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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BERKSHIRE HATHAWAY
HOMESTATE INS. CO.,

Plaintiff,

v.

SQI, INC., et al.,

Defendants.

CASE NO. C14-0868JLR

ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT AND
DENYING DEFENDANTS’
MOTION TO STRIKE AND
MOTION FOR LEAVE TO FILE
A SURREPLY

INTRODUCTION

Before the court are Plaintiff Berkshire Hathaway Homestate Insurance Company, formerly known as Cornhusker Casualty Company’s (“Cornhusker”), motion for summary judgment (Mot. (Dkt. #29)); Defendants SQI, Inc. (“SQI”), Ledcor Industries (USA), Inc. (“Ledcor”), and Admiral Way, LLC’s (“Admiral”) combined motion to strike and opposition memorandum (Resp. (Dkt. # 31)); Cornhusker’s reply memorandum (Reply (Dkt. # 35)); and Defendants’ motion for leave to file a surreply

1 (Mot. for Surreply (Dkt. # 39)). The court has considered the parties' submissions, the
2 balance of the record, and the relevant law, and has heard oral argument. Being fully
3 advised, the court grants in part and denies in part Cornhusker's motion for summary
4 judgment and denies Defendants' motion to strike and motion for leave to file a surreply.

5 **BACKGROUND**

6 This is a declaratory judgment action and insurance coverage dispute arising out of
7 underlying construction defect litigation. Cornhusker moves for summary judgment on
8 its request for a declaration that it has no obligation to indemnify or pay benefits to SQI
9 or its assignees with respect the underlying litigation. (*See* Mot. at 1-2.) Defendants
10 oppose Cornhusker's motion and request that the court either strike the motion or grant
11 summary judgment in SQI's favor. (*See* Resp. at 1-2.)

12 The case has its origins in a construction project in West Seattle. In 2001,
13 developer Admiral hired Ledcor as the general contractor to build the Admiral Way
14 Project ("the Project"), a structure consisting of 65 residential units, two ground-floor
15 commercial units, and an underground parking garage. (*See id.* at 2; Mot. at 4; 1st
16 Sparling Decl. (Dkt. # 30) ¶ 5, Ex. D ("Project CCRs") ¶ 3.1; *see also* Martens Decl.
17 (Dkt. # 33) ¶ 5, Ex. D ("Gartin Decl.") ¶¶ 2, 4.) Ledcor in turn hired multiple
18 subcontractors. (Resp. at 2; Sparling Decl. ¶ 8, Ex. G ("Ledcor Compl.") ¶ 12; *see also*
19 Gartin Decl. ¶ 4.) One of those subcontractors was SQI, which Ledcor hired to do the
20 roofing on the Project. (Resp. at 2; Ledcor Compl. ¶¶ 12-13.) In addition to working on
21 the original roofing, SQI also performed repairs on the roof in May and June of 2005.
22 (Resp. at 3; *see* Gardner Decl. (Dkt. # 32) ¶¶ 2-4, Exs. 1-3.)

1 From May 2003 through May 2006, SQI had three year-long commercial general
2 liability (“CGL”) insurance policies with Cornhusker. (Resp. at 2-3; *see* Martens Decl.
3 ¶¶ 2-4, Exs. A-C; 2d Sparling Decl. (Dkt. # 36) ¶¶ 3-5, Exs. B (“1st Policy”), C (“2d
4 Policy”), D (“3d Policy”). The policies provided coverage for “Bodily Injury and
5 Property Damage Liability” (Coverage A)¹; “Personal and Advertising Injury Liability”
6 (Coverage B); and “Medical Payments (Coverage C). (1st Policy at 92-102; 2d Policy at
7 31-41; 3d Policy at 32-42².) In addition, SQI paid extra premiums for products-
8 completed operations hazard (“PCOH”).³ (1st Policy at 11; 2d Policy at 15; 3d Policy at
9

10 ¹ Under Coverage A, Cornhusker agreed to “pay those sums that the insured becomes
11 legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which
12 this insurance applies.” (1st Policy at 92; 2d Policy at 31; 3d Policy at 32.) Cornhusker agreed
13 to pay for bodily injury and property damage, however, only if “(1) The ‘bodily injury’ or
14 ‘property damage’ is caused by an ‘occurrence’ that takes place within the ‘coverage territory,’
and (2) The ‘bodily injury’ or ‘property damage’ occurs during the policy period.” (1st Policy at
92; 2d Policy at 31; 3d Policy at 32.) Moreover, such coverage is subject to the exclusions
included under part 2 of Coverage A. (1st Policy at 92-97; 2d Policy at 31-36; 3d Policy at 32-
37.)

15 In addition, the amount that Cornhusker agreed to “pay for damages is limited as
16 described in SECTION III – LIMITS OF INSURANCE.” (1st Policy at 92; 2d Policy at 31; 3d
17 Policy at 32.) Section III states, “The Limits on Insurance in the Declarations and the rules
18 below fix the most we will pay The General Aggregate Limit is the most we will pay for
the sum of: . . . Damages under Coverage A, except damages because of ‘bodily injury’ and
‘property damage’ included in the ‘products-completed operations hazard.’ . . . The Products-
Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages
because of ‘bodily injury’ and ‘property damage’ included in the ‘products-completed operations
hazard.’” (1st Policy at 104; 2d Policy at 43; 3d Policy at 44.)

19 ² When referencing specific pages of SQI’s policies, the court will use the exhibit page
20 number found in the lower right corner of the page rather than the blue CM/ECF page number or
the page number for the original document.

21 ³ SQI paid an additional \$12,066.00 in 2003-04, an additional \$16,591.00 in 2004-05, and
22 an additional \$14,911.00 in 2005-06. (1st Policy at 11; 2d Policy at 15; 3d Policy at 12.) For
those premiums, Cornhusker provided a \$1,000,000.00 PCOH Aggregate Limit. (1st Policy at
11; 2d Policy at 15; 3d Policy at 12.)

1 12.) PCOH provisions apply to bodily injury or property damage that arises out of the
2 insured's completed work or product as opposed to its ongoing operations.⁴ *See*
3 *Goodwin v. Wright*, 6 P.3d 1, 4 (Wash. Ct. App. 2000). In addition, all three of SQI's
4 policies were subject to an endorsement that added an exclusion for residential
5 construction under Coverage A.⁵ (1st Policy at 116; 2d Policy at 55; 3d Policy at 57.)

