Case No. B264238

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE SECOND APPELLATE DISTRICT
DIVISION SIX

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD,

Plaintiff and Respondent,

v.

GREAT AMERICAN INSURANCE COMPANY,

Defendant and Appellant.

On Appeal from the Superior Court of California
County of Ventura
The Honorable Roger Picquet (*Ret.*), Judge Presiding
Case No. CIV236710

RESPONDENT'S BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

CNA Financial Corporation, a publicly traded company, wholly owns Respondent National Fire Insurance Company of Hartford. The only entity owning more than 10% of CNA Financial Corporation is Loews Corporation.

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I.

INTRODUCTION AND ISSUES PRESENTED

A cross-complaint between National Fire and Great American was the last active dispute in this very old, multi-party case. This Court's 2012 judgment required a trial of that dispute. It occurred without prejudicial error.

In all, five substantive rulings have led to this appeal. Listing them will lead us in turn to the issues presented for review – a task the Opening Brief shuns.

1. This Court held in its January 2012 Opinion that the agreement made by Plaintiff National Fire Insurance Company of Hartford to tender the limits of its primary insurance policy to Defendant Great American Insurance Company was ambiguous (i.e., "reasonably susceptible of different interpretations") as to whether it transferred to Great American the obligation to cover additional insured Sysco under the policy. (See *Nat'l Fire Ins. Co. v. Great Am. Ins. Co.* (Jan. 24, 2012, B255270, mod. Feb. 22, 2012 [nonpub. opn.]) at 5 ("*Nat'l Fire*").)

2. The trial court, after a "Step 1" trial re-examining the proffered evidence, independently determined that the Tender Agreement was ambiguous and could therefore "be explained by reference to the

circumstances under which it was made, and the matter to which it related."

3. At a "Step 2" trial, a jury determined that Great American breached the Tender Agreement by not paying Sysco's claims as an additional insured and not reimbursing National Fire for its $3.5 million payment for Sysco's claims; and that Great American failed to resolve Sysco's claims under the policy, causing National Fire to pay $3.5 million for Sysco's claims.

4. Based on the simultaneous court-trial of National Fire's implied contractual indemnity claim, the trial court issued a Statement of Decision in National Fire's favor.

5. The trial court denied Great American's motion for judgment notwithstanding the verdict and motion for new trial.

From these five decisions, we can glean the issues presented:

1. Is this Court's prior opinion law of the case?

2. Was the trial court's Step 1 ruling correct?

3. Was the jury verdict supported by substantial evidence?

4. Was the trial court's statement of decision proper?

5. Did the trial court correctly deny Great American's post-trial motions?

The answer to each of these questions is "Yes." First, Great

American's argument that the trial court erred in finding the Tender Agreement was ambiguous – and thus subject to interpretation by means of extrinsic evidence – is foreclosed by this Court having already made the same ruling in its prior decision here, which is law of the case. Indeed, the trial court gave Great American more process than it was due on this point, conducting the Step 1 trial to satisfy itself of the agreement's ambiguity and the existence of conflicting extrinsic evidence appropriate to its interpretation.

Next, the jury's verdict in Step 2 was supported by substantial evidence. This case turned heavily on witness credibility and the jury's sense of which party's explanation fit more of the conflicting extrinsic evidence. As the trial court noted, the jury "heard the testimony of the two experienced and skilled parties who entered into the agreement on behalf of their respective employers," as well as "testimony from other individuals who had been directly involved in earlier negotiations." (See 6AA, p. 1674.) "The jury and the jury alone, measured the credibility of the witnesses and determined the weight to be given to their testimony," before finding that the Tender Agreement obligated Great American to assume the defense of Sysco as an additional insured. (*Id.*)

That proper deference led the trial court to deny Great American's

motion for JNOV, and to find in National Fire's favor on its contractual indemnity claim. More importantly, where the trial court was required to exercise its own discretion as the "13th juror" – in ruling on Great American's new-trial motion – it did so and determined that the weight of the evidence favored National Fire.

This Court should affirm the Judgment, ending this case at long last.

II.

RESPONSE TO GREAT AMERICAN'S

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

The recitation of facts and procedural history in Great American's Opening Brief is – with exceptions not essential to this appeal – generally accurate. Rather than set forth its own extended facts section, to the extent important facts and procedural history have been glossed over or omitted, National Fire submits clarifications and additional record facts in the Argument sections to which they pertain.

