IN THE SUPREME COURT OF THE STATE OF NEVADA

ZURICH AMERICAN INS. CO., et al. *Plaintiffs - Appellants* v. IRONSHORE SPECIALTY INS. CO. *Defendant - Respondent*	Case No.: 81428

APPELLANTS' APPENDIX
Volume XXI

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damage. (Pltf. Opp. pp. 19-21.) Plaintiffs' contention that these cases somehow reject Ironshore's interpretation of the CP Exclusion, is flatly wrong. *None* of plaintiffs' cases address or construe the Ironshore CP Exclusion or language similar to it, which excludes property damage that first existed prior to policy inception, and deems property damage from work that was performed prior to policy inception to have first existed prior to policy inception. Certainly, none stands for the proposition advanced by plaintiffs: that endorsements to general liability insurance policies that limit an insurer's exposure for continuous or progressive loss or damage are against public policy or unenforceable.

In each of plaintiffs' cases, the court construed the wording of an American Safety Insurance Company ("ASIC") policy that attempted to exclude damage caused by prior work based on the "occurrence" of the damage. None of the cases addressed or construed the materially different language of an Ironshore policy, and certainly, none support plaintiffs' contention that endorsements that limit an insurer's exposure for continuous or progressive loss or damage are against public policy or unenforceable.

In *Pennsylvania General Ins. Co. v. American Safety Indem. Co.,* 185 Cal.App.4th 1515, 1522 (2010), the trial court ruled that there was no occurrence during the ASIC policy period because the insured's work (the negligent act) took place before inception of the policy. The trial court based its decision on the ASIC insuring agreement that provided that "occurrence" and "property damage" were separate triggers of coverage. On appeal, the court held that the ASIC policy was reasonably susceptible to the interpretation that the trigger of coverage was not when the insured completed its work (the negligent act) but, rather, when the damage caused by the insured's negligent causal acts commenced, because the ASIC exclusion applied to any injury-producing *occurrence* but not to any injury-producing *work.*

By contrast, the language in the Ironshore CP Exclusion expressly applies to property damage from injury-producing *work* rather than an *occurrence*, and further, expressly provides that "property damage" from "your work" is deemed to have "first existed" when the work was performed. Thus, the *Pennsylvania General* decision is not applicable to the materially different Ironshore CP Exclusion. For the exact same reasons, the interpretations of the identical ASIC "occurrence"-based exclusion in the other cases cited by plaintiffs are inapposite.[16]

[16] *Maryland Cas. Co. v. Amer. Safety Indem. Co.*, 2013 US Dist.Lexis 34610 (D. Nev. Mar. 12, 2013), *Acceptance Ins. Co. v. Amer. Safety Risk Reten. Grp., Inc.*, 2011 US Dist.Lexis 88101 (S.D.Cal. Aug. 9, 2011), *PMA Capital Corp. v. Amer. Safety Indem. Co.*, 695 F.Supp.2d 1124 (E.D. Cal. 2010) (Pltf. Opp. pp. 23-25).

As noted in Ironshore's moving papers, in *American Zurich. v. Ironshore*, *supra*, 2014 U.S. Dist. Lexis 100787 at *15-16, the court squarely rejected an identical argument made by the same entities in the instant case, ruling that the *Pennsylvania General* analysis does not apply, and that the materially different Ironshore language is not ambiguous.

3. The CP Exclusion Is Clear, Conspicuous and Unambiguous

Contrary to plaintiffs' assertion (Pltf. Opp. p. 23), the CP Exclusion is not "buried" in the policies. In each Ironshore policy, the CP Exclusion is a stand-alone endorsement. The endorsement is identified on *page 2* of the list of endorsements at the *very front* of each policy. In the endorsement itself, the title is in large font, boldfaced, and in capital letters. A warning appears at the top of the page: "THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY." The words plaintiffs contend are "buried" are printed in the same font size as that in the rest of the policy. In rejecting a similar contention, the court in *Crawford v. Ranger Ins. Co.*, 653 F.2d 1248, 1251 (9th Cir. 1981), stated: "[T]he exclusionary clause is not 'buried' inconspicuously in the policy. Rather, the heading and body of the exclusions section are the same type size and intensity as the other sections of the policy."

Any suggestion that the CP Exclusion is ambiguous is likewise without merit. The language is plain and clear. A policy provision is ambiguous only "when applying the policy to the facts leads to multiple reasonable interpretations." *Century Sur. Co. v. Casino West, Inc.*, 329 P.3d 614, 616 (Nev. 2014). Plaintiffs have not proposed *any* alternative interpretation of the CP Exclusion, let alone a reasonable alternative interpretation. In addition, plaintiffs offer no evidence that any of the insureds were surprised or confused by the CP Exclusion. There is no such evidence. "Unlike the policy in *Pennsylvania Gen.*, the [Ironshore] policy at issue herein is not ambiguous. The policy specifically states that property damage caused by work that was completed prior to the policy's inception is excluded from coverage." *American Zurich. v. Ironshore*, *supra*, 2014 U.S. Dist. Lexis 100787, * 15. Any argument that Zurich, a sophisticated, international, multi-billion-dollar insurer, somehow found the CP Exclusion vague and ambiguous is disingenuous at best. Zurich's own adjuster understood it well, and he agreed that Ironshore properly asserted it. The admission of an adjuster is relevant to whether a duty to defend exists. *See North Counties Engineering, Inc. v. State Farm*

General Ins. Co., 224 Cal. App. 4th 902, 923 (2014). The CP Exclusion must be applied as written.[17]

IV. PLAINTIFFS' DECLARATORY RELIEF CLAIMS SHOULD BE DISMISSED

As demonstrated in Ironshore's opening brief, declaratory relief is not available, where, as here, (1) a party seeks to address past wrongs, and/or (2) where another remedy, such as damages, is available. (MSJ, pp. 8-9.) Ironshore cited numerous cases in support, among them *Britz Fertilizers, Inc. v. Bayer Corp.*, 665 F. Supp. 2d 1142 (E.D. Cal. 2009), a case that is procedurally similar to the present case. Ironshore further demonstrated that *Britz Fertilizers* is in accord with court decisions from throughout the country.[18] And Ironshore showed that in a prior case between the same parties now before the Court, in an opinion on which plaintiffs here rely, the court *granted* Ironshore's summary judgment motion and *denied* plaintiffs' motion as to declaratory relief, holding that "it is well established that the purpose of declaratory relief is to 'bring[] to the

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[17] Plaintiffs submitted a last-minute Request for Judicial Notice, in which they include an interlocutory order in *Saarman Construction, Ltd. v. Ironshore Specialty Insurance Company Zurich*, 2016 WL 4411814 (N.D. Cal., August 29, 2016) in which the court found that the Ironshore CP Exclusion was somehow "ambiguous" even though the plaintiff did not and could not assert a competing "reasonable construction" of the language than that offered by Ironshore. Ironshore objects to the submission of the Saarman interlocutory order as *evidence*. It is *not* relevant evidence; it involved different underlying cases and insureds. Further, the *Saarman* interlocutory order has no value as *precedent*. It blithely ignores well-established principles of California law, among them: "An insurance policy provision is ambiguous when it is capable of two or more constructions both of which are reasonable." *Bay Cities Paving & Grading v. Lawyers' Mutual Ins.*, 5 Cal.4th 854, 867 (1993) (citation omitted). Courts must "interpret policy terms 'in context' and give effect 'to every part' of the policy with 'each clause helping to interpret the other'". *Palmer v. Truck Ins. Exch.*, 21 Cal.4th 1109, 1115 (1999). "[L]language in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract…." *MacKinnon v. Truck Ins. Exch.,* 31 Cal.4th 635, 648 (2003). Plainly, the *Saarman* court failed to follow these basic tenets of contractual construction, ignoring the admonition of the California Supreme Court in *Waller*: "Courts [should] not strain to create an ambiguity where none exists". *Waller v. Truck Ins. Exch.*, 11 Cal.4th 1, 18-19 (1995). Instead, the court conjured an ambiguity in the abstract, in the utter absence of any other reasonable interpretation of the provision, and confused the Ironshore language with the materially different language in *Pennsylvania General*, 185 Cal. App. 4th at 1522, an approach roundly rejected in *American Zurich v. Ironshore,* 2014 U.S. Dist. Lexis 100787, * 15. Rather than interpreting the actual language of the endorsement, the *Saarman* court adopted the approach urged by plaintiffs here: steadfastly ignore the actual contractual language (which plaintiffs have done throughout their briefing) and instead conflate materially different language in different insurance policies. The *Saarman* court's interlocutory order is clear error and will be reversed on appeal. It is unique and aberrational (no other court has *ever* found the Ironshore exclusion ambiguous), and devoid of any precedential value whatsoever.

[18] *See, e.g., Tevis v. Hoset (In re Tevis)*, 2011 Bankr. Lexis 5308, at *42 (9th Cir. 2011 Dec. 9, 2011) ("Where there is an accrued cause of action for a past breach of contract or other wrong, declaratory relief is inappropriate"); *Cunningham Bros., Inc. v. Bail*, 407 F.2d 1165, 1168 (7th Cir. 1969); *Phillips Med. Capital, LLC, v. Med. Insights Diagnostics Ctr., Inc.*, 471 F.Supp.2d 1035, 1048 (N.D. Cal. 2007); *Delaware St. Univ. Student Housing Fnd'n v. Ambling Mgt. Co.*, 556 F. Supp.2d 367, 374 (D. Del. 2008); *Beazer Homes Corp. v. VMIF/Anden Southbridge Venture*, 235 F.Supp.2d 485, 494 (E.D. Va. 2002) (same).

present a litigable controversy, which otherwise might only be tried in the future.'" *Assurance Co. of Am. v. Ironshore Specialty Ins. Co.*, 2015 U.S. Dist. Lexis 98990 at *7 (D. Nev. July 29, 2015). The court also found that the declaratory relief claims should be dismissed because they were superfluous. *Id.* at *7-8.

In response, plaintiffs contend that adjudication of their declaratory relief claims would be "logical" merely because the defense duty issue is presented in cross-motions for summary judgment (Pltf. Opp. p. 30). On the contrary, it would be illogical to grant a form of relief that regulates *future* conduct when the events at issue have all concluded; and it would be equally illogical to grant equitable relief when damages provide a full and complete remedy. As Ironshore demonstrated, plaintiffs' position has been soundly rejected by courts throughout the country, including the court in *Britz Fertilizers*—a case on which plaintiffs purport to rely (Pltf. Opp. p. 30) despite the fact that it stands for the exact opposite of plaintiffs' position.[19] Plaintiffs offer no explanation for why they purport to rely on *Britz Fertilizers*, nor do they address the other authority cited by Ironshore in its opening brief. Instead they string-cite cases which are either distinguishable or have nothing to do with the issue of whether declaratory relief is proper under facts analogous to those of the instant case. Thus the court in *Nordby Constr., Inc. v. Am. Safety Indem. Co.*, 2015 U.S. Dist. Lexis 34513, at *29-30 (N.D. Cal. Mar. 19, 2015), ruling on a 12(b)(6) motion, found it would be premature to dismiss the declaratory relief claim at that stage (*id.* at *30). The *Nordby* court also distinguished cases such as *Britz*, where, as here, the issue to be adjudicated is an insurer's alleged defense duty in cases *which have concluded*, which are not appropriate for declaratory relief, and cases where the issues go beyond alleged past wrongs. (*Id.*) None of the other cases that plaintiffs cite[20] address the appropriateness of declaratory relief. Summary judgment should be granted as to plaintiffs' declaratory relief claims.

V. PLAINTIFFS ARE NOT ENTITLED TO EQUITABLE INDEMNITY

As discussed in Ironshore's moving papers, plaintiffs are not entitled to equitable indemnity because

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[19] *See also*, *Public Serv. Mut. Ins. Co. v. Liberty Surplus Ins. Corp.*, 2014 U.S. Dist. Lexis 139773, at *25 (E.D. Cal. Sept. 30, 2014) (insurer's claim for declaratory relief re reimbursement of expenses incurred in defending and settling a claim dismissed because relief not prospective and availability of damages rendered equitable relief sought "superfluous"); *Lucey v. Nev. Ex rel. Bd. of Regents*, 2007 U.S. Dist. Lexis 98829, at *19 (D. Nev. Dec. 18, 2007) (declaratory relief count dismissed where damages available); *Simso v. Connecticut*, 2006 U.S. Dist. Lexis 85791, at *25 (D. Conn. Nov. 27, 2006) (no declaratory relief to adjudicate solely past conduct); *Crown Cork & Seal Co. v. Borden, Inc.*, 779 F. Supp. 33, 35 (E.D. Pa. 1991) (same).

[20] *Progressive Cas. Ins. Co. v. Delaney*, 2014 U.S. Dist. Lexis 69166 (D. Nev. May 20, 2014), *Seneca Ins. Co. v. Strange Land, Inc.*, 2014 U.S. Dist. Lexis 176940 (D. Nev. Dec. 19, 2014), and *Assurance Co. of Am. v. Ironshore Specialty Ins. Co.*, 2014 U.S. Dist. Lexis 138684 (D. Nev. Sep. 30, 2014).

plaintiffs and Ironshore are not joint tortfeasors; the only theoretically possible remedy available to plaintiffs is contribution. Plaintiffs fail to address the Nevada authority Ironshore cited for this basic principle. (*See* MSJ p. 16.) Instead, plaintiffs cite authority that does not turn on the definition of equitable indemnity. (Pltf. Opp. p. 31.) None of the cases cited support plaintiffs' position. *N. Am. Specialty Ins. Co. v. Nat'l Fire & Marine Ins. Co.*, 2013 U.S. Dist. Lexis 47573, at *10 (D. Nev. Apr. 2, 2013) does not address the issue of whether equitable indemnity is available only as between joint tortfeasors. Moreover, the *N. Am. Specialty* court cited *Medallion Dev., Inc. v. Converse Consultants*, 930 P.2d 115, 119 (Nev. 1997), *superseded by statute on other grounds as stated in Doctors Co. v. Vincent*, 98 P.3d 681, 688 (Nev. 2004), as the authority on which it relied for the definition of equitable indemnity; but *Medallion* holds that equitable indemnity is available between joint tortfeasors. While *Mitchell, Silberg & Knupp v. Yosemite Ins. Co.*, 58 Cal. App. 4th 389, 393-395 (1997) discusses whether "equitable indemnity" is among the rights *reserved* against other carriers for its contribution to a settlement of its insured, the opinion does not turn on the definition of "equitable indemnity" or consider whether equitable indemnity is available only to joint tortfeasors. *Sammer v. Ball*, 12 Cal.App.3d 607 (1970), is an indemnity case brought by a tort victim against a tortfeasor, not a claim between alleged joint insurers; it, too is completely inapposite. And the court in *Lexington Ins. Co. v. Sentry Select Ins.*, 2009 U.S. Dist. Lexis 47300 (E.D. Cal. June 5, 2009) explains in its decision that a claim between joint insurers to share the burden equally is properly *equitable contribution*; it does not reach the issue of whether indemnity is appropriate between non-joint tortfeasors.

VI. SUMMARY JUDGMENT SHOULD BE GRANTED AS TO ALL CAUSES OF ACTION RE *CLARK*

In its moving papers, Ironshore demonstrated that its insured, Universal Framing, Inc., was not the same entity as plaintiffs' insureds, Universal Framing, LLC, or the individual, Tom Hopson, dba Universal Framing. In response, plaintiffs contend that Universal Framing, Inc. does not exist (Pltf. Opp. p. 30), but offer no admissible evidence in support.[21]

In any event, even if admissible, plaintiffs' evidence would be of no consequence because plaintiffs offer it in support of a remedy for which they are not entitled, *i.e.*, that the Court should re-write Ironshore's contract with Ironshore's insured in order to create a contract insuring Plaintiffs' insured, Universal Framing,

[21] Ironshore objects to the Declaration of W. Reeves (ECF 39-1), ¶¶ 10 and 12, purporting to opine as to the non-existence of Universal Framing, Inc. based on a records search Mr. Reeves says he performed, as inadmissible hearsay, unqualified opinion, lacking foundation, and irrelevant, and moves to strike.

LLC. (*Id*.) Of course, there is simply no legal theory that allows one insurer to obtain a Court order re-writing another insurer's insurance contract with a third party, for any reason, much less for the purpose of writing the name of the moving party's insured into the other insurer's insurance policy. Offering no real explanation for their bizarre suggestion, plaintiffs simply cite authority for the proposition that an *insured* can seek to have an insurance contract re-written to correct a mistake in naming the correct insured on the. But even if they had actually demonstrated that Ironshore's insurance contract contained such a mistake (they did not), plaintiffs offer no legal theory under which they, as insurers, could obtain such a remedy; and none exists.

Moreover, plaintiffs' own evidence demonstrates that *their* insured, Universal Framing LLC, came into existence in *2003*,[22] and elsewhere they admit that the residence at issue was completed on March 19, *2002*.[23] Thus, plaintiffs have effectively admitted that their insured, Universal Framing, LLC could *not* have performed the work or have been liable for any resulting property damage, because Universal Framing, LLC *did not yet exist* when the residence was completed. Because Universal Framing, LLC could not have been liable, Ironshore does not owe an indemnity duty. For this separate and independent reason, Ironshore should be granted summary judgment as to the causes of action in connection with the *Clark* claim.

In addition, plaintiffs incurred no defense expenses with respect to this claim.[24] Therefore, the question whether Ironshore had a duty to defend is moot.

VII. PLAINTIFFS FAIL TO ADDRESS THE DESIGNATED WORK EXCLUSION

Ironshore's opening papers demonstrated that the Designated Work Exclusion in the Ironshore R.A.M.M. policy bars coverage with respect to the *Sanchez* claim. (MSJ, p. 28.) That exclusion excludes property damage arising from the insured's work performed before a certain date stated in the exclusion. For the Ironshore R.A.M.M. policy, the date in the exclusion is November 15, 2008.[25] Plaintiffs' opposition makes no mention of Ironshore's Designated Work Exclusion, conceding Ironshore's position.

VIII. THE "YOUR WORK" EXCLUSION APPLIES TO THREE CLAIMS

In its moving papers, Ironshore demonstrated that Exclusion *l*., for "property damage" to "your work", bars coverage for the *Seven Hills* and both *Anthem* claims. (MSJ pp. 26-27.) Plaintiffs offer no facts or

[22] Declaration of W. Reeves, ¶ 11.
[23] Declaration of Philip D. Witte ("WD") (ECF 41-2) ¶ 27, Exh. 157 (ECF 44-61) p. 3 of 4.
[24] WD ¶ 2, Exh. 157.
[25] *See* ND ¶¶ 116, 119, Exh. 116 (ECF 44-12) pp. ISIC 4369-80.

evidence to support their argument that Exclusion *l* does not apply. (Pltf. Opp. pp. 25-26.) Neither do they dispute the facts and evidence that Ironshore presented in support of the exclusion's application, or deny that when a defending insurer seeks reimbursement from a non-defending insurer, the non-defending insurer can rely on such extrinsic evidence as it possessed it at the time of its coverage determination. (*Id.*)[26] Plaintiffs merely argue that the exclusion does not apply unless Ironshore can establish that *all* property damage alleged in the complaints was caused by the insured's work. (*Id.*) This is incorrect. The Ironshore policies' coverage grant applies *only* to property damage caused by the insured. Ironshore identified the scope of the insured's work, and linked all alleged property damage within the scope of that work to alleged property damage in the complaints. All of that property damage was to the insured's work itself; none was property damage to other property caused by the insured's work. Plaintiffs do not contend otherwise.

IX. THE "KNOWN LOSS RULE" APPLIES TO SEVERAL CLAIMS

Plaintiffs do not and cannot deny that, with respect both *Anthem* claims, *Bennett*, *Seven Hills*, and *Sun City,* the insureds knew of the claim before the Ironshore policy began. Instead, they argue improbably that there is no Known Loss Rule. That is simply untrue. Plaintiffs rely on a single case, *Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal.4th 645 (1995), applying California law, which represents the minority view. But other courts have either rejected that position or limited *Montrose* to its particular facts, which are not present here. For example, in *Franklin v. Fugro-McClelland, Inc.*, 16 F. Supp. 2d 732 (S.D. Tex. 1997), the court, applying Texas law, granted the insurers' summary judgment motion based solely on the rule and held that no defense duty was owed. The court stated: "Under the 'loss in progress' or 'known loss' doctrine, insurance coverage is precluded where the insured is, or should be, aware of an ongoing progressive loss or known loss at the time the policy is purchased. . . ." *See also, Scottsdale Ins. Co. v. Sullivan Props., Inc.*, 2006 U.S. Dist. Lexis 11582, at *33-34 (D. Haw. Feb. 27, 2006) (summary judgment for insurer on duty to defend based on Known Loss Rule). Similarly, here, the underlying actions had been filed, or Chapter 40 notices had been served, and the insured knew that property damage had occurred, before the relevant policy incepted.[27]

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[26] *See Great W. Cas. Co. v. General Fire & Cas. Co.*, 2008 U.S. Dist. Lexis 84519, at *28 (E.D. Cal. Sept. 30, 2008); *Nat'l Fire & Marine Ins. Co. v. Redland Ins. Co.*, 2014 U.S. Dist. Lexis 107382, at *14, n. 6 (D. Nev. Aug. 4, 2014).

[27] After Ironshore filed its motion, it spotted two typographical errors. Ironshore's brief mistakenly refers to the Stewart & Sundell/*Anthem* claim as the Stewart & Sundell/*Seven Hills* claim (the evidence cited in support

X. IRONSHORE HAS NO DUTY TO INDEMNIFY RE ANY SETTLEMENT AMOUNTS

Even if the Court finds that the evidence demonstrates a *potential* for coverage, plaintiffs have offered *no* evidence whatsoever that there was *actual* coverage. Accordingly, plaintiffs have not carried their burden of proof that there was actual coverage. Ironshore owed no indemnity to its insureds for any claim. Summary judgment should be granted as to all indemnity claims.

Plaintiffs' contend that a rebuttable presumption of coverage exists in a contribution action between a defending insurer and a non-participating co-insurer, citing *Safeco Ins. Co. v. Superior Court*, 140 Cal. App. 4th 874 (2006). But as *Safeco* acknowledges, a non-defending insurer can overcome a presumption of coverage. *Id.* at 881. Here, Ironshore met its burden of proof through voluminous, uncontradicted, and undisputed evidence—including plaintiffs' own admissions, their claim notes and claim summaries—that paragraph 1 of the CP Exclusion applied to each of the underlying claims, and that paragraphs 2 and 3 independently applied to certain claims as well. Ironshore also proved that the "Your Work" Exclusion and Known Loss Rule independently applied to certain claims. Every factual predicate for Ironshore's defenses is supported by undisputed evidence. Even if the Court finds that the evidence was not sufficient to eliminate any possibility of coverage, it cannot find, in the absence of contradictory evidence, that Ironshore's undisputed evidence is insufficient to rebut the presumption. Plaintiffs neither challenge the evidence nor offer contrary evidence. Thus, there is no actual coverage under the Ironshore policies, and Ironshore owes no indemnity duty.

