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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

PORT LA DISTRIBUTION CENTER, L.P. et al., Plaintiffs, Appellants and Respondents, v. UNITED NATIONAL INSURANCE COMPANY, INC., Defendant, Respondent and Appellant.	B230255 (Los Angeles County Super. Ct. No. NC042775)

APPEAL from a judgment of the Superior Court of Los Angeles County. Roy L. Paul, Judge. Affirmed.

Jones Day, Martin H. Myers, Raymond H. Sheen, Brian D. McDonald and Matthew J. Silveira for Plaintiffs, Appellants and Respondents Port LA Distribution Center, L.P. and Port LA Distribution Center II, L.P.

Gordon & Rees, David C. Capell, Matthew C. Elstein and Lyndy Chang Stewart for Defendant, Respondent and Appellant.

On appeal from the judgment, Port LA Distribution Center, L.P. and Port LA Distribution Center II, L.P. (collectively, Port LA) challenges: (1) the order granting summary adjudication on its complaint in favor of United National Insurance Company, Inc. (UNIC); (2) the order granting judgment on the pleadings; and (3) the order denying, as untimely, its motion for production of documents.

Port LA also appeals from these postjudgment orders: (1) the order granting UNIC's motion to strike Port LA's cost memorandum; and (2) the order denying Port LA's motion to strike UNIC's cost memorandum.

In its appeal from the judgment, UNIC challenges: (1) the order granting Port LA summary judgment on UNIC's cross-complaint; (2) the order granting Port LA's motion for summary adjudication on UNIC's rescission defense to the complaint; (3) the order denying as moot UNIC's motion for summary judgment on its cross-complaint; and (4) the order granting Port LA's summary adjudication motion as to UNIC's duty to defend under the subject insurance policy.

We have read and considered the supplemental briefing of the parties on three issues originally not raised or briefed but requested by the court. The first issue pertains to an apparent inconsistency in the judgment. The remaining issues concern the appropriate review procedure for review of the trial court's discovery ruling and in what particulars, if any, Port LA sustained prejudice from the lack of a ruling on the merits of its discovery motion. We shall address these issues, *post*.

Based on our review of the record and applicable law, we affirm both the judgment and the postjudgment orders in their entirety.

INTRODUCTION

This action concerns the existence or nonexistence of a duty on the part of UNIC to defend and/or to indemnify and pay cleanup costs for an alleged pollution condition on real property and presents issues regarding the interpretation and applicability of the real property pollution insurance policy (Policy) issued by UNIC to Port LA regarding a

certain 55 acre real property[1] known as the Port LA Distribution Center (Site) in an industrial part of San Pedro in Los Angeles. The Policy was in effect from August 3, 1999 to August 3, 2009. The Site was operated as an oil refinery from about 1923 to 1948, during which time period the property ownership changed several times. From 1950 to 1995, the Site was operated as a terminal facility. Between 1997 and 1999, the facilities used for terminal facility operations were demolished in preparation for redevelopment of the Site as the San Pedro Business Center.

On February 25, 1985, the Regional Water Quality Control Board (Regional Board), which opened a case for this Site, issued a "Cleanup and Abatement Order" (Order No. 85-17),[2] which required then Site tenant Western Fuel Oil Company (WFO), among other operators of petrochemical facilities, "to conduct a subsurface investigation of their facilities to detect and assess any groundwater pollution which may be present." If a condition of pollution were found, WFO was directed to provide a plan which included "remedial measures and a timetable to correct that condition."

In November 1998, Regional Board issued a letter to LandBank, the representative for Gaffey Street Ventures, LLC (Gaffey Street), then owner of the Site, regarding requirements related to redevelopment of the Site and the proposed San Pedro Business Park. Although the Regional Board issued a "'no further action'" (NFA) letter with respect to the soil of the Site on January 13, 2000, Regional Board advised that the groundwater portion of the case remained open until two remediation goals were

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[1] The precise address of the insured property is listed as 2000, 2100, and 2200 North Gaffey Street and as 300, 301, 350, 400, 401, and 450 Westmont Drive, Los Angeles, California.

[2] Port LA points out UNIC contends Order 85-17 is not a cleanup and abatement order and in support of its contrary position, Port LA requests this court take judicial notice of an unpublished decision of this court which has been superseded by a grant of review and supplanted by a decision of our Supreme Court (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945) and of a brief filed in the matter before that Court. We deny the request. On the other hand, we note that although, on its face, Order No. 85-17 is not entitled a "Cleanup and Abatement Order," Regional Board expressly characterized its Order No. 85-17 as a "Cleanup and Abatement Order."

achieved, namely: (1) there was no recoverable free product remaining at the Site; and (2) both on-Site and off-Site groundwater had been contained and stabilized.

In December 2001, Port LA purchased the Site from Gaffey Street for the purpose of developing one or more of the properties which were part of the Site. The Policy, which originally had been issued to Gaffey Street, was transferred to Port LA.

It is undisputed that the groundwater contamination at the Site resulted from discharges prior to August 3, 1999 and that "benzene, MTBE, TBA and TAA" were detected at the Site prior to that date, which was the date the Policy began. In early 2002, petroleum "'free product'" was detected at the Site. Port LA retained third parties, including SCS Engineers (SCS) and CAPE Environmental Management, Inc. (CAPE), to provide various services, including investigation regarding groundwater contamination due to benzene, MTBE, TBA and TAA, among other contaminants. In 2007, for the first time, the Regional Board required Port LA to investigate fuel oxygenates in the deep groundwater.

BACKGROUND[3]

The parties acknowledge that UNIC had been "'paying on-going costs related to investigating, monitoring and remediating [groundwater contamination] . . . since 2000'" and that UNIC paid "'such on-going costs directly to CAPE . . . upon receipt of CAPE's invoices.'"[4] UNIC paid these costs based on its understanding that "these invoices reflect costs incurred for groundwater remediation of free product and monitoring and testing activities which were a consequence of that remediation, as required pursuant to Order No. 85-17 [issued in 1985]."

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[3] The record on appeal is voluminous and includes, among other items, an appellant's appendix, consisting of 12 volumes of documents; a two-volume appellant's appendix regarding a document under seal; a "supplemental appendix" of respondent/cross-appellant, which consists of volumes 1 through 23, plus volumes 23a through 23f; and multiple volumes of reporter's transcripts. We recount only those facts, procedural history, and other matters that are pertinent to the issues before us.

