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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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American Family Mutual Insurance Co., a)
Wisconsin corporation,

No. CV07-2237-PHX-NVW

10

Plaintiff,

ORDER

11

vs.

[Not for Publication]

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National Fire & Marine Insurance Co., a)
foreign corporation; et al,

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Defendants.

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Pending before the Court is Defendant Owners Insurance Company’s Motion for
Summary Judgment (Phase One) (doc. #457).

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A party moving for summary judgment must “file a statement, separate from the
motion and memorandum of law, setting forth each material fact on which the party relies
in support of the motion.” LRCiv 56.1(a). Any party opposing a motion for summary
judgment must file a separate statement responding to each paragraph of the moving
party’s separate statement of facts and setting forth any additional facts that establish a
genuine issue of material or otherwise preclude judgment in favor of the moving party.
LRCiv 56.1(b). LRCiv 56.1(d) permits the moving party to file a “reply memorandum,”
but does not permit the moving party to file a separate statement responding to the
nonmoving party’s separate statement. Any evidentiary objections to the nonmoving
party’s separate statement may be included in the reply memorandum, but may not be

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1 made in a separate statement. Therefore, the Court disregards and does not rely upon
2 Defendant Auto-Owners Insurance Company's Response to Plaintiff's Separate
3 Statement of Facts and Reply Statement of Undisputed Facts in Support of Defendant's
4 Motion for Summary Judgment (doc. #546), including the supplemental declaration of
5 Carolyn Decker (doc. #546-2).

6 **I. Legal Standard for Summary Judgment**

7 The Court should grant summary judgment if the evidence shows there is no
8 genuine issue as to any material fact and the moving party is entitled to judgment as a
9 matter of law. Fed. R. Civ. P. 56(c). The moving party must produce evidence and
10 persuade the Court there is no genuine issue of material fact. *Nissan Fire & Marine Ins.*
11 *Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). To defeat a motion for
12 summary judgment, the nonmoving party must show that there are genuine issues of
13 material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A material fact
14 is one that might affect the outcome of the suit under the governing law. *Id.* at 248. A
15 factual issue is genuine "if the evidence is such that a reasonable jury could return a
16 verdict for the nonmoving party." *Id.*

17 The party seeking summary judgment bears the initial burden of informing the
18 court of the basis for its motion and identifying those portions of the pleadings,
19 depositions, answers to interrogatories, and admissions on file, together with the
20 affidavits, if any, which it believes demonstrate the absence of any genuine issue of
21 material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The nature of this
22 responsibility varies, however, depending on whether the moving party or the nonmoving
23 party would bear the burden of proof at trial on the issues relevant to the summary
24 judgment motion. If the nonmoving party would bear the burden of persuasion at trial,
25 the moving party may carry its initial burden of production under Rule 56(c) by
26 producing "evidence negating an essential element of the nonmoving party's case," or by
27 showing, "after suitable discovery," that the "nonmoving party does not have enough
28 evidence of an essential element of its claim or defense to carry its ultimate burden of

1 persuasion at trial.” *Nissan Fire*, 210 F.3d at 1105-06; *High Tech Gays v. Defense Indus.*
2 *Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990).

3 When the moving party has carried its burden under Rule 56(c), the nonmoving
4 party must produce evidence to support its claim or defense by more than simply showing
5 “there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co.*
6 *v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Where the record, taken as a whole,
7 could not lead a rational trier of fact to find for the nonmoving party, there is no genuine
8 issue of material fact for trial. *Id.*

9 In the context of summary judgment, the court presumes the nonmoving party’s
10 evidence is true and draws all inferences from the evidence in the light most favorable to
11 the nonmoving party. *Eisenberg v. Ins. Co. of North America*, 815 F.2d 1285, 1289 (9th
12 Cir. 1987). If the nonmoving party produces direct evidence of a genuine issue of fact,
13 the court does not weigh such evidence against the moving party’s conflicting evidence,
14 but rather submits the issue to the trier of fact for resolution. *Id.*

15 However, each numbered paragraph of the moving party’s separate statement of
16 facts shall be deemed admitted for purposes of the motion for summary judgment if not
17 specifically controverted by a correspondingly numbered paragraph in the opposing
18 party’s separate statement of facts. LRCiv 56.1(b).

