SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 18b
Honorable Shella Deen, Presiding
Farris Bryant, Courtroom Clerk
191 North First Street, San Jose, CA 95113

DATE: November 7, 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

****Please specify the issue to be contested when calling the Court and Counsel****

LAW AND MOTION TENTATIVE RULINGS

FOR APPEARANCES: Department 18 is fully open for in-person hearings. The Court strongly prefers **in-person** appearances for all contested law and motion matters. For all other hearings, the Court strongly prefers either **in-person or video** appearances. If you must appear virtually, you must use video. 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. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 18:

https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

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.

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	16CV290420	Mario Tellez vs Golden Creek Investment, Inc. et al	**Order of Examination (Silver Creek Group Investment, Inc.)** No Proof of service on file. If there is no appearance, the matter will be ordered OFF CALENDAR.
LINE 2	24CV433073	Laurie Lindrup vs CLUBCORP SAN JOSE CLUB, INC. et al	**Motion (Petition) to Compel Arbitration** This motion is CONTINUED to December 12, 2024 at 9 a.m. in Department 18b. No further briefing.
LINE 3	22CV396105	Columbia Campbell et al vs Encompass Insurance Company	**Motion for Summary Judgment/Adjudication** Scroll down to LINE 3 for Tentative Ruling.
LINE 4	23CV410795	Stacey Belew vs Luigi Digrande et al	**Motion to Compel (Request for Production)** Notice of withdrawal of motion filed by moving party on July 31, 2024. This motion is therefore OFF CALENDAR.
LINE 5	23CV410795	Stacey Belew vs Luigi Digrande et al	**Motion to Compel (Form Interrogatories)** Notice of withdrawal of motion filed by moving party on October 24, 2024. This motion is therefore OFF CALENDAR.

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LAW AND MOTION TENTATIVE RULINGS

LINE 6	23CV421638	Jane Doe vs San Jose Open Bible Church et al	**Motion to Compel (Request for Production)** Scroll down to LINES 6 AND 7 for Tentative Ruling.
LINE 7	23CV421638	Jane Doe vs San Jose Open Bible Church et al	**Motion to Compel (Privilege Log)** Scroll down to LINES 6 AND 7 for Tentative Ruling.
LINE 8	15CV288804	Lydia Shore vs Salon Blu LLC et al	**Motion for Assignment/Turnover** Plaintiff Lydia D. Shore's motion for (1) an order instructing Defendant James Griffiths to assign his interest in commissions, sales, wages and all rights to payments thereunder earned from Salon Blu and Brazilian Blowout Bar to Plaintiff to pay Plaintiff's judgment in full, including interest and (2) for an order restraining Plaintiff from, *inter alia*, spending this income. Plaintiff argues that this is authorized by Code Civ. Proc., §708.510 and 708.520. The motion is unopposed, however the authority relied on by Plaintiff does not support her request: Code Civ. Proc., §708.510 (a) provides that the court may order the judgment debtor to assign to the judgment creditor all or part of a right to payment due or to become due, certain payments delineated in subparagraphs (1) through (6). Although Plaintiff argues that the assignment of commissions is sought, the record before the Court does not evidence that judgment creditor earns "commissions" from hair styling as used in §708.510. As such, the motion is DENIED as Plaintiff seeks a "right to payment" that is not authorized. Moving party to prepare formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 9	22CV400735	Rynoclad Technologies, Inc. vs FPC Builders, Inc., a corporation et al	**Motion for Award of Prejudgment Interest** Defendant/Cross-Complainant Yuanda USA Corporation's motion for an award of prejudgment interest against FPC Builders, Inc, made pursuant to Civil Code §1717 and Code of Civil Procedure §§1033.5, 3287 and 3289 (b). A notice of motion with this hearing date and time was served by U.S. Mail on September 13, 2024. FPC Builders, Inc. did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.). Good cause appearing, the motion is GRANTED. Moving party to prepare the formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 10	22CV407185	CREDITORS ADJUSTMENT BUREAU, INC., vs PERFECTVIPS, INC.	**Motion to Set Aside Default/Judgment** Defendant PerfectVIPs, Inc. brings this motion to set aside a default entered on March 21, 2024, and a default judgment entered on May 22, 2024, "thereby reinstating Defendant's previously filed answer". The motion is made pursuant to Code of Civil Procedure, section 473, subdivision (b), on the ground that entry of the default and default judgment was due to the illness of Defendant's sole officer and director that precluded Defendant from timely responding to Plaintiff's discovery or opposing Plaintiff's requests for default and judgment. Plaintiff argues that its sole officer and director suffered serious, debilitating health issues that, from Spring 2023 through July 2024, left her unable to respond to Plaintiff's discovery and motions or take other actions in this case. Plaintiff opposes the motion arguing that the relief requested is time barred as it was not filed within six months of the court order striking defendant's answer, Defendant's failure to oppose or appear at any of the multiple discovery motions and the motion for terminating sanctions constitutes inexcusable neglect, defendant offers no justification for her delay in filing this motion and the docket evidences the fact that defense counsel effectively ignored this litigation for some 18 months. After consideration of the record, and no good cause shown, the motion is DENIED. Whist Defendant may have been ill, there is no excuse for her counsel to fail to respond to discovery, fail to respond to motions and fail to make appearances. This complete lack of diligence by Defendant's counsel resulted in the granting of Plaintiff's motion for terminating sanctions. Vacating the default and default judgment is of no consequence as Plaintiff's answer will remain stricken and the time within which to vacate the terminating sanction (and resulting stricken answer) has long passed (Code Civ. Proc., §473(b)). Responding party to prepare formal order.

