reservation of rights to obtain reimbursement, even if the underlying claims are not ultimately covered by the policy. *Probuilders Specialty Ins. Co. v. Double M. Const.*, 116 F. Supp. 3d 1173, 1182 (D. Nev. 2015) (applying Nevada law). The typical insurance contract[7] does not only govern whether coverage

[7] "An insurance policy is a contract between a policyholder and an insurer in which the policyholder agrees to pay premiums in exchange for financial protection from foreseeable, yet unpreventable, events. As such, the duties undertaken by the policyholder and the insurer are defined by the terms of the policy itself." *Benchmark Ins. Co. v. Sparks*, 254 P.3d 617, 619 (Nev. 2011) (*citing* 1 New Appleman Insurance Law Practice Guide § 1.03[1] (Leo Martinez et al. eds., 2010)).

applies, but also how the insured must submit claims and the insurer must respond to them.

For example, in *Probuilders*, an insurer sought reimbursement for defense costs incurred under a reservation of rights after the court concluded that it had no duty to defend. *Id.* at 1176. In awarding reimbursement, the district court in *Probuilders* relied in part on a provision within the insurance contract that authorized the insurer to tender a defense subject to a reservation of rights. *Id.* at 1182. Notably, the court relied on this provision, even though the insurance contract's coverage did not actually apply to the claim. *Id.*

Here, as in *Probuilders*, the District Court determined that the Nautilus policy did not cover the claims against Flournoy, a finding Flournoy has appealed. Even if the Court upholds this no-coverage determination, the insurance contract between the parties still continues to govern whether Nautilus is entitled to reimbursement because the contract controls how Nautilus may respond to potential claims. The policy outlines a binary choice for the insurer when a potential duty to defend arises. If the insurer determines the claim is potentially covered, it "has the right and duty to defend the insured" in that suit. If the insurer determines the claim is not even potentially covered, then the insurer has "no duty to defend the insured." The contract makes clear that "no other obligation [to] . . . perform acts or services is covered…." Thus, the policy governs how Nautilus

may respond to claims and its related rights, and the mere fact that a (disputed) no-coverage determination has been made does not allow Nautilus to depart from other contractual provisions. Indeed, just as the district court relied on the insurance contract to ascertain a right to reimbursement in *Probuilders*, this Court should look to the insurance contract as the instrument governing Nautilus's alleged right to reimbursement.

ii. The Insurance Contract Did Not Authorize Nautilus to Tender a Defense under a Reservation of Rights, and Nautilus's Attempt to Modify that Contract was Ineffective.

An insurer may tender a defense subject to a reservation of rights only if the assertion of this right is consistent with the insurance contract. *Probuilders Specialty Ins. Co.*, 116 F. Supp. 3d at 1182. As explained above, the insurance contract in *Probuilders* explicitly authorized the insurer to provide a defense under a reservation of rights, stating: "Should we exercise our right to intervene then we shall also provide a defense to you, *subject to such reservations of rights, if any, we shall deem appropriate*." *Id.* at 1182, n.4 (emphases added). Noting this provision, the court awarded the requested reimbursement, finding that the insurer's reservation was "[c]onsistent with the general policy's terms and conditions" and that the insured's acceptance of monies constituted assent to the reservation. *Id.* at 1182; s*ee also Capitol Indem. Corp. v. Blazer*, 51 F. Supp. 2d 1080, 1083 (D. Nev. 1999) (denying reimbursement because there was not "a clear

understanding between the parties that [the insurer] reserved the right to reimbursement for the costs of the investigation and/or defense.").

Contrarily, if an insurance contract does not authorize an insurer to obtain reimbursement under a reservation of rights defense, an insurer cannot enjoy that right by unilaterally asserting it. *See Probuilders Specialty Ins. Co.*, 116 F. Supp. at 1182 (implying that reimbursement is not available absent an insurance contract consistent with granting the award); *see also Ohio Cas. Ins. Co. v. Biotech Pharmacy, Inc*., 547 F. Supp. 2d 1158, 1159 (D. Nev. 2008) (predicting that "Texas would not permit reimbursement of defense expenses absent an express provision in the insurance contract or the express agreement of the Parties").