[4] The parties acknowledged that as of March 30, 2007, UNIC paid Port LA approximately $417,695.

In early 2007, Regional Board directed Port LA to conduct additional monitoring and investigation of the quality of the groundwater to determine the presence of the fuel oxygenate tertiary butyl alcohol (TBA) in the groundwater beneath the free product and from wells with free product and recommended Port LA implement cleanup measures to avoid off-Site migration of benzene contamination.

In a letter dated March 30, 2007, Port LA requested UNIC pay for costs associated with addressing the condition of the groundwater at the Site and asked UNIC to acknowledge its duty to pay after the Policy expired. In its August 9, 2007 letter to UNIC, Port LA renewed its request for payment of CAPE's March 29, 2007 cost estimate to comply with Regional Board's directive regarding this groundwater monitoring and investigation and the costs associated with Port LA's retention of SCS, to "'assess the effectiveness'" of the current groundwater program and prepare a report, which report was dated June 19, 2006.[5] Port LA again requested UNIC acknowledge its duty under the Policy to pay Port LA's costs arising from groundwater contamination of the Site after expiration of the Policy.

By letter dated October 31, 2007, UNIC responded to this latter letter from Port LA. UNIC denied that the Policy required it to pay all future costs arising out of groundwater contamination and asserted the Policy only was required to pay for "cleanup costs" involving remedial activities resulting from a "'governmental mandate'" and which did "not include expenses arising out of testing, monitoring and/or determining the source and extent of contamination, except as a consequence of a 'pollution condition' to which this policy applies." UNIC declined to pay CAPE's March 29, 2007 cost estimate (or work plan), because, in addition to other reasons, the costs did not qualify as "'cleanup costs' as defined in the Policy," namely, "[t]he CAPE Workplan does not include any actual remedial activities." UNIC also declined to pay for costs invoiced by

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[5] In his November 10, 2009 declaration, Ian Carpe, an associate at BlackRock Realty Advisors, Inc. (BlackRock), Port LA's investment advisor, stated that, as of that date, the total amount of unpaid invoices for CAPR and SCS was $563,320.11, of which amount $224,894.95 was billed by SCS and $338,425.16 was billed by CAPE.

SCS, which Port LA retained to "'assess the effectiveness' of the current groundwater program and prepare a report," which SCS did. UNIC asserted "[c]osts incurred to assess the effectiveness of remediation groundwater activities are not 'expenses incurred in the removal, treatment, or remediation' of groundwater," and therefore, "they are not 'cleanup costs' within the Policy's meaning."

In its November 15, 2007 responsive letter, Port LA countered that costs incurred to address groundwater contamination are covered regardless of when the "pollution condition" arose, namely, pre- or post-Policy inception. Port LA asserted "the Policy identifies the discharge of petroleum contamination to groundwater as a known pre-existing 'pollution condition' at the [Site]" and that "[t]he Policy covers both pre-existing and new pollution conditions[,]" because "Coverage A provides coverage for 'cleanup costs' resulting from a 'pollution condition' if the 'pollution condition' commenced prior to the inception date of the Policy . . . while "Coverage D provides coverage for 'cleanup costs' resulting from a 'pollution condition' . . . commenced after . . . the inception date of the Policy."

Port LA further asserted that under the Policy, "cleanup costs" "incurred to test, monitor and determine the source and extent of contamination are covered 'cleanup costs' if they are done as a consequence of a covered 'pollution condition'—namely a discharge of petroleum products to groundwater contamination—as well as costs to test, monitor and determine the source and extent of such contamination."

Specifically, Port LA asserted: "TBA and MTBE are potential constituents associated with releases of petroleum hydrocarbons. As explained above, the Policy identifies the discharge of petroleum hydrocarbons to soil and groundwater as a known pre-existing 'pollution condition' at the [Site]. [Regional Board] merely asked CAPE to run additional laboratory tests to determine if two additional constituents, TBA and MTBE, are present in the known discharge of petroleum at the [Site]. In other words, CAPE was required to get more data about an already covered 'pollution condition.' As such, . . . Coverage A should apply to CAPE's work."

Lastly, Port LA asserted that the "governmental mandate" requirement of the Policy was satisfied, because since its purchase of the Site in 2001, Port LA had incurred costs regarding Regional Board's requirement that Port LA address groundwater contamination at the Site, and thus, the costs Port LA incurred to comply were incurred pursuant to a governmental mandate.

In addition, Port LA asserted UNIC acted unreasonably in refusing to pay the invoices of CAPE and SCS in question based on its misrepresentation of the Policy terms; in engaging in undue delay before processing and paying PORT LA's claim; and in refusing to respond to Port LA's request for confirmation of "its obligation to continue paying covered 'cleanup costs' for the existing groundwater claim following expiration of the Policy," which has prejudiced Port LA's ability "to obtain quotes for supplemental insurance coverage from markets that would otherwise provide such coverage" and "to proceed with accurate valuation of the [Site] for potential prospective purchasers."

In its responsive letter dated December 11, 2007, UNIC acknowledged "the costs [Port LA] incurs to actually remediate or correct groundwater contamination may be covered under the Policy, even if incurred after the Policy expires, provided all conditions of coverage are met. But, [UNIC] must independently evaluate each invoice before it can make its coverage determination." UNIC, however, refused to alter its position that the CAPE and SCS costs in question were not covered under the Policy.

A. Pertinent Policy Provisions

The Policy period was from August 3, 1999 to August 3, 2009. "Coverage A" and "Coverage D" of the policy set forth UNIC "Sites Cleanup Costs Liability." Coverage A applied to preexisting pollution conditions while Coverage D applied to new pollution conditions. In pertinent part, each coverage provided UNIC would pay on behalf of PORT LA "those sums . . . 'cleanup costs' resulting from a 'pollution condition' to which this insurance applies." Payment would be made for "'cleanup costs' [that] result from "a 'governmental mandate' upon [Port LA] to take 'corrective action' provided that a 'claim' for 'cleanup costs' is first made upon [Port LA] and reported to

[UNIC] in writing during the 'policy period' or Automatic Extended Reporting Period, if applicable."[6]

Additionally, under Coverage A and Coverage D, UNIC had "the right and duty to defend such 'claim' subject to the Each [sic] Pollution Incident Limit and the Policy Aggregate Limit. The amount [UNIC] will pay for 'cleanup costs' and all costs to investigate, contest, defend, or appeal all 'claim[s]' or 'suits' is limited as described in SECTION FIVE—LIMITS OF LIABILITY."

