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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

AMERICAN ZURICH INSURANCE )  
COMPANY and ZURICH AMERICAN )  
INSURANCE COMPANY, )

Plaintiffs, )

v. )

COUNTRY VILLA SERVICE CORP. )  
dba COUNTRY VILLA HEALTH )  
SERVICES, )

Defendant. )

AND RELATED COUNTER-CLAIMS )  
and THIRD PARTY ACTIONS )

2:14-cv-03779-RSWL-AS

**ORDER re: Country  
Villa's Motion for  
Partial Summary Judgment  
[75]**

Currently before the Court is Defendant/Counterclaimant Country Villa Service Corp.'s ("Country Villa") Motion for Partial Summary Judgment [75], in which Country Villa requests partial summary judgment in its favor as to Country Villa's Fifth Count for Declaratory Relief in Country Villa's Counterclaim

1 [20] against Plaintiffs/Counterdefendants American  
2 Zurich Insurance Company and Zurich American Insurance  
3 Company (collectively, "Zurich"). Country Villa's Mot.  
4 Part. Summ. J. Mem. P&A ("Mot."), ECF No. 75-1.

5 The Court, having reviewed all papers submitted and  
6 pertaining to Country Villa's Motion for Partial  
7 Summary Judgment [75], **NOW FINDS AND RULES AS FOLLOWS:**  
8 The Court **GRANTS** Country Villa's Motion [75].

9 **I. FINDINGS OF FACT**

- 10 1. Plaintiff American Zurich Insurance Company is an  
11 Illinois corporation engaged in the insurance  
12 business with a principal place of business in  
13 Illinois. Compl. ¶ 3, ECF No. 1.
- 14 2. Plaintiff Zurich American Insurance Company is a  
15 corporation incorporated in either New York or  
16 Illinois that is engaged in the insurance business  
17 with a principal place of business in Illinois.  
18 Compl. ¶ 4; Answer ¶ 4, ECF No. 19; Countercl. ¶ 4,  
19 ECF No. 20; Ans. to Countercl. ¶ 3, ECF No. 69.
- 20 3. Country Villa is a California corporation with a  
21 principal place of business in California that is  
22 in the business of managing skilled nursing care  
23 facilities located in California. Compl. ¶¶ 5, 8;  
24 Answer ¶¶ 5, 8 (undisputed); Countercl. ¶ 3.
- 25 4. The amount in controversy exceeds \$75,000. Compl.  
26 ¶¶ 1, 50; Countercl. ¶¶ 1-2.
- 27 5. Zurich provided seven years of workers'  
28 compensation insurance to Country Villa, beginning

1 January 31, 2004, and ending January 31, 2011.

2 Zurich's Statement of Facts ("Zurich's Facts") ¶ 1,  
3 ECF No. 79-1.

4 6. Zurich and Country Villa ("the parties") entered  
5 into separate insurance policy contracts ("Policy"  
6 or "Policies") for each of the seven policy years.  
7 Compl. ¶ 10, Ex. A at \*10, \*46, \*82, \*117, \*154,  
8 \*193, \*229, ECF No. 1-1; Stip. re: Program  
9 Agreements ("Stip.") ¶¶ 1-2, ECF No. 72.

10 7. Each of the Policies contains a standard-form  
11 provision that states: "The terms of this policy  
12 may not be changed or waived except by endorsement  
13 issued by us to be part of the policy."<sup>1</sup> Compl.,  
14 Ex. A at \*230; Zurich's Facts ¶ 2 (undisputed).

15 8. Each of the Policies issued to Country Villa  
16 include an attached Large Deductible Endorsement,  
17 which is two pages in length and sets forth two  
18 definitions: "Allocated loss adjustment expense"  
19 and "Claim." Compl., Ex. A at \*62-63, \*238, \*243-  
20 44; see Zurich's Facts ¶ 3 (undisputed); id. ¶ 11  
21 (dispute irrelevant).

22 9. Under the Large Deductible Endorsements, Country  
23 Villa agreed to reimburse Zurich, up to the

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24  
25 <sup>1</sup> The Court took judicial notice of the existence and  
26 content of the Policies, Incurred Deductible Agreements, and  
27 Specifications to the Incurred Deductible Agreements, attached to  
28 the Complaint [1] as Exhibits A-B, in the Court's October 2,  
2014, Order [59] regarding Zurich's Motion to Dismiss Certain  
Counts of Counterclaim. Oct. 2, 2014, Order re: Zurich's Mot.  
Dismiss 13:28-14:6, ECF No. 59.

1 deductible amount, the sum of (1) all covered  
2 benefits and damages Zurich paid for the injured  
3 workers' benefit, (2) all "Allocated loss  
4 adjustment expense," and (3) all assessments  
5 incurred by Zurich related to the deductible  
6 amount. Compl., Ex. A, at \*90-\*91; Zurich's Facts  
7 ¶ 13 (undisputed).

8 10. Zurich and Country Villa entered into an Incurred  
9 Deductible Agreement in 2004 and 2005, with the  
10 2005 Incurred Deductible Agreement ("IDA")  
11 continuing such that the parties entered into  
12 separate Specifications to the 2005 IDA each  
13 subsequent policy year. Compl., Ex. B; see  
14 Zurich's Facts ¶ 4 (undisputed).

15 11. The parties entered into the IDAs and  
16 Specifications after the effective date of the  
17 related Policy, but the IDAs and Specifications  
18 are, by their terms, retroactively effective on the  
19 start date of the related Policy. Compl., Ex. B at  
20 \*278, \*286, \*298, \*331, \*336; see Zurich's Facts ¶  
21 16 (undisputed).

22 12. The IDAs without the Specifications are twelve  
23 pages in length, and with the Specifications, are  
24 around twenty pages in length. Compl., Ex. B.

25 13. The IDAs state: "This Agreement governs the  
26 structure and operation of and the duties and  
27 obligations of each party to this Program and  
28 supersedes any Deductible endorsements to the

1 Policy(ies), prior communications, negotiations,  
2 participating plans or letters of election."  
3 Zurich's Facts ¶ 5 (undisputed); Compl., Ex. B at  
4 \*267.

5 14. The IDAs state the "Policy(ies) . . . including all  
6 endorsements, extensions, renewals and/or rewrites"  
7 "stated in the Specifications" are "subject to this  
8 Agreement." Compl., Ex. B at \*267.

9 15. The IDAs state that the "purpose of this Agreement  
10 is to outline (a) the scope, description and  
11 structure of the Incurred Deductible Program  
12 ("Program") You and We have entered into and (b)  
13 the duties and obligations of each party with  
14 respect to this Program." Id.

15 16. The IDAs state in the "Program Description"  
16 section: "Under the Program, We have selected a  
17 Third Party Administrator ("TPA") at Your request  
18 to handle and pay the claims presented in  
19 accordance with the provisions of the Policy(ies).  
20 You assume the risk within the Deductible Amount  
21 and We accept the risk transfer excess of the  
22 Deductible Amount(s) and the Aggregate Deductible .  
23 . . up to the limits of liability under the  
24 Policy(ies)." Id. at \*268.

25 17. The IDAs explain: "The Specifications state the (1)  
26 amount of Your initial payment to Us with respect  
27 to the Deductible Premium and the expected Incurred  
28 Losses within the Deductible Amount(s), as

1 determined by Us, plus related expenses and  
2 assessments; and (2) the timing and method of Our  
3 adjustment of the Incurred Losses, plus related  
4 expenses and assessments. You agree to and shall  
5 remit to Us all amounts when due, as stated in the  
6 Specifications. The amounts paid by You for Your  
7 obligations within the Deductible Amount(s) will be  
8 held by Us in a Loss Reimbursement Fund." Id.

9 18. The IDAs set forth definitions for the following  
10 terms, among others:

11 (1) "Allocated Loss Adjustment Expense" ("ALAE"),  
12 which is "an expense directly allocable to a  
13 specific claim";

14 (2) "Aggregate Deductible," which is "the greatest  
15 amount for the Program term stated in the  
16 Specifications of Paid Losses within the Deductible  
17 Amount(s) and, if applicable in accordance with the  
18 Specifications, Paid ALAE, You are obligated to  
19 reimburse Us for under the Policy(ies)";

20 (3) "Aggregate Deductible Charge," which is "the  
21 premium You pay Us for limiting the losses You are  
22 obligated to reimburse Us for to an Aggregate  
23 Deductible amount";

24 (4) "Claim Administration Expenses," which are  
25 "expenses charged by the TPA in addition to Claim  
26 Handling Fees that include but are not limited to .  
27 . . any other expenses relating to the servicing,  
28 management and reporting of the claims under the

1 Policy(ies)";

2 (5) "Deductible Amount(s)," which "is the amount  
3 You are obligated to reimburse Us for each  
4 occurrence, accident or claim under the Policy(ies)  
5 as stated in the Specifications";

6 (6) "Excess Premium," which is "the premium You pay  
7 to Us for limiting the losses You are obligated to  
8 reimburse Us for to the Deductible Amount(s) and  
9 for Our assumptions of the risk transfer excess of  
10 the Deductible Amount(s) up to the limits of  
11 liability under the Policy(ies)";

12 (7) "Incurred Loss," which is "a Paid Loss plus a  
13 Loss Reserve under the Policy(ies)";

14 (8) "Loss Reimbursement Fund," which "is a non-  
15 interest bearing account where Your funds are held  
16 by Us to provide for the payment of Your  
17 obligations within the Deductible Amount(s) under  
18 the Policy(ies)";

19 (9) "Other Special Charges," which "shall include  
20 but not be limited to additional premium taxes, new  
21 or modified assessment, premium and loss based  
22 assessments, administrative, statutory or court-  
23 ordered fines or penalties not the result of Our  
24 negligence, any expenses We incur to collect from  
25 You amounts past due and to enforce any of the  
26 provisions of this Agreement";

27 (10) "Paid ALAE," which "is a payment made by Us  
28 for ALAE under the Policy(ies)";

1 (11) "Standard Premium"; and

2 (12) "Default." Id. at \*269-72.