6 On August 6, 2002, Admiral recorded the "DECLARATION AND
7 COVENANTS, CONDITIONS, RESTRICTIONS, AND RESERVATIONS For The
8 Admiral[,] A Condominium" ("Project CCRs"), establishing the structure of the
9 ownership rights in the Project. (*See* Project CCRs.) The Project CCRs identify the units

11 ⁴ SQI's policies define PCOH as "all 'bodily injury' and 'property damage' occurring
12 away from premises you own or rent and arising out of 'your product' or 'your work,'" with a
series of limitations. (1st Policy at 109; 2d Policy at 48; 3d Policy at 49.)

13 ⁵ The residential construction exclusion reads, in pertinent part, as follows: "This
14 insurance does not apply to 'bodily injury' or 'property damage' resulting from or arising out of
15 'residential construction', [sic] For purposes of this endorsement, 'residential construction'
means work or operations of any nature or extent on, with respect to, or in support of structures
intended for human habitation, including but not limited to houses, apartments, condominiums,
or townhouses." (1st Policy at 116.)

16 "This insurance does not apply to 'bodily injury' or 'property damage' resulting from or
17 arising out of 'residential construction', [sic] For purposes of this endorsement, 'residential
construction' means work or operations of any nature or extent on, with respect to, or in support
of structures intended for human habitation, including but not limited to 'condominiums.'
18 'Residential construction' does not include, however, . . . 'apartments.' 'Condominiums' means
structures whereby separate parts of the structure may be owned individually by separate owners
and the underlying property is owned in common by all the separate owners together. . . .
19 'Apartments' means structures containing more than one single-family dwelling where the owner
of the structure owns each dwelling together with the underlying property." (2d Policy at 55.)

20 "This insurance does not apply to 'bodily injury' or 'property damage' resulting from or
arising out of the original construction, in whole or in part, of condominiums This exclusion
21 does not apply to the remodeling or repair of any existing structure" (3d Policy at 57.)

22 In each of SQI's policies, the residential construction exclusion is to be added to the
exclusions under Coverage A—bodily injury and property damage liability—in Section I,
Coverages. (1st Policy at 116; 2d Policy at 55; 3d Policy at 57.)

1 as the individually owned portions of the Project. (*See id.* ¶¶ B, 1.9.42, 5.1.)
2 Correspondingly, the CCRs provide for common ownership by the unit-owners of the
3 land on which the Project sits as well as the parts of the Project not included in the units.
4 (*See id.* ¶¶ B, 1.9.11, 1.9.35, 1.9.42, 2.1, 5.1, 6.1; *see also id.* ¶¶ 7.1 (describing the
5 “Limited Common Elements”), 9.)

6 Litigation related to the Project commenced in 2007, when the Admiral Way
7 Condominium Owners Association (“ACOA”) sued Admiral in King County Superior
8 Court alleging defects in the construction of the Project and Admiral added Ledcor as a
9 third party defendant (“the ACOA Suit”). (*See Mot.* at 6-7; *Resp.* at 4-5; 1st Sparling
10 Decl. ¶ 6, Ex. E (“ACOA Compl.”) While the ACOA Suit was ongoing, Admiral and
11 Ledcor sued SQI and various other subcontractors, also in state court (“the Contractor
12 Suit”). (*See Mot.* at 7-8; *Ledcor Compl.*) Cornhusker defended SQI in the Contractor
13 Suit under a reservation of rights. (*Resp.* at 8; 1st Sparling Decl. ¶ 9, Ex. H.) From there,
14 however, litigation continued to proliferate as Zurich American Insurance Company
15 (“ZAIC”), one of Ledcor’s insurers, brought a declaratory judgment action in state court
16 asserting that no coverage existed under its policies (“the Coverage Suit”). (*See Mot.* at
17 8-9; *Resp.* at 5-6.)

18 Several other insurers also became involved in the Coverage Suit, including
19 Cornhusker and First Mercury Insurance Company (“FMIC”), another of SQI’s insurers.
20 (*See Resp.* at 5-6; *Mot.* at 8.) In the Coverage Suit, Admiral and Ledcor asserted that
21 they are additional insureds under SQI’s policies and that Cornhusker and FMIC
22 therefore had a duty to defend and indemnify them in the ACOA suit. (*See Mot.* at 8;

1 Resp. at 5; 1st Sparling Decl. ¶¶ 12-13, Exs. K-L.) FMIC later filed a declaratory action
2 in this court seeking a determination that it owed no duty to defend or indemnify SQI
3 (“the FMIC Suit”). (*See First Mercury Ins. Co. v. SQI*, No. C13-2110JLR (W.D.
4 Wash.)) This court stayed the FMIC Suit under the *Brillhart* abstention doctrine. (*See*
5 *id.* Dkt. # 62.)

6 Over the last year, the parties to these various suits have begun to resolve their
7 claims. ACOA, for example, settled its claims against Admiral. (Resp. at 5.) In the
8 Coverage Suit, Cornhusker obtained a summary judgment ruling that at least Ledcor is
9 not an additional insured under SQI’s policies.⁶ (*See* 1st Sparling Decl. ¶¶ 12-13, Exs. K-
10 L.) Most importantly for this case, SQI settled with Ledcor and Admiral in the
11 Contractor Suit. (*See* Resp. at 8; 1st Sparling Decl. ¶ 10, Ex. I (“Stip. Judgment”).)
12 Pursuant to that settlement, SQI agreed to a stipulated judgment and assigned its rights

15 ⁶ Cornhusker contends that its victory on that motion was broader and included a ruling
16 that Admiral was also not covered under SQI’s policies. (*See* Mot. at 9, 15; Reply at 6.)
17 Defendants respond that the ruling pertained only to Ledcor’s status as an additional insured.
18 (*See* Resp. at 5, 20-21.) Although Cornhusker’s motion sought a finding of no coverage as to
19 “any party” to the Coverage Suit (2d Sparling Decl. ¶ 2, Ex. A), the resulting orders mention
20 only Ledcor (*see* 1st Sparling Decl. ¶¶ 12-13, Exs. K-L). Specifically, the first order grants
21 summary judgment on Ledcor’s breach of contract claims on two bases (1) additional insured
22 status, and (2) the residential construction exclusion. (1st Sparling Decl. ¶ 12, Ex. K.) The
second order grants summary judgment on and dismisses Ledcor’s third-party claims against
Cornhusker on the ground that Ledcor is not an additional insured under the policies at issue.
(1st Sparling Decl. ¶ 13, Ex. L.) The parties have provided scant information and no authority
regarding the breadth and preclusive effect of these state court orders, and more importantly, it is
unclear whether the issue is even within the scope of Cornhusker’s present motion. (*See* Mot. at
2; Reply at 8 (“[S]ummary judgment should be granted ruling that Cornhusker’s condominium
exclusions bar coverage for SQI’s stipulated judgment.”)) As such, the court expresses no
opinion at this time regarding the breadth and preclusive effect of the state court orders.

