2d Civil No. B238357

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LEROY BROWN and TERRIE BROWN,

Plaintiffs and Appellants,

vs.

MID-CENTURY INSURANCE COMPANY,

Defendant and Respondent.

Appeal from Los Angeles Superior Court,
Case No. BC433800
Honorable Richard Rico, Judge Presiding

RESPONDENT'S BRIEF

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Court of Appeal
State of California
Second Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: **B238357**

Case Name: **Brown et al. v. Mid-Century Insurance Company**

Please check the applicable box:

☐ There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

■ Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1. Mid-Century Insurance Company	Defendant/Respondent
2. Farmers Insurance Exchange	Owner of Mid-Century Ins. Co.
3. Farmers Group, Inc.	Attorney-in-fact for Farmers Ins. Exch.
4. Zurich Financial Services	Farmers Group, Inc. is a wholly-owned direct and indirect subsidiary of Zurich Financial Services Ltd., which is publicly traded on the Swiss Stock Exchange

Please attach additional sheets with Entity or Person Information if necessary.

Signature of Attorney/Party Submitting Form

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Party Represented: Respondent Mid-Century Insurance Company.

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

STATUTES

TABLE OF AUTHORITIES

MISCELLANEOUS

INTRODUCTION

A hidden hot water pipe corrodes—after more than four decades of being improperly encased in concrete—and gradually and continuously leaks water for months. An ordinary person using common sense would never call such a leak "sudden." But that's exactly what plaintiffs and appellants Mr. and Mrs. Leroy Brown (Plaintiffs) posit in their opening brief.

The undisputed evidence shows that a water pipe slowly and incrementally corroded over forty years and water leaked under Plaintiffs' house gradually and continuously for at least one month (if not longer). Their homeowners' policy, using express and unambiguous language, affords coverage for water damage *only* when such loss is caused by a "sudden and accidental discharge" and expressly *excludes* all other water-caused damage. Plaintiffs' policy expressly defines a "sudden" discharge to exclude any "gradual . . . release of water . . . over a period of time." Nonetheless, Plaintiffs contend their insurer, defendant and respondent Mid-Century Insurance Company (Mid-Century), improperly denied coverage for their water damage claim. They assert that the undeniably long-term corrosion process ultimately resulted in a "sudden," nano-second initial discharge, which then continued over time.

According to Plaintiffs, "[t]he corrosive process can go on for 15 years and then burst instantly." They claim that here the discharge qualified as sudden and accidental because the pipe "burst suddenly, in a

'nano-second' when it failed, spraying hot water into the crawl space under the laundry room of [their] home," even though the leak slowly continued, undiscovered, for months. In effect, they argue that every leak is "sudden" because it has to start at some definable point in time.

The trial court—granting Mid-Century's summary judgment motion—rightly disagreed that such an event would be covered. It found that Plaintiffs' semantic characterization made no sense. No matter how Plaintiffs characterized the leak process and how it might be micro-analyzed, there was no genuine fact dispute or basis to claim that the pipe's leak occurred suddenly: "The fact that the pipe's breach only took a fraction of a second does not mean the release of water was 'sudden.'" In fact, everybody—including Plaintiffs' expert—agreed the leak was caused by gradual corrosion, eventually creating a non-watertight condition and ultimately a slow "mist, stream and spray of water" over an extended period of time as the pipe further corroded and the size of its breach increased. Given the undisputed facts and the requirement of a sudden, non-gradual discharge, there could be no coverage as a matter of law.

In an apparent Hail Mary attempt, Plaintiffs invoke the efficient proximate cause doctrine, arguing there could have been an additional cause of damage beyond the gradual water discharge. But that argument fails at its premise. The efficient proximate cause doctrine is irrelevant because every possible type of damage Plaintiffs sustained (i.e., water damage, corrosion damage, wear-and-tear damage, mold damage)—

is expressly excluded from coverage. Only water damage from a sudden and accidental discharge is insured.

With no coverage, Plaintiffs' insurance bad faith claim necessarily fails. But even if that were not the case, more than reasonable cause supports the coverage denial here based on precedent, the policy's limited coverage for sudden and accidental water discharges, and the express water, corrosion, wear-and-tear and mold exclusions that Plaintiffs' struggle in vain to avoid. That, too, defeats any claim for insurance bad faith.

In short, the opening brief attempts to modify the policy's express and plain terms with a smoke-and-mirrors presentation. The judgment should be affirmed.

STATEMENT OF THE CASE

A. Plaintiffs' Homeowners' Policy Does Not Insure Water Damage Other Than A "Sudden And Accidental Discharge" Of Water; Mold Is Never Insured.

1. The Policy limits coverage for both causes and types of loss.

Mid-Century issued Plaintiffs a Farmers Next Generation Homeowners insurance policy (Policy). (1 Appellants' Appendix (AA) 106 ¶ 2, 144-145; 2 AA 463 ¶ 2.) The Policy provides limited first-party coverage for property damage. (1 AA 106 ¶ 3, 145, 156-167; 2 AA 463-467 ¶¶ 3-10.)

Unlike many policies which cover all risks unless excluded, the Policy "does not cover all *types* of loss or damage to covered property." (1 AA 156, emphasis added.) Nor does it "insure against all *causes* of loss or damage to covered property. (*Ibid.*, emphasis added.) The Policy expressly does not insure thirteen different *types* of loss, including "Water damage," "Corrosion" damage, "Wear and tear" damage, and "Fungi" (mold) damage. (1 AA 167-169; 2 AA 465 ¶ 7, 467 ¶ 10.) It further excludes from coverage thirty-five different *causes* of loss, including "Water," "Corrosion," "Wear and tear," and "Fungi." (1 AA 169-174; 2 AA 465 ¶ 7, 467 ¶ 10.) *Limited* coverage is provided as to *some*, but not all of these causes or types of loss by Extension of Coverage. (1 AA 160-161; 2 AA 466 ¶ 8.)

The "Introduction" highlights the fact that this Policy does not cover certain *causes* and *types* of loss: "[T]his policy insures different kinds of property; however, not all property is insured. . . . Coverage is dependent upon both the (1) *cause* of the loss or damage and (2) *type* of loss or damage." (1 AA 151; 2 AA 464 ¶ 4, emphases added.)

2. The Policy does not cover mold, both as a cause and type of damage.

The Policy *never* covers mold either as a *cause* or *type* of damage: "We do not insure loss or damage directly or indirectly *caused by, arising out of or resulting from* fungi or the discharge, dispersal, migration, release or escape of any fungi." (1 AA 171 [¶ I.B.10.], emphasis added; 2 AA 467 ¶ 10.) Likewise, the Policy does "not insure loss or damage consisting of, composed of or which is fungi." (1 AA 168 [¶ I.A.10.]; 2 AA 467 ¶ 10.) "Fungi" is defined as "any part or form of fungus, fungi, mold, mildew [or] spores . . . whether visible or not visible to the unaided human eye." (1 AA 153 [¶ 12.], emphasis omitted; see 2 AA 467 ¶ 10.)

3. The Policy does not insure water damage, other than that arising from a "sudden and accidental discharge."

The Policy also contains two water provisions—one does not insure water as a type of *damage*; the other excludes damage *caused* by water:

"We do not insure loss or damage consisting of, composed of or which is water damage, *except* as covered under Section I - Extensions of Coverage, **Limited water coverage**." (1 AA 167 [¶ I.A.1.], first emphasis added, second emphasis in original; see 1 AA 170 [¶ I.B.2.] [same; excluding water as a *cause* of loss].)

There is, however, a "[l]imited" extension of coverage for "direct physical loss or damage . . . from direct contact with water, but only if the water results from . . . a *sudden and accidental discharge*, eruption, overflow or release of water . . . from within any portion of . . . a plumbing system" (the "Sudden and Accidental Coverage"). (1 AA 160 [¶ I.1.a.(4)i.(a)], emphasis added; 2 AA 466 ¶ 8; see Appellants' Opening Brief (AOB) 2-3.)

In requiring a "sudden and accidental discharge," the Policy makes clear what *doesn't* qualify as falling within that phrase: "[A] constant or repeating gradual, intermittent or slow release of water, or the infiltration or presence of water over a period of time." (1 AA 161 [¶ I.1.c.]; 2 AA 466 ¶ 9.) It also describes several specific types of water events that *never* qualify for coverage under the Sudden and Accidental Coverage: (1) an intermittent or slow discharge, (2) seepage, (3) leakage, (4) trickle, (5) collection, or (6) infiltration or overflow of water from any source. (*Ibid.*)

4. The Policy does not insure corrosion damage or any other damage caused by corrosion unless it arises from a "sudden and accidental discharge" of water.

The Policy also does not cover corrosion *damage*: "We do not insure loss or damage consisting of, composed of or which is corrosion, deterioration, decay or rust." (1 AA 168 [¶ I.A.9.].) And, the Policy excludes all "loss or damage directly or indirectly *caused by, arising out of or resulting from* corrosion, deterioration, decay or rust," except for water damage caused by a "sudden and accidental discharge." (1 AA 171 [¶ I.B.9.], emphasis added.)

