

MICHELLE R. BERNARD (SBN: 144582)  
mbernard@grsm.com  
SCOTT P. WARD (SBN: 181182)  
sward@grsm.com  
GORDON REES SCULLY MANSUKHANI, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101  
Telephone: (619) 696-6700  
Facsimile: (619) 696-7124

Attorneys for Defendant  
AMCO INSURANCE COMPANY

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

LENNOX CARWASH, INC., a Delaware corporation; and LENNOX CARWASH  
PROPERTIES, LLC., a Delaware limited liability company,

Plaintiffs,

vs.

AMCO INSURANCE COMPANY, an Iowa corporation; and DOES 1 through 10, inclusive,

Defendants.

CASE NO. 2-23-cv-03746-RGK-JPR  
Hon. R. Gary Klausner

**DEFENDANT AMCO  
INSURANCE COMPANY'S  
MEMORANDUM OF POINTS  
AUTHORITIES IN OPPOSITION  
TO PLAINTIFF LENNOX  
CARWASH, INC.'S MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT**

DATE: February 20, 2024  
TIME: 9:00 a.m.  
DEPT: 850

Complaint Filed: April 13, 2023

Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

## TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. SUMMARY OF ARGUMENT .....	1
III. FACTUAL STATEMENT.....	3
A. AMCO Issues The Policy Based On Representations Made In The Application For Insurance .....	3
B. Nissani’s Purchase of The Premises And Car Wash Business.....	3
C. AMCO Receives Notice of the December 2018 Loss .....	4
D. AMCO Denies Coverage For The December 2018 Loss After An Extensive Investigation.....	4
1. AMCO’s Initial Investigation and Site Inspection.....	4
2. Lennox’s Incomplete Sworn Statements of Proof of Loss.....	5
3. Nissani EUO Testimony .....	6
4. AMCO Issues A Detailed 31-Page Coverage Denial Letter Regarding the 2018 Loss .....	6
E. AMCO Denies Coverage For The September 1, 2019 Loss After It Received None of the Documents or Information It Requested .....	7
F. The State of California Public Nuisance Suit Against Nissani and Lennox Carwash Properties .....	8
G. This Lawsuit Against AMCO And The Relevant Discovery .....	9
1. The Commercial Lease Produced By Plaintiff.....	9
2. Non-Operation Of The Car Wash Tunnel and Business .....	9
3. Nissani Provides False Statements Under Oath About Who Owned the Alleged Stolen Property .....	10
IV. PLAINTIFF’S MISGUIDED ATTEMPT TO CIRCUMVENT APPLICATION OF THE VACANCY CONDITION FAILS .....	10
A. Plaintiff’s New “Tenant” Theory To Challenge the Vacancy Condition Is Belatedly Asserted and Should Be Disregarded.....	10
B. The Policy’s Vacancy Condition Bars Coverage for the Losses.....	13

V.	AMCO HAS PROPERLY ASSERTED THE CONCEALMENT OR MISREPRESENTATION CONDITION TO PLAINTIFF’S CLAIMS .....	16
A.	Nissani’s Concealment Of The Public Nuisance Lawsuit And His Admissions In The Stipulation For Judgment Are Material .....	17
B.	False Statements That The Car Wash Was Open Washing Cars During The September 2018 – December 2018 Time Period .....	18
C.	False Statement That Plaintiff Used The Tunnel To Wash Cars.....	18
D.	Inconsistent Statements About Remodeling At The Premises .....	19
E.	The Court Should Issue Summary Judgment in AMCO’s Favor Sua Sponte Based On Plaintiff’s Violation of The Concealment/Misrepresentation Condition .....	19
VI.	CONCLUSION .....	20

Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

## TABLE OF AUTHORITIES

**Page(s)**

### **Cases**

<i>Adobe Lumber Inc. v. Hellman,</i> 2010 WL 760826 (E.D. Cal. Mar. 4, 2010) .....	13
<i>Celotex Corp. v. Catrett,</i> 477 U.S. 317 (1986) .....	19
<i>Chaidez v. Progressive Choice Ins. Co.,</i> 2013 WL 1935362 (C.D. Cal. May 9, 2013).....	19
<i>Coleman v. Quaker Oats Co.,</i> 232 F.3d 1271 (9th Cir. 2000).....	12
<i>Cummings v. Fire Ins. Exch.,</i> 202 Cal. App. 3d 1407 (1988).....	16, 17
<i>Evans v. Safeco Life Ins. Co.,</i> 916 F.2d 1437 (9th Cir.1990).....	15
<i>IV Sols., Inc. v. Conn. Gen. Life. Ins. Co.,</i> No. CV 13-9026-GW, 2015 U.S. Dist. LEXIS 189753 (C.D. Cal. Jan. 29, 2015).....	12
<i>MacKinnon v. Truck Ins. Exch.,</i> 31 Cal.4th 635 (2003).....	14, 15
<i>Morris v. Allstate Ins. Co.,</i> 16 F.Supp.3d 1095 (C.D. Cal. 2014).....	16
<i>Navajo Nation v. U.S. Forest Serv.,</i> 535 F.3d 1058 (9th Cir. 2008).....	12
<i>Ong. v. Fire Ins. Exchange,</i> 235 Cal.App.4th 901 (2015).....	14
<i>Palmer v. Truck Ins. Exch.,</i> 21 Cal.4th 1109 (1999).....	15
<i>Pena v. Taylor Farms Pac., Inc.,</i> 2014 WL 1330754 (E.D. Cal. Mar. 28, 2014) .....	13

Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

1	<i>People of the State of California v. Lennox Properties, LLC, Hooman</i>	
2	<i>Nissani, et al,</i>	
3	Los Angeles County Superior Court Case No. 20TRCV00676.....	8
4	<i>Pickern v. Pier 1 Imports,</i>	
5	339 F.Supp.2d 1081 (E.D. Cal. 2004).....	13
6	<i>Russell v. Pac. Motor Trucking Co.,</i>	
7	No. 13-CV-717-DCO, 2014 U.S. Dist. LEXIS 175513 (C.D. Cal. Dec. 18, 2014) .....	12
8	<i>St. Mary &amp; St. John Coptic Orthodox Church v. SBC Ins. Servs., Inc.,</i>	
9	57 Cal.App.5th 817 (2020).....	13
10	<i>Stockton Mariposa, LLC v. W. Am. Ins. Co.,</i>	
11	585 F. Supp. 3d 1241 (C.D. Cal. 2022).....	13
12	<i>Swierkiewicz v. Sorema NA.,</i>	
13	534 U.S. 506 (2002) .....	12
14	<i>Travelers Prop. Cas. Co. of Am. v. Superior Ct.,</i>	
15	215 Cal.App.4th 561 (2013).....	15, 16
16	<i>TRB Investments, Inc. v. Fireman's Fund Ins.</i>	
17	Co., 40 Cal.4th 19 (2004) .....	14, 15
18	<i>Wasco Prods., Inc. v. Southwall Techs., Inc.,</i>	
19	435 F.3d 989 (9th Cir. 2006).....	12
20	<b>Statutes</b>	
21	Cal. Civ. Code § 1638.....	15
22	Cal. Civ. Code § 1639.....	15
23	Cal. Civ. Code § 1644.....	15
24	Cal. Civ.Code § 1636.....	14
25	<b>Treatises</b>	
26	Fed. R. Civ. P. 8.....	14, 15
27		
28		

Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

**I. INTRODUCTION**

Defendant AMCO Insurance Company (“AMCO”) issued a policy providing commercial property insurance for the Lennox Car Wash buildings and business personal property located at 10709 Hawthorne Boulevard in Lennox, California (“Premises”/“Property”). AMCO filed a Motion for Summary Judgment (“Motion”) in this case on four different grounds that is set for hearing on February 20, 2024. See ECF Dkt. 26. Plaintiff Lennox Carwash, Inc. (“Plaintiff”/ “Lennox”) seeks Partial Summary Judgment (“Cross-Motion”) on AMCO’s Twenty-Second Affirmative Defense (Violation of the Vacancy Condition), one of the grounds for summary judgment AMCO cited in its Motion, and AMCO’s Twenty-Third Affirmative Defense (Violation of the Concealment/ Misrepresentation Condition).

As discussed fully below, the evidentiary record in support of AMCO’s Motion and its opposition to Lennox’s Cross-Motion reinforces that AMCO properly denied coverage for the December 2018 (“2018 Loss”) and September 1, 2019 (“2019 Loss”) car wash theft losses at issue in this case and that summary judgment should be entered in favor of AMCO.

**II. SUMMARY OF ARGUMENT**

AMCO’s policy contains a Vacancy Condition that bars coverage for theft or vandalism losses at a building that has been “vacant” for more than 60 consecutive days before the loss. Plaintiff in the Complaint and all along has tried to circumvent application of the Vacancy Condition by arguing that its car wash business was conducting operations at the Premises within 60 days of the 2018 Loss. However, Plaintiff’s CEO Hooman Nissani (“Nissani”) concedes – as he must – that he signed a Stipulated Judgment in January 2021 to escape personal liability in a separate public nuisance suit stating as an undisputed fact that the car wash which is the subject of this insurance recovery action had been closed since September 2018 (*i.e.*, more than 60 consecutive days before the date of the reported loss).

///

Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

1 With its longstanding argument now in tatters, Plaintiff belatedly tries to pivot  
2 to a new argument that it was a “tenant” for purposes of the Vacancy Condition such  
3 that the Premises cannot be deemed “vacant” because some of its business personal  
4 property was maintained on site. This untimely argument was never asserted in  
5 Lennox’s Complaint, is at odds with the plain wording of the AMCO policy and is  
6 contradicted by Lennox’s representations in its policy application that its property  
7 interest in the car wash on the Premises is that of a “Building Owner Occupant” –  
8 not a tenant. Ninth Circuit law prohibits parties from asserting unpled theories for  
9 the first time at the summary judgment stage.

10 Plaintiff’s interpretation is unsupported by any case authority or treatise  
11 addressing the Vacancy Condition and improperly asks the Court to read one  
12 subparagraph of the Condition out of context and without regard to the intent of the  
13 Condition, which is to protect insurers like AMCO from the increased risk of loss  
14 that occurs when covered property is left vacant and unattended for 60 days or more.  
15 That is exactly what happened in this case. Further, Plaintiff’s contention that it is a  
16 “tenant” rather than an “owner or general lessee” is incorrect and also irrelevant,  
17 since it is undisputed even under Plaintiff’s shifting description of the facts that it  
18 had control over the car wash building and the entire Property. Finally, the Cross-  
19 Motion fails to address AMCO’s assertion of the Vacancy Condition as a defense to  
20 the 2019 Loss and presents no evidence in that regard.

21 The Cross-Motion fares no better with respect to challenging AMCO’s  
22 Concealment/Misrepresentation Condition affirmative defense. Simply stated,  
23 Plaintiff cannot avoid the consequences of the plethora of false and inconsistent  
24 statements made during Nissani’s Examination Under Oath (“EUO”) which are  
25 summarized in AMCO’s 31-page coverage denial letter relating the 2018 Loss  
26 coupled with Plaintiff’s repeated refusals to cooperate with AMCO’s investigation  
27 and the failure of Nissani to return the EUO transcripts signed under the penalty of  
28 perjury to AMCO’s counsel. Viewing Plaintiff’s well-documented record of



Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

1 noncompliance with applicable policy’s loss conditions in context with the fact that  
2 Plaintiff and its CEO Nissani concealed from AMCO the existence of the Los  
3 Angeles County public nuisance suit involving this same Premises, this Court can  
4 adjudicate as a matter of law that Plaintiff has forfeited its right to recover policy  
5 benefits for the Losses. In sum, Plaintiff’s Cross-Motion should be denied and  
6 summary judgment entered in favor of AMCO.

