2025 WL 763997 (Cal.App. 2 Dist.) (Appellate Brief)
Court of Appeal, Second District, California,
Six Division.

BAYWA R.E. WIND, LLC, Plaintiff and Appellant,

v.

RSG UNDERWRITING MANAGERS, LLC; Lloyd's Syndicate CSL 1084; Lloyd's Syndicate 1458 Renaissancere Management Limited; QBE Insurance UK Limited; Lloyd's Syndicate Atrium 609; Convex Insurance UK Limited; Scottsdale Insurance Company; Everest Indemnity Insurance Company; Accident Fund General Insurance Company; HDI Global Specialty Se; and Agcs Marine Insurance Company, Defendants and Respondents.

No. B337522.
February 26, 2025.

On Appeal from the Superior Court of Santa Barbara County, The Honorable Jed Beebe, Judge Presiding • Case No. 24CV00202

Appellant's Opening Brief

Jeremiah M. Welch (SBN 180370), jwelch@sdvlaw.com, *William S. Bennett (SBN 315537), wbennett@sdvlaw.com, Melanie A. McDonald (SBN 326253), mmcdonald @sdvlaw.com, Kyle A. Rudolph (SBN 345277), krudolph@sdvlaw.com, Saxe Doernberger & Vita PC, One BetterWorld Circle, Suite 300, Temecula, CA 92590, Telephone: (951) 365-3145 • Facsimile: (203) 287-8847, for plaintiff and appellant BayWa r.e. Wind, LLC.

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***11 I. INTRODUCTION**

The trial court found that the property insurance policy issued in California by a company in California to a California-based wind energy developer for its wind farm development in Santa Barbara County, California, required the developer to litigate a coverage dispute under the policy in New York. The court reached this counterintuitive result, first, by interpreting the policy's choice of law and jurisdiction provision as a mandatory forum selection clause and, second, by determining that enforcement of this provision is reasonable.

This interpretation of the policy is incorrect as a matter of law. The policy provision at issue is permissive or, at a minimum, ambiguous on this distinction. Given the provision is permissive, the Insurers [1] must instead meet the requirements of a *forum non conveniens* analysis to move the case to New York, which they are unable to do.

Further, even if the trial court had been correct in finding the provision is mandatory, its enforcement would not be reasonable. By enforcing the provision as mandatory, the trial ***12** court overlooked the Insureds' inability in New York to either bring a bad faith claim against the Insurers or to enforce the efficient proximate cause doctrine, each of which are fundamental public policies in California. The denial of these California fundamental public policies deprives the California Insureds of access to substantial justice.

The trial court's order must be reversed. The stay should be removed, and this insurance coverage dispute should proceed in California.

II. STATEMENT OF THE CASE

The Insureds challenge the trial court's order staying this matter under California Code of Civil Procedure sections 410.30 and 418.10. (CT-260-61). Here, we outline the story of the dispute. Further evidentiary detail is provided, as needed, in the Argument.

A. The Insureds develop the Strauss Wind Farm

1. The Insureds' development of the Strauss Wind Farm

In 2016, the Insureds acquired the rights to the Strauss Wind Project (the "Project"). (CT-12, ¶ 28). The Project entails the development of a wind-powered electrical generation facility, consisting of twenty-seven (27) wind turbine generators and related interconnection facilities located at 4800 San Miguelito Road, Lompoc, California 96436. (CT-12, ¶ 29).

*13 2. The Insurers issue the 2020-2022 Policy and 2022-2023 Policy [2] to the Insureds in California

In return for the premiums paid, the Insurers issued to the Insureds in California two (2) consecutive insurance policies insuring the Project for "all risks of direct physical loss or damage to the Insured Property while at the location of the Project, while in offsite temporary storage, or while in transit, all within the Policy's territory and occurring during the Period of Insurance." (CT-50, 114). The 2020-2022 Policy provides two primary coverages: Construction All Risk and Delay in Start-Up. (CT-29). The 2022-2023 Policy provides these two primary coverages and adds two additional primary coverages: Operating All Risk and Business Interruption. (CT-73). The "Project" is defined under the Policies to mean "the wind power facility as named in the Policy Schedule and comprising the Insured Property at the designated location and as detailed within the Statement of Values . . .." (CT-59, 127). The Policies' schedules, in turn, identify the Project's address: 4800 San Miguelito Road, Lompoc, CA 93436. (CT-29, 73).

*14 3. Atmospheric river storms cause catastrophic damage to the Strauss Wind Farm

In January 2023 the Project was mere months away from completion and under partial construction when it was inundated with excessive amounts of rainwater corresponding with a series of atmospheric river storms that caused catastrophic loss to California's central coastline. (CT-231, ¶ 7). The storms, in turn, prompted the issuance of a Presidential Major Disaster Declaration to provide much needed federal assistance to the impacted areas. *See Presidential Major Disaster Declaration Expanded to Three Additional Storm-Impacted Counties*, https://www.gov.ca.gov/2023/01/18/presidential-major-

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disaster-declaration-expanded-to-three-additional-storm-impacted-counties/ (last visited Feb. 17, 2025). As a result of these atmospheric river storms, the Project suffered significant direct physical loss or damage (the "Loss"). (CT-231, ¶ 7). Such damage included, but was not limited to, the washing out of the Project's private access roads to and between the wind turbine generators as well as the public access road to the Project, *i.e.*, the San Miguelito Road. (CT-231, ¶ 8; *see also* CT-17, ¶¶ 60-61; CT-169).

4. Extensive project delays result from damage to the Strauss Wind Farm

The direct physical loss or damage sustained by the Project resulted in significant delays to the Project's completion and business interruption losses. (*See* CT-170; *see also* CT-15, CT-17, ¶¶ 47). In addition to having to replace physical components of the turbines themselves, the Insureds were hindered from accessing multiple turbines and sites where additional turbines were to be ***15** erected since the Project's roads had been washed out by the atmospheric river storms. (*See id.*) Thus, the Insureds had to assess and implement a repair plan that would restore access to the turbines via the Project's roads in a safe and code-compliant manner. (*See id.*)

B. The Insureds submit notice of loss to the Insurers under the 2022-2023 Policy

The Insureds promptly tendered notice of the Loss to the Insurers (the "Claim"), to which the Insurers initially responded correctly acknowledging the "Nature of Loss" as being "Inclement Weather Conditions - Heavy Rain" and referring to the Loss as being precipitated with the rain accompanying the atmospheric river storms which plagued the Project. (CT-132-56).

However, only a month later, the Insurers issued to the Insureds updated correspondence recategorizing the "Nature of Loss" as being "Earth Movement" and asserting that "[l]oss was caused by earth movement." (CT-158). Thus, according to the Insurers, coverage under the 2022-2023 Policy was limited to the Policy's lower, $10 million "Earth Movement" sublimit and corresponding higher deductible. (CT-159). Additionally, the Insurers assumed, without asking the Insureds, that the Loss fell under the Construction All Risk coverage, ignoring the Operating All Risk coverage also provided under the 2022-2023 Policy. (CT-159-60).

