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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

HALL CA-NV, LLC, a Texas limited liability)
company,)
)
Plaintiff,)
)
vs.)
)
LADERA DEVELOPMENT, LLC, a Nevada)
limited liability company,)
)
Defendant.)

3:18-cv-00124-RCJ-CBC

ORDER

On Plaintiff Hall’s motion, this Court granted summary judgment on March 29, 2022, resolving most but not all of the issues in this case. (ECF No. 157.) Presently, before this Court are two matters: (1) Defendant Ladera’s motion to reconsider the order on summary judgment or for certification for an interlocutory appeal and (2) whether the Court should grant partial summary judgment regarding which party is entitled to the proceeds of Defendant Ladera’s title insurance.¹

¹ Defendant also filed a motion for leave to file a supplemental brief in support of its motion for reconsideration. (ECF No. 170.) This comes after Defendant has filed its original motion and a reply. (ECF Nos. 159 and 162.) The Court finds that Defendant has not shown the necessary good cause for this supplemental filing. Its only argument that the Court should consider the additional brief is that the Court let the parties argue this motion at a hearing despite not noticing it for that hearing. (ECF No. 161.) This is not sufficient. There is no right to oral argument. Even more, there is no indication that Defendant could not have made the same points that it makes in the supplemental brief in its earlier filings. The Court therefore denies the motion for leave to supplement.

1 In the order on summary judgment, the Court held, among other things, that the
2 Intercreditor Agreement between the parties is a valid and enforceable contract. Defendant Ladera
3 challenges that conclusion. It contends that this Court erred by rejecting Defendant Ladera’s
4 argument that the Intercreditor Agreement was the product of fraud and mistake. The Court
5 rejected this argument because, as a matter of law, Defendant Ladera could not justifiably rely on
6 certain representations in the Intercreditor Agreement. Specifically, Defendant Ladera argues that
7 Texas law does not allow for such a conclusion where a party relied upon the words of the contract.
8 This Court is unpersuaded and denies this motion.

9 Turning to the second issue, on April 22, 2022, this Court held a hearing in which it
10 indicated that it was considering granting partial summary judgment *sua sponte* in favor of
11 Defendant Ladera to hold that Defendant Ladera is entitled to the proceeds of the title insurance
12 policy as a matter of law. (ECF Nos. 161, 165.) The parties have each submitted an opening brief
13 regarding this issue as well as a response. (ECF Nos. 163, 164, 166, 167.) After carefully
14 considering these filings, the Court is persuaded by Plaintiff Hall and holds that Plaintiff Hall is
15 entitled to the insurance proceeds.

16 This Order should resolve all but one outstanding issue. This Court has held that Plaintiff
17 Hall has successfully shown Defendant Ladera is liable for breach of contract for contesting
18 Plaintiff Hall’s superior loan status in the Bankruptcy Court. Plaintiff Hall’s damages for this
19 breach remain unresolved. Plaintiff Hall contends that these damages may be calculated through a
20 “prove-up evidentiary hearing.” (See ECF No. 153 at 18.) However, as these damages are “an
21 element of damages under a contract,” they need to go to trial even though the damages are for
22 attorney fees and litigation costs. *J.R. Simplot v. Chevron Pipeline Co.*, 563 F.3d 1102, 1116 (10th
23 Cir. 2009) (quoting 10 J. MOORE, *Moore’s Federal Practice* § 54.171(1)(a) (3d ed. 2008));
24 *accord Taurus IP, LLC v. DaimlerChrysler Corp.*, 726 F.3d 1306, 1342–43 (Fed. Cir. 2013). For

1 this reason, this case shall proceed to a bench trial² on the issue of damages, and the parties shall
2 file a proposed joint pretrial order within thirty days of the entry of this Order. The proposed joint
3 pretrial order should indicate whether there are any further issues for trial.

4 **FACTUAL BACKGROUND**

5 New Cal-Neva Lodge, LLC (“Borrower”) previously owned a certain property that
6 straddles the border of Nevada and California located in Crystal Bay, Washoe County, Nevada
7 and in Placer County, California (the “Property”). Borrower acquired the Property in February
8 2013 and operated a resort hotel on it known as the “Cal-Neva Lodge.”

9 On June 26, 2013, Borrower and Plaintiff Hall CA-NV, LLC (“Plaintiff Hall”) entered into
10 a letter of engagement by which Plaintiff Hall tentatively agreed to provide Borrower with a loan
11 for \$29,000,000 “to pay expenditures related to the renovation of improvements on the Property.”
12 (ECF No. 53 Ex. 2 (“June 26 Letter”).) Per the letter, final approval of the loan would be based
13 upon certain conditions being met such as a renovation plan approved by Plaintiff Hall. (*Id.*)

14 Over the next fifteen months, Plaintiff Hall and Borrower negotiated the terms of the loan,
15 reviewed construction plans, and made modifications before the loan closed on September 30,
16 2014. (*See* ECF No. 139 Ex. 1 (“Construction Loan Agreement”).) Under this agreement, Plaintiff
17 Hall would loan the money out over time with monthly installments as needed. (*Id.* § 12.)

