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10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**
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AV BUILDER CORP., et al., Plaintiffs, v. HOUSTON CASUALTY COMPANY,	Case No.: 20-CV-1679 W (KSC) **ORDER: (1) GRANTING IN PART & DENYING IN PART MOTIONS TO FILE DOCUMENTS UNDER SEAL [DOCS. 35, 38, 42, 45, 48];** **(2) GRANTING DEFENDANT'S MOTION FOR SUMMARY-JUDGMENT [DOC. 34]; AND** **(3) DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY-JUDGMENT [DOC. 37]**

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22 Pending before the Court are cross motions for summary judgment in this
23 insurance-coverage dispute. Along with the motions, the parties have filed requests to
24 redact portions of their briefs and exhibits.
25 The Court decides the matters on the papers submitted, and without oral argument.
26 See CivLR 7.1.d. For the reasons discussed below, the Court **GRANTS IN PART AND**
27 **DENIES IN PART** the parties' motions to seal [Docs. 35, 38, 42, 45, 48], **GRANTS**
28

Defendant's summary-judgment motion [Doc. 34] and **DENIES** Plaintiffs' partial summary-judgment motion [Doc. 37].

I. BACKGROUND

This insurance-coverage dispute arises from an underlying sexual harassment and breach of contract lawsuit filed against Plaintiffs AV Builder Corp., RestorCorp and Antonio Madureira (referred to collectively as "AVB"), by Laura Dusina, a former employee and ex-girlfriend of Madureira. Plaintiffs tendered their defense of the case to their insurance carrier, Defendant Houston Casualty Company ("HCC"), which denied coverage. AVB contends HCC wrongfully denied coverage and is now suing for breach of contract and breach of the implied covenant of good faith and fair dealing.

A. Circumstances leading to Laura Dusina's lawsuit against Plaintiffs.

Plaintiff Antonio Madureira is the President of Plaintiffs AVB and RestorCorp. (*Compl.* ¶ 3.) In February 2010, AVB hired Laura Dusina as a temporary receptionist. (*AVB's Ex. 3* at 34:3–7, 17–24.[1]) In approximately October 2012, she was promoted to office manager, and later to marketing director. (*Id.* at 35:2–20; *HCC's Ex. N* ¶ 35.) Then in approximately May 2015, she began managing Plaintiff RestorCorp's billing department, which is an affiliate of AVB that provides destructive testing services. (*HCC's Ex. N* ¶ 38.) In exchange for the added responsibilities, Dusina received a bonus and annual commissions of 3% of RestCorp's profits. (*Id.*)

Shortly after she began working at AVB, Madureira and Dusina began a sexual relationship. (*HCC's Ex. N* ¶ 26.) The affair was kept secret because Madureira was married. (*Id.* ¶ 22.) Although Madureira eventually divorced, he insisted on keeping

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[1] Except for the attached deposition transcripts, all page references to HCC's and AVB's exhibits are to the "MSJ Appendix" page numbers.

their on-and-off relationship secret because he continued to date and have other "traditional" girlfriends. (*Id.* ¶¶ 31, 32.)

On or about April 16, 2018, Dusina ended the relationship. (*HCC's Ex. N* ¶¶ 47, 48.) Later that day, Madureira sent Dusina an email entitled "Laura's Resignation / Continuation Agreement," in which he accepted her purported resignation. (*Id.* ¶ 49.) Dusina denied resigning so returned to work the next day and continued working at AVB for several months. (*Id.* ¶ 50.)

Eventually, Madureira and Dusina began negotiating over a severance agreement and general release. Dusina did not want to leave AVB and was demanding Madureira pay her "what [she] was owed from AV Builder in commissions and ending our relationship." (*AVB's Ex. 3* at 132:11–23, 157:2–10.)

On July 23, Madureira sent Dusina a copy of the agreement prepared by his attorney, Dick Semerdjian, and asked her to "review with your attorney." (*AVB's Ex. 10* at p. 286.) Dusina did not yet have an attorney, but on the same day emailed back:

> It was 475k (you pay all taxes and fees) you were paying medical bills, no its not ok that I can't talk to my coworkers and no you can't refer to what I have done for this company as dates of my employment.

(*Id.* at p. 287.) The parties continued to exchange emails and on July 31, Madureira emailed Dusina:

> Just checking if you're ready to approve the changes I submitted to you, so that I can forward them on to the attorney to get them included. Please also make any additional comments that you feel necessary to complete the agreement. Thank you.