III.

ARGUMENT

A. Interpretation Of The Parties' Tender Agreement Required The Jury To Resolve Factual Conflicts

The trial court's Step 1 ruling on the threshold determination of "ambiguity" – i.e., whether the proffered evidence is relevant to prove a

meaning to which the language is reasonably susceptible – is a question of law, and is therefore subject to independent review (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165) – except insofar as this Court has already examined and decided the same question the same way.

1. This Court's Prior Decision – That The Agreement's Meaning Must Be Resolved On The Weight And Credibility Of Conflicting Extrinsic Evidence – Is Law Of The Case

The trial on review here addressed the meaning and effect of the "Tender Agreement" between National Fire and Great American. National Fire contended that Great American agreed to assume – in connection with a major outbreak of food-borne hepatitis – the obligation owed to food distributor Sysco Corporation as an additional insured under a primary insurance policy issued by National Fire to Castellini Company LLC, a wholesale distributor of vegetables and other food products. (See 3AA, pp. 795 – 797.) Great American disagreed, arguing that the Tender Agreement obligated it only to assume the coverage obligations owed to Castellini and no one else. (See *id.*)

In 2009, the trial court agreed as a matter of law with Great American's position on this issue, granted Great American's motion for summary adjudication on all but one cause of action in National Fire's cross-complaint, and later entered judgment for Great American. (See *Nat'l Fire,*

supra, at p. 3.)

This Court reversed that judgment because "issues of material fact exist[ed] as to the parties' intent in entering into the Tender Agreement." (See *id.* at p. 1.) Specifically, this Court held, based on voluminous extrinsic evidence submitted without objection by both parties, that "the Tender Agreement is reasonably susceptible of different interpretations." (See *id.* at p. 5.) Thus, "[t]he scope and effect of the Tender Agreement **depend for resolution on the weight and credibility to be given to conflicting extrinsic evidence**." (See *id.* at p. 6, emphasis added.)

As a lynchpin of its succinct decision, this Court quoted the following rule of law: "'[W]hen, **as here**, ascertaining the intent of the parties at the time the contract was executed **depends on the credibility of extrinsic evidence**, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury' [Citations]." (See *id.* at p. 5, emphasis added; see, e.g., *In re Marriage of Stallworth* (1987) 192 Cal.App.3d 742, 757 ["Credibility of the witnesses and the weight of the evidence are matters for the finder of fact"], citing *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926.)

This Court's prior decision is law of the case. On a record full of extrinsic evidence submitted by both sides, the Court drew the legal

conclusion that material fact disputes existed, and therefore that a jury had to determine the weight and credibility of that evidence. While this Court's unqualified reversal did not expressly instruct or bind the trial court on how to try the case on remand, "the appellate opinion still governs subsequent trial court proceedings in the matter under the doctrine of 'law of the case'." (Eisenberg, et al., *Civil Appeals & Writs* (2013) ¶ 14:141.)

2. The Trial Court's Step 1 Bench Trial Confirmed That A Jury Would Resolve The Conflicting Extrinsic Evidence And Determine The Parties' Intent

Despite this Court's prior ruling that the Tender Agreement was ambiguous, the trial court decided to repeat that analysis in a Step 1 bench trial. And after reviewing extensive trial exhibits and deposition testimony, the trial court confirmed what this Court had already determined: that the Tender Agreement was reasonably susceptible of the different interpretations proposed by the parties. (See 3AA, p. 796.) It did so based on a more comprehensive set of extrinsic evidence than this Court had considered – thus in effect confirming more conflict on top of the established conflict.

The trial court further ruled that, although the Tender Agreement was properly described as Trial Exhibit ("TE") 53, it was not "integrated" – *i.e.*, TE 53 was not intended to be a final expression of all terms of the parties'

agreement (*Id.*) The jury's job would be to determine the weight and credibility of the evidence in order to glean the parties' intent at the time of their agreement, and to decide accordingly whether Great American must reimburse National Fire the $3.5 million in dispute.