19 **II. Facts Undisputed or Presumed True for Summary Judgment**

20 Astragal, L.L.C. (“Astragal”) was the developer of the project commonly known
21 as Astragal Luxury Villas at Thompson Peak located in Maricopa County, Arizona
22 (“Villas”). Astragal entered into a contract with George F. Tibsherany Development
23 Company (“GFTDC”) to serve as the general contractor for the Villas. GFTDC entered
24 into a subcontract agreement with Maldonado Masonry, L.L.C. (“Maldonado”), among
25 others, to perform work at the Villas. The subcontract required Maldonado to maintain
26 specifically described insurance coverage and to cause all its insurance companies to
27 name GFTDC as an additional insured on all insurance policies required under the
28 subcontract.

1 Minard-Ames Insurance Group (“Minard-Ames”) has an Agency Contract, dated
2 September 1, 1988, with Owners Insurance Company (“Owners”). The Agency Contract
3 states that Owners “does hereby appoint, and grant authority to [Minard-Ames] to solicit
4 and secure applications and to bind coverage, subject to company rules and regulations,
5 for the classes of insurance for which a commission is specified in the State Commission
6 Schedule attached, within the territory of Phoenix, Arizona and vicinity.”

7 Owners issued a commercial general liability policy to Maldonado, policy number
8 004625-45181001-00, effective January 14, 2000, through January 14, 2001 (“Policy”).
9 The Policy identifies Minard-Ames as the agency. The Policy does not include a blanket
10 additional insured endorsement or a named additional insured endorsement in favor of
11 GFTDC.

12 The Policy includes the following language:

13 **2. Duties In The Event of Occurrence, Offense, Claim Or Suit**

14 **a.** You¹ must see to it that we are notified as soon as practicable
15 of an “occurrence” or an offense which may result in a claim.
To the extent possible, notice should include:

- 16 (1) How, when and where the “occurrence” or offense
took place;
17 (2) The names and addresses of any injured persons and
witnesses; and
18 (3) The nature and location of any injury or damage
arising out of the “occurrence” or offense.

19 **b.** If a claim is made or “suit” is brought against any insured,
you must:

- 20 (1) Immediately record the specifics of the claim or “suit”
and the date received; and
21 (2) Notify us as soon as practicable.

22 You must see to it that we receive written notice of the claim
or “suit” as soon as practicable.

23 **c.** You and any other involved insured must:

- 24 (1) Immediately send us copies of any demands, notices,
summonses, or legal papers received in connection
25 with the claim or “suit”;
26 (2) Authorize us to obtain records and other information;

27
28 ¹“You” in the Policy refers to Maldonado.

- 1 (3) Cooperate with us in the investigation or settlement of
2 the claim or defense against the “suit”; and
3 (4) Assist us, upon our request, in the enforcement of any
4 right against any person or organization which may be
5 liable to the insured because of injury or damage to
6 which the insurance may also apply.

- 7 d. No insured will, except at that insured’s own cost, voluntarily
8 make a payment, assume any obligation, or incur any
9 expense, other than for first aid, without our consent.

10 Minard-Ames issued a Certificate of Liability Insurance dated August 9, 2000, to
11 GFTDC showing Maldonado was insured by Owners, Auto-Owners Insurance, and
12 Republic Indemnity of America. Below the date and above the names of “insurers
13 affording coverage,” the Certificate states in bold capital letters:

14 **THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION
15 ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE
16 HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR
17 ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.**

18 In an area for “description of operations/locations/ vehicles/exclusions added by
19 endorsement/special provisions,” the Certificate states: “Additional Insureds (except
20 workers compensation): Astragal, L.L.C. (Owner) and George F. Tibsherany
21 Development Corporation (General Contractor).”

22 On October 19, 2004, Astragal Condominium Unit Owners Association (“Astragal
23 HOA”) filed a lawsuit against Astragal and GFTDC alleging numerous defects in the
24 construction of the Villas (“HOA Lawsuit”). At all relevant times, GFTDC was insured
25 under a commercial general liability policy issued by American Family Mutual Insurance
26 Co. (“American Family”). American Family provided a defense to GFTDC in the HOA
27 Lawsuit.

