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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GEMINI INSURANCE COMPANY, a
corporation,

Plaintiff,

v.

WESTERN MARINE INSURANCE
SERVICES CORPORATION, a California
corporation,

Defendant.

No. 2:10-cv-03172-KJM-CKD

ORDER

AND RELATED THIRD- AND
FOURTH-PARTY CLAIMS

This order resolves the motion for summary judgment, or in the alternative, for partial summary judgment (the Motion), brought by plaintiff Gemini Insurance Company (Gemini) against defendant Western Marine Insurance Services Corporation (Western Marine) and Scottsdale Indemnity Company (Scottsdale), the subrogee of Western Marine. *See generally* Mot., ECF No. 95-1. Western Marine and Scottsdale each opposed the Motion. Opp’ns, ECF Nos. 111, 112. Gemini replied to each separately. Replies, ECF Nos. 115, 117. On January 15, 2016, court held a hearing on the motion. Howard Wollitz appeared for Gemini, Stephen Fleischer-Ihn appeared for Western Marine, and Gary Kull appeared for Scottsdale.

1 As explained below, the court GRANTS Gemini's Motion with respect to notice
2 and DENIES the balance of Gemini's Motion.

3 I. PROCEDURAL HISTORY

4 On November 23, 2010, Gemini filed the original complaint in this action, alleging
5 breach of contract and common law negligence against Western Marine. In response to the
6 complaint, Western Marine filed an answer and a third-party complaint against third-party
7 defendants Alliant Insurance Services, Inc. (Alliant) and David Cranmer, Wesco's insurance
8 broker. ECF Nos. 9, 10. After the court granted its motion to intervene, ECF No. 53, Scottsdale
9 filed an intervenor complaint, as Western Marine's subrogee, against Gemini, Alliant, and MCS,
10 the third-party administrator that adjusted claims for policies issued by Western Marine on behalf
11 of Gemini under a Program Administrator Agreement (PAA). ECF No. 56. Western Marine then
12 moved to amend its answer, ECF No. 52, which motion the court denied, Order, ECF No. 65.

13 Subsequently, Gemini filed this motion. At hearing, the court directed the parties
14 to meet and confer on whether the record should be corrected, and whether or not the parties
15 should be given the opportunity to file supplemental briefing. ECF No. 123. The parties
16 stipulated to allow both, ECF No. 125, and Gemini then filed Exhibit 40 to replace Exhibit 13,
17 ECF No. 127. Western Marine and Scottsdale each filed a supplemental memorandum in
18 response to Exhibit 40. ECF Nos. 129, 130. Gemini replied to each brief separately. ECF
19 Nos. 134, 135.

20 II. FACTUAL BACKGROUND

21 The facts in this section are undisputed unless specified otherwise.

22 A. Program Administrator Agreement (PAA)

23 Gemini is an insurer not licensed by the state of California, of a type known as a
24 non-admitted or surplus lines insurance company. Eskue Dep. 21:1-5, 32:8-14, ECF No. 96;
25 ECF No. 97, Gemini Ex. 7 at 44.¹ As a surplus lines insurer Gemini cannot directly contact
26 prospective insureds to sell policies in California. Eskue Dep. 21:10-13. Western Marine is a
27

28 ¹ All references to the record, other than depositions, cite to ECF pagination.

1 licensed surplus lines broker, specializing in marine insurance; it solicited, underwrote, bound,
2 and issued commercial insurance policies for Gemini to insureds in California under the PAA as
3 an independent contractor.² Western Marine’s Resp. to Gemini’s Stmt. of Genuine Issues
4 (WMRS) Nos. 1, 4, ECF No. 111-2; Scottsdale’s Resp. to Gemini’s Stmt. of Undisputed Fact
5 (SUMF) Nos. 1, 4, ECF No. 112-1; PAA at 3, 6, ECF No. 96, Gemini Ex. 1. As provided by the
6 PAA, Western Marine underwrote and issued policies for Gemini, and had binding authority to
7 do so. Eskue Dep. 22:20–23:4. The PAA established Western Marine’s duties and liabilities
8 related to underwriting and issuance of Gemini’s policy.

9 The PAA, or the “Agreement,” provides that “Company is contracted as the
10 Manager of the insurance companies designated in Exhibit A,” which included Gemini, “and
11 therefore has express and implied authority to enter into this contract and perform such duties as
12 required by this contract.” PAA at 2. Berkley Underwriting Partners, LLC (Berkley) was
13 designated as the “Company” for the purpose of the PAA. *Id.* Berkley, as an agent of Gemini,
14 entered into the PAA with Western Marine, designated as the “Administrator” for the purpose of
15 the PAA, effective July 1, 2004. Order at 6–8.

16 Under “Appointment/Authority,” section 1.2 of the PAA provides:

17 Subject to the limitations contained in this Agreement,
18 Administrator shall perform all acts necessary to the proper
19 solicitation, placement, acceptance, and servicing of the policies
20 including:

- 21 a. to solicit, underwrite, quote, bind, rate, code, and store policies;
22 and
- 23 b. to collect, receive, and account for premiums on policies; and
- 24 c. to number, issue, countersign, and deliver policies executed by
25 authorized officers of [Berkley]; and

26 ² “Independent contractor” and “agent” are not mutually exclusive legal categories. *APSB*
27 *Bancorp v. Thornton Grant*, 26 Cal. App. 4th 926, 930 (1994). An independent contractor is also
28 an agent when it contracts to act on behalf of a principal and is subject to the principal’s control
except with respect to the agent’s physical conduct. *Id.* Here, Western Marine is performing
Gemini’s underwriting services and selling insurance policies to potential insureds in California
because Gemini as a surplus lines insurer cannot have direct contact with potential insureds in
California. Thus, for the purpose of underwriting, binding and issuing commercial insurance
policies, Western Marine is an agent for Gemini.

1 d. to make endorsements, changes, and modifications to policies as
2 authorized by Company; and

3 e. to effect cancellation and non-renewal of policies . . . [and]

4 . . .

5 g. to perform faithfully the duties set forth herein and to provide
6 any other related activities or services incidental or necessary to the
7 complete servicing of policies issued hereunder.

8 PAA at 2–3. With respect to the word “underwrite” used in 1.2.a., Sheila Eskue, vice president
9 and underwriting manager of Western Marine, defines underwriting as “assessing a loss,
10 determining the profitability of the risk, to mitigate loss and to be profitable for the company.”
11 Eskue Dep. 36:10–12.

12 Under “General Obligations of Administrator,” section 4.3 of the PAA provides
13 that Western Marine shall be responsible for

14 full compliance with all applicable laws, regulations, rules, and
15 requirements relating to the performance of its obligations
16 hereunder; and the general standards, rules, and regulations of the
17 insurance industry; and all written instructions provided to
18 Administrator from time to time by Company.

19 PAA at 5.

20 Section 10.13 under “General Provisions” further provides, in relevant part,
21 “Administrator shall comply with the requirements of all applicable federal, state and local laws,
22 rules and regulations of all insurance regulatory authorities” PAA at 17.

23 Under “INSURANCE AND INDEMNITY,” section 8.2 of the PAA provides, in
24 relevant part:

25 At all times hereafter, Administrator agrees to defend, indemnify,
26 and hold Company harmless from and against all claims, actions,
27 causes of action, liability, or loss which result from any real or
28 alleged negligent or willful acts, errors, or omissions of
Administrator, or the servants, employees, representatives,
producers, or brokers of Administrator in the performance or breach
of duties under this Agreement, including but not limited to
soliciting, quoting, underwriting, and/or binding policies prohibited
under Section 3.1. [Western Marine] further agrees that in the
event [Berkley] is in violation of any state code, statute, regulation,
or bulletin due to the negligent or willful acts, errors, or omissions
of [Western Marine], or the servants, employees, representatives or
producers of Administrator, then Administrator shall assume the

1 responsibility and liability for such act and shall indemnify and
2 hold Company harmless for such liability and loss. Loss shall
3 include but not be limited to, all damages, costs, expenses,
4 reasonable attorneys' fees and other legal fees, penalties, fines,
5 direct or consequential damages, assessments, verdicts (including
6 punitive damages to the extent permissible by law), and any other
7 expense or expenditure incurred by Company.