XI. PLAINTIFFS' ARGUMENT REGARDING DEDUCTIBLES IS INCORRECT

Contrary to plaintiffs' argument (Pltf. Opp. pp. 26-27), Ironshore does not contend that deductibles eliminate the defense duty. Rather, Ironshore is entitled to the benefit of its deductibles because plaintiffs' claim for equitable contribution can only apply to that portion of the risk insured by *both* parties. *Fireman's Fund Ins. Co. v. Maryland Casualty Co.*, 65 Cal. App. 4th 1279, 1298 (1998). Ironshore does not insure the deductible amount. After the deductibles are taken into account, plaintiffs would recover nothing from Ironshore as to the *Mohan*, *Stallion Mountain, Sanchez*, and *Boyer* claims, even if the Court holds that

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of the Known Loss Rule clearly concerns the Stewart & Sundell/*Anthem* claim). (ECF Doc. 29-1, p. 32 of 36.) Also, Table 1 of the Nolan Declaration inadvertently references the "Sims Declaration" and "SD" instead of the Declaration of William C. Morison" and "WCM". All references to "SD", therefore, should be to "WCM".

Ironshore owed a defense duty (but not an indemnity duty), and plaintiffs would also recover nothing in the more unlikely event the Court holds that Ironshore owed both a defense and an indemnity duty (except *Stallion Mtn*.).

Plaintiffs' arithmetic is also incorrect. Instead of subtracting the deductible amounts from *one-half* of the defense and/or settlement amounts, as would be the case if Ironshore were required to share defense and/or settlement expenses with plaintiffs, plaintiffs focused on the entire amounts that they allegedly incurred to defend and settle the claims. There is no basis for plaintiffs to recover 100% of the amounts expended.

In support of plaintiffs' anti-stacking argument, plaintiffs cite only on the easily distinguishable *California Pacific Homes v. Scottsdale Ins. Co.*, 70 Cal. App. 4th 1187 (1999), where the court held that an insurer paying a claim cannot reduce its liability to *its insured* by stacking deductibles under other policies that have a defense duty. Plaintiffs are asking this Court to create new law by extending that ruling to an insurer-insurer contribution dispute. There is no precedent for that proposition. It should be rejected.

XII. PLAINTIFFS' EVIDENTIARY OBJECTIONS SHOULD BE OVERRULED

A. Response to Plaintiffs' Objections to the Declaration of Mary Frances Nolan

Each and every one of plaintiffs' objections to the Nolan Declaration (ECF No. 41-1) lacks specificity sufficient to identify the passage(s) to which the objection is raised, and therefore should be rejected. (*See* Pltf. Opp., pp. 23-24.)

B. Relevance.

Plaintiffs' only basis for contending that Ironshore did not possess the objected-to evidence at the time Ironshore disclaimed coverage is plaintiffs' unsupported contention, made only in its brief (Pltf. Opp. p. 23) that "Plaintiffs produced the documents." So what? Plaintiffs sent Ironshore a number of documents before it reached its coverage decisions. The fact, if it is a fact, that plaintiffs may have produced those documents again in this litigation is completely beside the point. Moreover, plaintiffs' claim that they produced the documents is demonstrably false with respect to a number of those objected-to documents. Exhibits 131-134 are 30(b)(6) deposition notices served by Ironshore on plaintiffs; Exhibits 135-141 are deposition excerpts. Plaintiffs' contention also ignores the fact that Ironshore's motion is directed towards claims regarding the duty to indemnify as well as the duty to defend. Evidence acquired after the coverage determination is certainly relevant with respect to the duty to indemnify. Exhibits 142-161 are documents

which plaintiffs admit were in their files. They are admissible to show that plaintiffs have no evidence with which to support a claim for contribution on amounts paid in indemnity and to demonstrate that plaintiffs have no evidence with which to contradict evidence submitted by Ironshore.

C. Foundation

Ms. Nolan laid the foundation for each of the exhibits and all testimony to which plaintiffs object. (*See* ND ¶¶ 1-4, pp. 1:1-5:3.) Ms. Nolan's testimony is manifestly based on her own experience and knowledge as (1) an employee of Certus, Ironshore's designated third party claims administrator, and the current claims handler for the claims at issue; (2) the custodian of the Ironshore claims files, the source of the exhibits she references; and (3) a former employee, claims adjuster, and supervisor for Midlands, Certus' predecessor as Ironshore's designated third-party claims administrator. With respect to documents supplied to Ironshore by plaintiffs and/or the insured in support of the claims, the documents are party admissions, requiring no additional foundation beyond testimony of receipt. With respect to Ironshore documents, foundation is further provided in the paragraph of the Nolan Declaration in which each exhibit is first referenced, which shows that the exhibit consists of a document maintained by Ironshore in the ordinary course of business. Regarding business records kept and maintained by plaintiffs in the ordinary course of business, foundation is provided by the deposition testimony of plaintiffs' designated 30(b)(6) witnesses, who testified as to the accuracy and completeness of these records. Such documents are offered as party admissions.

D. Hearsay

Most of the paragraphs to which plaintiffs object include descriptions of the documents being offered as exhibits, simply for purposes of identification. Such descriptions, to the extent that plaintiffs' non-specific hearsay objection was meant to apply to them, are not being offered for their truth, and therefore are not hearsay. Many objected-to documents were supplied by the insureds, or plaintiffs, and in many cases are statements of plaintiffs or the insureds, and are therefore party admissions and therefore not hearsay. In addition, they are offered in part to show that at the time of its coverage decision, Ironshore was in possession of extrinsic evidence that established a coverage defense; for that purpose, the evidence does not fall within the hearsay definition. FRE 801 (c). Some objected-to exhibits are documents provided by to Ironshore by plaintiffs and/or the insureds in support of their claims. These documents are party admissions and/or admissions against interest, not hearsay, and may be offered for their truth. FRE 801 (d)(2). Some objected-

to exhibits are Ironshore business records created and maintained in the ordinary course of business at or near the time of their creation. These records are subject to the exception for records of regularly conducted activity (business records). FRE 803(6). In addition, the documents demonstrate that Ironshore possessed the information referenced within them at the time of their creation, and for that purpose, do not fall within the hearsay definition at all. FRE 801 (c). Said documents include claim notes and certain communications between Midlands and Ironshore regarding claims and responses to tenders. Some objected-to exhibits are business records kept and maintained by plaintiffs in the ordinary course of business. Plaintiffs' designated 30(b)(6) witnesses testified as to the accuracy and completeness of these records. Hence, they are subject to the regularly recorded activity (business records) exception. FRE 803(6). Such documents are also offered as party admissions, and therefore are not hearsay. The objected-to paragraphs of the Nolan Declaration include testimony explaining the *significance* of certain documents to Ironshore's coverage decision and include testimony to the effect that Ironshore took some action. This testimony is based on Ms. Nolan's personal knowledge as the designated claims handler for these matters, and thus is not hearsay. Some of the paragraphs include testimony to the effect that Ironshore did *not* receive information. Such testimony is subject to the exception set forth in FRE 803(7). Further, to the extent such statements cite records of a regularly conducted activity or absence of a regularly conducted activity, such records would be exceptions to the hearsay rule under FRE 803(6) or (7). Certain paragraphs describe the contemporaneous recording of an event and are subject to a hearsay exception. FRE 803 (1), (5), and (6).

E. Best Evidence

Plaintiffs cryptically object to certain evidence based on the Best Evidence Rule. The best evidence rule is inapplicable. The best evidence rule merely requires introduction of the writing, if available, to prove the contents of the writing. FRE 1002. None of the declaration paragraphs cited contain testimony offered to prove the contents of a writing.

CONCLUSION

For all the foregoing reasons, Ironshore requests that the Court grant Ironshore's motion for summary judgment and enter judgment in favor of Ironshore and against plaintiffs forthwith.

Dated: October 27, 2016

By: /s/ William C. Morison
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Attorneys for Defendant
IRONSHORE SPECIALTY
INSURANCE COMPANY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ASSURANCE COMPANY OF AMERICA, et al., Plaintiffs, vs. IRONSHORE SPECIALTY INSURANCE COMPANY and DOES 1-20 inclusive, Defendants.	Case No. 2:15-cv-00460-JAD-PAL NOTICE OF NEW CASE AUTHORITY IN SUPPORT OF DEFENDANT IRONSHORE SPECIALTY INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; DECLARATION OF WILLIAM C. MORISON **ORAL ARGUMENT REQUESTED**

TO THE CLERK OF THE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE that defendant Ironshore Insurance Company submits herewith as Exhibit 1 the order of the United States District Court in the Eastern District of California, Hon. Troy L. Nunley, J., in *American Zurich Insurance Co., et al. v. Ironshore Specialty Insurance Company*, United States District Court for the Eastern District of California Case No. 2:14-cv-0060-TLN-DB ("*American Zurich*"), following the parties' cross-motions for summary judgment. The court denied plaintiffs' motion, and granted in part defendant Ironshore's motion, finding that there was no duty to defend the underlying actions based on application of the "plain language of the policy" in Ironshore CP Exclusion paragraphs 1. (Exh.

1, pp. 7:22 -8:19, *see also*, pp. 9:14-23 and *passim*.) The court rejected plaintiffs' contention that the underlying pleadings alleged the possibility sudden and accidental damage where they were silent as to the timing of the damage. (*See*, Exh. 1, pp. 11:10 -23, 12:17-18, 14:9-10; 15:9-10, 16:1-3, 17:3-10, 19:3-6, 18:12-16; 19:19-22; 20:15-18; 21:14-16; 22:11-13; 23:14-15; 24:17-18; 25:21-22.)

Had the decision in *American Zurich* been available at the time Ironshore's moving or reply papers had been filed, Ironshore would cited it as supporting authority in Ironshore's motion for summary judgment (ECF No. 40), at pages 13:6 (pleading that is silent as to facts supporting an exception to an exclusion is insufficient to establish a defense duty), 14:10 (as "*see also* the court's subsequent decision on cross-motions for summary judgment,"), and 23, fn. 42; Ironshore's opposition to plaintiffs' motion for partial summary judgment (ECF No. 46), at pages 14:27, 16:14, 19:18 (as "*see also*,"), and 25:21; and Ironshore's reply brief in support of its motion for summary judgment (ECF No. 48), at pages 4 fn. 8; 8:10 and 11:16.

Dated: November 1, 2016

Respectfully submitted,

MORISON & PROUGH, LLP

By:\s\William C. Morison
William C. Morison

Attorneys for Defendant
IRONSHORE SPECIALTY
INSURANCE COMPANY

DECLARATION OF WILLIAM C. MORISON

I, William C. Morison, declare:

1. I am a partner in Morison & Prough, LLP, counsel to defendant Ironshore Specialty Insurance Company ("Ironshore") in the above-entitled action. I am familiar with the file in this matter and regularly receive copies of all correspondence relating to it. I personally know the facts recounted in this declaration and if called to testify, I could and would do so competently.

2. Attached hereto as Exhibit 1 is a true and correct copy of the October 31, 2016

order of the court in in *American Zurich Insurance Co., et al. v. Ironshore Specialty Insurance Company*, U.S. District Court for the Eastern District of California Case No. 2:14-cv-0060-TLN-DB, following the parties' cross-motions for summary judgment. I received notice of this order on October 31, 2016 via e-mail automatically generated by ECF. Plaintiffs' counsel in the instant case, William C. Reeves, is also counsel for plaintiffs in *American Zurich v. Ironshore*.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on November 2, 2016, at Walnut Creek, California.

\s\ William C. Morison
William C. Morison

EXHIBIT 1

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

AMERICAN ZURICH INSURANCE COMPANY, et al.,

Plaintiffs,

v.

IRONSHORE SPECIALTY INSURANCE COMPANY,

Defendant.

No. 2:14-cv-00060-TLN-DB

ORDER

This matter is before the Court pursuant to Defendant Ironshore Specialty Insurance Company's ("Defendant") Motion for Summary Judgment (ECF No. 20) and Plaintiffs American Zurich Insurance Company ("American Zurch"), Northern Insurance Company of New York ("Northern"), and Steadfast Insurance Company's ("Steadfast") (collectively referred to as "Plaintiffs") Cross-Motion for Summary Judgment (ECF No. 26). The parties have both opposed each other's motions (*see* ECF Nos. 25 & 32), and filed the appropriate replies (*see* ECF Nos. 31 & 33). The Court has carefully considered the arguments raised by both parties. For the reasons set forth below, Defendant's Motion for Summary Judgment (ECF No. 20) is GRANTED IN PART and DENIED IN PART, and Plaintiffs' ("Plaintiff") Cross-Motion for Summary Judgment (ECF No. 26) is DENIED.

///

I. FACTUAL BACKGROUND

The instant action is an insurance coverage matter in which Defendant disclaimed coverage in connection with twenty-one separate legal matters. While the underlying legal matters which involved alleged construction defects were eventually settled and resolved, a coverage dispute still exists between insurers arising from Defendant's decision to disclaim coverage. Matt's Roofing and Sherman Loehr, who were both insured by Defendant, were named as defendants in these lawsuits alleging defects in the construction of homes. Defendant disclaimed coverage in those suits asserting that the projects were completed prior to the policy's issue date and thus excluded under the Continuous or Progressive Injury or Damage Exclusion. At issue in this motion are the following three insurance policies issued by Defendant:

Insured	Exhibit	Policy No.	Policy Term
Matt's Roofing	ECF No. 21-2 at 66	00VMU0905001	01/01/09-01/01/10
Matt's Roofing	ECF No. 25-7	000085201	01/01/10-01/01/11
Sherman Loehr	ECF No. 21-3	017U00905001	10/31/09-10/31/10

Plaintiffs brought the instant action against Defendant alleging sixty-three causes of action. (Second Am. Compl. ("SAC"), ECF No. 10.) Essentially Plaintiffs have alleged a count for decaratory relief, equitable contribution, and equitable indemnity as to each of the twenty-one legal matters settled by Plaintiffs. Defendant has moved for summary judgment as to all sixty-three counts. (*See* Def's P&A is Supp. of Mot. for Summ. J., ECF No. 20-1.) Plaintiffs move for partial summary judgment as to Defendant's duty to defend in connection with Causes of Action Nos. 1, 4, 7, 10, 13, 16, 19, 25, 28, 31, 34, 37, 40, 43, 46, 49, 52, 55, 58 and 61. Each of these Causes of Action is for Declaratory Relief as to Defendant's duty to defend in connection with each separate underlying matter. (*See* Pls' Mot. for Summ. J., ECF No. 26.)

II. LEGAL STANDARD

Summary judgment is appropriate when the moving party demonstrates no genuine issue as to any material fact exists, and therefore, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Under summary judgment practice, the moving party always bears the initial responsibility of informing

the district court of the basis of its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file." *Id.* at 324 (internal quotations omitted). Indeed, summary judgment should be entered against a party who does not make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986); *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288–89 (1968). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Fed. R. Civ. P. 56(c). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* at 251–52.

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First Nat'l Bank*, 391 U.S. at 288–89. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" *Matsushita*, 475 U.S. at 587 (quoting Rule 56(e) advisory committee's note on 1963 amendments).

In resolving the summary judgment motion, the court examines the pleadings, depositions,

answers to interrogatories, and admissions on file, together with any applicable affidavits. Fed. R. Civ. P. 56(c); *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1305–06 (9th Cir. 1982). The evidence of the opposing party is to be believed, and all reasonable inferences that may be drawn from the facts pleaded before the court must be drawn in favor of the opposing party. *Anderson*, 477 U.S. at 255. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244–45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898 (9th Cir. 1987). Finally, to demonstrate a genuine issue that necessitates a jury trial, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.* at 587.

III. ANALYSIS

Because the insurance policies issued by Defendant to Matt's Roofing and Sherman Loehr contain the same provisions, the Court finds it prudent to first discuss the language of the policies and then address the relevant California insurance law principles that will apply to this Court's interpretation of the policies. Because Plaintiffs have brought claims for declaratory relief, equitable contribution, and equitable indemnity as to each legal action brought against both Matt's Roofing and Sherman Loehr, the Court then turns to each case brought against these companies to determine whether there was potential coverage under Defendant's policy.

A. Policy Language

The Insuring Agreement in each of these policies provides in part:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of … "property damage" 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 … "property damage" to which this insurance does not apply.
>
> . . .
>
> This insurance applies to ... "property damage" only if:
>
> (1) The … "property damage" is caused by an "occurrence" …;

> [and]
>
> (2) The … property damage occurs during the policy period … .

(Def's Reply to Pl.'s Resp. to Def's Sep. Statement of Facts ("DRPRDSSF"), ECF No. 31-1, No. 1.)

The Ironshore Policies include the following definitions:

> 13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
>
> 16. "Products-completed operations hazard":
>
> a. Includes all . . . "property damage" occurring away from premises you own or rent and arising out of "your work" except:
>
> (1) Products that are still in your physical possession; or
>
> (2) Work that has not yet been completed or abandoned. . . .
>
> 17. "Property damage" means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it ... .
>
> 22. "Your work":
>
> a. Means:
>
> (1) Work or operations performed by you or on your behalf; and
>
> (2) Materials, parts, or equipment furnished in connection with such work or operations.
>
> b. Includes
>
> (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and
>
> (2) The providing or failing to provide warnings or instructions.

(DRPRDSSF, ECF No. 31-1, No. 2.)

The policies contain numerous exclusions including coverage for "damage to your work arising out of it or any part of it and included in the 'products completed operations hazard.'" (DRPRDSSF, ECF No. 31-1, No. 3.) Additionally, The Ironshore policies' declarations pages list specific "Endorsements Attached To This Policy," one of which is "Continuous or Progressive

Injury Exclusion" (the "CP Exclusion"), which provides in relevant part:

> This insurance does not apply to any… "property damage":
>
> 1. which first existed, or is alleged to have first existed, prior to the inception of this policy. "Property damage" from "your work" ... performed prior to policy inception will be deemed to have first existed prior to the policy inception, unless such "property damage" is sudden and accidental and takes place within the policy period; or
>
> 2. which was, or is alleged to have been, in the process of taking place prior to the inception date of this policy, even if such ... "property damage" continued during this policy period; or
>
> 3. which is, or is alleged to be, of the same general nature or type as a condition, circumstance or construction defect which resulted in ... "property damage" prior to the inception date of this policy.

(DRPRDSSF, ECF No. 31-1, No. 4.)

Keeping in mind the terms of the policy and the language set forth above, the Court turns to a brief discussion of the duty to defend under California law and then turns to the individual claims brought against Matts Roofing and Sherman Loehr.

B. Duty to Defend

The duty to defend does not depend on the insurer's investigation and determination that the plaintiff has a reasonable probability of success. It must protect the insured against groundless as well as probable claims; i.e., it must defend whenever the complaint shows a claim for covered damages, i.e., "potential coverage." *See Kazi v. State Farm Fire and Cas. Co.*, 24 Cal. 4th 871, 879 (2001); *Horace Mann Ins. Co. v. Barbara B.*, 4 Cal. 4th 1076, 1081 (1993), *as modified on denial of reh'g* (May 13, 1993). "The duty to defend is not without limitation; it extends only to the defense of those actions of the nature and kind covered by the policy." *Dillon v. Hartford Acc. & Indem. Co.*, 38 Cal. App. 3d 335, 339–40 (1974) (citing *Gray v. Zurich Insurance Co.*, 65 Cal. 2d 263, 275 (1966)). "If the insurer, after taking into consideration facts gathered from its own investigation or information supplied by the insured, determines that there is no potential liability under the policy, it may refuse to defend the lawsuit; this it does at its own risk, and if it later develops liability, or potential liability existed under the policy, the company will be held accountable to its insured, or to one who obtained judgment against its insured in the action it refused to defend." *Id.* (internal quotations omitted). In making a determination as to

whether the insurer owes a duty to defend the court compares the allegations of the complaint with the terms of the policy. *See Horace Mann Ins. Co.*, 4 Cal. 4th at 1081.

Keeping this in mind, the Court turns to the individual cases brought against both Matt's Roofing and Sherman Loehr.

C. Matt's Roofing

Defendant issued an insurance policy with the aforementioned language to Matt's Roofing from June 1, 2009 through June 1, 2011. (DRPRDSSF, ECF No. 31-1, No. 21.) Plaintiffs' Causes of Action One through Nine and Twenty-eight through Forty-eight pertain to ten legal actions against Matt's Roofing. Among these, eight of the cases[1] alleged the following identical facts:

> **At the time of the purchase by Plaintiffs**, the PROPERTY was defective and unfit for its intended purposes because Defendants did not construct the PROPERTY in a workmanlike manner as manifested by, but not limited to, numerous defects which have resulted in damage to the homes and their component parts. The defects include, without limitation and to various degrees on the plaintiffs' respective residences, the following:
>
> Faulty soil compaction, faulty existing underlying soils and expansive soils resulting in soil movement and damage to the structures, concrete slabs, flatwork and foundation defects; plumbing defects; electrical defects; drainage defects; roof defects; HVAC defects; waterproofing defects; window and door defects; landscaping and irrigation defects; framing, siding and structural defects; ceramic tile, vinyl flooring and countertop defects; drywall defects; fence and retaining wall defects; cabinet and wood trim defects; fireplace and chimney defects; tub and shower door defects; painting defects; sheet metal defects; and stucco defects.

(Def's Reply to Plaintiffs' Add'l Facts ("DRPAF"), ECF No. 31-1, Nos. 4, 10, 16, 22, 34, 52, 58 (emphasis added).) All of the aforementioned cases against Matt's Roofing allege that the damage or condition existed **at the time that the plaintiffs purchased the residences**. Of these

[1] *Appel v. Atherton Homes, LLC*, San Joaquin County Case No. 39-2009-00185411-CU-CD-STK ("Appel"); *Baluyot v. Morrison Homes, Inc.*, San Joaquin County Superior Court, Case No. CV035047 ("Baluyot"); *Bolton v. K. Hovnanian Forecast Homes, Inc.*, San Joaquin County Superior Court, Case No. 39-2011- 00259783-CU-CD-STK ("Bolton"); *Branch v. Woodside Weston Ranch, Inc.*, San Joaquin County, Case No. CV034440 ("Branch"); *Ali v. Arnaiz Development Inc.*, San Joaquin Superior Court, Case No. 39-2008-00199202 ("Ali"); *Anderson v. Frontier Land Companies*, San Joaquin County Superior Court, Case No. 39-2009-00212356 ("Anderson"); *Palacios v. Ticino Building Partners*, San Joaquin County Superior Court, Case No. 39-2010-00239095-CU-BC-STK ("Palacios"); *Reis v. Manteca Vintage Estates*, San Joaquin Superior County, Case No. 39-2011-00262450-CU-CD-STK ("Reis").

eight cases, Appel, Baluyot, Branch, and Ali were filed prior to the 2009 date that Defendant insured Matt's Roofing.[2] Thus, the plaintiffs in these matters were aware of the alleged defect and damage that allegedly existed prior to Defendant's issuance of the policy. Under the plain language of the policy, these claims would not be covered: "This insurance does not apply to any… 'property damage': 1. which first existed, or is alleged to have first existed, prior to the inception of this policy" ("CP Exclusion Section 1"). (DRPRDSSF, ECF No. 31-1, No. 4.) It is plainly clear that these causes of action would not be covered under the policies issued by Defendant. As such, the Court finds that there was not a duty to defend as to these causes of action because Defendant's duty to defend only extends to the defense "of those actions of the nature and kind covered by the policy." *Dillon*, 38 Cal. App. 3d at 339–40. Because Defendant did not have a duty to defend or liability as to these causes of action, the Court finds that Plaintiffs cannot succeed on their claims for declaratory relief, equitable contribution, and equitable indemnity on the Appel, Baluyot, Branch, and Ali cases and thus grants Defendant's motion for summary judgment as to Plaintiffs' First through Tenth Causes of Action as well as Plaintiffs' Twenty-eighth through Thirtieth Causes of Action.