28 On August 11, 2005, GFTDC filed a third-party complaint in the HOA Lawsuit
 against Maldonado and other subcontractors to recover damages against the
 subcontractors to the extent they had failed to perform their scope of work in a
 workmanlike manner. Gust Rosenfeld represented GFTDC in the HOA Lawsuit.
 Matthew Bedwell, an attorney at Gust Rosenfeld, provided Gloria Zanella, a legal
 secretary for Gust Rosenfeld, with a draft letter to be mailed to each of the subcontractors

1 named as third-party defendants to GFTDC's third-party complaint with a copy to each of
2 the insurance companies indicated on certificates of liability insurance or other insurance
3 documents for each subcontractor. In addition to the draft letter, Bedwell provided
4 Zanella with a list of subcontractors named as third-party defendants and a binder of
5 certificates of liability for the listed subcontractors. Zanella prepared a letter addressed to
6 each of the subcontractors and listed the insurance companies indicated on the certificates
7 of liability insurance for each particular subcontractor as recipients of a copy of the letter.

8 To obtain addresses for the insurance companies, Zanella researched the Arizona
9 Department of Insurance website, the internet, and other sources. She then compiled the
10 insurance companies' addresses on a document titled "List of Insurer Addresses." After
11 obtaining the addresses, Zanella printed a copy of each letter for each of insurance
12 companies indicated on the letter as a copy recipient. Zanella addressed envelopes for
13 each insurance company that was copied on one of the letters and enclosed a copy of the
14 signed letter and enclosures provided by Bedwell. After stuffing the envelopes and
15 sealing them, Zanella placed the envelopes in the firm's outgoing mail baskets for postage
16 to be affixed by mail room employees and for delivery by Central Courier personnel to
17 the United States Postal Service. She did not arrange for any of the letters to be mailed
18 by certified or registered mail.

19 If Zanella was unable to locate an insurance company's address, a copy was
20 mailed once the address was obtained. Zanella's affidavit states, "To my knowledge,
21 every subcontractor and insurance company carbon copied on the letter was mailed a
22 copy." Her affidavit does not state that she recalls, has personal knowledge of, or has
23 records of printing a copy for Owners, addressing an envelope to Owners, or mailing a
24 letter addressed to Owners.

25 A letter dated August 17, 2005, was sent to Gary Maldonado, that demanded a
26 defense and indemnity from Maldonado as well as insurance coverage as an additional
27 insured under Maldonado's insurance policy ("Maldonado Tender Letter"). The letter
28 states that Maldonado was "required to name GFTDC as an additional insured under the

1 policies issued by Zurich/Assurance Company of America, Owners Insurance Company
2 and Auto-Owners Insurance Company.” The Maldonado Tender Letter also states:

3 Accordingly, please immediately place your insurance carrier on
4 notice of this claim and further put them on notice that GFTDC will be
5 looking to them directly as an additional insured for coverage under the
6 policy in regard to the allegations being presented by the condominium unit
7 owners association. By copy of this correspondence to your agent and
8 insurance carrier, we are formally placing them on notice of GFTDC’s
9 demand for defense and coverage under the terms and conditions of the
10 policy of insurance noted above and noted in the attached certificate.
11 GFTDC formally demands that your insurance carrier respond to this
12 request for defense and coverage within 20 days. In addition, GFTDC
13 intends to look to you and your insurance carrier for the payment of all
14 expenses and costs associated with this defense as it relates to the
15 allegations from the condominium unit owners association. Please confirm
16 within 20 days of the date of this correspondence your agreement to defend
17 and indemnity [sic] GFTDC completely in regard to any and all allegations
18 being presented.

19 The Maldonado Tender Letter indicates a copy was mailed to each of the following:
20 Zurich/Assurance Co. of America, Owners Insurance Co., and Auto-Owners Insurance.

21 However, Owners denies receipt of the Maldonado Tender Letter. The
22 Declaration of Carolyn Decker, Senior Claims Representative for Owners, states that she
23 has personal knowledge that “Owners conducted an exhaustive review of its files to
24 determine whether [GFTDC] tendered its defense and indemnification to Owners with
25 respect to the [HOA Lawsuit]” and that “Owners was unable to locate receipt of any
26 tender for defense or indemnification by [GFTDC] with respect to the [HOA Lawsuit]
27 under the [Policy].”