Many courts that have squarely considered this issue have reached this conclusion. For example, in *Shoshone First Bank v. Pac. Employers Ins. Co.*, 2 P.3d 510, 516 (Wyo. 2000), the Supreme Court of Wyoming rejected an insurer's attempt to obtain reimbursement under a reservation of rights letter because the letter did not "*create a contract allowing an insurer to recoup defense costs from its insureds*. . . ." *Shoshone*, 2 P.3d at 516 (emphasis added). To find otherwise would be "*tantamount to allowing the insurer to extract a unilateral amendment to the insurance contract*." *Id.* (emphasis added); *see also Terra Nova Insurance Co. v. 900 Bar, Inc.*, 887 F.2d 1213 (3d Cir.1989) (holding that an insurer who defends under a reservation of rights cannot recover defense costs from its insured); *Med.*

Liab. Mut. Ins. Co. v. Alan Curtis Enterprises, Inc., 285 S.W. 3d 233, 237 (Ark. 2008) (holding that "an insurer may not recoup attorney's fees under a unilateral reservation of rights"); *Gen. Agents Ins. Co. of Am. v. Midwest Sporting Goods Co*., 828 N.E. 2d 1092, 1102 (Ill. 2005) (refusing to "condone an arrangement where an insurer can unilaterally modify its contract, through a reservation of rights, to allow for reimbursement of defense costs in the event a court later finds that the insurer owes no duty to defend").

Although an insurer cannot unilaterally create the right to reimbursement under a reservation of rights defense, it may bargain for that right through a contractual amendment, subject to any modification procedures outlined in the insurance contract. *Cf. Branch Banking & Tr. Co. v. Iny*, No. 2:13-CV-00469-LRH, 2014 WL 2459525, at *5–6 (D. Nev. May 30, 2014); *Keife*, 797 F. Supp. 2d at 1076. Although Nevada has not explicitly addressed this question in the reimbursement context at issue here, Nevada courts hold that "when a contract is clear on its face, it will be construed from the written language and enforced as written." *Canfora v. Coast Hotels & Casinos, Inc*., 121 P.3d 599, 603 (Nev. 2005) (internal quotation marks and citation omitted). This principle has been applied consistently to prohibit insurers from unilaterally creating rights through informal arrangements when the underlying insurance contract explicitly requires formal

amendment procedures. *See, e.g., Branch Banking & Tr. Co.*, 2014 WL 2459525, at *5–6; *Keife*, 797 F. Supp. 2d at 1076.

For example, in *Keife*, a life insurance policy required the insurer to pay out death benefits immediately and in one sum upon receipt of a completed claims form. *Id.* at 1077. Upon the insured's death, the insurance company sent the beneficiary a customer agreement purporting to supplement the terms of the original insurance contract by authorizing payment through a retained assets account, which permitted the insurer to retain the funds in its general account. *Id.* After the beneficiary withdrew all funds from the account, he sued, alleging the retained asset account violated the policy's requirement to pay the death benefits immediately because it allowed the insurer to retain control over the funds. *Id.* The insurer argued, among other things, that the customer agreement was a part of the contract and it authorized the retained assets account. The court rejected this argument because the customer agreement was not properly incorporated into the contract. *Id.* at 1076. This determination was based on two provisions in the insurance contract, which stated: (1) that the insurance contract was "the entire contract between the parties," and (2) that no change to the contract was "valid unless evidenced by amendment hereto signed by the Policyholder and by the Insurance Company." *Id.* The court reasoned that "the unambiguous plain language of these policy sections specifically prohibited [the insurer] from issuing a policy

booklet or insurance certificate which purports to alter or amend the policy and its obligations." *Id.*