The remaining four cases which utilized the aforementioned pleading were filed after the inception of the insurance policy. Thus, the Court now turns to the remaining four cases: Anderson, Bolton, Palacios, and Reis to determine whether Defendant had a duty to defend against any of these actions.

i. Anderson

Anderson was filed on May 15, 2009, in San Joaquin County Superior Court. (*See* Compl., Ex. 73, ECF No. 21-17.) The Complaint alleged causes of action for: strict product liability; strict product liability for components; violations of California Civil Code § 896; breach of implied warranties of merchantability; breach of contract; negligence; and breach of express warranties. (Ex. 73, ECF No. 21-17.) Of the 41 homeowners[3] in said action, twenty-eight were

[2] All of these cases alleged the following causes of action: strict product liability; strict product liability for components; breach of implied warranties of merchantability; breach of contract; negligence; and breach of express warranties. (*See* Ali Compl., Ex. 64, ECF No. 21-16; Appel Compl., Ex. 7, ECF No. 21-5; Baluyot Compl., Ex. 12, ECF No. 21-6; Branch Compl., Ex. 15, ECF No. 21-6.)

[3] Throughout this Order, the Court refers to homeowner plaintiffs as they pertain to the separate cases against

the original owners of the properties which were purchased from early 2000 until early 2005.[4] (*See* Anderson Homeowners Matrix, Ex. 77, ECF No. 21-17 at 74.) The homeowners all alleged that the defect existed at the time of purchase. In addition, the homeowners alleged that defendants "did not construct the property in a workmanlike manner as manifested by, but not limited to, numerous defects which have resulted in damage to the homes and their component parts." (ECF No. 21-17 at 22–23, ¶15.) In doing so, homeowners specifically contended that the roof was not properly constructed. (ECF No. 21-17 at 22–23, ¶15.) Furthermore, homeowners specified in their Third Cause of Action that the defects/damage to their property was caused by violations of building standards set forth in California Civil Code § 896 resulting in "roofs, roofing systems, chimney caps, and ventilation components . . . that allow water to enter the structure or to pass beyond, around, of through the designed or actual moisture barriers, including without limitation, internal barriers located within the systems themselves." (ECF No. 21-17 at 29, ¶ 44.)

These allegations support the notion that the defect existed at the time the home was completed and continued to cause damage from the date of completion up to the time that homeowners repaired the properties. As such, these claims are excludable under two legal theories. First, if the Court looks only to the allegation that the defect existed at the time that the plaintiffs purchased their home, many of the plaintiffs purchase their homes prior to January 1, 2009 and thus are exempted because the alleged damage existed prior to the policy. However, a more holistic reading of the allegations supports the argument that even if a plaintiff was a subsequent purchaser who did not purchase the home until after the policy inception date, the claim would still be excluded under CP Exclusions 1 or 2, since the claims in the Anderson litigation are dependent on a defective/negligent construction theory.

a. Date of Purchase

As referenced above, of the 41 homeowners in this action, twenty-eight were the original

Matt's Roofing and Sherman Loehr. In doing so, the Court's reference to the number of homeowners corresponds with the amount of properties in the action. For example, if the action concerned forty properties and some of those properties were owned by a husband a wife, for purposes of this Order they are considered one joint homeowner.

[4] The complaint does not differentiate as to subsequent purchasers as to whether the defect existed at the time of the original purchase of the home, i.e. the date of completion, or that of the subsequent purchase.

owners of the properties which were purchased from early 2000 until early 2005. (*See* Anderson Homeowners Matrix, ECF No. 21-17 at 74.) As for the thirteen homeowners[5] that were not the original purchasers, ten of the homeowners purchased the homes prior to the policy's January 1, 2009 inception date. Therefore these thirty-eight claims would not have been covered by the policy since the pleadings state that the defect and damage existed at time of purchase. (*See* CP Exclusions 1 and 2.) This leaves three homeowners[6] who purchased their homes in 2009, after the policy inception date. Under Plaintiffs' theory of possible sudden or accidental damage, these are the only three homeowners that Plaintiffs' theory could apply to. The problem with this theory is that there is no factual allegation within the Complaint that would allow the reader to infer a sudden or accidental cause of the alleged damage. To the contrary, the allegations taken as a whole reinforce the notion that the defect and damage complained of existed at the time that the homes were completed. (*See* ECF No. 21-17 at 22–29.)

b. Date of Completion

Under the insurance policy, specifically CP Exclusion 1, "'Property damage' from 'your work' . . . performed prior to policy inception will be deemed to have first existed prior to the policy inception, unless such 'property damage' is sudden and accidental." Thus, pursuant to the insurance policy, even if damages were not present prior to the policy inception, they may still be excluded where the "property damage . . . was, or is alleged to have been, in the process of taking place prior to the inception date of this policy, even if such ... 'property damage' continued during

[5] Pursuant to a Minute Order issued by this Court, Defendant provided the Court with Deeds of Trust as to the properties involved in litigation against both Matt's Roofing and Sherman Loehr which have been filed with the County Recorders. Defendant requests that this Court take judicial notice of these documents under Federal Rule of Civil Procedure 201. (*See* ECF No. 42.) Under Rule 201, facts appropriate for judicial notice are those "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The documents attached hereto are "not subject to reasonable dispute" and are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. In fact, Deeds of Trust and similarly recorded public documents are widely held as proper subjects of judicial notice. *See, e.g., In the Matter of Manges*, 29 F.3d 1034, 1042 (5th Cir. 1994) (taking judicial notice of deeds and assignments). As such, the Court GRANTS Defendant's request for judicial notice (ECF No. 42) of the aforementioned documents.

[6] Homeowners Anthony and Regina Vincent purchased their home on January 8, 2009. (*See* Vincent Deed of Trust, ECF No. 41-5 at 30.) Homeowners David and Kimberly Ott purchased their home on February 11, 2009. (*See* Ott Deed of Trust, ECF No. 41-5 at 32.) Homeowner Rosie Robinson purchased her home on October 22, 2009. (*See* Robinson Deed of Trust, ECF No. 41-5 at 28.)

this policy period" ("CP Exclusion 2").

The evidence before the Court shows that Matt's Roofing completed all work on the homes in the Anderson litigation in or before Spring 2005. (ECF No. 21-17 at 74.) Thus, the defect causing the damage existed at the time that the work was completed, which at the latest was in 2005. Because the nature of the claims against Matt's Roofing consist of faulty construction that would cause immediate and gradual damage due to water exposure, these claims fall squarely within CP Exclusions 1 and/or 2, as they existed prior to the policies January 2009 inception. Therefore, these claims are clearly excluded from the policy as the homeowners alleged that the defects existed at the time of purchase.

As referenced above, Plaintiffs have repeatedly alleged that the damages in Anderson could have been sudden or accidental and thus covered under Defendant's policy. (ECF No. 26 at 11.) In fact, Plaintiffs make this same argument as to all the cases against Matt's Roofing and Sherman Loehr at issue in the instant litigation. However, Plaintiffs fail to produce any evidence of allegations that would support a claim of sudden or accidental damage in this case or the foregoing. Instead, Plaintiffs rely on their assertion that the homeowners' claims against Matt's Roofing were "silent pleadings." (*See* ECF No. 26 at 12.) This Court finds no merit in Plaintiffs' claims. It is clear that the homeowners plead with specificity that the damage complained of was slowly caused by alleged construction defects. Here, Defendant compared the allegations of the complaint with the terms of the policy and determined that it did not owe a duty to defend as is required under the law. *See Horace Mann Ins. Co.*, 4 Cal. 4th at 1081. Therefore, the Court hereby grants Defendant's motion for summary judgment as to Plaintiffs' Thirty-first through Thirty-third Causes of Action because Plaintiffs cannot succeed on their claims for declaratory relief, equitable contribution, and equitable indemnity.

ii. Bolton

The Bolton litigation was filed on May 10, 2011. (Compl., ECF No. 21-20 at 75.) The Complaint alleged causes of action for: strict product liability; strict product liability for components; violations of California Civil Code § 896; breach of implied warranties of merchantability; breach of contract; negligence; and breach of express warranties. (ECF No. 21-

20 at 75.) As referenced above, Bolton also alleged that the defect caused by Matt's Roofing's work existed at the time of purchase. (ECF No. 21-20 at 79, ¶14.) Of the thirty homeowner plaintiffs in said litigation, only eight are original purchasers, all of whom purchased their homes in or before the end of 2003. Thus—pursuant to assertion that the defects existed at the time of purchase—those claims would be excluded as a prior defect/damage under the policy. The Court is not in receipt of the closing dates of the twenty-two subsequent purchasers, but notes that all of the homes were completed between May 2001 and April 2004. (*See* Boldon Homeowners Matrix, ECF No. 21-21 at 38.) Thus, Matt's Roofing performed work on these properties during that same time frame, roughly four and a half years prior to Defendant issuing its insurance policy.

A review of the pleadings in this matter shows that, like the Anderson litigation, the homeowners alleged violation of the Cal. Building Code (Cal. Civil Code § 896). (ECF No. 21-20 at 29, ¶ 43.) Specifically, homeowners alleged that the roof was installed in such a way that allowed "water to enter the structure or to pass beyond, around, or through the designed or actual moisture barriers." (ECF No. 21-20 at 29, ¶ 43.) Therefore, as discussed above as it pertained to the Anderson litigation, the defects would be excluded from the policy under CP Exclusions 1 and/or 2. Furthermore, there are no allegations or information that would lead to the conclusion that sudden or accidental damage occurred and caused the water damage to the homes. As such, the Court concludes that Defendant reasonably compared the allegations of the complaint with the terms of the policy and determined that it did not owe a duty to defend as is required under the law. *See Horace Mann Ins. Co.*, 4 Cal. 4th at 1081. Hence, the Court hereby grants Defendant's motion for summary judgment as to Plaintiffs' Thirty-seventh through Thirty-ninth Causes of Action because Plaintiffs cannot succeed on their claims for declaratory relief, equitable contribution, and equitable indemnity.

iii. Palacios

The Palacios litigation was filed on April 12, 2010, in San Joaquin County Superior Court, California. (Compl., Ex. 108, ECF No. 21-22 at 63.) The Complaint alleged strict products liability and negligence. (ECF No. 21-22 at 63.) Palacios also alleged that defects

caused by Matt's Roofing's work existed at the time of purchase. (ECF No. 21-22 at 66, ¶ 13.) Of the five homeowner plaintiffs[7] in said litigation, none are original purchasers, but all purchased the homes between December 2002 and December 2008. Thus, as the complaint alleges that the defects and damage existed at the time of purchase, the defects in those homes would be excluded as a prior defect/damage under the policy, under CP Exclsuion 1. Moreover, the complaint alleges a negligence cause of action that clarifies that the damages complained of stem from the careless and negligent construction of the properties. (ECF No. 21-22 at 66, ¶¶ 19–22.) Since these homes were completed in 2000 and 2001 (*see* ECF No. 20-22 at 90), these defects and the resultant damage existed prior to the 2009 insurance policy and are excluded under CP Exclusions 1 and 2. As such, the Court hereby grants Defendant's motion for summary judgment as to Plaintiffs' Forty-third through Forty-fifth Causes of Action because Plaintiffs cannot succeed on their claims for declaratory relief, equitable contribution, and equitable indemnity.

iv. Reis

The Reis litigation was filed on June 24, 2011, in San Joaquin County Superior Court, California. (Compl., Ex. 116, ECF No. 21-23 at 2.) The Complaint alleged causes of action for: strict product liability; strict product liability for components; violations of California Civil Code § 896; breach of implied warranties of merchantability; breach of contract; negligence; and breach of express warranties. (ECF No. 21-23 at 2.) As referenced above, Reis also alleged that the defect caused by Matt's Roofing's work existed at the time of purchase. (ECF No. 21-23 at 6, ¶ 14.) The litigation included 23 homeowners, fifteen of which were the original purchasers and closed on the homes between June 2002 and July 2005. (Reis Homeowners Matrix, Ex. 120, ECF No. 21–23 at 55.) The remaining eight homeowners purchased the properties between July 2005 and September 2010. (*See* Deeds of Trusts, Ex. 165, ECF No. 41-4.) Many of the homeowner claims in the Reis litigation are likely excluded because the defect and damage existed prior to the January 1, 2009, policy inception date. However, even those plaintiffs' claims who purchased the

[7] The Palacios litigation originally involved seven properties. The homeowners of two of the properties were dismissed from the action. (*See* Palacios Homeowners Matrix, Ex. 111, ECF No. 20–22 at 90.)

homes after the policy inception are likely excluded under CP Exclusion 2.

Like the other cases, the Reis plaintiffs allege that the defects and subsequent damage to their properties stems from violations of California's Building Code (Cal. Civil Code § 896). (ECF No. 21-23 at 29, ¶¶ 36–49.) Specifically, homeowners alleged that the "roof, roofing systems, chimney caps, and ventilation components at the propertie[s] allow water to enter the structure or to pass beyond, around, or through the designed or actual moisture barriers." (ECF No. 21-23 at 12, ¶ 45(a)(4).) Therefore, as discussed as above, the defects would be excluded from the policy under CP Exclusion 2 since the defect existed at the time construction was completed. Furthermore, there are no allegations or information that would lead to the conclusion that sudden or accidental damage occurred and caused the water damage to the homes. As such, the Court concludes that Defendant reasonably compared the allegations of the complaint with the terms of the policy and determined that it did not owe a duty to defend as is required under the law. *See Horace Mann Ins. Co.*, 4 Cal. 4th at 1081. Therefore, the Court hereby grants Defendant's motion for summary judgment as to Plaintiffs' Forty-sixth through Forty-eighth Causes of Action because Plaintiffs cannot succeed on their claims for declaratory relief, equitable contribution, and equitable indemnity.

v. Bautista

The Bautista litigation was filed on September 17, 2010, in San Joaquin County Superior Court, California. (First Am. Compl. ("FAC"), Ex. 84, ECF No. 21-19, at 19.) The FAC asserts the following causes of action: violations of standards for residential construction; strict liability; breach of implied warranty of merchantability; breach of contract; negligence; and breach of express warranty. (ECF No. 21-19 at 19.) Specifically, the FAC alleges:

> At the time PLAINTIFFS took possession of the PROPERTY, and thereafter, the PROPERTY was defective in design and construction in that, among other things the building envelope was designed and constructed so as to permit intrusion of water and/or moisture into its interior including, without limitation, water and moisture intrusion; the Structure was under designed and built to the wrong wind exposure causing movement or the structure and damage thereto; the building was improperly constructed, including improper construction of the framing system and related components; excessive cracking of exterior wall finishes so as to permit moisture intrusion; improper installation of the fenestration

> system; improper construction of the roofing system and deviations from building plan specifications; improper design and construction of the exterior drainage system.

(ECF No. 21-19, at 23, ¶ 16.) All of the claims arise out of a faulty construction theory. The homes in this litigation were all completed between October 2000 and October 2004. (Bautista Homeowners Matrix, Ex. 89, ECF No. 21-20 at 33.) Thus, any work by Matt's Roofing was completed at least four years prior to the 2009 insurance policy issued by Defendant. Like the aforementioned litigation against Matt's Roofing, the Bautista properties are excluded from the insurance policy under CP Exclusion 2 since the defects existed prior to the insurance policy. Moreover, there are no allegations that would usher these claims within the sudden and accidental realm of coverage, as Plaintiffs unsuccessfully urge. Therefore, Defendant's motion for summary judgement as to Plaintiffs' Thirty-fourth through Thirty-sixth Causes of Action is granted because Plaintiffs cannot succeed on their claims for declaratory relief, equitable contribution, and equitable indemnity.

vi. Pacheo

The Pacheo litigation was filed on November 7, 2011, in San Joaquin County Superior Court, California. (Compl., Ex. 103, ECF No. 21-22 at 15.) The Complaint alleges strict liability, strict products liability, breach of implied warranty of merchantability, breach of implied warranty of fitness, negligence, and negligence per se. (ECF No. 21-22 at 15.) The complaint alleges that "the construction defects complained of concern standard components of the development including leaking roofs, leaking windows, showers/tubs, stucco cracks, drywall cracks, inadequate draining, . . . " (ECF No. 21-22 at 17, ¶ 5(F).) The Pacheo litigants alleged that the construction defects "continu[ed] to deteriorate and to degrade, and the damages will continue in the future." (ECF No. 21-22 at 21, ¶ 19.) Thus, this litigation arises out of allegations that the homes were defectively constructed and those defective conditions existed at the original close of escrow.

The complaint states that the homes were built from 2001–2003. (ECF No. 21-22 at 17, ¶ 6.) Thus, any work by Matt's Roofing was completed at least five to six years prior to the 2009 insurance policy issued by Defendant and is excluded from the insurance policy under CP

Exclusions 1 and/or 2. Again, this Court finds no evidence to support an inference that the damages complained of could have been "sudden" or "accidental" and thus covered by Defendant's insurance policy. As such, Defendant's motion for summary judgement as to Plaintiffs' Fortieth through Forty-second Causes of Action is granted since Plaintiffs have not shown that they are capable of success on their claims for declaratory relief, equitable contribution, and equitable indemnity.

D. Sherman Loehr

Sherman Loehr is a custom tile company that performed work in numerous newly constructed residences. Defendant issued Sherman Loehr an insurance policy with the aforementioned language from October 31, 2009 through October 31, 2010. (DRPRDSSF, ECF No. 31-1, No. 4; *see also* Insurance Policy, Ex.4, ECF No. 21-3.) Plaintiffs' Causes of Action Ten through Twenty-seven and Forty-nine through Sixty-three pertain to ten legal actions against Sherman Loehr. (SAC, ECF No. 9.) Defendant asserts that the CP Exclusion bars coverage for all claims against Sherman Loehr because Sherman Loehr completed its work years before the 2009 inception date of the Ironshore policy. (ECF No. 20-1 at 15.) For the reasons set forth below, this Court agrees.

Defendants did not defend the following cases due to their determination that the alleged defects were excluded under the policy: *Yakel v. Elliott Homes, Inc.*, Sacramento County Superior Court, Case No. 34-2008 01025452 ("Yakel"); *Zavala v. Lennar Renaissance, Inc.*, Sacramento County Superior Court, Case No. 34-2009-00061399 ("Zavala"); *Perry v. Elliott Homes, Inc.*, Sacramento County Superior Court, Case No. 34-2009-00046856 ("Perry"); *Dobbins v. U.S. Home Corp.*, Sacramento County Superior Court, Case No. 34-2010-00070141 ("Dobbins"); *Peterson v. Del Webb California Corp.*, Placer County Superior Court, Case No. SCV 27125 ("Peterson"); *Aoki v. Lennar Renaissance, Inc.*, Sacramento County Superior Court, Case No. 34-2010-00074166 ("Aoki") *Babel v. Del Webb California Corp.*, Placer County Superior Court, Case No. SCV-0031692 ("Babel"); *Barry v. Dunmore Homes, LLC*, San Joaquin County Superior Court, Case No. 39-2010-00252992-CU-CDSTK ("Barry"); *Bell v. Meadowview Village Limited Partnership*, Sacramento County Superior Court, Case No. 34-2011-00105467 ("Bell"); *Chess v.*

Myers Homes, Yolo County Superior Court, Case No. CV10-2703 ("Chess"); and *Morataya v. Lennar Homes*, Sacramento County Superior Court, Case No. 34-2011-00095176 ("Morataya").

In Defendant's brief and Plaintiffs' opposition, the parties present the same arguments as to each legal matter discussed below. Basically, Defendant asserts that CP Exclusion bars coverage of the claims because Sherman Loehr completed its work years before the 2009 inception date. (ECF No. 20-1 at 15.) Plaintiffs oppose arguing that because the complaint is silent as to sudden and/or accidental damage that Defendant had a duty to defend. (ECF No. 26 at 11.) Thus, at the outset the Court notes these arguments and limits the discussion of each case below to the facts supporting the Court's position instead of repeating these arguments continually throughout this Order.

i. Yakel

The Yakel litigation was first filed in 2008. (Compl., Ex. 24, ECF No. 21-7 at 18.) Sherman Loehr was named as a cross-defendant on July 29, 2009, prior to the inception of the Ironshore policy, on October 31, 2009. (Cross-complaint, Ex. 25, ECF No. 21-7 at 32.) Therefore, the property damage existed and was known of prior to the policy's inception and is excluded because the property damage did not occur during the policy period. (*See* DRPRDSSF, ECF No. 31-1, No. 1 (limiting coverage of property damage to damage that occurs during the policy period).) Accordingly, the Court hereby grants Defendant's motion for summary judgment as to Plaintiffs' Tenth through Twelfth Causes of Action because Plaintiffs cannot succeed on their claims for declaratory relief, equitable contribution, and equitable indemnity.

ii. Zavala

The Zavala litigation was filed in October 23, 2009 in Sacramento County Superior Court, California. (*See* First Am. Compl., Ex 27, ECF No. 21-7; Cross-compl., Ex. 28, ECF No. 21-8.) Zavala brought claims for strict liability, breach of express warranties, breach of implied warranties of merchantability, breach of implied warranties of fitness, and negligence. Zavala alleged that eight homes, all built in 2000 and 2001, were discovered to be defective in the three years prior to bringing the suit. (ECF No. 21-7 at 61, ¶ 25.) Specifically, the complaint lists defective conditions in:

> the concrete slabs, stucco, water intrusion membranes, roofs, floors, walls, ceilings, doors, windows, sliding glass doors, decks, shear walls. concrete flatwork, sheet metal, insulation, electrical systems, heating, ventilation and air conditioning systems. pavement system, plumbing and plumbing fixtures, irrigation systems, and structural systems, were and are not of merchantable quality, nor were they designed, erected, constructed or installed in a workmanlike manner but instead, are defective and, as now known, the subject structures demonstrate improper, non-existent, and/or inadequately designed and/or constructed, concrete slabs, stucco, water intrusion membranes, roofs, floors, walls, ceilings, doors and windows, sliding glass doors, shear walls, concrete flatwork, sheet metal, insulation, electrical systems, heating, ventilation and air conditioning systems, pavement system, plumbing and plumbing fixtures, irrigation systems, and structural systems, so the subject structures as constructed are defective and improper and have resulted in damaged and defective structures and defective real property.