Section Nine of the Policy set forth these definitions of relevant terms, in pertinent part, as used in the Policy: "'Claim(s)' means a written demand received by [Port LA] seeking or purporting to hold [Port LA] responsible for . . . 'cleanup costs' arising out of a 'pollution condition.'"

"'Cleanup costs' means expenses incurred in the removal, treatment, or remediation of soil, surface water, groundwater or their contamination resulting from 'pollution conditions' covered by this [P]olicy, provided that such expenses; a. are the result of 'governmental mandate[.]'" [¶] . . . [¶] "'*Cleanup costs*' *do not include expenses arising out of testing, monitoring and/or determining the source and extent of contamination, except as a consequence of a 'pollution condition' to which this insurance applies.*" (Italics added.)

"'Corrective action' means those remedial operations and activities performed by a 'third party' not affiliated with [Port LA.]"

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6 Section Eight of the Policy sets forth the "Automatic Extended Reporting Periods" as follows: "Provided that you have not purchased any other insurance to replace this insurance which applies to a 'claim' otherwise covered under this [P]olicy, you have the right to the following: a period of five (5) years after the end of the 'policy period' in which to provide written notice to us of 'claim' first made and reported within the Automatic Extended Reporting Period. A 'claim' first made and reported within the Automatic Extended Reporting Period will be deemed to have been made on the last day of the 'policy period,' provided that the 'claim' arises from a 'pollution condition' that commenced before the end of the 'policy period'."

"'Governmental mandate' means any directive, order, requirement . . . of . . . any . . . State . . . of The United States of America . . . duly acting under the authority of environmental or related laws."

"'Pollutant(s) means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." "'Pollution condition' means the condition that arises out of a 'discharge' of 'pollutants' which affects land, surface water, groundwater or the atmosphere. The entirety of any 'discharge' shall be deemed to give rise to one 'pollution condition.'" "'Discharge' means the release, discharge, dispersal or escape of any 'pollutant.'"

B. Relevant Regional Board Orders and Directives

On February 25, 1985, Regional Board issued Order No. 85-17, which required WFO, and other petrochemical facilities, "to investigate the groundwater under and adjacent to (if necessary) their facilities to determine if a condition of pollution exists."

Specifically, WFO was ordered to: (1) "conduct an investigation and [S]ite assessment to detect and characterize any groundwater pollution beneath the facility," which "investigation shall be extended to define the edges of the plume(s)" if "the investigation yields data which reasonably indicates that the groundwater pollution extends beyond the facility borders;" (2) "at a minimum[,] identify the following: a. the areas ('plumes') and chemical nature of the pollution in the ground water[;] b. the existence and extent of any free hydrocarbon pools on the groundwater surface including chemical characterization of the hydrocarbons[;] c. the extent and chemical nature of any pollutants (particularly hydrocarbons) that may be absorbed onto the soils in the unsaturated (vadose) zones or be present as vapors[;] d. . . . provide data on the subsurface geology and hydraulic properties of the aquifers underlying the facilities including estimated direction and flow rate of the groundwater"; [;] (3) "submit a technical report containing a detailed plan for conducting the above investigation and Site assessment[, which] plan shall be a timetable for implementation of the plan" and "[a] final, complete report is to be submitted 30 days later"; and (4) "*[i]n the event a*

condition of pollution is determined in the above investigation and Site assessment," "*include remedial measures and a timetable to correct that condition* '*in the plan*.'"

In its March 1, 2007 letter, Regional Board stated it was "investigating possible source area(s) for TBA" and noted that the Site "is located upgradient of ConocoPhillips Wilmington Refinery;" a "groundwater monitoring and free product recovery program" was being performed at the Site; and the "groundwater is contaminated with one of [the] fuel oxygenates, TBA, in this area." Regional Board recommended Port LA: (1) monitor fuel oxygenates though a groundwater sampling event; (2) sample groundwater from wells with free product (MW-6R, MW-14R, MW-19R) by taking samples from beneath the free product; (3) obtain product samplings from wells with free product; (4) investigate human health risk associated with indoor air, because it expected "more detail[ed] benzene concentration beneath this [S]ite"; and (5) conduct "further investigation and [identify any] cleanup measure to be implemented," because "contaminated groundwater with benzene, 1, 2-DCA, and other chemicals migrate off[S]ite (MW-9R and MW-10R)."

By email dated December 4, 2007, Regional Board requested Port LA to investigate and assess the Site for a "condition of pollution" (Water Code, § 13050, subd. l). Regional Board noted there was "groundwater contamination with [TBA] all the way down to the Silverado Aquifer (more than 600 feet deep below mean sea level) beneath the ConocoPhillips Wilmington Refinery (CPWR) located adjacent to the [Site]. Due to the TBA contamination in the deeper aquifer, [Regional Board] requested testing of fuel oxygenates from the current groundwater monitoring network at the [Site]." Regional Board recommended Port LA conduct "a [S]ite-wide groundwater investigation to understand the current situation with fuel oxygenates" in view of "[r]ecent groundwater quality data show[ing] high concentration of TBA and tertiary-amyl alcohol (TAA) from on-[S]ite monitoring wells."

By order dated March 5, 2009, Regional Board "directed [Port LA] to submit a technical report by April 20, 2009 for a deep groundwater investigation and conceptual

site model (CSM) based on results of the investigation performed to date for chemicals of concern at the subject [S]ite" and "must include recommendations for additional investigations in case the CSM cannot convey all the required information."

By letter dated October 21, 2009, Regional Board noted it had "determined that additional requirements are necessary in order to complete Site contamination characterization" and directed Port LA to comply with "the enclosed Order to adequately assess groundwater contamination at and migrating from the [S]ite." In pertinent part, this order required Port LA in delineated items "1." through "3." to submit by December 24, 2009, a technical report (work plan) that provided "a 3-d illustration" depicting, among other things, "the current groundwater monitoring network screen intervals"; for installation of "three additional multi-depth clustered groundwater monitoring wells," or which "must be incorporated to the [S]ite's routine groundwater monitoring program"; and for performing "cone penetration testing-rapid optical screening tool laser-induced fluorescence (CPT-ROST LIF) investigation for the submerged light non-aqueous phase liquids (LNAPL)" In item "4.," Port LA was "required to conduct a quarterly groundwater monitoring and sampling program from all groundwater monitoring wells at the Site for hydrocarbon compounds and fuel oxygenates including TBA and TAA" and, "[b]y November 30, 2009," Port LA was to "submit a technical report (plan) for the subject [S]ite's required quarterly groundwater monitoring program for . . . review and approval." Item "5." required Port LA "to submit a chemical report (plan) to remove the identified contaminants including LNAPL at the subject [S]ite."