Similarly, in *Branch Banking & Trust Co.*, after a borrower defaulted on a loan agreement, the borrower relied on the lender's oral promise to allow the borrower additional time and opportunity to pay off the loan. 2014 WL 2459525, at *1. Inconsistent with this promise, the loan contract explicitly required all modifications and waivers of rights to be in writing and signed by the lender. *Id.* at *5. Citing this provision, the U.S. District Court for the District of Nevada refused to enforce the oral contract between the parties, because it failed "to comply with the explicit writing requirement in the loan agreements." *Id.*

Here, unlike the insurance contract in *Probuilders* which authorized reimbursement and a reservation of rights defense, the insurance contract between Nautilus and Flournoy does not create these rights. Apparently recognizing this deficiency, Nautilus sought to unilaterally create these rights by providing a reservation of rights letter. But just as the insurance contracts in *Keife* and *Branch Banking & Trust Co.* could not be informally modified to allow a more favorable payment method, the Policy here cannot be informally modified to allow the insurer more flexibility in responding to claims. Flournoy's Policy provides: "*This policy contains all the agreements between you and us concerning the insurance afforded…. This policy's terms can be amended or waived only by endorsement*

issued by us and made a part of this policy." Thus, the contract contains the same two provisions relied on in *Keife*: it makes clear that it "contains all the agreements" between the parties, and it stipulates that an amendment to the Policy is only effective if it is endorsed by Nautilus and "made a part of th[e] [P]olicy." Nautilus's reservation of rights letters were not made part of the Policy, do not govern the parties' interactions, and do not entitle Nautilus to reimbursement.

Because the insurance contract did not authorize a defense subject to a reservation of rights, Nautilus had no authority to obtain reimbursement under such an arrangement. Moreover, Nautilus's attempt to modify the insurance contract to allow such an arrangement was ineffective because it failed to comply with the modification procedures outlined in the original agreement. Consequently, Nautilus is not entitled to reimbursement under Nevada law.

iii. Because an Express Contract Governs Flournoy's and Nautilus's Dealings, An Implied-in-Fact Contract Could Not Have Formed.

An implied contract is "manifested by conduct" and "arises from the tacit agreement of the parties." *Reborn v. Univ. of Phoenix*, No. 2:13-CV-00864-RFB, 2015 WL 4662663, at *7 (D. Nev. Aug. 5, 2015) (quoting *Certified Fire Prot., Inc. v. Precision Constr.*, 283 P.3d 250, 256 (2012)). "To find a contract implied-in-fact, the fact-finder must conclude that the parties intended to contract and

promises were exchanged, the general obligations for which must be sufficiently clear." *Id.*

Importantly, "it is well settled that an action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter." *Morawski v. Lightstorm Entm't, Inc.*, 599 F. App'x 779, 780 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 427 (2015) (quoting *Lance Camper Mfg. Corp. v. Republic Indem. Co.*, 44 Cal.App.4th 194, 203, 51 Cal.Rptr.2d 622 (Cal. Ct. App. 1996)). Indeed, as Nevada has held, "[s]uch a claim is not available when there is an express, written contract, because no agreement can be implied when there is express agreement." *Reborn v. Univ. of Phoenix*, 2015 WL 4662663, at *7 (D. Nev. Aug. 5, 2015) (citing *Leasepartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 942 P.2d 182, 187 (Nev. 1997)).

Moreover, merely accepting benefits arising out of a proposed amendment to a contract does not constitute implied acceptance of that proposal. In *Keife,* discussed *supra*, the beneficiary accepted payment of death benefits through a retained assets account. *Keife*, 797 F. Supp. 2d at 1074. Although the beneficiary ultimately accepted payment through the account, the court held that the insurer's proposal to modify the contract to explicitly authorize the retained assets account was ineffective. *Id.* at 1076. Importantly, the court did not hold that the beneficiary

implicitly assented to the proposed modification by accepting payment through the proposed distribution method. Instead, the court recognized that the express contract's modification procedures did not permit modification by implication. *Id.*

Here, because an express contract (the Policy) governs the parties' interaction, an implied contract regarding the same subject matter could not have formed. The insurance contract governed the same "subject matter" that Nautilus attempted to address with its reservations of rights letters—the insurer's rights and options in responding to a claim submitted under the Policy.

