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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Nammo Talley Inc.,
Plaintiff,
v.
Allstate Ins. Co., et al.,
Defendants.

No. CV-11-01007-PHX-SMM
ORDER

Before the Court are six motions for summary judgment. Both Plaintiff Nammo Talley, Inc. (“Talley”) and Defendant Allstate Insurance Company, solely as successor-in-interest to Northbrook Excess and Surplus Insurance Company, formerly known as Northbrook Insurance Company, (“Allstate”) filed motions for summary judgment regarding the pollution exclusion (Docs. 131; 194), various notice and property damage issues (Docs. 190; 193), and allocation (Docs. 165; 167). All motions are fully briefed. The Court will grant Allstate’s motion regarding the pollution exclusion, deny Talley’s corresponding cross motion, grant the parties’ requests for oral argument regarding the remaining motions regarding notice and property damage issues, and hold the remaining motions for summary judgment in abeyance.

FACTS

Talley¹ is a defense contractor that has manufactured rocket motors, rocket propellant, and weapons at its manufacturing facility in Mesa, Arizona, (“the Site”) since

¹ The following facts are undisputed, unless indicated otherwise.

1 the early 1960's. (Doc. 1 at 15.) Allstate, as a successor-in-interest, issued two successive
2 umbrella policies ("the Policies") to Talley between 1975 and 1978. Policy 63-300-019
3 was issued for the period January 1, 1975, to January 1978; it was canceled effective
4 January 1, 1977. (Doc. 131-4 at 88.) Policy 63-002-569 was in effect from January 1,
5 1977, to January 1, 1978. (Id. at 108.) Both policies contain virtually identical qualified
6 pollution exclusions reading, in relevant part:

7
8 This policy shall not apply:

9 to personal Injury or Property Damage arising out of the discharge,
10 dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis,
11 toxic chemicals, liquids or gases, waste materials or other irritants,
12 contaminants or pollutants into or upon land, the atmosphere or any water
course or body of water; but this exclusion does not apply if such discharge,
dispersal, release or escape is **sudden and accidental**.

13 (Doc. 131-4 at 98, 113-114)(emphasis added).

14 On October 1, 1990, the State of Arizona filed a civil complaint against Talley
15 alleging "groundwater, surface water, and soil contamination" at the Site and neighboring
16 properties. (Doc. 1 at 17.) The State's claims arose out of Talley's historic manufacturing
17 operations at two areas at the Site: the water bore-out area ("WBO") and the thermal
18 treatment unit ("TTU"). (Doc. 1 at 24.).

19 The WBO operation, active from the 1960's until 1990, involved using a high-
20 pressure water system to remove solid propellant containing ammonium perchlorate from
21 rocket motors.(Docs 1 at 27; 131-1 at 12.) Talley attempted to collect removed propellant
22 through primary and secondary pollutant recovery techniques and then discharged the
23 water used in the operation to unlined evaporative ponds. (Doc. 1 at 28.) At some point,
24 perchlorate leached from the ponds into the local aquifer and resulted in perchlorate
25 contamination of neighboring wells and property offsite. (Doc. 1 at 17, 29.)

26 At the TTU, active from 1966 to 2006, Talley conducted open burning of waste
27 propellant containing perchlorate along with other materials in unlined burn pits. (Doc. 1
28 at 30.) During the majority of the TTU's operation, Talley employees dumped the waste

1 on bare ground. (Doc. 1 at 33-34.) The dumped waste would then be ignited and allowed
2 to burn. (Docs. 131-1 at 32; 134 at 32.) Though these activities were performed pursuant
3 to state permits, the TTU operations contaminated surrounding sites and water.

4 On August 30, 1991, Talley entered into a consent judgment to settle all claims
5 brought by the State. (Doc. 193-5 at 29.) As part of the judgment, Talley admitted that it
6 violated Arizona Administrative Code § § R18-8-260, et seq., promulgated pursuant to
7 the Hazardous Waste Management Act, A.R.S. §§ 49-901 et seq. (Id at 28-29). Talley
8 agreed to pay a \$500,000 civil penalty and to investigate and remediate toxic
9 contamination at the TTU and WBO. (Id. at 35-45.)