(*HCC's Ex. G* at p. 300.) The next day, Dusina sent Madureira a list of changes to the agreement. (*Id.* at p. 301.) These included: (1) payment of $600,000 ($200,000 of which she had already received), for which he would pay all the taxes; (2) language clarifying that the agreement does not affect Dusina's right under the Madureira Living Trust, Distribution of Specific Bequest; (3) continued full health insurance through 12/1/18; and (4) a letter of recommendation. (*Id.*)

On or about August 6, 2019, Dusina's employment with AVB ended. (*AVB's Ex. 3* at 38:8–10.[2]) The same day, Madureira requested a copy of AVB's employment practices liability insurance policy from his insurance broker. (*HCC's Ex. E* at 185:4–21, 187:18–188:1.)

The next day, August 7, Madureira emailed Dusina a copy of the "final agreement" for her "review and approval." (*HCC's Ex. H* at p. 319.) The agreement, entitled Severance Agreement and General Release ("Severance Agreement"), acknowledged that Dusina and Madureira,

> have engaged in a series of discussions concerning work place and personal issues prior to her resignation. The claims asserted in those discussions are collectively referred to herein as the "Dispute".

(*Id.* at p. 320.) The agreement further provided, without "any admission of liability, AV Builder agree[d] to fully, finally, and forever settle the Dispute and all known and unknown claims between them…." (*Id.*) Under section 1 (entitled "Settlement"), AVB agreed to, among other things, pay Dusina "a net of Four Hundred Thousand Dollars ($400,000) …." (*Id.*) In exchange, under section 11 (entitled "Release of All Claims"), Dusina was to agree to:

> irrevocably and unconditionally release, acquit and forever discharge Tony Madureira and AV Builder … from any and all claims, demands, losses, liabilities, agency charges and causes of action of any type arising or occurring on or before the effective date of this Agreement, as a result of or because of any act, omission or failure to act by Releasees, including, but not limited to, those arising out of or relating in any way to Ms. Dusina's employment by, association with, and termination of employment from AV Builder (hereinafter collectively referred to as "Claims").

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[2] Madureira testified that he believed Dusina's last day was August 2, 2018. (*HCC's Ex. E* at 187:12–17.) The last date of her employment is not a material fact for purposes of the issues raised in the pending motions.

(*Id.* at p. 323.) The agreement further provided that the "release includes but is not limited to Claims arising under the Age Discrimination in Employment Act, [and] Title VII of the Civil Rights Act of 1964…." (*Id.*)

On August 11, Madureira emailed Dusina and stated that he was changing his offer. (*HCC's Ex. H* at p. 333.) There is no indication what caused Madureira to change the offer. Nevertheless, the language regarding the scope of the release (i.e., section 11) did not change. (*Id.* at p. 337.) Madureira's email also stated that Dusina had "3 days to execute the agreement once you receive it. If you do not then you may pursue me in any fashion you see fit." (*Id* at p. 333.)

Meanwhile, on or about August 10, Madureira contacted his insurance broker and requested a quote to double the limits for AVB's employment practices liability insurance policy, which was set to expire in nine days. (*HCC's Ex. I* at pp. 341, 342.) On Monday, August 13, the broker responded that "[t]o increase the Employment Practices policy from the current $500,000 to $1,000,000; the additional annual premium would be $1,543.88. … Let me know if you would like to increase." (*Id.* at p. 341.) The same day, Madureira responded: "Please do, thanks!" (*Id.*)

The next day—August 14—attorney Josh Gruenberg sent attorney Semerdjian an email stating that he had been retained by Dusina "relative to her claims against Antonio Madureira and AV Builders" and that all "further communications with regard to this matter are to be with me." (*HCC's Ex. J* at p. 344.) The email also stated "[w]e are in the process of preparing a suit but will provide it to you prior to filing." (*Id.*)

On September 13, 2018, Gruenberg sent Semerdjian and Madureira a letter with a draft complaint. (*See AVB's Ex. 14*.) The letter reiterated that Gruenberg was representing "Dusina with respect to her claims against AV Builder Corp, Antonia Madureira, and Restorcorp," asserted that Dusina's "claims are substantial," and asked if "you would like to take part in some form of alternative dispute resolution process." (*Id.* at p. 402.) Gruenberg stated "[i]f we do not hear from you within 15 days, we will assume your clients would prefer to resolve this matter in the San Diego Superior Court."

(*Id.*) The draft complaint asserted eleven causes of action, including for sexual harassment, gender discrimination and intentional infliction of emotional distress. (*Id.* at pp. 403–424.)