Nautilus primarily relies on *Probuilders Specialty Ins. Co.* to support its theory that an implied contract to reimburse was formed here. 116 F. Supp. 3d at 1173. But as explained above, *Probuilders* instructs that an implied contract may form only when it is authorized by the express contract and one or more of the contracting parties assent to the terms by accepting the benefits. Unlike the policy in *Probuilders*, the Nautilus policy does not authorize the insurer to provide a defense subject to a reservation of rights. Instead, it instructs the insurer to either provide a defense or disclaim coverage. The unauthorized hybrid tactics pursued by Nautilus to provide a reserved defense allowed it to "hedge on its defense obligations by reserving its right to reimbursement while potentially controlling the defense and avoiding a bad faith claim." G*en. Star Indem. Co. v. Driven Sports, Inc.*, 80 F. Supp. 3d 442, 463 (E.D.N.Y. 2015) (quoting *Am. & Foreign Ins. Co. v.*

Jerry's Sport Ctr., Inc., 2 A.3d 526, 539 (Pa. 2010)). If Nautilus desired this contractual benefit, it should have bargained for it. It did not. Instead, it sought to unilaterally seize the benefit by asserting its alleged rights in an informal letter, a modification procedure the insurance contract explicitly prohibits.

Nor did Flournoy implicitly assent to Nautilus's reservation of rights by accepting defense payments on its behalf. Just as acceptance of funds through the retained assets account did not constitute assent to that distribution method in *Keife*, acceptance of defense funding under a purported reservation of rights did not constitute assent to Nautilus's asserted right to reimbursement. Both in *Keife* and here, the fully integrated contracts outlined the parties' rights and strictly governed how those rights could be modified. This situation at bar is not like the assent in *Probuilders* where the insurance contract already authorized a reservation of rights defense and no express modification procedures were apparently violated. Here, as in *Keife*, Nautilus cannot unilaterally create new rights.

3. The District Court Did Not Abuse Its Discretion in Declining Relief under 28 U.S.C. § 2202 Because State Law did not Warrant Relief and Section 2202 Provides No Independent Basis for Relief.

Section 2202 provides, "Further necessary or proper relief based on a declaratory judgment or decree may be granted . . . against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202.

While an award for further relief under section 2202 may include damages, such as reimbursement of fees, this type of auxiliary ruling is "not the primary function of a district court in a declaratory judgment proceeding." *All. of Nonprofits for Ins., Risk Retention Grp. v. Barratt*, No. 2:10-cv-1749-JCM-RJJ, 2013 WL 3200083, *4 (D. Nev. June 24, 2013). "The court reads this grant of power narrowly. That is, the court is inclined to award damages in an equitable action, such as this one, only where it is "necessary or proper to effectuate relief." *Id.* (quoting *Sec. Ins. Co. of New Haven v. White*, 236 F.2d 215, 220 (10th Cir. 1956)).

Here, the District Court refused to grant further relief under 28 U.S.C. 2202 for two reasons, each of which is supported by Nevada law.[8]

First, the court explained that Petitioner failed to demonstrate that 28 U.S.C. § 2202 relief was available where damages were not raised in the complaint and were sought only after final judgment had been entered. While some courts have awarded damages in this situation,[9] case law in Nevada is generally supportive of refusing relief when the party fails to timely raise the request. *See, e.g., Alliance of Nonprofits for Ins., Risk Retention Grp.*, 2013 WL 3200083, at *4. For example, in *Alliance of Nonprofits*, a plaintiff sought reimbursement of its attorney's fees as a

[8] The court also refused to grant relief under state law, which is discussed *supra.*
[9] *Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co.*, 255 F.2d 518, 522 (2d Cir. 1958).

form of damages pursuant to 28 U.S.C. § 2202 after it received declaratory judgment in its favor. *Id*. at *2-3. The court refused to award such relief, explaining:

> *[I]n its complaint*, plaintiff did not seek damages-instead requesting a declaratory judgment and an award of costs and attorneys' fees associated with this action. While the court is not blind to the damages plaintiff represents it incurred as a result of defendants' conduct, the court simply does not find that awarding damages under 28 U.S.C. § 2202 as necessary to effectuate the relief this court has already accorded.