Calendar Line 3
Case Name: *Columba Campbell, et al. v. Encompass Insurance Company, et al.*
Case No.: 22CV396105

Before the Court is Encompass Insurance Company's motion for summary adjudication. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background.

Plaintiffs Columba and Geraldine Campbell (collectively, "Plaintiffs") are a married couple who own and reside at real property commonly known as 14725 Sobey Road in Saratoga ("Property"), an approximately 8,598 square foot custom home built in 2004. (Complaint, ¶¶1 and 7.) The home has high-end finishes and features including, without limitation, imported French limestone floors, base trim, stairs and risers that flow continuously throughout all three levels of the home. (Complaint, ¶7.) The limestone at Plaintiffs' home is known as Beauharnais Bench 13 ("Beauharnais"), a highly sought after stone sourced from France with significant value and aesthetic appeal. (Complaint, ¶8.) Plaintiffs personally inspected and selected the Beauharnais blocks and slabs used in their home. (Complaint, ¶9.) Nearly all the pieces of Beauharnais used in Plaintiffs' home is non-standard custom thickness, shape, and curvature. (*Id.*) The use of Beauharnais constitutes one of the architectural features of Plaintiffs' home. (*Id.*)

In or around 2013, defendant Encompass Insurance Company ("EIC") issued an Elite Home Insurance Policy for the Property ("2013 Policy"). (Complaint, ¶11.) Defendant EIC renewed the 2013 Policy each year and coverage remains in effect. (*Id.*) [The 2013 Policy and renewed policies are collectively referred to as the "Policy."] Defendant EIC's Elite homeowners' coverage is the highest form of coverage that defendant EIC offers. (Complaint, ¶12.) The Policy's Elite level coverage provided extended replacement cost coverage with a Property Location Limit up to 200% of the estimated residence value of approximately $7,372,349, or approximately $14,744,698. (*Id.*) Replacement cost policies generally charge higher premiums in exchange for an agreement to repair or replace the damaged, lost, or stolen property with material of like kind and quality for similar use without deduction for

depreciation. (*Id.*) The Policy affords such coverage and also includes additional living expense ("ALE") coverage with no time or money limits. (*Id.*)

The Policy's limit of liability was based, in part, upon on-site inspections prepared for defendant EIC by their agents. (Complaint, ¶13.) These inspections noted the custom features and quality of the high-end finishes in Plaintiffs' home including, among other things, the Beauharnais which was an architectural feature of the home. (*Id.*) Defendant EIC was aware that the Beauharnais was an architectural feature of the home at all material times including when they underwrote the Policy. (Complaint, ¶10.)

In or around February 2020, Plaintiffs discovered visible water damage on the flooring of the basement sub-floor level. (Complaint, ¶16.) Plaintiffs are informed and believe the radiant heat pipe ruptured as a result of the structural chicken wire puncturing the PEX tubing. (*Id.*) The punctured PEX tubing resulted in damage to the Property (the "Loss"). (*Id.*)

In or around March and May 2020, defendant EIC inspected the Property and determined the Loss was covered by the Policy. (Complaint, ¶17.) In the lower level of the home, the only way to abate the water intrusion damage is to remove all the flooring, trim, walls and finishes that comprised the warm board and radiant floor heating system. (Complaint, ¶18.) Once efforts are undertaken to repair the damage to the Property, additional damage will be revealed. (*Id.*)

The available and known sources of Beauharnais have been exhausted and Plaintiffs are unable to match the existing flooring in their home with like kind and quality material that would result in a reasonably uniform appearance. (Complaint, ¶19.) In order to do so, alternative material flooring must be installed on all levels of Plaintiffs' home. (*Id.*)

Defendant EIC refuses to replace the flooring on all levels of the Property and insists Plaintiffs utilize material that is not like kind or quality to Beauharnais and that would not result in a reasonably uniform appearance or restore the Property to its pre-loss condition. (Complaint, ¶20.) A transition in flooring with lesser quality material diminishes the aesthetics and value of the home. (*Id.*)

Defendant EIC has also provided an unreasonable estimate for repairs that is roughly 10% of the amount of Plaintiffs' reasonable estimate for cost of repair for the Loss.