***16 1. The Insurers do not fully resolve the claim by January 15, 2023, the one year anniversary of the Insureds' discovery of the Loss**

Following the receipt of the Insurers' correspondence asserting positions seeking to significantly limit coverage available to the Insureds under the 2022-2023 Policy, the Insureds promptly responded to the Insurers, explaining to them that the Loss was not precipitated by earth movement but, rather, the atmospheric river storms. (CT-168-70). Thus, contrary to the Insurers' assertion, the Insureds explained that coverage under the 2022-2023 Policy for the Loss was not significantly limited by application of the Earth Movement sublimit and corresponding deductible. (*Id.*).

The Insurers replied to the Insureds doubling down on the Insurers' position that the Earth Movement sublimit and corresponding deductible applied, averring that "the Policy is governed by and construed in accordance with New York law" and, as such, "the causation inquiry stops at the efficient physical cause of loss ...." (CT-182-83). These contentions remained unresolved as of January 15, 2023, being the one-year anniversary of the Insureds' discovery of the Loss and, therefore, the date by which the Insureds were potentially obligated to bring suit under the terms of the 2022-2023 Policy. (*See* CT-105).

2. The Insureds are forced to bring suit on January 12, 2024, due to the 2022-2023 Policy's one year suit limitation provision

Despite the disagreement between the parties with respect to the appropriate limit of liability and deductible, as well as the Insurers' ongoing investigation into the Claim, the 2022-2023 ***17** Policy contains an "Action Against Underwriters" provision, which provides as follows:

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No suit or action on this Policy for the recovery of a claim shall be sustainable in any court of law or equity, unless the insured shall have fully complied with all the requirements of this Policy, nor unless commenced within twelve (12) months after the occurrence becomes known to the Insured, unless a longer period of time is provided by applicable statute.

(*Id.*) Accordingly, since twelve months had almost passed since the Loss occurred and no final coverage position had been taken by the Insurers, the Insureds were compelled to initiate litigation against the Insurers solely to reserve the Insureds' right to dispute the coverage afforded under the 2022-2023 Policy for the Loss. (CT-231, ¶ 10).

Due to the Insurers' previous representations concerning the application of New York law, the Insureds initiated suit in both California and New York on January 12, 2024. (CT-232, ¶ 11). Although California law supports tolling a suit limitation provision pending the insurer's adjustment of a claim, New York law does not. *Compare Prudential-LMI Commercial Ins. Co. v. Superior Court* (1990) 51 Cal.3d 674, 678, *with Grumman Corp. v. Travelers Indem. Co.* (N.Y. App. Div. 2001) 288 A.D.2d 344, 345).

i. The California suit

On January 12, 2024, the Insureds initiated suit in the Superior Court of California, County of Santa Barbara, by filing a Complaint against the Insurers for declaratory relief, breach of contract, and breach of the implied covenant of good faith and fair dealing. (CT-7). The Insurers then initiated service of process of ***18** the California Complaint on the Insurers with the intent to proceed forward with the coverage litigation in California. (*See* CT-232, ¶ 12).

ii. The New York suit

The Insureds also filed a separate complaint in the Supreme Court of the State of New York, County of New York, on January 12, 2024, in an action styled *BayWa r.e. Wind, LLC. et. al. v. RSG Underwriting Managers, LLC Trading as Power.Energy.Risk et. al.* No. 650204/2024. In the New York action, the Insureds only asserted causes of action for declaratory relief and breach of contract given that New York does not recognize a first-party bad faith tort insurance claim. *See id.* (NYSCEF Doc. No. 1). Furthermore, the Insureds did not immediately serve the New York complaint, consistent with the Insureds' intent of pursuing the coverage dispute against the Insurers in California. (*See* CT-232, ¶ 12).

C. The 2022-2023 Policy

As explained above, the 2022-2023 Policy provides expansive coverage for “all risks of direct physical loss of or damage to Insured Property while at the location of the Project, while in offsite temporary storage, or while in transit, all within the Policy's territory and occurring during the Period of Insurance.” (CT-50, 114).

In addition to insuring the California wind-powered electrical Project, the 2022-2023 Policy also has further connections and references to California. Specifically, the 2022-2023 Policy was issued by Appellee RSG Underwriting Managers, ***19** LLC trading as Power.Energy.Risk (“PERse”) via its California office, as noted on the first page of the 2022-2023 Policy:

Power Energy Risk

23 Corporate Plaza Suite 248

Newport Beach, CA 92660

p: 949.878.0320 f: 949.873.0319

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(CT-72). The 2022-2023 Policy's "Claim Procedure" section requires that notice of a "circumstance" be provided to PERse's agent located at the above Newport Beach address. (CT-83). The 2022-2023 Policy also acknowledges the Insureds' California residence, which identifies "5901 Priestly Drive, Suite 300, Carlsbad, California" as the "Address of the Insured." (CT-73).

1. The choice of law and jurisdiction provision

Despite the clear and obvious connections to California, the 2022-2023 Policy's "Policy Schedule" (a/k/a declarations) contains a "Choice of Law and Jurisdiction" provision that provides the following:

Law: The insurance shall be governed by and construed in accordance with the law of New York. Jurisdiction: Each party agrees to submit to New York jurisdiction subject to NMA5020 (14/09/2005) Service of Suit Clause naming: Mendes & Mount, 750 Seventh Avenue, New York, NY 10019-6829, USA

The interpretation, performance and enforcement of this agreement shall be governed by the laws of the state of New York without regard to principles of conflicts of law and any disputes between the insured and underwriters arising under or in connection with this insurance policy shall be subject to the exclusive jurisdiction of the courts of the state of New York and to the extent permitted by law the parties expressly ***20** waive all rights to challenge or otherwise limit such jurisdiction.

(CT-81).

2. The service of suit clause and Applicable Law (U.S.A.) endorsement

As referenced and incorporated into the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision, the 2022-2023 Policy contains a "Service of Suit Clause" which provides, in relevant part, the following:

It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this Clause constitutes or should be understood to constitute a waiver of Underwriters' rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States.

. . .

(CT-62).

Similarly, the 2022-2023 Policy's "Applicable Law (U.S.A.)" endorsement provides that "[t]his insurance shall be subject to the applicable state law to be determined by the court of competent jurisdiction as determined by the provisions of the Service of Suit Clause (U.S.A.)[.]" (CT-91). [3]

***21 D. The Insurers' motion to stay or dismiss**

On March 7, 2024, the Insurers filed with the trial court a Special Appearance Notice of Motion to Stay or Dismiss Pursuant to California Code of Civil Procedure Sections 410.30 and 418.10 (the "Motion"). (CT-190). The Insurers' Motion was premised on the enforcement of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision. (CT-197).

E. The trial court's order

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On April 4, 2024, the trial court held a hearing on the Insurers' Motion. (*See* 1 RT 1). The trial court began the hearing with its tentative ruling, finding the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision "looks mandatory to me because it has exclusive jurisdiction for resolving the matter in the New York courts, and the tendency is to follow that." (1 RT 5:2-5). Next, the trial court found that (a) California's "tort damages for bad faith and breach of the implied covenant of good faith and fair dealing in the insurance context" is not "a fundamental policy" of California, and (b) "the efficient proximate cause doctrine has any real application in circumstances where earth movement, although limited, is just subject to a cap, as opposed to excluded entirely." (1 RT 5:13-17). Based on the foregoing, the trial court found it was reasonable to proceed in New York while staying the California proceeding. (1 RT 5:19-24).