28 Owners retained the law firm of Rai & Barone to represent Maldonado in the HOA
Lawsuit. In a January 17, 2006 status report to Owners, Rina Rai stated, “On August 17,
2005, Defendant GFTDC tendered its defense of this case to Maldonado [M]asonry under
the indemnification clause of the subcontract to Maldonado [M]asonry.” The eight-page
status report quotes indemnity language from the Policy and discusses issues related to
GFTDC’s tender of defense to Maldonado, but does not include any reference to GFTDC
as an additional insured. It does not state that the August 17, 2005 letter on behalf of

1 GFTDC tendering defense to Maldonado under the indemnification clause also purported
2 to tender defense to Owners as an additional insured.

3 American Family is seeking to recover defense costs and indemnification from
4 Owners under the theory American Family and Owners both insured GFTDC. American
5 Family's Third Amended Complaint seeks (1) indemnification in connection with the
6 Astragal HOA property damage claims, (2) contribution for the cost of the defense, and
7 (3) equitable contribution for breach of duties by failing to participate in the defense of
8 GFTDC.

9 **III. Analysis**

10 Under the doctrine of equitable contribution, an insurer who has paid a claim may
11 seek contribution directly from other carriers that are liable for the same loss. *W.*
12 *Agricultural Ins. Co. v. Indus. Indem. Ins. Co.*, 838 P.2d 1353, 1355 (Ariz. App. 1992).
13 One insurer may be required to contribute to another insurer's payment of a claim if the
14 policies cover (1) the same parties, (2) in the same interest, (3) in the same property, and
15 (4) against the same casualty. *Id.* The doctrine is appropriate where two insurers have
16 agreed to indemnify the same party because it avoids the loss claimant making an
17 arbitrary choice as to which insurer should pay and it does not give one indemnitor an
18 incentive to avoid paying a just claim to its insured hoping the other indemnitor will pay.
19 *Id.* at 1356. However, if a party to an insurance policy breaches it, the other party is no
20 longer obligated to perform its contractual obligations under the policy. *Holt v. Utica*
21 *Mut. Ins. Co.*, 759 P.2d 623, 628 (Ariz. 1988).

22 **A. GFTDC Failed to Properly Tender Its Demand for Defense and** 23 **Indemnification to Owners.**

24 Owners contends that American Family may not obtain equitable contribution
25 from Owners because GFTDC failed to tender its defense and to demand indemnification.
26 American Family contends that genuine issues of material fact regarding GFTDC's tender
27 of defense preclude summary judgment.
28

1 Before an insurer's duty to defend may be found, it must be shown that the insurer
2 received sufficient notice that the insured was tendering the defense to it. *Purvis v.*
3 *Hartford Accident & Indem. Co.*, 877 P.2d 827, 830 (Ariz. App. 1994). A tender of
4 defense, "whether written or oral, must contain full and fair information concerning the
5 pending action and an unequivocal, certain and explicit demand to undertake the defense
6 thereof, with an offer to surrender control of the action to the indemnitor at least as to that
7 portion of the claim for which the indemnitee seeks ultimately to hold the indemnitor
8 liable." *Litton Sys., Inc. v. Shaw's Sales & Serv., Ltd.*, 579 P.2d 48, 52 (Ariz. App. 1978);
9 accord *Purvis*, 877 P.2d at 830. "What is required is knowledge that the suit is
10 potentially within the policy's coverage coupled with knowledge that the insurer's
11 assistance is desired." *Purvis*, 877 P.2d at 830 (quoting *Hartford Accident & Indem. Co.*
12 *v. Gulf Ins. Co.*, 776 F.2d 1380, 1383 (7th Cir. 1985)).

13 Arizona law recognizes a "mail delivery rule." *Lee v. Arizona*, 182 P.3d 1169,
14 1171, ¶ 8 (Ariz. 2008). Under this common law rule:

15 [T]here is a presumption that a "letter properly addressed, stamped and
16 deposited in the United States mail will reach the addressee." That is, proof
17 of the fact of mailing will, absent any contrary evidence, establish that
18 delivery occurred. If, however, the addressee denies receipt, the
presumption of delivery disappears, but the fact of mailing still has
evidentiary force. The denial of receipt creates an issue of fact that the
factfinder must resolve to determine if delivery actually occurred.

