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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

10	ASSURANCE CO. OF AMERICA, et al.	)	Case No.: 2:13-cv-02191-GMN-CWH
		)	
11	Plaintiffs,	)	ORDER RE: FINDINGS OF FACT AND
		)	CONCLUSIONS OF LAW
12	vs.	)	
		)	
13	IRONSHORE SPECIALTY INS. CO.,	)	
		)	
14	Defendant.	)	
		)	

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16 This Court, having presided over a trial on the briefs in this matter and considering the  
 17 evidence and argument of the parties, finds as follows:

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Findings of Fact

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I. Policies

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<sup>1</sup> Plaintiff American Guarantee and Liability Company ("American Guarantee") previously accepted an Offer of Judgment made by Ironshore. Dkt. No. 77. By virtue of this acceptance, a Consent Judgment was subsequently entered in favor of American Guarantee such that it is no longer a party to this action. Dkt. No. 79.

1 parties:

- 2 • Cedco, Inc. ("Cedco")
- 3 • Laird Whipple Concrete Construction, Inc. ("Laird Whipple")
- 4 • PR Construction Corp. ("PR Construction")
- 5 • Stewart & Sundell Concrete, Inc. ("Stewart & Sundell")
- 6 • Sunworld Landscape and Construction, LLC ("Sunworld")
- 7 • Universal Framing, LLC ("Universal Framing")

8 Zurich issued the following general liability insurance policies to Cedco:

- 9 • Policy No.: CON50022947 (effective 04/12/01-04/12/02); and
- 10 • Policy No.: CON50022947 (effective 04/12/02-04/12/03).

11 Exs. 1-2.

12 Zurich issued the following general liability insurance policies to Laird Whipple:

- 13 • Policy No.: SCP38949211 (effective 10/12/00-10/12/01).

14 Ex. 624.

15 Zurich issued the following general liability insurance policies to PR Construction:

- 16 • Policy No.: CON 33083339 (effective 08/01/99-08/01/00);
- 17 • Policy No.: CON 33083339 (effective 08/01/00-08/01/01); and
- 18 • Policy No.: CON 33083339 (effective 08/01/01-08/01/02).

19 Exs. 5-7.

20 Zurich issued the following general liability policies to Stewart & Sundell:

- 21 • Policy No.: 1849622 (effective 03/01/94-03/01/95)
- 22 • Policy No.: EPA24788847 (effective 03/01/95-03/01/96);
- 23 • Policy No.: EPA28258722 (effective 03/01/96-03/01/97);
- 24 • Policy No.: EPA30907464 (effective 03/01/97-03/01/98);
- 25 • Policy No.: EPA32604960 (effective 03/01/98-03/01/99);
- 26 • Policy No.: CON32604960 (effective 03/01/99-03/01/00);
- 27 • Policy No.: CON32604960 (effective 03/01/00-03/01/01); and
- 28 • Policy No.: CON32604960 (effective 03/01/01-03/01/02).

1 Exs. 11-18.

2 Zurich issued the following general liability policies to Sunworld:

- 3 • Policy No.: CON98713598 (effective 05/16/01-05/16/02).

4 Ex 21.

5 Zurich issued the following commercial general liability policies to Universal Framing:

- 6 • Policy No. SCP39574349 (effective 01/07/03-01/07/04);  
7 • Policy No. SCP39574349 (effective 01/07/04-01/07/05);  
8 • Policy No. SCP39574349 (effective 01/07/05-01/07/06); and  
9 • Policy No. SCP39574349 (effective 01/07/06-01/07/07).

10 Exs 24-27.

11 Ironshore issued Cedco the following general liability policies:

- 12 • Policy No.: 018ER0905001 (effective 06/01/09-06/01/10); and  
13 • Policy No.: 00194200 (effective 04/01/10-04/01/11).