Following oral argument, the trial court adopted its tentative ruling and subsequently entered an order staying the ***22** California proceeding pursuant to California Code of Civil Procedure sections 410.30 and 418.10. (1 RT 14:7-13; CT-260-61).

The Insureds timely appealed. (CT-264; Cal. Rules of Court, rule 8.104(a)(1)). The order is an appealable order granting the Insurers' motion to stay on the ground of inconvenient forum. Cal. Civ. Proc. Code § 904.1(a)(3).

III. STANDARD OF REVIEW

"[T]here is a split of authority in the appropriate standard of review to apply in reviewing an order to enforce a forum selection clause." *Schmidt v. Trinut Farm Mgmt., Inc.* (2023) 92 Cal.App.5th 997, 1005-06 (citing cases). Where there is conflicting extrinsic evidence relevant to the analysis, "[t]he majority of cases apply the abuse of discretion standard, not the substantial evidence standard." *Korman v. Princess Cruise Lines, Ltd.* (2019) 32 Cal.App.5th 206, 213-14 n. 6 (citing *Quanta Comput. Inc. v. Japan Commc'ns Inc.* (2018) 21 Cal.App.5th 438, 446-47). However, in situations like the instant case, where "no conflicting extrinsic evidence has been presented, the interpretation of a forum selection clause is a legal question that [the Court] review[s] de novo." *Id.* at 214 (quoting *Animal Film, LLC v. D.E.J. Prods., Inc.* (2011) 193 Cal.App.4th 466, 471).

When considering whether a contractual forum selection clause is enforceable, courts first look to the clause to determine whether the provision is "mandatory" or "permissive." *Animal Film, LLC* 193 Cal.App.4th at 472. Where a forum selection clause "merely provides for the submission of jurisdiction and does not expressly mandate litigation in a particular form," then it is ***23** permissive and "the traditional *forum non conveniens* analysis applies." *Id.* Conversely, "[a] clause is mandatory if it requires the parties to litigate their disputes exclusively in the designated forum . . .." *Verdugo v. Alliantgroup, L.P.* (2015) 237 Cal.App.4th 141, 162, n.2 (citing *Animal Film, LLC* 193 Cal.App.4th at 471-74; *Berg v. MTC Elecs. Techs.* (1998) 61 Cal.App.4th 349, 358-59). "A mandatory clause ordinarily is 'given effect without any analysis of conveniens; the only question is whether enforcement of the clause would be unreasonable.' " *Animal Film, LLC* 193 Cal.App.4th at 471 (quoting *Intershop Commc'ns AG v. Superior Court* (2002) 104 Cal.App.4th 191, 196).

IV. ARGUMENT

A. The 2022-2023 Policy's "Choice of Law and Jurisdiction" Provision is Permissive.

The trial court ruled that the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision was mandatory rather than permissive. (1 RT 5:2-5, 14:7-13; CT-260-61). This section demonstrates the error in that ruling.

1. The provision's reliance on the phrase "submit to" demonstrates its permissive structure

The 2022-2023 Policy's "Choice of Law and Jurisdiction" provision begins with the hallmark "submit to" language reinforcing its permissive structure. (CT-81).

Where a forum selection clause "merely provides for the submission of jurisdiction and does not expressly mandate litigation exclusively in a particular forum" it is permissive. *Animal Film, LLC*, 193 Cal.App.4th at 472. Permissive forum selection clauses use language such as "consent to" and "submit to" ***24** a particular jurisdiction. *See, e.g.*, *id.* at 470 ("[T]he parties hereto *submit and consent to* the jurisdiction of the courts present in the State of Texas in any action brough to enforce (or otherwise relating to) this agreement.") (emphasis added); *Berg*, 61 Cal.App.4th at 357 ("The company . . . has expressly *submitted to* the jurisdiction of the State of California . . . for the purpose of any suit . . . arising out of this Offering.") (emphasis added).

Conversely, where a forum selection clause "requires the parties to litigate their disputes exclusively in the designated forum" it is mandatory. *Verdugo* 237 Cal.App.4th at 147, n.2. Mandatory forum selection clauses use language such as "shall be litigated" or "shall have exclusive jurisdiction." *See, e.g.*, *Lu v. Dryclean-U.S.A. of Cal., Inc.* (1992) 11 Cal.App.4th 1490, 1492 ("Any and all litigation that may arise as a result of this Agreement *shall be litigated* in Dade County, Florida.") (emphasis added); *Cal-State Bus. Prods. & Servs., Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1672, n. 4 ("New York *shall have exclusive jurisdiction* over any case of controversy arising under or in connection with this Agreement . . ..") (emphasis added).

Here, the "Jurisdiction" section of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision is permissive. (*See* CT-81). That section provides, as follows:

> Jurisdiction: Each party agrees to *submit to* New York jurisdiction subject to NMA5020 (14/09/2005) Service of Suit Clause naming: Mendes & Mount, 750 Seventh Avenue, New York, NY 10019-6823, USA.

(*Id.* (emphasis added). Notably, it expressly includes the "submit to" language which California courts have routinely acknowledged ***25** is indicative of a permissive forum selection clause. *See Animal Film, LLC*, 193 Cal.App.4th at 470; *Berg*, 61 Cal.App.4th at 357. There is no language within the "Jurisdiction" section that indicates an agreement by the parties for New York to have exclusive jurisdiction over any dispute that arises between the parties. *C.f. Lu*, 11. Cal.App.4th at 1492; *Ricoh* 12 Cal.App.4th at 1672, n. 4.

Accordingly, the "Jurisdiction" section of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision demonstrates its permissive structure.

2. The provision's incorporation of the service of suit clause further supports a permissive interpretation

The 2022-2023 Policy's "Choice of Law and Jurisdiction" provision incorporates by reference the "Service of Suit Clause," further reinforcing the provision's permissive nature since the "Service of Suit Clause" contains no forum limitation language. (CT-81, 92).

"The fundamental goal of contractual interpretation is to give effect of the mutual intention of the parties," which "is determined by objective manifestations of the parties' intent" - *i.e.*, "the words used in the agreement." *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473-44; Cal. Civ. Code § 1636). Courts "look first to the language of the contract in order to ascertain its plain meaning or the meaning a lay person would ordinarily attach to it." *Waller v. Truck Ins. Exch., Inc.* (1995) 11 Cal.4th 1, 18. "The whole of a contract is to be taken together, so as to give effect to every part, if ***26** reasonably practicable, each clause helping to interpret the other." Cal. Civ. Code § 1641.

Here, the "Jurisdiction" section of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision, which utilizes the permissive "submit to" language, provides that it is "subject to" the "NMA5020 (14/09/2005) Service of Suit Clause . . .." (CT-81). In turn, the referenced "Service of Suit Clause" provides, in relevant part, the following: "[T]he

Underwriters hereon, at the request of the Insured, will submit to the jurisdiction of a Court of competent jurisdiction within the United States." (CT-92).