19 *Id.* (citations omitted). See *Anderson v. United States*, 966 F.2d 487, 491-92 (9th Cir.
20 1992) (mailbox rule applied where plaintiff's contention she had mailed tax return was
21 supported by her notarized statement that she had mailed the return, her sworn testimony
22 that she had seen the postal clerk postmark her return and place the envelope in the
23 mailing pouch, and the affidavit of a witness who accompanied plaintiff to the post office,
24 waited in the car, and saw plaintiff return to the car from the post office without the
25 envelope that had contained the tax return).

26 American Family urges the Court to presume, under the common law mailbox rule,
27 that the Maldonado Tender Letter was received by Owners. The "mail delivery rule,"
28 however, requires "proof of the fact of mailing." See *Lee*, 182 P.3d at 1171, ¶ 8. The

1 evidence submitted by American Family shows only that GFTDC's counsel prepared
2 tender letters to numerous subcontractors, intended to mail copies to all of the
3 subcontractors' insurers, did not mail all of the letters and copies at the same time, placed
4 some envelopes with letters in the firm's outgoing mail baskets, and did not send any of
5 the letters or copies by registered or certified mail. It does not show that anyone has
6 personal knowledge of, or records of, printing a copy for Owners, addressing an envelope
7 to Owners, or mailing a letter addressed to Owners. American Family has not submitted
8 proof that the Maldonado Tender Letter was actually mailed to Owners by GFTDC or its
9 counsel. There is, therefore, no basis for applying the "mail delivery rule" or presuming
10 that Owners received the Maldonado Tender Letter.

11 American Family contends also that Owners had constructive knowledge of the
12 tender letter because counsel it retained to defend Maldonado quoted from the Maldonado
13 Tender Letter in a status report dated January 17, 2006. However, counsel retained to
14 defend Maldonado did not represent Owners and had no obligation to inform Owners that
15 the August 17, 2005 Maldonado Tender Letter said, "GFTDC intends to look to you and
16 your insurance carrier for the payment of all expenses and costs associated with this
17 defense." American Family cites no authority to support its assertion that the implied
18 receipt of the Maldonado Tender Letter by Rai & Barone constitutes receipt by Owners of
19 "an unequivocal, certain and explicit demand to undertake the defense" of GFTDC on the
20 Policy, especially where the Policy did not include a blanket additional insured
21 endorsement or a named additional insured endorsement in favor of GFTDC.

22 Owners has produced evidence negating an essential element of American
23 Family's case and shown that American Family does not have enough evidence to carry
24 its ultimate burden of persuasion at trial. *See Nissan Fire*, 210 F.3d at 1105-06.
25 American Family has not submitted direct evidence of a genuine issue of fact regarding
26 GFTDC's failure to tender its defense and demand for indemnification to Owners. *See*
27 *Eisenberg*, 815 F.2d at 1289. GFTDC's failure to tender its defense and demand for
28 indemnity to Owners relieves Owners of its obligations to GFTDC under the Policy.

1 **B. GFTDC Violated the Notice Requirements in Section 2(c)(1) of the**
2 **Owners Policy.**

3 Owners contends that GFTDC breached Section IV, paragraph 2(c)(1) of the
4 Policy, which required GFTDC to immediately send Owners “copies of any demands,
5 notices, summonses, or legal papers received in connection with the claim or ‘suit’” by
6 failing to send Owners a copy of the HOA Lawsuit complaint or summons served on
7 GFTDC on October 25, 2004, or a demand for defense. Even if GFTDC had mailed the
8 Maldonado Tender Letter to Owners, Owners contends GFTDC should have attempted
9 further contact with Owners when it did not receive a response within 20 days as
10 demanded by the letter to ensure that Owners was notified as required by the Policy.
11 American Family contends that it would be inequitable to enforce the Policy’s notice
12 requirements because Owners did not deliver a copy of the Policy to Owners and
13 therefore GFTDC did not have notice of the notice requirements.

