SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: May 16, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

Scheduling motion hearings: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion *before* you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

Recording is prohibited: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

Court reporters: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV424884	Krista Carrillo et al. v. Stier's RV Center LLC et al.	Click on LINE 1 or scroll down for ruling in lines 1-2.
LINE 2	23CV424884	Krista Carrillo et al. v. Stier's RV Center LLC et al.	Click on LINE 1 or scroll down for ruling in lines 1-2.
LINE 3	18CV336673	Whispering Oaks Residential Care Facility LLC et al. v. Travelers Property Casualty Company of America et al.	Click on LINE 3 or scroll down for ruling.
LINE 4	21CV389240	Adolfo De Luna v. Garden City Sanitation, Inc.	Click on LINE 4 or scroll down for ruling in lines 4-5.
LINE 5	21CV389240	Adolfo De Luna v. Garden City Sanitation, Inc.	Click on LINE 4 or scroll down for ruling in lines 4-5.
LINE 6	22CV396170	Christian Humanitarian Aid v. AM Star Construction, Inc. et al.	Click on LINE 6 or scroll down for ruling in lines 6-7.
LINE 7	22CV396170	Christian Humanitarian Aid v. AM Star Construction, Inc. et al.	Click on LINE 6 or scroll down for ruling in lines 6-7.
LINE 8	23CV411137	Ana Gabriela Torres Anguiano et al. v. Young Van Vo et al.	Click on LINE 8 or scroll down for ruling. The parties are requested to appear to address the court's questions set forth below.
LINE 9	23CV423391	Citibank, N.A. v. Abner S. Aranza	Motion for unanswered RFAs to be deemed admitted: notice is proper, and the court has not received any opposition to the motion. Because the scope of the RFAs is appropriate and defendant never responded to them, the court GRANTS the motion. Plaintiff shall prepare the formal order.

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LINE #	CASE #	CASE TITLE	RULING
LINE 10	21CV376809	Travelers Property Casualty of America v. Critchfield Mechanical, Inc. et al.	Motion for leave to file cross-complaint: the court has signed the parties' proposed stipulation and order granting leave to file the cross-complaint, and so this motion is now MOOT. As noted in the court's May 13, 2024 Order, Old Republic must still separately file the cross-complaint as a standalone document.
LINE 11	22CV401096	P. Kavanagh Construction Co., Inc. v. Larry Spitters et al.	Motion to be relieved as counsel: parties to appear.
LINE 12	22CV407083	Luis Ahedo v. Jose Ochoa et al.	Click on LINE 12 or scroll down for ruling.
LINE 13	24CV434168	Toll Bros, Inc. v. Lefco, Inc. et al.	Click on LINE 13 or scroll down for ruling.

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Calendar Lines 1-2
Case Name: *Krista Carrillo et al. v. Stier's RV Center LLC et al.*
Case No.: 23CV424884

This is a "lemon law" case under the Song-Beverly Consumer Warranty Act and the California Consumers Legal Remedies Act, filed by Beverly Phillips and Krista Carrillo ("Plaintiffs"). The case arises from the purchase of a motor home on April 14, 2023.

Plaintiffs filed original complaint on October 24, 2023, stating several causes of action against defendants Heartland Recreational Vehicles LLC, Stier's RV Center LLC dba Camping World RV Sales, and various Does. On November 27, 2023, Plaintiffs dismissed Heartland Recreational Vehicles LLC and filed a Doe amendment naming Forest River, Inc. ("Forest River") as a defendant in place of "Doe 1." Plaintiffs also filed the operative first amended complaint ("FAC") on the same date.

The FAC states eight causes of action: (1) Violation of the Song-Beverly Consumer Warranty Act (against all defendants); (2) Violation of the Consumers Legal Remedies Act (against all defendants); (3) Breach of the implied warranty of merchantability—Civil Code section 1794 (against all defendants); (4) Failure to commence repairs within a reasonable time –Civil Code section 1793.2(b) (against all defendants); (5) Fraud and Deceit (as to Camping World only); (6) Negligent Misrepresentation (as to Camping World only); (7) Violation of the Unfair Competition Law (against Forest River and Camping World); and (8) Elder Abuse (against Forest River and Camping World). There are no exhibits attached to the FAC.

Plaintiffs' filing of the FAC was the one amendment permitted without leave of court under Code of Civil Procedure section 472. Defendant Stier's RV Center LLC filed an answer to the FAC on February 29, 2024.

Currently before the court are two matters filed by defendant Forest River: (1) a demurrer to the FAC's second, seventh, and eighth causes of action, and (2) a motion to strike portions of the FAC. Both matters are unopposed. Any timely opposition to these matters was due on May 3, 2024. Rather than oppose either matter, Plaintiffs filed a second amended complaint on April 30, 2024.

The court now makes the following rulings.

First, the court STRIKES the unauthorized second amended complaint on its own motion under Code of Civil Procedure section 436, subdivision (b). The FAC is still the operative pleading in the case. After Plaintiffs filed the FAC on November 27, 2023, they no longer had the ability to amend without prior leave of court, and such leave was neither sought nor granted here.

Second, the court SUSTAINS Forest River's demurrer to the FAC's second, seventh, and eighth causes of action on the ground that they fail to state facts sufficient to support a claim against Forest River. Because Plaintiffs failed to provide *any* response to the demurrer—

much less one that shows that the pleading defects can be cured—the court does so without leave to amend.[1]

Third, the court DENIES Forest River's unopposed motion to strike portions of the FAC. Forest River has moved to strike paragraphs 65-67, paragraphs 100-101 (along with paragraph 6 of the prayer), paragraph 151 (along with paragraph 8 of the prayer), and paragraphs 161 and 163 of the FAC. (See Jan. 31, 2024 Notice of Motion at p. 2:8-22.)

- Forest River has not established that the general allegations in paragraph 65-67 regarding the warranty for the subject vehicle are irrelevant, false or improper. Indeed, these general allegations may relate to other causes of action: Forest River has not challenged the first, third, or fourth causes of action.

- The motion to strike paragraphs 100-101 (part of the second cause of action) and paragraph 6 of the prayer is moot in light of the court's ruling on the demurrer to the second cause of action. Paragraph 6 of the FAC's prayer makes no reference to Forest River.

- The motion to strike paragraph 151 (part of the seventh cause of action) and paragraph 8 of the prayer is also moot in light of the court's ruling on the demurrer to the seventh cause of action. Paragraph 8 of the FAC's prayer makes no reference to Forest River.

- The motion to strike paragraphs 161 and 163 (part of the eighth cause of action) is moot in light of the court's ruling on the demurrer to the eighth cause of action.

IT IS SO ORDERED.

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[1] The court notes that the unauthorized second amended complaint dropped Forest River as a defendant from the seventh and eighth causes of action.

Calendar Line 3
Case Name: *Whispering Oaks Residential Care Facility LLC et al. v. Travelers Property Casualty Company of America et al.*
Case No.: 18CV336673

This is an insurance coverage dispute between plaintiffs Whispering Oaks Residential Care Facility LLC ("Whispering Facility"), Whispering Oaks RCF Management Co. Inc. ("Whispering Management"), and Naren Chaganti (collectively, "Plaintiffs") and defendants Travelers Property Casualty Company of America ("Travelers"), Joseph Tancredy, and Robert Killingsworth (collectively, "Defendants").[2] Plaintiffs allege that Travelers had a duty to defend or indemnify them in six underlying actions, and that Defendants engaged in a conspiracy with several nonparties to prevent Plaintiffs from obtaining the contractual benefits under its tenant's general commercial liability insurance policy. Travelers and Tancredy have now filed a motion for summary judgment addressing all of the remaining causes of action against them.

For the reasons stated below, the court GRANTS the motion for summary judgment.

I. BACKGROUND

A. The Whispering Oaks Residential Care Facility and The Policy

Chaganti is the sole owner of Whispering Facility and Whispering Management. (Declaration of Naren Chaganti ("Chaganti Decl."), ¶ 1.) Whispering Facility and Whispering Management owned and operated the Whispering Oaks Residential Care Facility ("Whispering Oaks RCF") located at 1450 Ridge Road, Wildwood, Missouri 63021. (Chaganti Decl., ¶¶ 1-2.) Plaintiffs also operated a public water system ("PWS") that supplied water to Whispering Oaks RCF and a neighboring skilled nursing facility. (*Id.* at ¶ 3.) The PWS consists of a 100-foot tall, 100,000-gallon water tower located at the top of a ridge, with a deep water well and a water pumping system. (*Id.* at ¶ 5.) Because the water tower is the highest point in the area, it is a suitable location for wireless communications antennae, and in 1996, AT&T (operating as New Cingular Wireless PCS LLC) entered into a 30-year lease with the property owner at the time to install wireless equipment on the water tower. (*Id.* at ¶¶ 5-6.)

Plaintiffs claim that the PWS is regulated by the Missouri Department of Natural Resources ("DNR" or "Missouri DNR") and that it was classified by the DNR as a Non-Transient Non-Community Water System. (Chaganti Decl., ¶¶ 3-4.)

In April 2008, non-party Cricket Communications Inc. ("Cricket") entered into a commercial lease agreement with Whispering Oaks Health Care Center, Inc. (Chaganti Decl., ¶ 7.) Plaintiffs Whispering Facility and Whispering Management are the successors-in-interest to Whispering Oaks Health Care Center, Inc. on the lease. (*Id.* at ¶ 8.) Under the lease,

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[2] This court (Judge Kirwan) previously granted Killingsworth's motion to quash service of summons on September 8, 2022, and the Court of Appeal affirmed that order. Plaintiffs assert that Tancredy is in default, and Defendants' reply ignores this assertion. (Opposition to Defendants' Motion for Summary Judgment/Adjudication (Opp.), pp. 6, 8.) The court's file reflects that Plaintiffs requested entry of default as to Tancredy in July 2022 but that default was not entered by the clerk's office. (See July 20, 2022 Request for Entry of Default.)