Nevertheless, the trial court narrowly read the "Service of Suit Clause" to mean only that it applied to service of process rather than an applicable jurisdiction. *See* RT 7:11-8:27). In doing so, the trial court seemingly read out the permissive "will submit to the jurisdiction of a Court of competent jurisdiction within the United States" language in the "Service of Suit Clause" and, instead, focused solely on the language in that provision concerning on whom service of process may be affected. (*See* RT 12:25-13:4). However, the 2022-2023 Policy must be interpreted as a whole, such that all provisions of the policy are given effect rather the rendering parts of the policy "superfluous, useless or inexplicable." *Carson v. Mercury Ins. Co.* (2012) 210 Cal.App.4th 409, 420 (citing 11 *Williston on Contracts* § 32:5, p. 704 (4th ed. 2012)); *see also Westrec Marina Mgmt., Inc. v. Arrowood Indem. Co.* (2008) 163 Cal.App.4th 1387, 1395 ("Although the heading . . . does not describe the effect of the provision . . ., the absence of a fully descriptive heading does not restrict the plain meaning of the ***27** provision.") (citing *Coit v. Jefferson Std. Life Ins. Co.* (1946) 28 Cal.2d 1, 11).

Under a holistic interpretation, and as noted above, the "Choice of Law and Jurisdiction" provision incorporates by reference the "Service of Suit Clause" which contains the permissive "will submit to the jurisdiction of a Court of competent jurisdiction within the United States" language. (CT-81, 92); *see also Haynes v. Farmers Ins. Exch.* (2004) 32 Cal.4th 1198, 1208 ("[I]nsurers may rely on endorsements to modify the printed terms of a form policy."). If the Court were to accept the trial court's narrow interpretation of the "Service of Suit Clause" to mean that it only applies to service of process notwithstanding its incorporation into the "Jurisdiction" section of the "Choice of Law and Forum" provision, then it would render the "will submit to the jurisdiction of a Court of competent jurisdiction within the United States" language within the "Service of Suit Clause" superfluous.

Accordingly, when construed as a whole, the 2022-2023 Policy's incorporation of the "Service of Suit Clause" within its "Choice of Law and Jurisdiction" provision reinforces the permissive structure of that provision.

3. The "Applicable Law (U.S.A.)" provision further supports a permissive interpretation

Consistent with the 2022-2023 Policy's "Service of Suit Clause," the 2022-2023 Policy also contains an "Applicable Law (U.S.A.)" endorsement, LMA 5021, which further supports a permissive interpretation of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision. (CT-91).

***28** The 2022-2023 Policy's "Applicable Law (U.S.A.)" endorsement provides as follows: "This Insurance shall be subject to the applicable state law to be determined by the court of competent jurisdiction as determined by the provisions of the Service of Suit Clause (U.S.A.)." (*Id.*) Importantly, the endorsement refers back to the 2022-2023 Policy's "Service of Suit Clause (U.S.A.)" as the guidepost to determining which jurisdiction shall govern a dispute between the parties under the 2022-2023 Policy. (*Id.*). And, as discussed above, the 2022-2023 Policy's "Service of Suit Clause" does not contain any forum limitation language prohibiting suit from proceeding in California. (*See supra* A.2).

Accordingly, the 2022-2023 Policy's "Applicable Law (U.S.A.)" endorsement further supports a permissive interpretation of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision. *See Haynes v. Farmers Ins. Exch.* (2004) 32 Cal.4th 1198, 1208 ("[I]nsurers may rely on endorsements to modify the printed terms of a form policy.").

4. Because the "Choice of Law and Jurisdiction" provision is permissive, the Insurers must demonstrate that Santa Barbara County is a *Forum Non Conveniens*, which they cannot do.

Since the Policies' "Choice of Law and Jurisdiction" provision is permissive, the Insurers bore the burden of proving (1) New York is a suitable place for trial, and (2) the balance of private and public interests tilt in favor of New York. *See Animal Fims,*

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LLC 193 Cal.App.4th at 472; *Stangvik v. Shiley, Inc.* (1991) 54 Cal.3d 744, 751.[4] ***29** For the second prong, the California Supreme Court has provided the following considerations:

The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing competing interests of California and the alternate jurisdiction in the litigation.

Stangvik 54 Cal.3d at 751 (citing *Pieper Aircraft Co. v. Reyno* (1981) 454 U.S. 235, 259-61; *Gulf Oil Corp. v. Gilbert* (1947) 330 U.S. 501, 507-09).

i. The private interests of the litigants weigh strongly in favor of California retaining jurisdiction

"The private interest factors are those that make trial and enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses." *Stangvik* 54 Cal.3d at 751 (citing *Pieper Aircraft Co. v. Reyno* (1981) 454 U.S. 235, 259-61; *Gulf Oil Corp. v. Gilbert* (1947) 330 U.S. 501, 507-09).

Here, the sole witness located in New York who the Insureds anticipate may be called upon to testify in this matter is the underwriter who negotiated the Policies with the Insureds on behalf of the Insurers. (*See* CT-193-95). However, considering the ***30** Loss occurred at a California Project, most of the witnesses who would be called upon to testify about the Loss, Project, and post-Loss repairs made to the Project reside in California, making California a far more convenient and less expensive forum for all involved. (*See* CT-231). Accordingly, the private interest factors tilt heavily in favor of California retaining jurisdiction over this matter.

ii. California has a substantial interest in retaining jurisdiction, while New York has no discernibly credible interest in having jurisdiction over this dispute

"The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing competing interests of California and the alternate jurisdiction in the litigation." *Stangvik* 54 Cal.3d at 751 (citing *Pieper Aircraft Co.* 454 U.S. at 259-61; *Gulf Oil Corp.* 330 U.S. at 507-09).

Here, the residents of Santa Barbara County have a strong interest in deciding this action: the Project is located in Santa Barbara County, brings jobs to the local community, and will provide years' worth of clean, renewable energy to California residents. (*See* CT-231). Moreover, the Insurers are both residents of California. (CT-231); *see Stangvik* 54 Cal.3d at 754 ("(1) If the plaintiff is a resident of the jurisdiction in which the suit is filed, the plaintiff's choice of forum is presumed to be convenient; and (2) ***31** a state has a strong interest in assuring its own residents an adequate forum for the redress of grievances.") (citations omitted).

Conversely, New York has little-to-no interest in overseeing this action: none of the parties are residents of New York, proceeding in New York would require significantly more effort to secure witness attendance at a much greater expense, and the residents of New York have minimal interest in overseeing a coverage dispute concerning the California Project which will be providing years-worth of clean energy to California residents. (*See* CT-9-11, 194).

Accordingly, had the trial court correctly found the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision to be permissive, under the traditional *forum non conveniens* analysis, the trial court would most likely have retained jurisdiction over this matter.

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B. If the "Choice of Law and Jurisdiction" Provision Is Not Permissive, It Is Ambiguous

The Insureds have demonstrated the permissive structure of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision above. Thus, even if this Court does not find that it is the sole reasonable interpretation of the language, it is clear that it is at least ***a*** reasonable interpretation.

