



1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 SAN DIEGO UNIFIED PORT
12 DISTRICT,

13 Plaintiff,

14 v.

15 NATIONAL UNION FIRE INSURANCE
16 COMPANY OF PITTSBURGH, PA.,
17 successor-in-interest to AIG
18 INSURANCE CO., and DOES 1 - 50,
19 Inclusive,

20 Defendant.

Case No.: 3:15-cv-01401-BEN-MDD

ORDER ON MOTIONS IN LIMINE

[Doc. Nos. 120, 121, 122, 124, 127, 130,
131, 133, 135, 136, 137, 138,
139, 141, 143, 144, 145, 147]

21 Defendant National Union, successor-in-interest to Landmark Insurance Company
22 (“Landmark”) sold the Port both *primary liability* and *umbrella liability* insurance policies,
23 promising to defend and indemnify the Port against certain property damage liability
24 claims or lawsuits. National Union issued four primary policies to the Port.¹ National
25

26
27 ¹ The parties agree that two of the primary policies are exhausted. (Policy Nos. SMP
28 8002308 & GLA 5000574.) There are two other primary policies, which the Port
contends are not exhausted. (Policy Nos. GLA 5000110 and SMP 8002932.)

1 Union also sold the Port “the first layer of liability insurance directly above the
2 Unexhausted Primary Policies and Exhausted Primary Policies in the form of” umbrella
3 insurance policies. Coverage under the four Umbrella Policies is triggered once the
4 Primary Policies are exhausted.

5 According to the First Amended Complaint (“FAC”), the Port tendered, and
6 National Union agreed to provide a defense under the Unexhausted Primary Policies to
7 certain claims (“*Claims*”) and lawsuits (“*Suits*”) asserted against the Port.² Subsequently,
8 National Union informed the Port that it “unilaterally would be assigning payments for one
9 of the Port’s defense experts to [National Union’s] indemnity obligation against the
10 Unexhausted Primary Policies’ limits.” National Union then tendered the asserted
11 remaining policy limits to the Port and informed the Port “[National Union] considered the
12 Unexhausted Primary Policies to be exhausted and that it would cease defending the Port
13 in the *Claims* and *Suits*.” National Union did not seek a judicial determination concerning
14 exhaustion.

15 The Port contested National Union’s assertion that the two remaining Primary
16 Policies were exhausted. Moreover, even if they were exhausted, “the terms of the
17 Umbrella Policies would require National Union to drop down and defend the Port in the
18 *Claims* and *Suits*.”

19 National Union “repeatedly disputed” any defense obligation under the Umbrella
20 Policies. However, on September 15, 2015, National Union acknowledged it “has a
21 defense obligation to defend [S]uits in accordance with the terms of its [U]mbrella
22
23

24
25 ² The California Supreme Court has explained that a “*suit*” means a “civil action
26 commenced by filing a complaint,” and “[a]nything short of this is a ‘claim.’” *Foster-*
27 *Gardner, Inc. v. Nat’l Union Ins. Co.*, 18 Cal. 4th 857, 878 (1998). A “*claim*” may be “a
28 demand for payment communicated in a letter, or a document filed to protect an injured
party’s right to sue a governmental entity, or the document used to initiate a wide variety
of administrative proceedings.” (*Id.* at 879.)

1 Policies.” Because of National Union’s temporary cessation of defensive services, the Port
2 incurred additional defense costs.

3 The Port commenced the present action on June 25, 2015, and filed its FAC on
4 November 20, 2015, asserting five causes of action. On December 14, 2015, National
5 Union filed a Motion to Dismiss, Sever and Stay, which was denied. On July 20, 2016,
6 National Union submitted its Answer to the Port’s FAC. The Port seeks a determination
7 that the Primary Policies have not been exhausted as claimed by National Union and that
8 it should have continued defending the Port until the Court or the Port agreed that the
9 remaining two Primary Policies were exhausted. National Union disagrees with the Port’s
10 claims contending it has reimbursed all accrued defense fees and costs, and it maintains its
11 actions have been both reasonable and correct. National Union also believes that the Port
12 failed to cooperate as required under the policies because the Port withheld information
13 and deprived National Union of the right to participate in the settlement of certain lawsuits.