7 **III. FACTUAL STATEMENT**

8 Plaintiff is a Delaware Corporation created in 2018, and Lennox Carwash  
9 Properties, LLC was also created in 2018. (See AMCO Statement of Additional  
10 Undisputed Material Facts [“AMF”], No. 1-2) Neither entity ever had any W-2  
11 employees. Nissani is both the CEO of Plaintiff and the Manager of Lennox Carwash  
12 Properties, LLC (AMF Nos. 3-4) - a different non-insured entity.

13 **A. AMCO Issues The Policy Based On Representations Made In The**  
14 **Application For Insurance**

15 AMCO issued Premier Businessowners Policy No. ACP BPA 3008959489 as  
16 “new business” to named insureds Lennox Carwash, Inc. DBA Lennox Carwash and  
17 Lennox Properties, LLC effective September 6, 2018 to September 6, 2019.  
18 (“Policy” – Plaintiff Sep. Stmt. Fact [“UF”] No. 1). The Policy provides insurance  
19 for two buildings at the Premises, including Building Number 001 described as “car  
20 washes building including equip., canopy & 2 pay booths.” The Declarations  
21 describes Building Number 001 as Owner Occupied (“OO”), consistent with the  
22 insurance application stating that that the applicant’s property interest in Building 1  
23 was “Building Owner – Occupant”. (AMF No. 5).

24 **B. Nissani’s Purchase of The Premises And Car Wash Business**

25 AMCO’s issuance of the Policy coincided with the September 6, 2018  
26 approximate escrow closing date for the purchase of the Property and the car wash  
27 business operating on that Property. Nissani signed the Purchase and Sale  
28 Agreement on behalf of the purchaser, HSK Properties, LLC.



Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

1 In September 2018, a vendor installed a chain link fence around the entire  
2 perimeter of the Premises. (AMF No. 6) Yelp postings from September 2018 and  
3 Nissani's statement to AMCO's consultant Mikey Minor of TechLoss ("Techloss")  
4 indicated that car wash was closed down at that time. AMF No. 7.

5 **C. AMCO Receives Notice of the December 2018 Loss**

6 On December 8, 2018, the Los Angeles County Sheriff received a report of a  
7 burglary at the Premises. The officers spoke with Justin Torbati ("Torbati"), who  
8 identified himself as the President of the Car Wash. Torbati said that between  
9 December 3-7, 2018, someone broke into car wash tunnel and stole business  
10 personal property. AMF No. 8

11 On December 28, 2018, AMCO received its first notice of the 2018 Loss.  
12 AMF No. 9, AMCO opened a claim file and then engaged in an extensive  
13 investigation with assistance from field/SIU investigator Rudy Miranda ("Miranda")  
14 and a consultant on loss valuation issues (TechLoss). AMCO also retained coverage  
15 counsel Celia Moutes-Lee, of Lewis Brisbois to assist the company with its  
16 evaluation of the 2018 Loss and to provide legal advice. AMF No. 10.

17 **D. AMCO Denies Coverage For The December 2018 Loss After An**  
18 **Extensive Investigation**

19 **1. AMCO's Initial Investigation and Site Inspection**

20 AMCO reached out to Keyvan Shamshoni ("Shamshoni"), the alleged  
21 general manager of Lennox Car Wash and Plaintiff's designated representative and  
22 initial point of contact for AMCO. Shamshoni reported the date of loss is December  
23 3, 2018. AMF No. 11. According to Shamshoni, they left the car wash at 6:00 p.m.  
24 on December 3 but did not set the burglar alarm as they had maintenance planned.  
25 AMF No. 12. He further advised that the car wash tunnel was protected by a chain  
26 and padlock rather than an alarm. AMF No. 13. When they returned to the car wash  
27 on December 6, Shamshoni advised that they discovered that the chain/lock was cut  
28 on the car wash tunnel. While there were cameras at the property, the DVR was

Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

1 stolen.

2 AMCO Claims asked Miranda to inspect the Premises. On January 25, 2019,  
3 Miranda inspected the premises, spoke to Shamshoni, and reported back in  
4 pertinent part as follows:

5 [t]he property was fenced all the way around. From the exterior the business  
6 appeared abandoned and unkept. . Sections of the roof were missing,  
7 damaged, or soaked in water from the recent rain. There was no central alarm  
8 monitoring system observed at the property. There was one single carwash on  
9 the property, which appeared old and in bad condition. The tunnel was secured  
10 by an iron fence. The fence was chained and padlocked. The track on the  
11 carwash was rusted and didn't appear to be in working condition. The tunnel  
12 appeared to be infested with pigeons as feathers and bird feces was scattered  
13 all round. AMF No. 14

14 Notwithstanding the above, Shamshoni claimed that they were using the car  
15 wash tunnel at the Premises to wash cars on December 3, 2018. Shamshoni could  
16 not recall the name of any car wash employee. Miranda reported that Shamshoni  
17 had difficulty answering questions about the 2018 Loss. He also learned with the  
18 alarm company that the burglar alarm did not sound at any time between December  
19 3- 6, 2018.

## 20 2. Lennox's Incomplete Sworn Statements of Proof of Loss

21 AMCO asked Lennox to submit complete Sworn Proofs of Loss pursuant to  
22 Section E (7) of the Policy to confirm the facts and amount of the loss and what  
23 Lennox was claiming. ANF No. 15 Three times including in May 2019 (five months  
24 after the loss), Lennox submitted incomplete Proofs of Loss that also improperly  
25 stated "to be determined at a later time" in response to many questions. Each Proof  
26 of Loss left blank Question 10 which asked Lennox to confirm under oath that it had  
27 nothing to do with the loss. AMF No. 16

28 ///

Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

**3. Nissani EUO Testimony**

On July 8, 2019, AMCO's coverage counsel, Ms. Moutes-Lee, drafted a letter requesting Plaintiff's EUO and included a request for documents. AMF No. 17. Yet, Nissani did not sit for his EUO until January 22, 2021, a delay of more than 18 months after her July 2019 request. Nissani then cut that session short, and it took another seven (7) months to August 11, 2021 to complete the EUO. AMF No. 18

On September 8, 2021, Ms. Moutes-Lee sent the two original EUO transcripts to Lennox's counsel with a written request for Nissani to sign under penalty of perjury and return the transcripts in the self-addressed stamped envelopes counsel provided. AMF No. 19. Ms. Moutes-Lee never received transcripts signed by Nissani under penalty of perjury. AMF No. 20.