18 During the negotiation period, the parties also discussed with Defendant Ladera
19 Development LLC (“Defendant Ladera”) about acquiring additional funds to ensure there would
20 be sufficient moneys to complete the construction project. Borrower agreed with Defendant Ladera
21 that Defendant Ladera would contribute a \$6,000,000 mezzanine loan to Borrower for the
22 construction project, which also closed on September 30, 2014. (ECF No. 139 Ex. 3 (“Junior Loan
23 Agreement”).) Defendant Ladera indicated that the loan was worth the risk involved if it were to

24 ² Neither party has filed a jury demand.

1 be second only to Plaintiff Hall’s loan, which Plaintiff Hall acknowledged in an internal
2 memorandum dated September 15, 2014. (ECF No. 145 Ex. 11 (“Hall Memo”) at 2 (“Ladera is
3 requiring a 2nd lien secured by the property, and a pledge of the Borrower partnership interest.”).)

4 Before the September 30, 2014 closing date, Plaintiff Hall and Defendant Ladera entered
5 into a separate agreement, whereby Plaintiff Hall’s loan would be senior to Defendant Ladera’s
6 loan. (ECF No. 139 Ex. 4 (“Intercreditor Agreement”).) Relevant to this case, the Intercreditor
7 Agreement imposed a number of duties onto Defendant Ladera:

8 1. “Junior Lender shall not in any manner interfere with Senior Lender’s security
9 interests in the Property unless and until all of the Senior Debt is no longer
outstanding.” (*Id.* at 4.)

10 2. “Junior Lender agrees that it will not at any time contest the validity, perfection,
11 priority or enforceability of any of the Senior Debt, any of the Senior Loan
Documents, or any of the liens and security interests of Senior Lender in the
Property or other collateral securing the Senior Debt.” (*Id.* at 5.)

12 3. “[Junior Lender will] not take any action or vote in any way so as to (A) contest
the legality, validity or enforceability of this Agreement or any Senior Loan
Document” (*Id.* at 11.)

13 4. “Notwithstanding anything to the contrary contained in this Agreement, during
14 the continuance of any Insolvency Proceeding, the Senior Debt shall first be
indefeasibly paid and satisfied in full in cash before any payment or distribution of
15 cash or other property is made upon the Junior Debt. In any Insolvency Proceeding,
any payment or distribution which may be payable or deliverable with respect to
16 the Junior Debt shall be paid or delivered directly to Senior Lender for application
to the payment and satisfaction of the Senior Debt unless and until the Senior Debt
shall have been indefeasibly paid and satisfied in full in cash.” (*Id.* at 10.)

17 5. “If applicable, Junior Lender agrees to vote for any plan of reorganization
18 approved by Senior Lender in respect of Borrower in any Insolvency Proceeding
respecting Borrower; provided, however, that Senior Lender agrees not to
unreasonably withhold or delay its consent to Junior Lender’s voting for a different
19 plan of reorganization if (i) the different plan is at least as beneficial to Senior
Lender (including without limitation with respect to Senior Lender’s payment, lien
20 and remedy rights thereunder) as the plan approved by Senior Lender, and (ii)
Junior Lender agrees in writing (A) that any payments received by Junior Lender
21 by virtue of such Insolvency Proceeding will be held by Junior Lender in trust for
the benefit of Senior Lender until such time as the Senior Debt is satisfied in full,
22 and (B) if the Senior Debt will not be satisfied in full by virtue of such Insolvency
Proceeding, promptly pay over to Senior Lender the payments so held in trust up to
23 the amount of the deficiency.” (*Id.*)

24 6. “Junior Lender agrees not to oppose any post-petition motion filed or supported
by Senior Lender, including, without limitation, motions for adequate protection

1 with respect to the ordinary course of its business or for post-petition borrowing
2 from Senior Lender.” (*Id.* at 12.)

3 7. “Junior Lender shall release insurance proceeds and condemnation awards, to be
4 applied to the restoration of the Property or to payment of the indebtedness
5 evidenced and secured by the Senior Loan Documents, in the same manner as
6 Senior Lender, under, the terms and provisions of the Senior Loan Documents, so
7 that no conflicts are created by and among Senior Lender, Junior Lender, or others
8 in the application of insurance proceeds or condemnation awards. Senior Lender
9 has the sole and exclusive right, as against Junior Lender, to adjust settlement of
10 insurance claims under the insurance policies in the event of any covered loss or
11 destruction. All proceeds of such insurance related to the Property shall inure to the
12 Senior Lender, and Junior Lender shall cooperate (if necessary) in a reasonable
13 manner in effecting the payment of such insurance proceeds to Senior Lender. In
14 the event Senior Lender permits the Borrower to utilize the proceeds of insurance
15 to replace any part of the Property, the consent of Senior Lender shall be deemed
16 to include the consent of Junior Lender.” (*Id.* at 5.)