14 Exs. 4, 505.

15 Ironshore issued Laird Whipple the following general liability policies:

- 16 • Policy No.: 017BW0905001 (effective 04/15/09-04/15/10); and  
17 • Policy No.: 000242101 (effective 04/15/10-04/15/11).

18 Exs. 8-9.

19 Ironshore issued PR Construction the following general liability policy:

- 20 • Policy No.: 000115801 (effective 01/31/10-01/31/11).

21 Ex. 10.

22 Ironshore issued Stewart & Sundell the following commercial general liability policy:

- 23 • Policy No.: 012A80905001 (effective 03/01/09-03/01/10);  
24 • Policy No.: 000167401 (effective 03/01/10-03/01/11).

25 Exs. 19-20.

26 Ironshore issued Sunworld the following policy:

- 27 • Policy No.: 00GN10905001 (effective 06/04/09-06/04/10).

28 Ex. 22.

1 Finally, Ironshore issued Universal Framing the following policy:

- 2 • Policy No.: 00T960905001 (effective 10/13/09-10/13/10).

3 Exs. 29.<sup>2</sup>

4 The policies Zurich and Ironshore issued include Commercial General Liability Coverage  
5 Forms that generally provide as follows:

6 We will pay those sums that the insured becomes legally obligated to  
7 pay as damages because of ... "property damage" to which this  
8 insurance applies. We will have the right duty to defend the insured  
9 against any 'suit' seeking those damages. However, we will have no  
10 duty to defend the insured against any "suit" seeking damages for ...  
11 'property damage' to which this insurance does not apply... .

12 b. This insurance applies to ... "property damage" only if:

- 13 (1) The ... "property damage" is caused by an "occurrence" ... [and]
- 14 (2) The ... "property damage" occurs during the policy period.

15 ...

16 "Occurrence" means an accident, including continuous or repeated  
17 exposure to substantially the same general harmful conditions.

18 ...

19 "Property damage" means:

- 20 a. Physical injury to tangible property, including all resulting loss of  
21 use of that property.

22 The policies Zurich and Ironshore issued also provide as follows:

23 4. Other Insurance.

24 If other valid and collectible insurance is available to the insured for a  
25 loss we cover under Coverages A or B of this Coverage Part, our  
26 obligations are limited as follows:

27 ...

28 c. Method of Sharing

If all of the other insurance permits contribution by equal shares, we  
will follow this method also. Under this approach each insurer

<sup>2</sup> Ironshore issued also issued Policy No. 00T960805001 (effective 10/13/08-10/13/09). Dkt. No. 28. Unlike the later policy, the 2008-2009 policy includes a Designated Work endorsement barring coverage for work completed prior to October 13, 2008. Dkt. No. 28, p. 50. Given the timing of the work at issue, this endorsement applies to bar coverage.

1 contributes equal amounts until it has paid its applicable limit  
2 of insurance or none of the loss remains, whichever comes first.

3 Meanwhile, the policies only Ironshore issued each include Continuous or Progressive  
4 Injury Exclusion endorsements ("CP Exclusion") which provide in relevant part as follows:

5 This insurance does not apply to any ... "property damage":

6 1. which first existed, or is alleged to have first existed, prior to the  
7 inception of this policy. "Property damage" from "your work" ...  
8 performed prior to policy inception will be deemed to have first  
9 existed prior to the policy inception, unless such "property damage" is  
10 sudden and accidental and takes place within the policy period; or

11 2. which was, or is alleged to have been, in the process of taking place  
12 prior to the inception date of this policy, even if such . . . "property  
13 damage" continued during this policy period; or

14 3. which is, or is alleged to be, of the same general nature or type as a  
15 condition, circumstance or construction defect which resulted in . . .  
16 "property damage" prior to the inception date of this policy.