1 against Cornhusker to Ledcor and Admiral in exchange for a covenant not to execute.
2 (*See* Resp. at 8; Stip. Judgment; 1st Sparling Decl. ¶ 11, Ex. J (“IFCA Notice”).)

3 The settlement between SQI and Ledcor and Admiral signaled the beginning of
4 this action. Not only did SQI assign its rights against Cornhusker and obtain a covenant
5 not to execute, but Admiral, Ledcor, and SQI have given notice to Cornhusker of their
6 intent to file claims against it under the Insurance Fair Conduct Act (“IFCA”), RCW
7 48.30.15. (*See* Stip. Judgment; IFCA Notice.) Anticipating impending litigation against
8 Admiral and Ledcor as SQI’s assignees,⁷ Cornhusker filed this action in federal court
9 seeking a declaration that its policies do not provide coverage for the losses involved in
10 the Contractor Suit. (*See* Compl. (Dkt. # 1); Mot.)

11 Shortly after Cornhusker filed this action, the case was transferred to this court as
12 related to the FMIC Suit (*see* 10/3/14 Min. Order (Dkt. # 24)), and the court issued an
13 order to show cause regarding diversity jurisdiction (*see* OSC (Dkt. # 25)). The court
14 noted that one of the parties in this case, Admiral, is a limited liability company (“LLC”),
15 that the court must analyze the citizenship of each member of an LLC for purposes of
16 assessing diversity of citizenship, and that Cornhusker had not provided information on
17 the citizenship of Admiral’s members. (*See* OSC at 2.) The court therefore ordered

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20 ⁷ True to their word, Defendants have counterclaimed for breach of contract, bad faith,
21 violations of the Washington Consumer Protection Act (“CPA”), RCW 19.86 *et seq.*, and
22 violations of IFCA. (*See* SQI Ans. (Dkt. # 16) ¶ 4 (breach of contract, IFCA, bad faith; CPA);
Admiral Ans. (Dkt. # 17) ¶ 4 (breach of contract, CPA); Ledcor Ans. (Dkt. # 18) ¶ 4 (breach of
contract, bad faith, CPA).)

1 | Cornhusker to provide that information within seven days. (*See id.*) Six days later,
2 | Cornhusker complied. (*See Resp. to OSC (Dkt. # 27).*)

3 | On November 13, 2014, Cornhusker filed the instant motion for summary
4 | judgment. (*See Mot.*) Cornhusker’s motion attempts to establish that Cornhusker has no
5 | duty to indemnify SQI or its assignees for the losses at issue in the Contractor Suit. (*See*
6 | *id.* at 1-2, 16.) The basis for this position is the exclusion in the policies that Cornhusker
7 | issued to SQI which bars coverage for personal injury and property damage resulting
8 | from or arising out of residential construction, including the construction of
9 | condominiums. (*See id.* at 11-16.) Cornhusker argues that the losses at issue in the
10 | Contractor Suit fall within residential construction exclusion because those losses arose
11 | out SQI’s work on the construction of condominiums. (*See id.*)

12 | Defendants counter that the court should strike the motion for summary judgment
13 | or deny it and grant summary judgment in SQI’s favor on the issue of coverage. (*See*
14 | *Resp.* at 1-2.) In support of the first contention, Defendants argue that (1) the court has
15 | not yet ruled on the order to show cause and therefore a motion for summary judgment is
16 | premature; (2) the court should stay this matter because it previously stayed the FMIC
17 | Suit; and (3) the court should grant Defendants additional time to conduct discovery
18 | before entertaining a motion for summary judgment. (*See id.* at 7-9.) Turning to the
19 | merits of the motion, Defendants assert that coverage exists because the residential
20 | construction exclusion does not apply to the policies’ PCOH provisions, and even if the
21 | exclusion does apply to those provisions, coverage nevertheless exists under several
22 | exceptions to the residential construction exclusion. (*See id.* at 9-20.)

1 Over fourteen weeks after Cornhusker filed its reply, Defendants filed a motion
2 for leave to file a surreply. (*Compare Reply with Mot. for Surreply.*) This motion
3 purports to address “new arguments presented by [Cornhusker] in its reply brief.” (Mot.
4 for Surreply at 1-2.) Cornhusker’s motion for summary judgment and Defendants’
5 motion to strike and motion for leave to file a surreply are now before the court.

6 DISCUSSION

7 A. Defendants’ Motion for Leave to File a Surreply

8 Defendants filed their motion for leave to file a surreply on March 18, 2015, over
9 fourteen weeks after Cornhusker filed its reply and just over a week before oral
10 argument. (*See id.*; *see generally* Dkt.) Defendants assert that a surreply is warranted
11 because Cornhusker has raised in its reply memorandum “new arguments which are at
12 best misleading.” (Mot. for Surreply at 2.) While recognizing that their request is
13 untimely, Defendants nevertheless urge the court to excuse their delay pursuant to
14 Federal Rule of Civil Procedure 1 and the court’s inherent authority to control its own
15 docket and calendar. (*Id.* (citing Fed. R. Civ. P. 1; *Young v. I.N.S.*, 208 F.3d 1116 (9th
16 Cir. 2000)).) The court is unwilling to excuse Defendants’ delay.

17 Local Civil Rule 7(g) governs the circumstances under which a party in this
18 district may file a surreply to address allegedly improper material in a reply brief. *See*
19 Local Rules W.D. Wash. LCR 7(g). Among other requirements, Rule 7(g) provides,
20 “The surreply must be filed within five days of the filing of the reply brief” *Id.*
21 Defendants waited over 100 days to file their request. (*See* Mot. for Surreply at 1.) In
22 light of this substantial violation of the Local Rules and Defendants’ failure to offer any

1 explanation for their delay, the court finds that this is not an appropriate situation in
2 which to excuse untimely filing through the exercise of the court's inherent authority to
3 control its docket and calendar. As such, the court denies Defendants' motion for leave
4 to file a surreply.