14 An insured’s failure to give notice does not relieve an insurer of its contractual
15 liability unless it can show that it has been prejudiced thereby. *Lindus v. N. Ins.*, 438 P.2d
16 311, 315 (Ariz. 1968); *Zuckerman v. Transamerica Ins. Co.*, 650 P.2d 441, 445, 447
17 (Ariz. 1982); *Liberty Mut. Fire Ins. Co. v. Mandile*, 963 P.2d 295, 302 (Ariz. App. 1997).
18 Nonetheless, American Family does not dispute that Owners was deprived of opportunity
19 to investigate the claim, participate in GFTDC’s defense, control the litigation, and
20 contribute to the settlement agreement reached in the HOA Lawsuit. *See Motiva*
21 *Enterprises, LLC v. St. Paul Fire & Marine Ins. Co.*, 445 F.3d 381, 386 (5th Cir. 2006)
22 (breaching a consent-to-settle provision prejudiced a primary insurer as a matter of law
23 where the insurer was not consulted about the settlement, the settlement was not tendered
24 to it, and the insurer had no opportunity to participate in or consent to the ultimate
25 settlement decision).

26 Relying on *Zuckerman*, American Family contends that “it would be inequitable
27 and contrary to GFTDC’s reasonable expectations to enforce a boilerplate policy
28 conditions [sic] of which it had no notice” because Owners did not provide GFTDC a

1 copy of the Policy. In *Zuckerman*, an insurance policy for fire loss contained a clause
2 requiring that any action for recovery on a claim insured under the policy must be
3 commenced within twelve months after the loss, which was significantly shorter than the
4 Arizona limitations period for an action on a written contract. 650 P.2d at 442-43, 444.
5 Within the one-year period, the insured consulted counsel and also negotiated directly
6 with the insurer's adjuster. Although tentative settlement was reached, the agreement fell
7 apart, and the insured filed an action against the insurer three months after the expiration
8 of the one-year policy period. *Id.* at 443. The Arizona Supreme Court held the insurer
9 was estopped to enforce the adhesive clause because it did "no more than provide a trap
10 for the unwary." *Id.* at 448-49. The court further found the insurer was not prejudiced by
11 the fact that the suit was brought more than one year after the loss occurred because there
12 never was any dispute regarding the loss, its cause, the existence of coverage for the loss,
13 or the amount of damage. *Id.*

14 Here, the Policy's requirements that insureds immediately send Owners copies of
15 legal papers received in connection with lawsuits against the insureds is not "a trap for the
16 unwary." GFTDC's subcontract with Maldonado required Maldonado to obtain
17 insurance that named GFTDC as an additional insured. A Certificate of Liability
18 Insurance was issued to GFTDC showing Maldonado was insured by Owners. If GFTDC
19 wanted to read the specific language of the Policy, it could have requested that Owners
20 send it a copy. Requiring insureds to send Owners copies of legal papers received in
21 connection with lawsuits against the insureds for which they want coverage is not outside
22 of reasonable expectations and is identical to the requirement in other subcontractors'
23 policies covering GFTDC as an additional insured. Owners does not contend that
24 GFTDC failed to send specific documents or comply with specific procedures or
25 timelines—GFTDC did not send Owners *anything* it received in connection with the
26 HOA Lawsuit.

27 GFTDC's counsel prepared a letter to Maldonado that identified Owners as a copy
28 recipient. American Family cannot claim that GFTDC did not know that the Policy

1 required it to send Owners papers received in connection with the HOA Lawsuit or was
2 surprised by such a requirement. It is not inequitable to find GFTDC breached Section
3 IV, paragraph 2(c)(1) of the Policy, which required GFTDC to send Owners documents
4 related to the HOA Lawsuit.

5 GFTDC's breach of the Policy's notice requirements relieves Owners of its
6 obligations to GFTDC under the Policy.

7 **C. GFTDC Is Neither a Named Insured Nor an Additional Insured Under**
8 **the Owners Policy, and Owners Is Not Estopped from Denying**
9 **Coverage on That Basis.**

10 Owners contends that it does not insure GFTDC as an additional insured under the
11 Policy and American Family may not obtain equitable contribution from Owners because
12 the two insurers do not share the same risk. American Family contends that GFTDC is an
13 additional insured under the Policy because Minard-Ames issued a certificate of
14 insurance that represents that GFTDC is an additional insured on the Policy and Minard-
15 Ames' representation of additional insured coverage is imputed to Owners because
16 Minard-Ames had actual authority to bind coverage on behalf of Owners. Also,
17 American Family contends that Owners is estopped from denying it owes additional
18 insured coverage to GFTDC because GFTDC relied on the representation to its detriment.