10 Talley initiated the present action after a number of its insurance providers refused
11 to cover the costs associated with Talley’s investigation and remediation responsibilities.
12 (Doc. 1.) All other insurers have reached settlement with Talley; Allstate, the lone excess
13 insurer included in the suit, is the last remaining defendant.

14 15 **STANDARD OF REVIEW**

16 A court must grant summary judgment if the pleadings and supporting documents,
17 viewed in the light most favorable to the nonmoving party, “show that there is no genuine
18 issue as to any material fact and that the moving party is entitled to judgment as a matter
19 of law.” Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
20 Jesinger v. Nevada Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive
21 law determines which facts are material. See Anderson v. Liberty Lobby, 477 U.S. 242,
22 248 (1986); see also Jesinger, 24 F.3d at 1130. “Only disputes over facts that might
23 affect the outcome of the suit under the governing law will properly preclude the entry of
24 summary judgment.” Anderson, 477 U.S. at 248. The dispute must also be genuine, that
25 is, the evidence must be “such that a reasonable jury could return a verdict for the
26 nonmoving party.” Id.; see Jesinger, 24 F.3d at 1130.

27 A principal purpose of summary judgment is “to isolate and dispose of factually
28 unsupported claims.” Celotex, 477 U.S. at 323-24. Summary judgment is appropriate

1 against a party who “fails to make a showing sufficient to establish the existence of an
2 element essential to that party’s case, and on which that party will bear the burden of
3 proof at trial.” Id. at 322; see also Citadel Holding Corp. v. Roven, 26 F.3d 960, 964 (9th
4 Cir. 1994). The moving party need not disprove matters on which the opponent has the
5 burden of proof at trial. See Celotex, 477 U.S. at 323-24. The party opposing summary
6 judgment need not produce evidence “in a form that would be admissible at trial in order
7 to avoid summary judgment.” Id. at 324. However, the nonmovant “may not rest upon
8 the mere allegations or denials of [the party’s] pleadings, but . . . must set forth specific
9 facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); see Matsushita
10 Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-88 (1986); Brinson v.
11 Linda Rose Joint Venture, 53 F.3d 1044, 1049 (9th Cir. 1995).

12 13 **DISCUSSION**

14 Allstate seeks summary judgment on Count I (declaratory judgment) and Count II
15 (breach of contract) on the basis that coverage for Plaintiff’s claims is barred by the
16 pollution exclusion contained in Allstate Policy Nos. 63-300-109 and 63-002-569. (Doc.
17 131.) Nammo refutes this claim, and has filed a cross motion for partial summary
18 judgment seeking a determination that the pollution exclusion does not bar coverage.
19 (Doc. 194.) The Court will address the parties’ motions in turn.

20 **a. Allstate’s Motion for Summary Judgment**

21 Allstate claims that the Policies’ pollution exclusion bars coverage because Talley
22 does not identify any specific instance of a “sudden” discharge, as interpreted by Smith v.
23 Hughes Aircraft Co., 22 F.3d 1432 (1993). (Doc. 131 at 11-12.) Allstate also argues that,
24 even if the Court interpreted “sudden” as having no temporal meaning, the exclusion
25 would still bar coverage because Talley’s polluting activities were intentional. (Doc. 131
26 at 12-16.) In response, Talley argues that “discharge,” as used in the qualified pollution
27 exclusion context, is the migration of toxic pollutants into the environment and that the
28 discharge at issue was not “sudden” because Talley did not expect or intend toxic

1 migration. (Doc. 196 at 13-20.) Talley also argues that Hughes misapplied Arizona law,
2 and that the Court should find that the “sudden and accidental” clause does not have a
3 temporal element because the pollution exclusion’s drafting history allegedly proves the
4 clause was adopted as a mere “clarification” of the “occurrence” definition. (Doc. 196 at
5 4-11.)