3 19. The IDAs state that "[i]n the event of a Default or  
4 a material change in Your financial condition . .  
5 ., We may, out Our option, terminate the financing  
6 portion of the Program" and "[t]he amount  
7 immediately due and payable to Us will be  
8 determined by Us using . . the full standard  
9 Premium by converting the Program to a guaranteed  
10 cost rating plan using Our manual rates in effect  
11 as of the Program effective date." Id. at \*276.

12 20. Specifications to the IDAs repeat the \$500,000  
13 large deductible amount set forth in the Large  
14 Deductible Endorsement in the Policy(ies) and set  
15 forth how "ALAE" "will be handled and paid." Id.  
16 at \*279-80.

17 21. Specifications to the IDAs set forth the  
18 "Deductible Premium" amount, the "Premium  
19 Surcharge" amount, and the "Unallocated Loss  
20 Adjustment Expense per claim." Id. at \*280-82.

21 22. Neither the Large Deductible Endorsements, nor the  
22 Policies, contain any mention of the terms  
23 Aggregate Deductible, ALAE Reserve, Default,  
24 Incurred ALAE, Loss Development Factor, Loss  
25 Reimbursement Fund, Loss Reserve, Paid ALAE, or  
26 Arbitration. Zurich's Facts ¶ 15 (undisputed).

27 23. Zurich did not file the IDAs or Specifications with  
28 the Workers' Compensation Insurance Rating Bureau



1 ("WCIRB") before they were issued or entered into  
2 by Zurich and Country Villa. Zurich's Facts ¶ 6  
3 (undisputed); Stip. ¶ 4.

4 24. The California Department of Insurance ("CDI") did  
5 not approve the IDAs or Specifications, or any  
6 exemplars or copies thereof, before they were  
7 issued or entered into by the parties. Zurich's  
8 Facts ¶ 7 (undisputed); Stip. ¶ 5.

9 25. The California Insurance Commissioner  
10 ("Commissioner") has stated that when a side  
11 agreement to a workers' compensation insurance  
12 contract "govern[s] integral aspects of the  
13 insurance relationship stemming from the treatment  
14 of deductibles," the side agreement is required to  
15 be filed under at least Cal. Ins. Code § 11658.  
16 Appl. of Insurance Commissioner to File Amicus  
17 Curiae Brief, DMS Serv. ("Commissioner Appl., DMS  
18 Serv."), No.B235819, 2011 WL 6345401, at \*4 (Cal.  
19 Ct. App. Dec. 14, 2011) (Appellate Brief); see id.  
20 at \*1-\*11.

21 26. The CDI's February 2011 Directive explained that  
22 collateral agreements affecting workers'  
23 compensation insurance obligations "are prohibited  
24 unless they are attached to the policy" under Cal.  
25 Code Regs., tit. 10, § 2268. CDI Feb. 14, 2011,  
26 Directive to WCIRB, at 2, ECF No. 20-2 (Exhibit 2  
27 to Countercl.).

28 27. It is undisputed that an actual controversy exists

1 between Zurich and Country Villa regarding the  
2 enforceability of the IDAs under California law.

### 3 II. CONCLUSIONS OF LAW

- 4 1. Summary judgment is appropriate when the movant  
5 shows that there is no genuine dispute as to any  
6 material fact and the movant is entitled to  
7 judgment as a matter of law. Fed. R. Civ. P.  
8 56(a).
- 9 2. Under Rule 56, the party moving for summary  
10 judgment has the initial burden to show "no genuine  
11 dispute as to any material fact." Fed. R. Civ. P.  
12 56(a); see Nissan Fire & Marine Ins. Co. v. Fritz  
13 Cos., 210 F.3d 1099, 1102-03 (9th Cir. 2000). The  
14 burden then shifts to the non-moving party to  
15 produce admissible evidence showing a triable issue  
16 of fact. Nissan Fire & Marine Ins., 210 F.3d at  
17 1102-03; see Fed. R. Civ. P. 56(a).
- 18 3. Disputed or unclear law or matters of law are not  
19 genuine disputes "as to any material fact."  
20 Sarviss v. Gen. Dynamics Info. Tech., Inc., 663 F.  
21 Supp. 2d 883, 899 n.16 (C.D. Cal. 2009) (stating  
22 that "[d]espite Plaintiff's assertion to the  
23 contrary, unclear law is not a 'genuine issue of  
24 material fact' that would preclude summary  
25 judgment).<sup>2</sup>

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26  
27 <sup>2</sup> See also Hayes v. Cnty. of San Diego, 736 F.3d 1223, 1236  
28 (9th Cir. 2013) (stating that the court "acknowledge[d] that the  
district court's summary judgment ruling 'was undertaken at a  
time when the law . . . was unclear' and that the district court

- 1 4. California law governs when a federal district  
2 court is sitting in diversity and the issue  
3 involves the substantive law of California.<sup>3</sup> See  
4 Conestoga Serv. Corp. v. Exec. Risk Indemnity,  
5 Inc., 312 F.3d 976, 980-81 (9th Cir. 2002).
- 6 5. When no published California opinion controls,  
7 federal courts may consider unpublished California  
8 opinions as persuasive authority. Emp'rs Ins. of  
9 Wausau v. Granite St. Ins. Co., 330 F.3d 1214, 1220  
10 n.8 (9th Cir. 2003) (stating that the court "may  
11 consider unpublished state decisions, even though  
12 such opinions have no precedential value" and that  
13 unpublished opinions, "while certainly not  
14 dispositive of how the California Supreme Court  
15 would rule," may still "lend[] support" to a  
16 certain position regarding California law);  
17 Washington v. Cal. City Correction Ctr., 871 F.  
18 Supp. 2d 1010, 1028 n.3 (E.D. Cal. 2012) ("The  
19 Court may cite unpublished California appellate  
20 decisions as persuasive authority.").
- 21 6. "A federal court applying California law must apply

22 \_\_\_\_\_  
23 could not be 'clairvoyant or prescient'); SEC v. Murphy, 626  
24 F.2d 633, 653 (9th Cir. 1980) (noting, without rejection, that,  
25 when law was unclear as to scienter requirement, the district  
26 court properly ruled on summary judgment that scienter was  
27 required); In re ATM Fee Antitrust Litig., 554 F. Supp. 2d 1003,  
28 1007 (N.D. Cal. 2008) (granting a motion for partial summary  
judgment by determining "'one of the darkest corners of antitrust  
law'" that was "unsettled, unclear, unwieldy, and unequivocally  
complex" after "substantial rumination on the legal issues").

<sup>3</sup> It is undisputed that California law applies.

1 the law as it believes the California Supreme Court  
2 would apply it," and "[i]n the absence of a  
3 controlling California Supreme Court decision, the  
4 panel must predict how the California Supreme Court  
5 would decide the issue, using intermediate  
6 appellate court decisions, statutes, and decisions  
7 from other jurisdictions as interpretive aids."  
8 Gravquick A/S v. Trimble Navigation Int'l, Ltd.,  
9 323 F.3d 1219, 1222 (9th Cir. 2003).

10 7. The interpretation of an insurance policy or  
11 contract is a question of law. Conestoga, 312 F.3d  
12 at 981.

13 8. In California, "the construction of a statute by  
14 officials charged with its administration,  
15 including their interpretation of the authority  
16 invested in them to implement and carry out its  
17 provisions, is entitled to great weight." Ass'n  
18 for Retarded Citizens v. Dep't of Developmental  
19 Serv., 696 P.2d 150, 38 Cal.3d 384, 391 (1985).

20 9. Section 11658 of the California Insurance Code  
21 states in relevant part: "a) A workers'  
22 compensation insurance policy or endorsement shall  
23 not be issued by an insurer to any person in this  
24 state unless the insurer files a copy of the form  
25 or endorsement with the rating organization  
26 pursuant to subdivision (e) of Section 11750.3

1 [i.e., the WCIRB]<sup>4</sup> and 30 days have expired from  
2 the date the form or endorsement is received by the  
3 commissioner from the rating organization without  
4 notice from the commissioner, unless the  
5 commissioner gives written approval of the form or  
6 endorsement prior to that time.

7 (b) If the commissioner notifies the insurer that  
8 the filed form or endorsement does not comply with  
9 the requirements of law, specifying the reasons for  
10 his or her opinion, it is unlawful for the insurer  
11 to issue any policy or endorsement in that form."  
12 Cal. Ins. Code § 11658.

13 10. California Code of Regulations, title 10, § 2268  
14 states in relevant part that "[n]o collateral  
15 agreements modifying the obligation of either the  
16 insured or the insurer shall be made unless  
17 attached to and made a part of the policy." Cal.  
18 Code Regs., tit. 10, § 2268.