5. The Policy does not insure "wear and tear" damage or any other damage caused by "wear and tear" unless it arises from a "sudden and accidental discharge" of water.

The Policy also does not cover wear-and-tear *damage*: "We do not insure loss or damage which is wear and tear . . . ." (1 AA 168 [¶ I.A.7.].) And, the Policy excludes all "loss or damage directly or indirectly *caused by, arising out of or resulting from* wear and tear," except for water damage caused by a "sudden and accidental discharge." (1 AA 170 [¶ I.B.8.], emphasis added.)

* * *

In sum, regarding mold, wear-and-tear, corrosion and water: Mold is never covered as a cause or type of damage, wear-and-tear and corrosion are never covered as a type of damage and wear-and-tear, corrosion and water are only covered as a cause of damage if there is a sudden and accidental discharge of water.

B. Plaintiffs Discover The Effects Of A Slow, Continuing Leak.

1. Plaintiffs first notice condensation and mold.

Plaintiffs first noticed condensation on the inside of their home's ground-floor windows around February 18, 2009. (1 AA 123:21-124:22; 2 AA 469 ¶ 12.) Within a couple of days they discovered condensation throughout the home's interior. (1 AA 125:3-24; 2 AA 469 ¶ 12, 470 ¶ 13.) They repeatedly tried to clean the moisture off the windows, but it returned every day. (1 AA 128:13-16, 208; 2 AA 469 ¶ 12.)

Over the course of the next several weeks, Plaintiffs discovered other evidence of leaking water. (1 AA 126:6-127:21, 128:6-12, 129:1-130:13, 207-209; see AOB 4 [conceding that condensation was "physical evidence of a leak"].) For instance, they began to notice mold on the interior walls and window frames. (1 AA 129:1-17; 2 AA 470 ¶ 13.) Mr. Brown later testified mold "was developing everywhere simultaneously" in "[e]very room that had a window." (1 AA 129:22-23,

130:2-3; 2 AA 470 ¶ 13.) At no time, however, did Plaintiffs observe any water discharge of any kind inside their house. (1 AA 128:21-25.)

2. One month later, plaintiffs discover moisture underneath their house.

About one month after they first noticed condensation and mold inside their house, Plaintiffs decided to investigate further. (2 AA 469 ¶ 12, 470 ¶ 14.) Mr. Brown stuck his head into the crawlspace under the house, shined a flashlight, and saw that the soil was damp. (1 AA 133:12-20.) At the time, he was unable to see the source of the moisture; he couldn't remember seeing or hearing any water spraying or anything that sounded like spraying. (1 AA 133:21-134:5.)

Mr. Brown's brother offered to go under the house into the crawlspace to take a look. (1 AA 131:8-132:20, 210; 2 AA 470 ¶ 14.) Mr. Brown reported to Mid-Century two days later in a recorded statement that his brother reported, "'Oh, yeah. You do have a leak.'" (1 AA 210.) But "[i]f he knew where (the leak) was coming from, he did not tell me. He just told me it was wet." (1 AA 133:9-11; see also 1 AA 131:14-15; 2 AA 492-493 ¶ 53.) So they decided to turn off the water. (1 AA 134:16-17, 212; 2 AA 470 ¶ 14.)

C. Plaintiffs' Plumber Uncovers The Leak's Hidden Source: A Corroded Pipe Embedded In The House's Concrete Foundation, Which Formed A Tiny Hole.

1. The plumber inspects the house's interior.

The next day, Mr. Brown contacted a plumbing company that he knew and trusted to diagnose the problem. (1 AA 135:21-136:11 ["I know the quality of their work. . . . I had referred them out to other homes that needed plumbing or some type of work. And they performed very well"]; 2 AA 471 ¶ 15.)

When the plumber arrived, Mr. Brown brought him to where moisture on the walls was most apparent—in the laundry room. (1 AA 219:14-25, 220:4-11; 2 AA 471 ¶ 16.) Almost immediately, the plumber identified the problem. (1 AA 220:6-16.) He told Mr. Brown that the most likely cause of the condensation and mold was a hot water leak originating from somewhere underneath the property's foundation. (1 AA 220:12-16; 2 AA 471 ¶ 16; see also 2 AA 477-478 ¶ 26 [fact of "hot water" leak undisputed].)

In addition, because the house sat on a concrete slab, he surmised that it would be difficult to locate the source of the leak. (1 AA 221:21-222:1.) He concluded that "[t]he leak could have been anywhere on the bottom floor of the house, and because it already had made a path, the water just was trickling, you know, wherever it was coming out at." (1 AA 221:24-222:2.) Nonetheless, given that the laundry room had the most

amount of damage relative to the rest of the house, the plumber told Mr. Brown that the leak was most likely near that room. (1 AA 222:3-8.)

With Mr. Brown's help, the plumber conducted a couple of tests to confirm whether the water was originating from the cold or hot water pipe, and concluded that hot water was leaking. (1 AA 220:16-18, 221:1-19, 223:1-8; 2 AA 471 ¶ 16, 472 ¶ 18.)

2. The plumber investigates the crawlspace.

After explaining to Mr. Brown the challenges of locating the water leak's source and possible solutions, the plumber went underneath the house into the crawlspace to investigate further. (1 AA 136:23-25, 222:6-8, 222:11-25, 223:9-224:10; 2 AA 471 ¶ 17.) There, he encountered mud and a pool of water on the ground. (1 AA 224:2-7, 224:22-225:4; 2 AA 471 ¶ 17.) He later testified that the pool measured about 4 to 5 feet wide and 10 to 15 feet long and was about 2 feet deep due to the ground being slanted in that area. (1 AA 225:6-11, 225:18-24.)

3. The source of the water damage is unveiled: a hot water pipe with a hidden hole, emitting a slow-paced "drip."

The plumber removed a section of drywall in the laundry room to expose "the hot and cold water manifolds."[1] (1 AA 226:1-227:6, 227:13-18; 2 AA 471 ¶ 17.) Then, Mr. Brown turned on the water to help the plumber find the leak's source. (1 AA 136:25-137:18, 138:14-24, 140:3-5; 2 AA 472 ¶ 18.) He later recalled that he "turned it on very low" and ran back in the house to see if there was water coming out of the pipes near where the manifolds had been exposed. (1 AA 140:3, 138:15-17, 138:24.)

According to Mr. Brown, the water "was just a drip out at that point, just enough to show [him] where the water was coming out at." (1 AA 140:3-5; 2 AA 472 ¶ 18.) However, he couldn't actually see the hole because "it was on the back side of the pipe." (1 AA 140:11-15; 2 AA 472 ¶ 18.) What he *could* see was water running at "a slow pace" down toward the entry of the crawl space. (1 AA 140:16-23, 142:17-18.) He claimed that the water's "slow pace" was due to the fact that he "did not turn [the water] on full blast." (1 AA 142:17-18; 2 AA 472 ¶ 18.)

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[1] "Manifolds" are control centers for hot and cold water that feed flexible plastic supply lines to individual fixtures. (See 1 AA 226:15-18.)

D. Plaintiffs Tender An Insurance Claim For Water Damage; Mid-Century Investigates And Determines There Is No Coverage.

Plaintiffs tendered an insurance claim to Mid-Century. (1 AA 103 ¶¶ 1-2; 2 AA 472, 473 ¶ 19.)

1. Mid-Century's first inspection.

The next day, Seann Clifford, the claims representative assigned to Plaintiffs' claim, called them to get more information (2 AA 373-374); two days after that, Mr. Clifford personally inspected their property (1 AA 103 ¶ 3; 2 AA 473 ¶ 20; see 2 AA 375).

While inspecting the ground-floor laundry room, Mr. Brown pointed out the horizontal section of piping that had been leaking, which, according to Mr. Clifford, "was part of a pressurized hot water line attached to the hot water manifold." (1 AA 103 ¶ 5; AOB 6 [conceding that Mr. Clifford "saw" the horizontal section of the corroded pipe the day he inspected].) Mr. Clifford observed and photographed the pipe and later described the horizontal section as "be[ing] embedded in the room's concrete slab foundation." (1 AA 103 ¶ 5.) He also noted that the pipe was "heavily corroded near a 90 degree angle bend." (*Ibid.*)

While inspecting the "leaking pipe," Mr. Clifford observed and photographed a hole in the pipe, facing down, measuring approximately 1/8 of an inch in diameter. (1 AA 103 ¶ 6, 229-231 [photographs showing the

corroded pipe intact with the hole facing down]; 2 AA 375 [Mr. Clifford's claim notes stating that he "verified pipe break" behind laundry closet]; see also 1 AA 107 ¶ 5 [observing that Mr. Clifford's "photographs showed the hole was pointing down on a horizontal section of copper pipe encased in the concrete slab floor of the laundry room"].)