**4. AMCO Issues A Detailed 31-Page Coverage Denial Letter Regarding the 2018 Loss**

On February 24, 2022, AMCO (through coverage counsel) issued a 31-page letter ("Coverage Denial Letter") to Lennox's attorney denying coverage for the 2018 Loss. AMF No. 21. The Coverage Denial Letter explained that Lennox failed to produce basic business records requested pursuant to the Policy and California Insurance Code section 2071, failed to establish coverage for the 2018 Loss, and that the Insured or its representatives made material misrepresentations or concealments in the claims process. AMF No. 22. AMCO's Coverage Denial Letter also concluded that the Policy's Vacancy Condition barred coverage for the 2018 Loss because the buildings at the Premises were "vacant" for more than 60 consecutive days prior to the alleged date of loss, citing the following evidence: Since September 2018, a chain link fence had been installed around the entire perimeter of the Premises; Yelp postings in September and November 2018 indicated that the car wash was closed, utility bills showed minimal water/electricity use; multiple area businesses confirmed the car wash non-operations and said the Premises had problems with homeless and squatters; and AMCO's own inspection showed the car

Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

1 wash tunnel rusted and replete with bird feathers and feces such that it had not been  
2 used for a long period. AMF No. 23. Further, Nissani told AMCO's consultant  
3 (Tech Loss) that the car wash had been "shut down" and neither Nissani nor any  
4 insured representative produced any permits, bids, contracts, invoices from  
5 contractors or any documents showing that remodeling or reconstruction work was  
6 being performed at the Premises prior to the 2018 Loss. AMF No. 24. AMCO also  
7 denied coverage on grounds Nissani failed to sign his EUO transcripts under penalty  
8 of perjury as required by the Policy. AMF No. 25.

9 **E. AMCO Denies Coverage For The September 1, 2019 Loss After It**  
10 **Received None of the Documents or Information It Requested**

11 On September 3, 2019, AMCO received notice of a second burglary loss at  
12 the Car Wash that occurred on September 1, 2019 ("2019 Loss"). (AMF No. 26)).  
13 AMCO opened a new claim file. On September 11, 2019, AMCO's adjuster sent  
14 Plaintiff a written request for a list of the stolen items, showing the  
15 brands/models/ages, descriptions and cost; photos of the building and any electrical  
16 damage; estimates for repairs and replacement items, and the police department case  
17 number. AMF No. 27,

18 On October 1, 2019, October 8, 2019, October 29, 2019, and November 4,  
19 2019, AMCO sent correspondence to Lennox to follow up on this request. AMF No.  
20 28. The adjuster only received a one-sentence email from Plaintiff on October 16,  
21 2019 claiming that "we are working on the items." AMCO never received the police  
22 case number, or any of the documents listed in his September 11, 2019 request.  
23 AMF No. 29. On November 14, 2019, AMCO denied coverage for the 2019 Loss  
24 due to the lack of a response from Lennox, citing Property Loss Conditions of the  
25 Policy. AMF No. 30.

26 ///

27 ///

28 ///

Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

**F. The State of California Public Nuisance Suit Against Nissani and Lennox Carwash Properties**

Unbeknownst to AMCO, while AMCO was adjusting the Losses, the State of California had filed a lawsuit against Lennox Carwash Properties, LLC and Nissani (personally) seeking civil penalties and alleging that the car wash at the Premises had become a public nuisance. *See People of the State of California v. Lennox Properties, LLC, Hooman Nissani, et al* Los Angeles County Superior Court Case No. 20TRCV00676 (the “Nuisance Lawsuit”) AMF No. 31. The Complaint alleged, in relevant part, as follows:

At all times material to this action, defendant Hooman Nissani (“Nissani”) was and is the owner, member, and/or responsible corporate officer of Lennox Carwash. Through his actions and/or omissions, Nissani has caused, maintained, permitted and/or contributed to the creation of a public nuisance on the Property....

The carwash business has been closed since September 2018 and the Property has been left vacant and neglected. During this time period, the Property has gained a general reputation in the community as a place where persons congregate to use illegal narcotics, urinate and defecate... In the past 18 months alone, between March 2019 and the present, the County Sheriff’s Department responded to over 50 calls for service at the Property regarding trespassers, use of illegal narcotics, sleeping inside the abandoned building. AMF No. 32.

In January 2021 (*i.e.* before Nissani sat for his second EUO session on August 11, 2021), as part of a deal to resolve the Nuisance Lawsuit, Nissani personally and on behalf Lennox Carwash Properties, LLC signed a Stipulation for Entry of Judgment that admitted as undisputed facts all the allegations above, including but not limited to that the carwash business had been closed since September 2018 and left vacant and neglected. AMF No. 33. Nissani and Lennox received the benefit of

1 that plea deal through the suit dismissal.

2 Nonetheless, in subsequent EUO testimony in connection with Plaintiff's  
3 insurance recovery claim, Nissani repeatedly testified that the car wash was "never  
4 really closed" for the period of September 2018 to December 3, 2018 and was  
5 handwashing cars in the parking lot and "for maybe one day" using the car wash  
6 tunnel AMF No. 34, with the objective of Nissani attempting to show that the  
7 building at the car wash was not "vacant" for 60 consecutive days to circumvent  
8 application of Policy's Vacancy Condition as a basis for AMCO to deny coverage  
9 for the Claim.

10 **G. This Lawsuit Against AMCO And The Relevant Discovery**

11 On April 13, 2023, Plaintiffs filed this suit alleging that AMCO improperly  
12 denied coverage for the 2018 Loss and 2019 Loss, and committed bad faith.  
13 AMCO's Answer asserted Violation of the Vacancy Condition and Violation of the  
14 Concealment/Misrepresentation Condition as its Twenty-Second and Twenty-Third  
15 Affirmative Defenses. The parties exchanged Rule 26 Disclosures and substantial  
16 written discovery.