19 11. California Code of Regulations, title 10, § 2218  
20 requires that "[a]ll workers' compensation  
21 insurance forms must be submitted in duplicate to  
22 the Workers' Compensation Insurance Rating Bureau  
23 of California for preliminary inspection," and that  
24 the "Bureau shall review such forms and submit them  
25 to the Commissioner for final action." Cal. Code  
26

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27 <sup>4</sup> See Cal. Ins. Code § 11750.3; Ceradyne, Inc. v. Argonaut  
28 Ins. Co., No. No. G039873, 2009 WL 1526071, at \*5 (Cal. Ct. App.  
Unpub. June 2, 2009).

1 Regs., tit. 10, § 2218.

2 12. An endorsement to an insurance policy "is an  
3 amendment to or modification of an existing policy  
4 of insurance" that "may alter or vary any term or  
5 condition of the policy" and that "may be attached  
6 to a policy at its inception or added during the  
7 term of the policy." Adams v. Explorer Ins. Co.,  
8 132 Cal. Rptr. 2d 24, 33 (Ct. App. 2003).

9 13. An endorsement to a workers' compensation insurance  
10 policy, for purposes of Cal. Ins. Code § 11658, may  
11 concern "matters unrelated to the description of  
12 [the insurer's] indemnity and insurance  
13 obligations." Ceradyne, Inc. v. Argonaut Ins. Co.,  
14 No. No. G039873, 2009 WL 1526071, at \*7 (Cal. Ct.  
15 App. Unpub. June 2, 2009); see Monarch Consulting,  
16 Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh,  
17 Pa., 993 N.Y.S.2d 275, 289 (App. Div. 2014).

18 14. The IDAs are endorsements to the Policies between  
19 the parties for purposes of Cal. Ins. Code § 11658,  
20 and are "collateral agreements modifying the  
21 obligation of either the insured or the insurer"  
22 for purposes of Cal. Code Regs., tit. 10, § 2268.

23 15. The IDAs were required to be filed with the WCIRB  
24 under Cal. Ins. Code § 11658 and "attached to and  
25 made a part of the policy" under Cal. Code Regs.,  
26 tit. 10, § 2268.

27 16. Because Zurich failed to file the IDAs with the  
28 WCIRB under Cal. Ins. Code § 11658, and failed to

1 attach the IDAs to the Policies under Cal. Code  
2 Regs., tit. 10, § 2268, the IDAs are illegal and  
3 void as a matter of law.

4 17. Enforcing the illegal IDAs on equitable grounds is  
5 inappropriate under the circumstances of this case.

6 18. The IDAs are illegal, void, and unenforceable in  
7 their entirety.

8 19. The federal Declaratory Judgment Act provides that  
9 "[i]n a case of actual controversy within its  
10 jurisdiction . . . any court of the United States .  
11 . . . may declare the rights and other legal  
12 relations of any interested party seeking such  
13 declaration, whether or not further relief is or  
14 could be sought." 28 U.S.C. § 2201(a).<sup>5</sup>

### 15 III. BACKGROUND

16  
17 <sup>5</sup> Though district courts in the Ninth Circuit "have at times  
18 applied the California Declaratory Relief Act when sitting in  
19 diversity," "the Ninth Circuit has indicated, although not  
20 explicitly held, that the federal Declaratory Judgment Act should  
21 apply," and the U.S. Supreme Court "has emphasized the procedural  
22 nature of the Declaratory Judgment Act," but, either way,  
23 "whether the state or federal statute applies makes little  
24 difference as a practical matter, as the two statutes are broadly  
25 equivalent." In re Adobe Sys., Inc. Privacy Litig., Case No.  
26 13-CV-05226-LHK, 2014 WL 4379916, at \*1, --F. Supp. 3d.-- (N.D.  
27 Cal. Sept. 4, 2014); see 28 U.S.C. § 2201(a); Cal. Code Civ. P. §  
28 1060; Market Lofts Cmty. Ass'n v. 9th St. Market Lofts, LLC, 166  
Cal. Rptr. 3d 469, 474-75 (Ct. App. 2014) (stating that  
California Code of Civil Procedure section 1060 requires merely  
that there be an actual controversy relating to the legal rights  
and duties of the respective parties"); see also In re  
Arbitration Between Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.  
v. Personnel Plus, Inc., 954 F. Supp. 2d 239, 247-48 (S.D.N.Y.  
2013)("Because there is no conflict, the McCarran-Ferguson Act  
does not come into play, and the Court applies the FAA. Thus, the  
question of the Payment Agreement's enforceability must be  
submitted to arbitration.").

1 **A. Factual Background**

2 Zurich contracted with Country Villa to provide  
3 workers' compensation insurance to Country Villa for  
4 seven consecutive policy years, from 2004 to 2011. Id.  
5 ¶ 10. For each of the seven policy years, the parties  
6 entered into insurance policy contracts ("Policy,"  
7 "Policy(ies)," or "Policies") and, later, separate  
8 IDAs/IDA Specifications ("IDA" includes IDA and any  
9 related Specifications). Countercl. ¶¶ 11, 75, 76.  
10 Zurich admits it did not file the IDAs with the WCIRB  
11 and that the IDAs were not approved by the CDI prior to  
12 their issuance. Stip. ¶¶ 4-5.

13 **B. Procedural Background**

14 Zurich filed this Action [1] against Country Villa  
15 on May 16, 2014, claiming breach of contract under  
16 California law for Country Villa's alleged breach of  
17 insurance policies, related contracts, and a promissory  
18 note. On July 1, 2014, Country Villa filed a Counter-  
19 claim [20] against Zurich for contract-related claims  
20 and declaratory relief. Country Villa filed the  
21 present Motion for Partial Summary Judgment [75] on  
22 April 6, 2015. The Opposition [79] and Reply [80] were  
23 timely filed. See Dckt. ## 78-80.

24 **IV. DISCUSSION**

25 **A. Country Villa's Evidentiary Objections**

26 Country Villa objects to four declarations attached  
27 to and in support of Zurich's Opposition.

28 1. Objection to Terzinski Declaration [80-1]



1 Country Villa objects to portions of the Terzinski  
2 Declaration that relate to the "2013 filings" made by  
3 Zurich to the WCIRB on grounds of irrelevance because  
4 "any submission to the [WCIRB]. . . in July 2013 is not  
5 a fact of consequence in determining the motion for  
6 partial summary judgment." Country Villa's Evid. Objs.  
7 to Terzinski Decl. 2:7-14, ECF No. 80-1. The Court  
8 agrees; Zurich's 2013 filings are irrelevant to whether  
9 the IDAs are void under California law or whether the  
10 IDAs should be enforced in equity if found void. As  
11 such, the Court **SUSTAINS** Country Villa's objections to  
12 the Terzinski Declaration.

13 2. Objection to Bartell Declaration [80-2]

14 Country Villa objects on grounds of irrelevance to  
15 portions of the Bartell Declaration that relate to the  
16 "1995 filings" Zurich made with the CDI. Zurich's 1995  
17 filings are irrelevant to the determination of Country  
18 Villa's Motion, as Zurich fails to show that its 1995  
19 filings were the equivalent of submitting the IDAs to  
20 the WCIRB, as required by Section 11658; or that its  
21 1995 filings otherwise satisfy Cal. Ins. Code § 11658  
22 and Cal. Code Regs., tit. 10, § 2268. The 1995 filings  
23 are also irrelevant to whether the IDAs, if found void,  
24 should nevertheless be enforced. The Court **SUSTAINS**  
25 Country Villa's objections to the Bartell Declaration.

26 3. Objection to Knoebel Declaration [80-3]

27 Country Villa objects to specific paragraphs of the  
28 Knoebel Declaration on grounds of irrelevance, best

1 evidence, and improper legal conclusion, among others.

2 The Court **SUSTAINS** Country Villa's evidentiary  
3 objections to the following portions of the Knoebel  
4 Declaration on the basis of irrelevance, Best Evidence,  
5 or improper legal conclusion: paragraphs 7-9 and 11-12,  
6 all of paragraph 13 except the first sentence, and  
7 paragraphs 14-16 and 19-26.

8 The Court **OVERRULES** the remainder of Country  
9 Villa's objections to the Knoebel Declaration either  
10 because the evidence is relevant or because the Court  
11 need not rely on the objected-to evidence to determine  
12 the present Motion.

13 4. Objection to Young Declaration [80-4]

14 Country Villa objects to the entire Young  
15 Declaration on the basis of, among other grounds,  
16 irrelevance. The Court **SUSTAINS** Country Villa's  
17 objections to the following portions of the Young  
18 Declaration on the basis of irrelevance:

19 1) Evidence related to Zurich's two Rate Filings made  
20 in 1995, Young Decl. Supp'g Opp'n ¶¶ 2-3, Exs. A-B, ECF  
21 No. 79-4;

22 2) Evidence related the Bankruptcy Court filing, In re  
23 Country Villa Nursing Center, Inc., Case No. 8:14-bk-  
24 11364-CB, Young Decl. Supp'g Opp'n ¶ 5, Ex. C

25 3) Evidence related to the copied page from *Accounting*  
26 *Practices & Procedures Manual*, Young Decl. Supp'g Opp'n  
27 ¶ 9, Ex. G; and

28 4) Evidence related to the California Assembly

1 Committee Reports on Assembly Bill No. 2490 (2009-2010  
2 Regular Session), Young Decl. ¶¶ 11-12, Exs. H-I, which  
3 is irrelevant for several reasons, but primarily  
4 because the Reports have nothing to do with any law  
5 relevant to determining the present Motion.