17 II. Underlying Matters

18 Cedco was named as a party to the following underlying matters:

- 19 • Bagley v. All Drywall and Paint, Clark County Case No. A620609 ("Bagley");
- 20 • Blasco v. Rhodes Design, Clark County Case No. A578060 ("Blasco"); and
- 21 • Ishihama v. Terravita Home Construction Co., Clark County Case No. A632302  
22 ("Ishihama").

23 Ex Nos. 47-52.

24 Laird Whipple was named as a party to the following underlying matters:

- 25 • Stacy v. American West Homes, Inc., Clark County Case No. A575959 ("Stacy");
- 26 • Cohen v. Nigro Desert Bloom, LLC, Clark County Case No. A591492 ("Cohen");
- 27 • Wright v. Carina Corp., Clark County Case No. A602989 ("Wright"); and
- 28 • Colford v. American West Homes, Inc., Clark County Case No. A593923  
("Colford").

Exs. 53-57, 70-71, 74-75.

PR Construction was named as a party to the following underlying matter:

- Epstein Family Trust v. Westgate Properties, Clark County Case No. A624664

1 ("Epstein").

2 Ex. 58-59.

3 Stewart & Sundell was named as a party to the following underlying matters:

- 4 • Aurora Glen HOA v. Pinnacle-Aurora II, LP, Clark County Case No. A605463
- 5 ("Aurora");
- 6 • Boyer v. PN II, Clark County Case No. A603841 ("Boyer");
- 7 • Mystic Bay HOA v. Richmond Amer. Homes, Clark County Case No. A611595
- 8 ("Mystic Bay"); and
- 9 • Torrey Pines HOA v. U.S. Home Corp., Clark County Case No. A571846 ("Torrey
- 10 Pines").

11 Exs. 51-52, 68-69, 72-73, 655, 657.

12 Sunworld was named as a party to the following underlying matter:

- 13 • Evers v. Fairway Pointe, LLC, Clark County Case No. A614799 ("Evers").

14 Ex. 60-61.

15 Finally, Universal Framing was named as party to the following underlying matters:

- 16 • Macias v. DW Arnold, Inc., Washoe County Case No. CV10-02863; and
- 17 • Larkin v. Comfort Residential, Washoe County Case No. CV09-03256.

18 Exs. 64-67.

19 In response to tenders, Ironshore disclaimed coverage in connection with each of the  
20 underlying matters.

21 Zurich agreed to defend the mutual insureds in connection with each of the underlying  
22 matters, incurring a total of \$291,804 based on the following:

23	Aurora	\$15,467
24	Bagley	\$20,181
25	Blasco	\$17,611
26	Boyer	\$6,139
27	Cohen	\$38,258
28	Colford	\$27,746

1	Epstein	\$9,129
2	Evers	\$42,494
3	Ishihama	\$14,222
4	Larkin	\$26,468
5	Macias	\$8,180
6	Mystic Bay	\$23,063
7	Stacy	\$21,705
8	Torrey Pines	\$4,262
9	Wright	\$16,159

10 Exs. 382-411.

11 Additionally, Zurich agreed to contribute toward settlements of the claims asserted against  
 12 the insureds, reached in connection with each the underlying matters, incurring \$862,890 based on  
 13 the following contributions:

14	Aurora	\$22,222
15	Bagley	\$4,256
16	Blasco	\$183,000
17	Boyer	\$0 (waiver of costs)
18	Cohen	\$40,000
19	Colford	\$100,000
20	Epstein	\$200
21	Evers	\$9,000
22	Ishihama	\$4,000
23	Larkin	\$50,000
24	Macias	\$225,000
25	Mystic Bay	\$76,000
26	Stacy	\$76,000
27	Torrey Pines	\$17,778
28	Wright	\$55,434

Conclusions of Law

I. This Court Has Already Held That Ironshore Improperly Denied Coverage In Connection With Each Of The Underlying Lawsuits.