On November 21, 2018, Dusina filed the complaint in the San Diego Superior Court (the "Underlying Action"). (*See HCC's Ex. N.*) The complaint acknowledged that Dusina and Madureira's sexual relationship was consensual. (*Id.* ¶ 26.) However, aside from the consensual nature of the relationship, Dusina alleged Madureira continually made offensive sexual comments about her in front of clients and coworkers. (*Id.* ¶ 33.) Even after Dusina was promoted to Marketing Director, Madureira "continued to demean [her] by making inappropriate sexual comments about her in front of her clients and coworkers." (*Id.* ¶ 36.) The complaint also alleged that after Dusina broke up with Madureira, he "embarked on a campaign of retaliation designed to forcer [Dusina] out of her employment at AV BUILDER." (*Id.* ¶ 51.) She claimed her "opposition to MADUREIRA's insistence on a quid-pro-quo sexual relationship was a substantial motivating factor in Defendants' decision to retaliate against Plaintiff." (*Id.* ¶ 52.) The complaint further alleged the proposed Severance Agreement was to "pay off" Dusina "for her silence" and she "suffered stress and anxiety due to MADUREIRA's retaliatory behavior and his pressure to sign the Nondisclosure Agreement." (*Id.* ¶¶ 54, 55.)

B. <u>AVB tenders its defense to HCC and HCC denies coverage.</u>

HCC issued employment practices liability insurance policies to AVB for the periods August 19, 2017 to August 19, 2018 (the "2017 Policy") and August 19, 2018 to August 19, 2019 (the "2018 Policy").[3] The terms of the two policies that are necessary for deciding the pending motions are substantively identical.

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[3] The 2017 Policy is attached as HCC's Ex. A and AVB's Ex. 1. The 2018 Policy is attached as HCC's Ex. B and AVB's Ex. 2. In this order, citations to the policies will be to the "2018 Policy" and "2017 Policy."

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The declarations page of both policies state that they are a "**CLAIMS MADE AND REPORTED POLICY.**" (*2017 Policy* at p. 2; *2018 Policy* at p. 61.) Under the "Insuring Agreement" each policy states, in relevant part:

> c. This Policy applies only if:
>
> (1) a "claim" because of an "insured event" is first made against any insured in accordance with the **WHEN COVERAGE IS PROVIDED (SECTION VII)** and **COVERAGE TERRITORY (SECTION VIII)** sections; and
>
> * * *
>
> (3) the "claim" is first reported in accordance with the **WHEN COVERAGE IS PROVIDED (SECTION VII)** and **COVERAGE TERRITORY (SECTION VIII)** sections, and

(*2017 Policy* at p. 40; *2018 Policy* at p. 99.)

Section VII of the policies, entitled "**WHEN COVERAGE IS PROVIDED**", as amended by the Claims Made & Reported Coverage with Supplemental Reporting Period Endorsement, provides that:

> 1. **Claims Made and Reported Coverage.** This Policy applies only to "claims" first made or brought against you and reported to us, in writing, within the Policy Period set forth on the Declarations page of this Policy or any Limited or Extended Reporting Period (if applicable).
>
> A "claim" will be considered first made or brought on the date we or any insured receives a written "claim" whichever comes first.
>
> All "claims" because of "one insured event" will be considered to have been made or brought on the date that the first of those "claims" was made or brought. Any "claim" arising out of an "insured event" reported to us pursuant to paragraph 2. will be deemed first made on the date notice of the "insured event" was given to us.

(*2017 Policy* at p. 28; *2018 Policy* at p. 91.)

A "claim" is defined in both policies as:

> 2. "Claim" means a written demand received by the insured alleging damages or the filing of a "suit", or any administrative proceeding including but not limited to the Equal Employment Opportunity Commission, or any other state or federal agency or authority with jurisdiction over you. However, "claim" does not include (1) labor or grievance arbitration subject to a collective bargaining agreement or (2) criminal proceedings.

(*2017 Policy* at p. 55; *2018 Policy* at p. 111.) An "'Insured Event' means actual or alleged acts of 'discrimination,' 'harassment,' and/or 'inappropriate employment conduct' by an Insured against an 'employee,' former 'employee,' or an applicant seeking employment with the Named Insured." (*2017 Policy* at p. 54; *2018 Policy* at p.113.) "One Insured Event" means "'insured events' which are (1) related by an unbroken chain of events or (2) made or brought by the same claimant." (*2017 Policy* at p. 55; *2018 Policy* at p. 114.)

Finally, Section VI of the Policies, as amended by the Claims Made & Reported Coverage with Supplemental Reporting Period Endorsement, provides:

> 2. Duties in the event of a "claim" or "suit."
>
> a. You must see to it that we receive written notice of a "claim" as soon as practicable, but in no event later than sixty (60) days after your actual notice or receipt of the "claim," or thirty (30) days after the expiration, termination, or cancellation of the Policy or any Extended Reporting Period, whichever comes first. Notice should include:
>
> (1) The identity of the person(s) alleging "discrimination," "harassment" or "inappropriate employment conduct;"
>
> (2) The identity of the insured(s) who allegedly committed the "discrimination," "harassment" or "inappropriate employment conduct;"

(3) The identity of any witness to the alleged "discrimination," "harassment" or "inappropriate employment conduct;"

(4) The date the "insured event" took place; and

(5) The written charge, complaint or demand as applicable.

(*2017 Policy* at pp. 28–29; *2018 Policy* at pp. 87–88.)