14 In preparation for trial, the parties filed several motions in limine to exclude
15 evidence. National Union filed fourteen motions in limine and the Port filed four. The
16 motions are fully briefed.

17 Upon consideration of the issues raised in the parties’ briefings, the Court rules as
18 follows.

19 LEGAL STANDARD

20 A. Standards for Motions in Limine

21 A court may make “a definitive ruling on the record admitting or excluding evidence,
22 either at or before trial.” Fed. R. Evid. 103. Rulings on motions in limine fall entirely
23 within this Court’s discretion. *United States v. Bensimon*, 172 F.3d 1121, 1127 (9th Cir.
24 1999) (citing *Luce v. United States*, 469 U.S. 38, 41-42 (1984)). The evidence is excluded
25 on a motion in limine only if the evidence is clearly inadmissible for any purpose. *Fresenius*
26 *Med. Care Holdings, Inc., v. Baxter Int’l, Inc.*, No. C 03-1431 SBA (EDL), 2006 WL
27 1646113, at *3 (N.D. Cal. June 12, 2006). If evidence is not clearly inadmissible,
28 evidentiary rulings should be deferred until trial to allow questions of foundation,

1 relevancy, and prejudice to be resolved in context. *See Bensimon*, 172 F.3d at 1127 (when
2 ruling on a motion in limine, a trial court lacks access to all the facts from trial testimony).
3 Denial of a motion in limine does not mean that the evidence contemplated by the motion
4 will be admitted at trial. (*Id.*) Instead, denial means that the court cannot, or should not,
5 determine whether the evidence in question should be excluded before trial. (*Id.*); *see also*
6 *McSherry v. City of Long Beach*, 423 F.3d 1015, 1022 (9th Cir. 2005) (rulings on motions
7 in limine are subject to change when trial unfolds).

8 DISCUSSION

9 **I. National Unions' Motions in Limine**

10 A. Motion No. 1 – Evidence Supporting Breach of Contract Claim and 11 *Sua Sponte* Dismiss Breach of Contract Claim. (Doc. No. 122.)

12 Defendant seeks to preclude the Port from offering, testifying, or referencing
13 evidence regarding the Port's fourth cause of action for breach of contract, or, alternatively,
14 dismissing the fourth cause of action *sua sponte* on the grounds that it is now moot. (Defs'
15 MIL No. 1 at 2, Doc. No. 122.)

16 The Port contends that it incurred out of pocket legal fees in recovering the defense
17 costs which the Defendant should have been paying from January 2015 to January 2017.
18 (Pl.'s Opp. Dft. MIL No. 1 at 3, Doc. No. 148.) The Port seeks to offer evidence and
19 testimony that Defendant's resumption of its defense duties in no way cured its breach of
20 the Policies. (*Id.* at 1.) The Port's opposition also addresses National Union's MIL No. 11
21 discussed below.

22 The motion is **DENIED**. The probative value of the evidence with respect to
23 National Union's action's regarding the Port's Breach of Contract Claim outweigh any
24 potential prejudice that may arise from its inclusion. The Court further finds it would be
25 inappropriate to *sua sponte* dismiss the Port's Breach of Contract Claim.

26 ///

27 ///

28 ///

1 B. Motion No. 2 – The Port’s Expert and Employee Witness Testimony.

2 (Doc. No. 130.)

3 Defendant next asks the Court to preclude the Port from introducing, referring or
4 commenting on evidence related to the District’s consultants which have not previously
5 been produced. (Defs’ MIL No. 2 at 2, Doc. No. 122.) The Port opposes the motion
6 contending that National Union’s motion presents no evidence of any stated intention by
7 the Port to present previously unproduced evidence, nor does it identify any evidence
8 which it believes the Port will seek to introduce. (Pl.’s Opp. Dft. MIL No. 2 at 3, Doc. No.
9 148.)

10 The motion is **DENIED**. However, should the issue arise during trial, National
11 Union may request the Court to reconsider its holding on this motion.