8 This [s]ection . . . shall survive termination of this Agreement.

9 In all third party liability claims asserted against Company, wherein
10 Administrator shall defend and indemnify Company, Administrator
11 shall notify Company within 24 hours of receipt of such claim.
12 Company shall have the right to retain counsel of its own selection,
13 at Administrator expense, to provide a defense to Company.
14 Company's written consent must be obtained prior to any
15 settlement, which consent will not be unreasonably withheld. If
16 Administrator, within a reasonable time after receiving notice of a
17 claim from Company, fails to defend, Company shall have the right,
18 but not the obligation, to undertake the defense, compromise, or
19 settlement of such claim on behalf of, for the account of and at the
20 risk of Administrator.

21 PAA at 11.

22 As noted, Section 3.1 of the PAA, provides, in relevant part:

23 With respect to the policies which Administrator is now or may in
24 the future be authorized to solicit, transact, quote, underwrite, rate,
25 or bind under this Agreement, Administrator will not solicit,
26 transact, quote, underwrite, rate, or bind policies on the following:

27 a. risks which are unacceptable in accordance with this Agreement,
28 or the underwriting guidelines, procedures, instructions, or
memoranda provided to Administrator by Company from time to
time, or in excess of the authority limits, or in violation of any other
limitations set out in Exhibit A; or

b. risks which are not in compliance with the applicable forms,
rules, rates, or filings of Company according to their exact terms
and to the laws and regulations in effect in the Territory.

29 PAA at 4. "Territory" is defined in Exhibit A to include California. Gemini Ex. 1 at 19.

30 Section 10.5 of the PAA identifies the "Applicable Law," and states the PAA
31 "shall be [interpreted], governed and enforced by and construed in accordance with the laws of
32 the State of Illinois, without regard to its rules regarding conflict of law." PAA at 16.

1 B. Gemini Policies

2 Between 2004 and 2007, Western Marine, issued three Gemini policies to Wesco
3 Sales Corporation (Wesco) for five recreational boat marinas in southern California (Marinas).
4 Gemini Ex. 7 at 45; ECF No. 98, Gemini Ex. 10 at 34; ECF No. 99, Gemini Ex. 13 at 3. The
5 policies were issued through Wesco’s retail insurance broker Alliant, specifically David Cranmer,
6 who had experience obtaining insurance for marine operators, and writing policies since 1985.
7 Cranmer Dep. 15:12–18, ECF No. 96, Gemini Ex. 5; Gemini’s Resp. to Scottsdale’s Counter-
8 Stmt. of Undisputed Facts (SCSF) No. 5.

9 1. 2004–2005 Policy

10 Wesco’s application for a 2004–2005 policy (2004 Application) requested blanket
11 coverage for all five Marinas. ECF No. 96, Gemini Ex. 4 at 138, 140. Western Marine contends
12 that “blanket coverage” is not defined in the policy. WMRS No. 13. Under Illinois law,
13 undefined contractual terms are typically afforded their plain and ordinary meanings “[u]nless the
14 agreement unequivocally specifies” nuanced connotations, *Frederick v. Prof’l Truck Driver*
15 *Training Sch., Inc.*, 328 Ill. App. 3d 472 (2002), and words of art or technical terms are assigned
16 their industrial meanings within the commercial context of the agreement, *Archer–Daniels*
17 *Midland Co. v. Ill. Commerce Comm’n*, 184 Ill. 2d 391 (1998) (noting that Illinois follows the
18 approach described in Restatement (Second) of Contracts § 202(3)(b)). *See also Prestwick*
19 *Capital Management, Ltd. v. Peregrine Financial Group, Inc.*, 727 F.3d 646, 656 (7th Cir. 2013).
20 According to Cranmer, blanket insurance or blanket coverage adds the stated values or
21 replacement values for all locations covered under the policy and allows it to be applied to one
22 location. Cranmer Dep. 20:4–14. Together, the blanket coverage and replacement values
23 provisions of the 2004–2005 Policy issued based on the Application create coverage for the repair
24 or replacement of the piers, wharves, docks, and floats at any of the five marina locations. SCSF
25 No. 6.

26 ////

27 ////

28 ////

1 One section of the 2004 Application contained the following instruction:

2 ENTER ALL CLAIMS OR LOSSES (REGARDLESS OF FAULT
3 AND WHETHER OR NOT INSURED) OR OCCURRENCES
4 THAT MAY GIVE RISE TO CLAIMS FOR THE PRIOR 5
YEARS

5 Gemini Ex. 4 at 137. Next to that instruction was a box labeled “CHK HERE IF NONE.” *Id.*
6 Both portions of the Application were left blank. *See id.* Towards the end of the Application,
7 Wesco was asked: “DO YOU FEEL THAT THE OPERATIONS, HOUSEKEEPING OR
8 OTHER PHYSICAL CONDITIONS PRESENT AN UNUSUAL EXPOSURE? IF YES,
9 EXPLAIN.” *Id.* at 155. In Cranmer’s application on behalf of Wesco, he checked the box for
10 “YES” but did not provide an explanation.

11 Western Marine ordinarily followed up if information was missing from an
12 Application. Eskue Dep. 74:9–24; Petersen Dep. 68:17–21, ECF No. 97, Gemini Ex. 6.
13 However, it issued the 2004–2005 Policy without following up. WMRS No. 11; SUMF No. 11;
14 Gemini Ex. 7 at 45.

15 The 2004–2005 Policy included blanket coverage for all five Marinas with the
16 term “BLKT” printed on the declarations page of the policy. Eskue Dep. 84:3–7, 86:14–20,
17 87:22–23; Cranmer Dep. 22:2–10, ECF No. 96, Gemini Ex. 5; Gemini Ex. 7 at 46; Cangemi Dep.
18 83:7–12, ECF No. 98, Gemini Ex. 11. The notation on the declarations page was the only
19 indication to clarify whether the policy was issued on a blanket limit basis. SCSF No. 4; *see also*
20 Eskue Dep. 87:2–5.

21 2. 2005–2006 Policy

22 In 2005, Western Marine ceased offering blanket coverage for multiple locations
23 in all of its policies. Dawson Dep. 133:5–17, ECF No. 97, Gemini Ex. 8. Also in 2005, Western
24 Marine hired Research Specialists Inc. (RSI) to inspect the docks at 3821 Victoria Avenue, one of
25 the five Marinas at issue in this case. ECF No. 101, Gemini Ex. 34 at 2. RSI’s inspection report
26 states: “[t]he docks are in good condition with no trip/fall hazards noted,” and “[t]he overall
27 condition of the . . . docks . . . is good.” *Id.* “Good” condition meant the docks were acceptable
28 for underwriting. Eskue Dep. at 128:11–20, 129:8–11, 130:15–21, 131:3–16. The report by RSI

1 contrasts with a 2002 report by Index Research Services Inc. (Index Research) sent to Western
2 Marine on the 3821 Victoria Avenue dock and a neighboring dock at 3615 Victoria Avenue
3 (together the “Oxnard Marinas”), which states,

4 [T]he docks areas [were] in poor condition. Some of the boards
5 were very worn and . . . [there were] raised wood and also the
6 plywood was warped in several patched area the boards were up
and could present a trip-and-fall hazard

7 Gemini Ex. 33 at 58.

8 Wesco’s application for the 2005–2006 Policy (2005 Application) renewed its
9 request for blanket coverage. Eskue Dep. at 94:15–23; Cranmer Dep. 62:12–17, 67:9–68:23;
10 ECF No. 98, Gemini Ex. 9 at 7. The 2005 Application also evidences the same omissions as did
11 the 2004 Application with respect to claims or losses for the past five years and any unusual
12 exposures. Gemini Ex. 9 at 3, 4, 7, 20, 29. Western Marine never made further inquiries with
13 respect to the omitted information before renewing the policy for 2005 to 2006. WMRS Nos.
14 15-16; SUMF No. 15–16; *see also* Cranmer Dep. 55:10–13. The 2005–2006 Policy did not
15 include blanket coverage for the Marinas. WMRS No. 16; SUMF No. 16. Western Marine did
16 not provide any specific notice to Wesco or its broker regarding the lack of blanket coverage.
17 Cranmer Dep. 68:11–23.