On September 30, 2014, this Court granted Plaintiffs' Motion for Partial Summary Judgment, and declared that Defendant Ironshore had a duty to defend its insured, Champion Masonry, in an underlying action styled Garcia v. Centex Homes (the Garcia Action). Dkt. No. 27. With respect to the Garcia Action, Ironshore denied a duty to defend its insured Champion Masonry, asserting that the Continuous or Progressive Injury or Damage exclusion precluded all possible coverage. The Court found that the complaint in the Garcia Action alleged damages potentially falling within the scope of the Ironshore Policy insuring agreement. Dkt. No. 27. Further, the complaint in Garcia was "vague as to the temporal implications of the alleged damages, and therefore, it is not clear on the face of the Garcia Complaint whether the alleged damages were or were not sudden and accidental." Dkt. No. 27, 6:10-13. Accordingly, this Court held that the exclusion relied upon by Ironshore did not eliminate the potential for coverage under the Ironshore policy and declared that Ironshore had a duty to defend Champion Masonry in the Garcia Action. Dkt. No. 27, 7, 2-4.

Thereafter, the Parties filed cross-motions for summary judgment, putting at issue Ironshore's duty to defend six (6) other insureds with respect to the balance of underlying actions, all of which Ironshore had declined coverage. In addressing these motions, this Court issued an Order which again found that a potential for coverage existed with respect to each of the insureds in each of the underlying actions and that the potential for coverage with respect to each was not eliminated by the Ironshore progressive damage exclusion. Dkt. No. 72. In so doing, this Court noted as follows:

This case arises from a dispute between co-insurers over coverage for sixteen separate underlying construction defect suits in Nevada state court. . . .

In each of these underlying cases, despite the fact that the insureds had commercial general liability policies with both Plaintiffs and Defendant Ironshore, they were defended and indemnified only by Plaintiffs. The insureds' policies with Defendant Ironshore afforded coverage between varying dates in the years 2009, 2010, and 2011. In



1 each case, Defendant Ironshore issued a denial letter stating that the  
2 insured's work was completed prior to the onset of the policy, and  
3 therefore coverage was not triggered pursuant to the policy's  
4 "Continuous or Progressive Injury or Damage Exclusion." See, e.g.,  
5 (Jan. 24, 2011, Cedco Denial Letter p. 2, ECF No. 55-6); (Champion  
6 Masonry Denial Letter p. 2, ECF No. 59). In the instant case,  
7 Plaintiffs allege that the claims were wrongly denied by Defendant  
8 Ironshore, and that Defendant Ironshore had a duty to defend and  
9 indemnify the insureds in each of the sixteen underlying actions.

10 Dkt. No. 72, 1:22-2:25.

11 Of significance, this Court ruled that Ironshore owed a duty to defend in connection with  
12 each of the underlying matters. Dkt. No. 72, 7:5-15:6. This court noted that the allegations in seven  
13 of the remaining sixteen underlying actions were identical to those made in the Garcia Action and,  
14 as in Garcia, did not specify when the alleged property damage occurred and did not contain  
15 sufficient allegations from which to conclude the damage was not sudden and accidental. Having  
16 recognized that these allegations triggered Ironshore's duty to defend in Garcia, this Court held that  
17 Ironshore also had a duty to defend in the seven identical actions. This Court then analyzed the  
18 allegations in each of the remaining nine underlying actions and held that in each, allegations gave  
19 rise to the possibility of coverage under the Ironshore policies, a possibility that was not eliminated  
20 under the progressive damage exclusion, and that Ironshore's duty to defend was triggered in each.