5 **B. Defendants' Motion to Strike**

6 Defendants offer three arguments for why the court should strike Cornhusker's
7 motion. The court rejects all of them. First, Defendants argue that diversity jurisdiction
8 has yet to be established because the court has not issued a ruling on the order to show
9 cause. (*See* Resp. at 7-8.) The court, however, is under no obligation to discharge or rule
10 on orders to show cause. Moreover, Cornhusker complied with the order to show cause
11 (*see* Resp. to OSC), and Defendants have not challenged Cornhusker's submission (*see*
12 Dkt.; Resp. at 7-8⁸). The order to show cause required Cornhusker to provide
13 information on Admiral's membership within seven days. (OSC at 2.) Cornhusker
14 provided the requested information six days later (*see* Resp. to OSC at 1-2, 5-6 (showing
15 that all Admiral's members are Washington residents)), and nearly five months have now
16 passed without the court taking action to remand the case (*see* Dkt.). As the court's
17 silence should have indicated, the court has accepted Cornhusker's response as
18 satisfactory and found that diversity jurisdiction exists over this matter.

21 ⁸ Although Defendants assert that "there exists a genuine issue of material fact as to the
22 justiciability of the case" (Resp. at 7), Defendants fail to explain how such a genuine issue exists
in light of Cornhusker's response to the order to show cause and Defendants' failure to contest
the information in that response (*see id.* at 7-8; *see also* Dkt.).

1 Second, Defendants contend that a stay is appropriate because the court previously
2 stayed the FMIC Suit and has received this case on reassignment from Chief District
3 Judge Marsha J. Pechman as related to the FMIC Suit. (*See* Resp. at 8.) In particular,
4 Defendants maintain that “since this case was to be heard along with the related [FMIC
5 Suit], and that lawsuit was stayed pending the [Coverage Suit], this case, too, should be
6 stayed in federal court under the same terms and conditions.” (*Id.*) As an initial matter,
7 nothing in this court’s or Chief Judge Pechman’s rulings suggests that this suit is “to be
8 heard along with” the FMIC Suit. Instead, Chief Judge Pechman’s order transferring this
9 case merely states that this case and the FMIC Suit are “related” and may present
10 “common questions of fact or law.” (10/3/14 Min. Order at 1.) The order does not
11 indicate that the cases will be heard together or that an order in one case will necessarily
12 apply to the other.

13 Furthermore, to the extent Defendants request that the court stay this case under
14 *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491 (1942) and its progeny, and
15 not only because this case is “related” to the FMIC Suit, Defendants’ request is not
16 properly before the court. Federal Rule of Civil Procedure 7(b) provides that “[a] request
17 for a court order must be made by motion . . . in writing, state with particularity the
18 grounds for seeking the order, and state the relief sought.” Fed. R. Civ. P. 7(b); *see also*
19 Local Rules W.D. Wash. LCR 7. Defendants, however, make their request only in their
20 response to Cornhusker’s motion and fail to “state with particularity” the reasons why
21 *Brillhart* abstention is appropriate here. (*See* Resp. at 8.) Moreover, unless a party has
22 “properly raised the issue” of *Brillhart* abstention, “the district court may proceed with

1 consideration of the action without sua sponte addressing whether jurisdiction should be
2 declined.” *Gov’t Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1227 (9th Cir. 1998).
3 Accordingly, the court rejects Defendants’ request for a stay without considering the
4 issue of *Brillhart* abstention.

5 Third, Defendants assert that Cornhusker’s motion is premature because no
6 meaningful discovery has taken place with respect to the issues raised in the motion. (*See*
7 *Resp.* at 8-9.) The court construes this portion of Defendants’ response as motion for a
8 continuance under Federal Rule of Civil Procedure 56(d). A party requesting a
9 continuance pursuant to Rule 56(d) “must identify by affidavit the specific facts that
10 further discovery would reveal, and explain why those facts would preclude summary
11 judgment.” *Tatum v. City & Cnty. of San Francisco*, 441 F.3d 1090, 1100 (9th Cir.
12 2006). Defendants provide no affidavit in support of their request, list no specific facts
13 that further discovery would reveal, and do not explain how additional discovery would
14 help them resist Cornhusker’s motion for summary judgment. (*See Resp.* at 8-9.)
15 Instead, they simply identify discovery that has not yet occurred and conclude that they
16 are unable to craft an informed response without that discovery.⁹ (*See id.*) As such, the
17 court denies Defendants’ motion for a continuance under Federal Rule of Civil Procedure

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⁹ The court finds no merit in Defendants’ complaint that Cornhusker did not provide full,
unmarked copies of the relevant policies when it filed its motion for summary judgment. (*See*
Resp. at 8-9.) The court will not grant a continuance on that basis because Defendants admit that
they are in possession of the policies. (*See id.* at 8 (“[T]he relevant Cornhusker policies are in
the possession of the parties . . .”).)

1 56(d), *see Tatum*, 441 F.3d at 1100, denies Defendants’ motion to strike, and turns to the
2 merits of Cornhusker’s motion.

3 **C. Legal Standards**

4 1. Summary Judgment

5 Summary judgment is appropriate if the evidence shows “that there is no genuine
6 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
7 Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v.*
8 *Cnty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). A fact is “material” if it might affect the
9 outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A
10 factual dispute is “‘genuine’ only if there is sufficient evidence for a reasonable fact
11 finder to find for the non-moving party.” *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986,
12 992 (9th Cir. 2001) (citing *Anderson*, 477 U.S. at 248-49).

13 The court is “required to view the facts and draw reasonable inferences in the light
14 most favorable to the [non-moving] party.” *Scott v. Harris*, 550 U.S. 372, 378 (2007).
15 The court may not weigh evidence or make credibility determinations in analyzing a
16 motion for summary judgment because these are “jury functions, not those of a judge.”
17 *Anderson*, 477 U.S. at 249-50. Furthermore, the court may consider as evidence only
18 materials that are capable of being presented in an admissible form. *See Fed. R. Civ. P.*
19 *56(c)(2)*; *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002).

