

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CERTAIN UNDERWRITERS AT
LLOYDS, LONDON,

Plaintiff,

v.

MELVIN G. ALLEN,

Defendant.

CASE NO. C14-0945JLR

ORDER GRANTING IN PART
AND DENYING IN PART
SUMMARY JUDGMENT

I. INTRODUCTION

Before the court is Plaintiff Certain Underwriters at Lloyds, London’s (“Lloyds”) motion for summary judgment and motion to strike. (Mot. (Dkt. # 13); Mot. to Strike (Dkt. # 21).) This is an insurance dispute. Lloyds moves for a declaratory judgment that Defendant Melvin Allen’s insurance claims are excluded from coverage under the homeowner’s policy Lloyds issued to Mr. Allen. Having considered the submissions of the parties, the balance of the record, and the relevant law, and having heard oral

1 argument, the court grants in part and denies in part Lloyds' motion for summary
2 judgment and grants Lloyds' motion to strike.

3 II. BACKGROUND

4 Lloyds issued a homeowner's insurance policy to Mr. Allen effective July 1, 2012
5 to July 1, 2013. (Bennett Decl. (Dkt. # 14) at 3-51 ("Policy"). The policy provided
6 coverage for Mr. Allen's dwelling, personal property, and "other structures" located at
7 3925 147th Avenue NE, Lake Stevens, Washington. (*Id.* at 3.) The premises at that
8 address consist of Mr. Allen's house, a garage, and two sheds. (Bennett Decl. at 53-64
9 ("Allen Dep.") at 15:6-22:21, 65-69 ("Diagrams"), 70-76 ("Photos").) The garage is
10 attached to the house by a breezeway; the sheds are unattached. (Allen Dep. at 15:6-
11 22:21; Diagrams; Photos.) Mr. Allen is an auto mechanic; he operates an auto repair
12 business out of the garage. (Allen Dep. at 9:20-10:21.)

13 The garage space is utilized as follows: Mr. Allen stores his motorcycle collection
14 in one portion of the lower level. (*Id.* at 24:4-5.) That portion also contains a bathroom,
15 as well as a desk with a computer and a credit card machine. (*Id.* at 20:9-21:1.) Mr.
16 Allen services his auto repair customers at that desk. (*Id.*; *see also id.* at 22:6-14.) The
17 remainder of the lower level serves as the mechanic shop. (*Id.* at 18:15-20:8.) It contains
18 one hydraulic lift and one stall. (*Id.*) Mr. Allen also stores one hydraulic lift outside the
19 garage. (*Id.*) Above the repair shop sits Mr. Allen's office and machine shop. (*Id.* at
20 19:7-11.)

21 Mr. Allen built the portion of the garage that currently houses his motorcycle
22 collection in 1974. (*Id.* at 15:6-21.) In 1983, in order to accommodate his burgeoning

1 auto mechanic business, he built an addition that expanded the garage to its current size.
2 (*Id.* at 17:2-18:2.) The back wall of the original structure now forms an interior wall; Mr.
3 Allen installed a door in the wall to allow access between the original and renovated
4 sectors. (*Id.* at 17:7-8:14; 27:8-28:7; Diagrams.)

5 In December, 2012, a fire occurred in the garage, damaging the garage and
6 adjacent dwelling. (Bennett Decl. at 52, 66-68; Griffith Decl. (Dkt. # 18) Ex. C
7 (“Assessment Rep.”), Ex. D (“Consulting Rep.”).) Mr. Allen has submitted a claim for
8 damage caused to both his dwelling and the portion of the garage consisting of the
9 original 1974 structure. (*See* Griffith Decl. Ex. A (“Repair Estimate”).) Lloyds claims
10 that it has already paid uncontested amounts for the actual cash value amount of loss to
11 the dwelling, cleaning of personal property, and loss of use. (Mot.; Griffith Decl. Ex. B
12 (“Cleaning Invoice”).) However, Lloyds contends that the following claimed losses are
13 uncovered: (1) damage to the garage, (2) costs caused by enforcement of ordinances or
14 laws regulating repair of the dwelling, and (3) increased costs for handling asbestos
15 contamination. (Compl. (Dkt. # 1).) Lloyds seeks a declaratory judgment regarding
16 those losses. (*See id.*) Lloyds also asks the court to declare that Mr. Allen’s appraisal
17 demand is premature. (*See id.*)