18 3. 2006–2007 Policy

19 As did the 2004 and 2005 Applications, Wesco’s application to renew the 2005–
20 2006 Policy (2006 Application) for the 2006 to 2007 term contained the same blanket-coverage
21 request as before, as well as the same omissions. ECF No. 98, Gemini Ex. 12 at 183, 184, 187,
22 197–200. As before, Western Marine did not make any inquiries into the incomplete answers.
23 Cranmer Dep. 82:24–83:8. Western Marine renewed the policy for 2006–2007 with no blanket
24 coverage. WMRS No. 23; SUMF No. 23. Western Marine did not inform Wesco or its broker
25 that the 2006–2007 Policy, like the 2005–2006 Policy, did not contain blanket coverage. *Id.*

26 The 2006–2007 Policy did not specify individualized coverage limits for each of
27 the five Marinas; thus, Western Marine used a statement of values, which stated the values for the
28 individual properties, in its underwriting file as the applicable coverage limits, because the policy

1 itself did not provide the limit for claims. Petersen Dep. 106:4–109:22; Dawson Dep. 39:4–7;
2 Cangemi Dep.117:7–18; *see also* Gemini Ex. 12 at 153.

3 The 2006–2007 Policy excluded coverage of losses or damage from wet or dry rot
4 unless it resulted from fire or lightning, or another “specified cause of loss,” with windstorm
5 qualifying as a “specified cause.” Gemini Ex. 40-2,³ ECF No. 127-2 at 38. The 2006–2007
6 Policy also excluded coverage for losses caused by “neglect of the insured to use all reasonable
7 means to save and preserve property from further damage at and after the time of loss,” wear and
8 tear, and “rust, corrosion, decay, deterioration, weathering, hidden or latent defect, or any quality
9 in property that causes it to damage or destroy itself” *Id.* at 38–39. The relevant exclusions
10 are for:

11 9. “Fungi,” Wet Rot, Dry Rot, and Bacteria – Presence, growth,
12 proliferation, spread, or any activity of ‘fungi,’ wet or dry rot, or
13 bacteria. However if ‘fungi,’ wet or dry rot, or bacteria results in a
14 ‘specified cause of loss’ we will pay for the loss or damage caused
15 by that “specified cause of loss.

16 . . .

17 12. Neglect – Neglect of the insured to use all reasonable means to
18 save and preserve property from further damage at and after the
19 time of loss.

20 15. Other Types of Losses:

21 a. Wear and Tear;

22 b. Rust, corrosion, decay, deterioration, weathering, hidden or latent
23 defect, or any quality in property that causes it to damage or destroy
24 itself

25 Gemini Ex. 40-2 at 38–39.

26 C. The Claim

27 Wesco, through David Cranmer of Alliant, submitted a Property Loss Notice to
28 Gemini on December 7, 2006 (the First Notice). SCSF No. 12. This First Notice stated a date of
loss on December 14, 2004, and sought coverage under the 2004–2005 Policy for “wind/storm
damage caused to docks” at the Oxnard Marinas. *Id.* Gemini directed the claim to Marine

³ Exhibit 40, ECF No. 127, was divided into two parts. Exhibit 40-1 is part one of the exhibit and Exhibit 40-2 is part two.

1 Claims Services, Inc. (MCS), which acted as Gemini's agent and adjusted the claim. SCSF No.
2 13. MCS assigned the claim to Langhammer & Associates (L&A) for further investigation. *Id.*
3 In a letter dated December 13, 2006 from MCS to L&A, MCS noted: (1) discrepancies in the date
4 of loss reported by Wesco, (2) the Notice was late and temporary repairs had been made, and (3)
5 Wesco had advised Alliant of the loss immediately, but Alliant had not reported the loss at that
6 time. *Id.*

7 On December 18, 2006, Theodore Brown of L&A interviewed Frank Butler,
8 Wesco's owner and president. SCSF No. 14. During the interview, Butler said the docks in
9 question were initially damaged either in January 2003 or 2004 by a major storm, which broke a
10 lot of the main supports. *Id.* Butler also told Cranmer that new docks would have to be put in,
11 but did not immediately follow up then. *Id.* The docks were not immediately replaced; instead,
12 temporary repairs were made following the loss, which exacerbated the damage to the docks. *Id.*

13 On December 20, 2006, Alliant submitted a new Property Loss Notice (the Second
14 Notice) for the Marinas, this time identifying December 10, 2006 as the date of loss. SCSF
15 No. 15.

16 On January 5, 2007, Brown made his first report to MCS on Wesco's claim. SCSF
17 No. 16. Brown noted the docks had suffered "notable wind damage" at an undetermined date
18 during a prior policy period, and the temporary repairs of placing "plywood over the original
19 decking may have result [sic] in conditions resulting in additional rotting of the docks." *Id.*
20 Contrary to Wesco's claims regarding the date of loss, MCS concluded the initial date of loss was
21 January 2001 when the Marinas were insured by another company. SCSF No. 18.

22 As a result of the discrepancies and issues raised by MCS, Joseph Pojman, then
23 Senior Vice President of Claims for Berkley, requested the file on Wesco's claim be sent to
24 Howard Wollitz, outside counsel for Gemini and its counsel in this case, for coverage review.
25 Pojman Dep. at 84:10-12, 155:10-13. Pojman further requested that Western Marine ask Wollitz
26 to send a reservation-of-rights letter to Wesco, but the letter was never issued. Pojman Dep.
27 157:18-161:2.

28

1 MCS, as Gemini instructed, did send Wesco's file to Wollitz on January 24, 2007
2 for a coverage review. SCSF No. 20. MCS identified the following issues for review: (1) late
3 notice of multiple dates of loss, (2) wear and tear as opposed to wind/storm damage, (3) the
4 failure to properly mitigate damage, (4) Wesco's failure to list damage to the docks on its
5 applications for insurance coverage, and (5) an original loss, which occurred prior to the policy
6 period. Scottsdale Ex. 11, ECF No. 112-1 at 140-43.

7 In February 2007, Wollitz provided his firm's analysis and recommendations
8 regarding Wesco's claim, and concluded the insured had misrepresented its loss history in its
9 insurance applications since 2001. SCSF No. 21. He suggested Gemini ask Western Marine
10 about what appeared to be false insurance applications and decide whether the policies should be
11 rescinded. Scottsdale Ex. 12, ECF No. 112-1 at 147. Wollitz also suggested Gemini should
12 retain an expert to determine the amount of damage the docks would have suffered from the
13 storms during the policy period had they not suffered previous losses. *Id.* at 145. In addition,
14 Wollitz suggested Gemini should

15 [D]isclaim any obligation to pay the cost to repair losses incurred
16 before the policy or damage caused by wet or dry rot, neglect,
17 consequential loss, wear and tear, decay, deterioration, weathering
18 hidden or latent defect of any quality in property that causes it to
damage or destroy itself, all of which are excluded causes of loss
under the appropriate policy.

19 *Id.* Following Wollitz's sending of his letter, in September 2007, Gemini agreed to pay Wesco's
20 claim up to the individual limits of the liability, although at the time, Wesco demanded blanket
21 coverage. SCSF No. 23. Gemini did not raise any of the potential coverage defenses identified
22 by MCS or Wollitz, and made no reservation of rights. *Id.* On March 5, 2008, Dennis Keithley
23 with MCS, who adjusted Wesco's claim, sent an email to Wollitz asking whether to initiate
24 litigation to reform the policy at issue. SCSF No. 24; SUMF No. 27.

25 In February 2009, Wesco filed suit against Gemini in the Underlying Action.
26 Wesco alleged Gemini had breached the insurance contract and its covenant of good faith and fair
27 dealing by paying Wesco's claim based on the limits of coverage per insured location rather than
28 blanket coverage. WMRS No. 31; SUMF No. 31. Western Marine's insurer, Scottsdale,

1 defended Gemini at the beginning of the Underlying Action. WMRS No. 34; SUMF No. 34. But
2 on August 2, 2010, Scottsdale withdrew its defense of Gemini. WMRS No. 35; SUMF No. 35.
3 Western Marine did not assume Gemini’s defense after Scottsdale’s withdrawal. WMRS No. 36;
4 SUMF No. 36.

5 In September 2010, Wesco accepted \$1.9 million in settlement of the Underlying
6 Action, and filed a notice to dismiss the case on August 15, 2012. WMRS No. 39; SUMF No. 39;
7 *see also Wesco Sales Corporation v. Gemini Ins. Co.*, No. 2009-336822 (Ventura Cty. Cal. Super.
8 Ct.). Gemini payed \$950,000, and Scottsdale payed \$950,000 on behalf of Western Marine. *Id.*

9 III. LEGAL STANDARD

10 Summary judgment is appropriate where the court is satisfied “that there is no
11 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
12 Fed. R. Civ. P. 56(a). The “threshold inquiry” is whether “there are any genuine factual issues
13 that properly can be resolved only by a finder of fact because they may reasonably be resolved in
14 favor of either party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). When the
15 court looks at the evidence presented by the parties, “[t]he evidence of the non-movant is to be
16 believed, and all justifiable inferences are to be drawn in . . . [the] [non-movant’s] favor.” *Id.*
17 at 255.