6 As a threshold matter, the Court agrees with Allstate and finds that Talley has not
7 identified any “sudden,” as interpreted by Hughes, discharge that resulted in
8 contamination. Hughes holds that under Arizona law “the definition of ‘sudden’
9 incorporates a notion of temporal brevity....” Hughes, 22 F.3d at 1437. Talley makes no
10 factual assertion that contamination resulted from anything but its routine waste-disposal
11 practices that spanned over multiple decades. (Docs. 195 at 10-13, 22-25; 134 at ¶¶ 4, 26,
12 38). Indeed, Talley’s only argument is that Talley did not “expect or intend”
13 contamination over that time. (Doc. 196 at 13-20.) Further, it is undisputed that both the
14 waste disposal and the toxic migration were products of Talley’s routine, continuous
15 practices. (Id.) Therefore, Talley has failed to offer sufficient evidence to satisfy the
16 pollution exclusion, as interpreted by Hughes.

17 Clearly, then, Hughes’s precedential value is the keystone issue to this action. In
18 Hughes, the Ninth Circuit held that the “sudden and accidental” pollution exclusion
19 barred coverage for groundwater contamination caused by the insured’s long-term
20 practice of discharging waste solvents into unlined ponds.² The Circuit confirmed that
21 “the definition of ‘sudden’ incorporates a notion of temporal brevity and does not merely
22 mean expected....” Hughes, 22 F.3d at 1437. In reaching its holding, the Ninth Circuit
23 found that, pursuant to State Farm Mut. Auto. Ins. Co. v. Wilson, 162 Ariz. 251, 782 P.2d
24 727 (1989), the district court had properly

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26 (1) looked to the language of the exclusion and concluded that “sudden”
27 “unmistakably connotes a temporal quality” (otherwise, it would simply be a
synonym for “accidental”); (2) concluded that requiring temporal brevity furthered

28 ² The pollution exclusion in Hughes is materially similar to the pollution exclusion
at issue here. See Hughes, 783 F.Supp. 1222, 1230 (1991).

1 public policy by excluding deliberate indifference on the part of a polluting
2 insured; and (3) analyzed the purpose of the transaction and, noting that Hughes is
3 not an unsophisticated consumer, concluded that “an interpretation of ‘sudden’
4 that fails to recognize its temporal quality” would frustrate the parties' intent by
5 forcing the Insurers to buy into the risk of insuring a pollution prone operation.

6 Id.

7 The Circuit also acknowledged the argument that the pollution exclusion was
8 drafted as a “clarification” of the “occurrence” definition. Id. However, the Circuit held
9 that the “drafting and marketing history of the pollution exclusion is not only unclear but
10 also irrelevant because [the insured] has not shown that it relied on this history or that the
11 history played a part in the policy negotiations.” Id.

12 Arizona having never addressed the interpretation of “sudden and accidental”
13 prior to—or in the 22 years since—the Ninth Circuit’s decision, Hughes reflects this
14 Circuit’s attempt to predict how Arizona courts would interpret the term in cases
15 involving the qualified pollution exclusion. See Aetna Cas. & Sur. Co. v. Sheft, 989 F.2d
16 1105, 1108 (9th Cir. 1993) (“When a decision turns on applicable state law and the state's
17 highest court has not adjudicated the issue, a federal court must make a reasonable
18 determination of the result the highest state court would reach if it were deciding the
19 case.”) Accordingly, Hughes remains binding in the Ninth Circuit “in the absence of any
20 subsequent indication from the [Arizona] courts that [the] interpretation was incorrect.”
21 Owen v. United States, 713 F.2d 1461, 1464 (9th Cir.1983). Simply said, “[s]tare decisis
22 requires that [this Court] follow [the Circuit’s] earlier determination as to the law of a
23 state in the absence of any subsequent change in the state law.” Newell v. Harold Shaffer
24 Leasing Co., 489 F.2d 103, 107 (5th Cir. 1974) (cited by Owen, 713 F.2d at 1464).

25 Allstate argues that Hughes remains binding on this Court because no Arizona
26 court has suggested that the decision is incorrect. (Doc. 131 at 11.) Talley argues that the
27 court should disregard Hughes because two subsequent Arizona cases—Taylor v. State
28 Farm Mut. Auto. Ins. Co., 175 Ariz. 148, 854 P.2d 1134 (1993) and Ohio Cas. Ins. Co. v.
Henderson, 189 Ariz. 184, 939 P.2d 1337 (1997)—indicate that Hughes does not reflect
Arizona law regarding the interpretation of insurance contracts. (Docs. 195 at 15; 196 at
5-6, 8). The Court agrees with Allstate.