18 Mr. Allen filed his answer to Lloyds’ complaint nine months late. (Ans. (Dkt.
19 # 15).) In his answer, he seeks to raise six counterclaims and eight affirmative defenses.
20 (*Id.*) Lloyds has moved for summary judgment on all of its claims. (Mot.) Lloyds has
21 also moved to strike Mr. Allen’s counterclaims and affirmative defenses as untimely.
22 (Mot. to Strike.) Lloyds’ motions are now before the court.

1 **III. ANALYSIS**

2 **A. Legal Standard**

3 The Declaratory Judgment Act states: “In a case of actual controversy within its
4 jurisdiction . . . any court of the United States . . . may declare the rights and other legal
5 relations of any interested party seeking such declaration, whether or not further relief is
6 or could be sought.” 28 U.S.C. § 2201(a). Lloyds seeks a declaration pursuant to this act
7 that certain losses are not covered under the homeowner’s insurance policy it issued to
8 Mr. Allen. A federal court sitting in diversity applies the substantive law of the forum
9 state, but federal procedural law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1939).
10 Accordingly, the parties agree that Washington State insurance law governs the parties’
11 controversy. *See Erwin v. Cotter Health Centers*, 167 P.3d 1112, 1120 (2007) (holding,
12 under Washington’s choice of law rules, that “the presumptive local law is applied” if
13 parties do not dispute the choice of law).

14 In Washington, the determination of whether coverage exists involves a burden-
15 shifting framework. *See McDonald v. State Farm Fire & Cas. Co.*, 837 P.2d 1000, 1003-
16 04 (Wash. 1992). The insured bears the initial burden to demonstrate that the loss falls
17 within the scope of the policy’s insured losses. *See id.* If the insured makes that
18 demonstration, the insurer can avoid coverage by showing that specific policy language
19 excludes the loss. *See id.* at 1004. Exclusions from coverage are strictly construed
20 against the insurer because they are contrary to the protective purpose of insurance.
21 *Stuart v. Am. States Ins. Co.*, 953 P.3d 462, 464 (Wash. 1998). If the insurer shows that
22 an exclusion applies, the burden shifts back to the insured to demonstrate that the loss fits

1 within an exception to the exclusion. *See MKB Constructors v. Am. Zurich Ins. Co.*, No.
2 C13-0611JLR, 2014 WL 4792034, at *16 (W.D. Wash. Sept. 25, 2014); *Mid-Continent*
3 *Cas. Co. v. Titan Const. Corp.*, No. 05-CV-1240 MJP, 2009 WL 1587215, at *5 (W.D.
4 Wash. June 5, 2009).

5 The interpretation of an insurance policy is a question of law for the court.
6 *Overton v. Consolidated Ins. Co.*, 38 P.3d 322, 325 (Wash. 2002). Insurance policies are
7 contracts, so policy terms are interpreted according to basic contract principles. *Id.*
8 Policies must be “considered as a whole” and “given a fair, reasonable, and sensible
9 construction as would be given to the contract by the average person purchasing
10 insurance.” *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 15 P.3d 115, 122 (Wash.
11 2000). If the language is clear, the court must enforce the policy as written and may not
12 create ambiguity where none exists. *Quadrant Corp. v. Am. States Ins. Co.*, 110 P.3d
13 733, 737 (Wash. 2005). A clause is only considered ambiguous if it is susceptible to two
14 or more reasonable interpretations. *Id.* If an ambiguity exists, the clause is construed in
15 favor of the insured. *Id.* However, if the language of an insurance policy is clear and
16 unambiguous, the court must enforce it as written and may not create ambiguity where
17 none exists. *Am. Nat’l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 951 P.2d 250, 256
18 (Wash. 1998). However, “the expectations of the insured cannot override the plain
19 language of the contract.” *Quadrant Corp.*, 110 P.3d at 737.