18 The moving party bears the initial burden of demonstrating to the court “that there
19 is an absence of evidence to support the non-moving party’s case.” *Celotex Corp. v. Catrett*,
20 477 U.S. 317, 325 (1986). Once the moving party satisfies its initial burden, the burden then
21 shifts to the non-moving party, who “must establish that there is a genuine issue of material fact
22” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986). A fact is
23 “material” when it might affect the outcome of the suit under the applicable substantive law
24 governing the claim. *Anderson*, 477 U.S. at 248. A factual dispute is “genuine” where the
25 evidence is such that “a reasonable jury could return a verdict for the non-moving party.” *Id.* In
26 other words, the non-moving party must “make a showing sufficient to establish the existence of
27 [every] element essential to that party’s case, and on which that party will bear the burden of
28 proof at trial.” *Celotex*, 477 U.S. at 322. “Where the record taken as a whole could not lead a

1 rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.”
2 *Matsushita*, 475 U.S. at 587 (internal quotations omitted). Thus, for instance, competent
3 testimony by a single declarant may defeat summary judgment though opposed by many other
4 declarants. *United States v. 1 Parcel of Real Prop., Lot 4, Block 5 of Eaton Acres*, 904 F.2d 487,
5 491–92 (9th Cir. 1990).

6 In carrying their burdens, both parties must “cit[e] to particular parts of materials
7 in the record . . . ; or show [] that the materials cited do not establish the absence or presence of a
8 genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.”
9 Fed. R. Civ. P. 56(c)(1). “A genuine issue of material fact does not spring into being simply
10 because a litigant claims that one exists or promises to produce admissible evidence at trial.”
11 *Del Carmen Guadalupe v. Agosto*, 299 F.3d 15, 23 (1st Cir. 2002); see *Galen v. County of*
12 *Los Angeles*, 477 F.3d 652, 658 (9th Cir. 2007).

13 The court has the discretion in appropriate circumstances to consider materials the
14 parties have not properly brought to its attention, but the court is not required to examine the
15 entire file for evidence establishing a genuine issue of material fact. See *S. Cal. Gas Co. v. City*
16 *of Santa Ana*, 336 F.3d 885, 889 (9th Cir. 2003); *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d
17 1026, 1031 (9th Cir. 2001).

18 IV. DISCUSSION

19 A. Choice-of-Law

20 The court must first determine which state’s law applies to Gemini’s claims. As
21 noted, the PAA includes a choice-of-law provision identifying Illinois law. PAA at 16. This
22 court previously has reviewed the choice-of-law rules that apply to its determination of whether
23 this provision is valid and applicable here:

24 When a federal court sits in diversity, it must look to the forum
25 state’s [California] choice of law rules to determine the controlling
26 substantive law.” *Patton v. Cox*, 276 F.3d 493, 495 (9th Cir. 2002).
27 When parties to a contract bargain for an explicit choice of law
28 provision, courts applying California’s choice-of-law rules are
guided by the California Supreme Court’s decision in *Nedlloyd*

1 *Lines B.V. v. Superior Court*, 3 Cal. 4th 459 [] (1992).” *Nuvo*
2 *Research Inc. v. McGrath*, C 11-4006, 2012 WL 1965870, at *3
3 (N.D. Cal. 2012).

4 Order at 4.

5 Under California law, the scope of a contract’s choice-of-law clause is determined
6 by the body of law identified in the agreement, unless the agreement specifies a different scope.

7 *Washington Mutual Bank, FA v. Superior Court*, 24 Cal. 4th 906, 916 n.3 (2001); *see also*

8 *Batchelder v. Kawamoto*, 147 F.3d 915, 918 n.2 (9th Cir. 1998). California courts broadly

9 construe a contractual choice-of-law provision, particularly when two sophisticated commercial

10 parties agree to such a clause. As a general rule, the parties’ choice will apply to all claims

11 arising from or related to the contract, including tortious breaches of duties emanating from the

12 agreement or the legal relationships it creates. *Nedlloyd Lines B.V.*, 3 Cal. 4th at 464.

13 Here, the choice-of-law clause in the PAA looks to Illinois as the governing law

14 for the contract’s interpretation: “[t]his [PAA] shall be [interpreted], governed and enforced by

15 and construed in accordance with the laws of the State of Illinois, without regard to its rules

16 regarding conflict of laws.” PAA at 16. Thus, as the breach of contract claim is related to the

17 contract, it is governed by Illinois law. As for the negligence claim, the complaint alleges

18 Western Marine negligently performed its duties under the PAA. Compl. ¶¶ 25–29. Therefore,

19 the negligence claim, though a tort claim, is based on alleged breaches of duties arising from the

20 PAA and the legal relationships created by the PAA, and the choice-of-law provision governs the

21 negligence claim as well. *See Cannon v. Wells Fargo Bank N.A.*, 917 F. Supp. 2d 1025, 1051–52

22 (N.D. Cal. 2013) (plaintiffs’ tort claims were subject to the choice-of-law provision).

23 The court first considers the contract claim.

24 B. Breach of Contract Claim

25 Under Illinois law, a breach of contract is shown by the following elements: (1) a
26 valid and enforceable contract exists; (2) plaintiff’s performance; (3) defendant’s breach of the

27 contract; and (4) plaintiff’s injury resulting from the breach. *Burrell v. City of Mattoon*, 378 F.3d

28 642, 651 (7th Cir. 2004). Here, the parties dispute only the third element. Gemini argues

 Western Marine breached the PAA when it failed to (1) provide specific notice to Wesco Sales or

1 its insurance broker that the renewal policies lacked blanket coverage, (2) provide a defense to
2 Gemini after Scottsdale ceased its defense, and (3) reimburse Gemini for the settlement amount it
3 paid out to Wesco Sales and defense costs Gemini paid after Scottsdale withdrew. *See generally*
4 *Mot.*

5 In response Western Marine contends it did not breach the contract because (1) it
6 provided sufficient notice, (2) Gemini was not listed as an indemnified party in the PAA, and
7 (3) Gemini was negligent. *See generally* Western Marine Opp'n. Scottsdale similarly contends:
8 (1) Gemini was not an indemnified party under the PAA; (2) PAA only provided indemnification
9 for Western Marine's negligence, and Gemini has not demonstrated Western Marine breached
10 any duty of care arising from the PAA; and (3) Gemini improperly paid the claim. *See generally*
11 *Scottsdale Opp'n.*

12 The parties' arguments can be broadly divided into the following categories:
13 (1) whether Gemini was an indemnified party under the PAA; (2) whether Western Marine
14 needed to notify Wesco or its insurance broker regarding the lack of blanket coverage in the later
15 policies; and (3) whether Gemini was negligent.

16 1. Indemnified Party

17 Indemnity agreements are strictly construed, and any ambiguity in the agreement
18 is to be construed against the indemnitee, because "an agreement to indemnify a party for its own
19 negligence is so unusual and extraordinary, the intent to indemnify to that extent must be beyond
20 doubt by express stipulation." *Blackshare v. Banfield*, 367 Ill. App. 3d 1077, 1079–80 (2006)
21 (citing *Westinghouse Electric Elevator Co. v. LaSalle Monroe Building Corp.*, 395 Ill. 429, 434–
22 35 (1946)). Western Marine contends because the indemnification provision of the PAA does not
23 list Gemini as a party, Gemini is not entitled to indemnification. The court finds Western
24 Marine's argument unpersuasive, as explained below.

25 Illinois courts have held that where an agent discloses the name of his principal or
26 where the party dealing with the agent knows that the agent is acting as an agent, the agent is not
27 personally liable on a contract unless he so agrees. *Water Tower Realty Co. v. Fordham 25 E.*
28 *Superior, L.L.C.*, 404 Ill. App. 3d. 658, 667 (2010); *Dunlop v. McAtee*, 31 Ill. App. 3d 56, 59–60

1 (1975). The PAA states “Company is contracted as the Manager of the insurance companies
2 designated in Exhibit A,” which listed Gemini, “and therefore Company has express and implied
3 authority to enter into this contract and perform such duties as required by this contract.” PAA at
4 2. Berkley was designated as the “Company” for the purpose of the PAA. *Id.* Gemini does not
5 dispute this reading of this provision, and the court has previously held the terms of the PAA
6 establish Berkley as plaintiff’s agent. Order at 7. Simply because the PAA does not directly
7 name Gemini as an indemnified party does not necessarily preclude it as one. It would be
8 inconsistent for Gemini, the principal, to be legally bound by all other parts of the agreement and
9 not the indemnification provision.