This decision by the trial court – just like the prior decision by *this* Court – reflected the black-letter law of contract interpretation. When ascertaining the intent of the parties at the time a contract was executed depends on the credibility of extrinsic evidence, facts, or circumstances other than the agreement, that credibility determination and the interpretation of the contract are questions of fact properly resolved by the jury. (See *Wolf v. Walt Disney Pictures and Television* (2008) 162 Cal.App.4th 1107, 1127; *Horseman's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1560; *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395; Cal. Civ. Code § 1647 ["A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates"].)

3. Knowing The "Definition" Of "Five Ambiguous Terms" Did Not Resolve The Ambiguity Of The Agreement As A Whole

Great American attempts to pigeonhole the ambiguity of the Tender

Agreement into literal definitions of "five terms in TE 53 that [the trial court] found ambiguous." (AOB at p. 34.) But that approach makes no sense because the ambiguity of the Tender Agreement never depended on whether the parties agreed about the meaning of a few particular terms.[1] For example, Great American contends that both parties agreed the phrase "any other entity claiming the benefit of said primary coverage" "*could* include Sysco." (See *id.* at p. 36, emphasis added.) But "agreement" on the meaning of this phrase – or any other term – does not resolve either (A) the meaning of the contract as a whole – the way it must be read – or (B) the core question of whether Great American agreed to *assume the obligations owed to Sysco* under the CNA Policy. For that determination, the jury had to turn to the extrinsic evidence for the light it shed on the agreement as a whole.

Similarly, Great American argues that the term "Sean Hanifin's letter" is unambiguous because "TE 53 expressly identifies 'Sean Hanifin's letter' as his August 25, 2005 letter to [Great American's counsel, Peter] Whalen."

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[1] Of course, the **premise** of Great American's "no conflict in the five ambiguous terms" argument is faulty too, because the trial testimony revealed that the parties *did* disagree about the meaning of those terms. (See, e.g., 3RT, p. 638:6-16 [Ms. Witten's testimony indicates that "ongoing discussions" included more than merely Ms. Witten's and Ms. Biondo's "conversations with each other"]; see also 3RT, p. 639:2-9.)

(See AOB at p. 37.) But this argument ignores the real problem. Merely identifying **what constituted** "Sean Hanifin's letter" did not assist the jury in resolving **how** the contents of that letter evidenced the parties' intent in executing the Tender Agreement. Likewise, the meaning of "Ongoing discussions" itself was not the real point; the issue for the jury was **how** the content of those discussions evidenced the parties' intent.

The trial court understood this distinction both in its Step 1 ruling and in its jury instructions in Step 2. In setting forth five ambiguous terms as examples, the court's Step 1 ruling indicated that to resolve the ambiguity of TE 53 "as a whole," those terms would need to be more than merely "defined" – they would also need to be "explained" and "clarified." (3AA, p. 797, ["T]here is language which is not very well **defined**, **explained** or **clarified** when TE 53 is read as a whole…"], emphasis added.) "Accordingly," the trial court ruled, "it will be the function of a jury to determine the weight and credibility of conflicting extrinsic evidence … to determine the intent of the parties at the time the contract was executed." (*Id.*)

Likewise, the trial court instructed the jury in Step 2 (Instr. 25) that the ambiguity of the terms of the Tender Agreement "makes **the** Tender Agreement" – not simply a few terms, but instead the whole thing –

"reasonably susceptible to more than one interpretation." (5AA, p. 1189, emphasis added.) Thus, as this Court had ordered long before, the jury weighed the credibility of extrinsic evidence – including "Sean Hanifin's letter" and the parties' "ongoing discussions" – to resolve the ambiguity as to the parties' intent in forming the Tender Agreement.

B. Plentiful Evidence Supported The Verdict

The jury's verdict in Step 2 is reviewed under a "substantial evidence" standard. (See *Winet*, *supra*, 4 Cal.App.4th at p. 1166 ["When the competent parol evidence is in conflict, and thus requires resolution of credibility issues, any reasonable construction will be upheld as long as it is supported by substantial evidence"].)

Contrary to Great American's assertions, ample trial evidence established that: **(a)** Great American breached a promise to regard the $1,250,000 that National Fire paid it as the entire remaining limits of the National Fire policy for claims arising out of the Pennsylvania Hepatitis A outbreak, including claims by Sysco for benefits under the National Fire policy; and **(b)** Great American's conduct was a substantial factor in causing National Fire's harm – i.e., the $3.5 million payment to American Guarantee.