20 **B. Mechanic Shop**

21 The parties dispute whether damage to the garage is covered by the policy. The
22 policy covers Mr. Allen’s dwelling, “including structures attached to the dwelling.”

1 (Policy at 8.) The policy also covers “other structures” that are “set apart from the
2 dwelling by clear space.” (*Id.*) The policy, however, includes the following exclusion,
3 signed by Mr. Allen:

4 The coverage afforded by this policy does not apply to the ownership,
5 maintenance, use, or existence of the following described building located
6 on the property insured hereunder:

6 Description of Building

7 XX Mechanic Shop

8 (Policy at 51 (Specified Outbuilding/Other Structure Exclusion Endorsement).)

9 Coverage, therefore, turns on the interpretation of the term “mechanic shop.”

10 Lloyds contends that the phrase refers to the garage, which Mr. Allen uses as a mechanic
11 shop. (Mot. at 5-7.) Mr. Allen contends the phrase is ambiguous because there are two
12 possible interpretations: (1) the phrase refers only to structures “unconnected” to the
13 dwelling, such the sheds or the auto lift Mr. Allen keeps outside the garage, and (2) the
14 phrase refers only to the portion of the garage that Mr. Allen actually uses as a mechanic
15 shop. (*See Resp.* at 8-14.) With respect to his second interpretation, Mr. Allen
16 distinguishes between the portion of the garage that corresponds to the original 1974
17 building (where he stores his motorcycle collection and computer desk) and the 1983
18 addition (where the lift, bay, office, and machine shop are located).

19 Lloyds has the better of the argument. The exclusion applies specifically to a
20 “building.” (Policy at 51 (“The coverage . . . does not apply . . . to the following
21 described building. . . . Described Building: Mechanic Shop.”)) Courts interpret
22 insurance contracts as an average insurance purchaser would understand them and give

1 | undefined terms in these contracts their “plain, ordinary, and popular” meaning. *Kish v.*
2 | *Ins. Co. of N. Am.*, 883 P.2d 308, 311-12 (Wash. 1994) (referring to Webster’s dictionary
3 | to ascertain the plain and ordinary meaning of the word “flood”). The plain and ordinary
4 | meaning of the word “building” is “a structure with walls and a roof.” See Merriam-
5 | Webster’s Collegiate Dictionary (11th ed. 2003); Black’s Law Dictionary (10th ed. 2014)
6 | (“A structure with walls and a roof, esp. a permanent structure.”). It is undisputed that, in
7 | 2012, the original 1974 garage and the 1983 addition constituted a single structure with
8 | walls and a roof. (*Id.* at 17:7-8:14; 27:8-28:7.) Mr. Allen’s proposed interpretations,
9 | however, would encompass only a portion of that building (certain rooms within the
10 | building), or, alternatively, only equipment located outside of that building. If the
11 | exclusion was intended to refer to a subpart of a building, it could easily have done so.
12 | (*See Webster’s Third New International Dictionary* 1165 (“Room: a space within a
13 | building enclosed by walls or separated from other similar spaces by walls or partitions
14 | part of the inside of a building that is divided from other areas by walls and a door and
15 | that has its own floor and ceiling.”); *The American Heritage Dictionary*, (5th. Ed. 2011)
16 | (“Room: . . . An area separated by walls or partitions from other similar parts of the
17 | structure or building in which it is located.”)). Instead, the exclusion referred to an entire
18 | building. (*See Policy* at 51.) Mr. Allen’s interpretation that “building” means only a
19 | “part of a building” does not comport with the plain language of the exclusion.

20 | The court finds that the only sensible construction of the exclusion is that it
21 | applied to the building on Mr. Allen’s premises that functioned as a mechanic shop. *See*
22 | *Weyerhaeuser Co.*, 15 P.3d at 122; *Kish*, 883 P.2d at 312 (holding that an ambiguity

1 exists only “if the language on its face is fairly susceptible to two different but reasonable
2 interpretations.”.) It is undisputed that, when Mr. Allen purchased the policy in 2012,
3 the only building on his premises that fit that description was the garage. (See Allen Dep.
4 at 9:20-10:21.) There is no support in the policy language for Mr. Allen’s contention that
5 he is entitled to excise a portion of the garage from the exclusion on the basis that it
6 happens to serve a dual purpose, or that it fit the definition of a separate building 30 years
7 ago. (See Policy at 51; *id.* at 20:9-21:1, 22:6-14.) Therefore, the court grants Lloyds’
8 motion for summary judgment. The court holds that the “Specified Outbuilding/Other
9 Structure Exclusion Endorsement” in the policy applies to the entire garage.