12 C. Motion No. 3 – Preclude Evidence of Alleged Bad Faith Conduct Released
13 by Prior Settlement Agreements. (Doc. No. 136.)

14 Defendant next seeks to preclude evidence of “bad faith” conduct released by
15 settlement agreements previously entered into by the parties. (Defs’ MIL No. 3 at 2, Doc.
16 No. 136.) The Port opposes the motion contending that National Union mischaracterized
17 the scope of the bad faith release, alleging that it was limited to claims and defense cost
18 invoices specified within the settlement agreements. (Pl.’s Opp. Dft. MIL No. 3 at 3, Doc.
19 No. 154.)

20 The motion is **DENIED**. National Union fails to acknowledge under the terms of
21 the settlement agreement that the bad faith waiver applied *only* to conduct relating to the
22 payment of invoices specified in the settlement agreements and Exhibit A attached thereto.
23 Moreover, National Union fails to demonstrate how the evidence it seeks to preclude would
24 be unduly prejudicial, time-consuming, or confusing to the jury.

25 D. Motion No. 4 – Preclude Evidence of claimed *Brandt* fees. (Doc. No. 137.)

26 Defendant seeks to preclude or limit the presentation of evidence or making
27 reference to the Port’s claim for attorneys’ fees and costs in this case, pursuant to the
28 decision in *Brandt v. Superior Court*, 37 Cal.3d 813 (1985). (Defs’ MIL No. 4 at 2, Doc.

1 No. 137.) The Port opposes the motion contending it submitted all evidence required under
2 the *Brandt* standard, thereby demonstrating compliance with this Court's June 7, 2017
3 Order regarding disclosure of *Brandt* evidence. (Pl.'s Opp. Dft. MIL No. 4 at 1, Doc. No.
4 155.)

5 The motion is **DENIED**. National Union's motion falls short of demonstrating the
6 Port did not comply with the *Brandt* standard or this Court's instructions pursuant to its
7 June 7, 2017 Order.

8 E. Motion No. 5 – Preclude Litigation Conduct From Trial Evidence. (Doc.
9 No. 124.)

10 Defendant seeks to preclude evidence of its own litigation conduct based on
11 California Civil Code § 47 (b) and Fed. R. Evid. 501. (Defs' MIL No. 5 at 2, Doc. No.
12 124.) The Port opposes the motion contending it is unsettled whether the litigation
13 privilege of § 47(b) applies to a carrier sued for bad faith (*see Nies v. National Auto. &*
14 *Cas. Inc. Co*, 199 Cal. App.3d 1192, 1203, n. 7 (1988)). Even assuming the general
15 applicability of the privilege, it has no application to the matters identified by National
16 Union. (Pl.'s Opp. Dft. MIL No. 5 at 2, Doc. No. 142.)

17 The motion is **GRANTED in part and DENIED in part**. National Union's motion
18 is denied as to evidence or testimony referencing the fact that National Union did not file
19 an action for declaratory relief and obtain a judicial declaration in its favor prior to
20 terminating coverage. The motion is granted as to any other evidence, testimony, or
21 reference of litigation conduct.

22 F. Motion No. 6 – Preclude Any Testimony by the Port's Witness Randa
23 Coniglio. (Doc. No. 131.)

24 Defendant withdraws its Motion in Limine No. 6. (Defs' MIL No. 6 at 1, Doc. No.
25 137.) National Union and the Port reached an agreement that National Union would
26 withdraw its objection to the Port calling Randa Coniglio as a witness, and the Port would
27 not object to the addition of Martin Eide to National Union's list of trial witnesses. (*Id.* at
28 2.)

1 The Court **DENIES** as **MOOT/WITHDRAWN**, Defendant's Motion in Limine
2 No. 6.

3 G. Motion No. 7 – Preclude from Evidence the “Chartis U.S. Domestic Legal
4 Compliance Manual,” Port Trial Exhibit 229. (Doc. No. 135.)