(ECF No. 21-7 at 61, ¶ 25.) Thus, the damage complained of was caused by defective work done prior to the inception of Defendant's policy and furthermore was known of prior to the policy issuance. Plaintiff has not offered any evidence from which this Court could find a possibility of the damage being caused by a sudden or accidental occurrence, whereas Defendant has provided sufficient evidence that the allegedly defective work was completed prior to the policy and thus excluded under the policy. Such evidence supports Defendant's reasonable belief that it did not have a duty to defend claims that were not within the policy's coverage. As such, the Court hereby grants Defendant's motion for summary judgment as to Plaintiffs' Thirteenth through Fifteenth Causes of Action for declaratory relief, equitable contribution, and equitable indemnity.

iii. Perry

The First Amended Complaint ("FAC") in the Perry action was filed on August 11, 2009 in Sacramento County Superior Court, California. (FAC, Ex. 33, ECF No. 21-8 at 50.) The FAC asserted seven causes of action for strict liability, strict liability of components, violations of California Building Standards set forth in California Civil Code § 896, breach of implied warranties of merchantability, breach of contract, negligence, and breach of express warranty. (ECF No. 21-8 at 50.) This case, like the others discussed above, asserted defective construction and workmanship which allegedly led to damage of the properties. The Perry litigation involved 78 homes all constructed during or before 2007. The FAC asserts that the properties were not

constructed in a workmanlike manner which resulted in defects, including but not limited to tile, vinyl flooring and countertop defects. (ECF No. 21-8 at 57 at ¶ 14.) As discussed at length above, the work was done prior to the effective date of Defendant's insurance policy. Plaintiffs have provided no facts that would support an allegation that damage in this litigation was the result of a sudden occurrence or accident. Thus, the Court finds that Defendant reasonably determined that it did not owe a duty to defend as is required under the law, *see Horace Mann Ins. Co.*, 4 Cal. 4th at 1081, and hereby grants Defendant's motion for summary judgment as to Plaintiffs' Sixteenth through Eighteenth Causes of Action.

iv. Dobbins

The First Amended Complaint ("FAC") in Dobbins was filed on April 7, 2010, in Sacramento County Superior Court, California. (FAC, Ex. 40, ECF No. 21-9 at 46.) The FAC asserted five causes of action, including strict liability, breach of implied warranty of merchantability, breach of contract, negligence, and breach of express warranty. (ECF No. 21-9 at 46.) The FAC alleged that seventeen properties were defectively designed and constructed. (ECF No. 21-9 at 48–49, ¶¶ 7–9.) All of the homes in this litigation were completed prior to the end of 2001, almost nine years prior to the insurance policy at issue. (Dobbins Homeowners Matrix, Ex. 43, ECF No. 21-9 at 91.) Because the legal claims in this matter are all based on faulty construction, the defects and/or damages alleged existed prior to the effective date of Defendant's insurance policy. The complaint does not allege any facts that would lend to a belief that the damages complained of were the result of a sudden or accidental occurrence. Moreover, Plaintiffs have not provided any evidence that would support an allegation that damage in this litigation was the result of a sudden occurrence or accident. Thus, the Court finds that Defendant reasonably determined that it did not owe a duty to defend as is required under the law, *see Horace Mann Ins. Co.*, 4 Cal. 4th at 1081, and hereby grants Defendant's motion for summary judgment as to Plaintiffs' Nineteenth through Twenty-first Causes of Action.

v. Peterson

The First Amended Complaint ("FAC") in the Peterson litigation was filed on August 16, 2010, in Placer County Superior Court, California. (FAC, Ex. 40, ECF No. 21-10 at 2.) The

FAC asserted five causes of action for strict liability, breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness, and negligence. (ECF No. 21-10 at 2.) The FAC alleged that thirty-three properties were defectively designed and constructed and that these homes "were defective when they left the Developer Defendants' possession and control." (ECF No. 21-10 at 10, ¶ 20.) The FAC alleges that the defective conditions included:

> concrete slabs, stucco, water intrusion membranes, roofs, f1oors/floor coverings, walls, ceilings, drywall, cabinets, doors and windows, sliding glass doors, shear walls, concrete flat work, sheet metal, insulation, electrical systems, heating, ventilation and air conditioning systems, pavement system, plumbing and plumbing fixtures, irrigation systems, soils, grading, framing, stairs, foundations, garage doors, shower door, mirrors, drainage, paint, fences, fireplaces/chimneys, decks, and structural systems, among other areas.

(ECF No. 21-10 at 10, ¶ 20.) All of the properties were completed between September of 2000 and had closed escrow prior to March of 2003. (Peterson Homeowners Matrix, Ex. 50, ECF No. 21-10 at 64.) Thus, the defect/damage existed over six years prior to the inception of the insurance policy at issue. (ECF No. 21-10 at 64.) These claims fall squarely within CP Exclusion 1 and/or 2 because the alleged defects existed prior to the policy. Once again, there are no facts or allegations provided that would support that damage in this litigation was the result of a sudden occurrence or accident. Thus, the Court finds that Defendant reasonably determined that it did not owe a duty to defend as is required under the law, *see Horace Mann Ins. Co.*, 4 Cal. 4th at 1081, and hereby grants Defendant's motion for summary judgment as to Plaintiffs' Twenty-second through Twenty-forth Causes of Action.

vi. Aoki

The Aoki Complaint for Damages was filed on March 30, 2010, in Sacramento County Superior Court, California. (Compl., Ex. 56, ECF No. 21-14 at 15.) The Aoki Complaint asserted six causes of action, including: strict products liability, strict components product liability, breach of implied warranty of merchantability, breach of contract, negligence, and breach of express warranty. (ECF No. 21-14 at 15.) The Aoki litigation involved over one-hundred residences. (Aoki Homeowners Matrix, Ex. 59, ECF No. 21-14 at 74–87.) The

Complaint alleged that the properties were defective and unfit for their intended purposes at the time construction was completed. (ECF No. 21-14 at 16, 19, ¶¶ 2, 14.)

> Defendants did not construct the PROPERTY in a workmanlike manner as manifested by, but not limited to, numerous defects which have resulted in damage to the homes and their component parts. The defects include, without limitation and to various degrees on the plaintiffs' respective residences, the following:
>
> Faulty soil compaction, faulty existing underlying soils and expansive soils resulting in soil movement and damage to the structures, concrete slabs, flatwork and foundation defects; plumbing defects; electrical defects; drainage defects; roof defects; HVAC defects; waterproofing defects; window and door defects; landscaping and irrigation defects; framing, siding and structural defects; ceramic tile, vinyl flooring and countertop defects; drywall defects; fence and retaining wall defects; cabinet and wood trim defects; fireplace and chimney defects; tub and shower door defects; painting defects; sheet metal defects; and stucco defects.

(ECF No. 21-14 at 19, ¶ 14.) Construction on the homes in this matter was completed on or before October 21, 2005. (ECF No. 21-14 at 74–87.) Thus, the homes were completed and allegedly defective four years prior to the inception of the October 2009 insurance policy. The Complaint does not allege any facts that would support that damage in this litigation was the result of a sudden occurrence or accident. Therefore, these claims fall squarely within CP Exclusion 1 and/or 2 because the defects existed prior to the policy. Based on the evidence provided, the Court finds that Defendant reasonably determined that it did not owe a duty to defend as is required under the law, *see Horace Mann Ins. Co.*, 4 Cal. 4th at 1081, and hereby grants Defendant's motion for summary judgment as to Plaintiffs' Twenty-fifth through Twenty-seventh Causes of Action.

vii. Babel

The Babel action was filed on September 7, 2012, in Placer County Superior Court, California. (Compl., Ex. 124, ECF No. 21-23 at 86.) The Complaint asserted three causes of action: violations of building standards as set forth in California Civil Code § 896; breach of contract; and breach of express warranty. (ECF No. 21-23 at 86.) Babel involved eleven residences, two of which subsequently withdrew from the litigation. (Babel Homeowners Matrix, Ex. 176, ECF No. 41-14 at 2.) The Complaint alleged that the properties were defective and unfit

for their intended purposes at the time of purchase by plaintiffs. (ECF No. 21-23 at 90–91, ¶ 13.) Babel plaintiffs further alleged that the defective condition was the result of:

> Defendants did not construct the SUBJECT PROPERTY and/or SUBJECT PROPERTIES in a workmanlike manner as manifested by, but not limited to, numerous defects which have resulted in damage to the homes and their component parts. The defects include, without limitation and to various degrees of plaintiffs' perspective residences, the following violations of California Civil Code Section 869 at seq:
>
> . . .
>
> (16) Ceramic tile and tile countertops at the SUBJECT PROJECT AND/OR SUBJECT PROPERTIES allow water into the interior walls, flooring systems, or other components.

(ECF No. 21-23 at 90–93, ¶ 13.) All of the homes within the Babel litigation were completed on or before July 8, 2005. (ECF No. 41-14 at 2.) The Complaint does not allege any facts that would support that damage in this litigation was the result of a sudden occurrence or accident. All of the claims are based on the theory of defective construction. Because the construction of these homes was completed at least four years prior to the 2009 insurance policy, these claims fall squarely within CP Exclusion 1 and/or 2. Based on the evidence provided, the Court finds that Defendant reasonably determined that the Babel claims were not covered by the policy and thus Defendant did not owe a duty to defend. *See Horace Mann Ins. Co.*, 4 Cal. 4th at 1081. As such, the Court finds that Plaintiffs cannot succeed on their claims for declaratory relief, equitable contribution, and equitable indemnity and hereby grants Defendant's motion for summary judgment as to Plaintiffs' Forty-ninth through Fifty-first Causes of Action.

viii. Berry

The First Amended Complaint ("FAC") in the Berry litigation was filed on January 5, 2011, in San Joaquin County Superior Court, California. (FAC, Ex. 129, ECF No. 21-25.) The FAC alleges seven causes of action consisting of: strict products liability; strict products liability of components; violations of California Building Standards set forth in California Civil Code § 896; breach of implied warranties of merchantability; breach of contract; negligence; and breach of express warranty. (ECF No. 21-25.) Berry involved fifty-nine residences, each of which was completed and closed escrow on or before April 18, 2003. (Berry Homeowners Matrix, Ex. 133,

ECF No. 21-26 at 37–44.) The FAC alleged that the properties were defective and unfit for their intended purposes at the time construction was completed. (ECF No. 21-25 at 7, ¶ 14.)

> Defendants did not construct the PROPERTY in a workmanlike manner as manifested by, but not limited to, numerous defects which have resulted in damage to the homes and their component parts. The defects include, without limitation and to various degrees on the plaintiffs' respective residences, the following:
>
> Faulty soil compaction, faulty existing underlying soils and expansive soils resulting in soil movement and damage to the structures, concrete slabs, flatwork and foundation defects; plumbing defects; electrical defects; drainage defects; roof defects; HVAC defects; waterproofing defects; window and door defects; landscaping and irrigation defects; framing, siding and structural defects; ceramic tile, vinyl flooring and countertop defects; drywall defects; fence and retaining wall defects; cabinet and wood trim defects; fireplace and chimney defects; tub and shower door defects; painting defects; sheet metal defects; and stucco defects.

(ECF No. 21-25 at 7, ¶ 14.) Thus, the FAC alleged that the homes were defective upon completion, and that such defects existed at least five years prior to the inception of the October 2009 insurance policy. The FAC does not allege any facts that would support that the alleged damage in this litigation was the result of a sudden occurrence or accident. Therefore, these claims are excluded under CP Exclusion 1 and/or 2 because the defects existed prior to the policy. Based on the evidence provided, the Court finds that Defendant reasonably determined that it did not owe a duty to defend based on the evidence before it, as is required under the law. *See Horace Mann Ins. Co.*, 4 Cal. 4th at 1081. Thus, the Court grants Defendant's motion for summary judgment as to Plaintiffs' Fifty-second through Fifty-fourth Causes of Action.

ix. Bell

The Complaint for Damages in the Bell litigation was filed on June 20, 2011, in Sacramento County Superior Court, California. (Compl., Ex. 137, ECF No. 21-26 at 76.) The Complaint alleges three causes of action: strict products liability; breach of implied warranties of merchantability; and negligence. (ECF No. 21-26 at 76.) The Bell litigation involved six residences, all of which were completed on or before April 3, 2003. (Bell Homeowners Matrix, Ex. 140, ECF No. 21-27 at 4.) Of the six residences, one of the homeowners was the original owner and closed escrow on the property in 2001. (ECF No. 21-27 at 4.) The remaining five

residences were owned by subsequent purchasers who closed escrow on the homes on or before December 5, 2008. (ECF No. 21-27 at 4.) The Complaint alleged that the properties were defective and unfit for their intended purposes at the time construction was completed. (ECF No. 21-26 at 79, ¶ 13.)

> Defendants did not construct the PROPERTY in a workmanlike manner as manifested by, but not limited to, numerous defects which have resulted in damage to the homes and their component parts. The defects include, without limitation and to various degrees on the plaintiffs' respective residences, the following:
>
> Faulty soil compaction, faulty existing underlying soils and expansive soils resulting in soil movement and damage to the structures, concrete slabs, flatwork and foundation defects; plumbing defects; electrical defects; drainage defects; roof defects; HVAC defects; waterproofing defects; window and door defects; landscaping and irrigation defects; framing, siding and structural defects; ceramic tile, vinyl flooring and countertop defects; drywall defects; fence and retaining wall defects; cabinet and wood trim defects; fireplace and chimney defects; tub and shower door defects; painting defects; sheet metal defects; and stucco defects.

(ECF No. 21-26 at 79, ¶ 13.)

Because the Complaint alleged that the homes were defective upon completion, any such defect would have existed at least by early 2003, six years prior to the inception of the October 2009 insurance policy. The Complaint does not allege any facts that would support even an inference that the alleged damage in this litigation was the result of a sudden occurrence or accident. Therefore, these claims fall squarely within CP Exclusion 1 and/or 2 because the defects existed prior to the policy. Based on the evidence provided, the Court finds that Defendant reasonably determined that it did not owe a duty to defend based on the evidence before it, as is required under the law. *See Horace Mann Ins. Co.*, 4 Cal. 4th at 1081. Thus, the Court grants Defendant's motion for summary judgment as to Plaintiffs' Fifty-fifth through Fifty-seventh Causes of Action.

x. Chess

The First Amended Complaint ("FAC") in the Chess litigation was filed on December 29, 2010, in Yolo County Superior Court, California. (FAC, Ex. 143, ECF No. 21-27 at 23.) The FAC alleges six causes of action consisting of: strict products liability; strict products liability of

components; breach of implied warranties of merchantability; breach of contract; negligence; and breach of express warranty. (ECF No. 21-27 at 23.) Chess involved twelve residences, each of which was completed and closed escrow on or before November 11, 2002. (Chess Homeowners Matrix, Ex. 146, ECF No. 21-27 at 57–58.) The FAC alleged that the properties were defective and unfit for their intended purposes at the time construction was completed. (ECF No. 21-27 at 27, ¶ 18.)

> Defendants did not construct the PROPERTY in a workmanlike manner as manifested by, but not limited to, numerous defects which have resulted in damage to the homes and their component parts. The defects include, without limitation and to various degrees on the plaintiffs' respective residences, the following:
>
> Faulty soil compaction, faulty existing underlying soils and expansive soils resulting in soil movement and damage to the structures, concrete slabs, flatwork and foundation defects; plumbing defects; electrical defects; drainage defects; roof defects; HVAC defects; waterproofing defects; window and door defects; landscaping and irrigation defects; framing, siding and structural defects; ceramic tile, vinyl flooring and countertop defects; drywall defects; fence and retaining wall defects; cabinet and wood trim defects; fireplace and chimney defects; tub and shower door defects; painting defects; sheet metal defects; and stucco defects.

(ECF No. 21-27 at 27, ¶ 18.) The Complaint further alleges negligence based on the same theory that the properties were negligently constructed and that such negligence is the proximate cause of the defects in the residences. (ECF No. 21-27 at 33, ¶¶ 52–53.)

The FAC states that the homes were defective upon completion, and thus any defect would have existed at least by the end of 2002, roughly seven years prior to the inception of the October 2009 insurance policy. The FAC does not allege any facts that would support that the alleged damage in this litigation was the result of a sudden occurrence or accident. In fact, the allegations support the opposite. Therefore, these claims fall squarely within CP Exclusion 1 and/or 2 because the defects existed prior to the policy. Based on the evidence provided, the Court finds that Defendant reasonably determined that it did not owe a duty to defend based on the evidence before it. *See Horace Mann Ins. Co.*, 4 Cal. 4th at 1081. Thus, the Court grants Defendant's motion for summary judgment as to Plaintiffs' Fifty-eighth through Sixtieth Causes of Action.

xi. Morataya

The Morataya Complaint was filed on January 14, 2011, in Sacramento Superior Court, California. (Compl., Ex. 150, ECF No. 21-28 at 19.) Unlike the previous cases, this case was brought by a single homeowner alleging that defective construction caused a fire in the home on December 22, 2010. Morataya alleged causes of action for strict liability, strict product liability, negligence, negligence per se, and breach of contract. (*See* Cross-compl., Ex. 151, ECF No. 21-28 at 32, ¶ 31.)

Defendant asserts that the work on the home was completed prior to the policy inception and thus is excluded under CP Exclusions 1 and 2. (ECF No. 201- at 15–17.) Furthermore, Defendant states that the fire occurred after the expiration of the policy on October 21, 2010, and thus any damage from the December 22, 2010 fire is beyond the scope of the policy. (ECF No. 201- at 17–18.) Plaintiffs response is limited to "[f]inally, as to Morataya, Ironshore[']s contention that the damages at issue were limited to a fire occurring outside of its policy is misplaced as allegations of damages unrelated to the fire were alleged." (ECF No. 25 at 17; *see also* ECF No. 26 at 17 (alleging the exact same thing about Morataya in Pls' Mot. for Summ. J.).)

The residence was completed on January 24, 2001. (Not. of Completion, Ex. 152, ECF No. 21-28 at 58.) The Court is in receipt of the original Complaint in this action. The original Complaint alleged three causes of action: breach of contract, negligence, and strict liability.[8] (ECF No. 21-28 at 19–24.) In the Cross-complaint provided to the Court, Plaintiff Lennar states that the First Amended Complaint ("FAC") alleges six causes of action: strict liability, strict product liability, negligence, negligence per se, and breach of contract. (*See* Cross-compl., Ex. 151, ECF No. 21-28 at 32, ¶ 31.) The Court is not in receipt of the FAC. The original Complaint seems to rely on a legal theory that the property was defectively constructed. (*See* ECF No. 21-28 at 24 ("On December 22, 2010, the residential structure which was designed, built, developed, and sold by Defendants, and each of them, to Plaintiffs was the subject of a significant structure fire, the genesis of which was a defectively designed and constructed chimney.").) However, this

[8] The Court notes that the original Complaint lists a first, second, and fourth cause of action. Upon first glance, it seems that there is a page missing from the Complaint. However, after further review, it appears that the Morataya plaintiffs misnumbered their causes of action.

Court cannot determine whether the Morataya plaintiffs made any allegations about a sudden or accidental occurrence that may have caused the fire without viewing the operative complaint, in this case the FAC. Thus, the Court cannot make a determination as to whether Defendant reasonably determined that it did not owe a duty to defend. As such, the Court finds that Defendant has not met its burden as to Plaintiffs' causes of action relating to the Morataya litigation and hereby denies Defendant's motion for summary judgment as to Plaintiffs' Sixty-first through Sixty-third Causes of Action. For the same reason, the Court cannot conclude that Plaintiffs are owed summary judgment on these claims and thus the Court denies Plaintiffs' cross-motion for summary judgment as to Plaintiffs' Sixty-first through Sixty-third Causes of Action.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment (ECF No. 20) is **GRANTED IN PART** and **DENIED IN PART**, and Plaintiffs' Cross-motion for Summary Judgment (ECF No. 26) is **DENIED**:

(1) Defendant's Motion for Summary Judgment as to Plaintiffs' First through Sixtieth Causes of Action is **GRANTED**.

(2) Defendant's motion for Summary Judgment as to Plaintiffs' Sixty-first through Sixty-third Causes of Action is **DENIED**.

IT IS SO ORDERED.

Dated: October 28, 2016

Troy L. Nunley
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Assurance Co. of America, et al.,

Plaintiffs

v.

Ironshore Specialty Ins. Co.,

Defendant

No.: 2:15-cv-00460-JAD-PAL

Order on motions for summary judgment

[ECF Nos. 39, 40]

The plaintiff insurance companies footed the bill for 15 construction-defect lawsuits brought against various construction companies. These insurers bring this action because they believe that the defendant Ironshore Specialty Insurance Company also owed a duty to defend in the underlying cases, so it should help pay the defense costs. The twist is that the plaintiffs do not dispute that Ironshore's policies provide no coverage for the underlying judgments against the insureds. Instead, they argue that the complaints in the underlying lawsuits were so vague that there was, at one point, a potential for coverage—and this potentially triggered Ironshore's duty to defend and its obligation to pay defense costs.

Ironshore's duty to defend was triggered only if the construction companies were sued for "sudden and accidental" damages. The thrust of the complaints in the underlying actions is that the insureds made mistakes when they built homes, like using the wrong materials. But nowhere do the complaints seek relief for damages caused by a sudden accident. The plaintiffs suggest that because it was theoretically possible that an accident was caused by an alleged defect, Ironshore should have defended the insureds until it was clearer that there was no coverage.

Although the duty to defend is broad, it is not limitless. A possibility that there could *later* be a potential for coverage is not the same as an *existing* potential for coverage—and the latter is needed to trigger the duty to defend. I thus grant summary judgment in favor of Ironshore and against the plaintiffs.

Background

The construction company insureds were sued in 15 separate lawsuits.[1] The complaints in these suits all allege that the insureds caused property damage by failing to use reasonable care when building residential homes.[2] The complaints vaguely allege that the defects in the buildings caused damage. They also attach a list of alleged defects, including problems like "defective lights," "inconsistent water temperature at showers," "excessive drywall cracking," and "defectively applied drywall patches."[3] The insureds demanded that Ironshore provide a defense to these suits, but Ironshore refused because it concluded that the lawsuits fell under an exclusion in Ironshore's policy.

Ironshore's policies generally cover property damage caused by its insureds.[4] But each policy excludes coverage for "continuous or progressive injury."[5] This exclusion says that Ironshore's policy does not cover any damages that existed "prior to the inception of this policy."[6] And it also deems any damages caused by an insured's work to be "prior to the inception of this policy" if the insured's work was performed before the policy-start date.[7] In short: the exclusion bars coverage if the insured worked on a home before the policy-start date, even if the damage from that work actually occurred after the policy went into effect.

So there is no coverage for damages caused by things that the insured construction companies did prior to the policy-start dates. That is a problem for the plaintiffs, because there is no dispute that all of the construction work was done prior to Ironshore's policies going into effect.

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[1] ECF No. 25. The insureds include: Cedco, Inc.; Debard Plumbing, Inc.; Laird Whipple Concrete Construction; Nevada Concrete Services, Inc.; JP Construction; Universal Framing, Inc.; Lukestar Corporation; PR Construction Corporation; and, R.A.M.M. Corporation.

[2] *See, e.g.,* ECF No. 39-64 (complaint for construction defects against one of the insureds).

[3] *Id.* at 17–19.

[4] ECF No. 39-3 at 5–6.

[5] *Id.* at 31.

[6] *Id.*

[7] *Id.*

The plaintiffs rely on an exception to this exclusion, which states that the coverage bar does not apply to "sudden and accidental" damage.[8] In other words: even if the insured's work was completed prior to the policy date, there is still coverage for sudden accidents that occur after the policy-start date.