10 **C. Code Compliance**

11 The parties dispute whether the policy covers the cost of repairs necessary to meet
12 building codes. The parties agree that, in general, the policy excludes the cost of
13 compliance with ordinances and laws, unless specifically provided otherwise under the
14 policy.¹ (See Mot. at 7; Resp. at 14.) Mr. Allen raises two arguments in favor of
15 coverage. Neither is persuasive.

17
18 ¹ Specifically, the policy provides:

19 1. We do not insure for loss caused directly or indirectly by any of the following. Such
20 loss is excluded regardless of any other cause or event contributing concurrently or in any
sequence to the loss.

21 a. Ordinance or Law, meaning enforcement of any ordinance or law regulating the
22 construction, repair, or demolition of a building or other structure, unless specifically
provided under this policy.

(Policy at 14.)

1 First, Mr. Allen contends that the “Loss Settlement” provisions of the policy
2 specifically provide for recovery. (Resp. at 14-15.) The “Loss Settlement” provisions
3 explain that covered property losses to buildings are settled at “replacement cost” as
4 follows:

5 (1) . . . we will pay the cost to repair or replace . . . but *not more than the*
6 *least of the following amounts:*

7 (a) The limit of liability under this policy that applies to the building;

8 (b) The replacement cost of that part of the building damaged for *like*
9 *construction and use* on the same premises; or

10 (c) The necessary amount actually spent to repair or replace the damaged
11 building.

(Policy at 16 (emphasis added).)

12 In interpreting similar policies, Washington courts have consistently held that
13 replacement costs “for like construction and use” of a structure do not include costs of
14 upgrading a structure to meet building codes that it did not previously meet. *See*
15 *Allemand v. State Farm Ins. Companies*, 248 P.3d 111, 114 (Wash. Ct. App. 2011)
16 (holding that coverage for “similar construction” did not include upgrades to comply with
17 building codes); *Dombrosky v. Farmers Ins. Co. of Wash.*, 928 P.2d 1127, 1135 (Wash.
18 Ct. App. 1996), *as amended* (Feb. 7, 1997) (holding that coverage for “equivalent
19 construction” did not include building code upgrades); *Roberts v. Allied Group Insurance*
20 *Co.*, 901 P.2d 317, 326 (Wash. Ct. App. 1995). (holding that coverage for “like
21 construction” did not include building code upgrades). Therefore, the replacement costs
22 described under subsection (b) do not include costs necessary to bring a formerly

1 nonconforming structure into compliance with existing building codes. (*See* Policy at
2 16.)

3 On the other hand, Washington courts interpreting similar provisions have found
4 that replacement costs in the “necessary amount actually spent to repair or replace the
5 damaged building” do include costs necessary to comply with building codes. *See*
6 *Starczewski v. Unigard Ins. Grp.*, 810 P.2d 58, 62 (Wash. 1991). Therefore, it appears
7 that the replacement costs described under subsection (c) could include compliance costs.
8 On that basis, Mr. Allen argues that he is automatically entitled to coverage for costs of
9 bringing his dwelling into compliance with modern building codes. (Resp. at 16-17.)

10 Mr. Allen overlooks the fact that the Loss Settlement provisions provide that
11 Lloyds will only pay the “least of” the three definitions of replacement and repair costs
12 set forth in subsections (a), (b), and (c). (Policy at 16.) Therefore, to the extent the
13 “necessary amount actually spent to repair or replace the damaged building” exceeds
14 “the replacement cost of that part of the building damaged for like construction and use
15 on the same premises,” Mr. Allen is entitled to receive only the latter amount.
16 Accordingly, the court holds that subsection (b) of the Loss Settlement provisions does
17 not include coverage for costs necessary to bring a formerly nonconforming structure into
18 compliance with current building codes, and to the extent the costs described under
19 subsection (b) exceed the costs described under subsection (c), Lloyds is only required to
20 pay the lesser amount.