5 Defendant seeks to preclude from use at trial the document entitled “Chartis U.S.
6 Domestic Legal Compliance Manual” because it lacks foundation, is not a claims handling
7 manual, it is irrelevant, immaterial, and more prejudicial than probative under FRE 403.
8 (Defs’ MIL No. 7 at 2, Doc. No. 135.)

9 The Port opposes the motion contending the following four points: First, the Claims
10 Manual is not irrelevant because whether National Union implemented and maintained
11 reasonable claims handling standards is at issue because the existence of guidance for
12 claims managers is an enumerated element of the unfair claims handling guidelines
13 acknowledged in the Claims Manual itself. (Pl.’s Opp. Dft. MIL No. 7 at 1, Doc. No. 160.)
14 Second, National Union cannot contest the Claims Manual authenticity because a party-
15 opponent cannot produce a company document and later challenge that same document’s
16 authenticity. (*Id.*) Third, the Claims Manual is not likely to create confusion because the
17 contents and language speak for themselves and make it clear that it is a claim handling
18 manual including a specific section devoted to “Claims Practices.” (*Id.*) Fourth, despite
19 not producing the Claims Manual until the Court compelled National Union to do so after
20 the close of discovery, National Union’s witnesses were asked about claims handling
21 manuals, including this Claims Manual, during depositions. (*Id.*)

22 This Court **RESERVES RULING** on National Union’s motion to preclude the
23 document entitled “Chartis U.S. Domestic Legal Compliance Manual,” Port Trial Exhibit
24 229 until trial.

25 ///

26 ///

27 ///

28

1 H. Motion No. 8 – Preclude Evidence and Argument from the Port Disputing
2 the Archived Losses. (Doc. No. 141.)

3 Defendant seeks to preclude the Port from offering evidence or testimony disputing
4 the admissibility of National Union’s archived losses as depicted on the Loss Run records
5 (from the 1980s) pursuant to the ancient document rule and lack of contradictory evidence.
6 (Defs’ MIL No. 8 at 2, Doc. No. 142.)

7 The Port opposes the motion contending the entries on the Loss Runs are the
8 evidence upon which National Union relies to support its argument that the two policies at
9 issue in this action, policy SMP 8002392 and GLA 500110 are exhausted. (Pl.’s Opp. Dft.
10 MIL No. 8 at 1, Doc. No. 158.) The Port’s opposition also addresses National Union’s
11 MIL No. 9 discussed below.

12 The motion is **DENIED**, subject to the Port laying the proper foundation and
13 addressing any privilege objection raised at trial.

14 I. Motion No. 9 – Preclude Testimony and Evidence of Payments to Indemnify
15 Five Matters. (Doc. No. 147.)

16 Defendant seeks to preclude the Port from offering evidence or testimony disputing
17 the admissibility and validity of five specified pre-2001 indemnity payments made by
18 National Union as depicted on the Loss Runs. (Defs’ MIL No. 9 at 2, Doc. No. 147.)

19 The Port opposes the motion, contending the entries on the Loss Runs which are the
20 evidence upon which National Union relies upon for its position that the two policies at
21 issue in this Action, policy SMP 8002392 and GLA 500110 are exhausted. (Pl.’s Opp. Dft.
22 MIL No. 9 at 1, Doc. No. 158.)

23 The motion is **DENIED**, subject to the Port laying the proper foundation and
24 addressing any privilege objection raised at trial.

25 ///

26 ///

27 ///

28 ///

1 J. Motion No. 10 – To Bifurcate the Amount of Punitive Damages and to
2 Preclude Evidence of National Union’s Wealth. (Doc. No. 145.)

3 Defendant seeks to bifurcate the damages phase of the punitive claim and preclude
4 evidence of financial condition until preliminary criteria are established. (*see* Defs’ MIL
5 No. 10, Doc. No. 145.)

6 The Port opposes the motion contending bifurcating the punitive damage claim from
7 the rest of the trial would be against judicial economy and would prejudice the Port by
8 prohibiting it from introducing evidence of National Union’s financial condition in support
9 of its punitive damages claim. (Pl.’s Opp. Dft. MIL No. 10 at 1, Doc. No. 157.)