20 The moving party bears the initial burden of showing there is no genuine issue of
21 material fact and that he or she is entitled to prevail as a matter of law. *Celotex*, 477 U.S.
22 at 323. For issues on which the moving party has the burden of proof, the moving party

1 must establish a prima facie case on its motion for summary judgment. *UA Local 343*
2 *United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. of the U.S.*
3 *& Can. AFL-CIO v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1471 (9th Cir. 1994). That is,
4 the moving party must present evidence that, if uncontroverted at trial, would entitle it to
5 prevail on that issue. *Id.* at 1473. If the moving party does so, the nonmoving party must
6 “set forth specific facts showing that there is a genuine issue for trial.” *Id.* at 1471
7 (internal citations and quotation marks omitted). “Legal memoranda and oral argument
8 are not evidence and do not create issues of fact capable of defeating an otherwise valid
9 summary judgment.” *Estrella v. Brandt*, 682 F.2d 814, 819-20 (9th Cir. 1982); *see also*
10 *Rivera v. Nat'l R.R. Passenger Corp.*, 331 F.3d 1074, 1078 (9th Cir. 2003) (“Conclusory
11 allegations unsupported by factual data cannot defeat summary judgment.”).

12 2. Insurance Policies

13 The interpretation of an insurance policy is a question of law for the court.
14 *Overton v. Consolidated Ins. Co.*, 38 P.3d 322, 325 (Wash. 2002). Insurance policies are
15 contracts, which are construed as a whole with the terms interpreted as they would be
16 understood by an average person purchasing insurance. *Id.* If the language of an
17 insurance policy is clear and unambiguous, the court must enforce it as written and may
18 not create ambiguity where none exists. *Am. Nat'l Fire Ins. Co. v. B&L Trucking &*
19 *Constr. Co.*, 951 P.2d 250, 256 (Wash. 1998).

20 The determination of whether coverage exists involves a burden-shifting
21 framework. *See McDonald v. State Farm Fire & Cas. Co.*, 837 P.2d 1000, 1003-04
22 (Wash. 1992). The insured bears the initial burden to demonstrate that the loss falls

1 within the scope of the policy's insured losses. *See id.* If the insured makes that
2 demonstration, the insurer can avoid coverage by showing that specific policy language
3 excludes the loss. *See id.* at 1004. Exclusions from coverage are strictly construed
4 against the insurer because they are contrary to the protective purpose of insurance.
5 *Stuart v. Am. States Ins. Co.*, 953 P.3d 462, 464 (Wash. 1998). If the insurer shows that
6 an exclusion applies, the burden shifts back to the insured to demonstrate that the loss fits
7 within an exception to the exclusion. *See MKB Constructors v. Am. Zurich Ins. Co.*, No.
8 C13-0611JLR, 2014 WL 4792034, at *16 (W.D. Wash. Sept. 25, 2014); *Mid-Continent*
9 *Cas. Co. v. Titan Const. Corp.*, No. 05-CV-1240 MJP, 2009 WL 1587215, at *5 (W.D.
10 Wash. June 5, 2009).

11 **D. Applicability of the Residential Construction Exclusion**

12 Cornhusker argues that it has no duty to indemnify SQI for the losses involved in
13 the Contractor Suit ("the Losses") because the Losses fall within the residential
14 construction exclusion ("the Exclusion") included in SQI's policies. (*See Mot.* at 1-2, 16-
15 17.) Defendants counter that SQI has coverage under the PCOH provisions of the
16 policies because those provisions represent a distinct separate grant of coverage to which
17 the Exclusion is inapplicable. (*See Resp.* at 15-20.) In addition, Defendants argue that
18 even if the Exclusion applies to the PCOH provisions, SQI nevertheless has coverage
19 under several exceptions to the Exclusion. (*See id.* at 14-15, 19.)

20 1. The Exclusion and the PCOH Provisions

21 Defendants argue that coverage exists under the PCOH provisions of SQI's
22 policies because those provisions are a separate grant of coverage under the policies to

1 | which the Exclusion does not apply. (*See id.* at 15-20.) As noted above, the PCOH
2 | provisions provide coverage for property damage that arises out of the insured’s
3 | completed work. (*See supra* Part II; 1st Policy at 109; 2d Policy at 48; 3d Policy at 49);
4 | *Goodwin*, 6 P.3d at 4. The parties appear not to dispute, at least in this context, that the
5 | Losses arose out of SQI’s completed work, and for the purposes of this motion, the court
6 | assumes but does not decide that that is true. Accordingly, Defendants’ argument boils
7 | down to a pure question of policy interpretation—that is, whether the Exclusion applies
8 | to the PCOH provisions, or alternatively, whether those provisions provide separate
9 | coverage to which the Exclusion is inapplicable.

10 | The court finds that the PCOH provisions do not create separate coverage and that
11 | the Exclusion applies to the PCOH Provisions. SQI’s CGL policies list only three
12 | coverages, which are each set forth in Section I of the policies: Coverage A (Bodily
13 | Injury and Property Damage Liability), Coverage B (Personal and Advertising Injury
14 | Liability), and Coverage C (Medical Payments). (1st Policy at 92-102; 2d Policy at 31-
15 | 41; 3d Policy at 32-42.) Each of these coverages contains its own insuring agreement and
16 | exclusion. (1st Policy at 92-102; 2d Policy at 31-41; 3d Policy at 32-42.) By contrast,
17 | PCOH is listed only in the “Definitions” section of the policies and is not designated as
18 | distinct type of coverage. (1st Policy at 109; 2d Policy at 48; 3d Policy at 49.) As a
19 | result, any claim falling under the definition of PCOH is subject to the terms and
20 | limitations of the coverage portion to which PCOH applies. *See Sparta Ins. Co. v.*
21 | *Colareta*, 990 F. Supp. 2d 1357, 1365 (S.D. Fla. 2014). Because PCOH is defined as
22 | applying to “bodily injury” and “property damage,” it necessarily falls under Coverage A

1 of SQI's CGL policies, the same coverage to which the Exclusion applies. *Id.*; (see 1st
2 Policy at 109; 2d Policy at 48; 3d Policy at 49; see also 1st Policy at 92; 2d Policy at 31;
3 3d Policy at 32.)