Nevertheless, the trial court held the provision was mandatory based on the succeeding section of that provision which provides, in relevant part, the following:

> The interpretation, performance and enforcement of this agreement shall be governed by the laws of the state of New York without regard to principles of conflicts of law and any dispute between the insured ***32** and the underwriters shall be subject to the exclusive jurisdiction of the courts of the state of New York . . ..

(1 RT 5:1-5; CT-81). The trial court's holding was in error because it disregards the permissive "Jurisdiction" section immediately preceding this paragraph of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision, and the 2022-2023 Policy's "Service of Suit Clause" and "Applicable Law (U.S.A.)" endorsement which both reinforce the permissive nature of the "Choice of Law and Jurisdiction" provision. (*See* CT-81-82, 91-92). At a minimum, this language is ambiguous, in which case (assuming the trial court's interpretation is deemed a reasonable one) the Insureds can discern at least four reasonable interpretations, discussed below. *See Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 868 ("A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable.") (quotation omitted).

1. There are at least four possible reasonable interpretations of the provision

When viewed as a whole, assuming the trial court's interpretation is deemed to be a reasonable interpretation, there are at least four potentially reasonable interpretations of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision:

- It is facially permissive due to the "Jurisdiction" section which utilizes the permissive "submit to" language (CT-81);
- It is facially mandatory due to the last paragraph of the provision which utilizes the "shall be subject to the exclusive jurisdiction" language (CT-81-82);
- It is permissive due to the provision's incorporation of the "Service of Suit Clause" which contains ***33** contravening "will submit to the jurisdiction of a Court of competent jurisdiction within the United States" language (CT-81, 92); or
- It is overridden by the "Applicable Law (U.S.A.)" endorsement, which refers back to the "Service of Suit Clause" to determine which forum governs a dispute between the parties under the 2022-2023 Policy (CT-81, 91-92).

These multiple, potentially reasonable interpretations demonstrate that whether the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision is mandatory or permissive is, at a minimum, ambiguous. *See Foster-Gardner, Inc.* 18 Cal.4th at 868.

The trial court held the second of the four interpretations controlled, which is incorrect for at least two reasons. (*See* 1 RT 5:1-5). First, the trial court did not properly account for the permissive "Jurisdiction" section of the "Choice of Law and Jurisdiction" provision. (*See id.*) The trial court's interpretation renders that section superfluous since the Insurers could have accomplished a mandatory forum selection clause by solely including the last paragraph of the "Choice of Law and Jurisdiction" provision

in the 2022-2023 Policy. *See Carson v. Mercury Ins. Co.* (2012) 210 Cal.App.4th 409, 420 (explaining that all provisions of an insurance policy must be interpreted as a whole, such that all provisions of the policies are given effect rather than rendering any parts "superfluous, useless or inexplicable.") (citing 11 *Williston on Contracts* § 32:5, p. 704 (4th ed. 2012)).

Second, the trial court narrowly construed the "Service of Suit Clause" and "Applicable Law (U.S.A.)" endorsement to mean that those sections of the 2022-2023 Policy only governed the ***34** manner by which service of process on the Insurers may be accomplished. (1 RT 7:11-8:27, 10:26-11:21). This interpretation has two significant issues. First, it makes the "will submit to the jurisdiction of a Court of competent jurisdiction within the United States" language within the "Service of Suit Clause" superfluous. Second, it reads out the language within the "Applicable Law (U.S.A.)" endorsement which refers to the "Service of Suit Clause" to determine which forum governs a dispute between the parties under the 2022-2023 Policy. (CT-81-82, 91-92). *See Carson* 210 Cal.App.4th at 420. [5]

When construed as a whole, there are at least four potentially reasonable interpretations of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision, rendering the provision ambiguous.

***35 2. If the "Choice of Law and Jurisdiction" provision is ambiguous, then an interpretation of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision as permissive is consistent with the objectively reasonable expectation of the Insureds at the time of the 2022-2023 Policy's formation**

Ambiguities are "resolved by interpreting the ambiguous provisions in the sense the promisor (i.e., the insurer) believed the promisee [(i.e., the insured)] understood them at the time of formation." *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822 (citing Cal. Civ. Code § 1649). In other words, "[a]n ambiguity in an insurance contract must be resolved in a manner consistent with the objectively reasonable expectations of the insured." *Am. Alt. Ins. Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239, 1245 (citing *Bank of the W. v. Superior Court* (1992) 2 Cal.4th 1254, 1265). If application of this rules does not eliminate the ambiguity, ambiguous language is construed against the party who caused the uncertainty to exist." *AIU Ins. Co.* 51 Cal.3d at 822 (citing Cal. Civ. Code § 1654).

Here, an interpretation of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision, consistent with the Insureds' objectively reasonable expectations at the time of the 2022-2023 Policy's formation, supports a finding that such provision is permissive. The 2022-2023 Policy was (a) issued in California, (b) to California companies, (c) to insure a California property providing clean, renewable energy to the residents of California. (*See* CT-72). These California connections, coupled with the multiple references to California throughout the 2022-2023 Policy ***36** and the conflicting "Service of Suit Clause" and "Applicable Law (U.S.A.)" endorsement would leave an objectively reasonable insured standing in the shoes of the Insureds to expect that it could seek judicial resolution through a California court, to the extent a coverage dispute arose under the 2022-2023 Policy for a loss to the California Project.

However, if the Court is unable to determine the Insureds' objectively reasonable expectation of whether the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision is mandatory or permissive based on the record that is available, then this must be remanded to the trial court for a factual inquiry on that issue. *See Am. Alt. Ins. Corp.* 135 Cal.App.4th at 1245 ("The interpretation of a contract, including the resolution of any ambiguity, is solely a judicial function unless the interpretation turns on the credibility of extrinsic evidence.") (citations omitted).

C. Enforcing the "Choice of Law and Jurisdiction" Provision to Force the Insureds to Litigate This Dispute in New York is Unreasonable

The Insureds have demonstrated that the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision is permissive, whether that be based on a plain and ordinary interpretation of the 2022-2023 Policy or consistent with the Insureds' objectively reasonable expectation of coverage. (*See supra* §§ A-B). However, if the Court were to find that the only reasonable

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interpretation of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision is that is mandatory, then enforcement of that provision is still unreasonable.

***37** A mandatory forum selection clause will not be enforced if enforcement of the clause is unreasonable. *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 496. The enforcement of the forum selection clause is unreasonable if it would bring about a result contrary to California public policy. *CGL Original Prods., Inc. v. Nat'l Hockey League Ass'n* (1995) 39 Cal.App.4th 1347, 1354; *see also G. Cos. Mgmt., LLC v. LREP Ariz., LLC* (2023) 88 Cal.App.5th 342, 350 (explaining that where the enforcement of a forum selection clause involves unwaivable rights created by California statutes, "the party seeking to enforce the choice of form selection clause bears the burden of showing litigating the claims in the contractually designated forum 'will not diminish in any way the substantive rights . . . afforded under California law.' " (quoting *Am. Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 10).