Cricket was entitled "to lease certain space on a water tank located on its premises for use in Cricket's telecommunication network." (*Id.* at ¶ 9.) The lease agreement also required Cricket to obtain commercial general liability insurance in the amount of $1 million. (*Id.* at ¶ 10.) Travelers issued a commercial general liability policy (the "Policy") to Leap Wireless International for the policy period of September 23, 2009 to September 23, 2010. (Nonmovant's Responses to Moving Party's Separate Statement [] ("SUF") 1.) The Policy identified Cricket Communications Inc. as an additional named insured. (*Ibid.*) The Policy, attached as Exhibit 1 to Defendants' Appendix of Evidence ("Defendants' Appx."), provides in pertinent part:

SECTION I – COVERAGES
COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

   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. 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. . . .

   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";

      (2) The "bodily injury" or "property damage" occurs during the policy period . . . .

(Defendants' Appx., Exh. 1, TRAV 0049 [some boldface omitted].)

SECTION V – DEFINITIONS

* * *

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

* * *

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general

harmful conditions.

* * *

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 cause it; or

b. loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

(Defendants' Appx., Exh. 1, TRAV 0060-TRAV 0063 [some boldface omitted].)

The Policy had a "Web XTend Liability" endorsement that modified the scope of coverage to include "advertising injury" and "web site injury," although Plaintiff does not rely on these provisions. In addition, it modified the definition of "Suit" in "Section V – Definitions" as follows:

> "Suit" means a civil proceeding in which damages because of "bodily injury," "property damage," "personal injury," "advertising injury" or "web site injury" to which this insurance applies are alleged. "Suit" includes:
>
> a. An arbitration proceeding in which such damages are claimed and to which you must submit or do submit with our consent; or
>
> b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which you submit with our consent.

(Defendants' Appx., Exh. 1, TRAV 0088-TRAV 0089 [some boldface omitted].)

In addition, the Policy was further modified by the Web Xtend Liability endorsement as follows:

COVERAGE B. PERSONAL INJURY, ADVERTISING INJURY AND WEB SITE INJURY LIABILITY

1. Insuring Agreement.

(a) We will pay those sums that the insured become legally obligated to pay as damages because of "personal injury", "advertising injury" or "web site injury" to which this insurance applies. We

will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal injury", "advertising injury", or "web site injury" to which this insurance does not apply.

(Defendants' Appx., Exh. 1 at TRAV 0085 [some boldface omitted].)

SECTION V – DEFINITIONS
PERSONAL AND ADVERTISING INJURY

The definition of "Personal and advertising injury" (**SECTION V – DEFINITIONS**) is deleted in its entirety and replaced by the following definitions of "advertising injury" and "personal Injury":

* * *

"Personal injury" means injury, other than "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor, provided that the wrongful eviction, wrongful entry or invasion of the right of private occupancy is performed by or on behalf of the owner, landlord or lessor of that room, dwelling or premises;

d. Oral, written or electronic publication of material that slanders or libels a person or organization or disparages a person's or organizations' goods, products or services, provided that claim is made or "suit" is brought by a person or organization that claims to have been slandered or libeled, or whose goods, products or services have allegedly been disparaged; or

e. Oral, written or electronic publication of material that appropriates a person's likeness, unreasonably places a person in a false light or

> gives unreasonable publicity to a person's private life.

(Defendants' Appx., Exh. 1 at TRAV 0088 [some boldface omitted].)

B. The Underlying Actions

It is undisputed that on or about January 8-10, 2010, a frozen pipe cut off the water supply to Whispering Oaks RCF and resulted in its closure. (TAC, ¶¶ 19-20; Chaganti Decl., ¶ 25.) On January 11, 2010, St. Louis County in Missouri ordered the closure of Whispering Oaks RCF, and on January 14, 2010, the Missouri DNR sued Plaintiffs for violations of the Missouri Safe Drinking Water Law. (Defendants' Response to Plaintiffs' Separate Statement of Additional Facts [] ("Add'l SUF"), P13-P14.) Plaintiffs allege that Travelers had a duty to defend them in six different matters arising out of the frozen pipe incident:

1. The DNR Suit

The Missouri DNR brought a suit for an injunction and civil penalties against Whispering Oaks RCF under the Missouri Safe Drinking Water Law. The suit alleged that Whispering Oaks RCF failed to comply with state laws and regulations requiring it to have a certified operator for its water system, failed to have an emergency operations plan, failed to maintain water pressure, and failed to monitor for residual disinfectant concentrations. (Defendants' Appx., Exhs. 5-8.) The suit eventually resulted in a jury verdict in favor of the DNR, and the Missouri court entered judgment imposing civil penalties of $135,600.00 and a permanent injunction barring Whispering Oaks RCF from "operating any public water system within the State of Missouri, other than Defendant's public water system located at 1450 Ridge Road." (*Id*., Exh. 8, p. 5.)

2. The DHSS Suit

The DHSS case arose out of inspections of Whispering Oaks RCF performed by the Missouri Department of Health and Senior Services ("DHSS"). (SUF 8.) The inspection found violations of Missouri law and resulted in the denial of Whispering Management's application for a license to continue operating Whispering Oaks RCF. (*Ibid.*)

Whispering Management and Whispering Facility then filed a complaint with the Administrative Hearing Commission for the State of Missouri on May 29, 2009, appealing the denial of its license application. (Defendants' Appx., Exh. 9.) The commission affirmed the denial of the license on December 7, 2012. Whispering Management then appealed to the Circuit Court of Cole County, which affirmed the decision on May 16, 2013. (*Id*., Exh. 10.) Whispering Management further appealed the Circuit Court's decision to the Missouri Court of Appeals, which also affirmed on August 5, 2014. (*Id*., Exh. 11.)

3. The St. Louis County Notice to Vacate

On January 11, 2010, St. Louis County issued a "Notice to Vacate Premises" for Whispering Oaks RCF, requiring Plaintiffs to vacate the facility and transfer residents to state-approved facilities within 48 hours, based on the absence of running water, overflowing toilets and sewage waste, and conditions constituting a health hazard that rendered the building unfit for occupancy. (Defendants' Appx., Exh. 12.)

4. The Cricket Suits

On August 16, 2013, Plaintiffs filed a suit in Missouri state court against AT&T and Cricket Communications, Inc. that was later removed to federal court in the Eastern District of Missouri. (Defendants' Appx., Exhs. 13-16.) According to the complaint in that case, someone unplugged a heating coil that protected the water pipes at Whispering Oaks from freezing. (*Id.*, Exh. 14 at p. 15.) The complaint also alleged that AT&T installed additional equipment and cables on the water tower without permission and that Cricket failed to obtain liability insurance, as required under its lease.

On November 20, 2015, Chaganti filed suit against Cricket in this court, in an action entitled *Chaganti v. Cricket Communications Inc., et al.* (Santa Clara County Superior Court Case No. 2015-1-CV-288323), which is still pending. (Defendants' Appx., Exh. 17.) The complaint in the 2015 case alleges, among other things, that Cricket breached the lease by failing to obtain liability insurance. (*Id.*, Exh. 18.)

5. The Federal Document Subpoenas

The Federal Document Subpoenas are document subpoenas issued in May 2011 by the United States Attorney's Office for the Eastern District of Missouri in connection with a health care fraud investigation of Whispering Oaks RCF, following the 2010 frozen pipe incident. (Defendants' Appx., Exh. 19; Chaganti Decl., ¶ 45.)

6. The Medical Board Disciplinary Action

The Medical Board Disciplinary Action was a disciplinary action from April 2010 against Dr. Surendra Chaganti, the psychiatrist at Whispering Oaks RCF and the brother of Plaintiff Naren Chaganti. (Defendants' Appx., Exh. 22; Chaganti Decl., ¶ 40.)

C. The Present Lawsuit

After several rounds of demurrers, Plaintiffs filed the operative Third Amended Complaint (TAC) on April 5, 2023, asserting seven causes of actions against Defendants:

1. Declaratory judgment;
2. Breach of contract;
3. Breach of duty of good faith and fair dealing;
4. Bad faith;
5. Misrepresentation and/or concealment;
6. Vexatious refusal to pay; and
7. Conspiracy.

The TAC also asserts an eighth cause of action for breach of contract against Jeff Kaplan, K&K Confidential Investigations, and Savannah Moore that are not at issue in the present motion.

Travelers and Tancredy now move for summary judgment, or alternatively, summary adjudication, on each of the seven causes of action against them.

II. PRELIMINARY MATTERS

A. Requests for Judicial Notice

Both parties have filed requests for judicial notice.

Defendants ask the court to take judicial notice of various exhibits submitted with their motion: copies of complaints, judgments, court dockets, motions, and other filings in the various underlying actions involving Plaintiffs and Whispering Oaks RCF. The court GRANTS Defendants' request and takes judicial notice of the documents, including the allegations and claims asserted in the underlying proceedings, *but not* the truth of any factual findings or assertions contained in these documents. (See *People v. Woodell* (1998) 17 Cal.4th 448, 455 ["'Evidence Code sections 452 and 453 permit the trial court to "take judicial notice of the *existence* of judicial opinions and court documents, along with the truth of the results reached--in the documents such as orders, statements of decision, and judgments--but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact." [Citations.]'"] [emphasis in original]; *Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112, 120 ["Judicial notice is properly taken of the existence of a factual finding in another proceeding, but not of the truth of that finding. [Citations.]"].)

Plaintiffs ask the court to take judicial notice of state and federal regulations, as well as a Rule of the Missouri Supreme Court, a United States Environmental Protection Agency (EPA) memorandum with the subject line, "Definition of a Non-Transient, Non-Community Water System" (Exh. 3), and an August 25, 2009 letter from the Missouri DNR (Exh. 6). The EPA memorandum and Missouri DNR letter appear to be official government documents (Evid. Code, § 452, subd. (c)), and so the court GRANTS Plaintiffs' request. At the same time, the court does not take judicial notice of the truth of any disputed contents of the EPA memorandum and Missouri DNR letter. (See *Engine Manufacturers Association v. State Air Resources Board* (2014) 231 Cal.App.4th 1022, 1032, fn. 7 [taking judicial notice of "state and federal regulations"]; *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 193-194 [court may not take judicial notice of truth of contents of official government documents].)