Discussion

A. The underlying complaints did not trigger Ironshore's duty to defend.

"The duty to defend is broader than the duty to indemnify."[9] An insurer has a duty to defend unless "there is no potential for coverage."[10] The duty to defend arises whenever the insurer "ascertains facts [that] give rise to the potential of liability under the policy"[11] and "continues throughout the course of the litigation."[12] To prevent an insurer from evading its defense obligations "without at least investigating the facts behind a complaint," any doubts about the insurer's duty to defend must be resolved in the insured's favor.[13] The duty to defend may be triggered by facts known to the insurer through extrinsic sources or by the factual allegations in the complaint.[14] The insured has the duty to point to allegations or evidence giving rise to a potential for coverage.[15]

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[8] *Id.*

[9] *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 1158 (Nev. 2004) (en banc).

[10] *Id.* (quotation omitted) (emphasis in original).

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

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

[13] *Id.*

[14] *Andrew v. Century Surety Co.*, 2014 WL 1764740, at *4 (D. Nev. April 29, 2014) (Gordon, A.) (predicting that the Nevada Supreme Court would apply the four-corners rule only when the complaint raises the possibility of coverage but the insurer's own investigation suggests there is no possibility of coverage).

[15] *Arrowood Indem. Co. v. Bel Air Mart*, 2014 WL 841314, at *5 (E.D. Cal. Mar. 4, 2014) (holding that the insured bears the burden of establishing that there is a potential for coverage, including that an exception to an exclusion applies); *Wynn's Int'l, Inc. v. Cont'l Ins. Co.*, 1995 WL 498846, at *3 (N.D. Cal. Aug. 14, 1995) (holding that plaintiffs have the burden to prove an exception to an exclusion applies, but only to the extent that there is a potential for coverage). . The parties disagree

Although broad, the duty to defend is not limitless. "An insured may not trigger the duty to defend by speculating about extraneous facts regarding potential liability."[16] The allegations in a complaint must create a *current* potential of coverage, not merely raise a theoretical possibility that a potential for coverage could exist in the future. For example, a district court held in another case that Ironshore had no duty to defend construction-defect cases brought against its insureds because the complaints in the underlying actions did not actually allege that any covered accidents occurred.[17] The court rejected the argument that there was an existing potential for coverage because the complaint could later be amended to allege an accident that that would give rise to coverage.[18]

I similarly held in a recent case that just because an insured was sued for intentional interference with a business relationship did not mean that a defamation-claim insurance policy was triggered.[19] This was so even though it was possible that the intentional-interference claims could later encompass an underlying defamation claim.[20] I explained that, until there is some existing allegation or evidence suggesting that the insured is actually being sued for defamation, the duty to

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about who bears the burden of proof to show the duty to defend was triggered here. Ironshore suggests that the plaintiffs must affirmatively prove that the sudden and accidental exception applies. The plaintiffs argue that it is Ironeshore that must disprove coverage. Neither are precisely correct. Plaintiffs have the burden to prove the duty to defend was triggered, which, in turn, requires it to demonstrate that the sudden and accidental exception was triggered. But the standard for showing the duty to defend applies remains low: the plaintiffs merely need to show that there was a potential for coverage. *Id.*

[16] *Beazley Ins. Co. v. Am. Econ. Ins. Co.*, 2013 WL 2245901, at *7 (D. Nev. May 21, 2013).

[17] *Am. Zurich Ins. Co. v. Ironshore Specialty Ins. Co.*, 2014 WL 3687727, at *1 (E.D. Cal. July 23, 2014) (addressing nearly-identical arguments about similar Ironshore policies); *see also Am. Zurich Ins. Co. v. Ironshore Specialty Ins. Co.*, 2016 WL 6441610, at *8 (E.D. Cal. Oct. 31, 2016) ("[T]here are no allegations or information that would lead to the conclusion that sudden or accidental damage occurred and caused the water damage to the homes. As such, the Court concludes that Defendant reasonably compared the allegations of the complaint with the terms of the policy and determined that it did not owe a duty to defend as is required under the law.").

[18] *Am. Zurich Ins. Co.*, 2014 WL 3687727, at *1

[19] *Nautilus Ins. Co. v. Access Med., LLC*, 2016 WL 5429650, at *4 (D. Nev. Sept. 27, 2016).

[20] *Id.*

defend is not triggered.[21]

The plaintiffs maintain that the allegations against the insureds in the underlying actions create a potential for coverage triggering Ironshore's duty to defend under its policy. They reason that although the complaints did not allege that any sudden accidents happened, they also did not expressly state there were no such accidents. In short: because the insureds were sued for causing property damage, and because causing property damage could, in theory, include an accident—there is a potential for coverage triggering the duty to defend.

The plaintiffs' argument would expand the duty to defend to the breaking point. Before the duty is triggered, there must be some allegation or evidence to create a current potential for coverage. And an allegation that is so vague that it could possibly encompass covered allegations in the future is not enough. Not only are there no actual allegations here that a sudden accident occurred, there is not even the suggestion of an accident in any of the complaints. The thrust of the complaints is that the insureds defectively built homes before Ironshore's policies started. And that claim is precisely what Ironshore's policies exclude: claims related to an insured's work performed prior to the policy-start date. The parties' policies are explicit about this exclusion.

Without any existing evidence or allegations giving rise to a potential for covered liability, there is no present duty to defend. Taking all of the allegations in the underlying complaints and the extrinsic evidence offered here, there is no indication that the insureds were being sued for an act covered by Ironshore's policy. There was thus no duty to defend.

B. The plaintiffs' other arguments for why Ironshore should have to pay are unavailing.

The plaintiffs alternatively argue that Ironshore should be barred from asserting its exclusion here. They first contend that Ironshore's policies are ambiguous because they are unclear about whether the date of damage matters, or instead, the date the underlying work is done. They point to the general provisions that provide coverage for damage occurring during the policy period, which, they say, conflicts with the exclusion for damage caused by the insured's own work.

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[21] *Id.*

This argument is unavailing. "An insurance policy is a contract that must be enforced according to its terms to accomplish the intent of the parties."[22] "An insurer has a right to limit the policy coverage in plain and understandable language, and is at liberty to limit the character and extent of the risk it undertakes to assume."[23] Ironshore's policies have broad coverage provisions for damage occurring during the policy period and then exclusions that carve out certain types of damages that are not covered. That is entirely proper. This is why courts have rejected the plaintiffs' same argument before.[24]

And none of the authority cited by the plaintiffs helps them. For example, plaintiffs cite *Pennsylvania Gen. Ins. Co. v. Am. Safety Indem. Co.*, but there the court found that terms in the policy were ambiguous about whether the trigger of coverage referred to the time when damage was inflicted or when the causal acts were committed.[25] The policy here could not be more clear: it specifically states that property damage caused by work that was completed prior to the policy's inception is not covered.

The plaintiffs finally argue that the exclusion is unenforceable because it is not sufficiently obvious in the policy. Exclusions in insurance policies must be stated clearly and unambiguously.[26] The exclusion is identified on page 2 of the list of endorsements at the front of each policy. It is in the same type as the surrounding text, not buried or inconspicuous. So I cannot say that it is insufficiently obvious.

Conclusion

Accordingly, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the **defendant's motion for summary judgment [ECF No. 40] is GRANTED.**

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[22] *Farmers Ins. Grp. v. Stonik By & Through Stonik*, 867 P.2d 389, 391 (Nev. 1994).

[23] *Trishan Air, Inc. v. Fed. Ins. Co.*, 635 F.3d 422, 430 (9th Cir. 2011).

[24] *Am. Zurich Ins. Co.*, 2014 WL 3687727, at *5.

[25] 185 Cal. App. 4th 1515, 111 Cal. Rptr. 3d 403 (2010); *Crawford v. Ranger Ins. Co.*, 653 F.2d 1248, 1251 (9th Cir. 1981).

[26] *Powell v. Liberty Mut. Fire Ins. Co.*, 252 P.3d 668, 672 (Nev. 2011).

IT IS FURTHER ORDERED that **plaintiffs' motion for partial summary judgment [ECF No. 39] is DENIED.**

The Clerk of Court is directed to enter judgment in favor of the defendant and against the plaintiffs and CLOSE THIS CASE.

Dated this 24th day of August, 2017

Jennifer A. Dorsey
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF Nevada

Assurance Company of America, et al.,

Plaintiffs,

V.

Ironshore Specialty Insurance Company,

Defendant.

JUDGMENT IN A CIVIL CASE

Case Number: 2:15-cv-00460-JAD-PAL

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☐ **Notice of Acceptance with Offer of Judgment.** A notice of acceptance with offer of judgment has been filed in this case.

IT IS ORDERED AND ADJUDGED

that judgment has been entered in favor of Defendant and against Plaintiffs.

August 24, 2017

Date

/s/ Debra K. Kempi

Clerk

/s/ Monica Reyes

(By) Deputy Clerk

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ASSURANCE CO. OF AMERICA, et al. Plaintiffs, vs. IRONSHORE SPECIALTY INS. CO., Defendant.	Case No.: 2:15-cv-00460-JAD-PAL MOTION FOR RELIEF FROM JUDGMENT **ORAL ARGUMENT REQUESTED**

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Plaintiffs American Guarantee & Liability Insurance Company, Assurance Company of America and Northern Insurance Company of New York (collectively "Plaintiffs"), pursuant to FRCP 60 hereby move for relief from the judgment entered by this Court. Dkt. No. 51.

FRCP 60(b) permits a Court to set aside a judgment for any reason that justifies relief, including where two cases arising out of the same circumstances result in conflicting rulings. See Pierce v. Cook & Co., 518 F.2d 720, 723 (10th Cir. 1975). Respectfully, conflicting rulings exist so as to warrant reconsideration.

As discussed below, the judgment entered in this matter is based on this Court's conclusion that coverage was barred under the policies issued by Defendant Ironshore Specialty Insurance Company ("Ironshore") because "there is not even a suggestion of an accident in any of the Complaints." Dkt No. 50, 5:10-12. This holding is contrary to and conflicts with rulings issued by Judge Navarro in a companion suit between these same parties involving nearly identical claims

pending before the District Court of Nevada - Case No.: 13-cv-02191-GMN-CWH ("Ironshore I"). See Assurance Co. of America v. Ironshore Specialty Ins. Co., 2016 WL 1169449 (D. Nev. 2016); Assurance Co. of America v. Ironshore Specialty Ins. Co., 2015 WL 4579983 (D. Nev. 2015); Assurance Co. of America v. Ironshore Specialty Ins. Co., 2014 WL 8728538 (D. Nev. 2014). In fact, the 2014 ruling (2014 WL 8728538) is in direct conflict with this Court's ruling as while Judge Navarro held in Ironshore I that Ironshore owed insured Champion Masonry a duty to defend in the underlying Garcia matter, this Court held otherwise as to additional insured Centex Homes. As the decisions reached by the Courts are irreconcilable, reconsideration by this Court is appropriate and warranted.

Respectfully, since each of the suits alleged various construction defects that caused damages at unspecified times and locations, a potential for damage arising from an accident was necessarily alleged in connection with each of the underlying matters at issue in this case. See Maryland Cas. Co. v. National American Ins. Co., 46 Cal.App.4th 1822 (Cal. 1996), holding that damages allegedly arising from construction defects fall are potentially covered since the damages may be caused by accidents that are neither expected nor intended. As Ironshore did not argue otherwise in its motion, any ruling by this Court that the underlying matters were not potentially caused by an "occurrence" - defined in the policies Ironshore issued as an accident - is not a position either party made or asserted in connection with their motions, and therefore is not supported by the record before this Court.[1]

As for the issue of whether any of the damages occurred suddenly, Ironshore has not, and cannot meet its burden of proving that none could have potentially occurred. In Pulte Home Corp. v. American Safety Ins. Co., 2017 WL 3725045 (Cal. 2017), a decision addressing the issue of damages because of property damage that was published after the cross-motions were fully briefed, the Court noted that it is well accepted that construction work performed at one time may manifest injury or damage to adjacent work at a later time. Given this reality, the Court in Pulte held that where the mechanisms and timing of the alleged property damage remained unknown, a potential

[1] "Occurrence" is defined in the policies issued by both Plaintiffs and Ironshore as an accident, including continuous or repeated exposure to substantially the same general harmful conditions. See e.g., Dkt. No. 39-3, p 17.

for coverage exists. Id.

The same holds true in this case. The claims asserted in the underlying matters are silent regarding the timing, mechanisms and extent of the damages - hence a potential for sudden damages. While Ironshore relies on the vague nature of the allegations to argue that no sudden damages actually occurred, its views are purely speculative.

Facts tending to show that a claim may not be covered "add no weight to the scales" in assisting an insurer to meet its burden of proving the absence of coverage. Pulte Homes, supra at p. 14. As the mechanisms and timing of the damages were unknown, Ironshore cannot meet its burden of proving that none of the damages occurred suddenly such that a potential for coverage exists, a conclusion reached several times in Ironshore I. See Assurance Co. of America v. Ironshore Specialty Ins. Co., 2016 WL 1169449 (D. Nev. 2016); Assurance Co. of America v. Ironshore Specialty Ins. Co., 2015 WL 4579983 (D. Nev. 2015); Assurance Co. of America v. Ironshore Specialty Ins. Co., 2014 WL 8728538 (D. Nev. 2014).

Accordingly, for the reasons set forth herein, Plaintiffs request that this Court set aside the judgment entered in this case.

Discussion

FRCP 60(b) permits a Court to set aside a judgment for any reason that justifies relief. FRCP 60(b)(6). Pursuant to FRCP 60(b), therefore, a Court is empowered to avert or correct an erroneous judgment. Fantasyland Video, Inc. v. County of San Diego, 505 F.3d 387 (9th Cir. 2007). Of significance, relief may be warranted where two cases arising out of the same circumstances result in conflicting rulings. See Pierce v. Cook & Co., 518 F.2d 720, 723 (10th Cir. 1975).

Per above, Plaintiffs and Ironshore are parties to Ironshore I, a separate matter currently pending before this Court. In both matters, Plaintiffs seek contribution from Ironshore toward the defense of insureds named as parties to underlying construction defect claims in which Ironshore disclaimed coverage based on its CP Exclusion.

In connection with Ironshore I, Judge Navarro issued a series of orders finding that Ironshore owed a duty to defend underlying matters in which similar, if not identical, claims were

asserted. Assurance Co. of America v. Ironshore Specialty Ins. Co., 2016 WL 1169449 (D. Nev. 2016); Assurance Co. of America v. Ironshore Specialty Ins. Co., 2015 WL 4579983 (D. Nev. 2015); Assurance Co. of America v. Ironshore Specialty Ins. Co., 2014 WL 8728538 (D. Nev. 2014). The crux of these orders is the following rationale expressed by the Court:

> Based upon the allegations in the Garcia Complaint, the Court is not convinced that the Continuous or Progressive Injury or Damage exclusion precluded all possible or arguable coverage because the "sudden or accidental" exception could have been implicated. For example, the Garcia Complaint alleged "damages stemming from, among other items, defectively built roofs, leaking windows, dirt coming through windows, drywall cracking, stucco cracking, stucco staining, water and insect intrusion through foundation slabs, and other poor workmanship." (Underlying Compl. at 7, ECF No. 16–4). Moreover, the Garcia Complaint alleged that "[w]ithin the last year, Plaintiffs have discovered that the subject property has and is experiencing additional defective conditions, in particular, there are damages stemming from, among other items, defectively built roofs, leaking windows, dirt coming through windows, drywall cracking, stucco cracking, stucco staining, water and insect intrusion through foundation slabs, and other poor workmanship." (Id. at 8). The Court finds that the Garcia Complaint is vague as to the temporal implications of the alleged damages, and therefore, it is not clear on the face of the Garcia Complaint whether the alleged damages were or were not sudden and accidental. Accordingly, this exclusion alone did not preclude all possible or arguable coverage.

Assurance, supra, 2014 WL 8728538 at p. 4.[2]

As noted by this Court, similar to the claims at issue in Ironshore I, the underlying matters at issue in this case vaguely allege that the defects in the buildings caused damage. Dkt. No. 50, 2:4-5. It is precisely the vague nature of these claims that led the Court in Ironshore I to conclude a potential for coverage exists.

A duty to defend is triggered by a mere potential for covered damages:

> An insurer has a duty to defend unless "there is no potential for coverage." The duty to defend arises whenever the insurer "ascertains facts [that] give rise to the potential of liability under the policy and "continues throughout the course of the litigation." To prevent an insurer from evading its defense obligations "without at least investigating the facts behind a complaint," any doubts about the insurer's duty to defend must be resolved in the insured's favor. As I explained in my prior order, the duty to defend may be triggered by facts known to the insurer through extrinsic sources or by the factual

[2] Per above, Garcia is also an underlying matter at issue in this case as to a different insured. The ruling reached by Judge Navarro, therefore, is in direct conflict with the ruling issued by this Court.

allegations in the complaint.

Nautilus Ins. Company v. Access Medical, LLC, 2017 WL 2193241 (D. Nev. 2017).

Here, Ironshore owed a duty to defend as "any doubts about an insurer's duty to defend must be resolved in the insured's favor." While Ironshore may speculate that damages alleged were ongoing in nature, its speculation does little more than create a question of fact which would dictate a duty to defend.

Each of the underlying suits at issue in this case alleged various construction defects that caused damages at unspecified times and locations.[3] Generally, damages allegedly arising from construction defects are potentially covered since the damages may be caused by accidents that are neither expected nor intended. See Maryland Cas. Co. v. National American Ins. Co., 46 Cal.App.4th 1822 (Cal. 1996). As Ironshore did not argue otherwise in its motion, the fact that the damages at issue were potentially caused by an "occurrence" (defined as an accident) is not in dispute.

As for the issue of whether any of the damages occurred suddenly, it is undisputed that the mechanisms and timing of the alleged property damage remained unknown. It is precisely this lack of specificity as to damage that gives rise to the potential that some of the damages occurred suddenly. See Pulte Home Corp. v. American Safety Ins. Co., 2017 WL 3725045 (Cal. 2017).

Ironshore has not, and cannot meet its burden of proving that none of the damages could not and did not occur suddenly, a conclusion reached by Judge Navarro in connection with Ironshore I. See Assurance Co. of America v. Ironshore Specialty Ins. Co., 2016 WL 1169449 (D. Nev. 2016); Assurance Co. of America v. Ironshore Specialty Ins. Co., 2015 WL 4579983 (D. Nev. 2015); Assurance Co. of America v. Ironshore Specialty Ins. Co., 2014 WL 8728538 (D. Nev. 2014).

As noted above, an insurer has a duty to defend unless there is no potential for coverage.

[3] Anthem - Ex. 31, ISIC 190:33-191:16, 194:13-18; Ex. 56, ISIC 2741:28-2742:26, 2745:13-18, Ex. 32; Mohan - Ex. 33. ISIC 998-999, Ex. 34; Seven Hills - Ex. 35, ISIC 4581:5-11, ISIC 4583:18-28, Ex. 36; Garcia - Assurance v, Ironshore, 2014 WL 4829709, p 1; see also Exs. 37, 38; Marcel - Ex. 42, ISIC 3742:20-3743:21, Ex. 43; Lino - Ex. 46, ISIC 4928:7-28, Ex. 47; Ex 48, ISIC 1773:12- 1774:7, Ex. 49; Wikey - Ex. 50, SIC 2154:25-2155:20, Ex. 51; Drost - Ex. 44, ISIC 1636:22-26, 1639:9-12; Ex. 45; Bennett - Ex. 52, ISIC 4977:1-3, 4978:12-4979:24983:6-12; Ex. 53; Boyer - Ex. 54, ISIC 3464:14-27, 3465:23-27; Ex. 55; Stallion Mtn. - Ex. 58, ISIC 5839:4-18, 5840:19-28; Ex. 59; Sun City - Ex. 60, ISIC 5891:20-5892:9; Ex. 61; Larkin - Ex. 62, ISIC 5931:11-25; Ex. 63.

Any doubts about the insurer's duty to defend must be resolved in the insured's favor. Here, given the vague nature of the allegations of damages asserted in the underlying matters, doubts necessarily exist regarding the timing and mechanisms of the damages at issue. Given these doubts, a potential for coverage existed such that Ironshore owed a duty to defend.

Conclusion

To be entitled to summary judgment on the issue of duty to defend, the moving party need only demonstrate the potential for coverage under the insuring agreement of the policy issued by the non-participating insurer. PMA Capital Corp. v. Caliber One Indem. Co., 695 F.Supp. 2d 1124, 1125 (E.D. Cal. 2010); see also Aydin Corp. v. First State Ins. Co., 18 Cal.4th 1183, 1188 (Cal. 1998). The analysis as to whether an insurer owes a coverage obligation requires only a comparison of the allegations pled to the provisions of the insurance policies. First Financial Ins. Co. v. Scotch 80's Limited, Inc., 2009 U.S. Dist. Lexis 54982 (D. Nev. 2009); see also United National Ins. Co. v. Frontier Ins. Co., 120 Nev. 678, 686-687 (2004).

Given the broad allegations of the underlying pleadings, claims potentially falling within the scope of coverage have been alleged, a fact that Ironshore does not dispute. By relying on exclusions to justify its coverage position coupled with extrinsic evidence (information not alleged in the pleadings), Ironshore bears the burden of proof and must demonstrate that no alleged damages could have conceivably occurred suddenly.

Ironshore has not, and cannot, meet its burden. Accordingly, for the reasons set forth herein, it is respectfully submitted that the judgment entered by this Court should be set aside.

Dated: September 20, 2017

MORALES FIERRO & REEVES

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IRONSHORE SPECIALTY
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ASSURANCE COMPANY OF AMERICA, et al., Plaintiffs, vs. IRONSHORE SPECIALTY INSURANCE COMPANY and DOES 1-20 inclusive, Defendants.	Case No. 2:15-cv-00460-JAD-PAL OPPOSITION OF DEFENDANT IRONSHORE SPECIALTY INSURANCE COMPANY TO MOTION FOR RELIEF FROM JUDGMENT

PRELIMINARY STATEMENT

Plaintiffs made no real effort to demonstrate that grounds exist to justify setting aside the Court's judgment in this matter. While Fed. R. Civ. Procedure 60(b)(6) allows a party to seek, on motion, relief from a judgment for "any other reason justifying relief from the operation of the judgment", a movant seeking relief under Rule 60(b)(6) must show "extraordinary circumstances" justifying the reopening of a judgment. *Gonzalez v. Crosby*, 545 U.S. 524, 536, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005). Plaintiffs have not demonstrated that extraordinary circumstances exist. They point to apparent conflict between the final judgment entered by the Court in Ironshore's favor in the instant case and interlocutory rulings made in a currently pending case between the same parties, *Assurance Co. of America v. Ironshore Spec. Ins. Co.*, D. Nev. case no. 2:13-cv-2191-GMN-CWH (the "Interlocutory Case"). But those rulings existed before the Court granted Ironshore's motion for summary judgment, and their continued existence in no way

creates an "extraordinary circumstance" that justifies a motion to re-open the Court's final judgment. Further, because they are interlocutory and subject to change, no conflict yet exists.