1 The Court finds that neither case referenced by Talley gives “indication” or
2 represents a “change in state law” suggesting that Hughes should be vacated. When it
3 comes to using extrinsic evidence to determine a party’s intent, a Court may use its sound
4 discretion to consider or deny extrinsic evidence. In Taylor, the Arizona Supreme Court
5 clarified that it is improper for a judge to use his or her own understanding to determine
6 whether a contractual term is ambiguous. Taylor, 175 Ariz. 154, 854 P.2d 1140. The
7 Taylor court emphasized that, where appropriate, a judge should consider parol evidence
8 to define contractual terms because a “court’s proper and primary function” is to enforce
9 the meaning intended by the contracting parties. Id. Hughes clearly complies with
10 Taylor’s ultimate purpose. In Hughes, the Ninth Circuit determined whether the “sudden
11 and accidental” clause was ambiguous by looking to how different jurisdictions
12 interpreted the language—not by using parol evidence, as suggested by Taylor. Hughes
13 22 F.3d at 1437. However, the Ninth Circuit nonetheless found the term to be ambiguous
14 and then considered parol evidence to determine the parties’ intent. Id. Importantly,
15 Hughes analyzed the meaning of “sudden and accidental” using the factors adopted in
16 Wilson—the very framework that Talley suggests the court use here. (Compare Doc.196
17 at 8 with Hughes, 22 F.3d at 1437). Thus, despite Talley’s arguments to the contrary, the
18 Ninth Circuit’s finding that the drafting history was unpersuasive on the issue of the
19 contracting parties’ intent confirms that the holding was ultimately proper. See Taylor at
20 175 Ariz. at 153, 854 P.2d at 1139 (“At what point a judge stops listening to testimony
21 that white is black and that a dollar is fifty cents is a matter for *sound judicial discretion*
22 and common sense.”)(emphasis added). Therefore, as Hughes did not blindly reject the
23 term’s drafting history but found it immaterial to the parties’ intent, Taylor does not
24 indicate that Hughes is incorrect.³

25 Talley’s argument concerning Henderson is equally unconvincing. Talley argues

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27 ³ Talley also argues that, because Taylor was decided just five days before Hughes
28 was argued and submitted for decision to the Ninth Circuit, that the Circuit did not
consider Taylor in its decision. (Doc. 194 at 16.) This argument is unconvincing as the
Ninth Circuit’s written opinion was offered more than five months after Taylor was
decided.

1 that Hughes should be disregarded because Henderson “rests on just the kind of evidence
2 Hughes improperly rejected”—i.e. a term’s drafting history. (Doc. 194 at 16.) However,
3 the cases are distinguishable. In Henderson, the court invoked the reasonable
4 expectations doctrine in route to considering the drafting history because the policy was
5 purchased by “average” consumers not expected to read or understand or negotiate their
6 contract. Henderson, 189 Ariz. at 190, 939 P.2d at 1343. In Hughes, the district court and
7 Ninth Circuit denied use of the reasonable expectations doctrine because the contract at
8 issue was not a contract of adhesion. Hughes, 783 F.Supp. at 1229 (“Because [The
9 insured] is a sophisticated buyer of insurance, it defies common sense to call this a
10 contract of adhesion.”); Id at 1231 (“Again, it is not lost on the Court that Hughes is not
11 an unsophisticated buyer of insurance.”); Hughes, 22 F.3d at 1437 (“We agree with and
12 adopt the district court’s analysis....”). The Court is therefore unconvinced that an
13 opinion analyzing a different type of insurance policy, bought by a different kind of
14 consumer, and analyzed under an unavailable legal doctrine calls Hughes into question.

15 In sum, Taylor and Henderson clarify—not materially alter—Arizona’s approach
16 to contract interpretation. Neither decision changes the outcome of Hughes. This Court is
17 therefore bound to follow Circuit precedent and interpret “sudden and material” as having
18 a temporal meaning.⁴ As Talley has offered neither fact nor legal argument suggesting
19 that its injuries were the result of a “sudden” event, the Court will grant summary
20 judgment in Allstate’s favor.