17 To protect their respective interests in the Property, both Plaintiff Hall and Defendant
18 Ladera acquired title insurance policies. Plaintiff Hall purchased a title insurance policy from Old
19 Republic National Title Insurance Company (“Old Republic”), which failed to cover any superior
20 mechanics’ lien arising from Penta’s prior work on the Property. (ECF No. 145 Ex. 22 (“Hall
21 Insurance Policy”) at LAD006948, LAD006973 (omitting standard coverage for “[t]he lack of
22 priority of the lien of the Insured Mortgage upon the Title . . . as security for each and every
23 advance of proceeds of the loan secured by Insured Mortgage over any statutory lien for services,
24 labor, or material arising from construction of an improvement or work related to the land when
the improvement or work”) Defendant Ladera also purchased title insurance from Old
Republic. (ECF No. 145 Ex. 23 (“Ladera Insurance Policy”).) Unlike Plaintiff Hall’s Insurance
Policy, Defendant Ladera’s insurance policy did cover mechanics’ liens. (*Id.*)

Defendant Ladera hired a law firm, Hopkins Carley, a law corporation. Defendant Ladera
hired these attorneys to review the Intercreditor Agreement prior to entering the mezzanine loan
to make sure it was enforceable, acceptable to Defendant Ladera, and to explain the terms to it, as

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1 well as to review the loan documents between Plaintiff Hall and the Borrower, and Plaintiff Hall
2 and Penta. (ECF No. 139 Ex. 5 (“Jeffrey Pickett Depo”) at 86:11–87:25.)

3 Before the parties closed the loans in September 2014, some construction work was
4 performed on the Property from fall 2013 to January 2014. This work included the following: work
5 on a model room, repair the roof, replace the boiler, remove trees, and abatement work for asbestos.
6 (ECF No. 145 Ex. 5 (“Jaynes Depo”) at 89:2–22.) To complete this work, Borrower hired the
7 PENTA Building Group (“Penta”). Plaintiff Hall’s 30(b)(6) witness, Michael Jaynes, admits that
8 he was aware of this construction work as early as late 2013. (*Id.* at 63:8–11.)

9 Under Nevada Revised Statutes Chapter 108, contractors generally enjoy a lien on
10 properties on which they have performed work. Nev. Rev. Stat. § 108.225. These liens are prior
11 over subsequent deeds of trust and mortgages. Nev. Rev. Stat. §§ 108.2453, 108.2457. As such,
12 Penta arguably had a first-in-line lien on the Property, giving Penta’s lien priority over Plaintiff
13 Hall’s and Defendant Ladera’s deeds of trust.

14 Between the 2013 work and the closing of the loans, Plaintiff Hall and Penta made several
15 representations that at least appeared to posit that Penta had not performed any work on the
16 Property before the closing of the loans. First, there was a document titled “Contractor’s
17 Agreement and Consent to Assignment of Construction Documents,” which Penta and Plaintiff
18 Hall signed on September 29, 2014. (ECF No. 145 Ex. 17 (“Contractor’s Agreement”).) This
19 document states:

20 Under the Agreement, no work of any kind (including the destruction or removal
21 of any existing improvements, site work, clearing, grubbing, draining, or fencing)
22 has been commenced or performed on the property described in the Agreement and
no equipment, or materials have been delivered to the property described in the
agreement for any purpose whatsoever.

23 (*Id.* at 1.) The Contractor’s Agreement defines the term “Agreement” collectively to include “any
24 other agreements executed by [Penta] and [Borrower] in connection with the [Property].” (*Id.*)

1 Second, the deeds of trust providing Defendant Ladera with a lien on the Property list
2 Defendant Ladera as having a “second priority lien.” (ECF No. 145 Ex. 13 (“Deeds of Trust”) at
3 1.) This is in spite of the fact that Penta arguably had the first-in-line lien, making Plaintiff Hall
4 the second-in-line lien and Defendant Ladera the third-in-line lien.

5 Third, several places in the Junior Loan Agreement indicate that Defendant Ladera will be
6 granted “a second priority lien on the” Property. (Junior Loan Agreement at 2.) Under an article
7 titled “CONDITIONS PRECEDENT TO LENDING,” Defendant Ladera’s lien “must be duly
8 perfected and in a second priority lien position subject only to the deed of trust securing” Plaintiff
9 Hall’s lien. (*Id.* at 6.)