4 Furthermore, Section II, which lists the policies' limits of insurance, states as
5 follows: "The Products-Completed Operations Aggregate Limit is the most we will pay
6 under Coverage A for damages because of 'bodily injury' and 'property damage'
7 included in the [PCOH]." (1st Policy at 104; 2d Policy at 43; 3d Policy at 44 (emphasis
8 added).) Because the policies set a limit on Cornhusker's liability under Coverage A
9 with respect to PCOH, the PCOH provisions fall under the terms of Coverage A and are
10 not a freestanding form of coverage. See *Colareta*, 990 F. Supp. 2d at 1366.

11 Moreover, other exclusions under Coverage A specifically address limitations on
12 PCOH. For example, exclusion (j) provides that "Paragraph (6) of this exclusion does
13 not apply to 'property damage' included in the '[PCOH],' " and exclusion (l) removes
14 from coverage "'property damage' to 'your work' arising out of it or any part of it and
15 included in the '[PCOH].'" (1st Policy at 94-95; 2d Policy at 33-34; 3d Policy at 34-35.)
16 Such language is superfluous unless the PCOH is part of Coverage A to which Coverage
17 A's exclusions apply. See *Fedway Marketplace W., LLC v. State*, 336 P.3d 615, 620 n.12
18 (Wash. Ct. App. 2014) ("[C]ourts construe contracts as a whole to effectuate all of the
19 contracts provisions, so as not to render words superfluous[.]") (citing *Colo. Structures,*
20 *Inc. v. Ins. Co. of the W.*, 167 P.3d 1125, 1131 (Wash. 2007)). Nor is there any reason to
21 think that only some of Coverage A's exclusions apply to the PCOH provisions while
22

1 others, such as the residential construction exclusion, do not. (*See* 1st Policy at 92-102,
2 116; 2d Policy at 31-41, 55; 3d Policy at 32-42, 57.)

3 Accordingly, the court finds that the PCOH provisions are not a separate type of
4 coverage under the policies. Rather they are merely a definition that pertains to the
5 coverage provided under Coverage A. Any exclusions that apply under Coverage A
6 therefore also apply to the PCOH provisions. Furthermore, the court finds that these
7 aspects of the policies are unambiguous. *See B&L Trucking*, 951 P.2d at 256. Multiple
8 courts have reached the same conclusions when faced with the same arguments that
9 Defendants make here and policy language that is identical in all relevant respects. *See*
10 *James River Ins. Co. v. Fortress Sys., LLC*, 569 Fed. App'x 896, 900-01 (11th Cir. 2014);
11 *Penn. Nat'l Mut. Cas. Ins. Co. v. Snider*, 996 F. Supp. 2d 1173, 1186-87 (M.D. Ala.
12 2014); *Colareta*, 990 F. Supp. 2d at 1364-66 and n.3 (collecting cases). Because the
13 Exclusion applies to Coverage A, the Exclusion also applies to the PCOH provisions.
14 (*See* 1st Policy at 116; 2d Policy at 55; 3d Policy at 57.)

15 Defendants' arguments that the PCOH provisions provide separate coverage fail to
16 persuade the court. First, Defendants contend that the PCOH provisions must provide
17 distinct coverage to which the Exclusion is inapplicable because PCOH has its own
18 coverage limits, SQI paid additional premiums for PCOH, and the definition of PCOH
19 includes its own exceptions. (*See* Resp. at 16.) None of these circumstances, however,
20 leads to the conclusion that PCOH provides distinct coverage. A different limit of
21 coverage for PCOH is just that—"a different applicable *limit*, not a separate form of
22 coverage." *Colareta*, 990 F. Supp. 2d at 1364 (emphasis in original). Nor does an

1 increased premium provide “evidence that claims classified as [PCOH] are subject to
2 distinct terms under the CGL.” *Id.* at 1364-65. Finally, internal limitations in the PCOH
3 definition do not support the proposition that PCOH is not subject to any other limitations
4 or exclusions in the policy.

5 Defendants next argue that applying the Exclusion to the PCOH provisions would
6 render PCOH coverage “illusory and void,” be inconsistent with the “intent of the
7 insurance policies,” and cause PCOH coverage to “fail[] of its essential purpose.” (Resp.
8 at 17-19 (internal quotation marks omitted).) The court disagrees. Defendants’ argument
9 might have merit if the Exclusion and the PCOH provisions overlapped completely. Yet
10 the Exclusion applies only to “residential construction” in defined circumstances (*see* 1st
11 Policy at 116; 2d Policy at 55; 3d Policy at 57), whereas the PCOH provisions apply to
12 completed work in general (*see* 1st Policy at 109; 2d Policy at 48; 3d Policy at 49). Thus,
13 SQI would potentially have had the benefit of the PCOH provisions on any project that
14 was not residential construction as defined in the applicable version of the Exclusion.¹⁰
15 Accordingly, applying the Exclusion to the PCOH provisions does not render the PCOH
16 provisions void or illusory or cause them to fail of their essential purpose, and it is not
17 inconsistent with the intent of the insurance policies.

18
19
20 ¹⁰ Nor do Defendants contend that SQI only works on residential projects. In fact, the
21 record reveals that SQI likely had several non-residential projects during the period of its policies
22 with Cornhusker. (*See, e.g.*, 1st Policy at 12 (a “midterm change document” that appears to add
an additional insured for a “designated construction project” listed as “Rainier Orthopedic
Institute”), 22 (same but for the designated construction project “Egrari Center for Plastic
Surgery”).

1 2. The Exclusion and Its Exceptions

2 Defendants next contend that even if the Exclusion applies to the PCOH
3 provisions, SQI nevertheless has coverage for the Losses under several exceptions to the
4 Exclusion. (*See* Resp. 14-15, 19.) Cornhusker, on the other hand, maintains that under
5 each of SQI’s policies the Exclusion bars all coverage for the Losses. (*See* Mot. at 11-
6 15.) Resolving that dispute requires the court to analyze the particular language of the
7 Exclusion in each of SQI’s policies.