10 Under Rule 42(b) of the Federal Rules of Civil Procedure, the Court may order
11 separate trials for one or more separate issues or claims “[f]or convenience, to avoid
12 prejudice, or to expedite and economize...” To determine whether to order bifurcation,
13 courts generally look to whether bifurcation will promote “‘efficient judicial
14 administration,’ considering such factors as convenience, prejudice to the parties,
15 simplification of discovery and conservation of resources, the risk of jury confusion, and
16 separability of the issues.” *Medtronic Minimed Inc. v. Animas Corp.*, No. CV 12-04471,
17 2013 WL 3233341, at *1 (C.D. Cal. June 25, 2013) (citing *Pinal Creek Grp. v. Newmont*
18 *Mining Corp.*, 218 F.R.D. 652, 654 (D. Ariz. 2003) and *Mformation Techs., Inc. v.*
19 *Research in Motion Ltd.*, No. C 08-04990, 2012 WL 1142537, at *1 (N.D. Cal. March 29,
20 2012)). And “[b]ecause bifurcation rests in principles of judicial economy, additional
21 considerations include (1) whether the evidence offered in the proposed phases will
22 overlap, and (2) whether bifurcation will permit deferral of costly and possibly unnecessary
23 proceedings pending resolution of potentially dispositive preliminary issues.” *J2 Glob.*
24 *Comm’ns, Inc. v. Protus IP Sols.*, No. CV 06-00566, 2009 WL 910701, at *2 (C.D. Cal.
25 Mar. 31, 2009) (quotations omitted) (citing *Hangarter v. Provident Life & Acc. Inc. Co.*,
26 373 F.3d 998, 1021 (9th Cir. 2004); *Jinro America, Inc. v. Secure Investments, Inc.*, 266
27 F.3d 993, 998 (9th Cir. 2001)).

1 “Bifurcation is particularly appropriate when the resolution of a claim or issue might
2 dispose of the entire case.” *Renfrow v. Redwood Fire & Cas. Ins. Co.*, 288 F.R.D. 514, 523
3 (D. Nev. 2013). But the Court has “discretion to subdivide the case in whatever manner
4 seems dictated by the circumstances” (*Rivera v. Nibco, Inc.*, No. CIVF-99-6443, 2006 WL
5 845925, at *5 (E.D. Cal. Mar. 31, 2006) (quotations omitted)), and bifurcation “is the
6 exception rather than the rule of normal trial procedure” within the Ninth Circuit. *Clark v.*
7 *I.R.S.*, 772 F. Supp. 3d 1265, 1269 (D. Haw. 2009) (citing *Hangarter*, 373 F.3d at 1021).

8 In this case, bifurcation into two jury trials will necessarily complicate and delay this
9 proceeding, and the Court concludes Defendant’s proposal does not outweigh bifurcation’s
10 disruptive effect. Accordingly, the Court **DECLINES** to bifurcate the trial as proposed by
11 National Union. The motion is **DENIED**.

12 K. Motion No. 11 – Preclude Evidence of Bad Faith and Breach of the
13 Covenant of Good Faith and Fair Dealing, or in the alternative, to Dismiss
14 the Fifth Claim sua sponte. (Doc. No. 143.)

15 Defendant moves (1) to preclude referencing the Port’s cause of action for bad faith
16 and breach of the covenant of good faith and fair dealing based on the Genuine Dispute
17 Doctrine, or, alternatively, dismissing that cause of action *sua sponte* on the grounds that
18 any such claim is now moot; (2) to prohibit all parties from offering any evidence of,
19 referring to, or commenting in any way on the statements contained within; and (3)
20 precluding all parties from making any reference to the fact that this motion has been filed
21 and/or granted for any purpose other than to enforce the Court’s order on this motion.
22 (Defs’ MIL No. 11 at 2, Doc. No. 143.)