19 First, GFTDC is not an additional insured under the Policy. American Family
20 relies on only a certificate of insurance as evidence of actual coverage. Under Arizona
21 law, a certificate of insurance does not establish insurance coverage. Alone, a certificate
22 of insurance does not create coverage obligations or legal obligations between the insurer
23 and the certificate holder. *Cont'l Cas. Co. v. Signal Ins. Co.*, 580 P.2d 372, 376 (Ariz.
24 App. 1978). “[A] certificate of insurance cannot contradict the terms of a policy; it only
25 provides information as to the policy’s contents.” *Id.* Therefore, issuing the Certificate
26 of Liability Insurance identifying GFTDC as an additional insured does not make GFTDC
27 an additional insured in fact where the Policy does not include a blanket additional
28 insured endorsement or a named additional insured endorsement in favor of GFTDC.

1 Second, Owners is not estopped from denying coverage to GFTDC as an
2 additional insured. The parties have not cited, and the Court has not found, any Arizona
3 case law deciding whether an insurer may be estopped from denying coverage shown by a
4 certificate of insurance issued by the insurer's agent. Authority from other jurisdictions
5 conflicts on this issue. *E.g., compare American Ref-Fuel Co. of Hempstead v. Resource*
6 *Recycling, Inc.*, 671 N.Y.S.2d 93, 96 (App. 1998) (doctrine of estoppel may not be
7 invoked where plaintiff was named as an additional insured on the certificate of insurance
8 but not on the policies) *with Marlin v. Wetzel County Board of Education*, 569 S.E.2d 462
9 (W. Va. 2002) ("because a certificate of insurance is an insurance company's written
10 representation that a policyholder has certain insurance coverage in effect at the time the
11 certificate is issued, the insurance company may be estopped from later denying the
12 existence of that coverage when the policyholder or the recipient of the certificate has
13 reasonably relied to their detriment upon a misrepresentation in the certificate"). The
14 Court need not anticipate how Arizona courts would decide this issue, however, because
15 American Family has not satisfied conditions for applying estoppel under Arizona law.

16 "The three elements of estoppel are (1) affirmative acts inconsistent with a claim
17 afterwards relied upon, (2) action by a party relying on such conduct and (3) injury to the
18 party resulting from a repudiation of such conduct." *Decker v. Hendricks*, 396 P.2d 609,
19 611 (Ariz. 1964). American Family has submitted evidence showing that Owners
20 authorized Minard-Ames to bind coverage and issue certificates of insurance and that
21 Minard-Ames issued a Certificate of Liability Insurance to GFTDC showing Maldonado
22 was insured by Owners. Although the Certificate of Liability Insurance expressly
23 "confers no rights upon the certificate holder" and "does not amend, extend or alter the
24 coverage afforded by the policies below," it is evidence of an affirmative act inconsistent
25 with a claim afterwards relied upon, which satisfies the first element of estoppel.

26 However, American Family's Statement of Facts does not establish either the
27 second or third element of estoppel. Regarding the second element, reliance on the
28

1 Certificate of Liability Insurance, American Family makes the following assertions
2 without reference to the record:

3 To comply with the insurance coverage requirements in the contracts,
4 GFTDC required the subcontractors to obtain from their insurance
5 companies and/or their insurance companies' agents, certificates of
insurance verifying that GFTDC was named as an additional insured under
the commercial general liability policies.

6 Based on the certificate of insurance, GFTDC believed that Minard-Ames
7 was the agent of Owners and was authorized to bind Owners to insurance
coverage under the Owners Policy.

8 GFTDC would not have allowed Maldonado Masonry to work on the Villas
9 until and unless Maldonado Masonry caused Owners to name GFTDC as an
additional insured under the Owners Policy.