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22 **b. Talley’s Motion for Partial Summary Judgment**

23 Despite having decided to grant summary judgment in Allstate’s favor, the Court
24 will address Talley’s cross motion on the pollution exclusion.

25 Talley argues that the doctrine of regulatory estoppel provides alternative grounds

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27 ⁴ The Court’s decision to follow Hughes makes Allstate’s additional argument
28 superfluous. Allstate bases its argument and Talley bases its response on the hypothetical
situation in which the Court would not attribute a temporal meaning to “sudden.” (See Docs. 131
at 12-16; 196 at 13-20.) The Court, therefore, having indeed attributed a temporal meaning to
“sudden,” will not address Allstate’s secondary argument in the interest of judicial efficiency.

1 on which Allstate should be prevented from invoking the pollution exclusion.⁵ (Doc. 194
2 at 7-14.) Per Talley’s argument, regulatory estoppel, a doctrine foreign courts have used
3 to preclude insurers from taking a position contrary to one allegedly presented to a
4 regulatory agency, see e.g. Morton Int’l, Inc. v. Gen. Acc. Ins. Co. of Am., 134 N.J. 1
5 (1993), is an iteration of estoppel and therefore should be recognized in Arizona because
6 “[e]stoppel gives effect to the reasonable expectations doctrine entrenched in Arizona
7 law.” (Doc. 194 at 11.) In response, Allstate argues that the regulatory estoppel claim
8 must fail because Talley does not prove that the parties relied on the drafting history in
9 their negotiations. (Doc. 136 at 11-17.) Further, Allstate argues that the use of Arizona’s
10 reasonable expectations doctrine is unfounded. (Doc. 136 at 16-19.) In its Reply, Talley
11 clarifies that the application of regulatory estoppel “hinges” on the reasonable
12 expectations of the state regulators, not the parties. (Doc. 137 at 10.) Having reviewed the
13 parties’ positions at length, the Court agrees with Allstate.

14 The Court is mindful that Arizona has never adopted the doctrine of regulatory
15 estoppel. In fact, Talley concedes that Arizona has “not...addressed regulatory estoppel
16 in this context” (Doc. 194 at 11) before setting forth its regulatory estoppel argument. As
17 discussed previously, this Court is bound to Circuit precedent in the absence of an
18 “indication” or “subsequent change in state law” suggesting that the decision is incorrect.
19 Owen, 713 F.2d at 1464; Newell, 489 F.2d at 107. In Morton, the New Jersey Supreme
20 Court defined the “critical issue” before it as “whether [New Jersey] should give effect to
21 the literal meaning of an exclusionary clause....” Morton, 134 N.J. at 72. The Ninth
22 Circuit clearly addressed this issue in Hughes by interpreting “sudden and accidental” as
23 having a temporal meaning. Hughes, 22 F.3d at 1437. The Court is therefore unconvinced
24 that it should depart from Circuit precedent by way of a foreign legal doctrine employed
25 exclusively by foreign courts.

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27 ⁵ Talley also argues that “the ‘sudden and accidental’ clause must be interpreted as
28 lacking a temporal element as a matter of law.”(Doc. 194 at 14-21.) The Court has
already decided against this proposition and will therefore focus its analysis on the
unique arguments set forth in Talley’s motion for partial summary judgment.

1 Moreover, the Court is unconvinced that Arizona courts would adopt the
2 regulatory estoppel doctrine. The problem lies with Talley’s reliance on the doctrine of
3 reasonable expectations. Arizona courts invoke the reasonable expectation doctrine when
4 determining the intent of an insured to interpret terms of an adhesion contract. Darner,
5 140 Ariz. at 391, 682 P.2d at 396 (adopting RESTATEMENT (SECOND)
6 CONTRACTS, § 211 (1981)). “An adhesion contract is typically a standardized form
7 offered to consumers of goods and services on essentially a ‘take it or leave it’ basis....”
8 Broemmer v. Abortion Servs. of Phoenix, Ltd., 173 Ariz. 148, 150, 840 P.2d 1013, 1015
9 (1992). “The distinctive feature of a contract of adhesion is that the weaker party has no
10 realistic choice as to its terms.” Id. Accordingly, Arizona Court’s would not use the
11 doctrine of reasonable expectations to determine either the regulators’ or the parties’
12 intent in this case.