In this order, Regional Board stated: "Due to historical land use at the [S]ite, soil and groundwater beneath the [S]ite have been impacted with petroleum hydrocarbons and fuel oxygenates including TBA and TAA. However, [Port LA has] not yet completed Site contamination characterization and have not organized Site investigation data into a conceptual Site model to assess the full extent of the groundwater contamination. . . . *Regional Board needs the required reports in order to complete the vertical and*

lateral delineation of the groundwater contamination plume and properly implement remedial measures."

By letter dated February 4, 2010, Regional Board advised Port LA that based on the discussion on January 20, 2010 of the technical reports, it was "hereby amending the October 21, 2009 order," a copy of which was attached to this letter. In pertinent part, the amended order revised the date for submission of the technical report pursuant to items "1." through "4." to February 26, 2010.

Deleted was item "5.," which would have required Port LA "[b]y March 1, 2010, . . . to submit a technical report (plan) to remove the identified contaminants including LNAPL at the subject [S]ite." In place of this requirement, the amended order added, as item "6." the following directive: Port LA was "required to submit a technical report (plan) to remove recoverable LNAPL and that addresses dissolved phase contaminants of concern at the subject [S]ite after understanding of LNAPL distribution, mobility and saturation by ninety days after BlackRock submits its reports with the results of the additional well installation and LNAPL assessment required by Provisions [items] 2[.] & 3."

C. Rulings on the Complaint

1. Operative Complaint

In its second amended complaint (Complaint),[7] Port LA seeks damages against UNIC for breach of contract for allegedly failing to carry out its duty to defend and for refusing to pay cleanup costs for a pollution condition properly submitted under the Policy (first and second causes of action, respectively); for tortuous breach of the implied covenant of good faith and fair dealing (third cause of action); and for declaratory relief regarding whether UNIC is obligated under Coverage A of the Policy to pay cleanup costs for the pollution condition and whether UNIC is obligated under Coverage D of the Policy to pay for cleanup costs for a pollution condition arising after August 3, 1999 (fourth and fifth causes of action, respectively). Port LA specifically sought recovery of

[7] This action was filed on October 16, 2008.

the costs and expenses for the "testing, monitoring and investigation . . . Regional Board required in 2007" that Port LA undertake.

UNIC answered by filing a general denial and asserting fifteen affirmative defenses, including the defenses that UNIC is entitled to rescind the policy (fourth affirmative defense); declaratory relief is inappropriate to the extent Port LA has an adequate remedy at law (seventh affirmative defense); Port LA's claims are barred in whole or in part by the equitable doctrines of waiver, estoppel, laches, or unclean hands (ninth affirmative defense); and Port LA's punitive damages claim is barred by its failure to plead or present evidence of a pattern of egregious practices by UNIC (tenth affirmative defense).

2. Proceedings and Rulings As to Complaint

On March 8, 2010, the trial court denied Port LA's motion for summary adjudication on the issues of UNIC's duty to defend alleged in the second cause of action and its duty to indemnify (pay "cleanup costs") alleged in the first cause of action of the Complaint.[8]

On May 13, 2010, the trial court denied Port LA's motion to continue the hearing on UNIC's motion for summary judgment or summary adjudication on the Complaint. Port LA sought the continuance based on its "belief that UNIC has withheld more than 800 documents in this litigation, claiming various privileges that, in half the cases, likely don't apply" and the pendency of a motion to compel to be heard by the discovery

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[8] Although the court's order only referred expressly to the duty to defend alleged in the second cause of action, the court's finding as to UNIC's duty to defend necessarily referred to the duty to defend alleged in the first cause of action. Nonetheless, the circumstances under which the trial court made its final ruling on the duty to defend allegation of the first cause of action is unclear. On September 28, 2010, the court granted UNIC's motion for judgment on the pleadings "as to the first cause of action for breach of contract (duty to defend)." In the judgment, the court noted "[t]he Court, by prior order dated August 9, 2010, granted Port LA's motion for summary adjudication as to the duty element of Port LA's first cause of action for breach of contract regarding the duty to defend claims."

referee. In denying the continuance, the court found "Port LA fails to make a sufficient showing that the facts to be obtained are essential to opposing UNIC's motion."

On the same date, the court granted UNIC's motion for summary adjudication on the Complaint as to the fifth cause of action (declaratory relief) regarding whether Coverage D was inapplicable because no pollution condition had commenced on or after August 3, 1999. The court tentatively ruled in favor of UNIC on the second cause of action (breach of contract) regarding whether UNIC had no duty to indemnify Port LA for costs to investigate as cleanup costs, but reserved its final ruling in view of the issue of whether UNIC owed Port LA a duty to indemnify as to the costs Port LA incurred for "free product removal" at the Site in 2009, a new issue raised in Port LA's opposition to UNIC's motion.

The court also denied as moot UNIC's motion for summary judgment on its cross-complaint or, alternatively, summary adjudication of Port LA's affirmative defenses asserted to the cross-complaint.

On August 9, 2010, on its own motion, the trial court granted reconsideration of the court's March 4, 2010 ruling denying the motion of Port LA for summary adjudication that UNIC had a duty to defend. The court ruled "as a matter of law, on the undisputed evidence before it, [UNIC] had a duty to defend the claim that arose with [Regional Board]'s issuance of the February 4, 2010 directive purporting or seeking to hold Port LA responsible for the cleanup of deep groundwater contamination at the Site, and which was tendered to [UNIC]." The court, however, did not address whether the Complaint alleged denial of benefits as to the February 4, 2010 trigger date.

The court granted Port LA's motion for summary adjudication of UNIC's fourth affirmative defense (rescission) to the Complaint. The court found the undisputed evidence revealed no misrepresentations or concealment of the remediation status of the Site and that UNIC waived any claim for rescission because "it failed to make further inquiry into any facts it might regard as material and instead simply issued the Policy."