10 This conclusion does not deviate from Illinois law, which provides that “indemnity
11 agreements must be set forth in clear and explicit language, so that the indemnitor’s obligations
12 are manifest,” *Taracorp, Inc. v. Industries, Inc.*, 73 F.3d 738, 743–44 (7th Cir. 1996). First, the
13 PAA provides that Berkley entered into the agreement as an agent of Gemini. Second, as stated
14 in the court’s previous order, Gemini was the actual provider of the insurance policies in dispute,
15 and the transactions between Berkley and Western Marine directly relate to Gemini, a fact
16 Western Marine was aware of through its issuing numerous policies for Gemini. Order at 8.
17 Western Marine was thus properly put on notice and the record shows it was aware of its
18 obligations as an indemnitor.

19 Accordingly, the court finds Gemini is a party to the indemnification provision.

20 2. Notice

21 Section 4.3 of the PAA provides that Western Marine is required to comply with
22 all applicable laws, regulations, rules, and requirements in the performance of its obligations
23 under the agreement. PAA at 5. Its obligations include underwriting and issuing policies, *id.* at
24 2–3, and neither party disputes that Western Marine was required to comply with California law
25 when it underwrote and issued policies to Wesco. The parties, however, dispute whether Western
26 Marine was required to give Wesco or its broker notice when, after the 2004–2005 Policy
27 expired, the 2005–2006 and 2006–2007 Policies no longer included blanket coverage.
28

1 Under California law, insurance companies are generally bound by the greater
2 coverage provided by an earlier policy when the insured is not notified of a specific reduction in
3 coverage under a renewal policy. *Metropolitan Business Management, Inc. v. Allstate Ins. Co.*,
4 448 Fed. Appx. 677, 678 (9th Cir. 2011) (citing *Allstate Ins. Co. v. Fibus*, 855 F.2d 660, 663 (9th
5 Cir. 1988)). The California Supreme Court has held that in cases of standard insurance contracts,
6 made between parties of unequal bargaining strength, exceptions and limitations on coverage
7 limitations must be called to the insured’s attention clearly and plainly. *Steven v. Fidelity &*
8 *Casualty Co.*, 58 Cal. 2d 862, 879 (1962). California courts “have long been disinclined to
9 effectuate clauses of limitation of liability which are unclear, unexpected, inconspicuous or
10 unconscionable.” *Id.* As the state Supreme Court explained,

11 It must be presumed, ordinarily, that persons are familiar with the
12 terms of written contracts to which they are parties, and in the
13 absence of fraud they are justly bound by the provisions therein, but
14 the rule should not be strictly applied to insurance policies. It is a
15 matter almost of common knowledge that a very small percentage
16 of policy holders are actually cognizant of the provisions of their
policies and many of them are ignorant of the names of the
companies issuing the said policies. The policies are prepared by
the experts of the companies, they are highly technical in their
phrase[o]logy, they are complicated and voluminous

17 *Raulet v. Northwestern etc. Ins. Co.*, 157 Cal. 213, 298 (1910). *Raulet*, however, addresses the
18 case of an individual lay consumer and not a business entity or an expert well versed in insurance
19 policies.

20 Here, Wesco acquired all three policies through Alliant, an insurance broker. This
21 is not a case where the insurance policies or contracts were made between parties of unequal
22 bargaining strength, where one party is unfamiliar with the provisions of an insurance policy or
23 its technical vocabulary. Cranmer, Wesco’s insurance broker from Alliant, had experience
24 obtaining insurance for marine operators, and he had been writing marine insurance since 1985.
25 Cranmer Dep. 15:12–18. Cranmer cannot reasonably be compared to a lay policy holder without
26 knowledge of how an insurance policy works. The cases Gemini cites to reach the opposite
27 conclusion are unhelpful as they pertain to interactions directly between an insurer and its
28 insured, a relationship of unequal bargaining strength. *See, e.g., Davis v. United Services Auto.*

1 *Ass'n*, 223 Cal. App. 3d 1322, 1325 (1990) (homeowners dealing directly with the insurer);
2 *Fields v. Blue Shield of Cal.*, 163 Cal. App. 3d 570, 575–78 (1985) (physician-psychiatrist suing
3 insurer directly for insurer’s refusal to pay for medical treatment); *Fibus*, 855 F.2d at 661–63
4 (automobile insurer brought declaratory judgment against individual insured to determine
5 coverage); *Sorensen v. Farmers Ins. Exch.*, 56 Cal. App. 3d 328, 330–34 (1976) (individual
6 insured brought suit against automobile liability insurer for coverage benefit). A case cited by
7 Western Marine, *Rios v. Scottsdale Ins. Co.*, 119 Cal. App. 4th 1020 (2004), is similarly
8 unpersuasive. At issue there was whether the insured’s agent’s mistaken representation with
9 respect to the policy could have been imputed to the insurer or the surplus lines broker. *Id.* at
10 1026. Here, the issue is not whether Cranmer failed to request blanket coverage for Wesco. The
11 application requested blanket coverage; however, Western Marine did not expressly advise him
12 that the renewed policies were without blanket coverage. *See supra*, p. 8.

13 A more comparable case is *Business to Business Markets, Inc. v. Zurich*
14 *Specialties (B2B)*, 135 Cal. App. 4th 165, 172 (2005). There, the California Court of Appeal
15 examined whether a surplus lines insurance broker, such as Western Marine here, can be liable to
16 an intended beneficiary of a contract. *Id.* at 167. The third party contacted a retail insurance
17 broker and informed him of the insured’s insurance needs, namely errors and omissions insurance
18 for the insured, an Indian company, to compensate the third party if the insured failed to deliver
19 the promised software. *Id.* The retail insurance broker then contacted the surplus lines insurance
20 broker to place the insurance policy. *Id.* The surplus lines insurance broker placed the policy
21 with the insurer. *Id.* When the insured failed to deliver the software, the insurer refused to pay
22 based on the policy’s exclusion for work done in India. *Id.* The California Court of Appeal
23 found that a surplus lines insurance broker is a “professional entity rendering specialized
24 services.” *Id.* at 171. “As such, clients and others rely on the broker to get the right type of
25 policy.” *Id.* at 172. A surplus lines insurance broker is thus well positioned to prevent injuries,
26 even those suffered by a third party, from an insured’s inadequate insurance coverage. *Id.*
27 Western Marine is a licensed surplus lines broker, specializing in marine insurance; it solicited,
28 underwrote, bound, and issued commercial insurance policies for Gemini to insureds in California

1 under the PAA as an independent contractor. As did the surplus lines insurance broker in *B2B*,
2 Western Marine provides a “specialized, niche-market service” and was positioned to prevent
3 injuries such as those suffered by Gemini when Wesco was provided with inadequate insurance
4 coverage. Wesco, through Cranmer, requested blanket coverage in its insurance applications.
5 Western Marine should have provided notice to Wesco when it declined to provide blanket
6 coverage subsequent to the 2004-2005 Policy. Simply providing an insurance policy omitting a
7 blanket coverage provision does not provide notice.

8 Western Marine also argues California Insurance Code section 678.1(c) codifies
9 the above common law insurer’s duty to give notice of an elimination of coverage and says the
10 statute provides an exception for surplus lines insurers such as Gemini. Opp’n at 10. Section
11 678.1(c) states:

12 An insurer, at least 60 days, but not more than 120 days, in advance
13 of the end of the policy period, shall give notice of nonrenewal, and
14 the reasons for the nonrenewal, if the insurer intends not to renew
15 the policy, or to condition renewal upon reduction of limits,
elimination of coverages, increase in deductibles, or increase of
more than 25 percent in the rate upon which the premium is based.