10 Fourth, the Intercreditor Agreement states that Defendant Ladera’s “Junior Note is secured
11 by[] that certain second lien Deed of Trust, Security Agreement, Assignment of Rents and Fixture
12 Filing to be recorded in the real property records.” (Intercreditor Agreement at 1.) This agreement
13 also included two lists of documents called the “Junior Loan Documents” and the “Senior Loan
14 Document,” and stated that “true, correct and complete copies of which have been delivered to”
15 Plaintiff Hall and Defendant Ladera. (*Id.* at 6.) The documents were not attached to the
16 Intercreditor Agreement; the titles were merely listed. (*Id.* at Exs. B, C.) Among these lists are the
17 Contractor’s Agreement, Deeds of Trust, and Junior Loan Agreement. (*Id.*)

18 While there are some representations that at least suggest that Penta had not performed any
19 work on the Property, there are other representations to Defendant Ladera explicitly stating that
20 such work occurred. For example, Defendant Ladera is owned and operated by two brothers,
21 Jeffrey and James Pickett. On March 28, 2014, six months before closing, James Pickett received
22 an email from Borrower’s representative and forwarded that email to Jeffrey Pickett regarding the
23 preconstruction work, stating, “What they spent the 3m on attached.” (ECF No. 139 Ex. 10
24 (“March 28 Email”).) Attached to the email, was a spreadsheet detailing the preconstruction work

1 that was completed, including that Borrower still owed Penta \$133,370. (*Id.*) It listed the following
2 construction work that was performed on the property leading up to that date:

Construction	
Tower Roof Repair & Mansard Re-C	428,577
Model Room	85,299
Mobilization & Demolition	-
Boiler Replacement	55,965
Tower Abatement	-
Tree Removal	10,100
Total	<u>579,942</u>

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9 (*Id.*) In his deposition, James Pickett admits receiving this information from Borrower’s
10 representative and forwarding it to his brother, Jeffrey Pickett, but James does not admit to
11 reviewing the attachment. (ECF No. 139 Ex. 6 (“James Pickett Depo”) at 215:2–16:11.)

12 In April 2014, James and Jeffrey Pickett exchanged emails with an individual named Brad
13 Rencher containing an attachment titled “Confidential Offering Memorandum for the Project.”
14 (ECF No. 139 Ex. 11 (“Confidential Memo”).) They discussed the possibility of extending the
15 mezzanine loan to Borrower. (*Id.* at LAD004398–99.) In the attached memorandum, the
16 preconstruction was listed; “The Property was closed in Sept. 2013 to begin roof repairs, model
17 room, and abatement work in preparation for the full construction start.” (*Id.* at LAD004446.)
18 Jeffrey Pickett testified that he is “sure” that he had seen the Confidential Memo. (Jeffrey Pickett
19 Depo at 253:11–54:3.)

20 In addition to these representations, Penta’s Fed. R. Civ. P. 30(b)(6) witness, Mark Briggs,
21 testified that the construction work was “obvious.” (ECF No. 139 Ex. 12 (“Briggs Depo”) at 51–
22 53.) He stated, “Fences were up. Our trailers were out. I’m not sure how you cannot see that
23 construction was -- that there was activity on the project.” (*Id.*) He further affirmed that the
24 “fencing had been out there since 2013 and was there well past September 2014.” (*Id.* at 138.) The

1 fencing also had signage, which read, “Construction Zone.” (*Id.* at 139.) Both James and Jeffrey
2 Pickett lived in the area and admitted to seeing the Property frequently. (James Pickett Depo at 58;
3 Jeffrey Pickett Depo at 50.)

4 James and Jeffrey Pickett both testified that they were not sure when they learned of the
5 preconstruction work on the Property. For example, James Pickett said, in his deposition,

6 Q. Sitting here today, do you recall whether you knew that work had been
performed before Ladera Development funded a penny?

7 A. No.

8 Q. No, you don’t recall?

9 A. I do not recall.

Q. Okay. So you could have been told that, and you just don’t remember?

A. Correct.

10 (James Pickett Depo at 149–50.) Likewise, for example, Jeffrey Pickett testified that he could not
11 recall if he was given access to a “Dropbox,” which contained an agreement such as one titled
12 “Preconstruction Services Agreement” between Penta and Borrower. (Jeffrey Pickett Depo at 118.)

13 In early 2016, Borrower fell behind on its financial obligations, and Plaintiff Hall declared
14 default. Shortly after this default, Penta filed suit against Plaintiff Hall in Nevada state court,
15 claiming that it had a mechanics’ lien with priority over Plaintiff Hall’s deed of trust. While this
16 case between Penta and Plaintiff Hall was in the discovery phase, Borrower filed for Chapter 11
17 Bankruptcy on July 28, 2016. The bankruptcy court merged the state court case with the ongoing
18 bankruptcy proceeding. The court then established a \$15,000,000 “Lien Litigation Reserve” to
19 ensure at least partial satisfaction of the liens against the Property. Defendant Ladera litigated
20 against Plaintiff Hall in bankruptcy court to attempt to recover at least partially on its \$6,000,000
21 loan. (*See, e.g.*, ECF No. 140 Ex. A (“Ladera Bankruptcy Plan”); Jeff Pickett Depo at 283:2–
22 284:8). Both Plaintiff Hall and Defendant Ladera also litigated together against Penta arguing the
23 mechanics’ lien was junior to the deeds of trust. (*See, e.g.*, ECF No. 140 Ex. H (“Motion for
24 Settlement”) at 10 of 31 (“While Hall continues to contest the priority of the liens of PENTA and

1 the Penta Subcontractors and other subcontractors, Hall recognizes that there is significant risk
2 that PENTA will prevail in the priority phase.”.)