21 Second, Mr. Allen argues that the efficient proximate cause rule nonetheless
22 precludes application of the exclusion. “The efficient proximate cause rule operates to

1 permit coverage when an insured peril sets other excluded perils into motion which ‘in an
2 unbroken sequence and connection between the act and final loss, produce the result for
3 which recovery is sought.’” *Kish*, 883 P.2d at 311 (quoting *Graham v. Public Employees*
4 *Mut. Ins. Co.*, 656 P.2d 1077 (Wash. 1983)). “In such a situation, the insured peril is
5 considered the proximate cause of the entire loss and the loss is covered despite the fact
6 that the other perils contributing to the loss were excluded.” *Id.*

7 The efficient probable cause rule is inapplicable to the instant situation. The rule
8 “applies only when two or more perils combine in sequence to cause a loss and a *covered*
9 *peril* is the predominant or efficient cause of the loss.” *Vision One, LLC v. Philadelphia*
10 *Indem. Ins. Co.*, 519, 276 P.3d 300, 309 (Wash. 2012); *see also Kish*, 883 P.2d at 312
11 (“When, however, the evidence shows the loss was in fact occasioned by only a single
12 cause, albeit one susceptible to various characterizations, the efficient proximate cause
13 analysis has no application. An insured may not avoid a contractual exclusion merely by
14 affixing an additional label or separate characterization to the act or event causing the
15 loss.”). Here, there is only one cause of the loss—the fire. The issue is not what caused
16 the losses, but rather what losses caused by the fire are recoverable. As addressed in the
17 preceding paragraph, that issue is governed by the Loss Settlement provisions. (*See*
18 *Policy* at 16.) Accordingly, the court grants Lloyd’s motion for summary judgment.

19 **D. Asbestos**

20 The parties dispute whether the policy covers the costs of asbestos cleanup. Mr.
21 Allen raises two arguments in favor of coverage. Neither is persuasive.
22

1 First, Mr. Allen points out that the policy provides coverage for losses to real
2 property caused by “discharge, dispersal, seepage, migration, release, or escape of
3 pollutants unless the discharge, dispersal, seepage, migration itself is caused by a Peril
4 Insured Against under Coverage C,” where “pollutant” is defined as “any solid, liquid,
5 gaseous or thermal irritant or contaminant.” (Policy at 12.) “Fire” is a peril insured
6 under Coverage C. (Policy at 13.) Therefore, Mr. Allen concludes that the asbestos
7 cleanup caused by the fire damage is necessarily covered by the policy. (Resp. at 19-20.)

8 The policy, however, includes an endorsement that specifically excludes increases
9 in insured losses due to contamination of hazardous substances as defined by the United
10 States Environmental Protection Agency (“EPA”). Specifically, the endorsement
11 provides:

12 Notwithstanding any provision to the contrary within the Policy . . . the
13 Policy does not insure: . . .

14 (b) any increase in insured loss, damage, cost, or expense, . . .

15 which arises from any kind of seepage or any kind of pollution and/or
16 contamination, or threat thereof, whether or not caused by or resulting from
17 a peril insured.

18 (Policy at 30 (“Seepage and/or Pollution and/or Contamination Exclusion”).) The
19 exclusion applies to, among other things, the “seepage of, or pollution and/or
20 contamination by, . . . any material designated as a ‘hazardous substance’ by the United
21 States Environmental Protection Agency.” (*Id.*) Asbestos is classified by the EPA as a
22 “hazardous substance.” *See* 42 U.S.C. § 9601(14); 40 CFR 401.15.