B. Defendants' Separate Statement

Plaintiffs argue that Defendants' motion should be denied on the ground that the separate statement does not comply with rule 3.1350 of the California Rules of Court, because it combines issues, such as the duty to defend and indemnify. (Opp. at p. 8.) The court finds that Defendants' separate statement is in substantial compliance with California Rules of Court, rule 3.1350(h) for a motion for summary judgment. The requirement that issues be separately identified applies to separate statements in support of a motion for summary adjudication. (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 118.) Here, Defendants have moved for summary judgment and summary adjudication in the alternative, and the court is primarily treating this motion as one for summary judgment. Finally, "Plaintiffs have not explained how any alleged deficiency in [Defendants'] Separate Statement of Material Facts impaired Plaintiffs' ability to marshal evidence to show that material facts were in dispute[.]" (*Ibid.*)

C. Request to File Oversized Brief

Plaintiffs have submitted a request to file an oversized brief. This should have been presented to the court *in advance of the hearing* as an ex parte application, but in any event, the court GRANTS the request.

III. LEGAL STANDARDS

A motion for summary judgment must dispose of the entire action, while a motion for summary adjudication may dispose of a cause of action, affirmative defense, or punitive damages, and may also determine whether a defendant owed a duty to a plaintiff. (Compare Code Civ. Proc., § 437c, subd. (a) with Code Civ. Proc., § 437c, subd. (f).) Nonetheless, "'[a] motion for summary adjudication . . . shall proceed in all procedural respects as a motion for summary judgment.' [Citation.]" (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 630.)

The moving party "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact[.]" (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850 (*Aguilar*); see also *Quidel Corp. v. Superior Court* (2020) 57 Cal.App.5th 155, 163 ["A plaintiff moving for summary adjudication meets its burden if it proves each element of the cause of action. [Citation.]"].) If the party opposing summary judgment then presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Aguilar, supra*, 25 Cal.4th at p. 856.)

On summary judgment, "the moving party's declarations must be strictly construed and the opposing party's declaration liberally construed. [Citation.]" (*Hepp v. Lockheed-California Co*. (1978) 86 Cal.App.3d 714, 717; see *Johnson v. American Standard, Inc*. (2008) 43 Cal.4th 56, 64 [the evidence is viewed in the light most favorable to the opposing plaintiff; the court must "liberally construe plaintiff's evidentiary submissions and strictly scrutinize defendant's own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor"].)

IV. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT/ADJUDICATION

Defendants move for summary judgment with respect to all remaining causes of action against them in the TAC, arguing that the first six causes of action against them fail because Travelers had no duty to defend or indemnify Plaintiffs in any of the underlying matters arising out of the frozen pipe incident. Defendants further argue that Plaintiffs have no evidence to support their seventh cause of action and that it is time-barred in any event.

A. Choice of Law

The parties do not claim that there is—and the court has not found—a choice of law provision in the Policy. In their opening brief, Defendants rely solely on California law. (See Memorandum of Points and Authorities in Support of Travelers Property Casualty Company of America's and Joseph Tancredy's Motion [] ("MPA").) Plaintiffs insist in their opposition that Missouri law applies under Civil Code section 1646. On reply, Defendants argue that even if Missouri law applies, they still prevail.

Despite Plaintiffs' insistence that Missouri law applies, they have not shown that there is any conflict between Missouri law and California law on any material issue before the court. In fact, the opposition brief repeatedly emphasizes the ways in which "California law is the same" as Missouri law. (E.g., Opp., p. 11:24; see also Opp., pp. 9:9-26:25.) As a result, even if it were necessary for the court to apply a "governmental interest" choice-of-law analysis to this case—a question that neither side has fully briefed or presented in the insurance policy documents—the court would find no difference in the laws of each jurisdiction. In the end, Defendants are entitled to summary judgment under either California or Missouri law.

B. Whether Travelers Owed a Duty to Defend

"Summary adjudication is appropriate to dispose of an issue of duty." (*Watts Industries, Inc. v. Zurich American Ins. Co.* (2004) 121 Cal.App.4th 1029, 1038 (*Watts*); see *Doe Run Res. Corp. v. Am. Guar. & Liab. Ins.* (Mo. 2017) 531 S.W.3d 508, 509 (*Doe Run*) [reversing grant of summary judgment on duty to defend issue].) "In general, interpretation of an insurance policy is a question of law that is decided under settled rules of contract interpretation." (*State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 194; *Griffitts v. Old Republic Ins. Co.* (Mo. 2018) 550 S.W.3d 474, 478.) "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civ. Code, § 1638; *Doe Run, supra*, 531 S.W.3d at p. 511 ["When interpreting an insurance policy, this Court gives the policy language its plain meaning, or the meaning that would be attached by an ordinary purchaser of insurance."].)

"'The duty to defend is contractual.'" (*Dua v. Stillwater Ins. Co.* (2023) 91 Cal.App.5th 127, 136 (*Dua*), quoting *Buss v. Superior Court* (1997) 16 Cal.4th 35, 47; see *Renco Group, Inc. v. Certain Underwriters at Lloyd's, London* (Mo.Ct.App. 2012) 362 S.W.3d 472, 479 (*Renco*).) The duty to defend is broad and includes claims against the insured that create a potential for indemnity. (*Dua, supra*, 91 Cal.App.5th at p. 136; see *Renco, supra*, 362 S.W.3d at p. 480.) Nevertheless, "if, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance." (*Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 655; see *Renco, supra*, 362 S.W.3d at p. 479.)

The duty to defend arises "'if the insurer "becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement."'" (*Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co.* (2018) 5 Cal.5th 216, 222 [quoting *Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 308]; *Truck Ins. Exch. v. Prairie Framing, LLC* (Mo.Ct.App. 2005) 162 S.W.3d 64, 79 (*Truck Ins. Exch.*).) "An insurer's duty to defend depends not upon the ultimate adjudication of policy coverage, but upon facts the insurer knew at the inception of the underlying lawsuit." (*Watts, supra*, 121 Cal.App.4th at p. 1039; *Renco, supra*, 362 S.W.3d at p. 479 ["An insurance company has a duty to defend an insured when the insured is exposed to potential liability to pay based on the facts known at the outset of the case[.]"].)

"When a complaint states multiple claims, some of which are potentially covered by the insurance policy and some of which are not, it is a mixed action. In these cases, 'the insurer has a duty to defend as to the claims that are at least potentially covered, having been paid premiums by the insured therefor, but does not have a duty to defend as to those that are not, not having been paid therefor.'" (*Gonzalez v. Fire Ins. Exchange* (2015) 234 Cal.App.4th

1220, 1231 (*Gonzalez*) [quoting *Buss v. Superior Court* (1997) 16 Cal.4th 35, 48]; see also *Superior Equip. Co. v. Maryland Cas. Co.* (Mo.Ct.App. 1998) 986 S.W.2d 477, 482 ["The presence of some potentially insured claims in complaint gives rise to a duty to defend, even though claims beyond coverage may also be present."].)

As explained in *Gonzalez*:

> This legal framework shapes a party's burden when seeking summary judgment. [Citation.] "To prevail [on the duty to defend], the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*. Facts merely tending to show that the claim is not covered, or may not be covered, but are insufficient to eliminate the possibility that resultant damages (or the nature of the action) will fall within the scope of coverage, therefore add no weight to the scales. Any seeming disparity in the respective burdens merely reflects the substantive law." [Citation.]

(*Gonzalez, supra*, 234 Cal.App.4th at pp. 1229-1230, emphasis and alteration original; see *Renco, supra*, 362 S.W.3d at p. 479 ["To extricate itself from a duty to defend the insured, the insurance company must prove that *there is no possibility of coverage*. [Citation.]"], emphasis original.) But "'even where the insurer brings a motion for summary judgment[,]'" the "'insured has the burden of proving its claim falls within the scope of the policy's basic coverage[.]'" (*Gonzalez, supra*, 234 Cal.App.4th at p. 1230 [quoting *Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398, 1407]; see also *Truck Ins. Exch., supra*, 162 S.W.3d at p. 80 [insured bears burden of proving coverage].)

Defendants argue that Travelers had no obligation to defend in any of the six underlying actions, because the Policy only obligates it to defend suits seeking "damages" for "bodily injury[,]" "property damage[,]" "personal injury[,]" "advertising injury[,]" or "website injury" and none of the actions fall within the Policy's coverage. According to Plaintiffs, the frozen pipe incident triggered Travelers' duty to defend because the subsequent suits and proceedings were all interrelated, and each arose "because of property damage." (Opp., p. 12.)

1. The DNR Suit

As noted above, shortly after the frozen pipe incident at Whispering Oaks RCF, the Missouri DNR filed suit in Missouri state court seeking an injunction and civil penalties under the Missouri Safe Drinking Water Law. (Defendants' Appx., Exhs. 5-8.) Defendants argue that Travelers had no obligation to defend the DNR Suit because the complaint for injunctive relief and civil penalties does not constitute a "suit" for "damages" under the Policy. (MPA at pp. 13-15.) Plaintiffs respond that injunctions seeking compliance with environmental laws and actions for civil penalties do constitute "suits" for "damages" under California and Missouri law. (Opp., pp. 15-19.)