3 Penta, Plaintiff Hall, Defendant Ladera, and various subcontractors entered into
4 negotiations on the best way to split the \$15,000,000 pot. But shortly into these negotiations, the
5 parties were able to exclude Defendant Ladera from participating based upon the Intercreditor
6 Agreement. The remaining parties to the negotiations agreed to a split of the money divvied up
7 between Plaintiff Hall and the various contractors, and they moved the bankruptcy court for
8 approval of the settlement. In the Motion for Settlement, Plaintiff Hall represented that it would
9 “exercise its rights under the Intercreditor Agreement with Ladera to insure Ladera’s nonobjection
10 to the motion to approve this Agreement and the Motion to Dismiss, including but not limited to
11 taking any action to enforce the Intercreditor Agreement, in the event Ladera breaches the terms
12 of the Intercreditor Agreement.” (*Id.* at 17 of 31.) Defendant Ladera did not contest the validity
13 and enforceability of the Intercreditor Agreement at that time or at all during the bankruptcy
14 proceedings. The bankruptcy court approved the proposed settlement.

15 ANALYSIS

16 The Court will first address Defendant Ladera’s motion and then turn to whether summary
17 judgment is proper.

18 ***I. Defendant Ladera’s motion for reconsideration or certification of interlocutory appeal.***

19 For this motion, Defendant Ladera essentially argues that under Texas law whether a party
20 exercised justifiable reliance cannot be decided as a matter of law where the party relied upon the
21 terms of the contract. The Court considered and rejected that argument in its order on summary
22 judgment and does so again here.

23 LR 59-1 controls the Court’s determination of Defendant Ladera’s request for
24 reconsideration. It states, in pertinent part:

1 A party seeking reconsideration under this rule must state with particularity the
2 points of law or fact that the court has overlooked or misunderstood. Changes in
3 legal or factual circumstances that may entitle the movant to relief also must be
4 stated with particularity. The court possesses the inherent power to reconsider an
5 interlocutory order for cause, so long as the court retains jurisdiction. Reconsideration also may be appropriate if (1) there is newly discovered evidence
6 that was not available when the original motion or response was filed, (2) the court
7 committed clear error or the initial decision was manifestly unjust, or (3) if there is
8 an intervening change in controlling law. . . . Motions for reconsideration are
9 disfavored. A movant must not repeat arguments already presented unless (and only
10 to the extent) necessary to explain controlling, intervening law or to argue new
11 facts. A movant who repeats arguments will be subject to appropriate sanctions.

12 Defendant Ladera relies on *Mercedes-Benz USA, LLC v. Carduco, Inc.*, 583 S.W.3d 553
13 (Tex. 2019). It claims that the Texas Supreme Court “emphasized that ‘[w]hether a party’s actual
14 reliance is also justifiable is ordinarily a fact question.’ It held only that there is no justifiable
15 reliance as a matter of law where ‘an oral representation . . . is directly contradicted by the express,
16 unambiguous terms of a written agreement between the parties.’” (ECF No. 159 (internal citations
17 omitted) (quoting *Mercedes-Benz*, 583 S.W.3d at 558–59).) From this and similar citations,
18 Defendant Ladera concludes, “This is not a situation where [Defendant Ladera] relied on an oral
19 representation that contradicted the contract – and thus, it was error to find that [Defendant
20 Ladera]’s reliance was not justified as a matter of law.” (*Id.*)

21 Defendant Ladera’s quotations of *Mercedes-Benz* fail to capture the meaning of that case.
22 To quote the first sentence in its entirety shows that summary judgment may be proper more
23 frequently than Defendant Ladera suggests: “Whether a party’s actual reliance is also justifiable is
24 ordinarily a fact question, *but the element may be negated as a matter of law when circumstances
exist under which reliance cannot be justified.*” *Mercedes-Benz*, 583 S.W.3d at 558 (emphasis
added). And while the *Mercedes-Benz* Court held that a party claiming fraud cannot justifiably
rely upon such fraudulent claims where the claims are directly contradicted by the terms of the
contract, it never held this was the only possible instance where justifiable reliance may be negated

1 as a matter of law. Rather, it stated, “Although [*JPMorgan Chase Bank, N.A. v. Orca Assets G.P.,*
2 *L.L.C.*, 546 S.W.3d 648, 660 n.2 (Tex. 2018)] discusses both direct contradiction and other red
3 flags, it does not require them both to negate justifiable reliance. In fact, we noted just the opposite,
4 stating that either could be sufficient to preclude justifiable reliance.”³ *Id.* at 559. As such, the
5 Texas Supreme Court has recently affirmed that a direct contradiction is *not* required to find that
6 justifiable reliance is precluded as a matter of law.

