LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 13 01837 BRO (JCGx)**	Date	March 27, 2014
Title	**ARE-EAST RIVER SCIENCE PARK, LLC v. LEXINGTON INSURANCE COMPANY**		

Present: The Honorable	**BEVERLY REID O'CONNELL, United States District Judge**	
Renee A. Fisher	Not Present	N/A
Deputy Clerk	Court Reporter	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
Not Present	Not Present	

Proceedings: (IN CHAMBERS)

ORDER RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [46]

Before the Court is Lexington Insurance Company's Motion for Summary Judgment. (Dkt. No. 46.) ARE-East River Science Park, LLC ("ARE" or "Plaintiff") filed an Opposition. (Dkt. No. 61.) Lexington Insurance Company ("Lexington" or "Defendant") filed a Reply. (Dkt. No. 65.) The dispute centers on an insurance contract provision, applying a high deductible to claims derived from named tropical storms ("Named Storm"). Defendant contends that Superstorm Sandy was a Named Storm, and accordingly that Plaintiff's claims do not meet the deductible. Conversely, Plaintiff maintains that Superstorm Sandy was reclassified from a hurricane to a post-tropical-cyclone prior to touching land, precluding the Named Storm provision from applying.

For the following reasons, the Court **DENIES** Defendant's Motion for Summary Judgment.

I. BACKGROUND

A. The Parties

Plaintiff is a real estate investment trust. (Dkt. No. 46-1 at 1.) Plaintiff owns the Alexandria Center for Life Science, a premier life science park located on the East River in Manhattan. (ARE Additional Fact ("AF") #83.)

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Defendant issued a commercial property policy to Plaintiff that was in effect when Sandy hit New York. (Dkt. No. 46-1 at 1.)

The National Weather Service ("NWS"), a component of the National Oceanic and Atmospheric Administration, which is an operating unit of the U.S. Department of Commerce, has several National Centers for Environmental Prediction. (Lexington Undisputed Fact ("UF") # 7.) The National Hurricane Center ("NHC"), one of the NWS National Centers, is located in Miami Florida. (UF #8.)

B. The Policy

Defendant issued a Commercial Property policy for Alexandria Real Estate Equities, Inc., effective June 1, 2012 to June 1, 2013 ("Policy"). According to the terms of the Policy:

> In the event that a single occurrence should produce a claim under this policy, [Defendant] will adjust such issues, damages or expenses arising out of such occurrence as a single event. A single deductible shall apply to the total of the adjusted claims resulting from the single occurrence.

(Dkt. No. 47-2, Ex. 2 at 21.) All of Plaintiff's claims are subject to a deductible. The deductible varies for different types of claims. (Dkt. No. 61 at 4.) One such type of deductible applies to a claim stemming from a Named Storm. (Dkt. No. 61 at 1.) The Policy defines Named Storms as those specifically designated as such by the NWS. (Dkt. No. 47-2, Ex. 2 at 21.) There are three (3) Flood deductibles under the Policy, one of which provides:

> 5% per unit of insurance involved in loss or damage, subject to a minimum of $100,000 any one occurrence with respect to Named Storms (a storm that has been declared by the National Weather Service to be a Hurricane, Typhoon, Tropical Cyclone or Tropical Storm).

(Dkt. No. 47-2, Ex. 2 at 21.) For a Named Storm, a high deductible applies. (Dkt. No. 47-2, Ex. 2 at 21.) The Policy also sets forth that "[o]ne event shall be construed to be all

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losses arising during a continuous period of 72 hours. When filing proof of loss, the insured may elect the moment at which the 72 hour period shall be deemed to have commenced . . .” (Dkt. No. 47-2, Ex. 2 at 8.)

C. Superstorm Sandy

Superstorm Sandy (“Sandy”) was a collection of weather conditions striking New York City on October 29, 2012. (Dkt. No. 61 at 1.) Sandy began as a classic “late-season hurricane in the southwestern Caribbean Sea.” (UF #9.) The NHC reclassified Sandy from a hurricane to a post-tropical cyclone at 5:00 p.m. Eastern Daylight Time (“EDT”) on October 29, 2012, “while the center was [a]bout 45 nautical miles southeast of Atlantic City, N.J.” (Dkt. No. 61-4, Dooley Decl. ¶ 13.) Sandy’s center hit landfall “on the eastern seaboard on October 29, 2012, at 7:30 p.m. EDT.” (Dkt. No. 61-4, Dooley Decl. ¶ 14.) Sandy “was not classified as a tropical system at the time of landfall.” (Dkt. No. 61-4, Dooley Decl. ¶ 14.) Further, the maximum storm surge at “New York harbor occurred at 9:24 p.m. EDT –approximately 4 hours and 24 minutes after [Sandy] transitioned to a post-tropical cyclone.” (Dkt. No. 61-4, Dooley Decl. ¶ 14.)