Again, "[t]he duty to defend is contractual." (*Dua, supra,* 91 Cal.App.5th at p. 136; *Crown Center Redevelopment Corp. v. Occidental Fire & Casualty Co.* (Mo.Ct.App. 1986) 716 S.W.2d 348, 365 ["an insurer's duty to defend is purely contractual"].) The Policy defines

"property damage" as "physical injury to tangible property, including all resulting loss of use of that property" or "loss of use of tangible property that is not physically injured." Meanwhile, "'Suit' means a civil proceeding in which damages because of 'bodily injury,' 'property damage,' 'personal injury,' 'advertising injury' or 'web site injury' to which this insurance applies are alleged."

The determinative question is therefore whether the DNR Suit (or any other proceeding allegedly related to the frozen pipe incident) constitutes a "suit" in which "damages" because of "property damage" are alleged.

Plaintiffs argue that "[b]oth Missouri and California cover defense of injunction and civil penalties in environmental enforcement actions." (Opp., p. 7:1-2 [citing *Farmland Indus., Inc. v. Repub. Ins. Co.* (Mo. 1997) 941 S.W.2d 505, 512 (*Farmland*) and *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 841-842 (*AIU*)].) These are both CERCLA cases. After considering these decisions, the court is not persuaded that *Farmland* and *AIU* are as broad as Plaintiffs claim.

The *Farmland* court explained that "Farmland's cost of undertaking the actions required by the government under CERCLA [the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9601 et seq.)] or similar state laws are 'damages' within the ordinary meaning of the term," because "the equitable relief at issue is a cost that Farmland is legally obligated to pay as compensation or satisfaction for a wrong or injury." (*Farmland, supra*, 941 S.W.2d at p. 509.) In other words, equitable or non-monetary relief may constitute "damages" if it is compensatory in nature. This concept finds support in the Eighth Circuit's subsequent interpretation of *Farmland* in *State Farm Fire & Casualty Co. v. National Research Center for College & University Admissions* (8th Cir. 2006) 445 F.3d 1100, 1103 (*State Farm*). There, the defendant argued (like Plaintiffs here) that *Farmland* stands for the broad proposition that "damages" includes "equitable relief" and that an action brought by the Federal Trade Commission (FTC) seeking non-monetary relief was therefore a suit for "damages" covered under an insurance policy. The Eighth Circuit disagreed:

> However, the outcome in *Farmland* depends on the fact that the relief sought in that case (unlike the relief sought here) was compensatory. The Missouri Supreme Court invokes the definition of "damages" as "*compensation* or satisfaction imposed by law for a wrong or injury caused by a violation of a legal right." [Citation.] The court reasons that the action required under the consent agreement 'is a cost that Farmland is legally obligated to pay as *compensation* or satisfaction for a wrong or injury."

(*State Farm, supra*, 445 F.3d at pp. 1103-1104, emphasis in original.) Based on this interpretation of *Farmland*, the court in *State Farm* determined that because "the relief sought by the FTC—an order that the NRCCUA stop making misrepresentations and make clear and conspicuous disclosures—is not designed to compensate anyone . . . , that relief does not constitute 'damages' under the Policy." (*Id.* at p. 1104.)

Farmland also explained that "fines or penalties are not included within the ordinary meaning of 'damages' " because they are "not compensation or reparation for an injury; rather, [they are] a sum imposed as punishment." (*Farmland, supra*, 941 S.W.2d at pp. 510-511.) The Missouri Supreme Court again focused on the compensation aspect of a suit in *Columbia*

Casualty Co. v. Hiar Holding, L.L.C. (Mo. 2013) 411 S.W.3d 258, holding that an insurer had a duty to defend under a policy covering "property damage" and "advertising injury" for a suit seeking statutory damages under the Telephone Consumer Protection Act (TCPA), because those statutory damages were intended to act as a liquidated damages provision and therefore represented compensable harms as opposed to a penalty. (*Id.* at pp. 267-268, citing *Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc.* (8th Cir. 2005) 401 F.3d 876, 879.)

California law is similar. In *AIU*, "the Supreme Court held that comprehensive general liability policies, materially similar to those at issue here, could be reasonably understood to cover toxic cleanup costs imposed in litigation under [CERCLA] and related state and federal laws." (*Bullock v. Md. Casualty Co.* (2001) 85 Cal.App.4th 1435, 1441 (*Bullock*).) The *AIU* Court recognized that the ordinary meaning of the word "damages" requires "'compensation,' in 'money,' 'recovered' by a party for 'loss' or 'detriment' it has suffered through the acts of another." (*AIU, supra*, 51 Cal.3d at p. 826.) The Court reached this conclusion because "the relief sought in the underlying suits at issue here is not punitive. CERCLA, for example, is a strict liability statute that serves essentially remedial goals, irrespective of fault." (*Id*. at p. 836.) The court also recognized that "prophylactic costs – incurred to pay for measures taken in advance of any release of hazardous waste – are not incurred 'because of property damage.'" (*Id*. at p. 843.)

Although Plaintiffs urge the court to adopt a broader reading of *AIU*, "[t]he *AIU* court expressly declined to decide whether the word 'damages' in a general liability insurance policy included the costs of injunctive relief in contexts other than those involving CERCLA. In fact, it characterized the notion as a 'more debatable proposition.'" (*Cutler-Orosi Unified School Dist. v. Tulare County School etc. Authority* (1994) 31 Cal.App.4th 617, 629 [quoting *AIU, supra*, 51 Cal.3d at p. 839, fn. 17].) In *Bullock, supra,* the Court of Appeal explained that "*AIU* does not stand for the proposition that whenever a public agency seeks to recoup costs of enforcement, a judicial award embodying such recoupment constitutes damages for purposes of typical liability policies." (85 Cal.App.4th at p. 1448.) Instead, *AIU* focused on whether the relief is remedial or prophylactic. The remedies at issue in *Bullock* were "not intended to make anyone whole for, or compensate for the damaging effects of, past conduct. They are intended to avert the *future* loss of housing units that *will* result from the conversion of residential hotel rooms to nonresidential use. In this sense they are prospective only, and are thus the functional equivalent of traditional injunctive remedies, not compensatory damages." ((*Id.* at p. 1446 [emphasis in original].) *Bullock* ultimately concluded that because the underlying complaint sought penalties, it was necessarily punitive in nature and thus not covered by the comprehensive general liability policy. (*Id.* at pp. 1448-1449.)

By contrast, in a case relied on by Plaintiffs, *Watts Industries Inc. v. Zurich American Insurance Co.* (2004) 121 Cal.App.4th 1029, 1035 (*Watts*), the Court of Appeal held that a suit against water system parts manufacturers by municipalities who claimed their water systems were being contaminated by substandard parts could constitute a suit for "damages" under the policy. Whether viewed as "traditional damages"—*e.g.*, "a court-ordered monetary payment recovered by a party for loss or detriment it has suffered through the acts of another"—" or as reimbursement of government response costs, they constitute "damages" under *AIU*." (*Id*. at pp. 1040-1041.) The Court made this determination because "a municipal water system is a conduit through which water flows continuously, as Zurich acknowledges, the municipality owns all the water in its system at any one time as an entire body" and because "at any one

time, a portion of the total water in the system is becoming contaminated. Thus at any one time, the municipality's water, as a whole, is damaged." (*Id.* at p. 1044.)

Here, the original DNR complaint requested an injunction requiring Plaintiffs to comply with regulations concerning safe drinking water, as well as an order imposing penalties. (Defendants' Appx., Exhs. 5-7.) Nothing in the complaint, amended complaint, or the judgment entered in the DNR Suit indicates that in pursuing claims under the Missouri Safe Drinking Water Law, the DNR sought these remedies as compensation for the residents of the facility or the public at large, as damages for harm to public property (as in *Watts*), or to recover the costs of clean up or enforcement (as in *AIU*). Plaintiffs present no contrary evidence in opposition. While they cite *Los Angeles County Metropolitan Transportation Authority v. Superior Court* (2004) 123 Cal.App.4th 261 for the proposition that a civil penalty provision can sometimes be intended to compensate rather than to punish, in that case, there was at least some indication that the civil penalty under the Unruh Civil Rights Act was intended to compensate. (See *id*. at p. 276.) No such showing has been made here.

As a result, the only reasonable conclusion is that the injunctive relief and civil penalties were prospective in nature and/or intended to punish. They were not intended to compensate anyone for past harm, but rather to discourage further non-compliance. Because there was no compensatory aspect to the relief sought by the DNR, there is no basis for concluding under either California or Missouri law that the DNR Suit was a "suit" for "damages" under the Policy.

Plaintiffs make the additional argument (applying the maxim of statutory construction *expressio unius est exclusio alterius*) that because the Policy excludes coverage for specific types of "penalties" ("arising out of the willful violation of a penal statute or ordinance relating to the sale of pharmaceuticals," arising from the "Telephone Consumer Protection Act," and arising from "[a]ny taxes, fines, interest, penalties or other costs imposed under . . . the Internal Revenue Code" (Defendants' Appx., Exh. 1, TRAV 0101, TRAV 0109, TRAV 0143)), it should not be interpreted to exclude coverage for any other penalties, including punitive civil penalties. (Opp., p. 16.) But the question of what the Policy covers and what it excludes are distinct inquiries. (See *Gonzalez*, *supra*, 234 Cal.App.4th at p. 1237 ["Determining whether an exclusion applies is unlike our earlier analysis of the Fire policy, which centered on the initial question of *coverage*."] [emphasis original].) Just because something is not expressly excluded from insurance coverage does not necessarily mean that it is included within that coverage. Plaintiffs ultimately have the burden of establishing that the claim falls within the scope of the Policy's coverage, before they can argue that it is not excluded. (See *id.* at p. 1230.)

The court concludes Travelers did not have a duty to defend the DNR Suit.

2. The DHSS and Cricket Suits

Travelers argues that it had no duty to defend either the DHSS or Cricket suits because those were brought by the Plaintiffs against DHSS and Cricket.