On October 15, 2018—approximately one month after receiving a copy of the draft complaint—AVB's attorney Semerdjian forwarded Gruenberg's letter and the draft complaint to HCC. (*See AVB's Ex. 11*.) On November 9, 2018, HCC sent a letter to AVB's attorney Semerdjian stating that it was denying coverage for the Underlying Action. (*See HCC's Ex. K*.) HCC asserted that "the instant 'claim' is deemed to have been first made on July 23, 2018, which was within the" 2017 Policy, but AVB did not notify HCC about the "claim" until October 15, 2018. (*Id.* at pp. 352–353.) Because AVB's notice was more than 60 days after it first received the "claim" and more than thirty days after the expiration of the 2017 Policy, HCC stated AVB "failed to comply with the Conditions Precedent set forth in SECTION VI.2 of the Policy and, therefore, coverage is not triggered under SECTION I. of the Policy." (*Id.* at p. 353.)

On August 27, 2020, AVB filed this lawsuit against HCC asserting causes of action for breach of contract and tortious breach of the implied covenant of good faith and fair dealing. (*See Compl*.) The parties have now filed cross motions for summary judgment seeking a determination regarding whether the Underlying Action was covered under the 2018 Policy.

II. MOTIONS TO FILE UNDER SEAL

HCC and AVB have filed motions to seal unredacted versions of certain briefs and exhibits filed in connection with the cross-motions for summary judgment. HCC seeks to file the following under seal on the basis that AVB has designated the documents confidential pursuant to a Stipulated Protective Order entered by the parties:

- HCC's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment ("HCC's P&A").
- HCC's Memorandum of Points and Authorities in Support of its Opposition to AVB's Motion for Partial Summary Judgment ("HCC's Opp'n").
- Exhibits D, E, F, and H to HCC's Appendix of Exhibits filed in support its Motion for Summary Judgment.
- Exhibit O to the Declaration of James Hazlehurst filed in connection with HCC's Reply.
- HCC's Evidentiary Objections filed in connection with its Reply.
- Exhibit P to the Declaration of James Hazlehurst filed in connection with HCC's Opposition to AVB's Motion for Partial Summary Judgment.

(*HCC's Mot. to Seal in Support of MSJ* at 1:1–18; *HCC's Mot. to Seal in Support of Reply* at 1:1–17; *HCC's Mot. to Seal in Support of Opp'n* at 1:1–18.[4]) AVB seeks to file the following under seal also on the basis that the parties have designated the documents as confidential pursuant to their stipulated Protective Order:

- AVB's Memorandum of Points and Authorities in Support of its Motion for Partial Summary Judgment ("AVB's P&A").
- AVB's Opposition to HCC's Motion for Summary Judgment ("AVB's Opp'n").
- Exhibits 3, 4, 5, 6, 7, 8, and 10 to AVB's Appendix of Exhibits filed in support of the Motion for Partial Summary Judgment.

(*AVB's Mot. to Seal in Support of Partial MSJ* at 1:22–2:13; *AVB's Mot. to Seal in Support of Opp'n* at 2:1–9.)

[4] HCC's motion to seal filed in support of the opposition did not seek to file under seal an unreadacted version of the opposition, which includes redactions. (*See HCC's Opp'n* at 19:11–23, 21:7–12.) However, the declaration filed in support of the motion to seal recognizes that HCC's opposition includes redactions. (*See Hazlehurst Dec. in Support of HCC's Opp'n* ¶ 4.)

"Historically, courts have recognized a 'general right to inspect and copy public records and documents, including judicial records and documents.'" Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597, n. 7 (1978)). Although access to judicial records is not absolute, there is a "narrow range" of documents that have traditionally been kept secret for policy reasons: "grand jury transcripts and warrant materials in the midst of a preindictment investigation." Id. (citing Times Mirror Co. v. United States, 873 F.2d 1210, 1219 (9th Cir. 1989)). The importance of this narrow range is that "[u]nless a particular court record is one 'traditionally kept secret,' a 'strong presumption in favor of access' is the starting point." Id. (citing Foltz v. State Farm Mutual Auto. Insurance Company, 331 F.3d 1122, 1135 (9th Cir. 2003)).

"[T]he strong presumption of access to judicial records applies fully to dispositive pleadings, including motions for summary judgment and related attachments." Kamakana, 447 F.3d at 1179. The reason is "because the resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in ensuring the 'public's understanding of the judicial process and of significant public events.'" Id. (quoting Valley Broadcasting Co. v. U.S. Dist. Ct., 798 F.2d 1289, 1294 (9th Cir. 1986)). "Thus, 'compelling reasons' must be shown to seal judicial records attached to a dispositive motion." Id. (citing Foltz, 331 F.3d at 1136). This standard applies "even if the dispositive motion, or its attachments, were previously filed under seal or protective order." Id. Relying on "a blanket protective order is unreasonable and is not a 'compelling reason' that rebuts the presumption of access." Id. at 1183 (citing Foltz, 331 F.3d at 1138).