On October 31, 2012, Governor Andrew M. Cuomo announced that “[h]omeowners should not have to pay hurricane deductibles for damage caused by the storm and insurers should understand the Department of Financial Services [would] be monitoring how claims [were] handled . . .” (Dkt. No. 60-11 at 2.)

D. The Dispute

The Named Storm deductible for the building is $15,143,578.[1] (UF # 64.) The building loss was only $667,002.33. (UF # 64.) Defendant has “issued payment of $258,773.68 for the personal property claim, after applying the 5% Named Storm deductible and the $100,000 minimum per occurrence amount.” (UF # 67-68.) Defendant has also adjusted ARE’s loss of business income claim to $169,882. (UF # 68.) Plaintiff has not yet indicated if it agrees with this amount. The reported business income for the

[1] This figure is calculated by taking 5% of the building’s reported value of $302,871,563. (UF # 64.)

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location is $24,446,952, meaning the Named Storms deductible for the loss of business income claim is $1,222,347.60. (UF # 44, 69.)

Defendant contends that Sandy qualified as a Named Storm under the Policy terms and accordingly the Named Storm deductible should apply to Plaintiff's damages. (Dkt. No. 65 at 1.) Defendant argues that Sandy was at all times a Named Storm, not only when it was a hurricane and a tropical storm, but also when it was a post-tropical cyclone. (Dkt. No. 65 at 1.) In the alternative, Defendant argues that Sandy was not reclassified from being a hurricane to being a post-tropical cyclone until 5 p.m. on October 29, 2012, and the damage sustained by the insured was generated by Sandy prior to its reclassification. (UF # 47.) As such, Defendant argues the Named Storm deductible applies. (Dkt. No. 65 at 1.)

In contrast, Plaintiff maintains that its building "sustained no damage from Hurricane Sandy, but only sustained damage from weather events [occurring] *after* Sandy had become a post-tropical cyclone." (Dkt. No. 61 at 9.) According to Plaintiff, at that point Sandy was not a Named Storm, but rather was a convergence of an "unnamed Nor'easter," unusual high tides unrelated to weather conditions, and a "post-tropical cyclone." (Dkt. No. 61 at 2.) A post-tropical storm is a type of storm specifically defined by the NWS but not one of the types listed in the Policy's definition. (AS # 101.) According to Plaintiff, the Policy language "establishes that the current state of the storm ***at the time of the loss*** determines whether the Named Storms deductible applies." (Dkt. No. 61 at 14) (emphasis added). Further, any questions regarding the source of Plaintiff's damage should be resolved by a jury. (Dkt. No. 61 at 15.)

For the following reasons, the Court agrees with Plaintiff. While Sandy was initially declared to be a Named Storm, the NWS changed its characterization of the storm while its center was still 45 nautical miles offshore. Further, because Defendant and Plaintiff offer conflicting evidence regarding the cause of Plaintiff's injuries, there is a genuine issue of material fact that must be resolved by a jury. Accordingly, summary judgment is **DENIED**.

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II. LEGAL STANDARD

Summary judgment is appropriate when, after adequate discovery, the evidence demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A disputed fact is material where its resolution might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the non-moving party. *Id.* A court may consider the pleadings, discovery, and disclosure materials, as well as any affidavits on file. Fed. R. Civ. P. 56(c)(2). Where the moving party's version of events differs from the non-moving party's version, a court must view the facts and draw reasonable inferences in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). The moving party may satisfy that burden by showing "that there is an absence of evidence to support the non-moving party's case." *Id.* at 325.

Once the moving party has met its burden, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the non-moving party must go beyond the pleadings and identify specific facts that show a genuine issue for trial. *Id.* at 587. Only genuine disputes over facts that might affect the outcome of the suit will properly preclude the entry of summary judgment. *Anderson*, 477 U.S. at 248; *see also Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) (finding that the non-moving party must present specific evidence from which a reasonable jury could return a verdict in its favor). A genuine issue of material fact must be more than a scintilla of evidence, or evidence that is merely colorable or not significantly probative. *Addisu v. Fred Meyer*, 198 F.3d 1130, 1134 (9th Cir. 2000).