The DHSS Suit actually *predates* the frozen pipe incident by several months, having begun in 2009. The letter from the DHSS to Whispering Oaks RCF, dated May 15, 2009, refers to alleged non-compliance "in the areas of Fire Safety Standards, Physical Plant Requirements, Administrative/Personnel and Residential Care Requirements, Resident Funds

and Property, and State Statute[.]" (Defendants' Appx., Exh. 9.) Moreover, the Decision by the Administrative Hearing Commission is focused on various problems with the Whispering Oaks RCF that are entirely unrelated to the Cricket lease. (*Id*., Exh. 10.)

As for the Cricket Suits, while they do have a direct connection to the frozen pipe incident, it is undisputed they are suits brought *by* Plaintiffs in Missouri and California seeking recovery from AT&T and Cricket for losses allegedly arising out of that incident. They are not suits for which Plaintiffs, as additional insureds, would "become *legally obligated to pay as damages*" because they are affirmative suits *seeking* damages.

Plaintiffs have not shown that the Policy required Travelers to bring claims on their behalf against DHSS or Cricket. They argue that Travelers had a duty to defend all the suits because they are "inextricably intertwined" with each other, but California courts treat the duty to present a defense as distinct from a contractual obligation to pursue counterclaims or a cross-complaint. (See *Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078, 1095 ["Liability insurance policies impose on an insurer the obligations to defend and indemnify an insured, but these policies generally do not impose an obligation to pursue claims for affirmative relief against third parties."]; *James 3 Corp. v. Truck Ins. Exch.* (2001) 91 Cal.App.4th 1093, 1104 ["Under the policy, Truck is contractually obligated to provide the insureds with a defense. However, there is nothing in the policy that contractually obligates Truck to fund and prosecute an insured's affirmative relief counterclaims or cross-complaints."]; *Barney v. Aetna Casualty & Surety Co.* (1986) 185 Cal.App.3d 966, 975 ["Moreover, Aetna had no duty under the policy to file a cross-complaint on Barney's behalf, for nothing in the policy provisions imposes upon the insurer the duty to prosecute claims of the insured against third parties."].)

The court has been given no reason to believe that the outcome would be any different under Missouri law, because determining an insurer's duty to defend under Missouri law similarly starts with looking at the language of a policy. (See *Allen v. Cont'l Western Ins. Co.* (Mo. 2014) 436 S.W.3d 548, 553-554; *View Home Owners Ass'n v. Burlington Ins. Co.* (Mo.Ct.App. 2018) 552 S.W.3d 726, 729-730.)

More fundamentally, Plaintiffs do not explain how, if Travelers had no duty to defend them in the DNR Suit, it could nevertheless be obligated to bring claims on Plaintiffs' behalf to offset any potential liability from that action. Plaintiffs cite cases discussing the "inextricably intertwined" theory and an insurer's obligation to bring "affirmative claims" on the insured's behalf in the context of an insurer's duty to defend. (E.g., *Great West Cas. Co. v. Marathon Oil Co.* (N.D.Ill. 2003) 315 F.Supp.2d 879, 881 ["Nevertheless, the authority appears virtually uniform in holding that there is a class of affirmative claims which, if successful, have the effect of reducing or eliminating the insured's liability and that the costs and fees incurred in prosecuting such 'defensive' claims are encompassed in an insurer's duty to defend."].) But Plaintiffs cite no authority for the proposition that even if there is *no* duty to defend a suit, there is still an obligation to have brought "affirmative claims" on an insured's behalf.

The court concludes that Travelers had no duty to defend either the DHSS or Cricket Suits.

3. St. Louis County Notice to Vacate.

Soon after the frozen pipe incident, St. Louis County issued a "Notice to Vacate" the Whispering Oaks RCF, effectively shutting it down. (Defendants' Appx., Exh. 12.) The Notice gives two reasons: "No running water service to plumbing fixtures" and "Sewage waste overflowing water closets." (*Id.*) Plaintiffs' only argument in claiming a duty to defend is that this action is an injunction and therefore "is covered for the same reason that the DNR suit is covered." For the reasons discussed above, the Court finds that Travelers had no duty to defend the St. Louis County Notice to Vacate.

4. Federal Document Subpoenas

As noted above, the Department of Justice (DOJ) filed a discovery motion in federal court in Missouri relating to a health care fraud investigation following the 2010 frozen pipe incident. Plaintiffs argue that the subpoenas were "a precursor to a charge" and sought documents relating to the DNR and DHSS cases. (Opp. at p. 20.) But for the reasons stated above, any connection to the DNR or DHSS proceedings is not enough. Furthermore, there is no indication that the DOJ sought "damages" under the Policy. Therefore, Travelers had no duty to defend the Federal Document Subpoenas.

5. Medical Board Complaint

The Missouri Medical Board Complaint involved proceedings brought against plaintiff Chaganti's brother, Dr. Surendra Chaganti, who is not an additional insured under the Policy. Generally, only a party to an insurance agreement has standing to seek to enforce it. (See *LaBarbera v. Security National Ins. Co.* (2022) 86 Cal.App.5th 1329, 1340.) None of the Plaintiffs were named in that complaint. A review of the counts in the complaint filed before the Missouri Administrative Hearing Commission shows nothing connecting these proceedings to the frozen pipe incident or anything that would constitute "damages" under the Policy. Plaintiffs do not present a coherent argument for how the Policy could conceivably be interpreted to cover the Medical Board Complaint brought against a non-party over alleged wrongdoing unrelated to Whispering Oaks. The court concludes that Travelers had no duty to defend the Medical Board Complaint.

6. Summary of Conclusions Regarding the First Six Causes of Action

In summary, the court agrees with Defendants that there is no possibility that any of the underlying six actions had the potential to fall within the scope of the Policy's coverage. (See *Gonzalez*, *supra*, 234 Cal.App.4th at pp. 1229-1231; *Renco*, *supra*, 362 S.W.3d at p. 479.) As Defendants point out, each of Plaintiffs' first six causes of action necessarily depends on the existence of a duty to defend. The first cause of action for a declaratory judgment seeks a determination that "Travelers had an obligation to defend Plaintiffs" (TAC, ¶ 47) while the second through fourth causes of action (breach of contract, breach of duty of good faith and fair dealing, and bad faith) are each premised on the breach of a contractual duty to defend. (*Id.* at ¶¶ 50, 62, 67.) The fifth cause of action alleges that Plaintiffs were harmed by relying on Travelers' alleged misrepresentation or concealment that the Policy covered them as additional insureds. (*Id.* at ¶ 71.) Plaintiffs' opposition brief makes it clear that this claim is also dependent on the existence of a duty to defend. (See Opp. at p. 23 [arguing with respect to the fifth cause of action that "there are duties to defend and indemnify."].) As to the sixth

cause of action for vexatious refusal, it is based on allegation that "Travelers failed to pay for Plaintiffs' defense . . . ." (TAC, ¶ 75; see also Opp., p. 23 ["Travelers . . . breached the duty to defend"].)

Plaintiffs make a perfunctory argument that summary judgment should still be denied because Defendants do not address estoppel under the Unfair Claims Settlement Practices Act (UCSPA). According to Plaintiffs, "[n]oncompliance with the UCSPA estops a defaulting insurer from contesting coverage" under California or Missouri law. (Opp., p. 9.) Even assuming that there is a triable issue as to whether Travelers failed to disclose the Policy and its benefits to Plaintiffs as additional insureds, the California cases they rely on merely provide that a violation estops an insurer from asserting a *statute of limitations* defense to coverage; and the Missouri case they rely on does not even address estoppel. (See *Spray, Gould & Bowers v. Associated Internat. Ins. Co.* (1999) 71 Cal.App.4th 1260, 1268-1269; *Neufeld v. Balboa Ins. Co.* (2000) 84 Cal.App.4th 759, 760-761; *Estes v. Bd. of Trs.* (Mo.Ct.App. 2021) 623 S.W.3d 678, 707.) There is no indication that the UCSPA impacts the scope of coverage under the Policy, which is the dispositive issue here, and there is no question here about the application of any statute of limitations. (See *Gonzalez*, *supra*, 234 Cal.App.4th at p. 1230 [there is no duty to defend if there is no potential for coverage]; *Renco*, *supra*, 362 S.W.3d at p. 479.)

The conclusion that Travelers had no duty to defend is also fatal to Plaintiffs' contention that Travelers had a duty to indemnify them. (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 958 ["Where there is a duty to defend, there *may* be a duty to indemnify; but where there is no duty to defend, there *cannot* be a duty to indemnify."] [emphasis in original]; *Sprint Lumber, Inc. v. Union Ins. Co.* (Mo.Ct.App. 2021) 627 S.W.3d 96, 114 ["'Missouri law is clear that where there is no duty to defend, there is no duty to indemnify.'"].)

The court therefore GRANTS summary judgment as to the first, second, third, fourth, fifth, and sixth causes of action in the TAC.

C. Conspiracy/Tortious Interference

Defendants also seek summary judgment with respect to Plaintiffs' seventh cause of action for "conspiracy to injure[,]" which the court construes as a claim for contractual interference. (See Opp., pp. 24-26.)

Defendants first argue that regardless of whether it is properly considered a conspiracy claim or a claim for tortious interference, the cause of action fails. (MPA, pp. 19-21.) According to Defendants, a conspiracy claim fails for the same reasons set forth in the Court's ruling on its demurrer to the Second Amended Complaint: "plaintiffs do not allege and cannot prove that Travelers had any duties under the leases and could be jointly liable with Cricket for breaches of the leases," "[t]he seventh cause of action is now being put to the test by summary judgment," and plaintiffs must "come forward with admissible evidence demonstrating a triable issue of fact." (*Id.* at pp. 20-21.) These arguments, however, fail to account for the initial burden that Travelers must meet as the moving party.