21 In the cross motions, Ironshore argued that even if had a duty to defend in the underlying  
22 actions, Plaintiffs failed to establish that Ironshore had a duty to indemnify the insureds. This Court  
23 held that Ironshore mischaracterized the Plaintiffs' burden, as "where a nonparticipating co-insurer  
24 is found to have a duty to defend in an already settled action, the insurer attempting to disclaim  
25 coverage bears the burden of proving the applicability of any policy exclusions." Dkt. No. 72,  
26 15:11-13. This Court went onto explain as follows:

27 Therefore, the question at issue is not whether Plaintiffs have  
28 sufficiently shown that Defendant Ironshore had a duty to indemnify,  
but instead whether Defendant Ironshore has sufficiently shown that it  
lacked a duty to indemnify in the underlying cases due to the  
exclusions in its policies. As Defendant Ironshore has not presented  
evidence demonstrating that the property damage alleged in the  
sixteen underlying cases fell within its policy exclusions,  
it has failed to carry this burden, and its Motion for Summary  
Judgment will accordingly be denied as to Plaintiffs' contribution  
claims.

1 Dkt. No. 72, 16:7-13.

2 This Court ruled that Ironshore, by improperly failing to defend, bears the burden of proving  
3 that it lacked a duty to indemnify and that “Defendant Ironshore has not presented evidence  
4 demonstrating that the property damage alleged in the sixteen underlying cases fell within its policy  
5 exclusions.” Dkt 72, 16:10-11.

6 In connection with a motion for reconsideration Ironshore filed, this Court reiterated its prior  
7 rulings, stating: “the Court found that Defendant Ironshore had a duty to defend its insureds in the  
8 underlying actions, and that Defendant Ironshore did not provide sufficient evidence for the Court  
9 to conclude that it lacked a duty to indemnify.” Dkt No. 84, 3:3-6. The Court denied the motion for  
10 reconsideration, finding neither clear error nor manifest injustice in the reasoning of its previous  
11 order. The Court expounded on its ruling as follows:

12 Additionally, the Court reiterates that Defendant Ironshore, as a  
13 nonparticipating co-insurer, bears the burden of demonstrating that  
14 the policy exclusion applies to each of the underlying actions. See,  
15 e.g., PMA Capital Ins. Co. v. Am. Safety Indem. Co., 695 F. Supp. 2d  
16 1124, 1125 (E.D. Cal. 2010) (“Once a party claiming coverage shows  
17 a potential for coverage under the coinsurer’s policy, the coinsurer  
18 must conclusively prove with undisputed evidence that no coverage  
19 existed under the policy.”). In the context of this case, this means that  
20 Defendant Ironshore bears the burden of showing that the damage at  
21 issue was not: (1) “sudden and accidental”; (2) “in the process of  
22 taking place prior to the inception date of [the] policy”; or (3) “of the  
23 same general nature or type as a condition, circumstance or  
24 construction defect which resulted in ‘bodily injury’ or ‘property  
25 damage’ prior to the inception date of [the] policy.” (Second  
26 Summary Judgment Order 8:1-14).

27 Dkt. No. 84, 4:22-25.

28 In summary, in prior rulings, this Court has concluded that:

1. Ironshore owed a duty to defend as to each underlying lawsuit at issue in this case;
2. Ironshore improperly denied coverage in connection with each of the underlying matters;
3. Ironshore, as the nonparticipating co-insurer bears the burden of demonstrating that a policy exclusion eliminated coverage with respect to the duty to indemnify; and
4. Ironshore failed to carry in its motions for summary judgment and reconsideration.

Dkt. Nos. 27, 72, 84.