Here, the trial court erred in finding the Insureds' bad faith claim against the Insurers and the application of California's efficient proximate cause doctrine were not fundamental public policies of California sufficient to render unreasonable the enforcement of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision. (RT 5:6-21). Although the trial court's ruling on this issue would be moot if the Court were to determine the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision was permissive rather than mandatory, if the Court were to determine the provision is mandatory, then enforcement of that provision would be unreasonable because New York does not recognize a first-party tort bad faith insurance claim and does not ***38** apply the efficient proximate cause doctrine. (*See infra* §§ C.1-2). We discuss both of these issues, in turn, below.

1. The Insureds' right to bring a bad faith claim against the Insurers is a fundamental public policy in California

The California Supreme Court has long held that "when an insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 575. Consistent with the general rule, the Supreme Court has further recognized the availability of punitive damages for tort bad faith insurance claims, explaining that "[t]he special relationship between the insurer and the insured illustrates the *public policy* considerations that may support exemplary damages . . .." *Egan v. Mut. of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 820 (emphasis added) (internally citing *Ferraro v. Pac. Fin. Corp.* (1970) 8 Cal.App.3d 339, 353). This is based, in part, on the principle that "[i]nsurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust." *Id.* (quoting Goodman & Seaton *Foreword: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court* 62 Cal. L. Rev. 309, 346-47 (1974)); *see also Spindle v. Travelers Ins. Cos.* (1977) 66 Cal.App.3d 951, 959 ("[T]he evolvement of the doctrine of the implied covenant of good faith and fair dealing [i]s an expression of [p]ublic policy in our state.").

In reinforcing this point, the California Supreme Court subsequently explained that "tort law is primarily designed to vindicate 'social policy.' " ***39** *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 682 (citing Prosser *Law of Torts* p. 613 (4th ed. 1971)). Although bad faith claims are premised on a contract, and therefore generally limited to contractual damages, "[a]n exception to the general rule . . . has developed in the context of insurance contracts where, for a variety of *policy reasons*, courts have held that breach of the implied covenant will provide the basis for an action in tort." *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 684 (emphasis added). Thus, the Supreme Court has made clear the creation of a tort bad faith insurance claim, including the punitive damages available therewith, reflects a fundamental public policy of California.

i. New York law does not recognize a substantively comparable cause of action for bad faith in insurance disputes

"Under New York law, an independent tort action for bad faith denial of insurance coverage is not recognized." *Wiener v. Unumprovident Corp.* (S.D.N.Y. 2002) 202 F.Supp.2d 116, 123 (citing *NYU v. Cont'l Ins. Co.* (N.Y. 1995) 662 N.E.2d 763, 769-770 (discussing the unavailability of a tort remedy in the absence of a duty apart from contractual obligations and dismissing bad faith claim since it was "duplicative of the first cause of action for breach of contract . . .."). Indeed, New York courts have expressly stated that they "are unwilling to adopt the widely-accepted tort cause of action for 'bad faith' in the context of a

first party claim ....” *Acquista v. N.Y. Life Ins. Co.* (N.Y. App. Div. 2001) 285 A.D.2d 73, 81. Instead, under New York law, an insured is limited to contractual remedies. *See NYU* 662 N.E.2d at 319-20.

***40** Furthermore, punitive damages for bad faith are only permitted in New York in “extraordinary circumstances.” *Wiener* 202 F.Supp.2d at 123; *see also Commerce & Indus. Ins. Co. v. U.S. Bank Nat'l Ass'n* (S.D.N.Y. Sept. 3, 2008) No. 07 Civ. 5731(JGK), 2008 WL 4178474, at *6 (explaining California's tort remedies for bad faith, including punitive damages, “materially conflicts with New York's more restrictive standards.”). For example, in *Caribbean Constr. Servs. Assocs., Inc. v. Zurich Ins. Co.*, the court overturned the trial court's dismissal of a bad faith cause of action where the trial court had improperly found both New York and Virgin Islands laws were the same on this issue. 267 A.D.2d 81, 82 (N.Y. App. Div. 1999). In doing so, the court explained that, “under New York law, punitive damages are available where the egregious conduct is ‘aimed at the public generally’ . . ..” *Id.* (quoting *Rocanova v. Equitable Life Assur. Soc.* (N.Y. 1994) 634 N.E.2d 940, 943). Conversely, like California, “Virgin Islands law does not require such a showing.” *Id.*; *see* Cal. Civ. Code § 3294(a) (authorizing the recovery of punitive damages in a tort action “where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice . . ..”).

ii. Other Courts have recognized an insured's right to bring a bad faith claim against the Insurers is a fundamental public policy in California sufficient to override the enforcement of an insurance policy's choice of law and/or forum selection clause

Given an insured's right under California law to bring a tort bad faith claim against its insurer, other courts have refused to enforce a choice of law or jurisdiction clause contained within ***41** insurance policy that would forfeit that right vis-à-vis application of the law of another forum. *See, e.g.*, *Connex R.R. LLC v. AXA Corp. Sols. Assurance* (C.D. Cal. Sept. 15, 2016) 209 F.Supp.3d 1147, 1151 (“An insured's right to bring bad faith claims for tort and punitive damages against an insurer is fundamental to California's public policy in this area.”) (citing Cal. Civ. Code § 1668); *Tri-Union Seafoods, LLC v. Starr Surplus Lines Ins. Co.* (S.D. Cal. 2015) 88 F.Supp.3d 1156, 1170 (“[T]he Court finds that recognizing a tort remedy for the insurer's breach of the implied covenant of good faith and fair dealing implicates a substantial and thus fundamental public policy of California.”); *Brighton v. Lutheran Church-Mo. Synod* (C.D. Cal. Feb. 1, 2013) No. SACV 12-883-JST (MLGx), 2013 WL12136522, at *4 (“California's decision to allow punitive damages and extra-contractual damages in insurance bad faith cases reflects a fundamental state policy of protective California citizens from exploitative behavior by insurers.”); *Skye Bioscience, Inc. v. ParternRe Ireland Ins. Dac* (C.D. Cal. June 20, 2023) No 2:23-CV-01218-CAS (AFMx), 2023 WL 4768734, at *11 (“California and New York conflict regarding the availability of a claim for tortious breach of the duty of good faith and fair dealing in the insurance context.”) (citations omitted); *Gomez v. Great-W. & Annuity Ins. Co.* (S.D. Cal. 2022) 638 F.Supp.3d 1156, 1162 (“[T]his Court is persuaded that providing a tort remedy and punitive damages for insurance bad faith is a fundamental policy of California that is more protective of its citizens than remedies provided under Illinois law.”); *see also Harris v. Provident Life & Acc. Ins. Co.* (2d Cir. 2002) 310 F.3d 73, 81 ***42** (“However, in California, unlike New York, [i]n insurance cases there is a well developed history recognizing a tort remedy for a breach of the implied covenant' where the insured acted ‘unreasonably or without proper cause.’ Thus, there is an actual conflict between the law of New York and the law of California.”) (quoting *Careau & Co. v. Sec. Pac. Bus. Credit* (1990) 222 Cal.App.3d 1371, 1395).