6 The Court **OVERRULES** the remainder of Country  
7 Villa's objections to the Young Declaration.

#### 8 **B. Zurich's Rule 56(d) Request**

9 Zurich requests a denial of Country Villa's Motion  
10 for Partial Summary Judgment so that Zurich may engage  
11 in additional discovery, which, Zurich claims, "will  
12 raise genuine issues of material fact." Young Decl.  
13 56(d) ¶ 10. Upon review of Zurich's Rule 56(d)  
14 Request, the Court finds that, even if the evidence  
15 sought was discovered, such evidence would not raise a  
16 "genuine issue of material fact" relevant to the  
17 Court's determination of the present Motion. The Court  
18 **DENIES** Zurich's Rule 56(d) request.

#### 19 **C. Parties' Requests for Judicial Notice**

20 In diversity cases, judicial notice is governed by  
21 the Federal Rules of Evidence. Alimena v. Vericrest  
22 Fin., Inc., No. S-12-0901, 2012 WL 66512001, at \*4 n.8  
23 (E.D. Cal. Dec. 20, 2012); Wray v. Gregory, 61 F.3d  
24 1414, 1417 (9th Cir. 1995). A court "may judicially  
25 notice a fact that is not subject to reasonable dispute  
26 because it: (1) is generally known . . .; or (2) can be  
27 accurately and readily determined from sources whose  
28 accuracy cannot reasonably be questioned." Fed. R.

1 Evid. 201(b). A court "must" take judicial notice "if  
2 a party requests it and the court is supplied with the  
3 necessary information." Fed. R. Evid. 201(c)(2).

4 1. Country Villa's RJN [75-3]

5 Country Villa requests judicial notice of the  
6 following:

7 1) In re Matter of the Licenses and Licensing Rights of  
8 American Zurich Insurance Company and Zurich American  
9 Insurance Company of Illinois, File No. DISP-2011-  
10 00811, before the Insurance Commissioner of the State  
11 of California, Notice of Hearing and Order to Show  
12 Cause, dated February 27, 2012. Country Villa's RJN ¶  
13 1, Ex. 1.

14 2) In re Matter of the Licenses and Licensing Rights of  
15 American Zurich Insurance Company and Zurich American  
16 Insurance Company of Illinois, File No. DISP-2011-  
17 00811, before the Insurance Commissioner of the State  
18 of California, Settlement Agreement, dated July 11,  
19 2013. Id. ¶ 2, Ex. 2.

20 3) Notice of Proposed Action and Notice of Public  
21 Hearing, Workers' Compensation Policy Forms, California  
22 Department of Insurance, Reg. File No. REF-2014-00014,  
23 dated December 9, 2014. Id. ¶ 3, Ex. 3.

24 4) Initial Statement of Reasons, Proposed Amendments to  
25 Workers' Compensation Policy Forms, California  
26 Department of Insurance, Reg. File No. REF-2014-00014,  
27 dated December 9, 2014. Id. ¶ 4, Ex. 4.

28 5) Text of Regulation, Workers' Compensation Policy

1 Forms, California Department of Insurance, Reg. File  
2 No. REF-2014-00014, dated December 9, 2014. Id. ¶ 5,  
3 Ex. 5.

4 Because the fact of the existence and content of  
5 the above documents is a fact "not subject to  
6 reasonable dispute" because the fact of the above  
7 documents "can be accurately and readily determined  
8 from sources whose accuracy cannot reasonably be  
9 questioned," the Court **GRANTS** Country Villa's Request  
10 for Judicial Notice in its entirety, taking judicial  
11 notice of the existence and content of the above  
12 documents,<sup>6</sup> attached as Exhibits 1 through 5 to Country  
13 Villa's Request for Judicial Notice.<sup>7</sup>

14 2. Zurich's RJN [79-2]

15 Zurich requests judicial notice of nine documents,  
16 some of which are not relevant to the present Motion.

17 The Court **DENIES** Zurich's request for judicial  
18 notice of the following exhibits because they are  
19  
20

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21 <sup>6</sup> The Court previously took judicial notice of Exhibits 1  
22 through 2, as well the underlying insurance policies and IDAs, in  
23 the Court's October 2, 2014, Order re: Zurich's Motion to Dismiss  
24 [59]. Zurich did not oppose judicial notice of these documents.  
Dckt. # 59 at 12:25-15:10.

25 <sup>7</sup> See Story v. Mammoth Mountain Ski Area, LLC, No.  
26 2:14-cv-02422-JAM-DAD, 2015 WL 2339437, at \*1 (E.D. Cal. May 13,  
27 2015) (stating that "Federal Rule of Evidence 201 permits courts  
28 to take judicial notice of matters that 'can be accurately  
verified and readily determined from sources whose accuracy  
cannot be reasonably questioned,'" and noting that "[d]ocuments  
that 'are administered by[, ] or publicly filed with[, ] [an]  
administrative agency' are properly subject to judicial notice  
under Rule 201").

1 irrelevant to determining the present Motion,<sup>8</sup> as  
2 previously discussed above:

3 1) Zurich's two Rate Filing Forms filed with the CDI in  
4 1995. Zurich RJN ¶¶ 1-2, Ex. A-B.

5 2) In re Country Villa Nursing Center Inc., Case No.  
6 8:14-bk-11364-CB. Zurich RJN ¶ 3, Ex. C.

7 3) *Accounting Practices & Procedures Manual* 65-8.  
8 Zurich RJN ¶ 7, Ex. G.

9 4) California Committee Reports, Analysis of California  
10 Assembly Bill No. 2490 (2009-2010 Regular Session).  
11 Zurich RJN ¶¶ 8-9, Ex. H-I.

12 The Court **GRANTS** Zurich's request for judicial  
13 notice as to the following exhibits because their  
14 existence and content are facts that can be accurately  
15 and readily determined from sources whose accuracy  
16 cannot reasonably be questioned:

17 1) "Civil Minutes-General," Healthsmart Pac. Inc. v.  
18 Zurich Am. Ins. Co., Case No. 08-cv-01207-JVS-RC (C.D.  
19 Cal. Feb. 20, 2009), ECF No. 31. Zurich's RJN ¶ 4, Ex.  
20 D.

21 2) "Ruling Motion to Compel Arbitration and Stay  
22 Proceedings," DMS Serv., LLC v. Zurich Am. Ins. Co.,  
23 Case No. EC 055245 (Cal. Sup. Ct. Aug. 5, 2011).  
24 Zurich's RJN ¶ 5, Ex. E.

25 3) "Appeals Court Docket" for Monarch Consulting Inc.  
26 v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., Case

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27  
28 <sup>8</sup> See Story, 2015 WL 2339437, at \*1 (denying a request for  
judicial notice when the material underlying the request was  
found not relevant to the issues presented by the motion).

1 No. APL-2014-00271 (N.Y. App. Div.), as of Apr. 17,  
2 2015. Zurich's RJN ¶ 6, Ex. F.

3 **D. Partial Summary Judgment for Declaratory Relief**

4 1. Legal Standard

5 A "court shall grant summary judgment" when the  
6 movant "shows that there is no genuine dispute as to  
7 any material fact and the movant is entitled to  
8 judgment as a matter of law." Fed. R. Civ. P. 56(a).  
9 The party moving for summary judgment has the initial  
10 burden to show "no genuine dispute as to any material  
11 fact." Fed. R. Civ. P. 56(a); see Fritz, 210 F.3d at  
12 1102-03. The burden then shifts to the non-moving  
13 party to produce admissible evidence showing a triable  
14 issue of fact. Fritz, 210 F.3d at 1102-03; see Fed. R.  
15 Civ. P. 56(a). Unclear law or disputed matters of law  
16 are not genuine disputes "as to any material fact."  
17 Sarviss, 663 F. Supp. 2d at 899 n.16.

18 2. Analysis

19 County Villa's Motion for Partial Summary Judgment  
20 [75] regards only the Fifth Count of Country Villa's  
21 Counterclaim, which requests a judicial declaration  
22 that the IDAs "are void and unenforceable" under  
23 California law because Zurich failed to file the IDAs  
24 with the WCIRB, as required by at least Cal. Ins. Code  
25 § 11658,<sup>9</sup> and failed to attach the IDAs to the Policies,

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26  
27 <sup>9</sup> The Commissioner has stated that similar side deductible-  
28 related agreements were required to be filed under Section 11735  
of the Insurance Code as well as Section 11658. Commissioner

1 as required by Cal. Code Regs., tit. 10, § 2268.

2 Countercl. ¶¶ 71-80, ECF No. 20.

3 Partial summary judgment is appropriate because  
4 Country Villa has shown that there is no genuine issue  
5 of material fact, and Zurich has failed to provide any  
6 genuine issue of material fact, disputing only matters  
7 of law. Fed. R. Civ. P. 56(a).

8 To declare the rights and obligations of the  
9 parties, the Court must determine three issues:

10 1) Are the IDAs subject to Cal. Ins. Code § 11658 or  
11 Cal. Code Regs., tit. 10, § 2268?;

12 2) If so, did Zurich violate Sections 11658 or 2268?;

13 3) If so, what is the appropriate remedy for Zurich's  
14 violation of California law?