The compelling reasons standard imposes a high threshold on parties seeking to maintain the secrecy of documents attached to dispositive motions. Kamakana, 447 F.3d 1180. "In general, 'compelling reasons' sufficient to outweigh the public's interest in disclosure and justify sealing court records exist when such 'court files might have become a vehicle for improper purposes,' such as the use of records to gratify private

1 spite, promote public scandal, circulate libelous statements, or release trade secrets." Id.
2 at 1179 (quoting Nixon, 435 U.S. at 598). "The mere fact that the production of records
3 may lead to a litigant's embarrassment, incrimination, or exposure to further litigation
4 will not, without more, compel the court to seal its records." Id. (quoting Foltz, 331 F.3d
5 at 1136).

6 In moving to seal documents attached to a dispositive motion, the party "must
7 articulate compelling reasons supported by specific factual findings [citation] that
8 outweigh the general history of access and the public policies favoring disclosure, such as
9 the 'public interest in understanding the judicial process.'" Kamakana, 447 F.3d at 1178–
10 79 (citations omitted). A broad, categorical approach that "[s]imply mention[s] a general
11 category of privilege, without any further elaboration or any specific linkage with the
12 documents, does not satisfy the burden." Id. at 1184.

13 As set forth above, the sole basis for AVB and HCC's requests to seal is their
14 stipulated protective order. This is not a sufficient basis to allow the sealing of
15 documents that are necessary to decide the motion. Additionally, based on the parties'
16 arguments, there is no basis for concluding that HCC or AVB are seeking to use the
17 documents to, for example, gratify private spite or circulate libelous statements. Because
18 the following documents are necessary to decide the cross-motions for summary
19 judgment, the Court will deny the parties' request to file them under seal:

20 • HCC's P&A.
21 • HCC's Opp'n.
22 • HCC's Exhibit D, p. 145.
23 • HCC's Exhibit E, pp. 86, 87, 185, 187, 188, 205.
24 • HCC's Exhibit F, p. 50.
25 • HCC's Exhibit G, pp. 300, 301.
26 • HCC's Exhibit H, pp. 319, 320, 323, 333, 337.
27 • HCC's Exhibit O, pp. 89, 90, 147.
28

- AVB's P&A.
- AVB's Opp'n.
- AVB's Exhibit 3, pp. 34, 35, 38, 132, 157.
- AVB's Exhibit 8, pp. 75, 76, 148–150.
- AVB's Exhibit 10, pp. 286, 287.

However, many of the documents the parties seek to seal are not necessary for the resolution of the motions and were not relied upon by the Court. This is important because "records attached to motions that are only 'tangentially related to the merits of a case' are not subject to the strong presumption of access." Baird v. BlackRock Institutional Trust Company, N.A., 403 F.Supp.3d 765, 792 (N.D. Cal. 2019) (citing Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1101 (9th Cir. 2016)). Thus, the Court will grant the motion to seal all documents not cited in the parties' briefs or this order.

III. APPLICABLE LAW

A. Summary-judgment standard

Summary judgment is appropriate under Rule 56(c) where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. See Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248.

A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The moving party can satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating that the

nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. Id. at 322–23. "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). If the moving party fails to discharge this initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159–60 (1970).

If the moving party meets this initial burden, the nonmoving party cannot avoid summary judgment merely by demonstrating "that there is some metaphysical doubt as to the material facts." In re Citric Acid Litig., 191 F.3d 1090, 1094 (9th Cir. 1999) (citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Triton Energy Corp. v. Square D Co., 68 F.3d 1216, 1221 (9th Cir. 1995) (citing Anderson, 477 U.S. at 252) ("The mere existence of a scintilla of evidence in support of the nonmoving party's position is not sufficient."). Rather, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by 'the depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Ford Motor Credit Co. v. Daugherty, 279 Fed. Appx. 500, 501 (9th Cir. 2008) (citing Celotex, 477 U.S. at 324). Additionally, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. See Matsushita, 475 U.S. at 587.

B. California insurance law

Under California law, an insurer is obligated to defend the insured when the facts alleged in the complaint create a potential for coverage. Scottsdale Ins. Co. v. MV Transp., 36 Cal. 4th 643, 654 (2005). However, in evaluating the duty to defend, the insurer may also consider facts outside those alleged in the complaint. Id. "If any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer's duty to defend

arises and is not extinguished until the insurer negates all facts suggesting potential coverage." Horace Mann Ins. Co. v. Barbara B., 4 Cal. 4th 1076, 1081 (1993).