10 GFTDC relied on the representation in the certificate of insurance that it
11 was an additional insured on the Owners Policy and entered into the
contract with Maldonado Masonry.

12 (Doc. #516 at 6, ¶¶ 33-36). Although LRCiv 56.1(b) permits a party to set forth
13 additional facts in response to a motion for summary judgment, it requires that each
14 additional fact "refer to a specific admissible portion of the record where the fact finds
15 support." At oral argument, for the first time, American Family's counsel identified
16 support for these assertions on page 3 of Exhibit K to Plaintiff American Family Mutual
17 Insurance Company's Statement of Uncontested and Contested Facts in Support of Its
18 Response to Defendant Owners Insurance Company's Motion for Summary Judgment
19 (Phase One), which is the Affidavit of George F. Tibsherany in Support of American
20 Family Mutual Insurance Company's Response to Owners' Motion for Summary
21 Judgment. The Court has no obligation to scour 157 pages of exhibits to attempt to find
22 an admissible portion of the record to support American Family's statement of facts.
23 Enforcing LRCiv 56.1(b) better serves justice than encouraging its violation.

24 Regarding the third element of estoppel, injury to GFTDC resulting from a
25 repudiation of additional insured coverage, American Family has offered no evidence.
26 American Family's statement of facts does not mention whether or how GFTDC was in
27 any way injured by the lack of additional insured coverage by Owners.
28

1 Because the Policy does not provide GFTDC additional insured coverage, and
2 Owners is not estopped from denying GFTDC additional insured coverage, American
3 Family may not seek equitable contribution from Owners. Moreover, even if Owners
4 were bound by Minard-Ames' issuance of an incorrect certificate of insurance and
5 estopped from denying GFTDC additional insured coverage under the terms of the
6 Policy, GFTDC's failure to tender defense to Owners and its breach of Policy conditions
7 would relieve Owners of any obligation to GFTDC under the Policy.

8 **IV. Attorneys' Fees**

9 Owners seeks award of attorneys' fees under A.R.S. § 12-341.01(A). Under the
10 statute, the Court may exercise its discretion to award attorneys' fees to the successful
11 party in any contested action arising out of a contract upon consideration of multiple
12 factors. *Associated Indem. Corp. v. Warner*, 694 P.2d 1181, 1184 (Ariz. 1985). Because
13 Owners has not addressed any of the factors the Court should consider in determining
14 whether to exercise its discretion under the statute and has not presented in any argument
15 in favor of exercising such discretion, the Court will deny Owners' request for attorneys'
16 fees.

17 **V. Rule 54(b) Certification**

18 There is no just reason for delay in entry of final judgment in favor of Defendant
19 Owners Insurance Company. Granting Owners summary judgment resolves all claims in
20 this action against this Defendant. Further, the issues decided in this Order are discrete
21 and do not overlap with issues to be decided later in this case. Moreover, an immediate
22 appeal of this Order would not threaten duplication of judicial work through repetitive
23 appeals on related issues or transactions and may contribute to appellate economy by
24 permitting review of this Order in conjunction with review of other Orders issued today in
25 this action on similar issues. For these reasons, pursuant to Fed. R. Civ. P. 54(b), the
26 Court directs entry of final judgment against Plaintiff American Family Mutual Insurance
27 Co. and in favor of Defendant Owners Insurance Company.

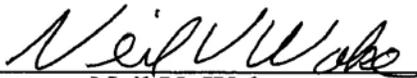
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1 IT IS THEREFORE ORDERED that Defendant Owners Insurance Company's
2 Motion for Summary Judgment (Phase One) (doc. #457) is granted.

3 IT IS FURTHER ORDERED that Defendant Owners Insurance Company's
4 request for attorneys' fees and costs pursuant to A.R.S. § 12-341.01(A) is denied.

5 IT IS FURTHER ORDERED that the Court expressly determines that there is no
6 just reason for delay in the entry of final judgment in favor of Defendant Owners
7 Insurance Company. The Court directs the Clerk to enter final judgment against Plaintiff
8 American Family Mutual Insurance Co. and in favor of Defendant Owners Insurance
9 Company.

10 DATED this 2nd day of September, 2009.

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12 _____
13 Neil V. Wake
14 United States District Judge

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