1. Great American Breached A Promise Inherent In The Tender Agreement

Combined with the language of TE 53 (the Tender Agreement), substantial evidence supported the following facts:

- A major stated goal of Great American in entering into the Tender Agreement was to secure exclusive control over the handling of the green-onion claims, because it believed National Fire's approach to defense and settlement of those claims was too permissive, and was setting "bad precedent" for future settlements of claims arising out of the Pennsylvania hepatitis outbreak. (See, e.g., 3RT, pp. 585:24 – 587:14; 6RT, 1064:13 – 1065:4, 1109:28 – 1110:9, 1197:16-22, 1198:3-10.)
- A major stated goal of National Fire in entering into the Tender Agreement was to alleviate the impossibility of settling so many serious injury claims with its relatively insignificant primary limits. (See, e.g., 3RT, pp. 556:25 - 559:26, 583:26 - 585:27; 5RT, pp. 882:10 - 884:28.)
- Both National Fire's and Great American's *actions* in executing the Tender Agreement manifested their intent to further these respective goals. On December 5, 2005, Great American accepted National Fire's $1,250,000 payment pursuant to the Tender

Agreement. That same day, Ms. Witten emailed Great American and its counsel, memorializing the transfer of "Chi-Chi's related claims" under the CNA Policy to Great American, and announcing: "This signals [National Fire's] departure from involvement with these cases, and Great American is, as of today, taking over the handling and management of the defense for the various pending matters." (See TE 56.) Ms. Biondo's response the next morning on behalf of Great American accepted the hand-off, noting Great American had designated counsel to take over the litigation, and confirming Ms. Biondo would handle "any further questions." (*Id.*)

- In negotiations for the Tender Agreement, the parties expressly discussed that "renewed demands by Sygma/Sysco" were one reason that National Fire would soon be required to fund additional settlements. Both parties knew that if Chi-Chi's prevailed against Sysco in its arbitration over the Pennsylvania hepatitis outbreak, Sysco would demand that Castellini make it whole. (See, e.g., 3RT, pp. 599:6 – 601:21, 627:5 – 629:1; TE 40; TE 44; 6RT, pp. 1127:12-21, 1128:9-17, 1216:3-11.)

- Great American sought to confirm that separate claims from a Tennessee hepatitis outbreak were not part of the tender proposal – but never requested any similar carve-out of Sysco's claims. (See 3RT, pp. 622:11 - 622:28, 623:21 – 626:12, 635:13 – 636:2; 6RT, pp. 1198:19 – 1199:17.)
- Both insurers believed at all relevant times that:
    - Sysco was an additional insured under the National Fire policy entitled to a defense (see 3RT 545:1 – 548:13, 549:23 – 550:22, 553:15 – 555:22, 556:16-24, 589:20 – 590:2, 642:12-20; 6RT, pp. 11154:21 – 1127:2, 1177:9-11, 1196:25-28, 1197:10-14; TE 14; TE 16);
    - Castellini and Sysco would have similar or identical liability for harm caused by the green onions they both played a role in delivering to the Pennsylvania Chi-Chi's restaurant (see 3RT, p. 570:8-10; 6RT, pp. 1122:22 – 1123:12);
    - National Fire could not pay its limit to benefit one insured (Castellini or Sysco) to the exclusion of the other (see 3RT, pp. 571:13 – 575:19, 580:15 – 18; 5RT, p. 897:3 – 13; 6RT, pp. 1154:21 – 1157:2, 1196:12-15); and

- The Tender Agreement obligated National Fire to pay Sysco's defense costs only *up to the date of National Fire's $1.25 million payment to Great American* (see 6RT, pp. 1102:14-28.), and forbade National Fire from entering into any settlements of any kind for any entity (see 3RT, p. 631:12-18).

The foregoing evidence could reasonably have led the jury to reject Great American's position that the parties intended for Great American to take over *only* the obligations to Castellini, leaving National Fire separate obligations to Sysco. All of this evidence instead supported National Fire's interpretation as the more reasonable of the two offered: that Great American would also have to assume resolution of the claims by Sysco for benefits under the National Fire policy related to the Pennsylvania green-onion claims. The jury could well have concluded that as a practical matter, this obligation inhered in Great American's promise in TE 53 to regard the $1.25 million that National Fire paid it as "the entire remaining limits" of the National Fire policy for claims arising out of the Pennsylvania hepatitis outbreak, including claims by Sysco for benefits under the National Fire policy.