In order to document the mold and moisture throughout the house, Mr. Clifford photographed the second and third floors. (1 AA 104 ¶ 7; 2 AA 375.) Before leaving Plaintiffs' residence, Mr. Clifford called their plumber to obtain more information about the leak. (1 AA 104 ¶ 8; 2 AA 375.) In the plumber's opinion, the hole in the pipe formed as a result of "wear and tear." (*Ibid.*)

2. Mid-Century's second inspection.

Later the same day, Plaintiffs' claim was assigned for further investigation to Rosie Acevedo—a Mid-Century adjuster who had handled claims for nineteen years. (1 AA 106 ¶¶ 1, 4; 2 AA 479 ¶ 28.) Ms. Acevedo promptly reviewed Mr. Clifford's notes and photographs (1 AA 106-107 ¶ 5; see 1 AA 229-231) and then went to inspect the Brown's property first-hand the following day (1 AA 107 ¶ 6; 2 AA 479 ¶ 29). Sometime before she arrived, Plaintiffs' plumber removed the section of corroded pipe from the laundry room and installed a temporary valve. (1 AA 104 ¶ 7; 2 AA 379:23-25.)

Like Mr. Clifford, Ms. Acevedo inspected the whole property, observing pervasive mold throughout. (1 AA 107 ¶ 6, 235; 2 AA 479-480 ¶ 29.) Plaintiffs confirmed to her in a recorded statement that they began noticing "evidence of a water leak" (2 AA 480 ¶ 30) in the form of condensation on the windows and mold growth "'a month ago, maybe'" (1 AA 107 ¶ 7, quoting 1 AA 208).

3. A third-party leak detection company confirms that the rest of the house's interior plumbing is sound.

Mid-Century then retained American Leak Detection to inspect Plaintiffs' property and determine whether there were any additional leaks in the plumbing system that may have contributed to the presence of mold or moisture. (1 AA 107 ¶ 8; 2 AA 377:12-378:5, 480-481 ¶ 31.) The company inspected the property the same day and issued a report stating the condition of the interior plumbing was "tight" and there were no other leaks. (1 AA 107 ¶¶ 8-9, 233; see also 2 AA 480-481 ¶¶ 31-32 [undisputed that rest of the house's plumbing was "sound"].)

4. Mid-Century concludes that the water damage is uninsured as caused by wear and tear, which eventually resulted in a tiny hole that emitted a slow, progressive water leak.

Based on all of this evidence, Ms. Acevedo concluded that "the cause of loss was wear and tear which caused a hole in the pipe, allowing water to leak into [Plaintiffs'] crawl space over a period of time." (1 AA 235; see 1 AA 107 ¶¶ 10-11; 2 AA 390:15-18; AOB 7.) Furthermore, this extended leak resulted in "condensation and mold growth" throughout Plaintiffs' home. (*Ibid.*)

5. Mid-Century denies Plaintiffs' claim for lack of coverage.

Ms. Acevedo concluded that the moisture and mold damage present in the Browns' home was not insured under their Policy. (1 AA 107-108 ¶¶ 10-11, 235; 2 AA 481-483 ¶ 33.) For that reason, Mid-Century denied their insurance claim. (1 AA 235; 2 AA 483 ¶ 34.) In its formal denial letter, Mid-Century explained that the mold and water were uninsured:

> Our investigation revealed that the pipe in the wall of the laundry room that runs into your crawl space has been leaking water into your crawl space over a period of time causing condensation and mold growth through out [*sic*] your home. Unfortunately, this loss is uninsured or excluded from

coverage under your policy. . . . These findings were confirmed by American Leak Detection and your plumber. (*Ibid.*)

The letter also reserved all other terms, conditions and provisions of the policy. (1 AA 108 ¶ 12, 238; 2 AA 483 ¶ 35.)

E. Plaintiffs Sue Mid-Century For Bad Faith And The Trial Court Grants Summary Judgment.

1. Plaintiffs sue for bad faith claiming coverage for the leak.

Plaintiffs sued Mid-Century asserting claims for breach of contract, insurance bad faith, negligence, fraud, violations of the Business and Professional Code and declaratory relief, and praying for both compensatory and punitive damages. (1 AA 4-18; 2 AA 484 ¶ 36.) Only breach of contract and insurance bad faith claims remained after Plaintiffs voluntarily dismissed their other claims. (1 AA 3; 2 AA 484 ¶ 36.)

The complaint's only factual allegation regarding the cause of damage was that "Plaintiffs' home was damaged when a plumbing pipe burst causing Plaintiffs substantial loss." (1 AA 7 ¶ 12.)

2. The experts agree: Gradual pipe corrosion resulted in a continuous leak that worsened and increased over time.

Both sides retained experts to test the corroded pipe that leaked. (1 AA 110-111; 2 AA 341-342.) Mid-Century's plumbing expert, Claude LeBlanc, inspected the two-foot section of copper pipe and the color photographs Mr. Clifford had taken during his inspection of Plaintiffs' home. (1 AA 110-111 ¶¶ 7-8.) He also reviewed Plaintiffs' water bill and service records for the period from September 25, 2008 to April 23, 2009. (1 AA 111 ¶ 10; see 1 AA 198-204.)

Mr. LeBlanc observed a hole in the horizontal section of the pipe, near a 90-degree bend, "which measured approximately 1/8 [of an inch] in diameter. The hole was surrounded by corrosion." (1 AA 110-111 ¶ 7.) He determined that the failed section of pipe was improperly encased in the concrete slab floor of the laundry room for more than forty years—i.e., since the house was built—and it had been in the same spot ever since. (1 AA 110 ¶ 7; see also 1 AA 111 ¶ 8.)[2] Plaintiffs' water usage records indicated that the volume of water that Plaintiffs consumed gradually increased beginning in October 2008. (1 AA 110 ¶ 10; see 1 AA 198-204.) This increase continued for approximately five or six months through mid-

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[2] California Uniform Plumbing Code sections 313.2 and 313.10.1 direct that "[n]o plumbing piping shall be directly embedded in concrete or masonry"; and where piping runs through concrete floors, "[s]leeving shall be provided." (1 AA 111 ¶ 9.)

March of 2009 when the leak was discovered and repaired. (*Ibid.*) In the expert's opinion, the leak occurred gradually, over a period of time, due to wear and tear:

> [T]he hole in the section of copper pipe I inspected on June 14, 2011, had formed as a result of ordinary wear and tear to the pipe which corroded because it had been defectively embedded into concrete without the required protective sleeve. . . . Because the pipe came into direct contact with these corrosive metallic elements, a slow, gradual and incremental deterioration of the pipe's outer wall took place near the pipe's bend. Eventually, in October of 2008 at the latest, this deterioration caused a pinhole-sized opening in the pipe . . . through which hot water slowly dripped out. . . . This unabated continuous dripping and leaking lasted at least five months until the leak was discovered and the water turned off on March 17, 2009. (1 AA 112-113 ¶ 11-12, 15.)

Plaintiffs' expert, Harvey Kreitenberg, agreed with Mid-Century's expert that the pipe embedded in concrete failed due to corrosion and that the size of the leak gradually increased over time. (2 AA 341 ¶¶ 4-7, 506 ¶ 3.) But he found two small holes, not one. (*Ibid.* [measuring one hole as 3/32" x 1/8" and the other as 1/32"].) He characterized the leak's trigger event as a "sudden breach in the wall of the pipe," which created "a non[-]water tight condition" and ultimately "a mist, stream and spray of water" as the corrosion process continued and "the size of the breach

increase[d]." (2 AA 341 ¶ 5.) In his view, it would have only taken "a mere fraction of [a] second (a 'nano' second[])" for the pipe to go from a "water tight" to "non[-]water tight condition," and therefore, he asserted, the pipe must have "failed suddenly." (2 AA 341-342 ¶¶ 5-6.)

3. Mid-Century moves for summary judgment and Plaintiffs argue that the leak, though ongoing, was sudden because it first began in a nano-second.

Mid-Century moved for summary judgment on the ground that the loss fell outside of coverage both as to water and mold damages and causes of loss. (1 AA 79.) In opposition, Plaintiffs contended that "the *burst* hot water pipe was a *sudden release*" and thus was a covered loss under the Sudden and Accidental Coverage. (2 AA 309, emphases added.)

Their theory was that "[t]he corrosive process can go on for 15 years and then burst instantly." (Reporter's Transcript (RT) 11.) They argued that after more than four decades of corrosion, the pipe "burst suddenly, in a 'nano-second' when it failed, spraying hot water into the crawl space under the laundry room of [their] home." (2 AA 311.) They claimed that "whether corrosion, decay, defect, and/or wear and tear" caused the "burst pipe," is "irrelevant and immaterial because the burst pipe [wa]s expressly covered" under the Sudden and Accidental Coverage Extension. (2 AA 474 ¶ 23, citing 1 AA 161 [¶ I.1.b.(4)].)