"Interpretation of an insurance policy is a question of law and follows the general rules of contract interpretation." MacKinnon v. Truck Ins. Exch., 31 Cal.4th 635, 647 (2003). A policy term is ambiguous when it is susceptible to two or more reasonable constructions. EMMI Inc. v. Zurich American Ins. Co., 32 Cal. 4th 465, 470 (2004). Courts, therefore, will not adopt "a strained or absurd interpretation in order to create an ambiguity where none exists." Bay Cities Paving & Grading, Inc., v. Lawyers' Mutual Ins. Co., 5 Cal. 4th 854, 867 (1993). Additionally, ambiguity cannot be found in the abstract. Id. Rather, the "proper question is whether the word is ambiguous in the context of this policy and the circumstances of this case." Id. at 868 (emphasis in original). The "policy 'must be construed as an entirety, with each clause lending meaning to the other.'" Carmel Development Co. v. RLI Ins. Co., 126 Cal.App.4th 502, 507 (2005). Where an ambiguity exists, however, it should be resolved against the insurer. EMMI, Inc., 32 Cal. 4th at 470–471 (citing Safeco Ins. Co. of America v. Robert S., 26 Cal. 4th 758, 763 (2001)).

IV. DISCUSSION

The parties' cross motions raise two issues. First, did Dusina make a "claim" during the 2017 or 2018 policy period? Second, assuming Dusina's claim was made during the 2018 Policy period, can HCC rescind the policy because Madureira made a material omission when he applied to double the policy limits to $1 million?

A. When did Dusina make a "claim" against AVB?

The parties disagree about whether Dusina's "claim" was made during the 2017 or 2018 policy period. If the claim was made during the 2017 Policy period, the parties agree that AVB did not timely report it. If, on the other hand, Dusina's claim was first made during the 2018 Policy period, the claim is timely.

As set forth above, under Section VI of the policies, AVB had a duty to notify HCC, "as soon as practicable, but in no event later than sixty (60) days after your actual notice or receipt of the 'claim,'…." (*2017 Policy* at pp. 28–29; *2018 Policy* at pp. 87–88.) A "claim" is defined, in relevant part, as "a written demand received by the insured alleging damages or the filing of a 'suit' ...." (*2017 Policy* at p. 55; *2018 Policy* at p. 111.) Although this definition does not refer to an "insured event," AVB contends that the duty to report a "claim" only arises when the "demand alleg[es] damages relating" to an "insured event." (*AVB's P&A* at 21:26–22:1, 22:5–7; *AVB's Opp'n* at 20:23–25.) In its reply, HCC disputes AVB's argument: "There is no requirement in the Policy that to constitute a 'claim', it must mention an 'insured event.'" (*HCC's Reply* at 4:17–19.)

Although HCC is correct that the policies' definition of a "claim" does not refer to an "insured event," the policies' other provisions create an ambiguity. Specifically, the provision requiring an insured to provide "written notice of a 'claim' as soon as practicable" states that the insured's "[n]otice should include:"

(1) The identity of the person(s) alleging "discrimination," "harassment" or "inappropriate employment conduct;"

(2) The identity of the insured(s) who allegedly committed the "discrimination," "harassment" or "inappropriate employment conduct;"

(3) The identity of any witness to the alleged "discrimination," "harassment" or "inappropriate employment conduct;"

(4) The date the "insured event" took place; and

(*2017 Policy* at pp. 28–29; *2018 Policy* at pp. 87–88.) The referenced conduct—"discrimination," "harassment," or "inappropriate employment conduct"—are "insured events" under the policies. (*2017 Policy* at p. 54; *2018 Policy* at p.113.) Because this provision states that the insured's notice of the "claim" should include information regarding the "insured event," an ambiguity exists regarding the type of "claim" an insured is obligated to report. Where an ambiguity exists, courts interpret the policy against the drafter and in favor of coverage. EMMI, Inc., 32 Cal. 4th at 470–471. For

this reason, the Court agrees with AVB that it was obligated to provide notice of a "claim" relating to an "insured event."

HCC nevertheless argues that AVB received a "claim" relating to an "insured event" no later than August 14, 2018. (*HCC's P&A* at 14:16–16:24.) The Court agrees.

The following facts are not disputed:

- On August 1, 2018, Dusina sent Madureira a list of changes to the proposed Severance Agreement. (*HCC's Ex. G* at p. 301.)

- The proposed Severance Agreement provided that in exchange for AVB paying a "net of Four Hundred Thousand Dollars ($400,000)" to Dusina, she was to release "Claims" including those "arising under the Age Discrimination in Employment Act, [and] Title VII of the Civil Rights Act of 1964…." (*HCC's Ex. H* at pp. 320, 323.)

- On August 10, Madureira contacted his insurance broker to double the limits on AVB's 2018 Policy. (*HCC's Ex. I* at p. 342.)