15 a. *Are the IDAs Subject to Cal. Ins. Code §*  
16 *11658 or Cal. Code Regs., tit. 10, § 2268?*

17 California Insurance Code § 11658 ("Section 11658")  
18 states that "[a] workers' compensation insurance policy  
19 or endorsement shall not be issued by an insurer to any  
20 person in this state unless the insurer files a copy of  
21 the form or endorsement with the rating organization  
22 [i.e., the WCIRB] . . . and 30 days have expired from  
23 the date the form or endorsement is received by the  
24 commissioner from the rating organization without  
25 notice from the commissioner, unless the commissioner  
26 gives written approval of the form or endorsement prior

27 \_\_\_\_\_

28 Appl., DMS Serv., 2011 WL 6345401, at \*3-\*8.



1 to that time." Cal. Ins. Code § 11658(a).

2 Section 11658 "requires workers' compensation  
3 carriers, before issuing a workers' compensation  
4 insurance policy, to file copies of their insurance  
5 policies, endorsements and forms with WCIRB; after a  
6 preliminary inspection, the WCIRB then sends the filed  
7 documents to the CDI for approval," and the CDI "has 30  
8 days in which to reject the filed form or endorsement."  
9 Monarch, 993 N.Y.S.2d at 279-80. Under Section 11658,  
10 "two regulatory agencies must review and approve all  
11 workers' compensation insurance forms," but the  
12 Commissioner "has the exclusive authority to regulate,  
13 accept, and reject workers' compensation insurance  
14 plans." Id. at 280.

15 Section 2268 of title ten of the California Code of  
16 Regulations ("Section 2268") states in relevant part  
17 that "[n]o collateral agreements modifying the  
18 obligation of either the insured or the insurer shall  
19 be made unless attached to and made a part of the  
20 policy." Cal. Code Regs., tit. 10, § 2268.

21 Country Villa argues that the IDAs are subject to  
22 Section 11658 because they are "[a] workers'  
23 compensation insurance policy or endorsement" and that  
24 the IDAs are subject to Section 2268 because they are  
25 "collateral agreements modifying the obligation of  
26 either the insured or the insurer." Zurich disagrees  
27 and argues that the IDAs are not subject to either  
28 Section 11658 or 2268 because the IDAs are mere

1 financial agreements with the "primary purpose" of  
2 securing Country Villa's deductible obligations under  
3 the Large Deductible agreements attached to the  
4 insurance policies. Opp'n 6:4-5.

5 i. *Authority*

6 There is no controlling California or Ninth Circuit  
7 authority determinative of Country Villa's request for  
8 declaratory relief. The most analogous cases are an  
9 unpublished California appellate decision, Ceradyne<sup>10</sup>; a  
10 published New York appellate decision, Monarch,<sup>11</sup> which  
11 is currently on appeal; and an unreported trial-level  
12 New York State opinion, National Union Fire.<sup>12</sup> Most  
13 helpful is material issued by the California Insurance  
14 Commissioner interpreting Sections 11658 and 2268 in  
15 analogous situations.<sup>13</sup>

16 Zurich argues that a published California appellate  
17 decision, DMS Services,<sup>14</sup> should govern. However, the  
18 court in DMS Services did not analyze or reach the  
19 issue of whether the collateral agreements in that case  
20

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21 <sup>10</sup> Ceradyne, Inc. v. Argonaut Ins. Co., No. G039873, 2009 WL  
22 1526071 (Cal. Ct. App. June 2, 2009).

23 <sup>11</sup> Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co. of  
24 Pittsburgh, Pa., 993 N.Y.S.3d 275 (App. Div. 2014).

25 <sup>12</sup> Nat'l Union Fire Co. of Pittsburgh, Pa. v. Source One  
26 Staffing, LLC, 36 Misc.3d 1224(A), 2012 N.Y. Slip Op. 51462(U),  
2012 WL 3156438 (Sup. Ct. 2012) (Unpub. Disp.).

27 <sup>13</sup> Commissioner Appl., DMS Serv., 2011 WL 6345401; Feb. 14,  
2011, CDI Directive to WCIRB, ECF No. 20-2.

28 <sup>14</sup> DMS Serv., Inc. v. Sup. Ct., 140 Cal. Rptr. 3d 896 (Ct.  
App. 2012).

1 were invalid under Section 11658, and DMS Services does  
2 not discuss Section 2268 at all. See DMS Serv., 140  
3 Cal. Rptr. 3d at 905-06.

4 Zurich also cites for support Grove Lumber<sup>15</sup> and  
5 HealthSmart<sup>16</sup>, two cases<sup>17</sup> from this District that found  
6 enforceable arbitration provisions in collateral  
7 agreements to workers' compensation insurance despite a  
8 Section 11658 argument. Id. at 8:26-9:4. Country  
9 Villa argues that Grove Lumber and HealthSmart are  
10 distinguishable and unpersuasive. The following is a  
11 discussion of the relevant case law.

#### 12 Grove Lumber

13 In the earlier 2008 case, Grove Lumber, the  
14 district court compelled arbitration pursuant to an  
15 arbitration provision in a collateral agreement to a  
16

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17 <sup>15</sup> Grove Lumber & Bldg. Supply, Inc. v. Argonaut Ins. Co.,  
18 No. SA CV 07-1396 AHS(RNBx), 2008 WL 2705169 (C.D. Cal. July 7,  
2008).

19 <sup>16</sup> HealthSmart Pac. Inc. v. Zurich Am. Ins. Co., No. 08-cv-  
20 01207-JVS-RC, at \*4-\*5 (C.D. Cal. Feb. 20, 2009) (In-Chambers  
21 Order Granting Defendant Zurich's Motion to Stay Case Pending  
Action and Compelling Arbitration, ECF No. 31).

22 <sup>17</sup> Both cases were decided prior to Ceradyne, 2009 WL  
23 1526071 (Cal. Ct. App. Unpub. June 2, 2009), the only California  
24 opinion on the issue. The California appellate court in Ceradyne  
25 "accepted amicus curiae briefs from general counsel for  
26 HealthSmart Pacific, Inc., and counsel for Grove Lumber &  
27 Building Supply, Inc.," which the court described as "involved in  
28 similar litigation/arbitration disputes with their workers'  
compensation insurers regarding large deductible policies" and  
"[h]aving similar claims and contracts" as those in Ceradyne.  
2009 WL 1526071, at \*4. After considering those amicus briefs,  
the court agreed that the challenged arbitration clause in the  
side program agreements "executed months after the inception of  
the actual policy" was "void" under Section 11658. Id.

1 workers' compensation insurance policy despite a  
2 Section 11658 argument because the insured failed to  
3 prove that the collateral agreement was subject to  
4 Section 11658. Grove Lumber, 2008 WL 2705169, at \*7  
5 (C.D. Cal. July 7, 2008). The court explained that  
6 because the insured had "concede[d] in its proposed  
7 statement of facts and conclusions of law . . . that  
8 the [collateral agreement] [was] a 'financial  
9 agreement' and not an insurance policy or endorsement,"  
10 Section 11658 did not apply because Section 11658  
11 requires the filing of only an "insurance policy or  
12 endorsement." Id. at \*7. The court also found that,  
13 under the FAA, the Section 11658 issue had to be  
14 decided by the arbitration panel. Id. at \*6.

15 Grove Lumber is distinguishable, unpersuasive in  
16 its reasoning, and ultimately unhelpful to the Court's  
17 determination of Country Villa's Motion.

18 First, the determinative facts of Grove Lumber are  
19 distinguishable from the facts of this case. Unlike  
20 the insured in Grove Lumber who conceded that the  
21 program agreements were mere financial agreements,  
22 Country Villa disputes such a contention and provides  
23 evidence and argument that the IDAs are insurance  
24 policies or endorsements subject to the filing  
25 requirements of Section 11658. Additionally, while the  
26 program agreements in Grove Lumber expressly stated  
27 they did not alter or affect the underlying policy or  
28

1 attached endorsements,<sup>18</sup> the IDAs here expressly state  
2 they *do* alter or affect the underlying policy and  
3 endorsements.<sup>19</sup>

4 Second, the court in Grove Lumber did not analyze  
5 the Section 11658 issue,<sup>20</sup> but preliminarily found that,  
6 due to the insured's concession and under the FAA,<sup>21</sup> the  
7 Section 11658 argument could not prevent the Court from  
8 compelling arbitration in that case. Id. at \*6-\*7.

9 Zurich emphasizes Grove Lumber's idea that because  
10 the program agreements did not "address [the insurance  
11 company's indemnity obligations for loss or liability,"  
12 the program agreements were "not an insurance policy or  
13 endorsement." Id. at \*7. The Court finds such an idea  
14 unpersuasive, especially in light of California's  
15 comprehensive workers' compensation insurance  
16 regulatory scheme and the California Insurance  
17 Commissioner's interpretation of Section 11658.

18 In California, "[w]orkers' compensation insurance  
19

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20 <sup>18</sup> 2008 WL 2705169, at \*2 ¶¶ 12-13.