The court ruled UNIC was "entitled to summary adjudication as a matter of law [on] Port LA's second cause of action for breach of contract in connection with the duty to indemnify" in view of "Port LA's acknowledgment that UNIC has paid the invoices submitted to it for free product removal at the Site in 2009" and "the undisputed evidence shows that UNIC did not breach its duty to indemnify Port LA."

On September 28, 2010, the trial court granted UNIC's motion for judgment on the pleadings as to the first (breach of contract; duty to defend), third (bad faith) and fourth (declaratory relief; pollution condition and cleanup costs under Coverage A) causes of action of the Complaint.

After noting that on August 9, 2010, the court had found "UNIC had a duty to defend as to deep groundwater contamination and that this duty was first triggered by . . . Regional Board's order of February 4, 2010," the court pointed out "for Port LA's duty to defend claim to go forward, Port LA must allege (and must be able to allege) denial of benefits following the [February] 4, 2010 trigger date."[9] The court granted judgment on the pleadings as to the first cause of action (duty to defend), because the Complaint was filed on September 4, 2009 and "the required denial of benefits is not presently alleged." The court found the third cause of action (bad faith) suffered "from the same defect," to the extent it was "premised on the denial of benefits due and owing to Port LA." Also, to the extent the bad faith was based on UNIC's statements seeking "rescission of the [P]olicy without a basis in fact to do so, which is not presently alleged in the . . . [C]omplaint, . . . such statements cannot form the sole basis for a bad faith claim." The court found the fourth cause of action (declaratory relief as to Coverage A) was premature, because "Regional Board has yet to—and indeed may never—issue a governmental mandate directing Port LA to remediate deep groundwater contamination at the Site."

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[9] On September 29, 2010, the court issued a nunc pro tunc order replacing "February" in place of "January" as the month for the trigger date.

The trial court afforded Port LA the opportunity to file a third amended complaint no later than October 8, 2010, but the court also directed UNIC, in the event Port LA elected not to file one, to submit a proposed judgment of dismissal and notice of entry of judgment no later than October 15, 2010.

The court denied the motion as to the second (breach of contract; duty to indemnify) and the fifth causes of action (declaratory relief; Coverage D inapplicable) of the Complaint as moot in light of the court's earlier grant of summary adjudication as to these causes of action in favor of UNIC.

D. Rulings on Cross-Complaint

1. Pleadings

UNIC filed a cross-complaint against Port LA, Gaffey Street's successor, for rescission of the Policy based on the alleged misrepresentations—which UNIC allegedly did not discover until June 2009—by Gaffey Street, which allegedly supplied misleading information to UNIC during the underwriting process. Gaffey Street allegedly "failed to accurately describe, among other things, the status of remediation efforts at the Site, including but not limited to, the time for and cost of completing the remediation as well as the certainty that an NFA would be issued shortly. The information provided regarding future anticipated remediation efforts and the true cost of remediation, among other things, was also inaccurate." In other words, "there was uncertainty about *when* the Site would be completely remediated and *when* an NFA would issue, *what* needed to be done to obtain an NFA, *how* to effectively remediate, the *additional* cost to complete remediation, and *who* would pay for it."

Port LA answered by denying the material allegations of the cross-complaint and asserting various affirmative defenses, including the statute of limitations (affirmative defense) and waiver (affirmative defense).

2. Rulings on Cross-Complaint

On March 8, 2010, after granting Port LA's motion for summary adjudication on the rescission cause of action in UNIC's cross-complaint based on Port LA's affirmative defenses of the statute of limitations bar and waiver, the court granted summary judgment on UNIC's cross-complaint in favor of Port LA and against UNIC. The court then placed off calendar as moot Port LA's motion for summary adjudication on another affirmative defense.

E. Rulings on Discovery Production Motion

1. Production Requests and Responses

On April 2, 2009, UNIC served written responses, which included objections and assertions of privilege, to Port LA's First Set of Requests for Production of Documents.

On April 9, 2009, UNIC produced responsive documents and provided a privilege-log which identified certain withheld documents and set forth corresponding privilege assertions.

On May 5, 2009, UNIC served on Port LA a revised privilege-log which identified certain privileged documents that had been produced inadvertently.

On May 13, 2009, in writing, UNIC and Port LA agreed to extend the time for Port LA to file a motion to compel further responses to June 3, 2009.

On May 28, 2009, the parties extended the time to file this motion to June 23, 2009.

On April 7, 2010, Port LA filed its motion to compel production.

2. Order Denying Discovery Motion

On August 19, 2010, the trial court overruled Port LA's written objections (Code Civ. Proc., § 643)[10] to the proposed order of the discovery referee, Justice Michael G. Nott, retired, recommending denial of Port LA's motion to compel UNIC to produce non-privileged responsive documents as time-barred, because it had not been brought within the applicable 45 day time period (§ 2031.310, subd. (c)) and no written extension by the

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[10] Undesignated statutory references are to the Code of Civil Procedure.

parties had been filed. Declining to reverse the discovery referee's ruling, the court also denied Port LA's request that the court direct the discovery referee to conduct an in camera review of the documents in question or, alternatively, grant Port LA's motion to compel.

F. Judgment

On November 15, 2010, the judgment was filed. The court noted that Port LA had not filed an amended complaint within the time provided. Judgment was entered in favor of UNIC as to each cause of action in the Complaint and in favor of Port LA and against UNIC on UNIC's cross-complaint.

The trial court entered judgment in favor of UNIC on the complaint following the grant of UNIC's motion for summary adjudication as to the second cause of action for breach of contract (cleanup costs) and the fifth cause of action for declaratory relief as to new pollution conditions coverage and UNIC's motion for judgment on the pleadings as to the first cause of action for breach of contract (duty to defend); the third cause of action for breach of the implied covenant of good faith and fair dealing; and the fourth cause of action for declaratory relief as to the pollution condition and cleanup costs and after Port LA failed to file a timely third amended complaint. The court entered judgment in favor of Port LA and against UNIC on UNIC's cross complaint.[11]

G. Rulings on Cost Memoranda

On February 10, 2011, the trial court ruled on the cross-motions of Port LA and UNIC to strike or tax the cost memorandum submitted by the other party. The court granted UNIC's motion to strike Port LA's cost memorandum in its entirety and denied

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[11] The first issue to which supplemental briefing was sought concerns an error on the face of the judgment. The judgment contains the erroneous recital that on March 8, 2010, the court granted UNIC's motion for summary adjudication on its cross-complaint. A plain reading of the March 8, 2010 minute order and order signed that date, however, reveals the trial court in fact granted summary judgment on UNIC's cross-complaint in favor of Port LA. This error obviously was inadvertent and is harmless. In their respective supplemental briefing, the parties acknowledge this error has no bearing on the validity of the judgment and the issues on appeal.