Alliance of Nonprofits at *4 (emphasis added). Thus, the failure to raise the request at the pleading stage is an important factor Nevada courts consider when evaluating whether to grant relief under 28 U.S.C. § 2202—one that the district court justifiably relied on when Nautilus failed to seek damage relief until after final judgment.

Second, the district court here ruled that Nautilus had not demonstrated entitlement to damages under 28 U.S.C. § 2202 alone, explaining:

> It would make little sense to apply substantive federal legal standards to a state-law case brought under diversity jurisdiction, particularly when "the operation of the Declaratory Judgment Act is procedural only," and "does not create any new substantive right but rather creates a procedure for adjudicating existing rights.

ER 16-18. Applicable law supports this position. Under Ninth Circuit precedent, 28 U.S.C. § 2202 is not considered an independent basis for fees. For example, in *Bateman v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 423 F. App'x 763 (9th Cir. 2011), an insured sought a declaratory judgment under 28 U.S.C. § 2202 that

its insurer violated Montana's Fair Trade Practices Act. In refusing to grant the "further relief" requested, this Court explained that the "Declaratory Judgment Act's 'further relief' provision, 28 U.S.C. § 2202, does not allow us to bypass the *Erie* doctrine to fashion a remedy that is not available under the state law that created Plaintiffs' cause of action." *Id* at **2; *see also Champion Produce, Inc. v. Ruby Robinson Co., Inc.*, 342 F.3d 1016, 1024 (9th Cir. 2003) ("An award of attorneys' fees incurred in a [federal] lawsuit based on state substantive law is generally governed by state law."); *Nat'l Merch. Ctr., Inc. v. MediaNet Grp. Techs., Inc*., 893 F. Supp. 2d 1054, 1057 (C.D. Cal. 2012) (refusing to award fees in a declaratory judgment action based on diversity unless available under state law).

Other circuits to have addressed the issue have reached the same conclusion. *See, e.g., Utica Lloyd's of Tex. v. Mitchell*, 138 F.3d 208, 210 (5th Cir.1998) ("[Section] 2202 of the Federal [Declaratory Judgment Act] 'does not by itself provide statutory authority to award attorney's fees ....'") (quoting *Mercantile Nat'l Bank at Dallas v. Bradford Tr. Co.*, 850 F.2d 215, 218 (5th Cir.1988)); *Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265, 273 (1st Cir.1990) ("The availability of attorney's fees in diversity cases depends upon state law, and this holds true in declaratory judgment actions."); *Am. Family Ins. Co. v. Dewald*, 597 F.2d 1148, 1151 (8th Cir.1979) ("[A]ttorney's fees may be awarded under 28

U.S.C. [§] 2202 where such an award is authorized by applicable state law for comparable actions.").

In one U.S. District of Nevada court case, the court relied on 28 U.S.C. § 2202 as an independent basis to award attorney's fees, but that case does not suggest that the same result should ensue here. *In re USA Commercial Mortg. Co.*, 802 F. Supp. 2d 1147, 1179-80 (D. Nev. 2011). In *USA Commercial Mortgage*, direct lenders who invested in fractionalized interests in short-term high interest rate mortgage loans brought action against a loan servicer and its financer alleging breach of contract, among other claims and parties. *Id. at* 1154. After a jury found in favor of direct lenders, the lenders moved for attorneys' fees. *Id.* at 1179-80. The court granted fees to most claimants because they were parties to a contract with a fee-shifting provision. *Id.* For five plaintiffs not party to the fee-shifting contract, however, the court found that a fee award pursuant to 28 U.S.C. § 2202 was appropriate because the five claimants were "inextricably intertwined" with those party to the fee-shifting contracts. *Id.* at 1180. The court cited only one case from the Tenth Circuit— *Gant v. Grand Lodge of Tex.*, 12 F.3d 998, 1003 (10th Cir.1993)—to support its position that § 2202 was a sufficient basis for awarding attorney's fees. *USA Commercial Mortgage* at 1179.