Although a court may rely on materials in the record that neither party cited, it need only consider cited materials. Fed. R. Civ. P. 56(c)(3). Therefore, a court may properly rely on the non-moving party to specifically identify the evidence that precludes

summary judgment. *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996).

Finally, the evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory or speculative testimony in affidavits and moving papers is insufficient to raise a genuine issue of fact and defeat summary judgment. *Thornhill's Publ'g Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson*, 477 U.S. at 253.

III. EVIDENTIARY OBJECTIONS

Plaintiff objects to the following exhibits attached to Larry M. Golub's ("Mr. Golub's") declaration: (1) a rough transcript of Dr. Austin Dooley's deposition (Ex. 19); (2) an email from Vahe Simitian ("Mr. Simitian") on October 31, 2012 (Ex. 15); (3) an email from Dean Shigenaga on October 31, 2012 (Ex. 16); (4) an e-mail string between Jared Hanner ("Mr. Hanner") and Mr. Simitian (Ex. 17); (5) Halliwell Engineering Associates Report, from November 21, 2012 (Ex. 21); (6) a copy of selected portions of the transcript from Mr. Hanner's February 12, 2014 deposition (Ex. 23); and (7) a copy of an April 16, 2012 email from Mr. Hanner (Ex. 24).

A. Objections 1-4

The rough transcript from Dr. Dooley's deposition and the emails are offered as evidence that Sandy was in fact a Named Storm. Defendant urges the Court that Plaintiff's employees also perceived Sandy to be a Named Storm that would trigger the Named Storm deductible. Defendant points to email exchanges with Mr. Smitian, in which he referred to Sandy as a Named Storm. Plaintiff argues first that Mr. Smitian was misled by representations in the media and second that the emails are irrelevant. (Dkt. No. 61-1, Smitian Decl. ¶ 8.) The Court agrees, finding that this evidence is not relevant to interpreting the plain language of the contract. *See* Fed. R. Evid. 401. The Court is confined to its written terms. *Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 666—67 (1995). According to the Parties' contract terms, Plaintiff's characterization of the storm is irrelevant. The relevant characterization comes from the NWS. (Dkt. No. 47-

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2, Ex. 2 at 21.) As such, the Court did not rely on this evidence in making its decision and finds it unnecessary to discuss the evidentiary objections further. The objections would have no bearing on the Court's analysis and would not impact the Court's final decision on the Motion for Summary Judgment or for Partial Summary Judgment.

B. Objection 5

Plaintiff objects to Exhibit 21, a Halliwell Engineering Associates report from November 21, 2012. Plaintiff objects on the grounds that it is improper hearsay, that the document is not properly authenticated, and that it is irrelevant to the motion for summary judgment. The Court agrees as to relevance. Fed. R. Evid. 401. This document discusses the applicability of a Special Flood Hazard area deductible. (Dkt. No. 47-21 at 1.) The Special Flood Hazard deductible is not at issue in the Motion for Summary Judgment. Accordingly, the Court will not consider this evidence in its Order.

C. Objections 6-7

Plaintiff objects to Exhibits 23 and 24, arguing that they were improperly filed with Defendant's Reply when they should have been included in the moving papers. (Dkt. No. 66 at 2.) The Court has discretion to disregard late-filed factual matters. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 873 (1990) (holding that "the district court did not abuse its discretion in declining to admit the supplemental affidavits"). Defendant utilizes the evidence to show that any contract ambiguities should not be construed against Defendant. According to Defendant, Plaintiff "agreed to eliminate from the policy language a provision that would have caused ambiguities to be construed against [Defendant]." (Dkt. No. 65 at 6-7 n.4.) The deleted provision of the Policy would have provided that "[r]egardless of who may have drafted or prepared this policy, or any portions thereof, the provisions contained herein shall be deemed to have been authored by [Lexington]." (Dkt. No. 65 at 7 n.4.) Plaintiff argues that it should be given an opportunity to respond. "Where new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the [non-]movant an opportunity to respond." *J.G. v. Douglas County Sch. Dist.*, 552 F.3d 786, 803 n.14 (9th Cir. 2008); *see also Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996).

While the Court agrees with Plaintiff, that these pieces of evidence have been improperly brought in a Reply, the Court finds that this evidence is not relevant to the Court's inquiry. Fed. R. Evid. 401. The Court determined that the Policy's language is not ambiguous and it will not consider this evidence.