- On August 11, Madureira emailed Dusina that he was changing his offer and she had "3 days to execute the agreement" or "pursue me in any fashion you see fit." (*HCC's Ex. H* at p. 333.)

- On August 13, Madureira agreed to increase the 2018 Policy limits from $500,000 to $1 million. (*HCC's Ex. I* at p. 341.)

- On August 14, Gruenberg emailed AVB that he was representing Dusina "relative to her claims against Antonio Madureira and AV Builders" and that "[w]e are in the process of preparing a suit but will provide it to you prior to filing." (*HCC's Ex. J* at p. 344.)

These undisputed facts establish that by August 14, 2018, AVB had (1) received a demand by Dusina for, among other things, a net payment of $400,000 to (2) release claims for discrimination and harassment and (3) received notification that a lawsuit was being prepared by Dusina. Based on these facts, under the terms of the 2017 Policy, AVB had received a "claim" related to an "insured event."

In its motion and opposition, AVB nevertheless argues that the above communications were not a "claim" because the parties' negotiations "related solely to

Ms. Dusina's perceived value from the relationship – not because Mr. MADUREIRA had done anything *wrong*." (*AVB's P&A* at 22:8–19; *AVB's Opp'n* at 21:4–8.) Instead, according to AVB, "the first written demand from Ms. Dusina alleging damages because of action or alleged acts of 'discrimination,' 'harassment' and 'inappropriate conduct' … was made … on September 13, 2019." (*AVB's P&A* at 22:20–24; *AVB's Opp'n* at 21:11–13.)

But this argument ignores the express terms of Madureira's proposed Severance Agreement requiring Dusina to release "claims" for harassment and discrimination. The argument also ignores Madureira's request for a quote and his subsequent agreement to double the 2018 Policy limits at approximately the same time he gave Dusina an ultimatum about signing an agreement releasing AVB from claims for discrimination and harassment. Finally, it is also relevant that in Dusina's subsequent lawsuit, she alleged Madureira continually made offensive and degrading comments about her to clients and co-workers, that he was essentially terminating her for refusing to have sex with him and that his attempt to get her to sign the Severance Agreement was retaliatory and caused her anxiety. Even absent Dusina's allegations, the most favorable inference that can be drawn for AVB is that Madureira and Dusina's negotiations involved "claims" for both "insured events" and un-"insured events." Thus, this Court finds that no reasonable jury reviewing these undisputed facts could find that by August 14, 2018, Madureira did not know the "claim" received was at least in part related to potential sexual harassment and discrimination claims.

AVB next argues that a "claim" under the policy consists of a single writing and there is not a single email that satisfies all the requirements of a "claim" under the policies. But AVB cites no authority for the proposition that a "claim" must consist of one writing and cannot be read in context. Additionally, under AVB's theory, if Dusina had sent AVB an email demanding $1 million, and thirty minutes later sent a follow-up email clarifying the demand was to settle alleged discrimination for which a complaint was being prepared, AVB would have no obligation to notify HCC because two emails

were required to satisfy the requirements of a "claim." The Court finds such an interpretation unreasonable.

Moreover, even if a "claim" was required to be in one document, Dusina's August 1 email is sufficient. Again, there is no dispute that Dusina's email demanded $600,000 to release claims for, among other things, harassment and discrimination. As such, this demand necessarily included damages for harassment or discrimination. Accordingly, the Court finds Dusina's August 1 email was a "claim" under the 2017 Policy.

For all these reasons the Court finds Dusina made a "claim" against AVB no later August 14, 2018. Because AVB did not notify HCC of the claim within 60 days, HCC is entitled to summary judgment.

B. <u>Did Madureira make material omissions regarding the 2018 Policy?</u>

HCC argues that even if the claim was timely under the 2018 Policy, coverage is not available because when Madureira applied to increase the policy from $500,000 to $1 million, he failed to disclose material information, i.e., the dispute with Dusina and the imminent lawsuit. (*HCC's P&A* at 20:1–8.) AVB responds that Madureira did not have a duty to disclose because HCC never asked about any disputes or potential claims. (*AVB's Opp'n* at 26:8–15.)

HCC's argument is based on Insurance Code § 332, which provides:

> Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining.

Citing a number of California and federal cases, HCC contends this section required Madureira to disclose his settlement negotiations with Dusina. (*HCC's P&A* at 21:12–22:8.)

The primary problem with HCC's argument is that it has not identified any question on the application asking Madureira to disclose his negotiations with Dusina.

Nor does there appear to be any question asking Madureira to disclose, for example, facts or circumstances that may lead to a "claim." This fact distinguishes all the federal and state cases HCC cites in support of its argument.