7 As discussed in this Court’s order granting summary judgment, there were a number of
8 “red flags” present here. To avoid reiterating the Court’s reasoning in that order, it will point to
9 one that is particularly telling: the email between Defendant Ladera’s two owner-managers with
10 an attached spreadsheet that noted Penta performed pre-construction work and was owed an
11 outstanding balance. The Court therefore did not err.⁴

12 Defendant Ladera alternatively requests that this Court certify an interlocutory appeal
13 under 28 U.S.C. § 1292(b). This statute provides that such an appeal may be taken where a district
14 court certifies “(1) that there [is] a controlling question of law, (2) that there [is] substantial grounds
15 for difference of opinion, and (3) that an immediate appeal may materially advance the ultimate
16 termination of the litigation.” *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1026
17 (9th Cir. 1981), *cause dismissed sub nom. Arizona v. U.S. Dist. Ct. for the Dist. of Arizona*, 459
18 U.S. 961 (1982), and *aff’d sub nom. Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983). If
19 Defendant Ladera were correct in its interpretation of Texas law, it would affect whether summary
20

21 ³ “Either ‘red flags’ alone or direct contradiction alone can negate justifiable reliance as a matter
of law.” *Orca Assets*, 546 S.W.3d at 660 n.2 (collecting cases).

22 ⁴ Defendant Ladera raises the same argument to claim that the Court erred in determining Defend-
23 ant Ladera could not rely on a unilateral mistake of fact claim. Defendant Ladera again argues that
it mistakenly believed that Penta had not yet started performing construction work. This claim fails
24 for the same reason, that is Defendant Ladera must show it exercised ordinary care, which is a
similar test to justifiable reliance. As such, the Court correctly held that claim should not proceed
as a matter of law.

1 judgment is appropriate, so there is a question of controlling law. The Court however finds that
2 the other two elements are not present here. The Texas Supreme Court has twice disavowed
3 Defendant Ladera’s interpretation of the law in the past five years, so there are not substantial
4 grounds for its difference of opinion. More importantly, as this case is prepared to proceed to a
5 short bench trial, an immediate appeal will not materially advance the ultimate termination of this
6 litigation.

7 ***II. The Court’s motion for partial summary judgment.***

8 Plaintiff Hall contends that it is entitled to the Ladera Insurance Policy proceeds based
9 upon the Intercreditor Agreement Section 3(a), which reads:

10 Junior Lender shall release insurance proceeds and condemnation awards, to be
11 applied to the restoration of the Property or to payment of the indebtedness
12 evidenced and secured by the Senior Loan Documents, in the same manner as
13 Senior Lender, under, the terms and provisions of the Senior Loan Documents, so
14 that no conflicts are created by and among Senior Lender, Junior Lender, or others
15 in the application of insurance proceeds or condemnation awards. Senior Lender
16 has the sole and exclusive right, as against Junior Lender, to adjust settlement of
17 insurance claims under the insurance policies in the event of any covered loss or
18 destruction. All proceeds of such insurance related to the Property shall inure to the
19 Senior Lender, and Junior Lender shall cooperate (if necessary) in a reasonable
20 manner in effecting the payment of such insurance proceeds to Senior Lender. In
21 the event Senior Lender permits the Borrower to utilize the proceeds of insurance
22 to replace any part of the Property, the consent of Senior Lender shall be deemed
23 to include the consent of Junior Lender.

18 (Intercreditor Agreement at 5.)

19 In its order analyzing Plaintiff Hall’s motion for summary judgment, this Court held the
20 following regarding the Ladera Insurance Policy:

21 The Court holds that [Section 3(a)] of the Intercreditor Agreement does not permit
22 Plaintiff Hall to recover the title insurance that Defendant Ladera acquired to solely
23 protect its interest in the Property. The insurance proceeds in this section are limited
24 to proceeds that are “to be applied to the restoration of the Property or to payment
of the indebtedness evidenced and secured by the Senior Loan Documents.” (*Id.*)
The insurance policy at issue was not to cover either. It is not to be applied for the
restoration of the Property, and it was not to be applied to Plaintiff Hall’s senior

1 debt. It only covered Defendant Ladera’s title. While the agreement goes onto say
2 that “[a]ll proceeds” of “insurance related to the Property” shall be turned over to
3 Plaintiff Hall in a reasonable manner, it is again to limited “such insurance” as
4 defined in the first sentence of the paragraph. (*Id.*) The Court therefore holds that
5 Plaintiff Hall is not entitled to summary judgment on its claim for these insurance
6 proceeds.