IV. REQUESTS FOR JUDICIAL NOTICE

Federal Rule of Evidence 201 empowers a court to take judicial notice of facts that are either "(1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *Mullis v. U. S. Bankr. Court for Dist. of Nevada*, 828 F.2d 1385, 1388 n.9 (9th Cir. 1987). According to Federal Rule of Evidence 201, the Court "*must* take judicial notice if a party requests it and supplies the court with the necessary information." Fed. R. Evid. 201(c)(2) (emphasis added).

A. Defendant's Requests for Judicial Notice

Defendant asks the Court to judicially notice: The National Hurricane Center's *Tropical Cyclone Report Hurricane Sandy*, from February 12, 2013 (Ex. 1); The National Hurricane Center Bulletin, Hurricane Advisory Number 30 (Ex. 2); The National Hurricane Center Post Tropical Cyclone Sandy Update (Ex. 3); The National Hurricane Center's Glossary of Terms (Ex. 4); The National Oceanic and Atmospheric Administration's National Weather Service (Ex. 5); Information About the National Hurricane Center (Ex. 6); and *In Re Hurricane Sandy Cases*, Case Management Order No. 1 from February 21, 2014 (Ex. 7). (Dkt. No. 49.)

The Court **GRANTS** Defendant's request for judicial notice of the foregoing exhibits.

1. Exhibits 1-3

The contents of Exhibits 1 to 3 are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned in accordance with Rule 201(b). The National Hurricane Center is part of the National Weather Service, and

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is a source "whose accuracy cannot be reasonably questioned" of weather and meteorological facts concerning tropical cyclones. *Corner Pocket, Inc. v. Travelers Ins.*, No. CIV.A. 12-288, 2013 WL 4766293, at *2 n.2 (W.D. Pa. Sept. 4, 2013) (taking judicial notice of National Weather Service's snow records). The exhibits are admissible because they consist of reports based on factual investigation. They are not precluded from admission merely because they express an opinion. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988) ("[P]ortions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report."). Accordingly, the Court finds that Exhibits 1 to 3 are capable of accurate and ready verification and are therefore properly subject to judicial notice.

2. Exhibits 4-6

The contents of Exhibits 4 to 6 are subject to judicial notice as they contain information posted on official government websites, particularly the NWS and the NHC sites. Both entities fall under the U.S. Department of Commerce. "It is appropriate to take judicial notice of this information, as it was made publicly available by government entities . . ." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010). Accordingly, the Court takes judicial notice of Exhibits 4 to 6.

3. Exhibit 7

The contents of Exhibit 7 are subject to judicial notice because the exhibit is a court filing. In its supplemental request for judicial notice, Defendant provides a Case Management Order that was issued by a committee of magistrate judges in the Eastern District of New York (the "Committee"). (Dkt. No. 65-4.) The Committee was appointed "to recommend procedures to ensure proper case filing and relation practices" for the 800 Sandy-related actions filed by property owners. (Dkt. 65-4 at 1.) The Court may take judicial notice of "court filings and other matters of public record." *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (citing *Burbank–Glendale–Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1364 (9th Cir. 1998)). Accordingly, the Court takes judicial notice of Exhibit 7.

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B. Plaintiff's Requests for Judicial Notice

Plaintiff asks the Court to judicially notice: The National Hurricane Center Public Affairs report, *Hurricane Sandy's Transition to a Post-Tropical Cyclone* from October 27, 2012 (Ex. 1); The United States Naval Observatory, Sun and Moon Data for Monday October 29, 2012 (Ex. 2); The American International Group's ("AIG") 2012 Form 10-K filed with the United States Securities and Exchange Commission ("SEC") (Ex. 3); The Transcript of AIG CEO Discussing Q4 2012 Results ("Earnings Call Transcript") from February 22, 2013 (Ex. 4); AIG's 2013 Form 10-K filed with the SEC (Ex. 5); Best Company's Reports for Defendant from January 29, 2013 (Ex. 6); and New York Governor Cuomo's October 31, 2012 Press Release (Ex. 7). (Dkt. No. 60.)

1. Exhibit 1-3, 5

The contents of Exhibits 1 to 3 and 5 are judicially noticeable because the documents are "matters of public record." *Reyn's Pasta Bella*, 442 F.3d at 746 n.6. Accordingly, the Court takes judicial notice of Exhibits 1 to 3 and 5 to 7.