16 Cal. Ins. Code § 678.1(c). The statutory provision does not directly codify the common law duty
17 for insurers to give notice of elimination of coverage. The language provides a narrower set of
18 situations in which an insurer is required to give notice. However, regardless of whether the
19 statute codifies the duty at issue, the section is inapplicable here as surplus lines insurance is
20 exempt from the notice requirement and nothing in the record shows either party contemplated
21 nonrenewal, or issued the renewal policies based on any conditions. *Id.* §§ 675.5(d)(7), 678.1(a).

22 Accordingly, Western Marine had a duty to provide notice to Wesco that the
23 renewed policies, contrary to the assumptions made in submission of the renewal applications, did
24 not contain blanket coverage. Gemini’s motion for summary judgment based on lack of notice is
25 GRANTED in this respect. The court finds it unnecessary to consider the kind of notice required,
26 because the record reflects Western Marine provided no notice.

1 3. Negligence of the Indemnitee

2 For an indemnity provision to extend to indemnification of the indemnitee’s own
3 negligence, the extended coverage must be clear and explicit. *Blackshare*, 367 Ill. App. 3d at
4 1079. “If that language is not present, indemnification will be limited to the liability arising out
5 of the indemnitor’s negligence only.” *Id.* Here, there is no language in the PAA requiring
6 Western Marine to indemnify Gemini for its own negligence. The issue for this court to resolve
7 is thus whether the Underlying Action arose out of Gemini’s or Western Marine’s negligence.
8 Specifically, Gemini and Western Marine dispute which of them was negligent in not adhering to
9 the relevant California insurance laws during the events leading up to the Underlying Action and
10 the Underlying Action itself. The court analyzes this dispute by first discussing the
11 misrepresentations in the applications and rescission before moving on to whether Gemini was
12 negligent.

13 a) Misrepresentation in the Applications and Rescission

14 First, Gemini argues Western Marine should have made inquiries when Wesco
15 returned the applications incomplete. In response, Western Marine contends it justifiably relied
16 on the representations of Cranmer, as Wesco’s insurance broker with Alliant. Western Marine
17 further argues information acquired when MCS adjusted the claim provided sufficient evidence
18 for rescission, but Gemini chose not to rescind. Lastly, Western Marine argues Gemini failed to
19 properly investigate and rely on its defenses in the Underlying Action. The court first addresses
20 the applications and whether Gemini should have rescinded.

21 Courts have applied California Insurance Code sections 331 and 359 to permit
22 rescission of an insurance policy based on an insured’s negligent or inadvertent failure to disclose
23 a material fact in the application for insurance. *Mitchell v. United Nat. Ins. Co.*, 127 Cal. App.
24 4th 457, 469 (2005) (collecting cases). The materiality of a misrepresentation is determined by its
25 probable and reasonable effect upon the insurer’s or its agent’s underwriting decision. Cal. Ins.
26 Code § 334 (“Materiality is to be determined not by the event, but solely by the probable and
27 reasonable influence of the facts upon the party to whom the communication is due, in forming
28 his estimate of the disadvantages of the proposed contract, or in making his inquiries.”); *Douglas*

1 v. *Fidelity Nat'l Ins. Co.*, 229 Cal. App. 4th 392 (2014). Specifically, the test for materiality is
2 whether the information would have caused the underwriter to reject the application, charge a
3 higher premium, or amend the policy terms, had the underwriter known the true facts. *Mitchell*,
4 127 Cal. App. 4th at 469. This is a subjective test, and whether the information would have
5 affected the underwriter depends on the underwriter involved. *See id.* Courts are divided as to
6 whether the issue of a misrepresentation's materiality in an insurance application is a question of
7 fact or law. Certain courts have found the materiality issue to be one of law merely because an
8 insurer "has demanded answers to specific questions in an application for insurance." *Imperial*
9 *Casualty & Indemnity Co. v. Sogomonian*, 198 Cal. App. 3d 169, 179 (1988). In *Mitchell*,
10 however, the court stated that "[i]t seems unreasonable to conclude that an incorrect answer to
11 any question on an insurance application automatically would constitute a material
12 misrepresentation." *Id.* at 475. Different factual situations may determine whether a
13 misrepresentation is material. The court finds this line of reasoning persuasive given the
14 subjective nature of the test, and agrees that in certain cases, the issue of materiality may be a
15 factual one. *See id.* However, as the court in *Mitchell* found, a trial court may properly grant
16 summary judgment for the insurer and the movant, where a reasonable trier of fact could not find
17 that the representations were immaterial, and where the evidence of materiality is not
18 contradicted. 127 Cal. App. 4th at 475. Lastly, while an insurer may have the right to rescind if
19 the insured made a material misrepresentation, the right may be waived when an insurer, or in this
20 case, the underwriter "neglect[s] to make inquiries as to [material] facts, where they are distinctly
21 implied in other facts of which information is communicated." *Old Line Life Ins. Co. v. Superior*
22 *Court*, 229 Cal. App. 3d 1600, 1606 (1991) (citing Cal. Ins. Code § 336(b)).⁵

23 Here, the information, or lack thereof, relates to two particular sections of the
24 applications. One section asked Wesco to enter all claims or losses that may give rise to claims
25 for the prior five years. Gemini Ex. 4 at 137. Wesco did not provide an answer. In another

26 ⁵ California Insurance Code section 336 provides: "The right to information of material
27 facts may be waived, either (a) by the terms of insurance or (b) by neglect to make inquiries as to
28 such facts, where they are distinctly implied in other facts of which information is
communicated."

1 section, Wesco was asked if any conditions presented an unusual exposure, and if yes, to explain.
2 Gemini Ex. 4 at 155. Wesco answered “yes” but did not provide an explanation. Gemini argues
3 Western Marine should have inquired further upon receiving the incomplete applications, and
4 because it did not do so, it prevented Gemini from seeking a rescission later on. Mot. at 7.
5 Western Marine, in return, contends Gemini should have rescinded the 2006–2007 Policy based
6 on the incomplete applications and later acquired evidence, which showed Wesco suffered
7 damages to the docks long before submitting its claim and had made repairs that exacerbated the
8 docks’ deterioration. Western Marine Opp’n at 15.

9 (1) Prior Damages or Losses

10 Omission of the fact that the docks had suffered prior damage or losses qualifies as
11 a material misrepresentation on Wesco’s application. The omission would have affected whether
12 Western Marine rejected the application, charged a higher premium or amended the policy,
13 because prior losses or damage would change the condition of the insured property as a policy
14 condition. The change in condition would likely increase the risk of future loss because a
15 previously damaged dock would be more susceptible to future weather events or deterioration in
16 general. This increased risk could not have been contemplated by Western Marine or Gemini
17 when they insured the marinas. *See Clayburgh v. Agricultural Ins. Co. of Watertown, N.Y.*,
18 155 Cal. 708, 711 (1909) (“The insurer seeks to guard itself against liability in the event that the
19 condition of the insured property should so change that the risk upon such property in its altered
20 condition would presumably not have been assumed for the premium paid.”).

21 However, under California law, Western Marine had no duty to inquire as to the
22 truth of representations of fact made by the insured or its agent in an application. *Mirich v.*
23 *Underwriters at Lloyd’s London*, 64 Cal. App. 2d 522, 531 (1944). A duty to inquire may arise
24 when the insurer or its agent, in this case Western Marine, becomes aware of facts that would
25 bring those representations under suspicion, and cause a prudent person to make inquiries.
26 *Mirich*, 64 Cal. App. 2d at 531. Wesco’s failure to respond to questions about prior losses in the
27 applications does not automatically imply there were prior losses. *See Colony Ins. Co. v.*
28 *Crusader Ins. Co.*, 188 Cal. App. 4th 743, 753–54 (2010) (“An insurer waives information about

1 a material fact where it neglects to make inquiry about material facts distinctly implied from other
2 facts that had been revealed.” (citation omitted)). Nevertheless, the reports from MCS and the
3 report from L&A to MCS both showed Wesco’s applications were inconsistent with respect to
4 dates of loss and damage. The effect of the temporary repairs disclosed by Wesco should also
5 have placed Gemini on alert for possible misrepresentations by Wesco. Scottsdale Exs. 7, 9.

6 Western Marine’s lack of inquiry did not waive Gemini’s right to rescission.
7 Gemini still had the right to rescind when later information revealed prior damage and losses up
8 until the commencement of the Underlying Action. *Cole v. Calaway*, 140 Cal. App. 2d 340,
9 347-48 (1956) (under California law, rescission must occur before an action on the policy and
10 within a reasonable time from discovering an error in the policy; citing to Cal. Civ. Code § 1691
11 (“to effect a rescission a party to the contract must, promptly upon discovering the facts which
12 entitle him to rescind”) and Cal. Ins. Code § 650 (“Whenever a right to rescind a contract of
13 insurance is given to the insurer by any provision of this part such right may be exercised at any
14 time previous to the commencement of an action on the contract.”)). Though Pojman and Wollitz
15 contemplated drafting a letter confirming the right to rescind, the actual rescission never occurred.