4. Finding no triable fact issue, the trial court grants summary judgment to Mid-Century.

The trial court granted summary judgment to Mid-Century. In doing so, it found that "none of the evidence cited by Plaintiffs creates a dispute of fact as to the cause of the leak." (2 AA 558.) It concluded that, based on all of the evidence—including Plaintiffs' expert—"everybody agrees . . . that this was something that occurred over a period of time." (RT 6.) The trial court noted that "Plaintiffs do not dispute that the pipe leaked over a period of one to two months, and that the leak was caused by corrosion which wore away at the pipe causing a 'non[-]water tight condition' and ultimately a 'mist, stream and spray of water'" as the corrosion process continued and the 'size of the break increase[d].'" (2 AA 558 [quoting Plaintiffs' expert at 2 AA 341 ¶¶ 5-7].) The court concluded: "A drip, et cetera, as has been discussed here in the facts as presented, is not covered. That's a gradual leak." (RT 9-10.)

The court repeatedly disagreed with Plaintiffs' characterization of the undisputed facts as involving a "sudden burst" of water. (See 2 AA 314 [Plaintiffs characterizing "'burst'" as meaning "'sudden explosion'"].) It observed that "if you're going to argue that, then . . . everything would be sudden . . . . I'm not sure that that really flies, quite frankly." (RT 2-3; see *id.* 6 ["(The pipe) didn't burst"; "(i)t wasn't a burst pipe"], 9 [same]; 2 AA 558 [court finding cause of damage was "not 'a sudden . . . discharge, eruption, overflow or release of water'"].) Rather, it found the opposite: "This evidence set forth by Plaintiffs' expert show[ed] that the release of

water was a 'gradual . . . release of water . . . over a period of time'"—an uncovered loss. (2 AA 558.)

Addressing Plaintiffs' counsel at the summary judgment hearing, the court stated: "Clearly, the pipe didn't all of a sudden burst," unless Plaintiffs' use of the word "'sudden'" is used merely to explain that "at one point in time there was no water [leaking], then there was water [leaking]." (RT 9.) "Obviously, that happened," noted the court, "but that is not the intent or import of the sudden and accidental exclusion clause." (*Ibid.*) If sudden meant in one moment there was no water discharged and the next moment there was, that would mean "[e]verything would be sudden." (RT 2-3.)

Lastly, the court rejected Plaintiffs' argument that the "efficient proximate cause" doctrine applied to cover the mold damage, noting that both water damage and mold damage were explicitly not covered by the Policy. (2 AA 558.)

F. The Trial Court Enters Judgment For Mid-Century And Plaintiffs Timely Appeal.

The court entered judgment in favor of Mid-Century and Plaintiffs timely appealed. (2 AA 552-553, 559, 561.)

STANDARD OF REVIEW

This Court reviews de novo the trial court's grant of summary judgment. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) The same legal standards apply here as apply to the trial court in determining whether any genuine issue of material fact exists. (*Trop v. Sony Pictures Entertainment Inc.* (2005) 129 Cal.App.4th 1133, 1143.)

Substantively, summary judgment is proper where there is a complete defense to plaintiff's cause of action—such as the existence of an express policy provision precluding the claimed loss from coverage. (Code Civ. Proc., § 437c, subds. (o)(2) & (p)(2); see also, e.g., *California Traditions, Inc. v. Claremont Liability Ins. Co.* (2011) 197 Cal.App.4th 410, 416; *Clarendon America Ins. Co. v. General Security Indemnity Co. of Arizona* (2011) 193 Cal.App.4th 1311, 1316; *Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72.)

ARGUMENT

I. THE CONTINUOUS LEAK HERE DOES NOT FALL WITHIN THE POLICY'S COVERAGE.

A. Damage From Gradual Leaks Is Not Covered.

Insurance carriers are entitled to choose the risks that they insure and those they do *not*, so long as they do so clearly. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 759; *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 269.) It is undeniable that the carrier here did so. It did not extend coverage to water-caused damage other than that caused by a sudden and accidental discharge of water.

1. The undisputed evidence shows the damage is not covered as it resulted from a slow leak, occurring continuously over time through one or two small holes.

It was undisputed in the trial court (and it is undisputed on appeal) that any damage occurred here as a result of a slow and gradual water leak from a very small hole in a pipe that had developed and grew larger over time due to slow and gradual corrosion.

(1 AA 110-113 ¶¶ 7-17; 2 AA 341-342 ¶¶ 5-7, 506 ¶ 3, 546; AOB 28.)[3]

The Policy at issue expressly does not insure water damage and expressly excludes coverage for any damage caused by "[w]ater." (1 AA 167 [¶ I.A.1.], 170 [¶ I.B.2.]; 2 AA 465 ¶ 7; AOB 3.) Coverage is *only* afforded if Plaintiffs can show their loss was covered under the *limited extension of coverage*—i.e., that the water damage was caused by a "sudden and accidental discharge" of water and *not* caused by "a constant or repeating gradual, intermittent or slow release of water, or the infiltration or presence of water over a period of time" or by a "seepage, leakage, trickle, collection, infiltration or overflow of water from any source . . . ." (1 AA 160 [¶ I.1.a.(4)i.(a)], 161 [¶ I.1.c.]; 2 AA 466 ¶ 8.) They cannot so prove.

The *undisputed* evidence precludes any such showing.

Mid-Century's investigation, which included property inspections, photographs of the home's interior, a report from a leak detection company,

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[3] The terms wear-and-tear and corrosion are used interchangeably in this case to mean the same thing: Deterioration of the pipe's outer wall over a period of time. (1 AA 104 ¶ 8, 112 ¶¶ 11, 14; 2 AA 341 ¶¶ 4-5, 375.) But even if wear-and-tear and corrosion are given distinct meanings, both refer to slow, gradual processes over time. (I.A.5., *post*; see also 3 California Ins. Law Dictionary & Desk Ref. (2012 ed.) § W12 ["policy exclusion for 'wear and tear' applies to diminished appearance, quality or functionality of an item arising because of the *passage of time* in the ordinary and reasonable use of that object *over time*," first emphasis in original, second emphasis added.) Moreover, both are either expressly uninsured or excluded; therefore the same analysis applies. (See Statement of Facts §§ A.4.-5.)

and at least one conversation with Plaintiffs' plumber, showed that any loss arose out of "long-term water leakage caused by wear and tear to the pipe and fungi (mold)." (1 AA 107 ¶ 10, 235-239; 2 AA 473-483 ¶¶ 19-33.) The *undisputed* evidence—including a declaration from Plaintiffs' *own* expert—confirmed that conclusion. (2 AA 341-342 ¶¶ 4-7, 506 ¶ 3.) The malfeasant pipe had been encased in concrete without a protective sleeve in violation of the Plumbing Code since the house was built in 1965 and had corroded and gradually leaked over time. (1 AA 110-113 ¶¶ 7-17; 2 AA 341-342 ¶¶ 4-7.)

The result was a *slow*, *gradual* leak. As Plaintiffs admit, the water leak "continued unabated for a month." (AOB 28; see also 1 AA 208 [Mr. Brown admitting that he first noticed condensation "(a) month ago, maybe" before making a claim]; 2 AA 546 [court finding that it was undisputed that pipe leaked over a period time].) Although Plaintiffs' water bills went up (consistent with a slow leak), they continued to have water pressure and service. (1 AA 111 ¶ 10, 198-204; AOB 21-22.) There was no sudden or complete breach. Rather, there was a slow, continuous leak. *No* evidence suggested that the first drop of water or the first trickle of water caused any damage. Rather, it was the slow accumulation of water that eventually resulted in condensation and mold.

Plaintiffs' plumber, the person who first found the leak, observed that "the water just was trickling." (1 AA 222:1-2.) Mr. Brown confirmed that when he turned on the water to help the plumber locate the source of the leak, the water was "*just a drip* out at that point," leaking at "a *slow*

pace" toward the entry of the crawl space. (1 AA 140:3-5, 16-23, 142:17-18; 2 AA 472 ¶ 18, emphasis added.)[4]

Both sides' experts agreed that the source of the leak was a small hole or holes (they disagreed only as to whether there was one hole or two) ranging from "about 1/8" in diameter" down to approximately 1/32". (See AOB 6 [conceding that one hole was "about 1/8" in diameter"]; 2 AA 341 ¶ 4 [finding a second hole measuring approximately 1/32"].) Nor was there any dispute that, according to Plaintiffs' expert, any pipe breach began microscopically and "(a)s the corrosion process continue(d), the size of the breach increase(d), ultimately producing a mist, stream and spray of water through the breach." (2 AA 341 ¶ 5, quoted at AOB 16.)

In the face of this undisputed evidence, Plaintiffs rely on semantics and strained characterizations. They rely on (1) a statement by Plaintiffs' plumber that the pipe had "*burst*" due to wear and tear, (2) a Mid-Century claim supervisor's statement that "burst" means "[s]udden explosion," and (3) a declaration from Plaintiffs' expert who opined that, it would have only taken "'a mere fraction of [a] second (a "nano" second[])'" for the pipe to go from a water tight to non-water tight condition, and therefore, the pipe must have "'failed suddenly.'" (AOB 6, quoting 2 AA 375, 388:6-12,

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[4] Although he claimed his observation was limited by the fact that he "did not turn [the water] on full blast" (1 AA 142:17-18; 2 AA 472 ¶ 18), Mr. Brown did not testify to any other rate of leakage when the water was turned on more fully.