Port LA's motion to strike UNIC's cost memorandum. After granting Port LA's motion to tax costs in the amount of $61,934.28, the court awarded UNIC costs in the amount of $96,919.06.

DISCUSSION

1. Judgment in favor of UNIC on Port LA Complaint Proper

On appeal from that portion of the judgment in favor of UNIC on the Complaint, Port LA challenges, as erroneous, the trial court's rulings granting UNIC's motions for summary adjudication and judgment on the pleadings. Port LA contends the trial court erred in concluding UNIC owed Port LA no duty to defend or indemnify under the Policy as alleged in the Complaint and that the Complaint failed properly to state causes of action for such breaches of duty, for bad faith, and for declaratory relief as to Coverage A.[12] There was no error.

Although prevailing on the Complaint, UNIC contends reversal of the judgment is warranted, because the trial court erroneously ruled that UNIC's duty to defend under the Policy was triggered by Regional Board's February 4, 2010 order amending its October 21, 2009 order. We disagree. The challenged ruling does not impact the judgment and therefore no reversal of the judgment is compelled.

A. Standards of Review

"Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding. (§ 437c, subd. (a).) Similarly, "[a] party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, . . . or one or more issues of duty, if that party contends that the cause of action has no merit or that there is no affirmative defense thereto, . . . or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for

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[12] Port LA does not challenge on appeal the trial court's ruling in favor of UNIC as to the fifth cause of action in the Complaint regarding Coverage D.

summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, . . . or an issue of duty. (§ 437c, subd. (f)(1).)

If a defendant moving for summary adjudication or summary judgment meets his initial burden of proving the nonexistence of an element of the cause of action, the existence of an affirmative defense, or the nonexistence of duty, the burden shifts to the plaintiff to raise an issue of fact for the jury to determine. (See, e.g., *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851, 853–854 (*Aguilar*); see also § 437c, subd. (p)(2).) All reasonable inferences must be drawn in favor of the plaintiff, and if a reasonable trier of fact could find for the plaintiff, the motion must be denied. (*Aguilar, supra*, at pp. 856–857.)

The facts are recounted from the record before the trial court in ruling on the defendant's motion for summary adjudication or summary judgment. (See, e.g., *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 279.) "We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections were made and sustained. [Citations.]" (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66.) "The trial court's stated reasons for granting summary judgment are not binding on us because we review its ruling, not its rationale. [Citations.]" (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.)

"A judgment on the pleadings in favor of the defendant is appropriate when the complaint fails to allege facts sufficient to state a cause of action. (Code Civ. Proc., § 438, subd. (c)(3)(B)(ii).) A motion for judgment on the pleadings is equivalent to a demurrer and is governed by the same de novo standard of review. [Citations.] All properly pleaded, material facts are deemed true, but not contentions, deductions, or conclusions of fact or law; judicially noticeable matters may be considered. [Citations.]" (*Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.)

B. No Duty to Indemnify Port LA For Investigative Costs

Port LA contends the trial court erred in concluding UNIC owed no duty to indemnify Port LA for its costs to investigate, including monitor, the deep groundwater contamination at the Site pursuant to Regional Board's directives. No error transpired.

We are not persuaded by Port LA's claim that all its investigative costs are covered under the Policy, because these costs pertained to a *single* "pollution condition" in that the pollution at the Site was the product of petroleum refinery and terminal operations at the Site from 1923 to 1995. The plain language of the Policy refutes this position.

"'Cleanup costs' do not include expenses arising out of testing, monitoring and/or determining the source and extent of contamination, *except as a consequence of a 'pollution condition' to which this insurance applies*.'" (Italics added.)

The Policy defines "'Pollution condition' [as] the condition that arises out of a 'discharge' of 'pollutants' which affects land, surface water, groundwater or the atmosphere. The entirety of any 'discharge' shall be deemed to give rise to one 'pollution condition'." However, the mere existence of a qualifying pollution condition does not signify coverage under the Policy.

Coverage A obligates UNIC to "pay on behalf of [Port LA] those sums . . . for 'cleanup costs' resulting from a [pre-existing] 'pollution condition' to which this insurance applies." "'Cleanup costs' means expenses incurred in the removal, treatment, or remediation of soil, surface water, groundwater or their contamination resulting from 'pollution conditions' covered by this policy, provided that such expenses . . . are the result of 'governmental mandate' . . . , which "means any directive, order, requirement, court order, or suit of . . . any . . . State . . . of the United States . . . duly acting under the authority of environmental or related laws."

The import of these provisions, when read together and in context, is that the threshold requirement for coverage of "Cleanup costs" in this situation is the existence of a "governmental mandate" directing Port LA to "clean up" the "groundwater or [its]

contamination." In this instance, prior to September 28, 2010, or to date, according to the record, no such governmental mandate existed as to cleanup of the groundwater or its contamination had been issued by Regional Board.

Additionally, in the absence of the requisite Regional Board directive or order in this regard, the investigative costs at hand, as a matter of law, are not subject to indemnification as "a consequence' of a "pollution condition." In contrast with costs associated with testing, monitoring or determining the effectiveness of remediation of such a condition, Port LA incurred these costs in order to identify the nature, character, and determine the extent of the pollutant(s) in the deep groundwater for the purpose and goal of assessing whether remediation measures might be necessary and, if so, what such measure(s) might be. As such, Port LA's investigative costs are not covered under Coverage A of the Policy. (See, e.g., *Aerojet-General Corp. v. Transport Indemnity. Co.* (1997) 17 Cal.4th 38, 61, fn. 13 [distinguishing "[i]ndemnification costs, i.e., expenses to resolve liability" from "defense costs, i.e., expenses to avoid or at least minimize liability"].)

C. No Duty to Defend Port LA as to Investigative Costs

Port LA contends its investigative costs are embraced under UNIC's duty to defend under the Policy. Initially, as discussed above, Regional Board's directives that Port LA investigate the deep groundwater to identify and determine the extent of pollutant contamination does not rise to the level of potential liability which would implicate UNIC's duty to defend under the Policy.