Despite the foregoing authority, the trial court found that *Boghos v. Certain Underwriters at Lloyd's of London*, foreclosed the issue notwithstanding that case involved the enforcement of an arbitration clause rather than a choice of law and forum selection clause. (2005) 36 Cal.4th 495; (RT 5:12-13). The trial court's reliance on *Boghos* was in error.

In *Boghos*, the issue before the Court was whether the disability insurance policy's arbitration clause was enforceable against the insured. 36 Cal.4th at 499. In relevant part, the insured asked the Court to extend its precedent in *Armendariz* and *Little* to find the arbitration clause unenforceable because it would require the insured to pay costs the insured would not otherwise incur if the dispute proceeded in court. *Id.* at 505 (citing *Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 Cal.3d 83, 100-02 (setting forth conditions by which an employer could lawfully compel an employee to arbitrate claims arising under the California Fair Employment and Housing Act without forfeiting the employee's statutory rights); *Little v. Auto Stiegler, Inc.*

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(2003) 29 Cal.4th 1064 (extending *Armendariz* requirements to apply to tort claims for wrongful discharge). The Court rejected ***43** this argument because, unlike the employment-related claims in *Armendariz* and *Little* which were either "based on or tethered to statutes," the insured's bad faith claim was not. *Id.* at 507. This was the key of the Court's holding. *See id.* The Court did not hold the insured's bad faith claim was *not* a fundamental public policy of California, and its decision was based on the application of an arbitration clause rather than a state-specific choice of law and jurisdiction clause. *See id.* Thus, the trial court erred in relying on *Boghos* to find the Insured's bad faith claim was not a matter of fundamental public policy to preclude the enforcement of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision. (*See* RT 5:12-13).

In summary, based on the authority and reasons discussed above, the trial court's finding that the Insureds' bad faith claim against the Insurers was not a fundamental public policy of California that would make the enforcement of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision unreasonable was in error. (*See* RT. 5:6-11).

2. Consistent with California Insurance Code §§ 530 and 530.5, the Insureds' entitlement to have their insurance claim adjusted with consideration of the efficient proximate cause doctrine is a fundamental public policy in California

California adheres to the efficient proximate cause of loss doctrine, which holds that, where multiple causes contribute to a loss, the cause that sets the others in motion (*i.e.*, the efficient cause) governs coverage. Cal. Ins. Code §§ 530, 530.5; *see Sabella v. Wisler* (1963) 59 Cal.2d 21, 27 (holding section 530 incorporated ***44** the efficient proximate cause of loss doctrine into California law as the preferred method for resolving first party insurance disputes involving losses caused by multiple risks or perils). Like a tort bad faith insurance claim, the statutorily enshrined efficient proximate cause of loss doctrine is a fundamental public policy of California that would make the enforcement of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision unreasonable. *See generally Jie v. Liang Tai Knitwear Co.* (2001) 89 Cal.App.4th 654, 687-89 ("Although the violation of a statute or constitutional provision is not invariably a prerequisite to the conclusion that a discharge violates public policy, the existence of a statute on a particular topic is one excellent method of establishing a public policy as to that subject.") (citations omitted).

The trial court never assessed this issue and, instead, erred in its finding that the efficient proximate cause doctrine does not apply where, such as here, the Insurers seek to substantially limit coverage through relegation to an extremely deficient sublimit of liability (further limited by a corresponding higher deductible). (*See* RT 5:13-18).

i. California Insurance Code §§ 530 and 530.5 do not limit application of the efficient proximate cause doctrine to exclusions only

California Insurance Code section 530 provides the following: "An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of loss; but he is still liable for a loss of which the peril insured against was only a remote cause." The plain language of the statute does ***45** not state that its application is limited to instances where an excluded cause of loss occurs somewhere within the causal chain. *See id.* Indeed, the California Supreme Court's application of the efficient proximate cause of loss doctrine to instances of concurrent covered and excluded causes of loss was based on a separate section of the California Insurance Code. *See Garvey v. State Farm Fire & Cas. Co.* (1989) 48 Cal.3d 395, 402 (explaining *Sabella* recognized that California Insurance Code section 532 would have precluded coverage under a "but for" analysis which would have contravened section 530).

To wit, where coverage concerns earth movement, as the Insurers posit in this matter, California Insurance Code section 530.5 provides the following:

> If a loss or damage results from a combination of perils, one of which is a landslide, mudflow, or debris flow, coverage shall be provided if an insured peril is the efficient proximate cause of the loss or damage

> and coverage would otherwise be provided for the insured peril. *Coverage shall be provided under the same terms and conditions as would be provided for the insured peril*.

(emphasis added). The last portion of this section mandates that "[c]overage shall be provided under the same *terms and conditions* as would be provided for the insured peril." Cal. Ins. Code § 530.5 (emphasis added). There is no question that rain is a covered peril, and the Insurers, in fact, initially correctly treated the Loss as caused by a rain event. (*See* CT-132). Thus, based on the plain language of the Code, where the efficient proximate case of loss is a covered peril, the corresponding coverages, limits, and deductibles apply. *See* ***46** *MacIsaac v. Waste Mgmt. Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1083 ("If the statutory language is clear and unambiguous, our task is at an end, for there is no need for judicial construction.") (citations omitted).

Accordingly, based on the plain language of California Insurance Code sections 530 and 530.5, the trial court's ruling that the efficient proximate cause of loss doctrine is limited to instances where an exclusion is implicated was in error. (*See* RT 5:13-18).

ii. The 2022-2023 Policy's sublimit for earth movement is a limitation on coverage, which, if applied here, violates California's efficient proximate cause doctrine

Per statute, California's efficient proximate cause doctrine is not limited to instances involving a covered and excluded cause of loss. Application of the 2022-2023 Policy's sublimit for earth movement is an extreme limitation of coverage that, if applied, would directly undermine the policy behind California's efficient proximate cause doctrine.

Although the specific question of whether a sublimit violates the efficient proximate cause doctrine has not been directly addressed by a California court, other courts that have considered this issue have held the efficient proximate cause doctrine does apply to limits of liability and deductibles, as it would apply to an exclusion.

For example, in *Are-E. River Sci. Park, LLC v. Lexington Ins. Co.*, the parties disputed whether a heightened "named storm" deductible applied to a loss the insured's property sustained when it was inundated with water accompanying Super Strom Sandy. (C.D. Cal. Mar. 27, 2014) No. CV 13 01837 BRO (JCGx), ***47** 2014 WL 12587051, at *2. If the "named storm" deductible applied, then a substantial portion of the insured's loss would go uncovered. *Id.* The court found the issue would ultimately rest on a finding of the efficient proximate cause of loss. *Id.* at *7 (citing *Garvey* 48 Cal.3d at 412). However, due to the competing evidence advanced by the parties, the court denied the insurer's motion and reserved that issue for a jury's determination. *Id.* at *7-9.