In Willard v. Valley Forge Life Ins. Co., 218 F. Supp. 2d 1197, 1202 (C.D. Cal. 2002) the application for life insurance stated that the policy would "take effect upon immediate payment with submission of the application, or upon receipt of payment due if the insured's health had not changed since the application." Id. at 1199. After the insured submitted the application, he discovered he had pancreatic cancer. Shortly thereafter, the insurer "delivered" the policy to the insured, who paid for the entire year's premium without disclosing his changed health condition. The insured died the following year. The insurance company investigated the insured's health records and denied coverage on the basis that the "policy would have become effective only upon payment for an insured whose health was the same as represented in the application." Id. at 1200.

The insured's widow sued the insurance company, who moved for summary judgment. In evaluating the insurer's motion, the district court explained that a "good health provision, which requires a prospective insured's health condition remain the same between application and policy delivery dates, is a condition precedent to coverage." Willard, 218 F.Supp.2d at 1200–01 (citation omitted). The court then reasoned:

> In his application, Willard [i.e, the insured] agreed his policy would not be effective until payment, assuming his health status had not changed between the application and delivery dates. Willard knew his health condition changed between those dates and did not tell Defendant. Willard's changed health condition caused his death. Despite Willard's eventual payment, his policy was ineffective because he did not comply with the condition of good health ***included in the application*** and Defendant did not waive that condition precedent.

Id. at 1202 (emphasis added).

Unlike Willard, HCC has not identified any question or provision in the application requiring Madureira to disclose his negotiations or dispute with Dusina. This fact also

distinguishes this case from all the other cases HCC cites in its motion. See Salkin v. United Services Auto. Ass'n, 835 F.Supp. 2d 825, 833–34 (C.D. Cal. 2011) (insured's omissions were in response to questions asked during the application process); Nieto v. Blue Shield of California Life & Health Ins., Co., 181 Cal.App.4th 60 (2010) (omissions concerning information requested on application regarding insured's medical history); Williamson & Vollmer Eng'g, Inc. v. Sequoia Ins. Co., 64 Cal. App. 3d 261, 275 (1976) (insurance application asked applicant if aware of any circumstances that may result in claim against it); Superior Dispatch, Inc. v. Ins. Corp. of N.Y., 181 Cal. App. 4th 175, 192 (2010) (insurance application requested list of "commodities hauled" and insured failed to disclose that it hauled "autos, dump trucks and other vehicles"); see also Mitchell v. United National Ins. Co., 127 Cal.App.4th 457, 468 (2005) (stating that the Insurance Code provides a "statutory framework that imposes 'heavy burdens of disclosure' 'upon both parties to a contract of insurance, and any material misrepresentation or the failure, whether intentional or unintentional, to provide ***requested information*** permits rescission of the policy by the injured party.'") (citation omitted; emphasis added).

Because HCC has not cited a case holding that an insured violates Insurance Code § 332 by failing to disclose information that is not requested on an insurance application, HCC is not entitled to summary judgment on this basis.

V. CONCLUSION & ORDER

For the reasons set forth above, Defendant's motion for summary judgment is **GRANTED** [Doc. 34], Plaintiffs' partial motion for summary judgment [Doc. 37] is **DENIED** and the parties' motions to file documents under seal [Docs. 35, 38, 42, 45, 48] are **GRANTED IN PART** and **DENIED IN PART**, as follows:

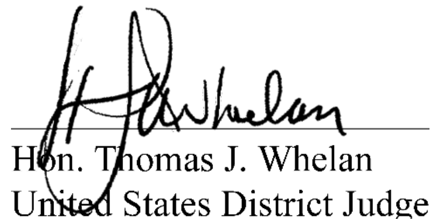
- **On or before April 1, 2022,** Plaintiffs are **ORDERED** to file unredacted copies of the following documents: (1) AVB's Memorandum of Points and Authorities in Support of the Motion for Partial Summary Judgment;

(2) AVB's Opposition to HCC's Motion for Summary Judgment; (3) AVB's Exhibit 3, pp. 34, 35, 38, 132, 157; (4) AVB's Exhibit 8, pp. 75, 76, 148–150; and (5) AVB's Exhibit 10, pp. 286, 287.

- **On or before April 1, 2022,** Defendant is **ORDERED** to file unredacted copies of the following documents: (1) HCC's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment; (2) HCC's Memorandum of Points and Authorities in Support of its Opposition to AVB's Motion for Partial Summary Judgment; (3) HCC's Exhibit D, p. 145; (4) HCC's Exhibit E, pp. 86, 87, 185, 187, 188, 205; (5) HCC's Exhibit F, p. 50; (6) HCC's Exhibit G, pp. 300, 301; (7) HCC's Exhibit H, pp. 319, 320, 323, 333, 337; and (8) HCC's Exhibit O, pp. 89, 90, 147.
- The Clerk shall file under seal the parties' lodged documents [Docs. 36, 39, 43, 46, 49].

IT IS SO ORDERED.

Dated: March 22, 2022



Hon. Thomas J. Whelan
United States District Judge