The weight of the extrinsic evidence of the parties' post-execution conduct further supported the verdict. National Fire had nothing more to do with the Pennsylvania green-onion claims beyond the date set forth in the Tender Agreement, closed its file, and heard nothing further about those claims until it received the demand from American Guarantee / Sysco (discussed in more detail below). In contrast, Great American offered to participate in Sysco's defense of the arbitration filed by Chi-Chi's (though the offer was rejected because Great American would not commit to indemnity). (See, e.g., 3RT, pp. 649:24 – 650:13, 652:19-24, 662:24-26, 663:17-28, 664:18-25; 6RT, pp. 1111:14-25, 1133:19 – 1134:2, 1204:21-24.)

Finally, there was never any serious dispute that Great American breached the promise described above, by declining every request from "any … entity claiming the benefit of [National Fire's] primary coverage" (TE 53), as well as National Fire's every demand that Great American satisfy such requests received by National Fire. The Opening Brief offers none.

2. Great American's Conduct Was A Substantial Factor In Causing National Fire's Harm, i.e. The $3.5 Million Payment

The following facts proving this element were largely undisputed at trial, or were established by very substantial evidence:

- At times after the Tender Agreement went into effect, American Guarantee, as Sysco's insurer and assignee, demanded Additional Insured benefits under Great American and National Fire's respective insurance policies issued to Castellini. It did so first by letter, and then sued Great American and National Fire (among others) in this Court. (See, e.g., 5RT, pp. 933:22 – 936:7, 936:12 – 937:14, 942:28 – 944:8.)
- Great American refused all of National Fire's requests to perform the Tender Agreement by protecting National Fire against American Guarantee / Sysco's demands. (See, e.g., 5RT, pp. 938:19 – 940:11, 942:15 – 17; 6RT, pp. 1204:21 – 1205:2.)
- Instead, Great American: (A) settled American Guarantee / Sysco's lawsuit on its own behalf, using as part of its settlement payment the $1.25 million National Fire paid to Great American under the Tender Agreement; and (B) in doing so, not only failed to obtain a release protecting National Fire, but expressly agreed to allow entry of a judgment against Castellini that American Guarantee / Sysco could use against National Fire. (See, e.g., 5RT, pp. 959:24 – 963:17; 6RT, pp. 1217:1–1218:9; TE 88.)

- National Fire paid American Guarantee / Sysco $3.5 million in settlement, having vigorously defended itself to that point. (3RT, pp. 667:1 – 668:9; 5RT, pp. 973:19 – 974:3; TE 94, check posted on December 28, 2009.)

That payment represented a compromise of claims for defense costs under the CNA Policy. (3RT, pp. 667:1 – 668:9; TE 93, TE 94; 5RT, pp. 973:19 – 974:3, 995:1-10.)

3. Great American's Legal Analysis Misses The Mark

Great American's misapplication of *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, highlights how National Fire met its burden of proof at trial. (See AOB at pp. 49-50.) In *Roddenberry*, the plaintiff sued her ex-husband Gene Roddenberry's estate for a share of profits from "Star Trek" projects he created after their 1969 divorce. In the divorce settlement, the parties had agreed to divide future profits in the original "Star Trek" television show ("Star Trek 1"), which ran from 1966 to 1969. The settlement agreement awarded plaintiff "profit participation income from Star Trek," without expressly defining the terms "profit participation" or "Star Trek." (*Roddenberry, supra*, at p. 642.)

Years after the divorce, Gene Roddenberry developed several profitable new Star Trek projects, including a second television series ("Star

Trek 2") in 1987, and a third series ("Star Trek 3"), which first aired in 1993. (*Id.*) The trial court ruled the plaintiff was entitled to profits from Star Trek 2 and Star Trek 3 because they were "continuations" of Star Trek 1. (*Id.* at p. 657.)