Even if extraordinary circumstances were present, the Court should deny Plaintiffs' motion on the merits. In its order granting summary judgment in Ironshore's favor, the Court correctly found that "Ironshore's duty to defend was only triggered if the complaints sued for 'sudden and accidental damages.'" (ECF No. 50 p. 1:18-19.) It also correctly found that the underlying complaints did *not* allege sudden and accidental damages. "The thrust of the complaints in the underlying actions is that the insureds made mistakes when they built homes, like using the wrong materials. But nowhere do the complaints seek relief for damages caused by a sudden accident." (*Id*. at 1:19-21.) Therefore, the Court correctly ruled, Ironshore had no duty to defend. (*Id*.)

The Court's ruling is consistent with the decisions of the Eastern District of California, which likewise found that Ironshore's Continuous and Progressive Injury or Damage Exclusion ("CP Exclusion") barred any possibility of coverage when, as here, the underlying complaints did not allege property damage that was sudden and accidental, alleging only property damage, at an indeterminate time, caused by construction defects. *American Zurich Ins. Co. v. Ironshore Specialty Ins. Co.*, 2014 U.S. Dist. LEXIS 100787, at *12-15, 2014 WL 3687727 (E. D. Cal. July 23, 2014); *American Zurich v. Ironshore*, 2016 U.S. Dist. LEXIS 150684, at *23, 2016 WL 6441610 (E.D. Cal. Oct. 31, 2016) ("*American Zurich*"). The Court's decision is also consistent with that of the Northern District of California, which earlier this year entered judgment in Ironshore's favor based on application of the CP Exclusion, ruling that Ironshore's CP Exclusion barred any possibility of coverage when the plaintiff insured "[d]id not meet its burden of showing that it satisfies [the sudden and accidental] exception to the CP Exclusion." *Saarman Constr., Ltd. v. Ironshore Specialty Ins. Co.*, 230 F. Supp. 1068, 1083-1084 (N. D. Cal. 2017).[1]

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[1] In every action involving Ironshore discussed in this memorandum, it was either established or undisputed that the work performed by Ironshore's insured was completed prior to the inception date of the Ironshore policies at issue, and thus the factual basis for the application of the CP Exclusion was established.

Plaintiffs' motion ignores both *Saarman* and *American Zurich*, pointing to interlocutory rulings in a case currently pending in this District, *Assurance Co. of America v. Ironshore Spec. Ins. Co.*, D. Nev. case no. 2:13-cv-2191-GMN-CWH (the "Interlocutory Case"). Although they are not final, orders in the Interlocutory Case state that the allegations of the underlying complaints triggered Ironshore's duty to defend even though they did *not* allege sudden and accidental damage, but rather (as did the underlying complaints in the instant case as well as *American Zurich* and *Saarman*), alleged that construction defects resulted in property damage at an indeterminate time. Indeed, in one instance the court in the Interlocutory Case expressly found that "*no reasonable inference can be drawn as to whether the alleged damages were sudden and accidental*." *Assurance Co. of Am. v. Ironshore Specialty Ins. Co.*, 2015 U.S. Dist. LEXIS 98990, at *19, 2015 WL 4579983 (D. Nev. July 29, 2015.) Contrary to law, the court nevertheless stated that Ironshore owed a duty to defend because the allegations did not *negate* the "possibility" of coverage. *Id*.

The position taken by the court in the Interlocutory Case has been rejected by every other judge who has considered the issue. Allegations from which no reasonable inference can be drawn as to whether the alleged damages were sudden and accidental cannot, and do not, create a "possibility" that the damages were sudden and accidental. For the reasons discussed below and in Ironshore's papers supporting its motion for summary judgment (ECF Nos. 40, 48) and opposing Plaintiffs' motion for partial summary judgment (ECF No. 46), the Court should deny Plaintiffs' motion.

ARGUMENT

I. PLAINTIFF HAS NOT DEMONSTRATED THAT EXTRAORDINARY CIRCUMSTANCES JUSTIFY ITS MOTION UNDER RULE 60(b)(6)

The Court should deny Plaintiffs' motion because Plaintiffs have not demonstrated the requisite "extraordinary circumstances" for relief under Fed. R. Civ. Proc. 60(b)(6). "Rule 60(b)(6) should be used sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *In re Fibercom, Inc.*, 503 F.2d 933, 941 (9th Cir.

2007) (internal quotation marks and citations omitted) (extraordinary circumstances existed where judgment exceeded Bankruptcy Court's powers and Trustee's delay was attributable to the other party's conduct). The fact that the court in the Interlocutory Case entered interlocutory orders that, were they to become final, would conflict with the Court's order and final judgment in the instant case does not constitute "extraordinary circumstances." The orders were made prior to the Court's entry of judgment. *See*, *Assurance Co. of Am. v. Ironshore Specialty Ins. Co*., 2014 U.S. Dist. LEXIS 138684, 2014 WL 4829709 (D. Nev. Sept. 30, 2014) (cited in Plaintiffs' brief, ECF No. 55 p. 2:4); *Assurance Co. of Am. v. Ironshore Specialty Ins. Co*., 2015 U.S. Dist. LEXIS 98990, 2015 WL 4579983 (D. Nev. July 29, 2015) (ECF No. 55 p. 2:3); *Assurance Co. of Am. v. Ironshore Specialty Ins. Co*., 2016 U.S. Dist. LEXIS 36993, 2016 WL 1169449 (D. Nev. March 22, 2016). Even the most recent interlocutory ruling cited was filed more than a year prior to the briefing in the instant case. Plaintiff could have cited these interlocutory rulings in the briefing on the cross-motions for summary judgment had it so chosen. That it did not do so does not somehow create "extraordinary circumstances."

Plaintiffs cite *Pierce v. Cook & Co*., 518 F.2d 720, 723 (10th Cir. 1975) in support of the proposition that a judgment may be set aside where two cases arising out of the same circumstances result in conflicting rulings. In *Pierce*, the extraordinary circumstance existed because the federal diversity judgment against certain accident victims had been based on controlling state law precedent, while another party to the same accident was able to appeal a similar judgment entered in state court and on appeal, succeeded in having the controlling precedent overruled. *Pierce*, 518 F. 2d at 722. To state the obvious, that circumstance did not exist at the time of entry of the judgment sought to be vacated. Moreover, the court found "extraordinary circumstances" in the need in federal diversity cases for the results to be substantially the same as those in state court litigation arising out of the same transaction or occurrence (citing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 74-75, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)). Pierce, 518 F. 2d at 723. No such concern exists here.

Moreover, the orders in the Interlocutory Case are, as noted, interlocutory and not final. As such, they are still subject to change, and cannot "conflict" with the Court's final judgment in

the instant case.

II. THE COURT CORRECTLY DETERMINED THAT A POTENTIAL FOR COVERAGE CANNOT BE CREATED BY SPECULATION

The core of the Court's ruling is as follows:

> Ironshore's duty to defend was only triggered if the complaints sued for "sudden and accidental damages." The thrust of the complaints in the underlying actions is that the insureds made mistakes when they built homes, like using the wrong materials. But nowhere do the complaints seek relief for damages caused by a sudden accident.

(*Id*. at 1:19-21.)

The Court's conclusion that the complaints do not seek relief for damages caused by a sudden accident is unassailable. Accordingly, Plaintiffs ignore it. Plaintiffs also ignore that the complaints do not allege sudden and accidental property damage by suggesting that Ironshore bore the burden of proving the negative—that there was "no possibility" of sudden and accidental damage (even though no sudden and accidental damage was alleged). (ECF No. 55 p. 2:20-21.) As they did in their summary judgment papers, Plaintiffs attempt to turn the sudden and accidental property damage exception on its head. The CP Exclusion bars any defense or indemnity obligation. But as the Court correctly found, Ironshore need not prove there was *no* potential for sudden and accidental damage if the pleadings themselves never allege such damages. "The allegations in a complaint must create a *current* potential of coverage, not merely raise a theoretical possibility that a potential for coverage could exist in the future." (ECF No. 50 p. 3:2-4.) While a duty to defend exists when the complaint alleges events that are potentially covered, a duty to defend cannot be created, in the absence of affirmative allegations, by speculation that events theoretically *could* have occurred that would be potentially covered. *Nautilus Ins. Co. v. Access Med., LLC*, 2016 WL 5429650, at *4, 2016 U.S. Dist. LEXIS 132300 (D. Nev. Sept. 27, 2016); *American Zurich Ins. Co. v. Ironshore Specialty Ins. Co*., 2016 WL 6441610, at * 10, 2016 U.S. Dist. LEXIS 150564. To contend, as do Plaintiffs, that the allegations do not *negate* a "potential" of sudden and accidental damage, when the allegations never *alleged* that potential in the first place, is sophistry. As the Court recognized, "[a]n insured may not trigger the duty to defend by speculating about extraneous facts regarding potential

liability." *Beazley Ins. Co. v. Am. Econ. Ins. Co.*, 2013 WL 2245901, at *7, 2013 U.S. Dist. Lexis 71699, at *22-23 (D. Nev. May 21, 2013).[2]

II. THE INTERLOCUTORY CASES'S RULINGS ERRONEOUSLY REQUIRE IRONSHORE TO NEGATE A "POSSIBILITY" THAT WAS NEVER PLED

The Interlocutory Case's rulings ignore the rule that for purposes of determining duty to defend, one may not speculate as to extraneous facts. In one passage, the court stated: "The Court finds that the *Garcia* Complaint is vague as to the temporal implications of the alleged damages, and therefore, it is not clear on the face of the *Garcia* Complaint whether the alleged damages were or were not sudden and accidental." *Assurance Co. of Am. v. Ironshore Specialty Ins. Co.*, 2014 U.S. Dist. LEXIS 138684 at *9, 2014 WL 4829709 (D. Nev. Sept. 30, 2014.) Thus, even though there were no allegations of damage that was sudden and accidental, the court in the Interlocutory Case speculated that sudden and accidental damage *could* have been possible, and ruled against Ironshore because no allegation negated that "possibility". *Id*. In another instance, the court in the Interlocutory Case stated: "These allegations do not specify when the alleged property damage at issue began, and *no reasonable inference can be drawn as to whether the alleged damages were sudden and accidental*." *Assurance Co. of Am. v. Ironshore Specialty Ins. Co.*, 2015 U.S. Dist. LEXIS 98990 at *19, 2015 WL 4579983 (D. Nev. July 29, 2015) (emphasis added). Thus, the Interlocutory Case court concluded that the underlying allegations somehow "gave rise to a possibility of coverage under the Ironshore policy" (*id*.) even though the court expressly found that *no reasonable inference* could be drawn as to whether the alleged damages were sudden and accidental. And in still another instance, the Interlocutory Case court stated that the underlying complaint "gave rise to the possibility of coverage" because "[j]ust as in the other complaints, the . . . complaint did not specify when the alleged property damage at issue began vis-à-vis the Ironshore policy period, nor did it *negate* a *possible* inference that the alleged

[2] When, as here, an exclusion applies, in order for there to be a duty to defend, the insured has the initial burden of proving the potential for application of an exception to an exclusion, just as it has the burden of proving the potential for coverage. Only if the insured carries its initial burden of showing potential for coverage must the insurer negate any possibility of coverage in order to avoid the duty to defend. *See*, *Ace Prop. & Cas. Ins. Co. v. Vegas VP, LP*, 2008 U.S. Dist. Lexis 37495, at *12-13 (D. Nev. May 7, 2008) ("the Nevada Supreme Court would assign the burden of proving that an exception to exclusion applies to the insured"); *Aydin Corp. v. First State Ins. Co.*, 18 Cal.4th 1183, 1194 (1998) (insured had the burden of proving the applicability of a "sudden and accidental" exception to a pollution exclusion).

damage was sudden and accidental." *Assurance Co. of Am. v. Ironshore Specialty Ins. Co.*, 2015 U.S. Dist. LEXIS 98990 at *22, 2015 WL 4579983 (D. Nev. July 29, 2015) (emphasis added). Thus, the Interlocutory Case court would impose a duty to defend on Ironshore in any case where the allegations do not *negate* the "possible inference" that the damage was sudden and accidental, even though no allegations support the "possible inference."

The Interlocutory Case orders are at odds with ample case authority holding that the duty to defend cannot be triggered by speculation about a *possible* event that could create a potential for coverage; rather, the pleadings must actually allege an event that could create a potential for coverage. *Sony Computer Entm't Am. v. Am. Home Ins. Co.*, 2005 U.S. Dist. Lexis 46692 (N.D. Cal. Aug. 30, 2005), *aff'd*, 532 F.3d 1007 (2008) (summary judgment for insurer affirmed, *finding no duty to defend*, where policy excluded sudden and accidental injury, underlying complaint did not allege sudden and accidental injury, and no extrinsic evidence supported such claim); *Gunderson v. Fire Ins. Exch.*, 37 Cal.App.4th 1106, 1114 (1995) ("An insured may not trigger the duty to defend by speculating about extraneous facts regarding potential liability or ways in which the third party claimant might amend its complaint at some future date."); *Beazley*, 2013 U.S. Dist. LEXIS 71699 at *22, 2013 WL 2245901. So held this Court; and so held the court in the Eastern District of California when considering whether materially similar allegations created a potential for coverage under Ironshore policies materially identical to those at issue here. *American Zurich Ins. Co. v. Ironshore Specialty Ins. Co.*, 2014 U.S. Dist. LEXIS 100787 at *12-15 (E. D. Cal. July 23, 2014); *American Zurich v. Ironshore*, 2016 U.S. Dist. LEXIS 150684, at *23, 2016 WL 6441610 at * 8, (E.D. Cal. Oct. 31, 2016). The contrary interlocutory orders in the Interlocutory Case are in clear error; if they become final in that form, they will be challenged.

III. NO CASE HOLDS THAT DAMAGE FROM CONSTRUCTION DEFECTS IS AUTOMATICALLY "ACCIDENTAL"

Plaintiffs' motion raises only one legal argument *not* made previously in its papers on the cross-motions for summary judgment/adjudication: the surprising proposition that an alleged construction defect is always an "accident." (ECF No. 55 p. 2.) That is pure nonsense. Many courts have held otherwise. Indeed, as this Court noted, the Eastern District of California granted

summary judgment in Ironshore's favor because the underlying allegations of property damage from construction defects did not allege "sudden and accidental" damage. *American Zurich*, 2014 U.S. Dist. LEXIS 100787 at *12-15 (*see*, ECF No. 50 p. 4 n. 7). It is also wholly irrelevant. The exception to the CP Exclusion requires that the damage be *sudden and* accidental, and that it take place during the Ironshore policy period, not that it merely be accidental.

Plaintiff's sole authority for its contention is *Maryland Cas. Co. v. Nat. American Ins. Co.*, 48 Cal.App.4th 1822 (1996), which Plaintiffs claim stands for the proposition that damages allegedly arising from construction defects are always "potentially covered because the damage may be caused by accidents that are neither expected nor intended." (ECF No. 55 p. 2:13-15.) More nonsense. In *Maryland Casualty*, the court ruled that manifestation of damage prior to the policy period did not "automatically" rule out damage continuing during the policy period, because under California's "continuous trigger" rule, "damage that [is] continuous or progressive [is] covered by all policies in effect during those periods." *Maryland Cas.*, 48 Cal.App.4th at 1830, quoting *Montrose Chemical Corp. v. Admiral Ins.*, 897 P.2d 1 (Cal. 1995) ("*Montrose II*"). The ruling had nothing whatsoever to do with the notion that damage from construction defects is somehow always accidental. Further, *Maryland Casualty*'s discussion of the "contiguous trigger" rule is inapposite because the decision did not involve a policy, as here, with an exclusion for damage based on when the damage "first existed" (which the Ironshore policy expressly deems to be at the time the work is performed). Nor did *Maryland Casualty* consider whether the underlying complaint had alleged claims for damage that was "sudden and accidental". *Maryland Casualty* is entirely inapposite.

IV. PLAINTIFF DID NOT MEET ITS BURDEN OF ESTABLISHING A POTENTIAL FOR COVERAGE

As it did in its summary judgment papers, Plaintiff again urges the Court to accept the proposition that Ironshore "did not meet its burden of proving" that no sudden property damage "potentially occurred". (ECF No. 55, p. 2:20-21.) As the Court correctly noted, however, "the insured has the duty to point to allegations or evidence giving rise to a potential for coverage." (ECF No. 50, p. 3:12-15.) Ironshore met its burden of showing that the CP Exclusion applied.

Just as the insured bears the burden of proving that there is a potential for coverage, the insured bears the burden of proving that an exception to an exclusion potentially applies. (*Id*., p. 3:26-28.)[3] Because, as the Court correctly ruled, "Ironshore's duty to defend was only triggered if the complaints sued for 'sudden and accidental damages,'" and because the complaints did *not* allege "damages caused by a sudden accident," Plaintiffs did not carry their burden. (*Id*. p. 1:19-21.) Simply put, Ironshore did not have the burden to negate the hypothetical "potential" that the damage was sudden and accidental because the Plaintiffs cannot point to allegations that created the "potential" in the first place.

Plaintiffs rely on *Pulte Home Corp. v. American Safety Ins. Co*., 2017 U.S. Dist. LEXIS 148653, 2017 WL 4050347 (S.D. Cal., Sept. 13, 2017) (applying Georgia law), contending that the court "noted that it is well accepted that construction work performed at one time may manifest injury or damage to adjacent work at a later time." (ECF No. 55 p. 2:24-25.) More nonsense. Not only does the decision never discuss the question of when property damage "manifests", the court granted summary judgment for the *insurer*, finding that there was no possibility of coverage because the complaint alleged only damage from defects in the insured's own concrete work (which was not covered) and "did not allege or imply that these concrete defects had caused damage to persons or property unrelated to the concrete itself" (which potentially would have been covered). 2017 U.S. Dist. LEXIS 148653 at *14. Thus, like this Court, the *Pulte* court refused to speculate that there was a "possibility" of coverage because a potentially covered loss *could* have been alleged, but was not. If anything, *Pulte* supports the Court's decision, not Plaintiffs' argument to the contrary.

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[3] *Vegas V.P.*, 2008 U.S. Dist. Lexis 37495, at *13.

CONCLUSION

For the foregoing reasons, Ironshore respectfully requests that the Court deny Plaintiffs' motion.

Dated: October 4, 2017

Respectfully submitted,

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ASSURANCE CO. OF AMERICA, et al. Plaintiffs, vs. IRONSHORE SPECIALTY INS. CO., Defendant.	Case No.: 2:15-cv-00460-JAD-PAL REPLY TO OPPOSITION TO MOTION FOR RELIEF FROM JUDGMENT **ORAL ARGUMENT REQUESTED**

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Plaintiffs American Guarantee & Liability Insurance Company, Assurance Company of America and Northern Insurance Company of New York (collectively "Plaintiffs") hereby submit the following Reply to their Motion for Relief from Judgment [Dkt. No. 55].

Introduction

Plaintiffs' motion seeking relief from the judgment entered in this matter pursuant to FRCP 60 is premised on the extraordinary circumstance that inconsistent rulings have now issued. In NV1, Judge Navarro held that Ironshore owed a duty to defend named insured Champion Masonry in connection with Garcia v. Centex Homes, Clark County (Nev.) Case No.: A616729 ("Garcia"). See Assurance v. Ironshore, 2014 WL 4829709 (D. Nev. 2014). In this case, this Court, as to the same underlying matter (Garcia), held otherwise in ruling that Ironshore did not owe a duty to defend additional insured Centex Homes. See Dkt. No. 42, Exs. 95-107, Dkt. No. 50. As these rulings contradict one another and cannot be reconciled since they involve the same matter with the

same allegations regarding damages, extraordinary circumstances exist.[1]

Even aside from Garcia, the rulings issued by the Court in NV1 and this Court are in variance and cannot be reconciled since the underlying construction defect matters at issue in this case and NV1 are effectively identical. Compare Dkt. Nos. 39, 40 and 50 with Assurance Co. of America v. Ironshore Specialty Ins. Co., 2016 WL 1169449 (D. Nev. 2016); Assurance Co. of America v. Ironshore Specialty Ins. Co., 2015 WL 4579983 (D. Nev. 2015); Assurance Co. of America v. Ironshore Specialty Ins. Co., 2014 WL 4829709 (D. Nev. 2014). In NV1, Judge Navarro held that a potential for coverage exists under Ironshore's policies as to construction defect suits since the the underlying matters generally fail to specify the timing and extent of damages such that Ironshore cannot rule out that damages at issue possibly could have occurred suddenly.[2] In contrast, this Court reached the opposite conclusion in holding that the same lack of specificity as to the scope and timing of the alleged damages could not support a finding that a potential for "sudden and accidental" damages had been alleged. Respectfully, since these rulings are based on the same core allegations of construction defects and resulting damages arising from alleged improper construction, an extraordinary situation exists given that the rulings are inconsistent that justifies and supports the relief Plaintiffs seek.

This Court's ruling that no accidental damages were alleged to have occurred in connection with the underlying matters at issue in this case is not supported by the record, and therefore was not a position argued by the parties. The record in this case confirms that the Complaints filed in each of the underlying matters alleged damages that, in part or in whole, were neither expected nor intended, and were therefore alleged to be unintended and accidental. The fact that the claims at issue were potentially caused accidentally is not surprising since a condition of coverage under all insurance policies (including Plaintiffs' policies) are damages potentially caused by an

[1] Contrary to Ironshore's contention that all of the rulings issued in NV1 are interlocutory, a judgment was entered as to Garcia. See Dkt. No. 39-2, Exs. 64, 65.

[2] While the rulings issued to date in NV1 other than as to Garcia are interlocutory in nature since no judgment has yet issued, Ironshore overlooks the fact the the Court awarded Plaintiffs $488,233 in damages after a bench trial which indicating a final order would separately issue. See Minute Order - Dkt No. 56-10. As a final order and judgment in NV1 should be entered at any time, the prior rulings will cease to be interlocutory in the near future.

"occurrence," a core coverage term defined as an "accident." A ruling that the underlying matters did not allege potentially accidental damages, therefore, would operate to bar coverage under all occurrence-based insurance policies in connection with construction defect suits. As the parties have not asserted this position while caselaw does not support this conclusion, any finding that the underlying matters did not seek damages potentially caused by accidents/occurrences is not supported by the record.

Meanwhile, since the Complaints filed in connection with the underlying matters omitted any specificity as to the timing and extent of the damages, Ironshore cannot meet its burden of proving that no potential for sudden damages existed. As argued in connection with Plaintiffs' motion, when a pleading is silent as to the timing of damages, a potential exists that the damages could have occurred suddenly such that a defense obligation is owed. See Newmont USA Ltd. v. American Home Assurance Co., 676 F.Supp.2d 1146 (E.D. Wash 2009); see also Mahl Bros. Oil Co. v. St. Paul Fire & Marine Ins. Co., 307 F.Supp.2d 474 (W.D. Wash. 2004). It is precisely this absence of specificity as to the timing of extent of damages that prevents and bars an insurer from meeting its burden of proving that no damages could have occurred suddenly. A contrary ruling would permit insurers to ignore the mandate that they must provide a defense in any suit in which a potential for coverage exists.

For these reasons, it is respectfully submitted that Plaintiffs' motion is meritorious and should be granted.