1 Between the two provisions, the endorsement controls. Whereas the general
2 policy language refers to “pollutants,” the exclusion applies to a subset of pollutants:
3 “hazardous substances.” (See Policy at 12, 30.) In contract interpretation, specific
4 provisions are given greater weight than general language. *Adler v. Fred Lind Manor*,
5 103 P.3d 773, 786 (Wash. 2004). More important, the plain language of the endorsement
6 provides that it supersedes contrary provisions in the policy. (Policy at 30); see
7 *Transcon. Ins. Co. v. Wash. Pub. Utils. Districts’ Util. Sys.*, 760 P.2d 337, 343 (Wash. Ct.
8 App. 1988) (giving effect to an endorsement that superseded the general terms of the
9 policy). Therefore, the policy does not cover the costs of the asbestos cleanup.

10 Second, Mr. Allen once again relies on the efficient proximate cause rule. That
11 rule, however, is inapplicable to the instant situation. The hazardous substances
12 exclusion applies to “*any increase in insured loss . . . which arises from any kind of*
13 *seepage or any kind of pollution and/or contamination, or threat thereof, whether or not*
14 *caused by or resulting from a peril insured.*” (Policy at 30 (emphasis added).)
15 Washington courts have found coverage where, as here, the precipitating event is itself
16 excluded from coverage by the clear terms of the insurance policy. See *Findlay v. United*
17 *Pac. Ins. Co.*, 917 P.2d 116, 118 (Wash. 1996) (holding that the efficient proximate cause
18 rule did not foreclose application of an exclusion that defined the combination of the two
19 causes at issue as an uninsured peril); *Vision One, LLC v. Philadelphia Indem. Ins. Co.*,
20 276 P.3d 300, 309 (Wash. 2012). Therefore, the court grants Lloyds’ motion for
21 summary judgment. The court holds that the policy does not cover the asbestos cleanup.
22

1 **E. Appraisal**

2 Lloyds asks the court for a declaratory judgment that Mr. Allen’s demand for an
3 appraisal is premature. The policy provides: “If you and we fail to agree on the amount
4 of loss, either may demand an appraisal of the loss.” (Policy at 17.) At oral argument,
5 the parties’ counsel confirmed that appraisal is a process is external to the court in which
6 each side picks an appraiser to assess the value of the claimed, covered losses, and a
7 neutral arbiter selected by the parties reconciles any differences between the appraisers’
8 opinions.

9 Lloyds contends that the precondition of a “failure to agree on the amount of loss”
10 has not been met. (Mot. at 9-11.) Mr. Allen points out that he has provided Lloyds a
11 copy of a 46-page estimate from a third party of the cost of repairs of his dwelling and the
12 garage. (*See* Repair Estimate.) Lloyds argues that it cannot form an opinion as to the
13 amount of loss because the report includes the cost of all damages to all structures on the
14 premises, some of which Lloyds believes are not covered. At oral argument, however,
15 the parties’ counsel agreed that their disagreement over the extent of coverage was based
16 on three issues: the mechanic’s shop exclusion, coverage for code upgrades, and
17 coverage for asbestos remediation. The court has now ruled on each of these three issues.
18 *See supra* §§ III.B-D. As such, the court need not reach the appraisal issue. Lloyds’
19 arguments as to why Mr. Allen’s documentation of his claims is inadequate are no longer
20 applicable. The parties’ rights regarding arbitration under the policy are unaffected by
21 this order. (*See* Policy at 17.) The court therefore denies Lloyds’ motion for summary
22 judgment and dismisses Lloyds’ appraisal claim without prejudice as moot. *See S. Or.*

1 *Barter Fair v. Jackson Cnty., Or.*, 372 F.3d 1128, 1133-34 (9th Cir. 2004); *Gator.com*
2 *Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005); *see also Doe No. 1 v. Reed*,
3 697 F.3d 1235, 1238 (9th Cir. 2012).