392:17-21; AOB 7, quoting 2 AA 381:6-11; AOB 12, quoting 2 AA 359:24-25; AOB 16, quoting 2 AA 341-342 ¶¶ 5-6, emphasis omitted.)

But none of these statements change what physically happened in this case. That's undisputed. The pipe *gradually* corroded. A hole, at first miniscule, eventually developed, and over time became progressively bigger (eventually reaching a maximum size of a still-tiny 1/8 of an inch in diameter). As the trial court properly found, the descriptive language used by Plaintiffs' plumber and expert do not create a genuine factual dispute. (2 AA 558; see also RT 6 [court finding that the pipe "didn't burst"; "(i)t wasn't a burst pipe"]; 9 ["It was not a sudden burst. Clearly the pipe didn't all of a sudden burst"]; *Nardizzi v. Harbor Chrysler Plymouth Sales, Inc.* (2006) 136 Cal.App.4th 1409, 1415 [a party opposing a summary judgment motion cannot manufacture a triable issue with "an expert opinion with self-serving conclusions" that "merely provides 'a dwindling stream of probabilities that narrow into conjecture,'" citation omitted].)

Certainly, there is nothing in the plumber's idiomatic use of the word "burst" when he spoke to Mid-Century adjusters that suggests a sudden, catastrophic pipe failure. To the contrary, his later testimony established that—a month or more after any hole developed—"the water just was trickling" out, confirming a slow leak. (1 AA 222:1-2.) The Sudden and Accidental Coverage Extension *expressly* does *not* encompass a "trickle" of water. (1 AA 161 [¶ I.1.c.]; see also RT 9-10 [court finding that "(a) drip, et cetera, as has been discussed here in the facts as presented, is not covered. That's a gradual leak"].)

Additionally, when Plaintiffs' counsel borrowed the plumber's use of the word "burst" at the hearing to describe the pipe breach, even he acknowledged that, after the pipe began to leak, the water began to leak slowly as a "mist" and then became a "stream." (RT 6.) The undisputed fact of this gradual, over-time increase in the leak's size renders irrelevant the plumber's colloquial use of the word "burst." In any event, the word "burst" doesn't necessarily mean "a sudden explosion," as repeatedly argued in the opening brief. (E.g., AOB 12.) It can mean simply "to break open." (Webster's 9th New Collegiate Dict. (1985) p. 189 (Webster's Dict.); *Scott v. Continental Ins. Co.* (1996) 44 Cal.App.4th 24, 29 ["In seeking to ascertain the ordinary sense of words, courts in insurance cases regularly turn to general dictionaries"].) In context here—i.e., the slow trickle of water over several weeks or months—that's the only conclusion that makes reasonable sense.

The fact that a Mid-Century supervisor testified he defines "burst" as "[s]udden explosion" does not change the nature of the leak *in this case,* especially given the plumber also testified that *he didn't know* whether the leak in this case was "sudden." (2 AA 358:16-18, 359:24-25.) In any event, opinions of insurance carriers' agents or representatives regarding a word's meaning in a policy are irrelevant since policy interpretation is a question of law for the courts. (E.g., *Chatton v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846, 865 ["the interpretation of an insurance policy is a *legal* rather than a *factual* determination"; thus, "opinion evidence is completely irrelevant to interpret an insurance contract" even if

"employees themselves admit[] the existence of . . . liability," emphasis in original]; accord, *Industrial Indemnity Co. v. Apple Computer, Inc.* (1999) 79 Cal.App.4th 817, 835, fn. 4.)

Plaintiffs' expert's "failed suddenly" characterization, likewise, does not withstand analysis. As the trial court noted, "at one point in time there was no water, then there was water . . . [o]bviously, that happened" (RT 9), but that is always true—at least at the microscopic level that the expert was addressing—and would mean "[e]verything would be sudden" (RT 2-3). And that—as noted by the court—is not and cannot be the intent or the import of the Sudden and Accidental Exception. (RT 9.) Rather, as the Plaintiffs' expert himself conceded, the hole gradually got bigger and the water discharge *gradually* progressed first from a mist, then to a stream, and eventually a spray. (2 AA 341 ¶ 5, 558.)

Everybody agreed—even Plaintiffs' own expert—"that this was something that occurred over a period of time." (RT 6; see also 2 AA 558 [court finding that "Plaintiffs do not dispute that the pipe leaked over a period of one to two months, and that the leak was caused by corrosion which wore away at the pipe causing a 'non(-)water tight condition' and ultimately a 'mist, stream and spray of water" as the corrosion process continued and the 'size of the break increase(d),'" quoting Plaintiffs' expert at 2 AA 341-342 ¶¶ 5-7].)

Plaintiffs' overblown claim that "[t]he corrosive process can go on for 15 years and then burst instantly, which is exactly what happened" (RT

11) is just not supported by the facts. The pipe did not "burst instantly." Rather, the pipe's outer wall slowly corroded, at first releasing no more than a mist, and gradually wearing away to release a steadier—but still gradual and incremental—trickle. (2 AA 558.)

2. The hole in the pipe is not distinct from the slow leak.

Plaintiffs' sudden rupture theory can be conceptualized as being premised on two hypothesized causes: (1) the pipe breach that necessarily occurs in one instant and slowly expands, and (2) the resulting slow, continuous leak. So conceptualized, the theory still fails.

On-point case law rejects Plaintiffs' position. In *Finn v. Continental Ins. Co.* (1990) 218 Cal.App.3d 69, 71, the court addressed a similar scenario—i.e., a sub-foundation water leak where continuous or repeated leakage over time was excluded. The policy at issue provided property damage coverage on a "open peril" or "all risk" basis, i.e., "the policy covers all risks except those specifically excepted or excluded . . . ." (*Ibid.*; see *Freedman v. State Farm Ins. Co.* (2009) 173 Cal.App.4th 957, 959, fn. 1.) The policy excluded coverage for "'loss to a building caused by continuous or repeated seepage or leakage of water or steam which occurs over a period of weeks, months or years from within a plumbing . . . system[.]'" (*Finn*, at p. 71.) The resulting damage "had occurred over a period estimated as from six months to several years." (*Ibid.*)

The plaintiff contended that the loss was covered because it was initially caused by a "sudden break" in the sewer line, a covered peril. (*Ibid.*) Since the "sudden break" was a cause of the loss, plaintiff contended, as here, the continuous leakage that followed was also covered. (*Id.* at pp. 71-72.)

Affirming summary judgment for the insurer, *Finn* rejected the argument that resulting "leakage" and a "sudden break in the pipe" were two distinct perils. (*Id.* at pp. 72-73.) It held that "[l]eakage or seepage cannot occur without a rupture or incomplete joining of the pipes. This case involved not multiple causes but only one, a leaking pipe." (*Id.* at p. 72.) As here, "[t]he exclusion at issue plainly and unambiguously denies coverage for water leaking, over a long period, from the plumbing system." (*Ibid.*) The fact that a sudden rupture *initiated* the slow leak (i.e., causing the pipe to go from a water-tight to non-water-tight condition), could not create coverage:

> Where a homeowner's broad peril policy for property damage excludes damage from "continuous or repeated seepage or leakage" from the plumbing system, the insurer cannot be made liable for such leakage damage on the theory that the efficient proximate cause of the leakage was a sudden break in the pipe, an included peril. (*Id.* at p. 70.)

The same result follows here: A constant, slow release of water over a period of time is always uninsured water damage.

Freedman v. State Farm Ins. Co., *supra*, 173 Cal.App.4th at pp. 959-965, is in accord. There, a contractor drove a nail through a hidden pipe, and the corrosive metallic elements in the nail—like the corrosive elements in the concrete here—slowly deteriorated the pipe over time, causing a hole (or holes) to form through which water leaked and caused damage. (*Id.* at p. 959.) Plaintiffs' homeowners' policy excluded coverage for damage caused by "continuous or repeated" leakage of water. (*Id.* at p. 960.)

The Court of Appeal held that "[g]iven the small size of the hole(s) through which water leaked, and given the extensive amount of water damage . . ., the leak must have lasted a sufficiently long time, or stopped and started sufficiently many times, to count as 'continuous' or 'repeated' under any reasonable construction of those terms." (*Id.* at p. 964.) As slow leaks and corrosion were both excluded perils (as here), every possible cause was excluded. (*Id.* at pp. 962-963.)

3. The claimed loss does not fall under the limited "sudden and accidental" coverage as a matter of law.

a. Plaintiffs did not meet their burden to show a factual basis for their contention that their loss falls within the limited coverage for "sudden and accidental" water discharges.

There is no dispute here that the claim is one for water damage and that all water damage is expressly uninsured under the Policy. (1 AA 167 [¶I.A.1.]; 2 AA 505 ¶ 1.) Thus, initially any water damage is simply not covered. An insured bears the initial burden of proving that a loss event falls within the policy's insuring clause. (*Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1188; see also *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 16 ["Before 'even considering exclusions, a court must examine the coverage provisions to determine whether a claim falls within (the policy terms),'" alteration in *Waller*, internal citation omitted].)