8 The Exclusion’s language varies in each of SQI’s three policies. Both the 2003-04
9 version and the 2004-05 version of the Exclusion bar coverage for “‘property damage’
10 resulting from or arising out of . . . work of any nature or extent on, with respect to, or in
11 support of structures intended for human habitation,” including condominiums. (1st
12 Policy at 116; 2d Policy at 55.) The 2004-05 version, however, contains an exception for
13 “apartments.” (2d Policy at 55.) For its part, the 2005-06 version of the Exclusion
14 precludes coverage only for “‘property damage’ resulting from or arising out of the
15 original construction, in whole or in part, of condominiums or townhouses.” (3d Policy
16 at 57.) In addition, the 2005-06 Exclusion contains what is worded as an exception for
17 “repairs.” (*See id.*)

18 Thus, in order to merit summary judgment on the applicability of all three versions
19 of the Exclusion, Cornhusker must demonstrate the absence of a genuine issue of material
20 fact regarding each of the following propositions: (1) the Project is a “structure intended
21 for human habitation”; (2) the Project is “condominiums”; (3) the Losses arose out of
22 SQI’s “work” on the Project; and (4) the Losses arose of SQI’s work on the “original

1 construction” of the Project. *See Celotex*, 477 U.S. at 323; *Nor-Cal Plumbing*, 48 F.3d at
2 1471, 1473. The court finds that no genuine issue of material fact exists with respect to
3 all but the last proposition.

4 The court agrees with Cornhusker that the Project is both “a structure intended for
5 human habitation” and “condominiums.” (*See Mot.* at 12-13.) There is no serious
6 dispute regarding the former term. The Project CCRs that Admiral filed provide that 65
7 of the Project’s 68 units are to be residential (Project CCRs ¶ 3.1); therefore, the Project
8 is clearly a structure intended for human habitation. Defendants do not dispute that point.

9 Defendants do challenge, however, whether the structure qualifies as
10 condominiums. In particular, Defendants argue that the 2004-05 exception for
11 “apartments” applies because up to 25% of the units in the Project can be rented out.
12 (*See Resp.* at 19; Gartin Decl. ¶ 9.) The court disagrees. The policy defines “apartments”
13 as a structure with multiple single-family dwellings “where the owner of the structure
14 owns each dwelling together with the underlying property.” (2d Policy at 55.) The
15 policy also establishes that “condominiums” are “structures whereby separate parts of the
16 structure may be owned individually by separate owners and the underlying property is
17 owned in common by all of the separate owners.” (*Id.*)

18 Read in light of those definitions, the Project CCRs reveal that the Project consists
19 of condominiums, not apartments. In particular, the CCRs provide that each unit is
20 owned individually while the unit-owners own the remainder of the Project in common.
21 (*See Project CCRs* ¶¶ B, 1.9.11, 1.9.35, 1.9.42, 2.1, 5.1, 6.1; *see also id.* ¶¶ 7.1, 9.) No
22 single owner owns “each dwelling together with the underlying property,” as required for

1 the apartments exception. (*See* 2d Policy at 55.) Nor are condominiums converted to
2 apartments simply because some unit owners have the right to rent out their units. Rental
3 does not affect the ownership rights in the structure and underlying property, which are
4 the key considerations under the policy. (*See id.*) Thus, the Project constitutes
5 condominiums for purposes of SQI’s policies.¹¹

6 In addition, it is undisputed that the Losses arose out of SQI’s work on the Project.
7 Leducor’s complaint against SQI in the Contractor Suit alleges defects in SQI’s work on
8 the Project. (*See* Leducor Compl. ¶¶ 12-13, 22, 24.) Moreover, Defendants’ entire
9 position in this litigation is premised on the notion that SQI’s work caused the Losses.
10 (*See, e.g.*, Resp. at 3-4, 15-20.) Cornhusker has therefore carried its burden on summary
11 judgment with respect to three of the four propositions that the court noted above.

12 The court finds, however, that with respect to the 2005-06 policy a genuine
13 dispute of material fact remains regarding whether all the Losses arose out of or resulted
14 from “original construction.” In framing the inquiry in this way, the court departs from
15 the parties’ presentation, which focuses on the applicability of the so-called “repairs
16 exception” to the 2005-06 Exclusion. (*See* Resp. at 14-15; Reply at 4-5.) That provision
17 states that the 2005-06 Exclusion “does not apply to the remodeling or repair of any
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19
20 ¹¹ This conclusion finds confirmation in the manner in which Admiral, Leducor, and other
21 parties to the underlying litigation have discussed the Project. (*See, e.g.*, 1st Sparling Decl. ¶ 7,
22 Ex. F (“Admiral Ans. & Counterclaims in ACOA Suit”) ¶ 3.5 (“On or about April 3, 2001,
Admiral entered into a written contract with Leducor . . . whereby Leducor agreed to provide all
materials and labor to construct a sixty-five unit condominium building with attached
commercial and garage spaces . . .”); Leducor Compl. ¶ 12 (“Leducor was the general contractor
for [the] Admiral Way Condominium Project . . .”).

1 existing structure.” (3d Policy at 57.) Focusing on this language, the parties argue over
2 whether Defendants can show that some of the Losses arose out of repairs (*see* Resp. at
3 14-15; Reply at 4-5), but they fail to discuss whether Cornhusker has shown that the
4 Exclusion applies in the first place. In so doing, the parties appear to assume that
5 showing the type of work giving rise to the loss is wholly part of the insured’s burden to
6 prove an exception rather than part of the insurer’s antecedent burden to prove an
7 exclusion. *See MKB Constructors*, 2014 WL 4792034, at *16.

8 The problem with the parties’ interpretation is that it fails to account for the 2005-
9 06 Exclusion’s language regarding “original construction.”¹² (3d Policy at 57.)
10 Appearing in the main body of the Exclusion, not within the so-called exception, that
11 language suggests that Cornhusker has the burden to prove that the Losses arose out of or
12 resulted from the original construction of the Project.¹³ (*See id.*) The court interprets
13 “original construction” in accordance with its plain meaning—as the process of building
14 to completion a new structure, and as distinct from work performed after completion,

15
16 ¹² The 2005-06 Exclusion reads, in pertinent part, as follows: “This insurance does not
17 apply to ‘bodily injury’ or ‘property damage’ resulting from or arising out of the original
18 construction, in whole or in part, of condominiums This exclusion does not apply to the
remodeling or repair of any existing structure”

19 ¹³ Of course, Defendants, as the parties in the role of the insured, bear the initial burden
20 of demonstrating coverage. *See McDonald*, 837 P.2d at 1003-04. Yet where, as here, the insurer
21 moves for summary judgment only on the applicability of an exclusion and gives no indication
22 that it challenges the insured’s ability to carry its initial burden of showing coverage (*see*
generally Mot.), the insurer will not be heard to complain that the insured has failed to offer
affirmative evidence of coverage but has instead focused its opposition on the exclusion.
Accordingly, the court rejects Cornhusker’s complaint that Defendants have not provided
evidence that otherwise covered property damage occurred during the 2005-06 policy period.
(*See* Reply at 4-5.)