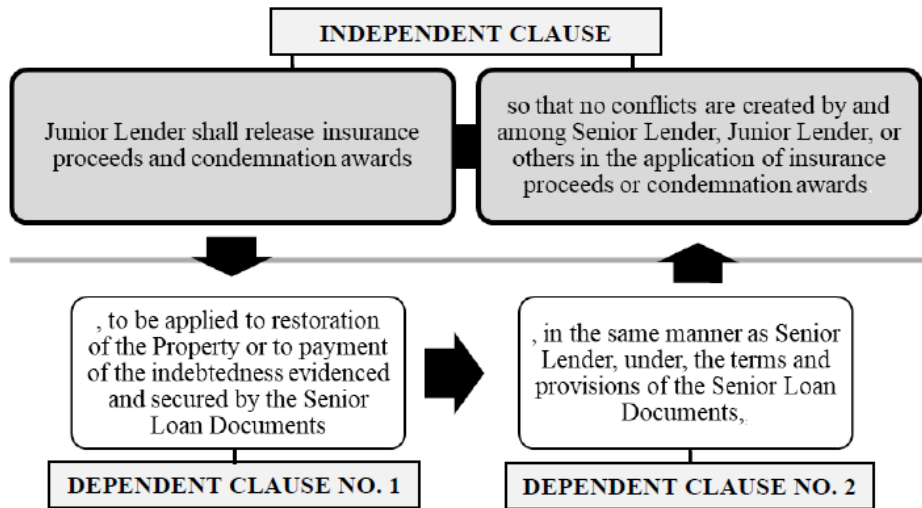
7 Upon the argumentation presented in the recent briefs and at oral argument, the Court is persuaded
8 to reconsider this holding and adopt Plaintiff Hall’s interpretation of the contract—that Plaintiff
9 Hall is entitled to the insurance proceeds from the Ladera Insurance Policy.

10 A court should grant summary judgment when “the movant shows that there is no genuine
11 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
12 Civ. P. 56(a). A factual dispute is genuine when “the evidence is such that a reasonable jury could
13 return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
14 (1986). Only facts that affect the outcome are material. *Id.* A court may also grant summary
15 judgment to a nonmovant sua sponte if the Court provides “reasonable notice [to the litigant] that
16 the sufficiency of his or her claim will be in issue.” *Verizon Del., Inc. v. Covad Commc’ns Co.*,
17 377 F.3d 1081, 1092 (9th Cir. 2004) (citing Fed. R. Civ. P. 56(f)).

18 To determine when summary judgment is appropriate, courts use a burden-shifting
19 analysis. When the party seeking summary judgment would not bear the burden of proof at trial,
20 he satisfies his burden by demonstrating that the other party failed to establish an essential element
21 of the claim or by presenting evidence that negates such an element. *Celotex Corp. v. Catrett*, 477
22 U.S. 317, 330 (1986) (Brennan J., concurring). A court should deny summary judgement if either
23 the moving party fails to meet his initial burden or, if after he meets that burden, the other party
24 establishes a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.
574, 586–87 (1986).

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The Court revisits this analysis by first examining Section 3(a). Plaintiff Hall contends that the first sentence contains two nonessential, dependent clauses which are to be understood as describing how the insurance proceeds are to be paid as opposed to limiting the type of insurance proceeds to which the provision applies. (ECF No. 164 at 8–14.) It provides the following graphic:



(*Id.* at 10.) Defendant Ladera posits that Dependent Clause No. 1 limits the type of insurance proceeds to which this provision applies as opposed to how the insurance proceeds is to be applied.

Defendant Ladera contends that Plaintiff Hall’s interpretation of the first sentence of Section 3(a) is strained because such a reading allegedly finds the dependent clauses meaningless. It is true that under Texas law, courts “must read all parts of the contract together, striving to give meaning to every sentence, clause, and word to avoid rendering any portion inoperative.” *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998) (citation omitted); *see also Aery v. Hoskins, Inc.*, 493 S.W.3d 684, 692 (Tex. App. 2016) (“Construction and interpretation must give effect to all provisions so none will be rendered meaningless.”). But the dependent clauses are not meaningless under Plaintiff Hall’s interpretation; they state how to apply the insurance proceeds under Plaintiff Hall’s interpretation.

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1 This provision of Section 3(a), standing alone, is amenable to both parties' interpretations.
2 However, reading the contract as a whole, the Court is persuaded that Plaintiff Hall's interpretation
3 is the only reasonable one.

4 Plaintiff Hall points to several other provisions in the Intercreditor Agreement that confirm
5 it is entitled to the Ladera Insurance Policy proceeds. Plaintiff Hall relies on Section 1(b), which
6 states, in pertinent part:

7 The holder of the Senior Debt shall first be finally and irrevocably paid in cash an
8 aggregate amount equal to the principal of the Senior Loan, accrued and unpaid
9 interest due thereon, and all other costs, fees, expenses and/or obligations now or
10 hereafter owing thereunder, before any payment of any character, whether in cash,
11 securities or other property, shall be made on account of the Junior Debt or
12 otherwise to or for the benefit of the holder or holders of Junior Debt

13 (Intercreditor Agreement at 3.) The Ladera Insurance Policy is undoubtedly a payment "made on
14 account of the Junior Debt or otherwise to or for the benefit of the holder of Junior Debt," so it
15 cannot be paid towards Defendant Ladera as the Junior Debt holder but must rather be paid towards
16 Plaintiff Hall as the Senior Debt holder.