16 (2) Unusual Exposure

17 In terms of the question regarding unusual exposure, Wesco answered in the
18 positive but failed to provide the required explanation. First, the question is whether the omitted
19 explanation was material. Would a lack of explanation as to what or how conditions presented
20 unusual exposure have caused Western Marine to reject Wesco’s application, charge a higher
21 premium, or amend the policy terms, had Western Marine known the true facts? Unusual
22 exposure with respect to the policies at issue would change the condition of the docks, is a critical
23 component of the insured property at issue. Unusual exposure would increase the likelihood the
24 docks would suffer damage in the event of a storm or require temporary remedies that could
25 accelerate deterioration of the docks in the event of further damage in the future. Such a
26 clarification of the condition of the insured property would cause Western Marine to reject the
27 application, charge a higher premium, or amend the policy term because it would increase the risk
28

1 in a manner Western Marine and Gemini did not assume for the premium paid. *See Clayburgh*,
2 155 Cal. at 711.

3 Given that this omission is material, the second question is whether the right to
4 rescission was waived because Western Marine did not inquire further. As noted above, Western
5 Marine had no generalized duty to inquire. *Mirich*, 64 Cal. App. 2d at 531. But here, Wesco’s
6 answer of “YES” should have alerted Western Marine of facts potentially material to the issuance
7 or renewal, in this case, of a policy. Even though the positive answer did not explicitly disclose
8 the docks suffered major changes to their condition, the answer nevertheless should have
9 prompted Western Marine to ask for an explanation because it implied changes to the docks’
10 condition. *See Colony Ins. Co.*, 188 Cal. App. 4th at 753–54. Western Marine had a duty to
11 inquire when Wesco did not provide an explanation as requested. Western Marine’s neglect to
12 inquire waived Gemini’s right to rescission. Thus, Gemini could not have rescinded on this
13 ground.

14 In sum, though Wesco’s lack of explanation regarding unusual exposure prevented
15 rescission by Gemini, there remains a genuine dispute of material fact as to Gemini’s negligence
16 in failing to rescind the policy with respect to prior damage and loss. The court need not reach
17 the question whether Gemini was negligent in the litigation of the Underlying Action.

18 b) Wesco’s Insurance Policies

19 The court next looks at whether Gemini was negligent with respect to the relevant
20 insurance policy at issue, here the 2006–2007 Policy. Both parties agree California law applies to
21 Gemini’s conduct.

22 (1) Ambiguous Policy Forms

23 Western Marine contends Gemini implied, in its motion, the language in the policy
24 was too ambiguous to determine whether blanket coverage and the amount of coverage for each
25 of Wesco’s docks were provided in the 2006–2007 Policy. Western Marine Opp’n at 14. Gemini
26 replies it never made such an argument, ECF No. 115 at 7, and the court agrees with Gemini.

27 A policy provision is ambiguous when it is susceptible to two or more reasonable
28 constructions, *E.M.M.I. Inc. v. Zurich American Ins. Co.*, 32 Cal. 4th 465, 470 (2004) (citation

1 omitted), and Western Marine points to no language in the 2006–2007 Policy that could be
2 interpreted in more than one way. Rather, as noted above, the issue here is whether Western
3 Marine should have provided clear notice to Wesco when it did not continue blanket coverage for
4 policies after the 2004–2005 period. With respect to Gemini’s argument that Western Marine
5 should have provided clear notice to signal the 2005–2006 and 2006–2007 Policies no longer
6 provided blanket coverage, the court has found a notice requirement above.

7 (2) Exclusions

8 The court turns next to whether Wesco’s claim should have been excluded. Under
9 California law, exclusionary clauses are strictly construed against the insurer and in favor of the
10 insured. *N. American Bldg. Maint., Inc. v. Fireman’s Fund Ins. Co.*, 137 Cal. App. 4th 627, 642
11 (2006). Any provision that takes away or limits coverage reasonably expected by the insured
12 must be “conspicuous, plain and clear” to be enforceable. *Id.* (citations and internal quotations
13 omitted).

14 Western Marine argues the 2006–2007 Policy contains specific exclusions that
15 applied to Wesco’s claim. ECF No. 129 at 1. However, Gemini did not properly exclude
16 Wesco’s claim. *Id.* at 1–2. Scottsdale similarly argues Gemini waived the coverage defenses
17 available under the exclusions without justification and paid Wesco’s claim. *See generally* ECF
18 No. 130. In reply, Gemini argues the exclusions did not apply. ECF Nos. 134, 135.

19 The 2006–2007 Policy provides that “Gemini” will pay for loss of or damage to
20 [c]overed [p]roperty . . . directly caused or resulting from any Covered Causes of Loss occurring
21 during the policy period.” ECF No. 127-2, Gemini Ex. 40 at 36. Covered Causes of Loss does
22 not include losses included in the exclusions. *Id.* As noted above, the relevant exclusions are as
23 follows:

24 9. “Fungi,” Wet Rot, Dry Rot, and Bacteria – Presence, growth,
25 proliferation, spread, or any activity of ‘fungi,’ wet or dry rot, or
26 bacteria. However if ‘fungi,’ wet or dry rot, or bacteria results in a
‘specified cause of loss’ we will pay for the loss or damage caused
by that “specified cause of loss.”

27 . . .

1 12. Neglect – Neglect of the insured to use all reasonable means to
2 save and preserve property from further damage at and after the
time of loss.

3 15. Other Types of Losses:

4 a. Wear and Tear;

5 b. Rust, corrosion, decay, deterioration, weathering, hidden or latent
6 defect, or any quality in property that causes it to damage or destroy
itself

7 Gemini Ex. 40-2 at 38–39. Gemini argues the rot was caused by windstorm, which as noted
8 above is a “specified cause of loss.” *Id.* at 38.

9 Here, the original loss to the docks occurred in January 2001. SCSF No. 18. A
10 2002 report, prepared not by Western Marine or Gemini but by Index Research and sent to
11 Western Marine, showed the docks were in poor condition. Nevertheless, the 2005 report
12 provided by RSI for Western Marine described the docks at 3821 Victoria Avenue as being in
13 good condition, although photographs showed plywood repairs. Gemini Ex. 33 at 58; Gemini Ex.
14 34 at 2; Scottsdale Ex. 11 at 140–41; Scottsdale Ex. 12 at 146. The later investigation by MCS
15 and L&A in 2006 and 2007 showed the plywood repairs made after January 2001 caused the
16 docks to rot. Scottsdale Ex. 12 at 141. The investigation by MCS and subsequent reports show
17 the rot was not caused by the windstorm, which would have allowed the damage by the rot to fall
18 within the exception to the exclusions, as Gemini asserted in its Reply. ECF No. 135 at 3. Thus,
19 at least part of the damage and loss reported in Wesco’s claim fell under the rot exclusion.
20 Similarly, damage and losses resulting from Wesco’s neglect in failing to properly repair the
21 docks after the 2001 loss, to avoid the rot, also should be excluded. Lastly, damage and loss
22 caused by normal wear and tear, as pointed out by MCS, and the additional deterioration resulting
23 from the temporary plywood repairs should have been excluded as well. Scottsdale Ex. 11 at
24 140–41. At the same time, the record before the court does not contain sufficient undisputed facts
25 to determine whether the entire claim should have been excluded.

26 Accordingly, the court DENIES Gemini’s motion for summary judgment on its
27 breach of contract claim.

1 C. Negligence Claim

2 In its negligence claim, Gemini alleges Western Marine breached its duties under
3 the PAA. Compl. ¶¶ 27–29. This claim requires the court to consider the “economic loss rule.”
4 As stated above, Illinois law applies here because Gemini alleges Western Marine negligently
5 performed its duties under the PAA. Compl. ¶¶ 25–29. Therefore, the negligence claim is a tort
6 claim based on alleged breaches of duties arising from the PAA and the legal relationships
7 created by the PAA. *See Cannon*, 917 F. Supp. 2d at 1051–52.