21 <sup>19</sup> Compl., Ex. B at \*267 (IDA) (stating that the  
22 "Policy(ies) . . . including all endorsements, extensions,  
23 renewals and/or rewrites" "stated in the Specifications" are  
24 "subject to this Agreement"); id. (IDA) ("This Agreement . . .  
25 supersedes any Deductible endorsements to the Policy(ies), prior  
26 communications, negotiations, participating plans or letters of  
27 election."); see Compl., Ex. A at \*230 (Policy) (stating that  
28 "[e]ach of the Policies contains a standard-form provision that  
states: "The terms of this policy may not be changed or waived  
except by endorsement issued by us to be part of the policy").

<sup>20</sup> Grove Lumber does not discuss Section 2268.

<sup>21</sup> There is no FAA issue here.

1 programs are to be closely scrutinized and are highly  
2 regulated.'" Monarch, 993 N.Y.S.2d at 291 (quoting  
3 Ceradyne, 2009 WL 1526071, at \*11).<sup>22</sup> The California  
4 "Legislature has created a highly regulated  
5 compensation system for injured workers with the twin  
6 goals of providing prompt medical treatment and  
7 containing costs." Adventist Health v. Workers' Compl.  
8 Appeals Bd., 149 Cal. Rptr. 3d 406, 412 (Ct. App.  
9 2012). Section 11750.3 explains that the "rating  
10 organization," which is the WCIRB, was created "[t]o  
11 examine policies, daily reports, endorsements or other  
12 evidences of insurance for the purpose of ascertaining  
13 whether they comply with the provisions of law and to  
14 make reasonable rules governing their submission."  
15 Cal. Ins. Code § 11750.3. Section 2218 of the  
16 California Code of Regulations title 10 states that  
17 "[a]ll workers' compensation forms must be submitted in  
18 duplicate to the [WCIRB] of California for preliminary  
19 inspection." Cal. Code Regs. tit. 10, § 2218.

20 In light of such a comprehensive regulatory scheme,  
21 it is unreasonable to limit Section 11658's filing  
22

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23  
24 <sup>22</sup> See also Commissioner Appl., DMS Serv., 2011 WL 6345401,  
25 at \*4-\*5 (stating that "[w]orkers' compensation insurance is a  
26 highly regulated area of insurance" and that the "regulation of  
27 rates is subject to an 'open' rating system that involves a  
28 complex analysis of multiple interrelated factors" and involves  
"an open rating system" where "employer can negotiate in the  
market place the deductible amounts best suited to their  
particular needs [such as offering] larger deductible amounts . .  
. and lower premiums for large employers who are able to assume a  
portion of the risk of loss").

1 requirements to the narrow sliver of an insurance  
2 agreement regarding only the insurers "indemnity  
3 obligations for loss or liability." Grove Lumber, 2008  
4 WL 2705169, at \*7. Nothing in the language of Section  
5 11658, or the language of any other related statutes or  
6 regulations, requires such a stingy interpretation of  
7 Section 11658.

8 On the contrary, Section 11658 itself clearly  
9 states that not only the insurance policy itself, but  
10 also *endorsements* to the insurance policy must be  
11 filed. Cal. Ins. Code § 11568. An endorsement "is an  
12 amendment to or modification of an existing policy of  
13 insurance," that "may be attached to a policy at its  
14 inception or added during the term of the policy," and  
15 that "'may alter or vary *any term or condition* of the  
16 policy.'" Adams v. Explorer Ins. Co., 13 Cal. Rptr.  
17 4th 438, 450-51 (Ct. App. 2003) (emphasis added). As  
18 such, an endorsement, which must be filed, is not  
19 limited to provisions addressing the insurer's  
20 indemnity obligations, but may be any agreement that  
21 alters or adds to any term or condition of an insurance  
22 policy. See id.

23 The California Insurance Commissioner has  
24 interpreted Section 11658.<sup>23</sup> With regard to an

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26 <sup>23</sup> The CDI, and ultimately the Commissioner, is charged with  
27 enforcing the statutes regulating the workers' compensation  
28 insurance industry. Commissioner Appl., DMS Serv., 2011 WL  
6345401, at \*1-\*5; see Ass'n for Retarded Citizens v. Dep't of  
Developmental Serv., 696 P.2d 150, 38 Cal.3d 384, 391 (1985)

1 agreement analogous to the IDAs here, where the insured  
2 "agree[d] to reimburse or otherwise pay the insurer for  
3 loss adjustment expenses and/or other claims or policy  
4 related expenses," and where the agreement included  
5 terms pertaining to "indemnity/loss obligation, payment  
6 or reimbursement obligation, allocated loss adjustment  
7 expenses (ALAE), other expenses or fees, the timing of  
8 reimbursements or payments to the insurer, collateral,  
9 circumstances that constitute a default by the insured,  
10 choice of law, arbitration, and other matters that are  
11 material to the insured's and insurer's obligations  
12 under a workers' compensation insurance policy," the  
13 Commissioner concluded that such an agreement was  
14 subject to the filing requirements of Section 11658.  
15 In the Matter of Zurich Am. Ins. Co., File No. DISP-  
16 2011-00811, Notice of Hearing and Order to Show Cause  
17 ("CDI OSC re: Zurich") 4:23-5:23 (Feb. 27, 2012), ECF  
18 No. 75-3. The Commissioner's position flies in the  
19 face of Grove Lumber's interpretation of Section 11658.

#### 20 HealthSmart

21 In HealthSmart, Zurich moved to stay the action and  
22 compel arbitration under the FAA, a situation analogous  
23 to Grove Lumber. HealthSmart Pacific, Inc. v. Zurich  
24 Am. Ins. Co., No. 08-cv-01207-JVS-RC, at \*1-\*2 (C.D.  
25 Cal. Feb. 20, 2009) (In-Chambers Order Granting

26 \_\_\_\_\_  
27 ("[T]he construction of a statute by officials charged with its  
28 administration, including their interpretation of the authority  
invested in them to implement and carry out its provisions, is  
entitled to great weight.").



1 Defendant Zurich's Motion to Stay Case Pending Action  
2 and Compelling Arbitration, ECF No. 31). Healthsmart  
3 blindly relied on Grove Lumber, citing no California  
4 law, and did not analyze the Section 2268 argument. As  
5 such, the Court finds that Healthsmart is, like Grove  
6 Lumber, distinguishable, unpersuasive, and unhelpful.

7 Ceradyne

8 Ceradyne, an unpublished California appellate  
9 opinion, is the only California opinion directly on  
10 point.<sup>24</sup> In Ceradyne, the insurance company provided a  
11 workers' compensation insurance plan to a large  
12 corporation. 2009 WL 1526071, at \*1. Several months  
13 after the insurance policy took effect, the parties  
14 entered into an Insurance Program Agreement ("IPA"),  
15 which had not been disclosed to or pre-approved by the

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16  
17 <sup>24</sup> California Court Rule 8.1115(a) states that "an opinion  
18 of a California Court of Appeal . . . that is not certified for  
19 publication or ordered published must not be cited or relied on  
20 by a court or a party in any other action. District courts in  
21 this District generally decline to consider an unpublished  
22 California decision when there is other published persuasive or  
23 binding authority on which to rely. See, e.g., Negrete v.  
24 Allianz Life Ins. Co. of N. Am., 927 F. Supp. 2d 870k 892 (C.D.  
25 Cal. 2013) (rejecting unpublished California court opinions  
26 because the unpublished opinions were *contrary to published*  
27 California court opinions). However, when there is no other  
28 binding authority on which to rely, federal courts may consider  
unpublished California opinions as persuasive authority. Emp'rs  
Ins. of Wausau v. Granite St. Ins. Co., 330 F.3d 1214, 1220 n.8  
(9th Cir. 2003) (stating that the Court "may consider unpublished  
state decisions, even though such opinions have no precedential  
value" and that unpublished opinions, "while certainly not  
dispositive of how the California Supreme Court would rule," may  
still "lend[] support" to a certain position regarding California  
law); Washington v. Cal. City Correction Ctr., 871 F. Supp. 2d  
1010, 1028 n.3 (E.D. Cal. 2012) ("The Court may cite unpublished  
California appellate decisions as persuasive authority.").

1 Insurance Commissioner or the WCIRB. Id. The IPA  
2 contained, among other clauses, arbitration and forum  
3 selection clauses. Id. The New York state trial court  
4 refused to stay or dismiss the case pursuant to the  
5 arbitration and forum selection clauses in the IPA  
6 because the court found that "the entire IPA was void  
7 because it had not been disclosed or approved as  
8 required by section 11658." Id. The appellate court,  
9 in a thorough and well-reasoned analysis,<sup>25</sup> found that  
10 the arbitration and forum selection clause challenged  
11 by the insured was void for failure to file the IPAs  
12 under Section 11658. Id. at \*11-\*12.

13 The insurance policies and IPAs in Ceradyne are  
14 similar in relevant aspects to the policies and IDAs  
15 here. See id. at \*2-\*3. The parties here also make  
16 similar arguments to those considered by Ceradyne.  
17 Significantly, the insurer in Ceradyne argued, as  
18 Zurich argues here, that the IPA was a mere financial  
19 document because it did not address the insurer's  
20 indemnity obligations for loss or liability. Id. The  
21 Ceradyne court "disagree[d] with this narrow  
22 interpretation of the disclosure requirements for  
23

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24 <sup>25</sup> The appellate court accepted amicus curiae briefs from  
25 HealthSmart Pacific, Inc. and Grove Lumber & Building Supply,  
26 Inc., which the Ceradyne court described as companies "involved  
27 in similar litigation/arbitration disputes . . . [h]aving similar  
28 claims and contracts." 2009 WL 1526071, at \*4. Ceradyne's  
robust, clear, and well-reasoned analysis, and consideration of  
these amicus briefs, makes Grove Lumber and HealthSmart further  
unpersuasive.