(Complaint, ¶21.) Defendant EIC failed to retain qualified contractors and subcontractors to prepare legitimate estimates for actual costs to restore the Property to its original condition. (*Id.*) The proposed scope of work contemplated by defendant EIC's repair estimate involves shoring the loaded structural walls in the basement which will result in cracking of the stone and walls and other damage to the home. (Complaint, ¶22.)

Defendant EIC has unreasonably refused to adjust the cost of repair estimate and to provide the full benefits that Plaintiffs are entitled to under the Policy. (Complaint, ¶23.) Defendant EIC has also unreasonably failed and refused to pay ALE benefits covered by the Policy. (Complaint, ¶24.) Despite receiving Plaintiffs' claim and substantial evidence of policy benefits due and owing, defendant EIC has refused and continues to refuse to pay benefits owed under the Policy in breach of their contractual obligations. (Complaint, ¶26.) Defendant EIC has also failed to comply with obligations to thoroughly and fairly investigate, process, and evaluate Plaintiffs' claim and have acted in bad faith by: (i) failing to timely process the claim; (ii) failing to engage qualified and licensed contractors, suppliers, and investigators in order to accurately adjust the claim; (iii) failing to supply a reasonable estimate for repair that would restore the Property to its pre-loss condition using material of like kind and quality under good workmanlike construction standards; (iv) failing to respond to, and to thoroughly and fairly investigate, information supporting coverage for the claim; (v) failing to accurately and in good faith respond to questions and requests for information from Plaintiffs, their counsel, and other qualified suppliers, stone specialists, and contractors; (vi) failing to be available to Plaintiffs for guidance and to provide answers in good faith regarding the claim; (vii) urging Plaintiffs to agree to settlement for an amount far less than defendant's potential liability; (viii) failing to give accurate information to Plaintiffs regarding their coverage and obligations under California law; and (ix) otherwise failing to work diligently and professionally with Plaintiffs depriving them of the benefits of the Policy. (Complaint, ¶27.)

On March 21, 2022, Plaintiffs filed a complaint against defendant EIC asserting causes of action for:

(1) BREACH OF WRITTEN CONTRACT

(2) BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

(3) ELDER FINANCIAL ABUSE

(4) DECLARATORY RELIEF

On April 29, 2022, defendant EIC filed an answer to the Plaintiffs' complaint.

On June 25, 2024, defendant EIC filed the motion now before the court, a motion for summary adjudication of the second and third causes of action of Plaintiffs' complaint and Plaintiffs' punitive damage request.

II. DEFENDANT EIC'S MOTION FOR SUMMARY ADJUDICATION IS DENIED.

A. BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING.

> The law implies in every contract, including insurance policies, a covenant of good faith and fair dealing. "The implied promise requires each contracting party to refrain from doing anything to injure the right of the other to receive the agreement's benefits. To fulfill its implied obligation, an insurer must give at least as much consideration to the interests of the insured as it gives to its own interests. When the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." (*Frommoethelydo v. Fire Ins. Exchange* (1986) 42 Cal.3d 208, 214–215 [228 Cal. Rptr. 160, 721 P.2d 41].)

(*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 720 (*Wilson*).)

> Tort liability for breach of the implied covenant of good faith and fair dealing has been variously measured. The primary test is whether the insurer withheld payment of an insured's claim unreasonably and in bad faith. (*Frommoethelydo v. Fire Ins. Exchange*, *supra*, 42 Cal.3d 208, 214-215.) Where benefits are withheld for proper cause, there is no breach of the implied covenant. (*California Shoppers Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 54-55 [221 Cal.Rptr. 171].) The duty imposed by law is not unreasonably to withhold payments due under the policy. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 920 [148 Cal.Rptr. 389, 582 P.2d 980].)

> Thus, there are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause. (See also *California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1986) 184 Cal.App.3d 1428, 1433 [229 Cal.Rptr. 409] [no award for bad faith can be made "without first establishing that coverage exists"]; *Kopczynski v. Prudential Ins. Co.* (1985) 164 Cal.App.3d 846, 849 [211 Cal.Rptr. 12]].)