17 Defendant Ladera contends that this interpretation of the provision, while technically
18 correct, is nonetheless not a reasonable reading of the contract. The Texas Supreme Court
19 considered a somewhat analogous issue in *Plains Expl. & Prod. Co. v. Torch Energy Advisors*
20 *Inc.*, 473 S.W.3d 296, 305 (Tex. 2015). In that case, the court considered whether the phrases
21 "arising from," "with respect to," and "attributable to" necessitated a but-for analysis no matter
22 how attenuated the result. *Id.* The court held that, while the party advocating for a but-for analysis
23 was correct in a similar overly technical, metaphysical sense, the reasonable reading was to imply
24 a "requisite degree of connectedness." *Id.*

25 The instant case is distinguishable from *Plains Expl. & Prod. Co.* There the Texas Supreme
26 Court found that the words "arising from," "with respect to," and "attributable to" implied a

1 requisite degree of connectedness. Here, however, Defendant Ladera, in essence, is claiming that
2 the words of the provision really do not mean what they state. The provision states that it applies
3 to “any payment of any character” that is “made on account of the Junior Debt or otherwise to or
4 for the benefit of the holder or holders of Junior Debt.” The plain meaning of these terms includes
5 insurance proceeds.

6 Further confirming this interpretation, Plaintiff Hall points to two other provisions, which
7 show that Plaintiff Hall was to be paid in full first before Defendant Ladera was to collect on its
8 debt. Section 3(b) reads:

9 If Junior Lender shall at any time hereafter acquire, by indemnification, subrogation
10 (for example, by payment of real estate taxes) or otherwise, any lien, right, title or
11 other interest in or to the Property, that lien, right, title or other interest shall
12 automatically be subject and subordinate to the Senior Security Instrument as
13 provided herein. If due to any applicable law or otherwise, such lien, right, title or
14 other interest does not automatically subordinate to the Senior Security Instrument,
15 Junior Lender agrees to execute any document or subordination that effects the
16 intent of the above sentence and this Agreement.

14 (Intercreditor Agreement at 5.) Plaintiff Hall claims that insurance policies are contracts of
15 indemnity, the insurance proceeds are “subject and subordinate to the Senior Security Instrument.”
16 While this is limited to interests “in or to the Property,” this provision further shows the nature of
17 the contract; that is, Defendant Ladera is surrendering its interests to Plaintiff Hall’s senior debt.

18 Plaintiff Hall next turns to Section 1(a), which reads, in pertinent part:

19 Junior Lender hereby intentionally waives, relinquishes and subordinates the
20 priority and superiority of the Junior Loan Documents and the rights, privileges and
21 powers of Junior Lender thereunder, including without limitation rights to any
22 insurance proceeds or condemnation award and similar rights or interests of Junior
23 Lender under the Junior Loan Documents, in favor of the Senior Security
24 Instrument and any instrument modifying or amending the same or entered into in
substitution or replacement thereof.

23 (Intercreditor Agreement at 3.) Plaintiff Hall relies on the language that Defendant Ladera
24 relinquishes insurance proceeds but neglects to include that this relinquishment is limited to

1 insurance proceeds of Defendant Ladera “under the Junior Loan Documents.” The Ladera
2 Insurance Policy was not included in the Junior Loan Documents, and Defendant Ladera was not
3 required to purchase the title insurance under the Junior Loan Documents. So, this provision does
4 not govern whether Hall is entitled to the proceeds of Ladera’s title insurance. However, this
5 provision shows the overall nature of the contract, which accords with Plaintiff Hall’s
6 interpretation of Section 1(b) and Section 3(a) that Plaintiff Hall is entitled to the Ladera Insurance
7 Policy Proceeds. The Court therefore grants Plaintiff Hall summary judgment on this issue.

8 **CONCLUSION**

9 IT IS HEREBY ORDERED that Defendant Ladera’s Motion for Reconsideration (ECF
10 No. 159) is DENIED.

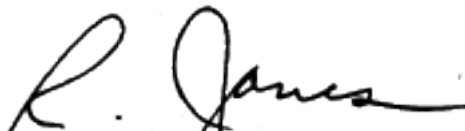
11 IT IS FURTHER ORDERED that Defendant Ladera’s Motion for Leave to Supplement
12 (ECF No. 170) is DENIED.

13 IT IS FURTHER ORDERED that the Court grants partial summary judgment in favor of
14 Plaintiff Hall and holds that Plaintiff Hall is entitled to the proceeds of the title insurance policy
15 issued by Old Republic National Title Insurance Company to Defendant Ladera. (ECF No. 145
16 Ex. 23).

17 IT IS FURTHER ORDERED that the parties shall file the joint pretrial order within thirty
18 days of the entry of this Order.

19 IT IS SO ORDERED.

20 Dated July 26, 2022.

21
22 
23 _____
24 ROBERT C. JONES
United States District Judge