1 purposes of section 11658." Id. The court pointed out  
2 that "a standard workers' compensation policy includes  
3 more than just a statement of the indemnity  
4 obligations," and "[t]o adequately and efficiently  
5 regulate and monitor rates and insurance companies, the  
6 Commissioner and the WCIRB must review more than  
7 indemnity and liability terms," as employers in  
8 California "have no choice but to secure workers'  
9 compensation insurance . . . and, consequently, the  
10 entire system is highly regulated." Id. at \*11.

11 The Ceradyne court found that the IPAs were subject  
12 to Section 11658's filing requirements because the  
13 language of both the policy and the IPAs made it clear  
14 that the IPAs "contain[ed] significant details  
15 regarding the terms of insurance." Id. at \*8; see also  
16 id. at \*10 ("[T]he IPA looks very much like part of an  
17 insurance contract," as its "primary function is  
18 related to Argonaut's ability and obligation to provide  
19 insurance."). Specifically, the IPA, like the IDA  
20 here, repeated terms found in the policy, and "defined  
21 itself" "as part of" the insurance program. Id. at \*7.  
22 The IPA also "contained several new items regarding how  
23 payments are to be made and maintained for the policy  
24 to continue in effect," including requests for  
25 security, \$500,000 in collateral, and a "Loss Deposit  
26 Fund . . . to pre-fund the payment of Paid Losses and  
27 [Allocated Loss Adjustment Expenses]." Id. The court  
28 concluded: "[t]o accept [the] claim the IPA is purely a

1 . . . financial document would require us to ignore the  
2 actual terms of the agreement." Id. at \*10. The IPAs  
3 were unenforceable under Section 11658. Id. at \*11.

4 Source One

5 A related opinion, National Union Fire Co. of  
6 Pittsburgh, Pa. v. Source One Staffing, LLC, 36 Misc.3d  
7 1224(A), 2012 N.Y. Slip Op. 51462(U), 2012 WL 3156438  
8 (Sup. Ct. 2012) (Unrep. Disp.), was issued in 2012 by a  
9 trial-level New York state court. In Source One, the  
10 insurance company and the insured entered into  
11 insurance policies and a separate Payment Agreement,  
12 which required the insured "to provide significant  
13 collateral to cover losses on claims under the Policies  
14 within the deductible" where the "amount of deductible  
15 required under the Payment Agreement was to be  
16 calculated in part based on respondent's loss history  
17 for claims under the Policies." 2012 WL 3156438, at  
18 \*1. The insurer argued that the arbitration clause in  
19 the Payment Agreement was unenforceable because it had  
20 not been filed with the WCIRB, as required by Section  
21 11658. Id. The insurer argued that the Payment  
22 Agreement was not a policy or endorsement required to  
23 be filed within the meaning of the Insurance Code. Id.

24 The court in Source One concluded that the Payment  
25 Agreement was required to be filed under Section 11658,  
26 and attached to the policies under Section 2268,  
27 because it was "clear" by the terms of the Payment  
28 Agreement "that the Payment Agreement forms a part of

1 the workers compensation policies." Id. at \*5-\*7. The  
2 court declined to apply the rationale of Grove Lumber  
3 and found that Ceradyne was "consistent with a  
4 directive issued by the California Department of  
5 Insurance on February 14, 2011 to the [WCIRB] . . .  
6 regarding the kind of workers compensation collateral  
7 agreements that are at issue in this matter," in which  
8 the Commissioner stated that "under California law,  
9 such agreements were required to be filed with the  
10 WCIRB." Id. at \*5-\*6. Because the Payment Agreement  
11 was not filed or attached, it was void and  
12 unenforceable under California law. Id. at \*5-\*7.

#### 13 Monarch

14 The only analogous published opinion is Monarch  
15 Consulting, Inc. v. Nat'l Union Fire Ins. Co. of  
16 Pittsburgh, Pa., 933 N.Y.S.2d 275 (App. Div. 2014), an  
17 opinion by a New York state lower-appellate-level  
18 court. In Monarch, the appellate court had "to decide  
19 whether three insureds are compelled to arbitrate their  
20 disputes with their workers' compensation insurance  
21 carrier even though the carrier failed to file the  
22 arbitration agreements, contained inside agreements to  
23 the insurance policies, with the California Department  
24 of Insurance as California law requires." 933 N.Y.S.2d  
25 at 279. The facts of Monarch are analogous. After the  
26 insurance company issued the policies, it sent to the  
27 insured additional agreements regarding, among other  
28 things, credit issues, payment obligations, deductible

1 loss reimbursement terms, terms of default, and dispute  
2 resolution procedures. Id. at 280.

3 The Monarch court considered the February 14, 2011,  
4 Directive issued to the WCIRB by the CDI and the CDI's  
5 enforcement action against Zurich. Id. at 280-82. The  
6 court agreed with the CDI's rejection of Zurich's  
7 argument that the payment agreements were mere  
8 financial agreements. Id. The court stated: "We note  
9 that the CDI order to show cause and settlement make  
10 clear that the CDI does, in fact, believe that side  
11 agreements are subject to regulatory statutes, and  
12 therefore, that those agreements are void if insurers  
13 fail to file them," and that "the CDI's interpretation  
14 of the Insurance Code receives weight under" California  
15 law. Id. at 287. The Monarch court also found  
16 Ceradyne, though unpublished, to be persuasive  
17 authority which the court "consider[ed] [for] its  
18 reasoning without relying on it as controlling  
19 authority." Id. at 288. The court concluded that the  
20 payment agreements "qualif[ied] as policy endorsements  
21 or agreements collateral to the policies" and thus  
22 "should have [been] submitted . . . to the CDI for  
23 approval."<sup>26</sup> Id. at 289.

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24  
25 <sup>26</sup> See also Monarch, 993 N.Y.S.2d at 290 ("[T]he payment  
26 agreements modify the parties' obligations under the policies in  
27 even more substantive ways. For example, as the Monarch court  
28 noted, the agreements provide that if the insureds defaulted  
under the agreements, National Union had the right unilaterally  
to "change any or all unexpired Policies" from deductible to  
non-deductible plans, and to concomitantly increase the premiums.

1           ii. *Analysis*

2           In light of the statutory and regulatory language;  
3 the highly regulated nature of California's workers'  
4 compensation insurance scheme; the language of the  
5 Policies and IDAs; the analogous facts and persuasive  
6 reasoning of Ceradyne, Source One, and Monarch; and the  
7 Commissioner's interpretation of Sections 11658 and  
8 2268, the Court finds that the IDAs are subject to  
9 Section 11658's filing requirements and Section 2268's  
10 attachment requirements.

11                           Section 11658

12           Section 11658 states in relevant part that "[a]  
13 workers' compensation insurance policy or endorsement  
14 shall not be issued by an insurer to any person in this  
15 state unless the insurer files a copy of the form or  
16 endorsement with the rating organization . . . and 30  
17 days have expired from the date the form or endorsement  
18 is received by the commissioner from the rating  
19 organization without notice from the commissioner,  
20 unless the commissioner gives written approval of the  
21 form or endorsement prior to that time." Cal. Ins.  
22 Code § 11658(a).

23           The IDAs have the same determinant characteristics  
24

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25 The insureds' payment obligations also included "any amount paid  
26 by [National Union] to a claimant on [the insureds'] behalf."  
27 These changes directly alter the policies, and indeed, directly  
28 implicate the insureds' reasons for obtaining the policies in the  
first place. To accept National Union's claim that the payment  
agreements are simply secondary financial documents would require  
this court to ignore the actual terms of the agreements.").

1 as the side agreements in Ceradyne, Source One, and  
2 Monarch, which were subject to Section 11658's filing  
3 requirements. Most significantly, the language of the  
4 Policies and the IDAs establish that the IDAs are part  
5 of the insurance program created by the Policies.  
6 Specifically, the Policies state that a later issued  
7 endorsement may "change[] or waive[]" the "terms of  
8 th[e] policy, and the IDAs state that the "Policy(ies)  
9 . . . including all endorsements, extensions, renewals  
10 and/or rewrites" stated in the IDA's Specifications are  
11 "subject to" the IDA. Compl., Ex. A at \*230; Compl.,  
12 Ex. B at \*267. The IDAs contain terms related to  
13 Country Villa's deductible and cost obligations under  
14 the Policies; create a new Aggregate Deductible; and  
15 define terms clearly tied to the Policies. Compl., Ex.  
16 B at \*268-\*84. The IDAs constantly refer to the  
17 Policy(ies) and fill out several policy terms. Id.  
18 The IDAs simply cannot be understood as a stand alone  
19 financial agreement separate from the related Policy.<sup>27</sup>

20 The Commissioner's interpretation of Section 11658  
21 further convinces the Court that the IDAs are subject  
22 to Section 11658's filing requirements. See  
23 Commissioner Appl., DMS Serv., 2011 WL 6345401, at \*6-  
24 \*9. The Commissioner, in its Application to File an  
25 Amicus Curiae Brief in DMS Services, stated that

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26  
27 <sup>27</sup> The language of the IDAs (even the title, "Incurred  
28 Deductible Agreement") makes clear that the IDAs are "part of the  
insurance contract, not a separate side financial agreement."  
Ceradyne, 2009 WL 1526071, at \*7.