17 **1. The Commercial Lease Produced By Plaintiff**

18 On December 27, 2023, over five years after the 2018 Loss, Plaintiff for the  
19 first time produced to AMCO a copy of their alleged lease with Lennox Carwash  
20 Properties, LLC. According to that document, Lennox Carwash Properties, LLC  
21 leased the entire Property to Plaintiff, the "Lessee," effective September 4, 2018,  
22 The Lease purportedly required Plaintiff to make a monthly lease payment to Lennox  
23 Carwash Properties. Yet, Plaintiff never made any lease payment to Lennox  
24 Carwash Properties. AMF No. 35.

25 **2. Non-Operation Of The Car Wash Tunnel and Business**

26 Plaintiff has not produced a single document evidencing any transaction  
27 during 2018 where it washed a customer vehicle using the car wash tunnel at the  
28 Property. Plaintiff also admitted that it had no sales and did not operate in 2019 at



all, including within 60 days of the 2019 Loss.

**3. Nissani Provides False Statements Under Oath About Who Owned the Alleged Stolen Property**

On January 18, 2024, Plaintiff filed this Cross-Motion based largely the declaration of Nissani. Nissani declared under oath that since September 2018 Plaintiff has owned the business personal property and carwash equipment at the Premises and that in September 2018 Plaintiff purchased the carwash business located at the Premises. (Nissani Decl., at ¶ 2, 5).

Yet, just a few weeks earlier on December 27 2023, Nissani under oath verified Plaintiff's Responses to Interrogatories which in multiple places stated that it was Lennox Carwash Properties, LLC which owned the business personal property stolen in the 2018 Loss and 2019 Loss, and Lennox Carwash Properties, LLC which bought the existing car wash business in September 2018.<sup>1</sup>

**IV. PLAINTIFF'S MISGUIDED ATTEMPT TO CIRCUMVENT APPLICATION OF THE VACANCY CONDITION FAILS**

**A. Plaintiff's New "Tenant" Theory To Challenge the Vacancy Condition Is Belatedly Asserted and Should Be Disregarded**

In its Cross-Motion, Plaintiff argues that the Policy's Vacancy Condition does not apply to bar coverage for the Loss because, here, named insured Lennox Carwash Inc. was a purported "tenant" of the Property, and the Vacancy Condition applies differently where the insured is a tenant versus an owner of the car wash. Notably, this theory of liability is a totally different from the theory of liability alleged in Plaintiff's Complaint wherein Plaintiff alleged as follows:

- This is a lawsuit by the Insureds to collect bargained-for insurance coverage for significant financial losses suffered as a result of theft and vandalism at

---

<sup>1</sup> AMCO acknowledges that on January 17, 2024, 13 days *after* the discovery cut-off and the day before filing the Motion, Plaintiff served a 51-page "Amended" Responses to Interrogatories and two sets of "Amended" Responses to discovery by Lennox Carwash Properties, LLC.



Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

1        *their insured car wash* located in Lennox, California; (Complaint, ¶ 1,  
2        emphasis added);

3        • [T]he inception of the Policy coincided with *the Insureds' September 2018*  
4        *purchase of the Property* and the existing on-site car wash business known as  
5        "Lennox Car Wash." (Complaint, ¶ 12, emphasis added);

6        • Following the purchase of the Property, *the Insureds intermittently operated*  
7        *the car wash business* at the Property for approximately 90 days (Complaint,  
8        ¶ 13, emphasis added);

9        • *Although the Insureds operated the car wash business only intermittently* in  
10       the period following the Policy's inception, they intended to perform more  
11       significant renovations in early 2019 and operate the car wash business on a  
12       full-time basis following those renovations;

13       • AMCO based its denial on the Policy's Vacancy Provision, which bars  
14       coverage for vandalism or theft if the insured building is vacant for more than  
15       60 consecutive days prior to the loss. *AMCO relied on the Vacancy Provision*  
16       *even though, as explained above, the Insureds operated the car wash*  
17       *business intermittently prior to the loss, and even though the car wash was*  
18       *not closed for 60 consecutive days prior to the date of loss.* (Complaint, ¶ 24,  
19       emphasis added.)

20       Now, for the first time, Plaintiff moves for partial summary judgment as to  
21       AMCO's reliance on the Vacancy Condition to deny coverage for the 2018 Loss,  
22       not based on the theory of liability alleged in the Complaint (*i.e.*, that AMCO  
23       wrongly concluded that the Insureds were not operating the car wash for at least 60  
24       days prior to the Loss) but rather because named insured Lennox Carwash Inc. was  
25       actually a "tenant" and therefore, a different "vacancy" definition applies to its  
26       occupation of the Premises. Nowhere in the Complaint, however does Plaintiff  
27       allege that this is the reason the Vacancy Provision did not apply. Nor does the  
28       Complaint allege that Lennox Carwash Inc. was renting the Premises from Lennox

Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

1 Carwash Properties, LLC.

2 It is well-settled in the Ninth Circuit that parties generally cannot assert unpled  
3 theories for the first time at the summary judgment stage. *Navajo Nation v. U.S.*  
4 *Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008) (“[W]here...the complaint does  
5 not include the necessary factual allegations..., raising such a claim in a summary  
6 judgment motion is insufficient to present the claim to the district court.” *Id.* at 1080.  
7 Because “summary judgment is not a procedural second chance to flesh out  
8 inadequate pleadings,” at the summary judgment stage, courts will not consider  
9 unpled theories or claims. *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d at  
10 989, 992 (9th Cir. 2006)(affirming district court’s refusal to consider unpled tolling  
11 allegations asserted for the first time in opposition to summary judgment motion);  
12 *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292-1293 (9th Cir. 2000) (holding  
13 that plaintiff could not proceed on summary judgment with unpled theory raised  
14 more than two years into the litigation where opposing party did not have  
15 opportunity to develop defense).