(*Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1151.)

"In evaluating whether an insurer acted in bad faith, 'the critical issue [is] the reasonableness of the insurer's conduct under the facts of the particular case.' [Citation.]" (*Pinto v. Farmers Ins. Exchange* (2021) 61 Cal.App.5th 676, 687 (*Pinto*).) "Although 'the reasonableness of an insurer's claims-handling conduct is ordinarily a question of fact, it becomes a question of law where the evidence is undisputed and only one reasonable inference can be drawn from the evidence.' [Citation.]" (*Pinto, supra,* 61 Cal.App.5th at p. 689.)

1. **GENUINE DISPUTE RULE.**

In moving for summary adjudication of the Plaintiffs' second cause of action, defendant EIC contends its conduct in this case was not unreasonable. In this case, defendant EIC concedes benefits are due under the Policy, but a dispute has arisen as to the amount of benefits Plaintiffs are entitled to. "Not every first party insurance claim is transmogrified into a bad faith suit simply because an insurer questions the amount of a bill before paying it. To give rise to tort liability for bad faith, the insurer's conduct not only must be erroneous but 'unreasonable' or 'without proper cause' as well. [Citations.]" (*Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 86.) Defendant EIC contends a court can reach the conclusion that defendant EIC acted reasonably, as a matter of law, based upon the "genuine dispute" rule/ doctrine.

> As discussed earlier, an insurer's denial of or delay in paying benefits gives rise to tort damages only if the insured shows the denial or delay was unreasonable. (*Frommoethelydo v. Fire Ins. Exchange, supra,* 42 Cal.3d at pp. 214–215.) As a

close corollary of that principle, it has been said that "***an insurer*** denying or ***delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to*** the existence of coverage liability or ***the amount of the insured's coverage claim is not liable in bad faith even though it might be liable for breach of contract***." (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 347 [108 Cal. Rptr. 2d 776].) This "genuine dispute" or "genuine issue" rule was originally invoked in cases involving disputes over policy interpretation, but in recent years courts have applied it to factual disputes as well. (See *id.* at p. 348; *Fraley v. Allstate Ins. Co.* (2000) 81 Cal.App.4th 1282, 1292–1293 [97 Cal. Rptr. 2d 386]; *Guebara v. Allstate Ins. Co.* (9th Cir. 2001) 237 F.3d 987, 992–994.)

The genuine dispute rule does not relieve an insurer from its obligation to thoroughly and fairly investigate, process and evaluate the insured's claim. A genuine dispute exists only where the insurer's position is maintained in good faith and on reasonable grounds. (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.*, *supra*, 90 Cal.App.4th at pp. 348–349; *Guebara v. Allstate Ins. Co.*, *supra*, 237 F.3d at p. 996.) [Footnote omitted.] Nor does the rule alter the standards for deciding and reviewing motions for summary judgment. "***The genuine issue rule in the context of bad faith claims allows a [trial] court to grant summary judgment when it is undisputed or indisputable that the basis for the insurer's denial of benefits was reasonable—for example, where even under the plaintiff's version of the facts there is a genuine issue as to the insurer's liability under California law.*** [Citation.] … ***On the other hand, an insurer is not entitled to judgment as a matter of law where, viewing the facts in the light most favorable to the plaintiff, a jury could conclude that the insurer acted unreasonably.***" (*Amadeo v. Principal Mut. Life Ins. Co.* (9th Cir. 2002) 290 F.3d 1152, 1161–1162.) Thus, an insurer is entitled to summary judgment based on a genuine dispute over coverage or

> the value of the insured's claim only where the summary judgment record demonstrates the absence of triable issues (Code Civ. Proc., § 437c, subd. (c)) as to whether the disputed position upon which the insurer denied the claim was reached reasonably and in good faith.

(*Wilson, supra,* 42 Cal.4th at pp. 723-724; emphasis added.)

2. **APPLICATION.**

Defendant EIC characterizes the dispute here as one which concerns the amount of the Plaintiffs' claim. The amount of the claim, in turn, depends upon the scope of the work necessary. Even more specifically, Plaintiffs contend they are entitled to replacement of the Beauharnais throughout the entire Property (all three levels) because availability of a matching Beauharnais stone has been depleted. Defendant EIC contends, on the other hand, that there is a genuine dispute as to whether the scope of the work can be limited to replacement of the Beauharnais at the basement level of Plaintiffs' Property because other products are available to match the existing Beauharnais at Plaintiffs' Property. Thus, according to defendant EIC, a genuine dispute exists with regard to the scope and, consequently, the amount of Plaintiffs' coverage claim.