Similarly, in *N.J. Transit Corp. v. Certain Underwriters at Lloyd's London* (N.J. Super. Ct. App. Div. 2019) 221 A.3d 1180, 1184, *aff'd on other grounds*, 243 A.3d 1248 (N.J. 2021), the insurers asserted that a lesser flood sublimit applied rather than the higher limit of liability available for a named windstorm. In relevant part, the insurers argued the efficient proximate cause doctrine only applied "to exclusions, not sublimits." *Id.* at 1193. The court disagreed, explaining the sublimit barred coverage for losses in excess of the sublimit and, "therefore excludes coverage for certain claims." *Id.* Accordingly, the court held that if the loss were caused by both flood and named windstorm, the efficient proximate cause doctrine applied such that the losses "would not be subject to the . . . sublimit in the policies." *Id.*

Here, the 2022-2023 Policy contains several limits and sublimits of liability, including a $174 million general limit and a significantly lesser $10 million Earth Movement sublimit. (CT-74). Likewise, the 2022-2023 Policy contains a significantly higher deductible for Earth Movement. (*Id.*). Just like the sublimit in *N.J. Transit Corp.* and deductible in *Are-E. River Sci. Park, LLC*, if the $10 million Earth Movement sublimit and corresponding ***48** deductible were to apply, as the Insurers posit, and the Insurers were successful in proving that the loss here was, in fact, the result of Earth Movement, as the 2022-2023

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Policy defines that term, then a substantial portion of the Insureds' claim would be uncovered (*i.e.*, it would be excluded). (*See id*); *N.J. Transit* 221 A.3d at 1193; *Are-E. River Sci. Park, LLC* 2014 WL 12587051 at *7-9. Such application would essentially allow the Insurers to sidestep the efficient proximate cause doctrine by relegating coverage to a significantly lesser coverage limit and heightened deductible, thereby leaving the Insureds to assume the costs of a significant portion of the covered Loss.

This outcome would be inconsistent with (a) the plain language of California Insurance Code sections 530 and 530.5, and (b) California's rule prohibiting insurers from contracting out of the efficient proximate cause doctrine. *See* Cal. Ins. Code §§ 530, 530.05; (Sen. Rules Comm., Comm. Report, Sen. Bill No. 917 (2017-2018 Reg. Sess.), Aug. 28, 2018, p. 2 ("California appellate court decisions have held that insurers may not contract out of the efficient proximate cause doctrine as contrary to California law) (citing *Howell v. State Farm Fire & Cas. Co.* (1990) 218 Cal.App.3d 1445; *Palub v. Hartford Underwriters Ins. Co.* (2001) 92 Cal.App.4th 645); *see also Piper v. Commercial Underwriters Ins. Co.* (1997) 59 Cal.App.4th 1008, 1021 (inferring that contracting around the efficient proximate cause doctrine would violate public policy). Accordingly, the trial court's finding that California's efficient proximate cause doctrine does not have "any real application in circumstances where earth moment, although ***49** limited, is just subject to a cap, as opposed to excluded entirely" was in error. (RT 4:13-17).

iii. New York law does not recognize the efficient proximate cause doctrine

Unlike California, which adheres to the efficient proximate cause doctrine per statute, New York does not. Indeed, New York courts have expressly acknowledged that New York does not have a statutory counterpart to California that mandates the application of the efficient proximate cause doctrine. *See Kula v. State Farm Fire & Cas. Co.* (N.Y. App. Div. 1995) 212 A.D.2d 16, 20 ("In fact, California has statutory adopted the efficient proximate cause doctrine. New York has no such legislation that would circumvent the 'lead-in' clause of the State Farm policy.") (internally citing Cal. Ins. Code §§ 530, 532). Thus, under New York law, courts often look to "the most direct and obvious cause . . ." to determine which cause of loss governs the interpretation of an insurance policy and the coverage that it provides. *Id.* (citing *Album Realty Corp. v. Am. Home Assur. Co.* (N.Y. 1992) 607 N.E.2d 804, 805; *Granchelli v. Travelers Ins. Co.* (N.Y.App.Div. 1990) 167 A.D.2d 839).

Based on New York law, the Insurers argue that the Insureds' Loss was caused by Earth Movement. (*See* CT-182-83). Based on California law, the Insureds argue that the Loss was caused by the atmospheric rainstorms and that Earth Movement, to the extent there is any within the meaning of the 2022-2023 Policy, would have been the *result*, rather than the cause, of the covered loss event. (*See* CT-169). As such, requiring the Insureds to litigate their claim for Loss to the California Project in New York ***50** without the benefit of California's efficient proximate cause doctrine would be unreasonable.

CONCLUSION

For the reasons set forth above, the trial court's order staying the California proceeding pursuant to California Civil Procedure Code sections 410.30 and 418.10 should be **REVERSED** and the case should be remanded.

Dated: February 26, 2025

SAXE DOERNBERGER & VITA, P.C.

Jeremiah M. Welch

William S. Bennett

Melanie A. McDonald

Kyle A. Rudolph

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By: /s/ William S. Bennett

Attorneys for Appellant, BAYWA RE WIND, LLC

Footnotes

1 The policy was issued by Appellees, RSG Underwriting Managers, LLC trading as Power.Energy.Risk, Lloyd's Syndicate CSL 1084, Lloyd's Syndicate 1458 Renaissancere Management Limited, QBE Insurance (Uk) Limited, Lloyd's Syndicate Atrium 609, Convex Insurance UK Limited, Scottsdale Insurance Company, Everest Indemnity Insurance Company, Accident Fund General Insurance Company (AFGIC), HDI Global Specialty Se, AGCS Marine Insurance Company, QBE (UK) Limited (collectively, the "Insurers") to Appellants, BayWa r.e. Wind, LLC ("BayWa") and Strauss Wind, LLC ("Strauss") (collectively, the "Insureds"). (*See* CT-73, 103-04).

2 The Insurers issued the Insureds two consecutive all-risk insurance policies for direct physical loss or damage to the Insureds' wind-powered electrical project, with the first insurance policy bearing a policy reference number of "PER 20 WPC 0251" and covering a period of December 31, 2020 to December 31, 2022 (the "2020-2022 Policy"), and the second insurance policy bearing a policy reference number of "PER 22 WPO 0227" and covering a period of December 31, 2022 to August 17, 2024 (the "2022-2023 Policy"). (CT-12, 29, 70, 73, 129-30, 209).

3 The 2022-2023 Policy also contains several insurer-specific service of suit endorsements, including a "CONVEX SERVICE OF SUIT CLAUSE (U.S.A.)" endorsement and an Accident Fund General Insurance Company "SERVICE OF SUIT ENDORSEMENT," none of which contain specific law or forum limitation language. (1 App. 92, 93, 101, 110).

4 The Insurers made no such showing in their Motion. (*See generally* 1 App. 196-203).

5 Additionally, had the Insurers intended for the "Service of Suit Clause" and "Applicable Law (U.S.A.)" endorsement to apply to service of process rather than forum selection, as the trial court found, then the Insurers could have simply limited the language within the clause and endorsement to apply only to service of process. (*See* 1 App. 91-92). They did not do so. *See* *Pardee Constr. Co. v. Ins. Co. of the W.* (2000) 77 Cal.App.4th 1340, 1359 ("The insurers could have limited coverage by express policy language that coverage was limited to claims arising from work performed during the policy period. However, they did not.").

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