16 This rule flows from the function that pleadings play under the Federal Rules  
17 of Civil Procedure. Rule 8 requires fair notice of the plaintiff’s claims. *Swierkiewicz*  
18 *v. Sorema NA.*, 534 U.S. 506, 512 (2002). “The pleading requirements of Rule 8 are  
19 in place to provide a party with adequate notice of the allegations against them. A  
20 party may not, therefore, allege new claims in his opposition to a summary judgment  
21 motion not previously raised in his complaint.” *Russell v. Pac. Motor Trucking Co.*,  
22 No. 13-CV-717-DCO (DTBx), 2014 U.S. Dist. LEXIS 175513, at \*27 (C.D. Cal.  
23 Dec. 18, 2014). Parties rely on the pleadings when conducting discovery and  
24 structuring their cases for summary judgment and trial. Allowing a plaintiff to allege  
25 one theory, but then pursue relief on an entirely different theory at summary  
26 judgment and trial is inconsistent with the Federal Rules. *IV Sols., Inc. v. Conn.*  
27 *Gen. Life. Ins. Co.*, No. CV 13-9026-GW (AJWx), 2015 U.S. Dist. LEXIS 189753,  
28 at \*32-34 (C.D. Cal. Jan. 29, 2015) (plaintiff that chose not to seek leave to amend

Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

1 the complaint may not rely on unpled allegations in opposition to summary  
2 judgment).

3 Now for the first time on summary judgment, Plaintiff Lennox Carwash, Inc.  
4 alleges the Vacancy Condition is not a bar to coverage for the Loss because it was a  
5 tenant insured for which a different “vacancy” applies. Lennox Carwash Inc. did  
6 not allege its tenant/vacancy theory in its Complaint and nor did it seek leave to  
7 amend its Complaint to add this new theory. Because Plaintiff failed to provide  
8 sufficient notice to AMCO under Rule 8 of its new theory, it should not be permitted  
9 to rely on it now for the first time on summary judgment.<sup>2</sup> Plaintiff’s untimely  
10 asserted “tenant” theory should be disregarded and its Cross-Motion on AMCO’s  
11 Twenty-Second Affirmative Defense denied.

12 **B. The Policy’s Vacancy Condition Bars Coverage for the Losses**

13 “Vacancy provisions in insurance agreements ‘are premised upon the  
14 recognition that unoccupied properties face an increased risk of damage, whether  
15 from property-related crime such as theft or vandalism or from building damage or  
16 loss related to neglect.’” *Stockton Mariposa, LLC v. W. Am. Ins. Co.*, 585 F. Supp.  
17 3d 1241, 1248 (C.D. Cal. 2022), citing *St. Mary & St. John Coptic Orthodox Church*  
18 *v. SBC Ins. Servs., Inc.*, 57 Cal.App.5th 817, 825 (2020). Accordingly, the Vacancy  
19 Condition in the Policy serves to protect AMCO against the precise circumstances  
20 presented by the Losses: the increased risks of loss that occur when premises are left  
21

---

22  
23 <sup>2</sup> Any argument that by Plaintiff that AMCO was made aware of some of these facts through  
24 discovery “is also unavailing, as notice effected under discovery alone is typically insufficient to  
25 satisfy Rule 8.” *Pena v. Taylor Farms Pac., Inc.*, 2014 WL 1330754, at \*5 (E.D. Cal. Mar. 28,  
26 2014) (“Further, in most instances, notice may not be effected through discovery alone because  
27 such notice will usually fail to satisfy Rule 8.”) (citing *Pickern*, 457 F.3d at 968–69); *see also*  
28 *Adobe Lumber Inc. v. Hellman*, 2010 WL 760826, at \*5 (E.D. Cal. Mar. 4, 2010) (“A plaintiff may  
not make vague and generic allegations in [the] complaint and simply add facts as discovery goes  
along without amending the complaint because to do so ‘would read the “fair notice” requirement  
out of Rule 8(a) and undermine the rule’s goal of encouraging expeditious resolution of disputes.’”) (quoting *Pickern v. Pier 1 Imports*, 339 F.Supp.2d 1081, 1088 (E.D. Cal. 2004)).

Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

vacant for an extended period and are vandalized. *TRB Investments, Inc. v. Fireman's Fund Ins. Co.*, 40 Cal.4th 19, 22, 30, 50 (2004).

Plaintiff argues that under the Vacancy Condition, because it is allegedly a tenant renting the carwash Property from Lennox Carwash Properties, LLC, a different vacancy definition applies. However, that assertion is not supported by *TRB Investments* or any case interpreting the plain language of the Vacancy Condition, and Plaintiff cites no cases or treatises regarding the Vacancy Condition in the brief.

This contention omits the fact that, even under this new “tenant” theory, the Policy was also issued to the owner, and as such, subpart (b) applies. Further, in the application for the Policy, Nissani stated that the Property was to be owner occupied. AMF No. 36. AMCO relied on that representation in issuing the Policy.

Moreover, subpart (a) applies only where a tenant rents just a portion of the building, i.e., a unit or suite. AMF No. 37. Here, Lennox Carwash Inc. allegedly rented the entire Property. AMF No. 38. As a general lessee of the entire Property, subpart (b) applies and the Property is considered vacant, where, as here, less than 31% of the Property was being used for carwash operations for more than 60 consecutive days before the December 2018 Loss.

Further, Plaintiff’s skewed interpretation of the Vacancy Condition violates several basic tenets of insurance policy interpretation. An insurance policy is a contract, and the ordinary rules of contract interpretation apply. *Ong. v. Fire Ins. Exchange*, 235 Cal.App.4th 901, 907 (2015). Language in a contract must be construed in the context of the document as a whole. It cannot be found ambiguous in the abstract. *Id.* The interpretation of a contract must “give effect to the ‘mutual intent’ of the parties ... at the time the contract was formed.” *MacKinnon v. Truck Ins. Exch.*, 31 Cal.4th 635, 638 (2003) (citing Cal. Civ. Code § 1636). Such intent is to be inferred, if possible, from the written provisions of the contract based on their “ordinary and popular sense,” unless a “technical sense or special meaning is given

Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

1 to them by their usage.” *Id.* at 839 (citing Cal. Civ. Code §§ 1639, 1644, 1638).