2. Exhibit 4, 7

The contents of Exhibits 5 and 7 are judicially noticeable because they are indicative of what information was in the public realm. While the Court may not take the judicial notice of the truth of the Press Release or the Earnings Call Transcript "[c]ourts may take judicial notice of publications introduced to 'indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.'" *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010). As such, the Court judicially notices the contents of Exhibits 4 and 7.

V. DISCUSSION

A. Choice of Law

"At the outset, the Court notes that under the mandate of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the obligation of a district court sitting in diversity

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jurisdiction is to interpret and apply state law." *Clemco Indus. v. Commercial Union Ins. Co.*, 665 F. Supp. 816, 818 (N.D. Cal. 1987) *aff'd*, 848 F.2d 1242 (9th Cir. 1988). Defendant urges that New York law controls (Dkt. No. 65 at 1), while Plaintiff urges that California law controls. (Dkt. No. 61 at 10-11.)

As a district court in a diversity case, this Court "must apply the same choice of law analysis that would be applied by state courts in the jurisdiction in which the district court is situated." *Liew v. Official Receiver & Liquidator*, 685 F.2d 1192, 1195 (9th Cir. 1982) (*citing Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). The choice-of-law analysis adopted by the California courts is the "governmental interest" analysis. *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 161 (1978). "Under the 'governmental interest' analysis, if there is a 'true conflict,' i.e., the two competing states' laws differ and both have an interest in having their law applied to the action at hand, then the court must apply the 'comparative impairment' approach . . ." *Clemco*, 665 F. Supp. at 818. For a comparative impairment analysis, the Court must "determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state." *Id*. (quoting *Liew*, 685 F.2d at 1196 n.6).

"California has a very strong interest in regulating insurance contracts entered into with its own residents in its own jurisdiction and with policing insurance contracts executed in its own jurisdiction and with policing insurance contracts executed in its own jurisdiction." *Clemco*, 665 F. Supp. at 818. In *Clemco*, the Court ruled that "a California resident that employs California residents and pays taxes to California, [] has an expectation that California law will govern the insurance contracts it enters into within California." *Id*. Here, the policy was issued in California, notice of loss was to be given to Defendant in Glendale, and losses are to be and have been paid to ARE in Pasadena. (AS # 86—92.) There is no "performance" of the contract in New York—the policy specifies Lexington's address in Boston, Massachusetts, (AS # 158), and Lexington adjusted the claim from New Jersey. (AS # 159.) Further, Defendant conducts almost 50% more business in California than it does in New York. (AS # 166). California law presumptively applies, and, if Defendant disagrees, it must prove that there is a conflict between the states' laws and that New York law should apply ahead of California law. *See Wash. Mut. Bank, FA v. Sup. Ct.*, 24 Cal. 4th 906, 919 (2001) ("[T]he trial court may properly find California law applicable without proceeding to the third step in the

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analysis if the foreign law proponent fails to identify any actual conflict or to establish the other state's interest in having its own law applied.").

Defendant urges the Court to apply New York insurance law; however it argues that regardless "the storm surge is the legally relevant cause of the loss, whether viewed under New York or California law." (Dkt. No. 65 at 1.) Defendant argues that the rules are "substantially the same" and California's rule regarding ambiguity "'differs only slightly from that in New York.'" (Dkt. No. 46-1 at 8 n. 4, 5, 9 n. 6) Counsel affirmed this view during the argument of this matter. Additionally, Defendant does show that New York has a competing interest in having its law apply. Instead, Defendant argues that it will prevail under either application. As a result, the Court will look to California law and "will attempt to apply the law the California Supreme Court would apply were it faced with the same issues." *Clemco*, 665 F. Supp. at 818.

B. The Named Storm Deductible

1. The Court finds that the policy provision is not ambiguous.

Under California law, insurance policies are contracts and, therefore, are governed in the first instance by the rules of construction applicable to contracts. *Bank of the W. v. Sup. Ct.*, 2 Cal. 4th 1254, 1264 (1992). Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs its interpretation. *Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, 563 F.3d 777, 783 (9th Cir. 2009) (citing Civ. Code, § 1636). Such intent is to be inferred, if possible, from the written provisions of the contract. *Id* (citing Civ. Code, § 1639). The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," controls judicial interpretation unless used by the parties in a technical sense, or "unless a special meaning is given to them by usage." *Northrop*, 563 F.3d at 783 (citing Civ. Code, §§ 1638, 1644).