Defendant EIC contends this is so because it relied upon the opinion of an expert. "'The "genuine dispute" doctrine may be applied where the insurer denies a claim based on the opinions of experts.'" (*501 East 51st Street, etc. v. Kookmin Best Ins. Co., Ltd.* (2020) 47 Cal.App.5th 924, 937.) " 'A genuine dispute exists only where the insurer's position is maintained in good faith and on reasonable grounds.' [Citation.] Those grounds include reasonable reliance on experts hired to estimate repair benefits owed under the policy. [Citation.]" (*Paslay v. State Farm General Ins. Co.* (2016) 248 Cal.App.4th 639, 653.) "Where the parties rely on expert opinions, even a substantial disparity in estimates for the scope and cost of repairs does not, by itself, suggest the insurer acted in bad faith." (*Fraley v. Allstate Ins. Co.* (2000) 81 Cal.App.4th 1282, 1293.)

In relevant part, defendant EIC proffers the following facts: Around mid-February 2020, plaintiff Columba Campbell discovered a puddle of water in the wine cellar of his home, which is in the basement level, and subsequently determined the source of the water was a leak

in the hydronic floor heating system.[1] On February 19, 2020, Plaintiffs reported a claim to defendant EIC.[2] On April 20, 2020, EIC adjuster Alan Kachic spoke with plaintiff Columba Campbell and offered to have a Bay Area contractor, Mark Scott Construction ("MSC"), get involved as a consultant and prepare a repair estimate.[3] MSC inspected the home with plaintiff Columba Campbell on April 21, 2020.[4] MSC began working on a repair estimate, including conducting additional inspections and obtaining sub-bids for the work.[5] In mid-July 2020, MSC completed a $1,589,478.32 estimate to repair the Plaintiffs' home.[6] Because MSC believed it could obtain a stone to blend with the material in the rest of the home, the scope of the estimate was to repair only the damaged basement level, not the entire house.[7] In a September 15, 2020 email, plaintiff Columba Campbell rejected MSC's "initial scope of work" stating there was no stone available to match the floor in their home.[8] In a September 28, 2020 email to plaintiff Columba Campbell, defendant EIC's Mike Evanoff stated that MSC had contacted another stone supplier, ASN Natural Stone ("ASN"), and proposed that when MSC obtained stone samples from ASN they set up a meeting at the Plaintiffs' home to view those samples and "confirm they are a like, kind, and quantity match."[9] On February 19, 2021, an inspection of the Plaintiffs' home occurred to evaluate the stone samples.[10] On February 25, 2021, ASN's Rose Garcia ("Garcia") issued a letter to MSC which stated that, based on her "experience" and professional opinion, the two kinds of stone ASN was able to source were an "excellent stone to blend with the now unavailable Beauharnais" in the Plaintiffs' home.[11]

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[1] See Separate Statement of Undisputed Material Facts in Support of Encompass Insurance Company's Motion for Summary Adjudication ("EIC UMF"), Issue No. 1, Fact No. 1.
[2] See EIC UMF, Issue No. 1, Fact No. 2.
[3] See EIC UMF, Issue No. 1, Fact No. 3.
[4] See EIC UMF, Issue No. 1, Fact No. 4.
[5] See EIC UMF, Issue No. 1, Fact No. 5.
[6] See EIC UMF, Issue No. 1, Fact No. 6.
[7] *Id.*
[8] See EIC UMF, Issue No. 1, Fact No. 8.
[9] See EIC UMF, Issue No. 1, Fact No. 9.
[10] See EIC UMF, Issue No. 1, Fact No. 13.
[11] See EIC UMF, Issue No. 1, Fact No. 14. Plaintiffs' Objections to Evidence in Support of Opposition to Defendant's Motion for Summary Adjudication, Objection No. 8, is OVERRULED. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., §437c, subd. (q).)

Defendant EIC relied on the February 25, 2021 written opinion of Garcia from ASN in concluding the repair to the home could be limited to the damaged lower level.[12]

In opposition, Plaintiffs acknowledge the principle that, "where an insurer, for example, is relying on the advice and opinions of independent experts, then a basis *may* exist for invoking the doctrine and summarily adjudicating a bad faith claim in the insurer's favor." (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 348 (*Chateau*); italics original.) However,

> an expert's testimony will not *automatically* insulate an insurer from a bad faith claim based on a biased investigation. It suggested several circumstances where a biased investigation claim should go to jury: (1) the insurer was guilty of misrepresenting the nature of the investigatory proceedings (see *Tomaselli v. Transamerica Ins. Co.*, *supra*, 25 Cal. App. 4th 1269, 1281 [allowing a bad faith claim to go to the jury where an insurance company without any evidence of fraud forced an insured to submit to an examination under oath, dissuaded the insured from having an attorney present, and misled the insured about the purpose of the examination]); (2) the insurer's employees lied during the depositions or to the insured; (3) the insurer dishonestly selected its experts; (4) **the insurer's experts were unreasonable**; and (5) the insurer failed to conduct a thorough investigation.