23 The Port contends it incurred out of pocket legal fees in recovering the defense costs
24 which National Union should have been paying from January 2015 to January 2017. (Pl.’s
25 Opp. Dft. MIL No. 11 at 2, Doc. No. 148.) Moreover, National Union’s reliance upon the
26 genuine dispute doctrine to dismiss the Port’s cause of action for breach of the implied
27 covenant of good faith and fair dealing is misplaced due to National Union’s abandonment
28

1 of the Port's defense which is directly contrary to clear authority regarding how a carrier
2 must proceed if there is a dispute about exhaustion. (*Id.*)

3 The motion is **DENIED**. The probative value of the evidence with respect to
4 National Union's actions regarding the Port's Bad Faith Claim outweighs any potential
5 prejudice that may arise. The Court further finds it would be inappropriate to *sua sponte*
6 dismiss the Port's Bad Faith Claim.

7 L. Motion No. 12 – Preclude Evidence that National Union Waived the
8 Attorney-Client Privilege, etc. Regarding Ms. Campbell's Testimony. (Doc.
9 No. 144.)

10 Defendant seeks to preclude the Port from offering evidence or referring to National
11 Union's assertion of waiver of the attorney-client privilege and disputing the right of a
12 witness to make corrections to a deposition transcript. (Defs' MIL No. 12 at 2, Doc. No.
13 144.)

14 The Port opposes the motion contending it has not designated any testimony from
15 Wanda Smith-Campbell's deposition to which National Union makes a privilege objection.
16 (Pl.'s Opp. Dft. MIL No. 12 at 1, Doc. No. 156.) Moreover, the purpose of an errata is to
17 correct, not to contradict witness testimony. (*Id.*)

18 The motion is **DENIED**.

19 M. Motion No. 13 – Preclude Testimony by the Port's Expert Witness Dorn
20 Bishop. (Doc. No. 139.)

21 Defendant seeks to preclude the Port from offering or referencing testimony or the
22 expert report of the Port's Expert Witness Dorn G. Bishop on the grounds that Mr. Bishop's
23 opinions consist of improper legal opinion, lack foundation and are without evidentiary
24 basis. (Defs' MIL No. 13 at 2, Doc. No. 139.)

25 The Port opposes the motion contending that National Union mischaracterizes Mr.
26 Bishop's opinions, labeling them legal conclusions when in fact they espouse no such legal
27 conclusion and instead relate to insurance industry customs and practices which in no way
28 invades the jury or Courts province. (Pl.'s Opp. Dft. MIL No. 13 at 1, Doc. No. 161.)

1 Moreover, Mr. Bishop, as an insurance coverage expert, is permitted to rely on applicable
2 law and industry standards as well as his experience in forming an expert opinion as long
3 as it is grounded in the requisite foundation and evidentiary basis under the Federal Rules
4 of Evidence. (*Id.*)

5 The motion is **GRANTED in part and DENIED in part**. Although it is undisputed
6 that Mr. Bishop is an attorney and not a claims adjuster, it is entirely proper for an expert
7 to rely on the applicable law and industry standards in forming an opinion. The Port has
8 identified sufficient factual foundation for his opinion of whether an insurer “deviated from
9 industry standards [to support] a finding that they acted in bad faith (i.e. an ultimate issue
10 of law). Furthermore, Mr. Bishop’s testimony and expert report will be helpful to the trier
11 of fact because it will provide a framework for understanding complex claims handling
12 practices involving insurance cases, including issues related to policy exhaustion and an
13 insurers’ duty to defend its policyholder. National Union’s motion is **DENIED** as to Mr.
14 Bishop’s testimony and expert report. Testimony outside of the aforementioned subject
15 areas is inadmissible and National Union’s motion is **GRANTED** as to evidence and
16 testimony which exceed these limited boundaries.

17 N. Motion No. 14 – Preclude the Port’s Expert Witness David L. Blount. (Doc.
18 No. 138.)

19 Finally, Defendant seeks to preclude the Port from offering testimony or the expert
20 report of Port’s Expert Witness David L. Blount regarding his opinions of the motive, intent
21 and state of mind of Douglas Beal because Mr. Blount is not an engineer or geologist, and
22 the relevance of his opinions and expert report do not outweigh their prejudicial effect.
23 (Defs’ MIL No. 14 at 2, Doc. No. 138.)