The court of appeal reversed, holding that the trial court's ruling was not based on substantial evidence of contractual intent. (*Id.*) The only Star Trek property in existence when the parties contracted in 1969 was Star Trek 1. By the time it was cancelled shortly before the settlement negotiations, it had "amassed a production deficit of $3 million," and "no further Star Trek projects were in development or contemplated." (*Id.* at pp. 646-647.) The plaintiff herself acknowledged that "[d]uring the settlement negotiations Star Trek 1 was considered a failure, and … there was no contemplation that Gene Roddenberry might further develop the Star Trek idea after divorce…." (*Id.* at p. 655.) Moreover, "[t]he evidence was uncontradicted that Star Trek's post-divorce resurgence was unprecedented in entertainment industry history." (*Id.* at p. 649.)

In short, there was no evidence whatsoever that either party to the *Roddenberry* divorce settlement intended "profit participation from Star Trek" to include profits from new Star Trek projects developed two decades in the future. In *this* context the *Roddenberry* court held the plaintiff could

not meet her burden by pointing *solely* to evidence that the 1969 agreement *did not exclude* profit-sharing from future Star Trek projects: "The failure to expressly exclude *uncontemplated* and *nonexistent* projects is immaterial." (*Id.* at p. 655, emphasis added.)

Here, by contrast, Sysco's role in the events leading up to the green-onion claims, and its existence as an additional insured under the CNA policy, were facts undeniably contemplated by Great American and National Fire during negotiations of the Tender Agreement. So the agreement's failure to expressly foreclose any obligations to Sysco *did* support National Fire's position. But it was far from the only evidence to do so – a key distinction from *Roddenberry* that Great American ignores.

* * *

In sum, neither an **express** promise by Great American to appoint defense counsel for Sysco, nor evidence that the parties expressly discussed such obligation, was necessary to support the verdict, where the evidence recited above (and more) supported reasonable inferences that:

- the intent of the Tender Agreement was to establish – as between Great American and National Fire – that National Fire's responsibilities were fully exhausted with respect to *any* entity claiming the benefit of that coverage, and that Great American

would thereafter assume those responsibilities under the CNA Policy;

- Great American's purpose for entering the Tender Agreement was to gain total control of the handling and resolution of the green-onion claims, **removing** National Fire from any role that would continue the kind of coverage and settlement "precedents" that Great American wanted to avoid; and
- an interpretation requiring National Fire to continue defending and indemnifying Sysco as an additional insured would have defeated that purpose, contradicted the express conditions of the Tender Agreement, and been practically impossible after having paid its entire policy limit to Great American (i.e., such a result could not have been either party's reasonable expectation).

Simply put, no evidence suggested that Great American ever expected National Fire would continue any involvement with the green-onion claims, including responding to Sysco's claim for policy benefits. On the contrary, the record discloses substantial evidence that both sides negotiated for National Fire's total exit from the defense and settlement of all claims for its primary insurance benefits, no matter who asserted such claims. The Tender Agreement itself said so; Great American's coverage counsel imposed

exactly that condition during the negotiations; and both sides' claims handlers announced to all concerned, within 24 hours of the deal, that Great American would take over all claims-handling from National Fire.

C. The Court Should Affirm The Judgment For National Fire On Its Implied Contractual Indemnity Claim

In the Statement of Decision finding for National Fire on its claim for implied contractual indemnity, the trial court explained:

> "The jury found that the Tender Agreement, as specifically defined by the court, obligated [Great American] to assume the defense of Castellini and also the defense of Sysco as an additional insured. The jury heard the testimony of the two experienced and skilled parties who entered into the agreement on behalf of their respective employers, Ms. Witten (NF) and Ms. Biondo (GA). The jury also heard testimony from other individuals who had been directly involved in earlier negotiations. The jury, and the jury alone, measured the credibility of the witnesses and determined the weight to be given to their testimony." (See 6AA, p. 1674.)

Thus, the trial court ruled that "all the essential evidence and operative facts relative to the Implied Contractual Indemnity cause of action have been determined by the jury in its verdict on the Breach of Contract cause of action and that, therefore, [National Fire] is entitled to a judgment for the

same amount ($3.5 million)." (*Id.*)

There is no cause to disturb this decision. The elements of National Fire's Implied Contractual Indemnity Claim overlapped significantly with the Breach of Contract claim tried to the jury. National Fire had to prove by a preponderance of the evidence that: (1) Great American breached a promise to regard the $1,250,000 that National Fire paid it as the entire remaining limits of the National Fire policy for claims arising out of the Pennsylvania Hepatitis A outbreak, including claims by Sysco for benefits under the National Fire policy; and (2) Great American's conduct was a substantial factor in causing National Fire's harm – i.e., the $3.5 million payment. (See generally CACI 3801 and authorities cited therein.) Because the jury's verdict on National Fire's breach-of-contract action is supported by substantial evidence (as set forth above), the Statement of Decision on the related claim should likewise be affirmed.