1 II. Ironshore Has Not Met Its Burden Of Proving The Absence of Coverage.

2 Under Nevada law, “[a]n insurer . . . bears a duty to defend its insured whenever it ascertains  
3 facts which give rise to a potential for coverage under the policy.” United Nat’l Ins. Co. v. Frontier  
4 Ins. Co., 99 P.3d 1153, 1158 (Nev. 2004). When a duty to defend is shown, nonparticipating  
5 coinsurers are presumptively liable for both the costs of defense and settlement. Safeco Ins. Co. v.  
6 Superior Court, 140 Cal.App.4th 874 (2006), Employers Ins. Co. of Wausau v. Lexington Ins. Co.,  
7 2014 WL 4187842 (C.D. Cal. 2014); Acceptance Ins. Co. v. American Safety Risk Retention  
8 Group, Inc., 2011 WL 3475305 (S.D. Cal. 2011). By virtue of the settlement, the parties forgo their  
9 right to have liability established by a trier of fact as the settlement becomes presumptive evidence  
10 of the insured's liability and the amount thereof. Advent, Inc. v. National Union Fire Insurance  
11 Company of Pittsburgh, 2016 WL 7100489 (Cal. App. 2016); Westport Ins. Corp. v. Northern  
12 California Relief, 76 F.Supp.3d 869 (N.D. Cal. 2014); Assurance Co. of America v. National Fire &  
13 Marine Ins. Co., 2012 WL 1970017 (D. Nev. 2012). By refusing to participate, therefore, the  
14 recalcitrant coinsurer waives the right to challenge the reasonableness of defense costs and amounts  
15 paid in settlement because any other rule would render meaningless the insured's right to settle.  
16 Great American Ins. Co. v. Sequoia Ins. Co., 2016 WL 844819 (C.D. Cal. 2016); Federal Ins. Co. v.  
17 National Union Fire Ins. Co. of Pittsburgh, PA, 2013 WL 1209665 (C.D. Cal. 2013).

18 When it is demonstrated that the non-participating insurer owed a duty to defend, the burden  
19 shifts to the non-participating insurer to prove the absence of coverage as the settling insurer need  
20 not prove actual coverage. Valley Forge Ins. Co. v. Zurich American Ins. Co., 2014 WL 4980302  
21 (N.D. Cal. 2014); Axis Surplus Ins. Co. v. Glencoe Ins. Ltd., 204 Cal.App.4th 1214 (2012). The  
22 **absence** of coverage, therefore, constitutes an affirmative defense for which the non-participating  
23 insurer bears the burden of proof. St. Paul Mercury Ins. Co. v. Mountain West Farm Bureau Mut.  
24 Ins. Co., 210 Cal.App.4th 645 (Cal. 2012); MGA Entertainment, Inc. v. Hartford Ins. Group, 2012  
25 WL 628203 (C.D. Cal. 2012); PMA Capital Ins. Co. v. American Safety Indem. Co., 695 F.Supp.2d  
26 1124 (E.D. Cal. 2010).

27 As the disclaiming insurer that improperly failed to defend, Ironshore bears the burden of  
28 proving the absence of coverage, which it has not done based on the evidence admitted at trial.

1 Ironshore's main argument is that the CP exclusion included in all of its policies bars  
2 coverage. Ironshore, however, has failed to demonstrate that this exclusion applies to bar actual  
3 coverage.

4 Prong 1 of the CP Exclusion seeks to deem all damages arising from work completed before  
5 the inception of any of its policies as occurring outside of its policy period. The exclusion, however,  
6 does not apply to sudden damages. Ironshore has presented no evidence regarding when any of the  
7 damages actually occurred, and therefore whether any of the damages occurred suddenly. Absent  
8 this evidence, Ironshore cannot meet its burden of proving that none of the damages occurred  
9 suddenly.<sup>3</sup>

10 A separate consideration is the fact that the provision deeming that all damages occur  
11 outside of its policy period runs counter to the coverage otherwise available under the policy,  
12 creating an inherent ambiguity. See Saarman Construction, Ltd v. Ironshore Specialty Ins. Co.,  
13 2016 WL 4411814 (N.D. Cal. 2016). This Court agrees that the deemer sentence included in the CP  
14 Exclusion runs counter to the purpose and intent of the policy, creating an inherent ambiguity.