Discussion

A. Ironshore Neither Disputed Nor Challenged That Each Underlying Suit Alleged Damages Potentially Caused By An Accident.

As pointed out in connection with the cross-motions filed by the parties, the policies that Plaintiffs and Ironshore issued both included standard coverage forms for which the insuring agreements provide as follows:

> a. We will pay those sums that the Insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the Insured against any "suit" seeking those damages. . . .

> . . .
>
> b. This insurance applies to "bodily injury" and "property damage" only if
>
> (1) The "bodily injury" or" property damage" is caused by an "occurrence that takes place in the "coverage territory";
>
> . . .
>
> **"Occurrence" means an accident. including continuous or repeated exposure to substantially the same general harmful conditions.**
>
> . . .
>
> "Property damage" means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property, . . .

See Dkt. No. 39, Ex 1, ISIC 4-17; Ex. 2, ISIC 66-79; Ex. 3, ISIC 1304-1317; Ex. 4, ISIC 1507-1520; Ex. 5, ISIC 1857-1870; Ex. 6, ISIC 1912-1925; Ex 7, ISIC 2307-2320; Ex. 8, ISIC 2369-2382; Ex. 9, ISIC 3356-3369; Ex. 10, ISIC 3554-3567; Ex. 11, ISIC 2544, 2567; Ex. 12, ISIC 2482-2495; Ex. 13, ISIC 3116-3129.

Damage potentially caused by an accident (defined as an "occurrence"), therefore, is a core and threshold issue that must exist for there to be coverage and for any defense to be owed under any insurance policy, including the policies Plaintiff issued.

In both moving for summary judgment and opposing Plaintiffs' motion for summary judgment, Ironshore never argued that the claims at issue were not covered by the insuring agreements in its policies. See Dkt. Nos. 40, 46. Given this, Ironshore never took the position that it did not owe a duty to defend because no damages were alleged that were potentially caused by an accident (defined as an "occurrence").[3]

Instead, Ironshore's coverage arguments are focused on its manuscript CP Exclusions included in each of its policies which seek to bar coverage for damages arising from work performed and completed prior to its policy period, except for sudden and accidental damages. In so doing, Ironshore effectively concedes that allegations were made of claims caused by

[3] Ironshore does not argue otherwise in its Opposition as it simply ignores this issue by not addressing it. Dkt. No. 59.

"occurrences" a/k/a "accidents" were alleged.

A finding that the underlying matters included no allegations damages potentially caused by accidents would not only bear on Plaintiffs' duty to defend (since the term "occurrence" is also included in Plaintiffs' policies), but the duty of any insurer that issued an "occurrence" based insurance policies. Specifically, given that construction defect suits generally allege damages arising from defects, a conclusion that defect-based claims are never caused by accidents would invalidate coverage to numerous contractors and trades named in construction defect suits, an outcome that would have a substantial and profound impact on coverage for construction defect suits in Nevada (since no insurer would ever owe a coverage obligation)..

Neither party to this suit (or NV1) has ever argued that the underlying matters did not allege damages potentially caused by an accident (defined as an "occurrence"). For this reason, this Court's ruling that the damages at issue were not potentially caused by an "accident" is not supported by the record.

B. Regardless, Each Of The Underlying Suits Included Allegations of Damages Potentially Caused By An Accident.

As noted by this Court, each of the underlying matters are construction defect suits involving residential homes. Given that construction defect litigation is a boutique industry, commonality exists regarding the type and nature of the claims alleged.

In their motion, Plaintiffs pointed out that common (often times identical) allegations were made in each of the underlying matters of physical injury to tangible property. Dkt No. 39. Specifically, as noted in the motion, claims were asserted in each underlying matter of defects causing damages as follows:

Anthem - Ex. 31, ISIC 190:33-191:16, 194:13-18; Ex. 56, ISIC 2741:28-2742:26, 2745:13-18, Ex. 32;

Mohan - Ex. 33. ISIC 998-999, Ex. 34;

Seven Hills - Ex. 35, ISIC 4581:5-11, ISIC 4583:18-28, Ex. 36;

Garcia - Assurance v, Ironshore, 2014 WL 4829709, p 1; see also Exs. 37, 38;

Marcel - Ex. 42, ISIC 3742:20-3743:21, Ex. 43;

Lino - Ex. 46, ISIC 4928:7-28, Ex. 47; Ex 48, ISIC 1773:12-1774:7, Ex. 49;

Wikey - Ex. 50, SIC 2154:25-2155:20, Ex. 51;

Drost - Ex. 44, ISIC 1636:22-26, 1639:9-12; Ex. 45;

Bennett - Ex. 52, ISIC 4977:1-3, 4978:12-4979:24983:6-12; Ex. 53;

Boyer - Ex. 54, ISIC 3464:14-27, 3465:23-27; Ex. 55;

Stallion Mtn. - Ex. 58, ISIC 5839:4-18, 5840:19-28; Ex. 59;

Sun City - Ex. 60, ISIC 5891:20-5892:9; Ex. 61;

Larkin - Ex. 62, ISIC 5931:11-25; Ex. 63.

In each case, allegations were asserted of various defective conditions causing damages. Based on these allegations, legal theories were asserted in each case of breach of express warranty, breach of implied warranty and negligence, all of which are accident based.

In asserting these claims, the underlying matters did not include allegations that all defective conditions and resulting damages were either expected or intended. Rather, in each case, the allegations were silent as to whether the damages were expected or intended, or included affirmative contentions that the damages resulted from negligence. In so doing, a potential existed that the damages at issue were unexpected and unintended, and therefore accidental (defined as an "occurrence").

Accordingly, aside from the fact that no party to this case argued that the damages at issue were not potentially caused by an accident, the allegations themselves support and confirm that damages were alleged that were potentially caused by an accident.

C. The Potential That Damages Occurred Suddenly Existed.

An insurer owes a duty to defend in any instance in which a possibility of coverage may exist. Fresno Economy Import Used Cars v. USF&G, 76 Cal.3d 272, 278 (Cal. 1977). All that is required is a bare possibility of coverage as whether coverage is likely is irrelevant. Montrose Chem Corp. v. Superior Court, 6 Cal.4th 287, 295 (Cal. 1993). A defense is excused, therefore, where a Complaint could not conceivably support a claim for which a coverage obligation is owed. Amato v, Mercury Cas. Co., 18 Cal.App.4th 1784, 1790 (Cal. 1993).

Newmont USA and Mahl Bros. are instructive as each dealt with similar policy language.

In Newmont USA, the Court ruled as follows:

> It is undisputed that the EPA's complaint did not include any specific facts regarding the alleged discharges or how the discharges occurred. Rather the complaint is couched in general terms appropriate for a CERCLA action. The insurers concede, that there are no specific facts pled in the EPA's complaint about the releases and "there are no allegations of the underlying complaint that would characterize the contamination at issue as sudden and/or accidental." Ct. Rec. 176 at 12. Likewise, as Plaintiffs point out, there are no allegations in the underlying complaint that would rule out the potential for coverage and the possibility of facts demonstrating that the contamination at issue was sudden and accidental. [citation omitted].
>
> The law requires the court to resolve all doubts regarding the sufficiency of the allegations to trigger coverage in favor of the insured and the duty to defend. Moreover, when an insurer is unconvinced of its duty to defend, insurers are to resolve such doubt in favor of furnishing a defense to its insured while it pursues other avenues for resolving the uncertainty. These two fundamental tenets of insurance law operate in favor of finding the insurers had a duty to defend.

676 F.Supp.2d at 1159-1160.

Meanwhile, the Court in Mahl Bros. ruled as follows:

> [C]ourts have held that where an underlying claim does not specify how the relevant hazardous substance was discharged into the environment, such claim did not clearly negate an interpretation that such discharge was sudden and accidental. [citation omitted]. In particular, the underlying actions in Blank, Avondale and Trico, for which the insureds sought coverage from the insurers, did not sufficiently and unambiguously specify how the contaminants were discharged into the environment as to render it implausible that the discharges were both "sudden and accidental" and thereby negate coverage.
>
> . . . [I]n the instant case the alleged initial discharge of petroleum pollutants in the underlying state court action is not specified in the complaint filed in the underlying action which merely alleges that"[o]n or before November 2, 1993, a discharge of petroleum product contaminated the groundwater and soil at and in the vicinity of a gasoline service station and wholesale petroleum facility." Underlying Complaint ¶ 5. As such, the complaint in the underlying action alleges a discharge that is within the sudden and accidental exception to the pollution exclusions, such that Defendant may not rely on the pollution exclusion to avoid defending and, if necessary, indemnifying Plaintiff with regard to the underlying action.

307 F.Supp.2d at 496.

Newmont USA and Mahl Bros. directly support the conclusion that where allegations as to

the timing and extent of damages are not pled (as is true in connection with each of the underlying matters at issue in this case), a potential exists that the damages could have occurred suddenly. Given that this Court expressly held that the showing for duty to defend is low as the plaintiffs need only show that there was a potential for coverage, the lack of specificity in each of the underlying matters permits for plaintiffs to meet this burden.

The cases Ironshore relies upon are inapposite as none involve damage claims in which the scope, extent and timing of the damages are not pled. Given the logic and rationale of Newmont USA and Mahl Bros., both of which are consistent with the rulings issued in NV1, it is respectfully submitted that a potential exists that some of the damages could have possibly occurred suddenly such that a defense was owed.

D. At A Minimum, Doubts Exist Which Must Be Resolved In Favor Of A Duty To Defend.

Doubt as to whether facts give rise to a duty to defend is resolved in favor of the insurer owing a defense obligation. Horace Mann Ins. Co. v. Barbara B., 4 Cal.App.4th 1076, 1081 (Cal. 1993). An insurer is excused from defending, therefore, only when a Complaint can by no conceivable theory raise a single issue which could bring it within the scope of coverage. Alterra Excess & Surplus Ins. Co. v. Snyder, 234 Cal.App.4th 1390, 1401-1402 (Cal. 2015).

On a motion for summary judgment, an insurer must be able to negate the potential for coverage as a matter of law. Anthem Electronics, Inc. v. Pacific Employers Ins. Co., 302 F.3d 1049, 1059 (9th Cir. 2002). Absent an ability to conclusively show that coverage is barred, a defense is owed. McMillin Cos., LLC v. American Safety Indem. Co., 233 Cal.App.4th 518, 533 (Cal. 2015).

In this case, Ironshore cannot meet its burden of negating the potential for coverage as a matter of law. The underlying matters each include allegations of damages that omit specificity as to scope, extent and timing of when and how the damages occurred. Given this, the matters do not include the requisite allegations to permit an insurer to prove that none could have occurred suddenly.

In its Order, this Court noted that there must be some allegation or evidence to create a current potential for coverage as if there is none, the duty to defend would be expanded to the

breaking point. Plaintiffs agree.

In connection with each of the underlying matters, allegations were made of defects and damages that are silent as to the scope, extent and timing of the damages. Given this silence, a potential exists that the damages could have occurred suddenly. Given this, some allegations were asserted in each of the underlying matters of damages that could have occurred suddenly.

In holding otherwise, this Court stated as follows:

> Not only are there no actual allegations here that a sudden accident occurred, there is not even the suggestion of an accident in any of the complaints.

Dkt. No. 50, 5:11-12.

Respectfully, the absence of specificity as to allegations of damages asserted in the underlying matters supports and confirms the fact that the damages could have possibly occurred suddenly (and accidentally). It is precisely this possibility that bars Ironshore from meeting its burden of proving that no damages could have conceivably occurred suddenly.

Pulte Home Corp. v. American Safety Ins. Co., 2017 WL 3725045 (Cal. 2017) supports this view. In that case, the Court noted that where the mechanisms and timing of damages are unknown, a potential for coverage exists as to the scope and extent of damages are unknown. As the mechanism and timing of damages as to the underlying matters in this case are equally unknown, a possibility exists that the damages occurred suddenly. It is precisely this possibility that creates the potential for coverage.

Conclusion

For the reasons set forth herein, it is respectfully submitted that good cause exists to grant Plaintiffs' motion.

Dated: October 11, 2017

MORALES FIERRO & REEVES

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Assurance Co. of America, et al., Plaintiffs v. Ironshore Specialty Ins. Co., Defendant	Case No.: 2:15-cv-00460-JAD-PAL **Order Denying Motion for Rule 60(b) Relief and Motion for Attorneys' Fees and Costs** [ECF Nos. 54, 55]

In this insurer-versus-insurer coverage dispute, I granted summary judgment in favor of the Ironshore Speciailty Insurance Company after concluding that its duty to defend was not triggered in a handful of construction-defect lawsuits.[1] Ironshore, having made offers of judgment to each of its adversaries, now moves for attorneys' fees and costs. The losing carriers oppose that motion and ask me to set aside the judgment because my conclusions differ from those reached by another judge in this district who considered similar issues—a fact that they fully apprised me of before I made my decision. I find no reason to set aside the judgment. And although I conclude that I have discretion to award fees under Nevada law based on the offers of judgment that the plaintiffs rejected in this case, I do not find that such an award is warranted here. So I also deny Ironshore's motion for attorneys' fees and costs.

[1] ECF Nos. 50 (summary-judgment order), 51 (judgment).

Discussion

I. Plaintiffs' motion for relief from judgment

Rule 60(b) of the Federal Rules of Civil Procedure allows the court to "relieve a party . . . from a final judgment, order, or proceeding" for a variety of reasons, including the catchall "any other reason that justifies relief."[2] The Ninth Circuit has cautioned, however, that "judgments are not often set aside" under this rule, and it "should be 'used sparingly as an equitable remedy to prevent manifest injustice.'"[3]

Plaintiffs ask me to reconsider my entry of judgment in favor of Ironshore[4] because it "is contrary to and conflicts with rulings issued by Judge Navarro in" another case between these parties in this district.[5] But this is not news to me. I knew about those other rulings when I issued mine because plaintiffs told me about those rulings in their opposition to the motion for summary judgment.[6] And they offered me the same block-quoted passages in that opposition that they now offer in support of their Rule 60(b) motion.[7] I was no more persuaded by these points then than I am now. Because

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[2] Fed. R. Civ. P. 60(b).

[3] *In re Int'l Fibercom, Inc.*, 503 F.3d 933, 941 (9th Cir. 2007) (quoting *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1103 (9th Cir. 2006), and *United States v. Washington*, 394 F.3d 1152, 1157 (9th Cir. 2005)).

[4] ECF No. 50.

[5] ECF No. 55.

[6] *See* ECF No. 45 at 10.

[7] *Compare* ECF No. 45 at 19–20 *with* ECF No. 60 at 7.

the plaintiffs have not demonstrated that they are deserving of Rule 60 relief from the judgment, I deny their motion.

II. Ironshore's motion for attorneys' fees and nontaxed costs

Ironshore moves for attorneys' fees and nontaxed costs based offers of judgment that it made to the plaintiffs under Nevada Rule of Civil Procedure 68[8] and NRS 17.115 in this diversity case.[9] Five months after it removed this indemnity-and-contribution case from state court, Ironshore served offers of judgment on the three plaintiffs.[10] Each offered to allow judgment to be entered in favor of the plaintiff carrier "and against Ironshore in the amount of $13,000, inclusive of all costs, applicable interest, and attorneys' fees, in full satisfaction and in complete resultion of each and every claim asserted by" that carrier.[11] No plaintiff accepted the offer, so the case moved forward,[12] the parties briefed competing summary-judgment motions in 2016,[13] and I entered summary judgment in Ironshore's favor in the summer of 2017.[14] Ironshore argues that this was a case with "enormous factual and legal complexity" that it was "able to dispose

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[8] ECF No. 54. Nev. Rev. Stat. §17.115 was repealed effective October 1, 2015. Nevertheless, because it was in effect at the time Ironshore served its offers, I consider it. My conclusion does not change, however, whether I evaluate the request under NRCP 68 or the now-abrogated statute.

[9] *See* ECF No. 1 at 2–3 (citing diversity as the basis for removal jurisdiction).

[10] ECF No. 54-2 at 1–2.

[11] ECF Nos. 54-3, 54-4, 54-5.

[12] ECF No. 54-2.

[13] *See* ECF Nos. 28–38, 39–49.

[14] ECF No. 50.

of" through motion practice instead of a more costly trial, and it asks for the $302,214.50 in attorneys' fees and $3,863.53 in nontaxable costs that it incurred from the date of the offers of judgment through the entry of judgment.[15] The plaintiff carriers contend that federal law does not permit an award of Ironshore's fees and costs here and, even if these amounts could be recovered, they are not justified in this case.[16]

A. This court can apply Nevada law to award fees in this case.

Rule 68 of the Nevada Rules of Civil Procedure authorizes a litigant to make an offer of judgment to resolve a case. If the defendant makes an unconditional offer under the rule and the plaintiff rejects it and fails to beat it, the court can order the plaintiff to pay the defendant's attorneys' fees "from the time of the offer."[17] "In making such an award of attorney fees, the district court must carefully review" these factors established by the Nevada Supreme Court in *Beattie v. Thomas*: "(1) whether the plaintiff brought the claim in good faith, (2) whether the defendants' offer of judgment was reasonable and brought in good faith in both its amount and timing, (3) whether it was grossly unreasonable or an act in bad faith for the plaintiff to reject the offer and proceed to trial, and (4) whether the fees sought are reasonable and justifiable in amount."[18] When the court "properly considers these *Beattie* factors, the award of attorney's fees is

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[15] ECF No. 54 at 9–10.

[16] ECF No. 56.

[17] Nev. R. Civ. P. 68(f)(2).

[18] *Ozawa v. Vision Airlines, Inc.*, 216 P.3d 788, 792 (Nev. 2009) (*citing Beattie v. Thomas*, 668 P.2d 268, 274 (Nev. 1983)).

discretionary. . . ."[19] Because this state offer-of-judgment rule is substantive and does not conflict with the federal rule, it applies in this diversity case.[20]

B. Though procedurally available, an award of fees is not warranted here.

Though fees are available under NRCP 68 in a federal case like this in which the plaintiff fails to beat a defendant's offer of judgment,[21] after an analysis of the *Beattie* factors, I conclude that an award of attorneys' fees is not justified in this case. The first *Beattie* factor requires the court to consider the plaintiffs' litigation motives.[22] When doing so, I cannot say that the plaintiffs did not bring this action in good faith. Even though I granted summary judgment in favor of Ironshore, there is nothing in this record that suggests that the plaintiffs lacked a good-faith motive in bringing or maintaining this lawsuit. Just a few months before they filed this lawsuit, they had received a favorable ruling on the same legal issues in a separate action before a different judge in this

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[19] *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nevada*, 997 P.2d 130, 136 (Nev. 2000).

[20] *See MRO Commc'ns, Inc. v. Am. Tel. & Tel. Co.*, 197 F.3d 1276, 1284 (9th Cir. 1999); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n.31 (1975) ("In an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, . . . state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.") (citations omitted); *see also Cheffins v. Stewart*, 825 F.3d 588, 597 (9th Cir. 2016).

[21] I also find that Ironshore's motion complies with LR 54-14 and that its offers were unconditional.

[22] *Frazier v. Drake*, 131 Nev. Adv. Op. 64, 357 P.3d 365, 372 (Nev. Ct. App. 2015) (noting that the first three *Beattie* factors "all relate to the parties' motives in making or rejecting the offer and continuing the litigation").

district.[23] So, the timing suggests that the plaintiffs brought and pursued this case in good faith.

Those same circumstances—and the path that the other cases between these litigants were taking—make it difficult for me to conclude that Ironshore's offer of judgment was reasonable and brought in good faith in both its amount and timing. When Ironshore served its offers in August of 2015, the plaintiffs had at least one more favorable ruling in the parallel litigation in their pockets.[24] So, I cannot say that Ironshore's offer to have judgment entered against it in the amount of $13,000 for each of the three plaintiffs ($13,000 x 3 = $39,000), when Ironshore's potential exposure was $835,000, was made in good faith. This sum likely didn't even cover the plaintiffs' costs of defense at that point.

For the same reasons, I cannot say that it was grossly unreasonable for the plaintiffs to reject Ironshore's offers or that they acted in bad faith by doing so. Because the first three *Beattie* factors weigh against an award of attorneys' fees and persuade me to deny Ironshore's request for fees, it makes no difference whether I find the amount of Ironshore's request reasonable. Even if I were to conclude that the more than $300,000 in attorneys' fees that Ironshore is requesting in this case are reasonable, the balance of

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[23] *See Assurance Co. of Am. v. Ironshore Specialty Ins. Co.*, No. 2:13-cv-02191-GMN, 2014 WL 4829709, at *1 (D. Nev. Sept. 30, 2014).

[24] *See* ECF No. 72 in *Assurance Co. of Amer. v. Ironshore Spec. Ins. Co.*, 2:13-cv-02191-GMN-CWH (order dated July 29, 2015).

the *Beattie* factors tips heavily against a fee award here. I thus deny Ironshore's request for an award of attorneys' fees.

C. Ironshore's nontaxable costs motion is not sufficiently developed.

Although Ironshore also requests an award of nontaxable costs, it fails to establish the legal basis for that award. Ironshore devotes the entirety of its argument to demonstrating its entitlement to attorneys' fees, leaving the legal basis for its nontaxable fees request unclear.[25] This makes it impossible for the court to evaluate whether those costs should be awarded in this case. For this reason, I deny Ironshore's motion for nontaxable costs. But I do so without prejudice to Ironshore's ability to file a renewed motion for those costs that specifically sets for the legal basis for their recoverability no later than October 1, 2018.

Conclusion

Accordingly, IT IS HEREBY ORDERED that Plaintiffs' Motion for Relief from Judgment **[ECF No. 55] is DENIED**; and

IT IS FURTHER ORDERED that Ironshore's Motion for Attorneys' Fees and Nontaxable Costs **[ECF No. 54] is DENIED**; Ironshore has until October 1, 2018, to file a renewed motion for nontaxable costs consistent with this order.

Dated: September 18, 2018

U.S. District Judge Jennifer A. Dorsey

[25] *See* ECF Nos. 54 (motion), 57 (reply).

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ASSURANCE CO. OF AMERICA, et al. Plaintiffs, vs. IRONSHORE SPECIALTY INS. CO., Defendant.	Case No.: 2:15-cv-00460-JAD-PAL NOTICE OF APPEAL

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

BE ADVISED THAT Plaintiffs Assurance Company of America, Northern Insurance Company of New York and American Guarantee & Liability Ins. Co. (collectively Zurich"), pursuant to FRAP 3 and 4, hereby appeal to the United States Court of Appeals for the Ninth Circuit from both the judgment entered in this matter on August 24, 2017 and all interlocutory orders issued by this Court, including, but not limited to, the Orders filed on August 24, 2017 and September 18, 2018. Dkt. Nos. 50, 51 and 67. Note that this appeal is related to a separate appeal assigned Ninth Circuit Case No.: 18-16857.

Dated: October 8, 2018

MORALES FIERRO & REEVES

By: /s/ William C. Reeves
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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ZURICH AMERICAN INSURANCE COMPANY; AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, *Plaintiffs-Appellants*, v. IRONSHORE SPECIALTY INSURANCE COMPANY, *Defendant-Appellee.*	No. 18-16937 D.C. No. 2:15-cv-00460-JAD-PAL ORDER CERTIFYING QUESTION TO THE NEVADA SUPREME COURT

Filed July 2, 2020

Before: Marsha S. Berzon and Sandra S. Ikuta, Circuit Judges, and Ivan L.R. Lemelle,[*] District Judge.