D. Great American Has Demonstrated No Error In The Denial Of Either Of Its Post-Trial Motions

The trial court's order denying Great American's motion for new trial is reviewed under an abuse-of-discretion standard. (*County of Los Angeles v. California State Water Resources Control Bd.* (2006) 143 Cal.App.4th 985, 997-998; see *Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387 ["The determination of a motion for a new trial rests so completely within

the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears"].)

Regarding the order denying Great American's motion for judgment notwithstanding the verdict, "[a]s in the trial court, the standard of review on appeal is whether any substantial evidence – contradicted or uncontradicted – supports the jury's conclusion." (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 770, internal punctuation and citation omitted.) In applying this test, the Court must "view the facts in the light most favorable to the judgment, resolving all conflicts in respondent's favor and accepting all reasonable inferences deduced from the evidence." (*Taylor v. Nabors Drilling USA, LP* (2d Dist., Div. 6, 2014) 222 Cal.App.4th 1228, 1237, internal punctuation omitted.)

In denying Great American's post-trial motions, the court observed that "[b]oth Ms. Biondo and Ms. Witten *[respectively, Great American and National Fire's key witnesses]* gave lengthy testimony at trial. In addition, each party placed into evidence testimony from other witnesses and numerous documents, including (but not necessarily limited to) letters, emails, and insurance policies." It continued: "Counsel were afforded sufficient latitude to examine, cross-examine and argue their respective positions. The jury was presented a plethora of evidence and all counsel did

a highly professional and commendable job in explaining to the jury how the evidence supported their respective client's position and not that of their opponent." (See 11AA, pp. 3134 – 3135.)

With particular regard to the motion for new trial, the court, "as guided by the applicable statutes and case law," and in its capacity as a "13th juror," weighed the evidence and the credibility of witnesses, and ruled that there was "sufficient evidence to support the jury's decision." (*Id*. at p. 2; see *Dominguez v. Pantalone* (1989) 212 Cal.App.3d 201, 215 ["When a trial court rules upon a motion for a new trial made upon the ground of insufficiency of the evidence, the judge is required to weigh the evidence and judge the credibility of witnesses"].) That decision warrants this Court's highest deference.

As to the motion for JNOV, the trial court recognized that here it could not "weigh the evidence or determine the credibility of witnesses"; instead, it determined after "carefully review[ing]" the evidence "that there is substantial evidence to support the jury's verdict." (11AA, p. 3135 [citing *Linear Technology Corp. v. Tokyo Electron Ltd.* (2011) 200 Cal.App.4th 1527].)

Great American presents no convincing argument for reversing these orders.

1. The Judgment Does Not Depend On Any Implied-Contract Theory

Great American's main contention appears to be that National Fire argued post-trial that the Tender Agreement was implied rather than express – though it is not clear how that point would require reversal even if it accurately described National Fire's position. (See AOB at pp. 39-44.) Regardless, National Fire's position **did not depend on** the Tender Agreement being an "implied contract" or having "implied terms." National Fire offered an Implied Contractual Indemnity theory as an alternative to its main Breach of Contract claim – but the jury accepted the Breach of Contract claim, which certainly concerned an express contract. National Fire's position throughout trial and post-trial proceedings was precisely the one established by this Court in its prior decision, and by the trial court after the Step 1 trial: that the written Tender Agreement was reasonably susceptible to more than one interpretation, and it was therefore the fact-finder's role to weigh conflicting extrinsic evidence, and the testimony of witnesses, to derive the parties' intent.

Even if, as Great American argues, the Tender Agreement "contain[ed] no express intention that Great American defend and indemnify Sysco under the CNA Policy" (see AOB at p. 40), that would not require creating an "implied term" to establish such intention. Rather, as explained

fully above, the parties' intent had to be gleaned from the agreement's language combined with the conflicting extrinsic evidence of its meaning. In sum, that the Tender Agreement was an *ambiguous* contract does not mean it was an *implied* one.