4 **F. Untimely Counterclaims and Defenses**

5 Mr. Allen refused to answer Lloyds' complaint until three months before trial.
6 (*See Compl.; Ans.*) Only after Lloyds moved for summary judgment—and pointed out
7 that Mr. Allen had never filed an answer—did Mr. Allen decide to respond to the
8 complaint. (*See Mot.; Ans.*) In his answer, Mr. Allen raises for the first time six
9 counterclaims against Lloyds, namely, claims for breach of contract insurance bad faith,
10 violation of the Washington Insurance Fair Conduct Act, violation of the Washington
11 Consumer Protection Act, breach of contract, negligence, and seeking various declaratory
12 judgments. (*See Ans.* at 6-8.) Mr. Allen also raises for the first time eight affirmative
13 defenses. (*See id.* at 4.) At oral argument, Mr. Allen's counsel stated that he was not
14 prepared to proceed to trial on his counterclaims; in fact, he had not even began
15 discovery. Yet he put forth no explanation as to why he had waited so long to bring the
16 counterclaims to the court's attention.

17 "The decision whether to permit such a belated attempt to expand a [case] lies
18 within the discretion of the district court." *Brass v. Cnty. of L.A.*, 328 F.3d 1192, 1197
19 (9th Cir. 2003) (holding that a district court properly refused to permit the plaintiff to
20 raise new claims on the eve of trial because the plaintiff "offered no excuse or
21 justification for his failure to raise them earlier"); *Coleman v. Quaker Oats Co.*, 232 F.3d
22 1271, 1294 (9th Cir. 2000) (upholding a district court's order preventing the plaintiff

1 from proceeding on claims raised for the first time on summary judgment); *see also* Fed.
2 R. Civ. P. 12(h) (“The court may strike from a pleading an insufficient defense or any
3 redundant, immaterial, impertinent, or scandalous matter.”); *Lake v. Fellner*, No. 2:12-
4 CV-01345-GMN, 2014 WL 664653, at *2 (D. Nev. Feb. 19, 2014) (striking answer filed
5 one year after the deadline to respond under Rule 12(f); *Intagio Corp. v. Tiger Oak*
6 *Publications, Inc.*, No. C 06-3592 PJH, 2007 WL 2769783, at *1 (N.D. Cal. Sept. 21,
7 2007) (same)

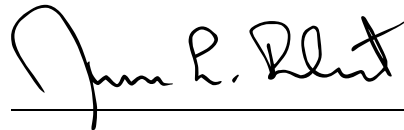
8 The court holds that Mr. Allen is not permitted to inject 14 new claims and
9 defenses into the case three months before trial. For the past year, this case has
10 proceeded according to a schedule agreed upon by the parties. (*See* JSR (both parties
11 agreeing that the case would be ready for trial by June 1, 2015). Every major case
12 deadline, from the deadline to amend pleadings, to the discovery deadline, to the
13 dispositive motions deadline, has now passed. (*See* Sched. Order (Dkt. # 10).) Motions
14 in limine have been filed. (*See* MILs (Dkt. # 22).) Trial is looming one month away.
15 (*See* Sched. Order.) Now, at the twelfth hour, Mr. Allen wants to reset the clock to zero,
16 and start afresh with new defenses and counterclaims. That tactic unfairly prejudices
17 Lloyds, who has prepared this case for a year on the basis of the properly pleaded claims.
18 Mr. Allen, however, has not shown a satisfactory reason as to why he waited so long—
19 after agreeing to a trial date in June, 2015, no less—to apprise the court of his
20 counterclaims and affirmative defenses. Therefore, the court exercises its discretion and
21 strikes Mr. Allen’s untimely counterclaims and affirmative defenses. *See Alvarado v.*
22 *FedEx Corp.*, No. C 04-0098 SI, 2007 WL 127999, at *1 (N.D. Cal. Jan. 12, 2007)

1 (striking an untimely answer because the plaintiffs would be prejudiced by the late
2 assertion of new defenses); *Brass*, 328 F.3d at 1197 (“The district court did not abuse its
3 discretion in refusing to allow [the plaintiff] thus to broaden his case.”).

4 **IV. CONCLUSION**

5 For the foregoing reasons, the court grants in part and denies in part Plaintiff’s
6 motion for summary judgment (Dkt. # 13). The court also grants Plaintiff’s motion to
7 strike (Dkt. # 21) and strikes Defendant’s counterclaims and affirmative defenses without
8 prejudice.

9 Dated this 7th day of July, 2015.

10
11 

12 JAMES L. ROBART
13 United States District Judge
14
15
16
17
18
19
20
21
22