Order

[*] The Honorable Ivan L.R. Lemelle, United States District Judge for the Eastern District of Louisiana, sitting by designation.

SUMMARY[**]

Certification to Nevada Supreme Court

The panel certified to the Nevada Supreme Court the following questions:

> Whether, under Nevada law, the burden of proving the applicability of an exception to an exclusion of coverage in an insurance policy falls on the insurer or the insured? Whichever party bears such a burden, may it rely on evidence extrinsic to the complaint to carry its burden, and if so, is it limited to extrinsic evidence available at the time the insured tendered the defense of the lawsuit to the insurer?

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

ORDER

We ask the Nevada Supreme Court to resolve two open questions of state law. First, we need guidance regarding whether the insurer or the insured bears the burden of proving the applicability of an exception to an exclusion of coverage in an insurance policy. We also need guidance in determining whether the party carrying such burden may rely on extrinsic evidence, and if so, whether only extrinsic evidence available at the time the insured tendered the defense of the lawsuit to the insurer is relevant for proving an exception to the exclusion. Accordingly, we certify the following questions:

> Whether, under Nevada law, the burden of proving the applicability of an exception to an exclusion of coverage in an insurance policy falls on the insurer or the insured? Whichever party bears such a burden, may it rely on evidence extrinsic to the complaint to carry its burden, and if so, is it limited to extrinsic evidence available at the time the insured tendered the defense of the lawsuit to the insurer?

Our phrasing of the questions should not restrict the Court's consideration of the issues involved. The Court may rephrase the questions as it sees fit in order to address the contentions of the parties. If the Court agrees to decide these questions, we agree to accept its decision. We recognize that the Court has a substantial caseload, and we submit these questions only because of their significance to actions brought to enforce an insurer's duty to defend under Nevada insurance law.

I

This case is an insurance coverage dispute between Ironshore Specialty Insurance Company (Ironshore), on the one hand, and American Guarantee & Liability Insurance Company and Zurich American Insurance Company (collectively, "Zurich"), on the other.[1]

Beginning in the early 2000s, about a dozen development companies built thousands of homes using various subcontractors. Eight subcontractors are relevant here.[2] Each of these subcontractors completed its work on the various properties before 2009. During this period, each was insured by Zurich for property damage that occurred during the policy period.

Some time after completion of their work on these housing developments, each of the eight subcontractors obtained an insurance policy from Ironshore. The Ironshore policy insured the subcontractors for bodily injury or property damage that occurred during the policy period. The policy period for each subcontractor began in 2009 and ended in either 2010 or 2011.

[1] We granted Zurich's motion to substitute Zurich American Insurance Company for Assurance Company of America and Northern Insurance Company of New York.

[2] The subcontractors are Cedco, Inc., Lukestar Corporation dba Champion Masonry, Debard Plumbing, Inc., JP Construction Co., LLC, Laird Whipple Construction, Inc., PR Construction Corp., Nevada Concrete Services, Inc. aka Stewart & Sundell, and Universal Framing, Inc.

The insurance contract between Ironshore and the eight subcontractors states, in relevant part:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" 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 "bodily injury" or "property damage" to which this Insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. . . .
>
> This insurance applies to "bodily injury" and "property damage"only if:
>
> > (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; [and]
> >
> > (2) The "bodily injury" or "property damage"occurs during the policy period.[3]

[3] The Ironshore policies define "occurrence" to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policies also define "property damage" to mean "[p]hysical injury to tangible property, including all resulting loss

In addition to the coverage provision, Ironshore's policy also includes an exclusion provision, which states:

> This insurance does not apply to any "bodily injury" or "property damage":
>
> > 1. which first existed, or is alleged to have first existed, prior to the inception of this policy. "Property damage" from "your work", or the work of any additional insured, performed prior to policy inception will be deemed to have first existed prior to the policy inception, unless such "property damage" is sudden and accidental and takes place within the policy period[]; or
> >
> > 2. which was, or is alleged to have been, in the process of taking place prior to the inception date of this policy, even if the such "bodily injury" or "property damage" continued during this policy period; or

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of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it."

> 3. which is, or is alleged to be, of the same general nature or type as a condition, circumstance or construction defect which resulted in "bodily injury" or "property damage" prior to the inception date of this policy.

Between 2010 and 2013, homeowners who purchased homes within these development projects brought 14 construction defect lawsuits against the developers in Nevada state court (the "Underlying Lawsuits").[4] The developers then sued each subcontractor as a third-party defendant. The complaints in the Underlying Lawsuits alleged that the defendants performed construction work on specific properties, that the work was defective, and that the properties were damaged as a result. The typical complaint said the following:

> Plaintiffs have discovered defects and damages within the periods of the applicable statutes of limitations that the subject property has and is experiencing defective conditions, in particular, there are damages stemming from, among other items, defectively built

[4] Although there was a 15th lawsuit in which homeowners sued a different subcontractor, RAMM Corp., that lawsuit is not relevant to this appeal because Zurich expressly waived any argument with respect to the district court's ruling related to that lawsuit.

> roofs, leaking windows, dirt coming through windows, drywall cracking, hardboard separating, hardboard staining, stucco cracking, stucco staining, and other poor workmanship.
>
> . . .
>
> Within the last year, Plaintiffs have discovered that the subject property has and is experiencing additional defective conditions, in particular, there are damages stemming from, among other items, defectively built roofs, leaking windows, dirt coming through windows, drywall cracking, hardboard separating, hardboard staining stucco cracking, stucco staining and other poor workmanship.

Although each complaint alleged that the homeowner suffered property damage, no complaint made specific allegations describing when or how the property damage occurred.

After being sued by the homeowners, the subcontractors tendered the defense to Zurich. Zurich agreed to defend the subcontractors against the Underlying Lawsuits. Zurich also sent tender letters to Ironshore requesting defense and indemnification on behalf of the subcontractors.

After receiving these tender letters, Ironshore investigated the claims and disclaimed coverage pursuant to the exclusion provision in its insurance policy. Specifically, Ironshore relied on paragraph 1 of the exclusion, which provides that its

insurance does not apply to property damage from work performed by a subcontractor before the policy inception, because such damage is deemed to have existed before the inception of the policy.

Zurich settled each of the claims against the subcontractors. Zurich then sued Ironshore, seeking contribution and indemnification for the defense and settlement costs, as well as a declaration that Ironshore owed a duty to defend the subcontractors against the Underlying Lawsuits. Ironshore moved for summary judgment, arguing that it had no duty to defend because there was no potential for coverage under the terms of its insurance policy.

The district court (Judge Jennifer Dorsey) granted summary judgment in favor of Ironshore. The court stated that Ironshore's exclusion provision "bars coverage if the insured worked on a home before the policy-start date, even if the damage from that work actually occurred after the policy went into effect." And because there was "no dispute that all of the construction work was done" before the policies took effect, the court concluded that Ironshore had no duty to defend.[5] The court rejected the argument that the "sudden and accidental" exception to the exclusion of coverage applied. The court reasoned that none of the complaints in the Underlying Lawsuits alleged that the damage occurred

[5] Because the district court ruled that Ironshore did not owe a duty to defend, the court did not address the narrower duty to indemnify. *See Allstate Ins. Co. v. Miller*, 212 P.3d 318, 324 (Nev. 2009). Therefore, this appeal does not directly implicate the duty to indemnify.

suddenly, and, absent any evidence to support such an allegation, Zurich failed to carry its burden. (The court assumed that Zurich could have introduced extrinsic evidence, but did not directly address the question.). Accordingly, the court granted Ironshore's motion for summary judgment. In effect, Judge Dorsey implicitly concluded that the insured (or in this case, Zurich) had the burden of establishing the applicability of the sudden and accidental exception to the exclusion.

Shortly before the district court issued its decision, a different Nevada district court (Judge Gloria Navarro) reached a different conclusion in a substantially identical case. *See Assurance Co. of Am. v. Ironshore Specialty Ins. Co.*, No. 2:13-cv-2191, 2015 WL 4579983 (D. Nev. July, 29, 2015), *submission deferred sub nom. Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co.*, No. 18-16857 (9th Cir. April 14, 2020) (referred to as "*Nevada Zurich II*"). After considering substantially identical facts and the same Ironshore insurance policy, Judge Navarro concluded that Ironshore owed a duty to defend because the underlying complaints in that case "did not specify when the alleged property damage occurred and did not contain sufficient allegations from which to conclude that the damage was not sudden and accidental."[6] *Nevada*

[6] After a bench trial, Judge Navarro also held that Ironshore failed to "meet its burden of proving the absence of actual coverage," i.e., duty to indemnify, because it failed to demonstrate that the exclusion provision bars coverage. *Nevada Zurich II*, 2017 WL 4570303, at *6 (D. Nev. Oct. 12, 2017). As previously mentioned, *supra* note 5, Judge Dorsey did not rule on the duty-to-indemnify issue, so that issue is not directly raised in the appeal underlying this certified question. Nevertheless, because the duty to indemnify is narrower than the duty to defend, *see Miller*, 212 P.3d at 324, we understand that the Nevada Supreme Court's answer to the burden-of-proof question raised in this certification order would

Zurich II, 2015 WL 4579983, at *5. Absent evidence that the alleged property damage was not sudden and accidental, the court concluded that Ironshore failed to carry its burden of showing that the exception to the exclusion did not apply. *Id.* Again, Judge Navarro assumed extrinsic evidence was admissible, but did not address the issue directly. In effect, Judge Navarro implicitly concluded that the insurer (or in this case, Ironshore) had the burden of proving the nonapplicability of the exception to the exclusion.

In light of *Nevada Zurich II*, Zurich filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure seeking relief from the judgment in the case underlying this certification order. Judge Dorsey denied the motion, stating that she was not persuaded by Judge Navarro's reasoning.[7]

Zurich timely appealed. We stay Zurich's appeal of the grant of summary judgment in favor of Ironshore pending the Nevada Supreme Court's resolution of the questions we certify here. In a concurrently filed order, we also stay Ironshore's appeal of *Nevada Zurich II*. *See* Order, *Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co.*, 18-16857 (9th Cir. July 2, 2020).

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likewise answer a similar question regarding who bears the burden of proving the duty to indemnify.

[7] Zurich did not argue to Judge Dorsey, nor does it argue on appeal, that Judge Navarro's ruling had a preclusive effect. Accordingly, any such argument is forfeited. *See United States v. Depue*, 912 F.3d 1227, 1232–33 (9th Cir. 2019) (en banc).

II

On appeal, the key question underlying the parties' dispute relates to who bears the burden of proof in establishing the duty to defend under an insurance policy, and what evidence may be used to carry that burden.[8] Because Zurich is seeking contribution from a nonparticipating co-insurer, Zurich bears the same burden of proof as an insured. *See United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 1155–56 (Nev. 2004) (treating the insured and the participating insurer identically).

The complaints in the Underlying Lawsuits do not include any allegations as to when or how the alleged property damage occurred. So, if the insured has the burden of proving the applicability of the "sudden and accidental" exception to the exclusion of coverage, then Ironshore would prevail, because the complaints in the Underlying Lawsuits do not indicate that the alleged property damage were sudden and accidental. But if the insurer has the burden of proving that the exception to the exclusion does not apply, then Zurich would prevail under the same logic. This result would be different only if the parties could introduce extrinsic evidence regarding whether the property damage was sudden and accidental.

[8] Zurich also argues that the exclusion provision in Ironshore's insurance policy "is inherently in conflict with the insuring agreement and therefore, creates an ambiguity which should be construed against [Ironshore]." We hereby reject this argument and hold that Ironshore's policy unambiguously excludes property damage caused by work that was completed before the policy's inception, subject only to the exception from the exclusion.

A

Nevada law does not clearly resolve either the burden-of-proof question or the extrinsic-evidence question. With respect to the burden of proof, under Nevada law, the insured bears the burden of proof initially and must demonstrate that the claim is "within the terms of the policy." *Nat'l Auto. & Cas. Ins. Co. v. Havas*, 339 P.2d 767, 768 (Nev. 1959). If the insured carries its burden, then the burden shifts to the insurer to show that an exclusion applies. *Id.* But Nevada law is silent as to whether the insured's burden to show coverage includes showing the applicability of an exception to an exclusion. There are reasonable arguments on both sides.

The argument that the insurer (here, Ironshore) bears the burden of proving the non-applicability of an exception to an exclusion of coverage is as follows. The duty to defend is based on allegations in the complaint. *United Nat'l*, 99 P.3d at 1158. The insurer must defend unless there is no potential coverage under the insurance policy. *Id*. Where (as here) the complaint is silent on whether the property damage was sudden and accidental, there is a potential that the damage were sudden and accidental. Therefore, it is up to the insurer to disprove such potential.

The counterargument that the insured (Zurich) bears the burden of proving that the exception to the exclusion applies is as follows. Insurance policies are treated like contracts under Nevada law, so ordinary contract principles apply. *Century Sur. Co. v. Andrew*, 432 P.3d 180, 183 (Nev. 2018). Under such contract principles, the plaintiff has the initial obligation to prove breach, such as that the conditions precedent were fulfilled but the defendant failed to perform. *Clark Cty. Sch. Dist. v. Richardson Const., Inc.*, 168 P.3d 87,

95 n.21 (Nev. 2007). The burden then shifts to the defendant, which has the obligation to raise an affirmative defense. *Id.* If the defendant can establish the applicability of an affirmative defense, then the burden shifts back to the plaintiff to prove its case. *See Nevada Ass'n Servs., Inc. v. Eighth Jud. Dist. Ct.*, 338 P.3d 1250, 1254 (Nev. 2014) ("Once a defendant shows that a voluntary payment was made [an affirmative defense], the burden shifts to the plaintiff to demonstrate that an exception to the voluntary payment doctrine applies.").

As the plaintiff, the insured must establish that the insurer has a duty to defend and breached the contract by failing to do so. There is no duty to defend if there is no potential for coverage, *United Nat'l*, 99 P.3d at 1158, so the insured must show a potential for coverage. If, after "comparing the allegations of the complaint with the terms of the policy," the insured has shown that "there is arguable or possible coverage," *id.*, then the burden shifts to the insurer to prove an affirmative defense, i.e., that the alleged loss is excluded from coverage, *see Havas*, 339 P.2d at 768. Under California law, if the insurer proves the applicability of an exclusion, the burden shifts back to the plaintiff to prove that an exception to the exclusion applies, such that the insurer owed a duty to defend. *See Aydin Corp. v. First State Ins. Co.*, 18 Cal. 4th 1183, 1188, 1194 (1998);[9] *see also Aeroquip Corp. v. Aetna Cas. & Sur. Co.*, 26 F.3d 893, 895 (9th Cir. 1994) (predicting

[9] Although *Aydin* involved the duty to indemnify, which under California law (just as under Nevada law) is narrower than the duty to defend, *see Certain Underwriters at Lloyd's of London v. Super. Ct.*, 24 Cal. 4th 945, 961 (2001), California courts have applied *Aydin* in the broader duty-to-defend context, *see McMillin Cos. v. Am. Safety Indem. Co.*, 233 Cal. App. 4th 518, 533 n.23 (2015); Croskey et al., *California Practice Guide: Insurance Litigation* ¶ 7:571.6 (The Rutter Group 2019).

that California, like the majority of other states, would place the burden of proving the applicability of an exception to an exclusion on the insured, because such an "allocation aligns the burden with the benefit and is consistent with the general principle under California law that while the burden is on the insurer to prove a claim covered falls within an exclusion, the burden is on the insured initially to prove that an event is a claim within the scope of the basic coverage." (quotation omitted)). Although the Nevada Supreme Court has not spoken on this issue, given that Nevada's duty to defend appears to be identical to California's, and Nevada courts often look to California for guidance,[10] it is reasonable to conclude that the Nevada Supreme court would adopt the California approach.

B

The allocation of the burden of proof will decide this case as a matter of law if Nevada adheres to the four corners rule. The Nevada Supreme Court has not decided whether parties may use evidence extrinsic to the complaint to carry their burden, and if so, whether they can adduce only evidence available at the time of the tender, or may also rely on evidence developed later.

Nevada's seminal insurance-coverage case, *United National*, does not resolve whether extrinsic evidence is

[10] Nevada's seminal case on the duty to defend is *United National*, wherein the Nevada Supreme Court cited to California case law several times. *See* 99 P.3d at 1158 n.21, n.23, & n.25 (citing *Horace Mann Ins. Co. v. Barbara B.*, 4 Cal. 4th 1076 (1993); *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263 (1966); *Aetna Cas. & Sur. Co. v. Centennial Ins. Co.*, 838 F.2d 346 (9th Cir. 1988) (applying California law)).

admissible to establish whether there is coverage. First, *United National* explains that the process for determining whether an insurer owes a duty to defend involves comparing only "the allegations of the complaint with the terms of the policy," 99 P.3d at 1158, which suggests the party that bears the burden of proof with respect to the duty to defend may not rely on extrinsic evidence. But in explaining the difference between the duty to defend and the duty to indemnify, *United National* noted 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." *Id.* (alteration and omission adopted) (quoting *Gray*, 65 Cal. 2d at 276–77). It also suggested that an insurer could not evade "its obligation to provide a defense for an insured without at least investigating the facts behind a complaint." *Id.* This language suggests that an insurer may (or must) consider extrinsic evidence available at the time the insured tendered the lawsuit to the insurer.

More recently, the Nevada Supreme Court clarified that "facts outside of the complaint cannot justify an insurer's refusal to defend its insured." *Andrew*, 432 P.3d at 184 n.4. We interpret *Andrew* as prohibiting an insurer's reliance on extrinsic evidence available at the time of tender to *defeat* the duty to defend. But *Andrew* did not address whether extrinsic evidence may *trigger* the duty to defend when the complaint alone would not trigger such a duty. And the Nevada Supreme Court has not spoken on whether, if extrinsic evidence may be used, the parties may rely on evidence developed after the time of the tender to establish that the exception to the exclusion was or was not applicable. In other words, in a lawsuit such as this one, it is unclear whether the party carrying the burden of proving an exception to the exclusion may adduce new evidence to prove that the

property damage at issue was (or was not) sudden and accidental.

If Nevada adopts the rule that the parties may consider only the four corners of the complaint, then this case can be decided as a matter of law, because there is no dispute that the complaints in the Underlying Lawsuits are silent as to when or how the property damage occurred. Put differently, the complaints neither establish nor disprove that the property damage was "sudden and accidental," so the party that bears the burden of proof with respect to the exception to the exclusion will be unable to carry its burden. On the other hand, if Nevada permits the use of extrinsic evidence, then the outcome will depend on whether Zurich or Ironshore can show there is a genuine issue of material fact as to the applicability or non-applicability of the exception to the exclusion, depending on which party bears the burden and what evidence can be adduced. The Nevada Supreme Court's answer to these questions will be dispositive of these issues in the earlier action, and we will follow its decision in this case.

III

The Clerk of Court is hereby directed to transmit forthwith to the Nevada Supreme Court, under official seal of the Ninth Circuit, a copy of this order and request for certification and all relevant briefs and excerpts of record. Submission of this case remains deferred, and the case will be submitted following receipt of the Nevada Supreme Court's opinion on the certified questions or notification that it declines to answer the certified questions. The Clerk shall administratively close this docket pending a ruling by the Nevada Supreme Court regarding the certified questions. The

panel shall retain jurisdiction over further proceedings in this court. The parties shall notify the Clerk of this court within one week after the Nevada Supreme Court accepts or rejects certification. In the event the Nevada Supreme Court grants certification, the parties shall notify the Clerk within one week after the Court renders its opinion.

QUESTIONS CERTIFIED; PROCEEDINGS STAYED.

Marsha Berzon
Circuit Judge

Sandra Ikuta
Circuit Judge

Ivan L.R. Lemelle
District Judge for the Eastern District of Louisiana

Supplemental Material

Pursuant to Rule 5 of the Nevada Rules of Appellate Procedure, we include here the designation of the parties who would be the appellants and appellee in the Nevada Supreme Court, as well as the names and addresses of counsel.

For Appellants Zurich American Insurance Company and American Guarantee & Liability Insurance Company:

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Morales Fierro & Reeves
600 S. Tonopah Drive
Suite 300
Las Vegas, NV 89106

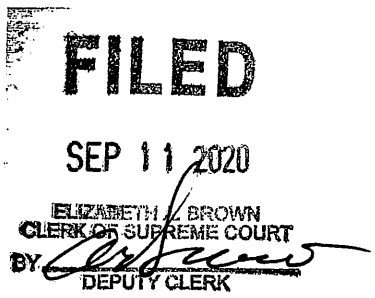
For Appellee Ironshore Specialty Insurance Company:

William C. Morison
Morison & Prough, LLP
2540 Camino Diablo
Suite 100
Walnut Creek, CA 94597

IN THE SUPREME COURT OF THE STATE OF NEVADA

ZURICH AMERICAN INSURANCE COMPANY; AND AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY,
Appellants,
vs.
IRONSHORE SPECIALTY INSURANCE COMPANY,
Respondent.

No. 81428



ORDER ACCEPTING CERTIFIED QUESTIONS, DIRECTING BRIEFING AND DIRECTING SUBMISSION OF FILING FEE

This matter involves legal questions certified to this court, under NRAP 5, by the United States Court of Appeals for the Ninth Circuit. Specifically, the Ninth Circuit has certified the following questions to this court:

> Whether, under Nevada law, the burden of proving the applicability of an exception to an exclusion of coverage in an insurance policy falls on the insurer or the insured? Whichever party bears such a burden, may it rely on extrinsic evidence to the complaint to carry its burden, and if so, is it limited to extrinsic evidence available at the time the insured tendered the defense of the lawsuit to the insurer?

As no clearly controlling Nevada precedent exists with regard to these legal questions and the answers may determine the federal case, we accept these certified questions. *See* NRAP 5(a); *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 749-51, 137 P.3d 1161, 1163-64 (2006).

Accordingly, appellants shall have 30 days from the date of this order to file and serve an opening brief addressing the certified questions. Respondent shall have 30 days from the date the opening brief is served to

file and serve an answering brief. Appellants shall then have 21 days from the date the answering brief is served to file and serve any reply brief. The parties' briefs shall comply with NRAP 28, 28.2, 31(c), and 32. *See* NRAP 5(g)(2). The parties may file a joint appendix containing any documents necessary for this court to resolve the certified questions that were not already provided to this court with the Certification Order. *See* NRAP 5(d).

Lastly, in any proceeding under NRAP 5, fees "shall be the same as in civil appeals . . . and shall be equally divided between the parties unless otherwise ordered by the certifying court." NRAP 5(e). The Ninth Circuit's order does not address the payment of this court's fees. Accordingly, appellants and respondent shall each tender to the clerk of this court, within 14 days from the date of this order, the sum of $125, representing half of the filing fee. *See* NRAP 3(e); NRAP 5(e).

It is so ORDERED.

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

Cadish, J.
Cadish

Silver, J.
Silver

cc: Morales Fierro & Reeves
Morison & Prough, LLP
Clerk, United States Court of Appeals for the Ninth Circuit