Both Plaintiff and Defendant maintain that the Policy language is unambiguous. The Court agrees, finding that the policy language is unambiguous. "If the meaning a layperson would ascribe to the language of a contract of insurance is clear and unambiguous, a court will apply that meaning." *Montrose*, 10 Cal. 4th at 666-67.

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Accordingly, the Court will apply the clear and unambiguous meaning of the Policy language.

2. The proximate cause of damages is a matter for jury determination.

Though the damage to Plaintiff's garage is largely undisputed, there remain genuine disputes of material fact as to the predominant cause of the damage. Specifically, the Parties disagree about the predominant cause of water entry, the role of a high tide, the role of other weather systems, and the role of precipitation. Defendant maintains that Hurricane Sandy is the cause of Plaintiff's damages, while Plaintiff maintains that the unnamed post-tropical cyclone is the cause of Plaintiff's damages. Under California law, in situations in which multiple causes contribute to a single loss, the court looks to the "efficient proximate cause," meaning the cause that is responsible for setting any and all other causes in motion. *See Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 412 (1989). Under an efficient proximate cause analysis, "[c]overage should be determined by a jury . . ." *Id*. To determine if the Named Storm deductible applies, a jury must first determine the "efficient proximate cause" of Plaintiff's damages.

The Policy designates that the Named Storm deductible applies to "any one occurrence with respect to Named Storms." (Dkt. No. 47-2, Ex. 2 at 21.) An "occurrence" is defined as

> any one loss, disaster, casualty, or series of losses, disasters, or casualties, arising out of one event. When the term applies to loss or losses from the perils of tornado, cyclone, hurricane, windstorm, hail, flood, earthquake, volcanic eruption, riot . . . one event shall be construed to be all losses arising during a continuous period of 72 hours.

(Dkt. No. 47-2, Ex. 2 at 8.)

Because the NHC reclassified Sandy from being a hurricane prior to landfall of the storm's center, Plaintiff contends that the "occurrence" was not with respect to a Named Storm. A Named Storm is "a storm that has been declared by the National Weather Service to be a Hurricane, Typhoon, Tropical Cyclone or Tropical Storm." (Dkt. No. 47-2, Ex. 2 at 21.) Sandy "was not classified as a tropical system at the time of landfall."

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(Dkt. No. 61-4, Dooley Decl. ¶ 14.) "The NHC determined that [Sandy] had become post-tropical on October 29, 2012, at about 5:00 p.m. [EDT]." (Dkt. No. 61-4, Dooley Decl. ¶ 13.) At that time, Sandy's "center was [a]bout 45 nautical miles southeast of Atlantic City, [New Jersey]." (Dkt. No. 61-4, Dooley Decl. ¶ 13.) As a post-tropical cyclone, Sandy "made landfall on the eastern seaboard on October 29, 2012, at 7:30 p.m. EDT." (Dkt. No. 61-4, Dooley Decl. ¶ 14.) A post-tropical cyclone is not listed in the Named Storm provision and is distinct from a hurricane. (AS # 101.) Unlike hurricanes, post-tropical cyclones do not get their energy from warm water like tropical cyclones, but instead rely mainly on a baroclinic process. (AS # 101-03.)

Plaintiff takes the position that the "occurrence" was with respect to "a convergence of an unnamed Nor'easter, unusual high tides unrelated to weather conditions, and a 'post-tropical cyclone.'" (Dkt. No. 61 at 2.) Plaintiff offers declarations of employees averring that the water began to impact the building after the storm was reclassified. According to Mr. Smitian,

> [o]n the night of October 29, 2012, at approximately 7:10 p.m. [Eastern Standard Time ("EST")], water from storm drains began to back up through floor drains in the garage of the Science Center causing water damage. At approximately 7:56 p.m. EST, water began to come down the vehicular access ramps into the garage causing further water damage. After the storm, there was approximately 5 feet of standing water in the garage.

(Dkt. No. 61-1, Smitian Decl. ¶ 10.) Mr. Smitian confirmed this information by reviewing time-stamped surveillance videos from the Science Center garage. (Dkt. No. 61-1, Smitian Decl. ¶ 10.) Plaintiff supplied Defendant with these "time-stamped surveillance videos, which document the fact that no water entered the Science Center garage until well after the storm had transitioned to a post-tropical cyclone." (Dkt. No. 61-1, Smitian Decl. ¶ 13.) Additionally, Plaintiff's expert avers that "[t]he maximum storm surge at the Battery in New York harbor occurred at 9:24 p.m. EDT- approximately 4 hours and 24 minutes after 'Superstorm Sandy' transitioned to a post-tropical cyclone." (Dkt. No. 61-4, Dooley Decl. ¶ 14.) Plaintiff relies on this evidence to draw the inference that its damages were caused by Sandy *after* its reclassification.