While *Gant* seems to suggest that § 2202 may serve as an independent basis beyond contract law for awarding fees, the Tenth Circuit explicitly rejected this

expansive reading in *Schell v. OXY USA Inc*, explaining that § 2202 was merely a procedural vehicle to award fees that "were independently required by the will at issue" in *Gant*. *Schell v. OXY USA Inc*., 814 F.3d 1107, 1128 (10th Cir.), *cert. denied*, 137 S. Ct. 376, 476 (2016) (emphasis added). The Court stated, "We have *never* recognized § 2202 as an independent basis to award attorney's fees-viz., as an additional ground for such fees beyond the four well-recognized exceptions to the American Rule." *Id.* at 1127.

The U.S. District Court for the District of Nevada's conclusion in *In re USA Commercial Mortg. Co*. that 28 U.S.C. § 2202 is an independent basis for fees is not well-supported and contradicts Ninth Circuit and sister circuit precedent. Moreover, the weight of authority supports the district court's interpretation below—that Nautilus must show an independent basis for fees to trigger the procedural power of 28 U.S.C. § 2202.

Nautilus contends it is entitled to fees pursuant to *Omaha Indem. Ins. Co. v. Cardon Oil Co*., 687 F. Supp. 502, 505 (N.D. Cal. 1988), *aff'd*, 902 F.2d 40 (9th Cir. 1990). But that case says nothing about whether 28 U.S.C. § 2202 is a proper substantive basis for awarding fees. Tellingly, the district court's analysis in the *Omaha Indemnity* case consisted of two, distinct steps. First, it considered whether the request for reimbursement under 28 U.S.C. § 2202 was proper. Second, it considered whether the insurer was legally entitled to reimbursement under

California law. If Nautilus's position here (that § 2202 provides a complete substantive basis for attorney fees) were correct, the *Omaha Indemnity* district court could have stopped at step one. But it did not, demonstrating that 28 U.S.C. § 2202 is not a sufficient, independent basis for awarding fees.

For these reasons, the district court had sufficient bases to deny Nautilus further relief under 28 U.S.C. § 2202, and its denial of relief should be affirmed.[10]

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[10] Nautilus also asked the court to reopen the judgment pursuant to F.R.C.P. 59(e) to allow it to file a second motion for summary judgment and amend its complaint. The denial of a Rule 59 motion is subject to an abuse of discretion review. Rule 59(e) is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (*quoting* Wright, Miller & Kane, Federal Practice and Procedure § 59.30 (2d ed. 1983). "[A] motion for reconsideration should not be granted, absent highly unusual circumstances." *Id.* (citing *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)). "A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Id.*

Here, Nautilus asked the court to reopen the judgment so that it could consider Nautilus's entitlement to reimbursement. Nautilus did not point to any new evidence, clear error, or change in the law. Moreover, this argument was available to Nautilus prior to the entry of judgment. Thus, Rule 59(e) was not a proper procedural remedy, and the district court did not abuse its discretion in denying Nautilus's request to reopen.

VII. CONCLUSION

For these reasons, Flournoy requests this Court to reverse the district court's ruling that Nautilus has no duty to defend and affirm the district court's holding that Nautilus is not entitled to reimbursement of defense fees and costs.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28 – 2.6, Flournoy concurs with Nautilus's statement of related cases.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. Appl. P. 32(a)(7)(B) because this brief contains 10,310 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Date: January 12, 2018.

HARPER | SELIM

/s/ James E. Harper

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: January 12, 2018.

HARPER | SELIM

/s/ James E. Harper

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of SELMAN BREITMAN LLP and on the 20th day of November, 2019, a true and correct copy of the above and foregoing document was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system and by United States First-Class mail to all unregistered parties as listed below:

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