"As our Supreme Court has noted, '[s]ummary judgment law in this state, however, continues to require a defendant moving for summary judgment to present evidence, and not

simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence.' [Citation.]" (*Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 101, quoting *Aguilar, supra*, 25 Cal.4th at p. 854, alteration original.) To meet its initial burden, a defendant "'"may . . . present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence—as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing."'" (*A.G. v. County of Los Angeles* (2018) 28 Cal.App.5th 373, 376 [citations omitted].) The court agrees with Plaintiffs that Defendants have not met their initial burden, as Defendants have done nothing more than offer the December 2011 emails produced by Plaintiffs. (Defendants' Appx., Exh. 25.) This is not the equivalent of an admission from Plaintiffs that they have discovered nothing. (See *Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1306.)

Alternatively, Defendants argue that any tortious interference claim is untimely because it would have accrued by no later than January 24, 2012, when Cricket terminated the lease, and Plaintiffs did not bring suit until more than six years later. (MPA, p. 21; Reply, p. 12.) In response, Plaintiffs argue that the discovery rule applies under Missouri law and that their claim therefore did not accrue until they learned of Defendants role in causing Cricket's breach. (Opp., p. 26.) Statute of limitations issues are normally questions for the trier of fact but "'whenever reasonable minds can draw only one conclusion from the evidence, the question becomes one of law.'" (*Brewer v. Remington* (2020) 46 Cal.App.5th 14, 28.) The court finds that Plaintiffs' claim is time-barred.

It is undisputed that Cricket sent a letter to Plaintiffs on January 24, 2012, terminating its lease. (Add'l SUF, P26; Chaganti Decl., ¶ 60.) Defendants show that under Missouri law, a tortious interference claim accrues "when damage can be ascertained" and that the limitation period is "five years after the causes's accrual." (*D'Arcy & Assocs., Inc. v. K.P.M.G. Peat Marwick, L.L.P.* (Mo.Ct.App. 2004) 129 S.W.3d 25, 29-30.) As such, Plaintiffs were required to bring suit by no later than January 24, 2017, well before they filed this lawsuit on October 18, 2018. (See *Goff v. Fowler* (Mo.Ct.App. 2010) 323 S.W.3d 797, 801 (*Goff*) [defendant met its burden of showing that the plaintiff's action was barred by a statute of limitations unless an exception applied based on the face of the petition].)

Plaintiffs insist that under Missouri law, they had 10 years to discover Defendants' alleged wrongdoing and another five years to file suit. Under Missouri Revised Statute section 516.120(5), "all fraud claims must be brought within five years from when the cause of action accrues, which is either when the fraud is discovered or at the end of 10 years after the fraud takes place, whichever occurs first." (*Ellison v. Fry* (Mo. 2014) 437 S.W.3d 762, 769.) The problem with this contention, however, is that Plaintiffs are not asserting a fraud claim. Thus, the relevant provision is Missouri Revised Statute section 516.280: "the general tolling statute, which sets out a 'discovery rule' for cases in which a defendant conceals the wrong." (*Ibid*.) Plaintiffs have presented no evidence showing that Defendants prevented them from discovering the basis for a tortious interference claim as required under Missouri law. (See Mo. Rev. Stat. § 516.280 ["If any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be so prevented."].) Instead, Plaintiffs contend that it is Defendants who have the burden to present evidence of when Plaintiffs should have discovered their claim. (Opp., p. 26.) This is incorrect. "[O]nce the moving party establishes that plaintiff's claim is barred by the statute of limitations, the burden shifts to the plaintiff to show that he comes within an exception in the

statute to avoid the application of the limitations period to the claim. [Citation.]" (*Goff, supra,* 323 S.W.3d at p. 800.) This is because "[t]olling statutes are treated as exceptions to the applicable statute of limitations, as the burden of proving facts sufficient to toll the statute is upon the party asserting that the statute of limitations has been tolled. [Citation.]" (*Id.* at p. 801.)

California law is in accord. (See *Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1, 6-7 ["Where as here a defendant moving for summary judgment shows, as an affirmative defense, the applicable limitations period ran out before the complaint was filed and the plaintiff relies on the delayed discovery rule the plaintiff has the burden 'to show that a triable issue of one of more material facts exists as to that . . . defense[.]' "].)

Because Plaintiffs have failed to show a triable issue of material fact regarding the application of the statute of limitations to the tortious interference cause of action, it is untimely, and the court GRANTS summary judgment as to the seventh cause of action.

V. CONCLUSION

The motion for summary judgment is GRANTED.

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Calendar Lines 4-5
Case Name: *Adolfo De Luna v. Garden City Sanitation, Inc.*
Case No.: 21CV389240

1. Background

This is an employment case in which plaintiff Adolfo De Luna alleges that defendant Garden City Sanitation, Inc. ("GCS") discriminated against him on the basis of a disability and wrongfully terminated him.

Both sides have filed dueling motions to compel and for a protective order. On February 22, 2024, GCS filed a motion to compel further deposition testimony from De Luna. This motion included a request for a protective order to govern the conduct of De Luna's counsel, David Chun, at future depositions, as well as a request for $5,858.15 in sanctions against De Luna and Chun, based on their conduct at De Luna's December 18, 2023 deposition. On March 6, 2024, De Luna filed a motion for protective order to govern the conduct of GCS's counsel, Adam Khan, at future depositions. This motion included a request to compel further deposition testimony: (1) from GCS's person-most-qualified ("PMQ") witness, Salvatore San Filippo, (2) from San Filippo in his personal capacity, and (3) from former GCS employee David Calegari. It also included a request for monetary sanctions against GCS and Khan in the amount of $8,108.76,

The clerk's office calendared GCS's motion to be heard on May 16, 2024. It calendared De Luna's motion to be heard on May 23, 2024. On March 7, 2024, De Luna filed an ex parte application asking that his motion be advanced to May 16, 2024, so that the two motions for a protective order could be heard on the same day. The court granted that application on March 8, 2024. For some reason, however, De Luna did not inform the court that he had filed *another* motion to compel—specifically, a motion to compel Salvatore San Filippo to provide further answers to deposition questions, on February 27, 2024—and that this motion was also calendared for May 23, 2024. As a result, that third motion is still on calendar for next week and is not presently before the court. Nevertheless, it appears to encompass similar or overlapping subject matter as the other two motions, and so the court orders the parties to appear at the hearing to address whether the court's orders, set forth below, render that third motion moot.

2. Counsel's Conduct at the Depositions

The court has reviewed the parties' moving papers, including well over 200 pages of excerpts from the depositions of De Luna, San Filippo (both individual and PMQ), and Calegari. Although the court generally does not operate under the illusion that each side in a discovery dispute is equally to blame for any disputes that arise, the court finds that both counsel here—Chun and Khan—behaved abysmally at the depositions and should be (but don't appear to be) embarrassed by their own conduct. Typically, counsel will have enough self-awareness not to raise their less-than-decorous behavior to public scrutiny, but in this case, counsel on both sides have purposely submitted ample evidence of unprofessional behavior by each other to the court, including page after page of transcripts showing unusually lengthy and unpleasant arguments at the depositions, interrupting each other, talking over each other, and generally being extremely discourteous not only to one another, but also to the witnesses and the court reporter. In their efforts to "one up" each other and gain leverage over their

opponent, neither Chun and Khan displayed any flexibility or willingness to compromise over even the most trivial of issues. After reading these deposition transcripts, the court makes the following findings with dismay:

a. Chun's Conduct

- At De Luna's deposition, Chun insisted on making an objection on the record before the witness was sworn regarding the fact that the court reporter was appearing remotely. This resulted in a ludicrous argument between Chun and Khan that delayed the start of the deposition by several minutes (over 10 pages of transcript). Chun then unnecessarily accused Khan of "lying" about the deposition. The court does not understand why Chun felt the need to make this objection before the deposition could begin. The court does not understand why Khan resisted so mightily. The timing of this objection was completely *irrelevant*.

- Chun insisted on taking numerous breaks—seven—in the space of less than two hours during De Luna's deposition, sometimes in the middle of a line of questioning by Khan. This was grossly improper. It gives rise to the inference that Chun was coaching De Luna during these multiple and apparently unnecessary breaks. It does not appear from the transcript that these breaks were taken for any reason other than to interrupt the questioning, particularly upon the introduction of a new exhibit.

- Chun caused significant additional delay in De Luna's deposition, including multiple lengthy colloquys with Khan, as a result of his insistence on receiving hard copies of exhibits. Although the court does find that Khan's failure to provide a copy of exhibits for opposing counsel was discourteous, the court also finds that Chun's reaction was over-the-top, and his unwillingness to compromise or acquiesce this one time by receiving electronic copies on his computer was equally discourteous. Chun took the official paper exhibits out of the deposition room even after being asked not to do so.

- Chun made improper speaking objections and interrupted questions with commentary. For example, he asked "What is the relevancy of that?" in response to one question, before the witness could answer, and tried to dissuade Khan from proceeding with the question.

- At the PMQ deposition of GCS (San Filippo), Chun argued with the witness, saying "That is not responsive. This witness is giving the same robotic answer in a way that doesn't even respond to the question being asked." This is not the correct way to preserve an objection if counsel believes that a witness has not fully answered a question. It is unprofessional to argue with a witness in this way.

b. Khan's Conduct

- At the PMQ deposition of GCS (San Filippo), Khan instructed the witness not to answer questions that he deemed to be outside the scope of the PMQ topic. This was grossly improper.

- At the PMQ deposition and at San Filippo's deposition, Khan repeatedly made long, speaking objections that appeared to be designed to coach the witness. (E.g., when the witness was asked, "Why can't you answer my question, Mr. San Filippo?" Khan responded, "It is outside the scope of this deposition, that is why." When San Filippo was asked "And did you review those requests prior to your deposition today?" Khan interjected: "Objection. Asked and answered. And for the record, defendant served objections to these requests. I'm happy to having mark [sic] that as Exhibit 2 if you'd like, Mr. Chun.") There are many, many more examples of this incredibly improper behavior. The court lists only two that are readily at hand and recalls reading other instances that were even more egregious. Although the court is certainly aware that, as a practical matter, all counsel in the heat of deposition testimony will sometimes elaborate on an objection for longer than is necessary. That is only natural, human behavior, and it is understandable in isolation. But those instances must still be kept to a minimum. They should be the rare exception, not the rule. In the case of the PMQ and San Filippo depositions, it appeared to be the rule.