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In contrast, Defendant argues that the storm surge which caused the flooding actually developed when Sandy was a tropical storm and a hurricane. (Dkt. No. 65 at 1.) Defendant points to documents from the NHC stating that "although Sandy made landfall as an extratropical low, its strong winds, heavy rains and storm surge had been felt onshore for many hours while Sandy was still a hurricane." (UF # 22.) Defendant offers evidence that the storm surge was generated while Sandy was still a hurricane and that the "predominant water entry into the garage was the result of overland flood water surge from the East River." (UF # 23, 46.) Defendant relies on this evidence to draw the inference that Plaintiff's damages were caused by Sandy *prior* to its reclassification.

As such, based on Plaintiff and Defendant's evidence, the Court finds that conflicting inferences could be made. In one instance, the factfinder may determine the storm surge began before the storm's reclassification. In another instance, the factfinder may look to the reclassification of the storm and the timing of the water entry and determine the cause was the post-tropical cyclone. "[B]earing in mind the facts here, [the Court] conclude[s] the question of causation is for the jury to decide." *Garvey*, 48 Cal. 3d. at 412; *see also Celotex*, 477 U.S. at 331 n.2 ("If ... there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment....") (internal citation and quotation marks omitted). Accordingly, the Court **DENIES** Defendant's Motion for Summary Judgment.

C. Bad Faith and Punitive Damages

Defendant seeks judgment on Plaintiff's bad faith claim and request for punitive damages. Plaintiff contends that it is unable to present supportive evidence because Defendant was uncooperative during the discovery process. Accordingly, Plaintiff asks the Court to deny or defer decision on these claims pursuant to Rule 56(d). The Court finds that Rule 56(d) applies here.

1. Defendant argues that the genuine dispute rule applies.

Defendant argues that Plaintiff cannot prove its claim for bad faith as a matter of law. According to Defendant, if it failed to perform a contractual duty it did so with

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proper cause.[2] If the insurer "fails to deal fairly and in good faith with its insured by refusing, *without proper cause*, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing." *California Shoppers, Inc. v. Royal Globe Ins. Co.*, 175 Cal. App. 3d 1, 54 (Ct. App. 1985) (quoting *Gruenberg v. Aetna Ins. Co*., 9 Cal.3d 566, 574 (1973)) (emphasis in original). Because there is a genuine dispute as to coverage, Defendant argues it cannot have acted without proper cause and accordingly summary judgment should be granted on the bad faith claim. *See Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 669 (9th Cir. 2003) ("Because the key to a bad faith claim is whether denial of a claim was reasonable, a bad faith claim should be dismissed on summary judgment if the defendant demonstrates that there was 'a genuine dispute as to coverage.'") (internal quotation marks and citation omitted). According to Defendant, it genuinely believed and believes that the Named Storm deductible applies here. As such, Defendant argues that it cannot be accused of acting without proper cause.

2. The genuine dispute rule does not absolve an insurer from conducting an investigation.

For the genuine dispute rule to apply, Defendant must show that it acted reasonably and in good faith when conducting an investigation. "The genuine dispute rule does not relieve an insurer from its obligation to thoroughly and fairly investigate, process and evaluate the insured's claim." *Wilson v. 21st Century Ins. Co.*, 42 Cal. 4th 713, 724 (2007). According to the Ninth Circuit, "the genuine dispute doctrine should be applied on a case-by-case basis. " *Guebara v. Allstate Ins. Co.*, 237 F.3d 987, 994 (9th Cir. 2001). "An insurer's good or bad faith must be evaluated in light of the totality of the circumstances surrounding its actions." *Wilson*, 42 Cal. 4th at 723. "A *genuine* dispute exists only where the insurer's position is maintained in good faith and on reasonable grounds." *Wilson*, 42 Cal. 4th at 723. "[A] genuine dispute does not exist where there is evidence that the insurer failed to conduct a thorough investigation." *Feldman*, 322 F.3d at 669.

[2] Defendant also argues that as a matter of law, Plaintiff cannot bring bad faith claims in New York citing to the *In re Hurricane Sandy* Case Management order. (Dkt. No. 65 at 2; *see* Dkt. 65-4.) The Court determined that California law applies to this action, therefore this legal argument is inapposite.