Thus, the orders denying Great American's post-trial motions did not rely on any implied-contract theory. And in all events, Great American's effort to justify reversal on this basis (see AOB at pp. 40-44) depends on a series of factual inferences from the evidence that this Court cannot draw under the applicable standards of review.

2. No "Judicial Admission" Existed As A Ground For New Trial

Great American claims that, over the long course of this litigation, National Fire has offered multiple positions on whether the CNA Policy "exhausted" under the Tender Agreement. (See, e.g., AOB at pp. 8-9, 29-30.) But even had National Fire posited different legal theories of relief prior to trial – which was its right – the fact remains that *at trial*, National Fire consistently maintained that the Tender Agreement transferred the obligations under the CNA Policy to Great American. All the terms, including the provision that National Fire's obligations were to be treated as exhausted *as between National Fire and Great American* and thereby assumed by Great American, support that interpretation. (See 4RT, pp.

781:6-12, 782:10-16.) Simply put, alternative legal theories adopted by the parties pre-trial do not bear on any decision this Court must now make.

But Great American's "exhaustion" argument goes further. In a short, opaque section arguing that a new trial should have been granted, Great American contends that the "the verdict – which relies on the CNA Policy being in effect – cannot stand in light of" claimed "admissions" by National Fire that its policy had "exhausted." (See AOB at p. 53.) Whatever that may mean, the substantive law of judicial admissions forecloses any finding that National Fire "judicially admitted" that the CNA Policy "exhausted" for any purpose at any time before the Tender Agreement. Neither the allegations made in the Second Amended Cross-Complaint nor the contentions included in National Fire's responses to Requests for Admission propounded by American Guarantee were "judicial admissions" of any fact relevant to this trial.

A judicial admission "is a waiver of proof of a fact by conceding its truth, and it has the effect of removing the matter from the issues." (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271.) "[N]ot every factual allegation in a complaint automatically constitutes a judicial admission. Otherwise, a plaintiff would conclusively establish the facts of the case by merely alleging them, and there would never be any

disputed facts to be tried." (*Barsegian v. Kessler & Kessler* (2013) 215 Cal.App.4th 446, 452.) "Rather, a judicial admission is ordinarily **a factual allegation by one party that is admitted by the opposing party**. The factual allegation is removed from the issues in the litigation because the parties agree as to its truth. Thus, facts to which adverse parties stipulate at trial are judicially admitted. Similarly, in discovery when a party propounds requests for admission, any facts **admitted** by the responding party constitute judicial admissions. And when an **answer** admits certain factual allegations contained in a complaint or cross-complaint, those facts are likewise judicially admitted." (*Id.*, emphasis added.)

The key missing component here is concession. National Fire **alleged** some form of exhaustion in the operative cross-complaint. And National Fire **contended** some form of exhaustion in its responses to third-party American Guarantee's Requests for Admission – but never in response to a request to admit that the CNA Policy was exhausted. National Fire has never conceded or admitted that its policy was completely exhausted or that all obligations owed to Sysco under the policy were terminated as of December 5, 2005 (as Great American's truncated argument may be implying) – because that allegation has never been made by Great American or any other party in a way that enabled National Fire unequivocally to

concede it. In short, there was never any agreement or concession that the limit of the CNA Policy was exhausted by payment of claims.

IV.

CONCLUSION

Great American's entire position in this appeal springs from its unwavering resistance to decisions both from this Court and from the trial court that the Tender Agreement at issue is subject to two reasonable interpretations. This Court's decision is law of the case and cannot be challenged here. But even if there were any doubt, the trial court looked at the proffered evidence *again* and reached the same conclusion. Given the substantial evidence supporting the jury's verdict and the trial court's statement of decision, Great American's mere disagreement with the rule of law is not enough to warrant reversal of the judgment for National Fire.

For all the foregoing reasons, the Court should affirm the Judgment in favor of National Fire.

Dated: February 9, 2016

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CERTIFICATE OF WORD COUNT

I certify that according to the word count of the computer program used to prepare the foregoing brief, it contains 6,693 words, including footnotes.

Dated: February 9, 2016

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