We further conclude that Port LA's investigative costs do not qualify as costs incurred in conjunction with defense of a "claim"[13] under the Policy. Coverage A provides UNIC has "the right and duty to defend such 'claim'" and to pay "'all costs to investigate, contest, defend, or appeal all 'claim' or 'suits'[.]" As the trial court properly

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[13] Under the Policy, "'[c]laim(s)' means a written demand received by the insured seeking or purporting to hold the insured responsible for . . . 'cleanup costs' arising out of a 'pollution condition.'"

concluded, the term "investigate" refers to investigation of a claim or litigation, not investigation of matters directed by Regional Board to investigate. Accordingly, UNIC had no duty to indemnify Port LA for its investigative costs in carrying out Regional Board's directives in this regard.

D. Rulings Regarding February 4, 2010 Order Inconsequential

UNIC contends reversal of the judgment as to the Complaint is warranted, because the trial court erroneously found that UNIC's duty to defend under the Policy regarding the deep groundwater contaminants was triggered by Regional Board's February 4, 2010 order. No reversal of the judgment is compelled. The trial court's ruling in this regard did not in any material way affect the validity of the judgment and was extraneous to the issues before the court on the Complaint.

On August 9, 2010, the trial court denied Port LA's motion for summary adjudication as to UNIC's duty to defend and duty to indemnify (first and second causes of action, respectively), rejecting Port LA's contentions that UNIC had a duty to defend against Regional Board's requests for clean up, specifically investigation and monitoring, and that UNIC was obligated to indemnify Port LA for its costs incurred in investigating deep groundwater contamination in that "all costs to investigate, contest, defend, or appeal" fall within the Policy's duty to defend umbrella. Acknowledging that the duty to defend a potentially covered claim is broader than the duty to indemnify, (citing to *Buss v. Superior Court* (1997) 16 Cal.4th 35, 48), the trial court concluded that until Regional Board "directs Port LA to take corrective action, there isn't even a potential claim."

On August 19, 2010, Port LA filed a motion for clarification and/or reconsideration on the grounds the trial court's ruling did not address whether any of Regional Board's directives from 2001 to 2007 had triggered UNIC's duty to defend and that, to the extent the trial court intended that the Regional Board's February 4, 2010 order was the first trigger of UNIC's duty to defend, the court should reconsider its ruling. UNIC both opposed reconsideration and moved for reconsideration on its own behalf.

On September 14, 2010, at the hearing, the trial court denied both motions for reconsideration but granted its own motion for clarification. The court clarified that in its August 9, 2010 order, the court found Regional Board's directives from 2001 to 2007 did not trigger UNIC's duty to defend and that its February 4, 2010 order constituted the first trigger of UNIC's duty to defend.[14]

On September 28, 2010, the trial court granted UNIC's motion for judgment on the pleadings as to the first cause of action (duty to defend) of the Complaint, explaining UNIC's duty to defend was first triggered by Regional Board's February 4, 2010 order, but the Complaint had been filed on September 4, 2009. The court directed Port LA to file and serve a third amended complaint in this regard no later than October 8, 2010.

It is uncontroverted that Port LA did not file an amended complaint by this deadline and that judgment was entered in favor of UNIC in material part, because no amended complaint was filed.

In view of the foregoing, the trial court's ruling that UNIC's duty to defend was triggered by Regional Board's February 4, 2010 order is of no moment and, at best, simply dictum. In the absence of an actionable claim stated by Port LA in a properly pled complaint, a finding that UNIC had a duty to defend arising from the February 4, 2010 order goes nowhere.

2. Judgment in Favor of Port LA on UNIC Cross-Complaint Proper

UNIC challenges that portion of the judgment in favor of Port LA on its cross-complaint as error. No error transpired.

On March 3, 2010, the trial court granted Port LA's motion for summary adjudication as to its statute of limitations and waived affirmative defenses to UNIC's cross-complaint and, in view of such rulings, granted summary judgment in favor of Port LA and against UNIC on the cross-complaint.

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[14] In its September 28, 2010 order, the trial court inadvertently referred to this clarification as having taken place on August 9, 2010.

The cross-complaint alleged various material misrepresentations by Gaffey Street in its application for the Policy. These misrepresentations fell into these categories: During the underwriting process, Gaffey Street and/or its agent LandBank represented: (1) the status of remediation efforts at the Site; (2) the cost, timing, and scope of the remediation efforts of CET, the environmental contractor; and (3) the certainty that shortly Regional Board would issue a NFA, which would reflect completion of remediation efforts. Not until July 2009, when Port LA produced the 1999 Underwriting Summary, did UNIC discover the falsity of these representations and the falsity of certain representations made in the 1998 Underwriting Summary.

UNIC asserts summary judgment in favor of Port LA on the cross-complaint must be reversed, because the evidence presented revealed the challenged representations were indeed false. Specifically, this evidence demonstrated "remediation was not expected to be complete for at least a year" . . . ; CET had submitted a proposal to Gaffey Street to perform additional work in the event remediation was not completed until after 1999 and CET planned to negotiate additional costs with Gaffey Street; and Regional Board imposed conditions on Site closure for at least two years after soil closure had been given.

A plain reading of the 1998 Underwriting Summary refutes UNIC's claim of ignorance prior to issuance of the Policy as to the earliest timeframe for complete closure by Regional Board. This Summary expressly provides: "[g]roundwater monitoring will continue during and for a minimum of two years after termination of the remedial systems."

Moreover, the excerpts from the deposition of Thomas Scruben, submitted by UNIC, established that at the time the Policy was issued, Scruben was in possession of the December 1998 Underwriting Summary to which was appended an extra or amended page 9 dated July 15, 1999. UNIC thus was on inquiry notice of the existence of an underwriting summary more current that the December 1998 Summary.

As for the alleged misrepresentations of the cost, timing, and scope of the remediation efforts of CET, the environmental contractor, UNIC has failed to show in what way such alleged misrepresentations were material and conclusive; to point out evidence in the record in support, and to make a cogent argument supported by applicable authority for reversing the judgment in this regard. "This court is not required to discuss or consider points which are not argued or which are not supported by citation to authorities or the record. [Citations.]" (*MST Farms v. C.G. 1464* (1988) 204 Cal.App.3d 304, 306; see also, *Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 649-650 [challenge to presumption of correctness requires pertinent "argument and legal authority on each point raised," not just "bare assertion of error"]; *Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1303 [waiver where point unsupported "with reasoned argument and citations to authority"]; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 [waiver where failure to cite record references].)