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Defendant argues that under California law, an insurer is not liable for bad faith unless its refusal to pay policy benefits was unreasonable. *See Nieto v. Blue Shield of Cal. Life & Health Ins. Co.*, 181 Cal. App. 4th 60, 86 (2010) ("The ultimate test is whether the insurer's conduct was unreasonable."). According to Defendant, "[i]t responded promptly to the claim, conducted a thorough investigation (which included retention of a building consultant, engineer and meteorologist), and reasonably concluded the Named Storm deductible applied." (UF # 34-51, 63-74.) Conversely, Plaintiff contends that Defendant failed to conduct a thorough investigation and sought to offer statements from Defendant's parent company, AIG to support their assertion. (Dkt. No. 61-5, Chaney Decl. ¶¶ 3-8.)

3. Plaintiff avers that it was deprived an opportunity to gather evidence regarding the insurer's investigation.

Plaintiff argues it was deprived an opportunity to depose a witness on the alleged AIG statements and therefore the Court should deny the motion pursuant to Rule 56(d). Rule 56 provides that the Court may defer considering a motion or may deny it if a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition. Fed. R. Civ. P. 56(d)(1); *see U.S. Equal Opportunity Comm'n v. Dillard's Inc.*, No. 08-CV-1780-IEG PCL, 2011 WL 4507068, at *2 (S.D. Cal. Sept. 28, 2011) (denying without prejudice Dillard's motion for summary judgment without prejudice and re-noticing it so that the parties could engage in more discovery).

Plaintiff alleges that Defendant received a directive from AIG to deprive coverage to insureds despite having knowledge that Sandy was not a Named Storm. (Dkt. No. 61-5, Chaney Decl. ¶ 18.) According to Plaintiff, "[Defendant] applied the Named Storms deductible before conducting any meaningful or objective investigation of [Plaintiff's] claim as part of an overall corporate position that would result in [Defendant] saving tens of millions of dollars while depriving [Plaintiff] and other insureds of tens of millions of dollars of insurance coverage." (Dkt. No. 61-5, Chaney Decl. ¶ 3.) According to Plaintiff, "[i]n its 2012, 10-K, AIG expressly acknowledged that when Storm Sandy made landfall, it was categorized as an extratropical cyclone, not a hurricane." (Dkt. No. 60-1 at 97) ("When the storm made landfall, it was categorized as an extratropical cyclone, not a

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hurricane."). Plaintiff was deprived an opportunity to gather evidence in support of this allegation.

Plaintiff filed a declaration averring that it sought the deposition of the person most qualified to speak on behalf of AIG's statements; however Defendant refused to provide this witness. (Dkt. No. 65-1, Chaney Decl. ¶¶ 7-8.) Defendant filed a motion for a protective order, which was denied by the Magistrate Judge. (Dkt. No. 65-1, Chaney Decl. ¶¶ 7-8.) Defendant then filed a motion for reconsideration of the Magistrate Judge's order, which was denied by this Court. (Dkt. No. 65-1, Chaney Decl. ¶ 10-12.) Plaintiff argues "that the requested discovery will further establish that AIG issued inappropriate directives to apply the Named Storms deductible and that [Defendant] intentionally followed this directive, in conscious disregard of the language in its policy and [Plaintiff's] rights under the policy, and with the motivation to deprive [Plaintiff] of those rights in order to maximize its own profits." (Dkt. No. 65-1, Chaney Decl. ¶ 18.) As of March 3, 2014 when Plaintiff finalized its Opposition to the Motion for Summary Judgment it had not been able to schedule the deposition. (Dkt. No. 65-1, Chaney Decl. ¶ 16.) During oral argument for the Motion, Defendant argued that Plaintiff took the desired deposition and was unable to produce evidence supporting the desired inference. The Court finds that this averment from Defense counsel is insufficient to show the absence of a genuine issue.

While the Court is empowered to grant summary judgment if it finds Defendant did not act unreasonably, *Feldman*, 322 F.3d at 670, the Court declines to make such a determination without first offering Plaintiff an opportunity to present its evidence. Accordingly, the Court **GRANTS** Plaintiff's request for a Rule 56(d) denial of the Motion on Plaintiff's bad faith claim and request for punitive damages.

VI. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiff's Rule 56(d) Motion and **DENIES** Defendant's Motion for Summary Judgment.

IT IS SO ORDERED.

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