Here, the Policy's insuring agreement is clear: "This policy does not insure all *types* of loss or damage to covered property. This policy does not insure against all *causes* of loss or damage to covered property." (1 AA 156, emphases added.) More specifically the Policy "do[es] not insure covered property for the *types* of loss or damage described in Section I - Uninsured Loss or Damage and Excluded Causes of Loss or Damage [or] . . . damage to covered property directly or indirectly *caused* by, arising

out of or resulting from the excluded causes of loss or damage set forth in Section I - Uninsured Loss or Damage and Excluded Causes of Loss or Damage . . . ." (*Ibid.*, emphases added.)

Under the uninsured *types* of damage, water damage is the first type listed as not insured. (1 AA 167 [¶ I.A.1.].) There is only a limited exception for water damage resulting from a sudden and accidental discharge. (*Ibid.*; see 1 AA 160 [¶ I.1.a.(4)i.(a)].)

Such a "'sudden and accidental' exception serves to 'reinstate coverage' where it would otherwise not exist." (*Aydin, supra*, 18 Cal.4th at p. 1192.) As the opening brief appropriately concedes, that means that "it was the Browns' burden to present facts showing a 'sudden release' of water, causing damage to their home." (AOB 20.)

Without such a showing, courts should not "hesitate to summarily dispose of meritless litigation upon nothing more than [a] smoke and mirrors presentation." (*Rochlis v. Walt Disney Co.* (1993) 19 Cal.App.4th 201, 219, disapproved on another ground in *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251.)

b. Under the Policy's express language, the gradual leak here cannot qualify as "sudden."

As discussed, it is indisputable that the corrosion, the breach in the pipe, and the leaking of water from the pipe was incremental and gradual

over an extended—i.e., weeks or months—period of time. The Policy is explicit: "[A] constant or repeating gradual, intermittent or slow release of water, or the infiltration or presence of water over a period of time" cannot qualify as "*sudden.*" (1 AA 161 [¶ I.1.c.]; 2 AA 466 ¶ 9.) The Policy is even more specific; "seepage, leakage, trickle" and "overflow" are *not* "sudden." (1 AA 161 [¶ I.1.c.].) But that's all there was here—a gradual leak or "trickle" (the plumber's word), not a sudden discharge.

c. The judicially established meaning of "sudden and accidental" also bars coverage here.

Even without the Policy's express definition, the judicially confirmed, common-sense reading of "sudden" does *not* include "gradual." (See *ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co.* (1993) 17 Cal.App.4th 1773, 1795 (*ACL Technologies*) ["Whatever shades of meaning inhere in the word sudden, gradual is not one of them"].) "Sudden" in an insurance policy means the *polar opposite* of "gradual": "[W]hatever 'sudden' means, it does not mean gradual. The ordinary person would never think that something which happened gradually also happened suddenly. The words are antonyms." (*Id.* at p. 1788.) A discharge that occurs "gradually and continuously for years is not 'sudden' in the ordinary and popular sense of the word." (*Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 754 (*Shell Oil*).)

Rather, as a matter of law, "'sudden' conveys the sense of an unexpected event that is abrupt or immediate in nature." (*Id.* at p. 755; *ACL Technologies*, at p. 1786 [the word must "convey a 'temporal' meaning of immediacy, quickness, or abruptness"].)

"Any continuous event, whether it be of 30 years' or 2 months' duration, is simply not 'sudden.'" (*Truck Ins. Exchange v. Pozzuoli* (1993) 17 Cal.App.4th 856, 860 (*Pozzuoli*); see also *Shell Oil, supra*, 12 Cal.App.4th at p. 756 [no coverage for discharge over a 30-year period]; *T. L. Enterprises, Inc. v. County of Los Angeles* (1989) 215 Cal.App.3d 876, 877, 879 ["Appellant contends: . . . 'The damage incurred by the improvement was "sudden"' . . . [¶¶] Appellant's first contention lacks merit. Contrary to its position, the evidence shows the damage to the property occurred gradually over an extended period of time."].)

That construction has long been the law. The Policy's Sudden and Accidental Coverage Extension is not new or novel. On the contrary, its wording is almost exactly the same as the common exception to the standard *pollution* exclusion that—just like here—serves (if it applies) to reinstate coverage where none would otherwise exist. The only difference here is that the provision does not "reinstate" coverage, but rather acts to provide coverage in the first place within the insuring agreement where none would otherwise exist. (See *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 643-644; *Shell Oil, supra*, 12 Cal.App.4th at pp. 752-753.) In interpreting the pollution exclusion's sudden and accidental exception, Division Three of this Court—in the leading case—held that

"'sudden' conveys the sense of an unexpected event that is *abrupt or immediate in nature*." (*Shell Oil*, at p. 755, emphasis added; accord, *ACL Technologies*, *supra*, 17 Cal.App.4th at pp. 1784-1787.) Identical language to the Sudden and Accidental Coverage Extension, thus, precludes coverage for gradual pollution leaks. (*Shell Oil*, at p. 754; *ACL Technologies*, at p. 1787.)

Truck Ins. Exchange v. Pozzuoli, *supra*, 17 Cal.App.4th 856, addressed a "sudden and accidental" pollution exception that defined "sudden"—similar to the exception here—as "'not continuous or repeated in nature.'" (*Id.* at p. 858; compare 1 AA 161 [¶ I.1.c.] [defining a sudden and accidental water discharge as not "constant or repeating"].) There, the occurrence was leakage of gasoline stored in an underground tank. (*Pozzuoli*, at p. 858.) The parties stipulated that the underground tank had been leaking for at least sixty days (comparable to the period at issue here). (*Ibid.*) Following *Shell Oil* and the common sense meaning of the words "sudden" in the policy, *Pozzuoli* held that that "a leakage of extended duration[] must be deemed to have been intentionally excluded from coverage by the parties" (*id.* at p. 859) and a leak of at least sixty days, therefore, was not sudden, affirming summary judgment for the insurer on that basis (*id.* at pp. 860-861).

Although *Shell Oil*, *ACL Technologies*, and *Pozzuoli* are directly on point, the opening brief ignores them. But this case falls squarely within their holdings. It makes no difference whether it is pollution or water leaking. Plaintiffs have conceded that the water leaked continuously over

time for at least one month. (AOB 28; see also 1 AA 208; 2 AA 469 ¶ 12.) Where a leak is indisputably gradual and concededly continuous, there is no coverage under the Sudden and Accidental Coverage Extension.

4. The Policy's limited sudden and accidental discharge coverage is clear and unambiguous.

Faced with the inevitable conclusion that the Sudden and Accidental Coverage Extension does not apply, Plaintiffs attempt to create ambiguity where none exists. The opening brief argues that the Sudden and Accidental Coverage Extension (what it mislabels as an exclusion) is ambiguous because (1) "it fails to define terms or even use them consistently," and (2) "the term 'period of time' is ambiguous and undefined, and thus, leaves it to the insurer to decide what is a 'period of time.'" (AOB 37-38.) Wrong.

The phrase "sudden and accidental" has repeatedly been held unambiguous as a matter of law: "'Sudden and accidental' is not ambiguous if we give the words their full significance." (*Shell Oil*, *supra*, 12 Cal.App.4th at p. 755; accord, *ACL Technologies*, *supra*, 17 Cal.App.4th at p. 1787; *Pozzuoli*, *supra*, 17 Cal.App.4th at p. 860.)

Even were that not the case, Plaintiffs' argument would fail. First, "[t]he fact that a term is not defined in the policies does not make it ambiguous. [Citations.] Nor does '[d]isagreement concerning the meaning of a phrase[.]' . . . '[L]anguage in a contract must be construed in the

context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract.' [Citation.]" (*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 868, additional quotation marks omitted.) The word "sudden" has a common, easily understood, and obvious meaning. As discussed above, it means the opposite of "gradual" and requires an abrupt discharge.

Analysis of whether coverage exists must always begin with the plain meaning of the language used in the policy. (*Ameron Intern. Corp. v. Insurance Co. of State of Pennsylvania* (2010) 50 Cal.4th 1370, 1378 (*Ameron*); Civ. Code, § 1639.) Where possible, "the clear and explicit meaning of the policy terms (understood in their ordinary and popular sense)" governs the interpretation. (*Titan Corp. v. Aetna Casualty & Surety Co.* (1994) 22 Cal.App.4th 457, 469; Civ. Code, §§ 1638, 1644.) If the language is "clear and explicit, and does not involve an absurdity," the language itself "govern[s] its interpretation." (Civ. Code, § 1638.)

"This reliance on common understanding of language is bedrock." (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867.) First, "sudden" is plain language with a common understanding—it means abrupt and immediate. That understanding governs.