24 The Port opposes the motion contending that Mr. Blount’s opinions go to industry
25 standards of what constitutes investigative versus remedial work in the context of
26 environmental clean-ups. (Pl.’s Opp. Dft. MIL No. 14 at 1, Doc. No. 162.) Moreover, Mr.
27 Blount’s vast experience in the field of environmental clean-up and cost assessment for
28

1 associated work negates any concerns and outweigh any purported prejudicial effect that
2 may arise from the fact that he is not a licensed geologist or engineer. (*Id.*)

3 The motion is **GRANTED in part and DENIED in part**. National Union's motion
4 is **DENIED** as to Mr. Blount's testimony and expert report as to the industry practices
5 regarding what constitutes investigative versus remedial work in the context of
6 environmental clean-ups and assessing the related costs of such work. The motion is
7 **GRANTED** as to evidence and testimony that exceeds the aforementioned limited
8 boundaries.

9 **II. The Port's Motions in Limine**

10 A. Motion No. 1 – Exclude the Errata Sheet of Wanda Smith-Campbell. (Doc.
11 No. 120.)

12 The Port seeks to preclude Defendant from introducing into evidence Smith-
13 Campbell's errata sheet or from using the errata sheet to object to the Port's use of Smith-
14 Campbell's videotaped deposition. (Pl.'s MIL No. 1 at 1, Doc. No. 120.)

15 Defendant opposes the motion contending that it is consistent with her corrections
16 to those several portions of her testimony that contained mistakes. (Defs' Opp. Pl.'s MIL
17 No. 1 at 2, Doc. No. 159.)

18 The motion is **DENIED**.

19 B. Motion No. 2 – Expert Opinion Testimony. (Doc. No. 121.)

20 The Port seeks to preclude Defendant from introducing expert opinion testimony of
21 experts John Goldwater, Philip R. Watters, and Albert L. McComas, pursuant to Federal
22 Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579
23 (1993). (Pl.'s MIL No. 2 at 1, Doc. No. 121.)

24 Defendant opposes the Port's motion contending that it is an effort to undercut
25 National Union's defense before any of their expert witnesses offer any admissible opinion
26 testimony that will assist the trier of fact. (Defs' Opp. Pl.'s MIL No. 2 at 2-3, Doc. No.
27 168.)

1 The motion is **GRANTED in part and DENIED in part**. The Port's motion is
2 **GRANTED** as to Expert Witness opinion testimony of Philip R. Watters because
3 according to his expert report, his opinion is based solely on Rimkus' subjective definitions
4 and standards of investigation costs and remediation costs. Moreover, it provides no basis
5 or insight into how the Rimkus' definitions of investigative versus remediation costs are
6 derived. Nor does it explain how or why the Rimkus' definitions are appropriate or how
7 they should be applied. Of note, Watters' concedes that neither California nor the EPA
8 uses Rimkus' phrase "contaminant mass" in any of their definitions of remediation activity.
9 Moreover, he admits that people within the environmental community do not use Rimkus'
10 definition of remediation as "activities that impact the contaminant mass at a site." (*Id.* at
11 11.)

12 The Port's motion is **DENIED** as to Expert Witness opinion testimony of John
13 Goldwater and Albert L. McComas.

14 C. Motion No. 3 – Other Insurance Carrier Policies and Settlements Between
15 Port and Other Carriers and Third Parties. (Doc. No. 127.)

16 The Port seeks to exclude all testimony and evidence related to its insurance policies
17 with other insurance carriers and third parties on the grounds that such evidence is
18 irrelevant and conveying it to a jury would be highly improper and prejudicial even if the
19 court sustained an objection and instructed the jury not to consider such facts. (Pl.'s MIL
20 No. 3 at 1, Doc. No. 127.)

21 Defendant opposes the Port's motion contending that it is not based on actual facts
22 of the case, nor the underlying claims and suits at issue in this matter, but instead is founded
23 on mere imaginary motivations. (Defs' Opp. Pl.'s MIL No. 3 at 2, Doc. No. 167.)