3. Denial of UNIC's Motion for Summary Adjudication as Moot Proper

UNIC contends the trial court erred in refusing to rule on its motion for summary judgment on its cross-complaint or, alternatively for summary adjudication on Port LA's second, seventh, ninth, and tenth affirmative defenses to the cross-complaint. In view of our above determination that judgment in favor of Port LA was properly entered in favor of Port LA, we conclude the trial court properly denied UNIC's motion as moot.

4. Granting of UNIC's Motion to Strike Cost Memorandum Not Abuse

Port LA contends the trial court erred in striking its cost memorandum, because it qualified as a "prevailing party" on the cross-complaint.

"'The determination of whether there is to be a prevailing party is to be made "on a practical level" after considering what each party accomplished via the litigation.'" (*Brawley v. J.C. Interiors, Inc*. (2008) 161 Cal.App.4th 1126, 1137; see §1032, subd. (a)(4).) "[T] he trial court exercises its discretion to determine the prevailing party, 'comparing the relief sought with that obtained, along with the parties' litigation objectives as disclosed by their pleadings, briefs, and other such sources." (*Chinn v.*

KMR Property Management (2008) 166 Cal.App.4th 175, 188.) Where, as here, neither Port LA on its Complaint nor UNIC on its cross-complaint prevailed by obtaining a monetary award, UNIC, as defendant, is properly characterized as the "prevailing party." (See *Gerstein v. Smirl* (1945) 70 Cal.App.2d 238, 239-241.)

5. Port LA's Challenge to Discovery Ruling Forfeited

Port LA contends the trial court erred in concluding its motion to compel production of documents by UNIC was time-barred and that this Court should direct the trial court to review UNIC's assertions of privilege on the merits. We disagree.

A. Factual Background

On April 2, 2009. UNIC served written responses, which included objections and assertions of privilege, to Port LA's First Set of Requests for Production of Documents.

On April 9, 2009, UNIC produced responsive documents and provided a privilege-log which identified certain withheld documents and set forth corresponding privilege assertions.

On May 5, 2009, UNIC served on Port LA a revised privilege-log which identified certain privileged documents that had been produced inadvertently.

On May 13, 2009, in writing, UNIC and Port LA agreed to extend the time for Port LA to file a motion to compel further responses to June 3, 2009.

On May 28, 2009, the parties extended the time to file this motion to June 23, 2009.

On April 7, 2010, Port LA filed its motion, about ten months past the deadline for bringing the motion.

On August 19, 2010, the trial court denied Port LA's request that its motion be granted or, alternatively, that the discovery referee be directed to conduct an in camera review of the documents sought. The court adopted the discovery referee recommendation that the motion be denied as time-barred, because it had not been brought within the applicable 45-day deadline (§ 2031.310, subd. (c)) and no written extension had been filed by the parties.

B. Applicable Legal Principles

"[I]f a propounding party is not satisfied with the response served by a responding party, the propounding party may move the court to compel further responses. (§§ 2030.300 [interrogatories], 2031.310 [inspection demands].) The propounding party must demonstrate that the responses were incomplete, inadequate or evasive, or that the responding party asserted objections that are either without merit or too general. (§§ 2030.300, subd. (a)(1)-(3), 2031.310, subd. (a)(1)-(3).) The propounding party must bring its motion to compel further responses within 45 days of the service of the response[, or supplemental response, or on or before a specific later date to which the parties have agreed in writing] (§§ 2030.300, subd. (c) § 2031.310, subd. (c)), and must demonstrate that it complied with its obligation to 'meet and confer.' (§§ 2016.040, 2030.300, subd. (b), 2031.310, subd. (b)(2).) (Also required is a separate statement as specified in Cal. Rules of Court, rule 3.1020.) In addition, a party moving to compel further responses to an inspection demand must establish 'good cause justifying the discovery sought by the inspection demand.' (§ 2031.310, subd. (b)(1).)" (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 403, fn. omitted.)

C. Standard of Review

"We review discovery orders for an abuse of discretion. [Citation.] Under this standard, a trial court's ruling on a discovery motion 'will be overturned upon a prerogative writ if there is no substantial basis for the manner in which trial court discretion was exercised or if the trial court applied a patently improper standard of decision.' [Citation.] Moreover, where the propriety of a discovery sanction turns on statutory interpretation, we review the issue de novo, as a question of law. [Citation.]" (*People ex rel. Lockyer v. Superior Court* (2004) 122 Cal.App.4th 1060, 1071.)

D. Untimeliness of Motion Foreclosed Ruling on Merits

We conclude the trial court correctly found that Port LA's motion to compel further responses to its production of documents request was untimely. The parties

extended the time to file this motion to June 23, 2009. Port LA, however, did not file its motion until April 7, 2010, almost ten months later, well beyond the 45-day time limit imposed by section 2031.310, subdivision (c), and all agreed-upon extensions. Port LA therefore is not entitled to a ruling on the merits of its discovery motion in the face of this time-bar.[15]

For a contrary conclusion, Port LA relies on section 2031.320, which does not set forth any deadline for filing a motion to compel production. Port LA's reliance is misplaced on section 2031.20, which, in pertinent part provides: "If a party filing a response to a demand for inspection . . . thereafter fails to permit the inspection . . . *in accordance with that party's statement of compliance*, the demanding party may move for an order compelling compliance." (§ 2031.320, subd. (a), italics added; see also, § 2031.210, subd. (a)(1) [statement of compliance response]; cf. § 2031.210, subd. (a)(3) [objection response].)

By its own unambiguous terms, section 2031.320 applies only when the party responds to the demand for inspection with a statement of compliance and "thereafter fails to permit the inspection . . . in accordance with that party's statement of compliance." Section 2031.320, however, is inapplicable where, as here, the refusal to permit inspection is based on the assertion of privilege, an objection response.

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[15] This disposition obviates the need to address whether Port LA should have sought prerogative writ review in the first instance and whether Port LA was prejudiced from the absence of a ruling on the merits of its motion.

DISPOSITION

The judgment is affirmed in its entirety, and the postjudgment order appealed from is affirmed in its entirety. Each party shall bear its own costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.