(*Chateau*, *supra*, 90 Cal.App.4th at pp. 348-349; italics original; emphasis added; see also *Fadeeff v. State Farm General Ins. Co.* (2020) 50 Cal.App.5th 94, 102-103 (*Fadeef*).)

Plaintiffs submit evidence in opposition which calls into question (i.e., creates a triable issue of material fact with regard to) whether defendant EIC's expert (ASN's Rose Garcia) opinion was a reasonable opinion to be made. More specifically, Plaintiffs submit testimony of two limestone experts who disagree with Garcia's conclusion.[13] The concern, as identified by the *Chateau* and *Fadeef* courts, is that "an insurer [will seek to] insulate itself from liability for bad faith conduct by the simple expedient of hiring an expert for the purpose of manufacturing

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[12] See EIC UMF, Issue No. 1, Fact No. 15.

[13] See ¶¶11 – 12 and Exh. 20 – 21 of the Declaration of Alexandria C. Carraher in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Adjudication.

a 'genuine dispute.'" (*Fadeef*, *supra*, 50 Cal.App.5th at p. 103 citing *Chateau*, *supra*, 90 Cal.App.4th at p. 349, fn. 8.) This conclusion is in accord with *Wilson*, *supra*, 42 Cal.4th at p. 723 which holds that summary judgment/ adjudication is appropriate only "when it is ***undisputed or indisputable*** that the basis for the insurer's denial of benefits was reasonable."

In anticipation, defendant EIC contends the dueling expert testimony only serves to establish the existence of a genuine dispute. To support this contention, defendant EIC cites *Chateau*, *supra*, 90 Cal.App.4th at pp. 349-351 to suggest that an "insurer's reliance on expert's opinion precluded bad faith liability as a matter of law even when insured's engineering experts disagreed with insurer's engineering experts about the extent of earthquake damage."[14] The court does not find this to be an accurate summary of the *Chateau* court decision. In relevant part, the *Chateau* court explained:

> When it moved for a summary adjudication of HOA's bad faith cause of action, AIIC presented evidence of the existence of a legitimate dispute with HOA as to just what was due under the policy. That evidence consisted primarily of the declaration of the officer of the claim adjustment company retained by AIIC to investigate HOA's claimed loss. That declaration spelled out in considerable detail the entire adjustment process as it unfolded.

(*Id.* at p. 349.)

> In opposing AIIC's motion, HOA essentially offered only a two-page declaration of its expert who claimed to have read the claim files and, based thereon, expressed the ***conclusionary*** opinions that AIIC (1) had not conducted an adequate and thorough investigation of HOA's loss, (2) had engaged in dilatory claims handling and unreasonable adjusting practices, (3) had arrived at an inadequate initial scope of loss for the structural damage and (4) had failed to obtain all necessary engineering inspections and reports. HOA's expert then concluded that, by such actions, AIIC had breached the implied covenant of

[14] See page 17, lines 18 – 21, of the Memorandum of Points and Authorities in Support of Encompass Insurance Company's Motion for Summary Adjudication ("EIC MPA").

> good faith and fair dealing. HOA argues that such "evidence" is sufficient to raise a triable issue of fact. We disagree.

(*Id.* at pp. 349-350; italics original, emphasis added.)

The *Chateau* court effectively disregarded this conclusory expert declaration offered by the insured to find the one and only reasonable inference to be drawn from the otherwise undisputed evidentiary record was that the insurer had a reasonable and legitimate basis for questioning (i.e., disputing) the insured's claim. (*Id.* at p. 350—"Only one inference can be drawn from this record. AIIC had a reasonable and legitimate basis for questioning HOA's claim … We can find nothing in this record that supports a contrary conclusion. Certainly the conclusionary declaration of HOA's expert does not.")

The court in *Chateau* was not presented with the dueling expert opinions present in this case. The court will agree with defendant EIC that the mere existence of competing expert opinions does not necessarily establish bad faith. However, the court cannot accept defendant EIC's stance that its reliance on an expert opinion, irrespective of competing expert opinion(s), will preclude a finding of bad faith. Were this to be the rule, then insurers could always escape liability for bad faith by hiring an expert to manufacture a dispute and, as *Chateau* instructs, "an expert's testimony will not *automatically* insulate an insurer from a bad faith claim."