Second, in any event, the Sudden and Accidental Coverage Extension *does* define "sudden." Specifically, "[a] sudden and accidental discharge, eruption, overflow or release of water *does not include* a

constant or repeating gradual, intermittent or slow release of water, or the infiltration or presence of water over a period of time." (1 AA 161 [¶ I.1.c.]; 2 AA 466 ¶ 9.) Even more so, the Policy does "not cover any water, or the presence of water, over a period of time from any constant or repeating gradual, intermittent or slow discharge, seepage, leakage, trickle, collection, infiltration or overflow of water from any source, even if from the usage of [a plumbing system], whether known or unknown to any insured." (*Ibid.*)

There is no doubt that this was a continuous, gradual discharge—leakage in the form of a trickle. Within the inherent constraints of language, "sudden" is defined to exclude the gradual leak present here. (See *Pozzuoli, supra*, 17 Cal.App.4th at p. 860 [declining to look outside the policy language because the policy defines "sudden" as "not continuous"].)

Lastly, an ordinary person using common sense understands the unambiguous meaning of "a period of time." Perhaps there might be a question as to whether a microscopic nano-second or a few seconds qualifies as "a period of time." But there is no doubt that weeks and months (as at issue here) constitutes a "period of time." Otherwise, the phrase is rendered improperly meaningless. (See Civ. Code, §§ 1641 [all portions of contract language to be given effect], 1643 ["A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done

without violating the intention of the parties"], 3541 ["An interpretation which gives effect is preferred to one which makes void"].)

A layperson knows the difference between a sudden discharge and a gradual leak or trickle over time. Undeniably, from a layperson's point of view, the circumstance here is the latter. If a layperson would ascribe clear and unambiguous meaning to the provision, a court must apply that meaning. (*Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 666-667; *Ameron, supra*, 50 Cal.4th at p. 1378.)

There's no ambiguity here. The language is clear and explicit. Sudden does not mean over an extended period of weeks and months.

5. A pipe leak, as here, due to "corrosion" is not "sudden" as a matter of law.

In addition, the effect of the pipe leak—water damage—is uninsured however caused. But, even if causation were taken into account, the cause of the water damage—corrosion—is also an uninsured type of damage, again except to the extent that corrosion may have triggered the Sudden and Accidental Coverage Extension. (1 AA 110-111 ¶ 7, 112 ¶¶ 11-12, 113 ¶ 15, 168 [¶¶ I.A.7., I.A.9.]; 2 AA 341 ¶¶ 4-5.) It is undisputed here that corrosion caused the pipe leak. (1 AA 104 ¶ 8; 2 AA 375, 506 ¶ 3; AOB 6; see also fn. 3, *ante*.) Likewise, it is undisputed that this corrosion was gradual and long term. "Corrosion is, by definition, a *gradual* process," not a sudden event. (*ACL Technologies, supra*, 17 Cal.App.4th at p. 1795,

emphasis added; Webster's Dict., *supra*, p. 293 [defining "corrode" as "to weaken or destroy gradually"].)

The pipe in this case corroded because it was improperly encased in concrete. (1 AA 110-112 ¶¶ 7, 9, 11-13.) "These facts lead inevitably to the conclusion that the copper pipe failed as a result of deterioration." (*Murray v. State Farm Fire & Casualty Co.* (1990) 219 Cal.App.3d 58, 63; see also 1 AA 112 ¶¶ 11-12 [Mid-Century's expert concluding that the hole "formed as a result of ordinary wear and tear to the pipe which corroded"; and "deterioration of the pipe's outer wall took place near the pipe's bend" due to the pipe coming "into direct contact with these corrosive metallic elements"].) Thus, absent *sudden* water damage, the pipe's corrosion is an excluded cause and event.

The opening brief contends that the Policy somehow covers "corrosion." (AOB 26.) That totally misreads the Policy's express language. Corrosion is *expressly not insured* as a *type* of damage *and is expressly excluded* from coverage as a *cause* of damage. (1 AA 168 [¶ I.A.9.], 171 [¶ I.B.9.].) The only exception is if the result falls within the Sudden and Accidental Coverage Extension for water damage. (1 AA 160-161, 171 [¶ I.B.9.].) But, as shown above, the Sudden and Accidental Coverage Extension doesn't apply.

Plaintiffs cannot manufacture ambiguity by interpreting irrelevant out-of-context Policy language. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265 [policy language "'cannot be found to be ambiguous

in the abstract,'" citation and emphasis omitted].) The Policy here is not ambiguous; it expressly excludes corrosion from coverage.

B. The Efficient Proximate Cause Doctrine Does Not Apply To Create Otherwise Nonexistent Coverage.

In a strained effort to manufacture coverage for their mold claim, Plaintiffs turn to the efficient proximate cause doctrine. That doctrine applies to "open peril" or "all risk" policies, which cover all risks except those specifically excepted or excluded. Under that doctrine, in a first-party insurance case involving an all risk policy, even if an excluded peril may have contributed to causing the loss, a claim may nonetheless be insured if a *covered* peril is both the "efficient proximate cause" of the loss *and* a contributing cause. The policy here, though, is not an "open peril" policy. It does not insure specified types of damage regardless of the perils which may have contributed or combined to cause damage. (See *Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 403-404; *Brodkin v. State Farm Fire & Casualty Co.* (1989) 217 Cal.App.3d 210, 216; Croskey, et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2011) ¶ 6:135, pp. 6A-37 to 6A-38.) Rather, it is a limited risk policy with no coverage afforded to broad categories of damage *types* and *causes*. If the loss's cause or the type of damage is outside of the defined coverage, there is no catch-all exception to revive coverage.

In any event, the doctrine does not trigger coverage for two reasons: (1) mold damage is not insured under the Policy—however caused—and no exception applies; and (2) all potential efficient proximate causes of the mold damage—including water, mold, wear-and-tear and corrosion—are excluded under the Policy.

1. Mold is never covered, either as a cause of loss or as a type of damage; even the limited Sudden and Accidental Coverage Extension never applies to mold.

Mold is not insured under the Policy, however caused. And, damage caused by mold is excluded. Even the Sudden and Accidental Coverage Extension does not reinstate mold coverage. Mold is not covered. Period. It is an uninsured *type* of damage: "We do not insure loss or damage consisting of, comprised of or which is fungi" (1 AA 168 [¶ I A.10.]); and it is an uninsured *cause* of damage: "We do not insure loss or damage directly or indirectly caused by, arising out of or resulting from fungi . . ." (1 AA 171 [¶ I.B.10.]).

Despite this unequivocal exclusionary language, the opening brief boldly contends that mold *is* covered "because it resulted from direct contact with the abrupt and sudden discharge of water." (AOB 33-34.) Nonsense. The Sudden and Accidental Coverage Extension is never mentioned in relation to the Policy's express mold exclusion, nor is mold

mentioned in the Coverage Extension itself. Rather, unlike water damage, both mold damage and damage caused by mold are absolutely eliminated from coverage; both mold provisions expressly state there are *no* "Extensions of Coverage." (1 AA 168 [¶ I.A.10.] ["we do not insure any remediation or provide any Loss of Use or any Extensions of Coverage for expenses directly or indirectly due to, arising out of or resulting from remediation of fungi"]; 1 AA 171 [¶ I.B.10.] ["we do not insure any remediation or provide any coverage under Loss of Use or any Extensions of Coverage directly or indirectly due to, arising out of, or resulting from remediation of fungi"].)

And even if that were not the case, Plaintiffs' argument fails as the underlying water damage is explicitly and clearly *not* covered, as shown in Section I.A., above. The opening brief cites to some out-of-context Policy language, which includes, as part of the definition of water, "dampness, vapor, condensation, moisture, steam and humidity" as supposed evidence of mold coverage (AOB 34, quoting 2 AA 415), but this doesn't change the fact that in order to be covered under the Policy, any such moisture, condensation, etc. must be the result of a sudden an accidental discharge (see § I., *ante*; *Bank of the West*, *supra*, 2 Cal.4th at p. 1265 [policy "'must be construed in the context of that instrument as a whole,'" citation omitted]). Nor does it change the fact that however caused, mold is not covered.

De Bruyn v. Superior Court (2008) 158 Cal.App.4th 1213—a case from this Division—is on all fours, explaining why the efficient proximate

cause doctrine does not apply in cases like this one where mold is absolutely excluded, but the policy has limited "sudden and accidental" discharge language, allowing coverage for *other* types of water damage. There, the issue was whether the insurer may rely upon an "'absolute' mold exclusion" to deny coverage for mold damage resulting from the covered discharge of water. (*Id.* at p. 1216.) The policy covered losses to the dwelling and personal property caused by a sudden and accidental discharge of water from any plumbing or household appliance (*id.* at pp. 1216-1217)—just like this case (1 AA 160 [¶ I.1.a.(4)i.]). The policy at issue in *De Bruyn*, using effectively the same language as here, "'plainly and precisely communicate[d]' [citation] that mold damage is not covered even when it results from a covered sudden and accidental discharge of water." (158 Cal.App.4th at p. 1216, quoting *Julian, supra*, 35 Cal.4th at p. 759.) The Court held that the efficient proximate cause doctrine does not trump the express exclusion of mold *damage*. (*De Bruyn*, at pp. 1216-1217.)

This case is no different. Not only is mold *damage* an uninsured peril and damage *caused* by mold an excluded peril, but both of these mold provisions expressly state that the limited extension of coverage *does not apply*. Pursuant to *De Bruyn*, this means the efficient proximate cause doctrine does not apply. That, standing alone, is enough to reject Plaintiffs' argument for mold coverage. But there's more.