2 Ambiguous terms are generally construed against insurers, but “[a] policy  
3 provision is ambiguous only if it is susceptible to two or more *reasonable*  
4 constructions despite the plain meaning of its terms within the context of the policy  
5 as a whole.” *Palmer v. Truck Ins. Exch.*, 21 Cal.4th 1109 (1999) (emphasis added.)  
6 “If a reasonable interpretation favors the insurer and any other interpretation would  
7 be strained, no compulsion exists to torture or twist the language of the policy.”  
8 *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1441 (9th Cir.1990).

9 Here, the Policy was issued to named insureds Lennox Carwash Inc. DBA  
10 Lennox Carwash and Lennox Properties LLC as an owner occupied property. The  
11 intent behind the Vacancy Condition is to guard against the increased risks of loss  
12 that occur when insured premises are left vacant for an extended period and are  
13 vandalized. *TRB Investments, supra*, 40 Cal.4th at 22, 30, 50. Under Lennox  
14 Carwash Inc.’s proposed interpretation of the Vacancy Condition, where a  
15 commercial property is rented to a tenant, it can remain unoccupied indefinitely so  
16 long as there is sufficient business personal property housed in the commercial  
17 property to conduct customary operations. This argument strains credulity.

18 While AMCO found no case that addresses this specific scenario (where a  
19 policy is allegedly issued to both an owner and a tenant), one case, *Travelers Prop.*  
20 *Cas. Co. of Am. v. Superior Ct.*, 215 Cal.App.4th 561 (2013) (“*Travelers Prop.*”),  
21 offers guidance. In *Travelers Prop.*, the Court of Appeal for the Second Appellate  
22 District (led by Justice Croskey) interpreted the same vacancy provision as that  
23 found in the Policy. Like Lennox Carwash Inc., in *Travelers Prop.*, the plaintiff (a  
24 loss payee of a condominium development) in an effort to secure coverage for a  
25 vacant property that sustained a theft and vandalism loss, argued that the real party  
26 in interest/insured (an HOA) may not have been the owner of the property, and  
27 therefore did not fall under subpart (b) of the vacancy provision.

28 ///

Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

The Court of Appeal rejected the argument stating that “[i]t cannot reasonably be disputed that the insured, the HOA, was the owner of the building and not a tenant.” *Id.* at 577. While the court found that there was no evidence in the record as to whether the developer had transferred ownership of the development to the HOA at the time the policy was issued, it nonetheless found:

In any event, the HOA's interest in the building is, of necessity, more akin to that of an owner than a tenant. Beyond that, even if [plaintiff] were to somehow successfully assert that the policy did not define “vacant,” for the situation raised by these facts, we would turn to the plain meaning of the word, and conclude that the unoccupied building was vacant. *Id.* at fn. 18.

Here, even under Lennox Carwash Inc.’s new misguided theory, the Policy was issued to **both** the owner and a tenant of the subject Property. Under *Travelers Prop.*, because the Policy does not expressly define the term “vacant” for the situation raised by these facts, the plain meaning of the term “vacant” would apply, and the Property which was unoccupied at the time of the 2018 Loss would be considered vacant. Accordingly, Plaintiff’s Cross-Motion as to AMCO’s Twenty-Third Affirmative Defense should be denied.

**V. AMCO HAS PROPERLY ASSERTED THE CONCEALMENT OR MISREPRESENTATION CONDITION TO PLAINTIFF’S CLAIMS**

It is well-settled that California law permits an insurer to deny coverage for a tendered claim where an insured intentionally conceals or misrepresents a material fact in connection with a claim for insurance benefits. *Cummings v. Fire Ins. Exch.*, 202 Cal. App. 3d 1407, 1415-1419 (1988) (affirming summary judgment for insurer because insured made material misrepresentations during presentation of claim); *Morris v. Allstate Ins. Co.*, 16 F.Supp.3d 1095, 1100-1101 (C.D. Cal. 2014) (granting summary judgment based on material misrepresentations made in the claims handling process). A knowing, intentional misstatement can be determined by evidence, not just through admissions by the insured. *Id.*



Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

Significantly, the fact which is concealed or misrepresented need not be dispositive of the insurance claim or investigation. *Cummings supra*, 202 Cal. App. 3d at 1417. Instead, “[M]ateriality is determined by its prospective reasonable relevance to the insurer’s inquiry.” *Id.* Thus, a misrepresentation is material if it “concerns a subject reasonably relevant to the insured’s investigation, and if a reasonable insurer would attach importance to the fact misrepresented.” *Id.* Furthermore, intent to defraud the insurer is necessarily implied when the misrepresentation is material and the insured makes it with knowledge of its falsity. *Id.* at 1418. Although materiality is generally a mixed question of law and fact, it may be decided as a matter of law if reasonable minds could not differ as to the materiality of the misrepresentation. *Id.*, at 1417.

Here, Plaintiff’s representatives concealed material facts and made several material misrepresentations during the presentation of the Claim to AMCO in violation of the Policy’s concealment/misrepresentation/fraud provision, including but not limited to the following:

**A. Nissani’s Concealment Of The Public Nuisance Lawsuit And His Admissions In The Stipulation For Judgment Are Material**

It is undisputed Plaintiff’s CEO Nissani did not disclose to AMCO or its coverage counsel the Nuisance Lawsuit that was ongoing during the adjustment of the 2018 Loss, which alleged the Premises was a Public Nuisance. The materiality of that suit is shown in the Complaint where the State alleges “The carwash business has been closed since September 2018 and the Property has been left vacant and neglected . . .” Plaintiff and Nissani also concealed the Stipulation for Entry of Judgment filed with the Court where Mr. Nissani and Lennox Carwash Properties admitted as undisputed facts “the carwash business has been closed since September 2018... between March 2019 and the present, the County Sheriff’s Department responded to over 50 calls for service at the Property regarding trespassers, use of illegal narcotics, sleeping inside the closed carwash building...urination and



1 defecation on or near the Property...”