For the reasons discussed above, defendant EIC's motion for summary adjudication of the second cause of action of Plaintiffs' complaint is DENIED.

B. **ELDER FINANCIAL ABUSE.**

Defendant EIC moves for summary adjudication of Plaintiffs' third cause of action for financial elder abuse by arguing, again, that the existence of a genuine dispute about the amount of coverage precludes, as a matter of law, a finding of wrongful conduct necessary to establish a claim for financial elder abuse. (See *Paslay v. State Farm General Ins. Co.* (2016) 248 Cal.App.4th 639, 658—"there is no evidence that State Farm acted in subjective bad faith or unreasonably in denying additional benefits [and the] elder abuse claim thus fails in light of the evidence supporting the application of the genuine dispute doctrine to the Paslays' bad faith claim.")

For the same reasons discussed above, defendant EIC's motion for summary adjudication of the second cause of action of Plaintiffs' complaint is DENIED.

C. **PUNITIVE DAMAGES.**

Finally, defendant EIC moves for summary adjudication of Plaintiffs' claim for punitive damages. Defendant EIC cites to a number of general legal principles regarding punitive damages which may be recovered "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." (Civ. Code, §3294.) As the statute is written in the disjunctive, defendant EIC must demonstrate plaintiffs cannot establish any oppression, fraud, or malice in order to meet its initial burden. Likewise, "'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff ***or*** despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civil Code §3294, subd. (c)(1); emphasis added.) Again, this language is written in the disjunctive so for defendant EIC to meet its initial burden with regard to malice, defendant EIC would have to negate both.

Apart from citing to general legal principles, defendant EIC argues only that its conduct (in relying on expert opinion(s) and paying over $2 million of Plaintiffs' claim) is "nowhere near 'despicable,' 'vile,' 'wretched,' or 'loathsome.'"[15] However, this only addresses one avenue for establishing malice. Defendant EIC proffers no argument or evidence concerning "intent to cause injury to plaintiff" and, thus, has not met its initial burden. Nor does defendant EIC meet its initial burden by simply asserting that Plaintiffs "can never prove by clear and convincing evidence the type of evil conduct necessary for punitive damages."[16]

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[15] See page 21, lines 19 – 20, of the EIC MPA. "'Despicable conduct' has been described as conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people. [Citation.] Such conduct has been described as '[having] the character of outrage frequently associated with crime.'" (*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1050.)

[16] Summary judgment law in this state, however, continues to require a defendant moving for summary judgment to present evidence, and not simply point out [footnote] that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. … For the defendant must "support[]" the "motion" with evidence including "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice" must or may "be taken." (Code Civ. Proc., § 437c, subd. (b).) The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed

Accordingly, defendant EIC's motion for summary adjudication of Plaintiffs' request for punitive damages is DENIED.

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evidence--as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing.

(*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855.)

Calendar Lines 6 and 7
Case Name: *Jane Doe vs San Jose Open Bible Church et al*
Case No.: 23CV421638

Before the Court are Plaintiff Jane Doe's two motions: (1) a motion to compel Defendant San Jose Open Bible Church to provide further responses and corresponding document production to Plaintiff's Requests for Production of Documents (Set One) Nos. 4, 5, and 6, and (2) a motion to compel Defendant to provide a complete privilege log and to remove redactions and produce the documents Defendant has identified in its privilege log (Line-Item Nos. 4, 5, 11, 12, 13, 14, 15, and 23).

Motion to Compel Further Responses and Documents

Plaintiff's motion is brought on the grounds that the requests in dispute seek documents that are discoverable pursuant to Code of Civil Procedure § 2017.010, seek documents that do not contain particularly sensitive information, that any privacy concerns are resolved by the Protective Order in place and that "Defendant affirmed and verified under penalty of perjury that it would amend these responses and produce corresponding responsive documents after a Protective Order was executed", but despite numerous attempts to meet and confer, and the issuance of a Protective Order, Defendant has failed and/or refused to do so.

In her complaint, Plaintiff alleges sexual assault and harassment by a staff member, Caleb Sayre, at Defendant's after-school program. Plaintiff alleges that Mr. Sayre was employed by, and under the control of, Defendant. Plaintiff seeks two categories of documents: (1) documents relating to the hiring of Mr. Sayre, including those he submitted to apply for any position; and (2) Mr. Sayre's personnel file, including documents related to hiring, training, and the termination of Mr. Sayre. Plaintiff argues that these documents are discoverable and directly related to Plaintiff's claims in this sexual assault litigation, including Defendant's knowledge Mr. Sayre's inappropriate conduct, insufficient hiring, training, and supervision of Mr. Sayre, ratification of the offensive behavior, and liability for punitive damages for intentionally concealing from clientele such as Plaintiff and her parents the risk of being sexually assaulted by a childcare teacher at their after-school program.