- After returning from multiple, different breaks in San Filippo's deposition, Khan and the witness would begin by saying that the witness wished to "clarify" one of his earlier responses. This gives rise to the inference that Khan was coaching San Filippo during these different breaks, which is improper.

- Just like Chun, Khan also insisted on taking breaks during a line of questioning or even while a question was still pending during San Filippo's deposition. This was grossly improper.

- As noted above, Khan was inflexible and discourteous in refusing to provide Chun with a hard copy of the deposition exhibits even while he was using hard copies to take the deposition of De Luna.

3. The Court's Orders Under Code of Civil Procedure Sections 2025.420 and 2025.470

It is not the role of the court to micromanage depositions, but given the apparent inability of the parties' counsel in this case to engage in communications that did not devolve into drawn-out arguments over procedure, "coaching," semantics, and perceived slights, the court will now make the following orders under Code of Civil Procedure sections 2025.420 and 2025.470 for any future depositions in the case:

a. If a deposition is being taken in person, the party taking the deposition will engage its best efforts to arrange for the court reporter to appear in person, as well. If for some reason the court reporter is not able to appear in person, the party taking the deposition will provide as much advance notice to the other side as possible. The other side will not inflexibly object to the remote appearance of the reporter unless there is some good reason to do so.

b. If a deposition is being taken in person, the party taking the deposition shall provide a courtesy hard copy of any exhibits to opposing counsel.

c. Counsel shall refrain from making speaking objections. The more often this occurs, the more the inference arises that counsel is improperly coaching the witness. Example: "Lacks foundation" is OK; "How could he possibly know that? He already told you [x, y, and z]" is NOT OK. Although the court is not ordering monetary sanctions on these motions at this time—if anything, both sides today should be sanctioned and the amounts would cancel out—the court will keep an open mind regarding sanctions if this improper behavior persists from one or both sides going forward. The court will also keep an open mind about a possible report to the California State Bar for any "wilful disobedience or violation of an order of the court." (Bus. & Prof. Code, § 6103.) The court expects this improper deposition behavior to stop immediately.

d. Counsel will *not* instruct a witness not to answer a question simply because it is outside the scope of a PMQ notice or is "irrelevant." These alone are not proper bases for an instruction not to answer.

e. Counsel for the witness will not unilaterally take a break in the middle of a line of questioning, or even worse, while a question is pending. The court expects counsel to collaborate on the timing of reasonable breaks in a deposition. Although frequent breaks may well be necessary or appropriate, more than two breaks per hour will be viewed by the court in this case as presumptively excessive, given the amount of witness coaching that seems to have occurred on both sides.

f. Counsel will not coach their witnesses during breaks.

4. The Court's Orders on the Motions to Compel

It appears that De Luna's deposition was adjourned well before it was completed. The court orders the parties to resume De Luna's deposition, with a time limit of *six hours on the record* (*i.e.*, excluding any breaks or colloquy of counsel).

Although it appears that the PMQ deposition and deposition of San Filippo in his personal capacity were substantially completed, the court agrees with De Luna that his counsel was prevented from obtaining some relevant testimony. In addition, the court finds, based on the excerpts provided by the parties, that San Filippo was combative and evasive in his testimony. The court therefore orders the parties to resume these depositions with a *combined time limit of four hours on the record* (again, excluding any breaks or colloquy of counsel). De Luna may divide these four hours as he sees fit (*e.g.*, two hours for the PMQ deposition and two hours for San Filippo in his personal capacity; 45 minutes for PMQ and 3.25 hours for personal capacity; etc.), but in no event shall the total combined time for both depositions exceed four hours.

It appears that the third-party deposition of Calegari took the bulk of a day, ending at 5:30 p.m. (It is not clear what time the deposition began.) De Luna's motion provides no explanation as to why further testimony is needed from Calegari, and the need for additional areas of questioning is not apparent from the short excerpts submitted from his deposition transcript. In contrast to San Filippo, the excerpts from Calegari's transcript do not show

combative or evasive testimony. Accordingly, the court denies the motion to compel additional testimony from this third-party witness.

In sum, the court GRANTS IN PART and DENIES IN PART the motions for a protective order and the motions to compel. The court denies each side's requests for sanctions against the other. Finally, as noted above, the court orders the parties to appear to address the remaining deposition-related discovery motion.

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Calendar Lines 6-7
Case Name: *Christian Humanitarian Aid v. AM Star Construction, Inc. et al.*
Case No.: 22CV396170

Plaintiff Christian Humanitarian Aid ("CHA") has filed two motions to compel against defendant AM Star Construction, Inc. ("AMS"): (1) a motion to compel compliance with document requests and further responses to those document requests; and (2) a motion to compel further responses to special interrogatories (Nos. 1-18). CHA argues that this discovery is central to understanding the claim for damages of $513,976.93 contained in AMS's cross-complaint. CHA has also requested monetary sanctions against AMS with respect to each motion.

1. The Documents Motion

On the date that AMS's opposition to this motion was due, AMS apparently provided supplemental responses to the document requests and also produced "500+ pages" of documents. AMS now argues that this motion has been resolved and that no monetary sanctions should be awarded. In reply, CHA asserts that both the supplemental responses and the supplemental document production are still incomplete. According to CHA, the written responses are unverified, and they also do not correspond to the actual production, leaving open the possibility that AMS has stated that it "hereby produces" documents that do not exist. (Reply, pp. 3:15-5:6.) The document production is also missing a number of categories of documents, including communications with subcontractors and suppliers, contracts or subcontracts, bids, estimates, invoices, time sheets, and photographs/videos. (Reply, pp. 2:19-3:5 & 5:7-6:28.)

The court concurs with CHA that to the extent that any such documents are still in AMS's possession, custody, or control, they must be produced. In addition, AMS's written responses must be further revised to make clear whether such documents have either been produced or are being withheld. If the documents never existed, or have somehow been lost or destroyed, that should also be clarified in the response. The court hereby orders AMS:

- To supplement its written responses to clarify the issues identified on pages 3-5 of CHA's reply brief, within 20 days of notice of entry of this order.

- To provide a verification for its written responses within 20 days of notice of entry of this order.

- To produce any documents listed on page 2, line 19 to page 3, line 5 of CHA's reply brief within 45 days of notice of entry of this order.

- To pay monetary sanctions of **$1,750** (five hours at $350/hour) to CHA within 45 days of notice of entry of this order. The court finds that AMS's material delays were without substantial justification.

In short, the motion is GRANTED IN PART.

2. The Interrogatories Motion

CHA argues that its 18 special interrogatories are directed to obtaining "a breakdown of the $500,000 in damages AM Star alleges in its cross-complaint." AMS responds that its answers are sufficiently responsive and provide a "detailed breakdown of the components of the mechanics lien." Specifically, AMS argues that the chart attached to its January 7, 2021 termination letter ("Exhibit C") "provides the detailed breakdown of the mechanics lien components[,] and it's superfluous to require further recitation of it all." (Opposition, pp. 1:27-2:12.)

The court has reviewed AMS's responses to the interrogatories and finds that they are insufficient on their face. For example, the answers to Interrogatories Nos. 1 and 3 simply parrot the recitation of damages contained in paragraph 25 of AMS's first amended cross-complaint. These are not good-faith answers and make a mockery of the discovery process. Similarly, the court has reviewed "Exhibit C" to the January 7, 2021 letter and finds that it does not provide a "detailed breakdown of the mechanics lien components." Rather, it provides a breakdown of elements that AMS contends should be *subtracted from* the mechanics lien total, but it does not provide support for any affirmative amounts that AMS claims as damages.

The court finds that the answers to Interrogatories Nos. 1 and 3 are woefully insufficient. AMS must provide detailed, supplemental answers within 30 days of notice of entry of this order.

Because the answers to Interrogatories Nos. 5, 7, 9, 11, 13, and 15 all rely on the patently insufficient "Exhibit C," AMS must supplement its answers to these interrogatories within 30 days of notice of entry of this order.

The answers to Interrogatories Nos. 2, 4, 6, 8, 10, 12, 14, 16, and 18 fail to identify documents with particularity. The court orders AMS to supplement its answers to these interrogatories within 30 days of notice of entry of this order. The court rejects AMS's claim that its document production is "massively voluminous," given that it is only "500+ pages."[3] AMS must provide specific citations in its answers.

The answer (and objections) to Interrogatory No. 17 are also insufficient on their face. AMS cannot affirmatively assert a damages claim of $2,025 and then hide behind the attorney-client privilege in refusing to provide sufficient information about the claim. This is an improper use of the privilege as both a sword and a shield. AMS will supplement its answer to Interrogatory No. 17 with specific information about "collection costs" and should be able to do so without running afoul of any attorney-client privilege.

The court finds that AMS's interrogatory responses and opposition to this motion were without substantial justification. The court awards the full amount of monetary sanctions requested by CHA in its motion: **$2,228.75** (six hours at $350 hour plus a $128.75 filing fee). AMS shall pay this amount within 45 days of notice of entry of this order. In discovery, the purpose of monetary sanctions is compensatory, not punitive.

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[3] In its opposition to the interrogatories motion, AMS repeatedly says "500+ documents" instead of "500+ pages," but this appears to be an error.

IT IS SO ORDERED.

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Calendar Line 8
Case Name: *Ana Gabriela Torres Anguiano et al. v. Young Van Vo et al.*
Case No.: 23CV411137

This is a motion to compel further responses to form interrogatories, special interrogatories, requests for admissions, and requests for production of documents, filed by defendant Mario Salinas Jimenez ("Jimenez") against plaintiffs Ana Gabriela Torres Anguiano and Carolina Villegas Ramos. Notice is proper for the motion, but the court has received no response from the plaintiffs.