8 Illinois courts have consistently adhered to the “economic loss rule”: where the
9 relationship between the parties was governed by contract, a party cannot recover under a tort
10 theory for solely economic losses. *Moorman Mfg. Co. v. Nat’l Tank Co.*, 91 Ill. 2d 69, 81 (1982).
11 The rule is based on the theory that parties to a contract have already allocated their risk through
12 agreement and thus do not need tort law to protect their rights. *Mars, Inc. v. Heritage Builders of*
13 *Effingham, Inc.*, 327 Ill. App. 3d 346, 351 (2002). Under Illinois law, “economic loss” is defined
14 as “damages for inadequate value, costs of repair, and replacement of the defective product, or
15 consequent loss of profits without any claim of personal injury or damage to other property.” *Id.*
16 at 350–51 (citing *Moorman*, 91 Ill. 2d at 81). Although *Moorman* and *Heritage Builders* both
17 involved a case of product liability, the Illinois Supreme Court applies the economic loss rule to
18 claims to contract for services as well. *Anderson Elec., Inc. v. Ledbetter Erection Corp.*, 115 Ill.
19 2d 146, 153 (1986) (plaintiff seeking to recover purely economic losses due to defeated
20 expectations of commercial bargain cannot recover in tort, regardless of plaintiff’s inability to
21 recover in contract).

22 The economic loss rule has three exceptions. A plaintiff may recover economic
23 damages in tort when (1) the plaintiff has sustained a personal injury or property damage as a
24 result of a sudden or dangerous occurrence; (2) the plaintiff’s damages are proximately caused by
25 the defendant’s intentional, false misrepresentation; or (3) the plaintiff’s damages are proximately
26 caused by the negligent misrepresentation of a defendant in the business of supplying information
27 for the guidance of others in their business transactions. *Heritage Builders*, 327 Ill. App. 3d at
28 351–52.

1 Here, Gemini alleges Western Marine had a duty to perform its obligations under
2 the PAA with reasonable care, and to follow applicable law, but Western Marine breached that
3 duty on several occasions. Compl. ¶¶ 27, 28. Gemini alleges Western Marine’s negligent
4 conduct “caused Gemini to be damaged in the amount of \$978,000” Compl. ¶ 29; Mot. at
5 11. The duties Western Marine allegedly performed negligently arose out of its contractual
6 relationship with Gemini governed by the PAA. Similar to the plaintiff in *Anderson Electric*,
7 Gemini is seeking to recover a purely economic loss. Gemini’s claim does not fall into any of the
8 three exceptions to the economic loss rule. Gemini has not suffered a personal injury or property
9 damage as a result of a sudden or dangerous occurrence, and Gemini has not shown
10 misrepresentation on the part of Western Marine, whether intentional or negligent. *Heritage*
11 *Builders*, 327 Ill. App. 3d at 351–52. When pressed at hearing, Gemini did not provide any
12 argument or authority to show why its negligence claim is not barred by the economic loss rule.

13 On this record, given the absence of any disputed issue of material fact, the court
14 GRANTS summary judgment for Western Marine on Gemini’s negligence claim. *See Gospel*
15 *Missions of America v. City of Los Angeles*, 328 F.3d 548, 553 (9th Cir. 2003) (“Even when there
16 has been no cross-motion for summary judgment, a district court may enter summary judgment
17 sua sponte against a moving party if the losing party has had a ‘full and fair opportunity to
18 ventilate the issues involved in the matter.’” (quotation omitted)).

19 V. PARTIAL SUMMARY JUDGMENT

20 Gemini has requested that should the court deny its motion for summary judgment,
21 the court grant its motion for partial judgment.

22 Motions for partial summary judgment may be useful to narrow disputes before
23 trial, eliminate claims or defenses, or otherwise streamline a case. *See, e.g., Bruschini v. Board of*
24 *Educ.*, 911 F. Supp. 104, 106 (S.D.N.Y. 1995). The Supreme Court has recognized their utility in
25 this respect: “Summary judgment procedure is properly regarded not as a disfavored procedural
26 shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed “to
27 secure the just, speedy and inexpensive determination of every action.” *Celotex*, 477 U.S. at 327
28 (citing Fed. R. Civ. P. 1); *see also* 10A Charles A. Wright, et al., *Federal Practice & Procedure*

1 § 2712 (3d ed. 1998). And Rule 56 expressly allows district courts the authority to grant
2 summary judgment on “each claim or defense—or the part of each claim or defense—on which
3 judgment is sought.” Fed. R. Civ. P. 56(a).

4 Courts occasionally decline to address motions for partial summary judgment
5 when adjudicating the motion would waste resources rather than preserve them. *See, e.g.,*
6 *Anselmo v. Mull*, No. 12-1422, 2013 WL 3941779, at *2 (E.D. Cal. July 30, 2013). As another
7 judge of this court has noted, “piecemeal resolution” of a case by partial summary judgment often
8 “makes trial more difficult and complex as opposed to streamlined.” *Chiron Corp. v. Genentech,*
9 *Inc.*, 268 F. Supp. 2d 1139, 1148 n.6 (E.D. Cal. 2002). Moreover, the Supreme Court has taken
10 care to note that district courts should act “with caution in granting summary judgment,” and that
11 courts have authority “to deny summary judgment in a case where there is reason to believe the
12 better course would be to proceed to a full trial.” *Anderson*, 477 U.S. at 255; *accord Lind v.*
13 *United Parcel Serv., Inc.*, 254 F.3d 1281, 1285 (11th Cir. 2001); *United States v. Honeywell Int’l,*
14 *Inc.*, 542 F. Supp. 2d 1188, 1203 (E.D. Cal. 2008).

15 Gemini identifies twenty separate portions of its breach of contract claim in its
16 request for partial summary judgment. Mot. at 17–20. The court finds granting its motion here, if
17 justified, would result in a “piecemeal resolution.” Accordingly, the court DENIES Gemini’s
18 motion for partial summary judgment insofar as aspects of the motion have not been addressed
19 above.

20 VI. DECLARATION OF UNDISPUTED FACTS

21 Gemini also asks in the alternative that the court issue an order establishing as
22 undisputed the contents of its Statement of Undisputed Facts. Mot. at 23; ECF No. 95-5.
23 Western Marine and Scottsdale, despite not directly opposing the request, have provided
24 substantial citations to the record to dispute the facts provided by Gemini.

25 As provided by Federal Rule of Civil Procedure 56(g), if the court declines to
26 grant the relief requested by a motion for summary judgment, “it may enter an order stating any
27 material fact—including an item of damages or other relief—that is not genuinely in dispute and
28 treating the fact as established in the case.” The moving party bears the initial burden of

1 demonstrating the absence of a genuine issue of material fact. *Devereaux v. Abbey*, 263 F.3d
2 1070, 1076 (9th Cir. 2001) (citing *Celotex Corp.*, 477 U.S. at 323).

3 The advisory committee's comment to Rule 56(g) provides the following
4 guidance, which echoes the rationale for denying partial summary judgment in the appropriate
5 cases:

6 If it is readily apparent that the court cannot grant all the relief
7 requested by the motion, it may properly decide that the cost of
8 determining whether some potential fact disputes may be
9 eliminated by summary disposition is greater than the cost of
10 resolving those disputes by other means, including trial. Even if the
11 court believes that a fact is not genuinely in dispute it may refrain
from ordering that the fact be treated as established. The court may
conclude that it is better to leave open for trial facts and issues that
may be better illuminated by the trial of related facts that must be
tried in any event.

12 Fed. R. Civ. P. 56(g) advisory committee's note to 2010 amendment.

13 The court denies the alternative relief requested in Gemini's motion. The court
14 finds that while certain facts appear to not be genuinely in dispute, the court's determining as
15 much will hamper trial and the triers of fact, as the complex issues and arguments in a case such
16 as this require a full context. The parties will, of course, be given an opportunity identify
17 disputed and undisputed factual matter in their joint pretrial statement.

18 VII. CONCLUSION

19 Accordingly, the court GRANTS Gemini's motion with respect to notice and
20 DENIES the balance of Gemini's motion for summary judgment and partial summary judgment
21 on its breach of contract claim. The court DENIES Gemini's request for the court to enter an
22 order establishing certain facts as undisputed. The court GRANTS summary judgment in favor of
23 Western Marine on Gemini's negligence claim.

24 IT IS SO ORDERED.

25 DATED: June 21, 2016.

26 
27 UNITED STATES DISTRICT JUDGE
28