2 These concealments reasonably relate to the application of the Vacancy  
3 Condition to both Losses, as framed by Plaintiff’s Complaint, its interrogatory  
4 responses and AMCO’s investigation. Reasonable minds cannot differ on the issue.<sup>3</sup>  
5 The intent to defraud is reasonably implied by the fact Plaintiff was representing to  
6 AMCO that the car wash was open.

7 **B. False Statements That The Car Wash Was Open Washing Cars**  
8 **During The September 2018 – December 2018 Time Period**

9 After Nissani sat for an EUO a few months after he signed the Stipulation for  
10 Judgment personally and for Lennox Carwash Properties, LLC admitting as an  
11 undisputed fact that the carwash business has been closed since September 2018. At  
12 the EUO, he testified that Plaintiff operated the car wash most of the time from  
13 September 2018 through the December 2018 date of loss. This contradicted not only  
14 the Stipulation, but Nissani’s earlier statement to the TechLoss consultant in April  
15 2019 that he had shut down the car wash shortly after purchasing it. The materiality  
16 of the EUO false statements and evidence of intent to defraud are the same as for the  
17 related concealments above – Plaintiff’s CEO misstated facts in an attempt to avoid  
18 the Vacancy Condition and get an insurance pay out on the 2018 Loss. The fact  
19 Nissani never returned his signed and dated EUO transcripts executed under penalty  
20 of perjury to AMCO’s coverage counsel does not ameliorate his material breach of  
21 the Policy Condition.

22 **C. False Statement That Plaintiff Used The Tunnel To Wash Cars**

23 Plaintiff’s General Manager and authorized representative Shamshoni  
24 represented in his recorded statement to AMCO that Plaintiff had used the car wash  
25

26 <sup>3</sup> The Stipulated facts about closure of the car wash also relate to the veracity of Plaintiff’s  
27 report of the loss (Shamshoni said Plaintiff was using the car wash tunnel just before the  
28 2018 Loss) and the Stipulated facts about 50 Sheriff calls to the Property reasonably relates  
to Plaintiff’s compliance with its contractual duty to keep covered property such as the  
building from suffering further damage.

Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

1 tunnel to wash cars at the Premises through December 3, 2018. This representation  
2 is material because it goes to whether Plaintiff was “conduct[ing] customary  
3 operations” within 60 days of the 2018 Loss for purposes of the Vacancy Condition,  
4 or could even do so. In contradiction to Shamshoni, Nissani testified that Plaintiff  
5 was hand-washing cars during that period and not using the tunnel to wash cars. As  
6 of this date, Plaintiff has not produced any document showing any car wash sales  
7 from 2018 or 2019 where Plaintiff used the tunnel.

8 **D. Inconsistent Statements About Remodeling At The Premises**

9 Under California law, the Concealment or Misrepresentation condition can  
10 apply where the insured provides inconsistent statements. *Chaidez v. Progressive*  
11 *Choice Ins. Co.*, 2013 WL 1935362, at \*4 (C.D. Cal. May 9, 2013). Once again,  
12 Plaintiff’s authorized representative and General Manager (Shamshoni) and CEO  
13 (Nissani) were not on the same page. Shamshoni denied that any construction or  
14 remodeling of the car wash tunnel was ongoing or planned at the time of the 2018  
15 Loss. Nissani claimed that there was. Neither Nissani nor any Plaintiff counsel or  
16 representative produced any permits, bids, contracts, invoices from contractors or  
17 any documents showing that remodeling or reconstruction work was being  
18 performed at the Premises prior to the 2018 Loss – just a couple handwritten checks  
19 made out to alleged handymen for which Plaintiff claimed to have no contact  
20 information.

21 **E. The Court Should Issue Summary Judgment in AMCO’s Favor**  
22 **Sua Sponte Based On Plaintiff’s Violation of The**  
23 **Concealment/Misrepresentation Condition**

24 It is well-settled that this Court has power to enter summary judgment for  
25 AMCO on the Concealment/Misrepresentation Condition *sua sponte* “so long as the  
26 losing party was on notice that she had to come forward with all of her evidence.”  
27 *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). There is no dispute that  
28 Plaintiff’s CEO made material misstatements regarding the facts and circumstances

1 of the 2018 Loss (summarized in AMCO's Coverage Denial Letter) and concealed  
2 the existence of the Nuisance Lawsuit from AMCO as well as Nissani's related  
3 admission in that litigation regarding vacancy and closure of the car wash business  
4 since September 2018 – information that was material to AMCO's coverage  
5 investigation and adjustment of the Losses. Based on Plaintiff's blatant violation of  
6 the Policy's Concealment/Misrepresentation Condition, summary judgment should  
7 be granted in favor of AMCO on Plaintiff's Complaint.

8 **VI. CONCLUSION**

9 Far from dispelling application of AMCO's Vacancy Condition and  
10 Concealment / Misrepresentation Condition to bar coverage for the Losses, the  
11 evidence in Plaintiff's Cross-Motion and this Opposition confirm that AMCO  
12 properly invoked these Policy conditions. For the reasons stated above, Plaintiff's  
13 Cross-Motion should be denied and summary judgment entered in favor of AMCO.

14 Dated: January 29, 2024

GORDON REES SCULLY MANSUKHANI,  
LLP

15  
16 By: /s/ Michelle R. Bernard

17 Michelle R. Bernard

18 Scott P. Ward

19 Attorneys for Defendant

AMCO INSURANCE COMPANY  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF COMPLIANCE**

The undersigned, counsel of record for Defendant AMCO Insurance Company, certifies that this brief contains 6,338 words, which complies with the word limit of Local Rule 11-6-1, excluding the parts of the document exempted by Local Rule 11-6-1.

By: /s/ Michelle R. Bernard  
Michelle R. Bernard  
Attorney for Defendant

Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101