The court has reviewed the discovery requests propounded by Jimenez and finds them to be appropriate. If it is indeed the case that plaintiffs have failed to serve any substantive responses to these requests, as Jimenez claims, then the court will grant the motion. What the court finds extremely confusing, however, is the fact that Jimenez has included a declaration from counsel that purports to attach copies of plaintiffs' discovery responses to Jimenez's requests, but these do not appear to be the correct responses. (See Declaration of Christopher W. Rivera, Exhibit D.) These responses indicate that they are responsive to requests *from defendant Young Van Vo*, not from defendant Jimenez. In addition, these responses do not match up with the requests attached to the motion. For example, Jimenez attaches eight special interrogatories, but the responses address 27 special interrogatories. It does not help that plaintiffs' special interrogatory responses do not include the text of the requests to which they are responding, making it extremely difficult for the court to compare the responses to the original requests.

In the event that plaintiffs did provide responses to Jimenez's discovery, then this should have been brought as a motion to compel *further* responses under Code of Civil Procedure section 2030.300, and Jimenez should have filed a separate statement in support of the motion. No separate statement appears to have been included here.

Accordingly, the court orders the parties to appear to clarify this procedural mess. In the event that plaintiffs did not serve responses to Jimenez's discovery, the court will grant the motion, order plaintiffs to provide substantive responses within 20 days of notice of entry of this order, and also order plaintiffs to pay monetary sanctions in the amount of $990 to Jimenez within 30 days of notice of entry of this order (2 hours at $450/hour plus filing and reporter fees of $60 and $30).

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Calendar Line 12
Case Name: *Luis Ahedo v. Jose Ochoa et al.*
Case No.: 22CV407083

Defendants Omega Global Technologies, Inc. ("Omega") and Jose Ochoa move for leave to file a cross-complaint against plaintiff Luis Ahedo, as well as four other new cross-defendants: Adorina Sargezian Khezrabad, OT Components LLC, Alejandro Escalante, and Luis Carlos Carrasco. Defendants argue that the portion of the cross-complaint that is asserted against Ahedo is compulsory, and that it is directly related to the remainder of the permissive claims against the other cross-defendants.

The court finds that defendants have not adequately explained how the cross-complaint's allegations against Ahedo are compulsory in nature. As the court understands it, Ahedo's allegations against defendants are based on a claim of failure to pay proper wages under the Labor Code: Ahedo contends that Omega misclassified him and therefore failed to pay him overtime, to pay him for meal and rest periods, to reimburse him for business expenses, and to pay him agreed-upon sales commissions. By contrast, the proposed cross-complaint alleges that Ahedo misappropriated Omega's proprietary information and worked with the other cross-defendants to use this proprietary information to compete with and divert business from Omega. These are two completely different types of allegations. The court is certainly not an expert in employment law, but it is unaware of any authority for the proposition that *wage-and-hour* claims and claims of *misappropriation of proprietary information* arise out of the "same transaction, occurrence, or series of transactions or occurrences." (Code Civ. Proc., § 426.10, subd. (c).) The court has reviewed and re-reviewed defendants' briefs in an effort to find such legal authority, and it sees none. Moreover, the court agrees with Ahedo that defendants "provide[] no factual explanation regarding why the causes of action alleged in the proposed Cross-Complaint are 'compulsory' in nature." (Opposition, p. 4:8-11.)

Because defendants' motion falls short on both the law and the facts, and because the court views the allegations of the proposed cross-complaint as being fundamentally different in nature from the allegations in the first amended complaint, the court concludes that the proposed cross-complaint is permissive rather than compulsory.

Having reached that conclusion, the court also finds that defendants have not provided any explanation for why this proposed pleading is being brought so late into the case. Indeed, Ahedo points out that defendants were aware of the facts that form the basis of the cross-complaint on March 7, 2022, more than two years ago, and even before Ahedo filed the complaint in this case. (Opposition to Motion for Leave, Exhibit A [Letter from Michael W. Stebbins to OT Components LLC].) A failure to explain a delay in seeking a permissive cross-complaint is grounds for a denial. (See *Crocker National Bank v. Emerald* (1990) 221 Cal.App.3d 852, 862-864.)

For the foregoing reasons, the court DENIES the motion.

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Calendar Line 13
Case Name: *Toll Bros., Inc. v. Lefco, Inc. et al.*
Case No.: 24CV434168

Toll Bros., Inc. ("Petitioner") petitions to confirm an arbitration award issued by an American Arbitration Association arbitrator (Alan J. Wilhelmy) on January 10, 2024. Respondents Lefco, Inc., William J. Leffler, and Todd Leffler ("Respondents") oppose the petition and also purport to have filed a counter-petition to vacate the award, although the court finds no such petition in the file. Respondents have submitted a unitary memorandum of points and authorities in opposition to the petition to confirm and in support of their petition to vacate.

As an initial matter, the court notes that this petition appears to have been filed in this court based on the erroneous belief that Menlo Park—where the arbitration occurred—is in Santa Clara County. (Petition, ¶ 15.) Menlo Park is in San Mateo County. Nevertheless, Respondents have not objected to venue in this county, and the arbitration documents indicate that Respondents are based in this county, in San Jose. Additionally, the dispute between the parties appears to arise out of building projects throughout the State of California. Accordingly, the court will address the merits of the petition(s).

The sole statutory basis upon which Respondents object to the arbitration award is Code of Civil Procedure section 1286.2, subdivision (a)(5): "The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title." Specifically, Respondents argue that the arbitrator unfairly "ignored" their request for a continuance of the evidentiary hearing, as a result of which they failed to appear for the evidentiary hearing. The court finds this argument to be without merit.

First, it is based on the notion that Respondents learned about the date of the November 20, 2023 evidentiary hearing only seven days beforehand, on November 13, 2023. This claim by Respondents totally lacks credibility. As Petitioner points out, Respondents and their former counsel (Patrick Whitehorn) received numerous notices of the hearing in August, September, October, and November 2023. Indeed, Respondents themselves replied on September 11, 2023 to an email chain that included notice of the evidentiary hearing date. Further, Whitehorn appeared on behalf of Respondents at an August 15, 2023 preliminary hearing at which the arbitrator set a further preliminary hearing on October 18, 2023, as well as the evidentiary hearing for November 20 and 21, 2023. (Declaration of Brian C. Plante, ¶ 9.) This was confirmed in the arbitrator's August 20, 2023 Scheduling Order. (Plante Declaration, Exhibit 9, ¶ 6 ["The dates for the evidentiary hearing will be November 20 and 21, 2023."].)

Second, Respondents claim that they needed more time to retain new counsel after Whitehorn withdrew, but the date of Whitehorn's withdrawal was August 30, 2023, nearly three months before the evidentiary hearing. Moreover, the court presumes that Whitehorn would have complied with the Rules of Professional Conduct by taking "reasonable steps to avoid reasonably foreseeable prejudice to the rights of [his] client[s]" by giving "sufficient notice" and giving his client an opportunity to retain other counsel. (Rules Prof. Conduct, rule 1.16(d).) Thus, Respondents should have known of the need to find substitute counsel well before August 30, 2023 and well before the start of the evidentiary hearing. Respondents claim

that Whitehorn "did not provide Lefco with his file or brief Todd Leffler on what had occurred or been scheduled while he represented Lefco." (Opposition, p. 3:7-10.) Even if this claim is true (as to which the court is dubious, given the other claims of Respondents that strain credulity), it does not bear directly on the fairness of the arbitration proceedings. Instead, it is a matter between Respondents and their former counsel. Indeed, there is no evidence that Respondents raised this claim with the arbitrator (*i.e.,* that Whitehorn deprived them of his file or any information about what had occurred while he had represented them) in their efforts to seek a continuance.

Third, Respondents claim that they sought a continuance in a November 18, 2023 email, but this was just *two days* before the November 20 evidentiary hearing. That timing is inherently unreasonable. If, as they claim, they only learned of the hearing date on November 13, they do not explain why they *waited five days* before raising the issue in an email. Moreover, the only November 18, 2023 email that the court has received from the parties is entirely equivocal and conditional—it does not set forth a clear request to the arbitrator for a continuance. The email describes Respondents' efforts to find counsel over the past week (*with no explanation as to why they did not start seeking new counsel on or before August 30, 2023*), and it states: "[I]f we are to properly defend ourselves then we would need additional time to find counsel to represent us." (Declaration of Todd J. Leffler, Exhibit 7.) This conditional language does not propose a specific continuance; it does not describe any efforts to find counsel since Whitehorn withdrew; it does not set forth a reasonable amount of time to find new counsel; and it does not even ask the arbitrator to make any ruling on a postponement of the hearing.

Fourth, even though Respondents did not appear for the evidentiary hearing, it does appear that they were given an extension of time to submit a closing brief to the arbitrator. Thus, Respondents need to show, under section 1286.2, subdivision (a)(5), that they were somehow prejudiced by the arbitrator's supposed refusal to continue the hearing (if it was indeed a refusal), and they have not pointed to anything. Their papers do not contain any hint of any offer of proof that could have been made that would have changed the outcome of the arbitration. Indeed, there is no indication that the arbitrator's evidentiary sanctions against Respondents—based on their failure to comply with discovery orders—would have been any different.

In short, the court finds that Respondents have failed to demonstrate any basis for vacating the arbitration award. The court finds: (1) that there was no clear request to the arbitrator to postpone the arbitration hearing; (2) that even if there was a clear request, it was not supported by sufficient cause—indeed, it was not supported by any colorable cause, given the lack of credibility of Respondents' reasons for waiting until the eleventh hour to make the request; (3) that Respondents had months to seek new counsel and squandered this opportunity; and (4) that the denial of a postponement did not result in any discernible prejudice to Respondents.

For all of these reasons, the court GRANTS the petition to confirm the arbitration award and DENIES the petition to vacate the award (to the extent that any such petition has been properly presented). Petitioner shall submit a proposed judgment that conforms to the final award.

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