1 similar side deductible agreements issued by Zurich to  
2 DMS Services were required to be filed under Section  
3 11658 because the agreements "govern integral aspects  
4 of the insurance relationship stemming from the  
5 treatment of deductibles," and "[n]one of the  
6 deductible agreements . . . are stand alone documents;  
7 each can be understood only by reference to the  
8 underlying policies." Id. at \*3-\*4; see id. at \*1-\*11.  
9 The Commissioner also noted that the sheer length of  
10 the agreements, as well as their complex terms related  
11 to the underlying insurance policy, made it clear that  
12 they were "not simply the 'mechanics of payment.'" Id.  
13 at \*7 n.2.

#### 14 Section 2268

15 Section 2268 of the California Code of Regulations,  
16 title 10, requires that "[n]o collateral agreements  
17 modifying the obligation of either the insured or the  
18 insurer shall be made unless attached to and made a  
19 part of the policy." Cal. Code Regs., tit. 10, § 2268.  
20 The IDAs, as endorsements, clearly "modify[] the  
21 obligation of either the insured or the insurer" and  
22 are thus subject to Section 2268's attachment  
23 requirements. Cal. Code Regs., tit. 10, § 2268; see  
24 Feb. 14, 2011, CDI Directive to WCIRB, ECF No. 20-2  
25 ("The Insurance Commissioner has prohibited the use of  
26 collateral agreements, which is synonymous with the  
27 term 'side-agreement,' concerning workers' compensation  
28 insurance unless they are attached to the policy.").

1           b. *Did Zurich Violate California Law?*

2           Zurich admits that it did not file the IDAs with  
3 the WCIRB, as required by Section 11658, and that the  
4 IDAs were never approved by the CDI in any other  
5 manner. Stip. ¶¶ 4-5; Zurich's Facts ¶¶ 7-8  
6 (undisputed). Zurich thus violated Section 11658 by  
7 failing to file the IDAs with the WCIRB before issuing  
8 the IDAs. Cal. Ins. Code § 11658.

9           Zurich does not dispute the fact that the IDAs were  
10 not attached to the Policies, as the IDAs were entered  
11 into after the Policies were issued. See Compl., Ex.  
12 B. As such, Zurich also violated Section 2268 by  
13 failing to attach the IDAs to the related Policy at the  
14 time the Policy was issued. Cal. Code Regs., tit. 10,  
15 § 2268; see Feb. 14, 2011, CDI Directive to WCIRB, at  
16 2, ECF No. 20-2.

17           c. *Proper Remedy*

18           Section 11658(a) states that a workers'  
19 compensation insurance policy or endorsement "*shall* not  
20 be issued by an insurer" unless it is filed with the  
21 WCIRB and in one way or another approved by the  
22 Commissioner, and subsection (b) states that issuing an  
23 unapproved policy or endorsement "*is unlawful.*" Cal.  
24 Ins. Code § 11658 (emphasis added). Section 11658 is  
25 clear: the unfiled and unapproved IDAs are illegal  
26 under Section 11658 and therefore void as a matter of  
27 law. Kremer v. Earl, 27 P. 735, 736 (Cal. 1891)  
28 (stating that "[i]t is not necessary that the act

1 itself . . . declare in express words" that a contract  
2 in violation of the act is "void"); see Monarch, 993  
3 N.Y.S.2d 275, 290-92; Ceradyne, 2009 WL 1526071, at  
4 \*11-\*12.

5 Zurich argues that the IDAs, though illegal and  
6 void under California law, should nevertheless be  
7 enforced in equity.

8 i. *Equitable Enforcement*

9 Under California law, "[n]o court will lend its aid  
10 to give effect to a contract which is illegal, whether  
11 it violates the common or statute law." Kremer, 27 P.  
12 at 736 (Cal. 1891). "If, upon a review of all the  
13 state legislation upon the subject, . . . a contract  
14 appears to contravene the design and policy of the  
15 laws, a court of equity will not enforce it." Id.

16 Yet, in "compelling cases," California courts have  
17 enforced illegal contracts "in order to avoid unjust  
18 enrichment and a disproportionately harsh penalty upon  
19 the plaintiff." Malek v. Blue Cross of Cal., 16 Cal.  
20 Rptr. 3d 687, 707 (Ct. App. 2004) (internal quotation  
21 marks and alterations omitted). "[T]he extent of  
22 enforceability and the kind of remedy granted depend[s]  
23 upon a variety of factors, including the policy of the  
24 transgressed law, the kind of illegality[, ] and the  
25 particular facts." Id.

26 Under the relevant equitable factors, the illegal  
27 IDAs should not be enforced.

28 First, there is no risk of Country Villa's *unjust*

1 enrichment because an insurer's issuance of an illegal  
2 contract, even if it results in enrichment to the  
3 insured, does not result in *unjust* enrichment because  
4 the insured did nothing wrong, and the insurer should  
5 have known its own legal duties. See Ceradyne, 2009 WL  
6 1526071, at \*11-\*12. Furthermore, as Country Villa  
7 explains in its Reply, if the IDAs are void, Country  
8 Villa is still liable to Zurich under the actual  
9 insurance policies and attached large deductible  
10 endorsement, as well as by statute, to reimburse Zurich  
11 for claims paid within the deductible. Reply 18:15-20.

12       Second, refusing to enforce the IDAs is not an  
13 unduly harsh penalty on Zurich, because Zurich knew or  
14 should have known its filing requirements under  
15 California law, and enforcing the IDAs would encourage  
16 illegal activity. Furthermore, because Country Villa  
17 remains liable to Zurich under the policies, attached  
18 endorsements, and California law, refusing to enforce  
19 the IDAs is not unduly harsh. See Monarch, 993  
20 N.Y.S.2d at 291.

21       Third, the policy behind "the transgressed law"  
22 strongly counsels against enforcing the IDAs, as  
23 enforcing the IDAs "would defeat the statutory purpose"  
24 of Sections 11658 and 11735 by "allow[ing] an insurance  
25 company to bypass the governmental review process by  
26 simply waiting . . . after the policy has gone into  
27 effect to introduce additional or modified terms to its  
28 insurance program." Ceradyne, 2009 WL 1526071, at \*11.

1 As the Ceradyne court noted, “[i]t cannot be overlooked  
2 that workers’ compensation coverage is not optional for  
3 the employer.” Id.

4 Fourth, Zurich is the party at fault in this  
5 situation, as Zurich knew or should have know of its  
6 filing requirements under California law; it would not  
7 be equitable to allow the party who created the  
8 illegality to enforce the illegal contract. See id.

9 Finally, the IDAs should not be enforced under  
10 California’s “settled rule” that a contract in  
11 violation of a statute enacted for the protection of  
12 the public should not be enforced. Napa Valley Elec.  
13 Co., 28 Cal. App. at 478-79. The IDAs violate Sections  
14 11658 and 2268, which are laws and regulations “enacted  
15 for the protection of the public,” as California’s  
16 workers’ compensation insurance scheme protects the  
17 public workforce, as well as the insured employers who  
18 are required by law to purchase workers’ compensation  
19 insurance.<sup>28</sup> See id. (stating that, with regard to such  
20 a contract, “the court will refuse the plaintiff any  
21 relief and will leave the parties where it finds them,”  
22 “not to help the defendant . . .; not for the sake of  
23 either party, but for the sake of the law itself”).

24 ii. *Severability*

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26 <sup>28</sup> See Monarch, 993 N.Y.S.2d at 291 (“[T]he ‘review and  
27 preapproval safeguards [in California’s workers’ compensation  
28 insurance regulatory scheme] were created to protect both  
employers and employees.’”); see Ceradyne, 2009 WL 1526071, at  
\*11.

1 Zurich argues that certain portions of the IDA  
2 should be severed, rather than voiding the entire IDA.  
3 The Court agrees that this argument is, as Country  
4 Villa states, "nonsensical," Reply at 23:1-2, because  
5 the entire IDA, not merely certain portions of the IDA,  
6 is required to be filed with the WCIRB, and Country  
7 Villa challenges the IDAs in their entirety. See Cal.  
8 Ins. Code § 11658; Cal. Code Regs., tit. 10, § 2268.  
9 As such, the IDAs, along with their Specifications, are  
10 void as a matter of law and unenforceable in their  
11 entirety.

#### 12 V. CONCLUSION

13 Based on the foregoing, the Court **GRANTS** Country  
14 Villa's Motion for Partial Summary Judgment [75].

15 **IT IS HEREBY ORDERED** that Partial Judgment be  
16 entered in favor of Country Villa as to the Fifth Count  
17 of Country Villa's Counterclaim [20], and

18 **IT IS HEREBY DECLARED** that the 2004 and 2005  
19 Incurred Deductible Agreements, along with the 2004-  
20 2011 Specifications to the Incurred Deductible  
21 Agreements, all of which are attached as Exhibit B to  
22 Zurich's Complaint [1], were, in their entirety, void  
23 *ab initio* and are unenforceable.

24 **IT IS SO ORDERED.**

25 DATED: July 9, 2015

RONALD S.W. LEW

**HONORABLE RONALD S.W. LEW**  
Senior U.S. District Judge

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