15 Prong 2 of the CP Exclusion seeks to bar coverage for damages "which . . . are in the  
16 process of taking place prior to the inception date of this policy and continue[ ]" while Prong 3  
17 seeks to bar coverage "which is, or is alleged to be, of the same general nature or type as a  
18 condition" as to damages which continue. At trial, Ironshore has failed to meet its burden of  
19 demonstrating that all damages at issue precede the inception of its policy and continue into its  
20 policy period. As the underlying lawsuits are largely silent as to the timing of the damages, no  
21 conclusive evidence exists regarding the timing of the damages. Given this, Ironshore cannot meet  
22 its burden.

23 The balance of arguments Ironshore asserts (i.e., purported known loss rule, "your work"  
24 exclusion) have been previously addressed by this Court and are unavailing.

25 Based on the foregoing, this Court concludes that Ironshore cannot meet its burden of  
26 proving the absence of actual coverage such that it is liable for both defense expenses and  
27 settlement payments Zurich has made.

28 <sup>3</sup> While prong 1 also requires that the damages result from an accident, this requirement already exists by virtue of the insuring agreement and its requirement that damages result from an "occurrence."

1 III. This Court Awards Zurich An Equal Share Of The Sums It Has Incurred.

2 Equitable contribution apportions costs among insurers when several insurers are obligated  
3 to indemnify or defend the same loss or claim and one insurer has paid more than its share of the  
4 loss or defended the action without any participation by the others. Travelers Property Casualty  
5 Company of America v. Amica Mutual Ins. Co., 2016 WL 317657 (D. Nev. 2016), citing Hudson  
6 Ins. Co. v. Colony Ins. Co., 624 F.3d 1264, 1267 (9th Cir. 2010). Equitable contribution is implied  
7 by law and designed to prevent the potentially unfair result that would occur if the company to pay  
8 first were left to cover the entire loss, and therefore exists to ensure that one insurer does not profit  
9 at the expense of another. Fireman's Fund Ins. Co. v. Maryland Cas. Co., 65 Cal. App. 4th 1279,  
10 1296 (1998); Howard v. American Nat. Fire Ins. Co., 187 Cal.App.4th 498 (2010).

11 By virtue of the rulings made herein, this Court concludes that Zurich is entitled to  
12 contribution from Ironshore.

13 There is no fixed rule for allocating costs and expenses among primary insurers covering the  
14 same loss. Evanston Ins. Co. v. Western Community Ins. Co., 2016 WL 1555706 (D. Nev. 2016);  
15 North American Specialty Ins. Co. v. National Fire & Marine Ins. Co., 2013 WL 1332205 (D. Nev.  
16 2013). Thus, allocation is a decision that ultimately rests in the discretion of the Court. See  
17 Centennial Ins. Co. v. United States Fire Ins. Co., 88 Cal.App.4th 105 (2001); Maryland Casualty  
18 Co. v. Nationwide Mutual Ins. Co., 81 Cal.App.4th 1082, 1089 (2000).

19 The policies issued by both Zurich and Ironshore each include provisions which explicitly  
20 state that an equal share approach will be followed if the other available insurance which exists  
21 permits for contribution by equal shares. Given this, the language of the policies themselves  
22 support an equal shares allocation, a model other Courts have followed. See Harleysville Mut. Ins.  
23 Co. v. Hartford Cas. Ins. Co., 90 F.Supp.3d 526 (E.D.N.C. 2015) Travelers Indem. Co. of America  
24 v. AAA Waterproofing, 2014 WL 201726 (D. Colo. 2014); Residence Mut. Ins. Co. v. Travelers  
25 Idem. Co. of CT, 26 F.Supp.3d 965 (C.D. Cal. 2104); Carolina Cas. Ins. Co. v. Travelers Prop. Cas.  
26 Co., 90 F.Supp.3d 304 (D.N.J. 2014).

27 This Court is aware that there are various other allocation models, and that Courts in other  
28 jurisdictions have employed alternate models in allocating losses between insurers (i.e., number of

1 limits, "time on risk," etc.) based on the unique facts before them. In this case, difficulty exists in  
 2 employing alternate models as not only is the timing of the damages is unknown, the evidence  
 3 provided this Court is unclear regarding when construction work was performed and or completed.  
 4 For this reason, this Court declines to adopt a different approach.