13 The court does not find that the Arizona insurance regulators either were insureds
14 or lacked “realistic choices” in negotiating the content to the pollution exclusion. Indeed,
15 state regulators presumably held the ultimate power of negotiation. Therefore, Arizona
16 courts would not use the reasonable expectations doctrine to determine the regulators’
17 intent. See Darner, 140 Ariz. at 391.

18 Further, just as Hughes rejected the insured’s invocation of the reasonable
19 expectations doctrine because the insured was a “sophisticated buyer of insurance” that
20 employed its own insurance department and professional insurance brokers, see Smith v.
21 Hughes Aircraft Co. Corp., 783 F. Supp. 1222, 1231 (D. Ariz. 1991) aff’d in part, rev’d in
22 part sub nom. Smith v. Hughes Aircraft Co., 22 F.3d 1432 (9th Cir. 1993), the Court
23 finds that application of the reasonable expectations doctrine is untenable when applied to
24 Talley. At the time of the Northbrook policies, Talley was a self-described “diversified,
25 multi-industry corporation with domestic and international operations serving worldwide
26 markets.” (Docs. 136-8 at 7; 136-7 at 6.) Talley had both retail and wholesale brokers
27 negotiating its insurance contracts. (See Doc. 136-6 at 3-4) (Letter from Talley’s
28 insurance broker to Northbrook: “Please advise if Northbrook Insurance Company is not

1 able to comply with any of these points. We are delivering the policy to Talley Industries:
2 however, anticipate their objections in the areas indicated.”) Also, Talley’s Director of
3 Insurance, Charles Lorenz, an “expert” on insurance matters, handled insurance
4 procurement for Talley and all of its subsidiaries. (Doc. 136-9 at 4, 7-10.) The Court
5 therefore will not apply the reasonable expectations doctrine to determine Talley’s intent.

6 In the end, regardless of which entity’s intent—Arizona’s regulatory insurance
7 agency or Talley—the Court sets out to determine, use of Arizona’s reasonable
8 expectation doctrine would be improper. As the application of Talley’s regulatory
9 estoppel argument “hinges” on the reasonable expectations doctrine, the Court will
10 therefore deny Talley’s argument as a matter of law.

11 CONCLUSION

12 For the reasons set forth above the Court will grant Allstate’s motion for summary
13 judgment and deny Talley’s motion for partial summary judgment regarding the pollution
14 exclusion. Accordingly,

15 **IT IS HEREBY ORDERED** granting Allstate’s Motion for Summary Judgment
16 on the Pollution Exclusion (Doc. 131). The Court therefore denies Count II (Breach of
17 Contract) with prejudice. (Doc. 1 at 11-12.) No final determination as to Count I
18 (Declaratory Judgment) will be given until the Court addresses the distinct issues
19 presented in the parties additional motions for summary judgment. (Doc. 1 at 10-11.)


20 **IT IS FURTHER ORDERED** denying Talley’s Motion for Partial Summary
21 Judgment (Doc. 194).

22 **IT IS FURTHER ORDERED** granting the parties’ request for oral argument on
23 the issues contained in Talley’s Motion for Partial Summary Judgment Regarding
24 Property Damage (Doc. 190) and Allstate’s Motion for Summary Judgment on Late
25 Notice and Named Insured Issues (Doc. 193). The Court will hear oral argument on
26 **Wednesday, April 22, 2015, at 2:00 p.m.** in Courtroom 401, 401 West Washington St.,
27 Phoenix, Arizona. Both Plaintiff and Defendant will be allotted 30 minutes to present
28 their arguments regarding Allstate’s motion (Doc. 193). Plaintiff and Defendant will

1 thereafter be granted 20 minutes to present their arguments regarding Talley's motion
2 (Doc. 190). (The difference in allotted time attributed to the overlapping issues and
3 arguments in the parties' motions.)

4 **IT IS FURTHER ORDERED** that the Court shall hold the parties' remaining
5 motions for partial summary judgment regarding allocation (Docs. 165; 167) in abeyance.

6 DATED this 31st day of March, 2015

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Honorable Stephen M. McNamee
10 Senior United States District Judge
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