24 The motion is **DENIED**. The probative value of the evidence with respect to
25 National Union's action's in regards its determination of exhaustion of the underlying
26 primary policies outweighs any potential prejudice that may arise. The Port framed this
27 Motion in Limine expansively without pointing to any specifics. At this point, there is no
28

1 basis for excluding any specific evidence. However, should the situation change during
2 the trial, the Port may request the Court to reconsider its holding on this motion.

3 D. Motion No. 4 – Confidential Status Report Communications. (Doc. No.
4 133.)

5 The Port seeks to preclude Defendant from introducing evidence, testimony or
6 referencing at trial confidential and privileged status reports as to third parties. (Pl.’s MIL
7 No. 4 at 1, Doc. No. 133.)

8 Defendant opposes the motion contending the Port’s effort to preclude Defendant
9 from introducing defense counsel’s status reports prepared in the underlying claims and
10 suits is based on a fundamental misunderstanding or misreading of Calif. Civil Code
11 section 2860(d) (“Section 2860(d)”), and its unsupportable position that the status reports
12 are not relevant to the instant action. (Def’s Opp. Pl.’s MIL No. 4 at 2, Doc. No. 163.)

13 The Court **RESERVES** ruling on the Port’s Motion in Limine No. 4. The
14 admissibility of the evidence and testimony will be determined at trial.

15 **CONCLUSION**

16 In summary, the Court rules as follows:

- 17 1. The Court **DENIES** Defendant’s Motion in Limine No. 1. (Doc. No. 122.)
- 18 2. The Court **DENIES** Defendant’s *Amended* Motion in Limine No. 2. (Doc.
19 No. 130.)
- 20 3. The Court **DENIES** Defendant’s Motion in Limine No. 3. (Doc. No. 136.)
- 21 4. The Court **DENIES** Defendant’s Motion in Limine No. 4. (Doc. No. 137.)
- 22 5. The Court **GRANTS in part and DENIES in part**, Defendant’s Motion in
23 Limine No. 5. (Doc. No. 124.)
- 24 6. The Court **DENIES as MOOT/WITHDRAWN**, Defendant’s Motion in
25 Limine No. 6. (Doc. No. 131.)
- 26 7. The Court **RESERVES RULING** on National Union’s Motion in Limine
27 No. 7 to preclude from evidence the document entitled “Chartis U.S.
28

1 Domestic Legal Compliance Manual,” Port Trial Exhibit 229 until trial.
2 (Doc. No. 135.)

- 3 8. The Court **DENIES** Defendant’s Motion in Limine No. 8. (Doc. No. 141.)
4 9. The Court **DENIES** Defendant’s Motion in Limine No. 9. (Doc. No. 147.)
5 10. The Court **DENIES** Defendant’s Motion in Limine No. 10. (Doc. No. 145.)
6 11. The Court **DENIES** Defendant’s Motion in Limine No. 11. (Doc. No. 143.)
7 12. The Court **DENIES** Defendant’s Motion in Limine No. 12. (Doc. No. 144.)
8 13. The Court **GRANTS in part and DENIES in part**, Defendant’s Motion in
9 Limine No. 13 as to the preclusion of testimony by the Port’s Expert
10 Witness Dorn Bishop. (Doc. No. 139.)
11 14. The Court **GRANTS in part and DENIES in part**, Defendant’s Motion in
12 Limine No. 14 as to the preclusion of testimony by the Port’s Expert
13 Witness David Blount. (Doc. No. 138.)
14 15. The Court **DENIES** the Port’s Motion in Limine No. 1. (Doc. No. 120.)
15 16. The Court **GRANTS in Part and DENIES in part**, the Port’s Motion in
16 Limine No. 2. (Doc. No. 121.)
17 17. The Court **DENIES** the Port’s Motion in Limine No. 3. (Doc. No. 127.)
18 18. The Court **RESERVES** ruling on the Port’s Motion in Limine No. 4. The
19 admissibility of the evidence and testimony will be determined at trial. (Doc.
20 No. 133.)

21 **IT IS SO ORDERED.**

22
23 DATED: October 22, 2018


24 **HON. ROGER T. BENITEZ**
25 United States District Judge
26
27
28