2. Because all of the potential causes—mold, water damage, corrosion, and wear-and-tear—are excluded, the efficient proximate cause is irrelevant.

In any event, where, as here, *all* potential causes of loss are excluded, the identification of the efficient proximate cause of the loss is rendered unnecessary and there is no coverage as a matter of law. (*Brodkin, supra*, 217 Cal.App.3d at p. 218; see also *Julian, supra*, 35 Cal.4th at pp. 753, 761 [where every possible efficient proximate cause is excluded plaintiffs' loss is not covered]; *Brodkin*, at p. 217 ["(S)ummary judgment is still proper if all of the alleged causes of the loss are excluded under the policy"].)

Here, the only possible causes are:

- Wear and tear to the pipe over time (1 AA 104 ¶ 8 [Plaintiffs' plumber stating that cause was "wear and tear"]; 2 AA 375 [same]; AOB 6 [conceding that plumber stated "wear and tear" was the cause]),
- corrosion—resulting from the pipe having been improperly embedded in concrete for several decades to the point where a tiny leak formed (1 AA 110 ¶ 7 [pipe had been embedded in concrete, in violation of the Plumbing Code, since 1965], 111 ¶ 7 [hole measured approximately 1/8 of an inch in diameter], 112-113 ¶¶ 11-12, 15; 2 AA 311 [conceding that

the pipe failed "as a result of corrosion"], 341 ¶ 4 [Plaintiffs' expert concluding that the pipe "failed due to a yet to be identified form of corrosion"; pipe's holes measured 1/8 of an inch or less], 506 ¶ 3 [undisputed that pipe failed "as a result of corrosion"]),

- gradually-caused resulting water damage (2 AA 341 ¶ 5 [Plaintiffs' expert finding that "(a)s the corrosion process continue(d), the size of the breach increase(d), ultimately producing a mist, stream and spray of water through the breach"], 342 ¶ 7 [Plaintiffs' expert finding that the moisture and condensation rose up into Plaintiffs' residence for approximately one or two months]), and
- mold, which formed throughout the home's interior (1 AA 129:1-23, 130:2-3; 2 AA 470 ¶ 13 [Plaintiffs' expert finding that mold formed throughout the home's interior, and mold developed "everywhere simultaneously" in "(e)very room that had a window"]).

But all four possible causes—water, mold, corrosion and wear-and-tear—are not covered. Accordingly, *any* resulting damage, whether water, mold, corrosion, wear-and-tear or any other type of damage, is also uninsured.

The only coverage potential is the Sudden and Accidental Coverage Extension. But that doesn't apply. And since all potential causes are excluded, the efficient proximate cause is irrelevant.

II. THERE CAN BE NO BAD FAITH AS A MATTER OF LAW AS THERE WAS NO COVERAGE.

Bad faith claims necessarily fail if there is no coverage. *Waller v. Truck Ins. Exchange, Inc.*, *supra*, 11 Cal.4th at p. 35, is controlling and on point: "[B]ecause a contractual obligation is the underpinning of a bad faith claim, such a claim cannot be maintained unless policy benefits are due under the contract." (Citations omitted; accord, e.g., *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1151 ["Where benefits are withheld for proper cause, there is no breach of the implied covenant"]; *MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.* (2010) 187 Cal.App.4th 766, 784.)

Because no benefits were owed under the policy, there can be no bad faith liability, no matter how Mid-Century handled the claim. (See *Brodkin*, *supra*, 217 Cal.App.3d at p. 218 [because the insurer correctly denied the claim, even if there was evidence that the claim was improperly handled, there could be no cause of action for breach of the covenant of good faith].)

III. EVEN IF PLAINTIFFS HAD COVERAGE, THEIR BAD FAITH CLAIM HAS NO MERIT UNDER THE GENUINE DISPUTE DOCTRINE.

There's an additional reason to affirm summary disposition of Plaintiffs' bad faith claim, even if coverage remains open to dispute: A genuine dispute as to coverage (that is, a reasonable legal basis for the carrier's position) precludes, as a matter of law, recovery against an insurer for bad faith. (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 723-724; *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 347 (*Chateau Chamberay*) ["It is now settled law in California that an insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith"].)

The coverage dispute at this stage is purely a legal one: The undisputed facts show that a pipe failed due to long-term deterioration and corrosion of the pipe's outer wall and the resulting damage was caused by a continuous, gradual trickling of water. The question, therefore, is a legal one: What coverage does the Policy provide under its Sudden and Accidental Coverage Extension? The reasonableness, for bad faith purposes, of Mid-Century's legal policy-interpretation position is a question of law for the court to decide. (*Wilson, supra*, 42 Cal.4th at p. 723; *Chateau Chamberay, supra*, 90 Cal.App.4th at p. 348.) On the policy-interpretation issue, a more-than-genuine dispute exists, as demonstrated in

Section I, above. Indeed, we believe that Section I demonstrates that Mid-Century's position is correct as a matter of law. But at a minimum, that position is amply supported by controlling precedent. (E.g., *Finn*, *supra*, 218 Cal.App.3d 69; *Freedman*, *supra*, 173 Cal.App.4th 957; *Shell Oil*, *supra*, 12 Cal.App.4th 715; *Pozzuoli*, *supra*, 17 Cal.App.4th 856.)

That precedent establishes a genuine issue as a matter of law and no possibility of insurance bad faith liability. (See, e.g., *Bosetti v. U.S. Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1239 [carrier's position reasonable as a matter of law where it relied on authority that Court of Appeal then disagreed with]; *Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966, 973, 976 [same—that insurer's policy interpretation ultimately rejected by Supreme Court did not negate that it had been premised on a reasonable legal position]; *Dalrymple v. United Services Auto. Assn.* (1995) 40 Cal.App.4th 497, 522-523 [carrier's position reasonable as a matter of law where law was developing as to distinction between "occurrence" and "accident" in third-party coverage].)

But there's more. Reasonable coverage disputes—genuine disputes defeating bad faith liability—can exist as a matter of law based upon factual as well as legal disputes. (*Chateau Chamberay*, *supra*, 90 Cal.App.4th at p. 348.) Here, Mid-Century's conclusion that the exclusive cause of the water damage was a slow, continuous leak over time is amply supported not only by expert testimony, but *undisputed* expert testimony.

Plaintiffs' bad faith argument is mostly premised on their incorrect assertion that Mid-Century "fail[ed] to examine the failed pipe section until *after* coverage was denied and a lawsuit had been filed by [Plaintiffs]." (AOB 11, emphasis in original; see also AOB 22 ["Neither Claim Rep Clifford nor Acevedo . . . examine(d) the damaged pipe section"], 29 [contending that Mid-Century "failed to examine the failed section of pipe until after (Plaintiffs) filed their complaint"].) But the undisputed record shows otherwise; Mr. Clifford's photographs, taken on the day of his inspection, show the failed section of pipe intact. (1 AA 103 ¶¶ 5-6.) Further, as the opening brief concedes, Mr. Clifford "saw" the corroded pipe the day he inspected. (AOB 6; see also 1 AA 107 ¶ 5 [observing that Mr. Clifford's "photographs showed the hole was pointing down on a horizontal section of copper pipe encased in the concrete slab floor of the laundry room"].)

In any event, Mid-Century's contemporaneous investigation, including its adjuster's phone call with Plaintiffs' plumber, confirmed the pipe failed due to wear and tear. A contemporaneous investigation that reaches a conclusion consistent with later expert testimony establishes *objective* reasonableness—i.e., the absence of bad faith—as a matter of law. (See *Morris*, *supra*, 109 Cal.App.4th at p. 973 [reasonableness is an objective test]; *Fraley v. Allstate Ins. Co.* (2000) 81 Cal.App.4th 1282, 1292 ["'genuine dispute' doctrine may be applied where the insurer denies a claim based on the opinions of experts"].)

Regardless, whether Mid-Century ultimately prevails as to Plaintiffs' contractual claim, ample, reasonable legal and factual bases support its position, negating, as a matter of law, any possible bad faith liability. At a minimum, summary adjudication of Plaintiffs' bad faith cause of action should be affirmed.

CONCLUSION

A pipe that gradually and incrementally develops a small leak due to corrosion, which then gradually and continuously leaks water for at least weeks on end falls squarely outside of the Policy's coverage, including outside its limited coverage extension for "sudden and accidental discharge[s]."

The trial court properly granted summary judgment in Mid-Century's favor. That judgment should be affirmed.

Respectfully submitted,

October 10, 2012

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this RESPONDENT'S BRIEF contains **12,354** words, not including the tables of contents and authorities, the caption page, or this certification page, as counted by the word processing program used to generate it.

Dated: October 10, 2012

Gary J. Wax

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On October 10, 2012, I served the foregoing document described as: **RESPONDENT'S BRIEF** on the parties in this action by serving:

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(X) **BY MAIL:** As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on October 10, 2012, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Leslie Barela

AMENDED PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

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(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

ANITA F. COLE