5 Based on the foregoing, this Court concludes that fairness and equity weigh in favor of a  
 6 equal shares approach.

7 The policies issued by both Zurich and Ironshore include deductible endorsements generally  
 8 providing that any coverage obligation attaches in excess of certain sums. Ironshore policies  
 9 contain varying deductible amounts - \$5,000 for Universal Framing, \$25,000 for Stewart & Sundell  
 10 and \$10,000 for all other trades. While Zurich's policies generally include lower amounts, payment  
 11 records generally reflect that Zurich largely received payments back from insureds for any  
 12 deductible amounts owing.

13 While the parties agree that deductible amounts may be considered by this Court in reaching  
 14 an appropriate final allocation, they disagree as to how to do so. Zurich takes the position that the  
 15 deductible amount should be deducted from the gross amount since its payments offset against the  
 16 deductible owing under the policies Ironshore issued. Ironshore, in contrast, argues that the  
 17 deductible amount should be deducted from its net share.

18 This Court agrees with Zurich and concludes in equity that Zurich's payments offset against  
 19 any deductible amount owing under the policies Ironshore issued such that any reduction applies to  
 20 the gross amount incurred, and not Ironshore's net share. See Continental Cas. Co. v. St. Paul  
 21 Surplus Lines Ins. Co., 803 F.Supp.3d 1113 (E.D. Cal. 2011), citing Montgomery Ward & Co., Inc.  
 22 v. Imperial Cas. & Indem. Co., 81 Cal.App.4th 356, 370 (2000) and holding that insurance can be  
 23 used to offset against a deductible in another insurer's policy.

24 In applying these facts and law, this Court concludes that net amount incurred by Zurich,  
 25 after reduction for deductibles, is \$976,466 based on the following:

<b>Insured/Matter</b>	<b>Total Incurred</b>	<b>Deductible</b>	<b>Net Incurred</b>
Cedco - Bagley	\$24,437	\$10,000	\$14,437
Cedco - Blasco	\$200,611	\$10,000	\$190,611

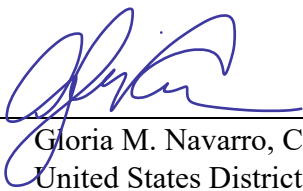
1	Cedco - Ishihama	\$18,222	\$10,000	\$8,222
2	Laird - Cohen	\$78,258	\$10,000	\$68,258
3	Laird - Colford	\$127,746	\$10,000	\$117,746
4	Laird - Stacy	\$97,705	\$10,000	\$87,705
5	Laird - Wright	\$71,593	\$10,000	\$61,593
6	PR Constr. - Epstein	\$9,329	\$10,000	\$0
7	Stewart - Aurora	\$37,689	\$25,000	\$12,689
8	Stewart - Boyer	\$6,139	\$25,000	\$0
9	Stewart - Mystic Bay	\$99,063	\$25,000	\$74,063
10	Stewart - Torrey Pines	\$22,040	\$25,000	\$0
11	Sunworld - Evers	\$51,494	\$10,000	\$41,494
12	Universal - Macias	\$233,180	\$5,000	\$228,180
13	Universal Larkin	\$76,468	\$5,000	\$71,468
14	<b>Totals</b>	<b>\$1,153,974</b>		<b>\$976,466</b>

15 Based on an equal shares approach, this Court awards Zurich \$488,233, constituting one half  
16 of \$976,466, exclusive of any entitlement to prejudgment interest.

17 To the extent not directly addressed herein, this Court finds any other positions furthered by  
18 Ironshore to be unavailing, and therefore not impacting the rulings made herein.

19 **IT IS SO ORDERED.**

20 **DATED** this 12 day of October, 2017.

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25 Gloria M. Navarro, Chief Judge  
26 United States District Court  
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