1 such as repairs or remodeling. Admittedly, the presence of the “repairs exception”
2 confuses matters somewhat, possibly introducing ambiguity concerning whether the type
3 of work giving rise to the Losses is part of the Exclusion (and therefore part of the
4 insurer’s burden) or part of an exception to the Exclusion (and therefore part of the
5 insured’s burden). Nevertheless, even if such ambiguity exists, the court must resolve it
6 in favor of the insured. *See Stuart*, 953 P.3d at 464; *B&L Trucking*, 951 P.2d at 256.
7 Thus, the court concludes that in order to prove that the 2005-06 Exclusion applies,
8 Cornhusker has the burden to demonstrate that the Losses arose out of or resulted from
9 original construction.

10 Cornhusker has failed to make the necessary demonstration. In fact, due to its
11 mistaken view regarding its burden of proof, Cornhusker has ignored the issue of whether
12 the Losses arose out of original construction. (*See generally* Mot.; Reply.) While
13 Defendants’ admissions establish that at least some of the Losses arose out of SQI’s
14 original construction (*see* Leducor Compl. ¶¶ 12-13; Resp. at 3-4, 15), Defendants have
15 also offered unchallenged evidence that calls into question whether all the Losses arose
16 from that source. Specifically, Defendants provide a bid, contract, and invoice showing
17 that SQI performed repairs on the Project in May and June of 2005, two years before the
18 ACOA Suit. (Gardner Decl. ¶¶ 2-4, Exs. 1-3; *see also* Resp. at 3-4, 14-15.) Viewing the
19 evidence in the light most favorable to Defendants and mindful that Cornhusker bears the
20 burden of proof on this issue, the court finds that a genuine dispute of material fact
21 remains regarding whether some of the Losses arose out of work that was not “original
22

1 construction.”¹⁴ (*See* 3d Policy at 57); *Nor-Cal Plumbing*, 48 F.3d at 1471, 73;
2 *McDonald*, 837 P.2d at 1004.

3 To sum up, Cornhusker has shown there is no genuine dispute of material fact that
4 the Project is a Structure intended for human habitation and consists of condominiums,
5 and that the Losses arose out of SQI’s work on the Project. A genuine dispute of material
6 fact remains, however, regarding whether the Losses all arose out of or resulted from
7 original construction.

8 These findings have the following implications for coverage of the Losses under
9 SQI’s policies with Cornhusker: No coverage exists under the 2003-04 and 2004-05
10 policies because those versions of the Exclusion are fully applicable here. Any property
11 damage occurring during those policy periods indisputably arose out of SQI’s work on a
12 structure intended for human habitation and on condominiums. Nevertheless, coverage
13 may exist under the 2005-06 policy to the extent that otherwise covered property damage
14 arising out of SQI’s 2005 repairs occurred during that policy period. Of course, if

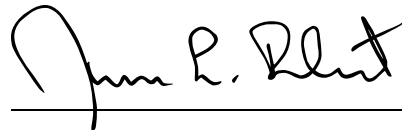
15
16 ¹⁴ Similarly, Defendants are not entitled to a summary judgment ruling that coverage
17 exists under the 2005-06 policy. Although Cornhusker bears the burden to prove the Exclusion
18 applies, Defendants cannot obtain summary judgment on the issue of coverage without first
19 showing that covered property damage occurred within the policy period. *See McDonald*, 837
20 P.2d at 1003-04. Defendants, however, have offered only an unsupported assertion that property
21 damage occurred between May 2005 and May 2006. (*See Resp.* at 4, 15.) Defendants’ assertion
22 is not evidence on the basis of which the court could grant summary judgment. *See Orr*, 285
F.3d at 773; *Estrella*, 682 F.2d at 819-20. Moreover, when evaluating Defendants’ request for
summary judgment, the court must view the evidence that does exist in the record in the light
most favorable to Cornhusker. *See Scott*, 550 U.S. at 378. Accordingly, the court finds that a
genuine issue of material fact remains regarding whether coverage exists under the 2005-06
policy and therefore denies Defendants’ request for summary judgment. (*See Resp.* at 2, 9, 14-
15.)

1 property damage that occurred during that period arose out of SQI's original
2 construction, such property damage would be subject to the 2005-06 Exclusion and
3 would not be covered.¹⁵

4 CONCLUSION

5 For the foregoing reasons, the court DENIES Defendants' motion for leave to file
6 a surreply (Dkt. # 39); DENIES Defendants' motion to strike (Dkt. # 31); and GRANTS
7 in part and DENIES in part Cornhusker's motion for summary judgment (Dkt. # 29).

8 Dated this 30th day of March, 2015.

9
10 

11 JAMES L. ROBART
12 United States District Judge

13
14 ¹⁵ Defendants also request that the court deny Cornhusker's motion under Federal Rule of
15 Civil Procedure 56(c)(2) for relying on incomplete, marked-up copies of the policies as evidence.
16 (*See Resp.* at 12-13.) The court rejects that request. Rule 56(c)(2) allows a party to "object that
the material cited to support or dispute a fact [on summary judgment] cannot be presented in a
form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2); *see also Orr*, 285 F.3d at
773.

17 To the extent Cornhusker's initial policy excerpts would have been inadmissible, such
18 inadmissibility is irrelevant for two reasons. First, Cornhusker has submitted what it asserts are
19 complete, unaltered copies of the policies ("clean copies") as declarations in support of its reply
20 memorandum. (*See* 2d Sparling Decl. ¶¶ 3-5, Exs. B-D; *see also* Reply at 7 n.5.) Defendants,
21 who have their own copies of the policies (*see Resp.* at 8), have not objected to or pointed out
22 any flaws in the clean copies, and the court finds that it may consider the clean copies as
summary judgment evidence.

20 Second, the court has not relied on the initial excerpts. Having been made aware of
21 potential problems with the initial excerpts, the court has based its analysis on the clean copies.
22 Further, Defendants will not be heard to object that they could not rely on the clean copies in
formulating their response. Defendants have admitted that they have their own copies of the
policies (*see id.*), and they submitted excerpts of those copies with their opposition to
Cornhusker's motion (*see* Martens Decl. ¶¶ 2-4, Exs. A-C).