The Court signed the Protective Order on July 20, 2024. Despite agreeing to provide documents in dispute in its verified responses, once a Protective Order was issued, Defendant has not done so.

The requests are as follows:

Request No. 4: All DOCUMENTS provided to YOU by SAYRE to apply for employment with YOU.

Request No. 5: All DOCUMENTS relating to YOUR hiring of SAYRE, including background checks, screenings, applications, references, and lists of past employment.

Request No. 6: The formal personnel file for SAYRE, including without limitation, employment applications, background and/or reference checks, teaching credentials, training records, employee time sheets, work schedules, performance reviews, pay rate information,

notes, letters, communications from YOUR employees or agents, incident reports, and disciplinary actions.

In response to each request in dispute, Defendant responded:

"Responding Party objects to the extent this interrogatory violate the privacy rights of one of its employees. However, without waiving said objections, *Responding Party will produce non-privileged documents subject to a protective order.*" (Emphasis added.)

During the parties' first meet and confer call in March, Defense Counsel requested that a protective order be executed before Defendant would produce the documents requested by Requests, Nos. 4, 5, and 6. Plaintiff agreed. The Stipulated Protective Order explicitly identifies the documents requested by the discovery requests at issue in this Motion:

"IT IS FURTHER STIPULATED that the Parties shall have the right to designate "Confidential" any documents or information which relate to the following categories, that the Designating Party in good faith believes is entitled to confidential treatment under applicable law: a. Documentation relating to the employment of Caleb Sayre at Carter 18 Ave. Christian Preschool, including Caleb Sayre's employee file."

Defendant has still not served documents in accordance with its statement of compliance and opposes the motion, arguing that the records sought by Plaintiff contain information regarding Mr. Sayre that is privileged and protected under Mr. Sayre's constitutional right to privacy and absent a court order or Mr. Sayre's written consent, Defendant is unable to produce such documents.

It is unclear why, despite the issuance of a Protective Order in this matter, that specifically contemplates the documents requested and at issue here, and its verified response that it would produce responsive documents, Defendant has not produced the documents in dispute here. Good cause appearing, the motion is GRANTED. Defendant shall serve verified, code-complaint further responses and produce responsive documents to Request Nos. 4, 5 and 6, in accordance with the terms of the Protective Order by November 18, 2024.

Motion to Provide Privilege Log and Remove Redactions

Plaintiff also moves to compel Defendant to (1) provide a complete privilege log and (2) to remove redactions and produce the documents that Defendant has identified in its "insufficient" privilege log (Line-Item Nos. 4, 5, 11, 12, 13, 14, 15, and 23) on the grounds that Defendant has objected to various discovery requests on the grounds of privilege, but failed to provide a proper privilege log. Plaintiff argues that the documents in dispute are not privileged and should not have been redacted or withheld. Defendant opposes the motion, arguing that production would disclose the contact information of students enrolled in Defendant's program from 2013-2017, and those minor students have a substantial privacy interest in their contact information as its disclosure necessarily warrants the disclosure of their religious association. Defendant also argues that Plaintiff seeks records regarding Mr. Sayre that are privileged and protected under his right to privacy.

The Court finds that Defendant's privilege log is incomplete as it does not identify the specific privilege or provide Plaintiff with sufficient information to enable her to evaluate

Defendant's claim of privilege. Each document in the privilege log must be clearly labeled -- grouping documents together is not sufficient -- and the privilege log must identify for each document: the author, recipients, date of preparation, and the specific privilege or work product protection claimed. *Hernandez v. Sup.Ct. (Acheson Indus., Inc.)* (2003) 112 CA 4th 285, 291-292. Defendants privilege log falls short of this requirement. The Court does not see any reference to the student's religion in the record and any privacy concerns are allayed by the issuance of a Protective Order. As such, the motion to compel a complete, compliant privilege log is GRANTED and Defendant shall serve the same by November 18, 2024. Once the compliant privilege log has been served, and assuming no attorney client or work product privilege applies, Defendant shall produce the documents identified in Privilege Log Line Nos. 4, 5, 11, 12, 13, 14, 15, and 23, in accordance with the Protective Order in place in this matter, no later than November 22, 2024.

Plaintiff to prepare a formal order.

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