LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 15-08359-BRO (PJWx)**	Date	March 23, 2017
Title	**COMMERCIAL VENTURES, INC. V. SCOTTSDALE INSURANCE COMPANY**		

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

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (IN CHAMBERS)

ORDER RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT [63, 65]

I. INTRODUCTION

Currently pending before the Court are Defendant Scottsdale Insurance Company's ("Defendant") Motion for Summary Judgment, (Dkt. No. 63 (hereinafter, "Def. MSJ")), and Plaintiff Commercial Ventures, Inc.'s ("Plaintiff") Motion for Partial Summary Judgment, (Dkt. No. 65 (hereinafter, "Pl. MSJ")). After considering the papers filed in support of and in opposition to the instant Motion, as well as oral argument of counsel, the Court **GRANTS** Defendant's Motion and **DENIES** Plaintiff's Motion.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

This action arises from an insurance coverage dispute between Plaintiff and Defendant. The facts underlying the disagreement are largely undisputed. Plaintiff is a Delaware corporation with its principal place of business in Los Angeles, California. (Dkt. No. 75-1) (hereinafter, "Pl. SUF") ¶ 1.)[1] Plaintiff is acting on behalf of Daylight Investors, LLC ("Daylight") and Noblita, LLC ("Noblita"), two Delaware limited liability companies, with their principal places of business in Los Angeles, California, who are Plaintiff's affiliates and are additional insureds under the terms of the Policy.

[1] The Court cites Dkt. No. 75-1 when referencing Plaintiff's Statement of Undisputed Facts and Dkt. No. 77-1 when referencing Defendant's Statement of Undisputed Facts as each includes both the proffered undisputed fact and the opposing party's response.

(Pl. SUF ¶¶ 4, 7–8; Def. SUF ¶ 1.) Noblita—the company at issue here—is an apparel business formed in May 2011. (Pl. SUF ¶ 10.) Defendant is an insurance company incorporated in Ohio, with its principal place of business in Scottsdale, Arizona. (Dkt. No. 1 (hereinafter, "Compl.") ¶ 4.) Defendant issued a Business Management Indemnity Policy to Plaintiff, Policy No. EKS3085776 (the "Policy"), effective from February 1, 2013, to February 1, 2014. (Pl. SUF ¶ 2; Dkt. No. 77-1 (hereinafter, "Def. SUF") ¶ 10.)

The Policy provides coverage for, amongst other things, crime losses during the insured period, with a $25,000 deductible and $1 million in aggregate coverage for each loss.[2] (*See* Pl. SUF ¶ 5; Def. SUF ¶ 12; *see also* Declaration of Jonathan A. Sorkowitz (Dkt. No. 64) (hereinafter, "Sorkowitz Decl."), Ex. A (hereinafter, "Policy"); Declaration of Gregory Beach (Dkt. No. 67) (hereinafter, "Beach Decl."), Ex. 1.)[3] The Crime Coverage portion of the Policy includes coverage for "Employee Theft." (Def. SUF ¶ 13; *see also* Policy at 20.)[4] "Employee" is defined in the Policy as:

> Any natural person while in the services of the Insured, including sixty (60) days after termination of service; provided the Insured:
>
> i. compensates such person directly by salary, wages or commissions; and
>
> ii. has the right to direct and control such person while performing services for the Insured.

(Policy at 22; *see also* Def. SUF ¶ 15.)

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[2] Defendant disputes Plaintiff's characterizations of the Policy in Plaintiff's Statement of Undisputed Facts, (*see, e.g.*, Pl. SUF ¶¶ 3–5), arguing that the Policy speaks for itself; nonetheless, Defendant provides similar characterizations in its own Statement of Undisputed Facts, (*see, e.g.*, Def. SUF ¶¶ 12–14). The Court has reviewed the Policy and, so long as the parties' characterizations are accurate representations of the Policy, cites the corresponding undisputed fact containing the parties' description of the Policy. The Court also cites the relevant provision of the Policy.

[3] The policies each party provides appear to be identical. (*Compare* Sorkowitz Decl., Ex. A *with* Beach Decl., Ex. 1.) Accordingly, the Court refers to only one for the sake of convenience and brevity.

[4] The Policy page numbers refer to the ECF number, as the Policy is not consecutively paginated.

Noblita's owners are Daylight, who has a 49% ownership interest, Richard or "Rik" Guido ("Mr. Guido"), who has a 49% ownership interest, and Adrienne Switzer Guido, who has a 2% ownership interest. (Def. SUF ¶ 2; Pl. SUF ¶ 10.) As an owner of the company, Mr. Guido was entitled to receive $27,500 per month under certain conditions. (*See* Dkt. No. 67-2 (hereinafter, "Operating Agreement") § 5.2(b).) The proper characterization of this payment (as a wage, salary, owners' draw, or otherwise) is a point of contention between the parties.

In November 2013, Daylight filed a lawsuit against Mr. Guido in the Superior Court of California, County of Los Angeles. (Def. SUF ¶ 17.) In its Complaint, Daylight alleged that Mr. Guido participated in a fraudulent scheme transferring money and inventory from Noblita to another Florida-based company in which he had an ownership interest. (*See* Def. SUF ¶ 23; *see also* Pl. SUF ¶ 24.) Accordingly, Plaintiff notified Defendant, through its insurance broker, of a "potential employee theft/crime claim" involving Mr. Guido in late 2013 or early 2014.[5] (*See* Def. SUF ¶ 24; Pl. SUF ¶ 25.) Defendant sent Plaintiff a later dated January 14, 2014, acknowledging Plaintiff's claim. (Def. SUF ¶ 25.) On January 30, 2014, Cheryl Lanier, one of Defendant's adjusters, sent Greg Beach, Noblita's controller, a letter quoting certain terms of the Policy and enclosing a Crime Proof of Loss Form. (Def. SUF ¶ 26.) On February 10, 2014, Mr. Beach sent Ms. Lanier a letter explaining that Mr. Guido "was not entitled to take any distribution from Noblita" unless the company had adequate monies or was profitable. (Def. SUF ¶ 27.) According to Mr. Beach, the majority of the months during which Mr. Guido worked for Noblita it had negative operations and Mr. Guido was not entitled to a distribution. (*Id.*) Nonetheless, Mr. Beach averred that Mr. Guido "inappropriately took over $1 million in distributions from the Company." (*Id.*)

On March 25, 2014, Mr. Beach sent Ms. Lanier a letter informing her that Noblita had reached a settlement with Mr. Guido relating to the Superior Court action and asking for an extension of time for filing a Proof of Loss. (*See* Def. SUF ¶¶ 28, 30.) Ms. Lanier granted the extension and gave Plaintiff until September 30, 2014, to file its Proof of Loss. (Def. SUF ¶ 30.) On April 4, 2014, Mr. Beach e-mailed Ms. Lanier, informing her that Plaintiff intended to go forwards with its claim under the crime provision of the Policy. (Def. SUF ¶ 31; Pl. SUF ¶ 26.) Plaintiff's Proof of Loss indicated that it

[5] The parties dispute when Plaintiff informed Defendant of the possible loss. (*See* Def. SUF ¶ 24.) The date is not material in this case, however.

intended to make a claim for a $1 million loss "occurring through the dishonesty of Richard Guido employed as President from May 2011 to October 30, 2013," with "said loss occurring between May 2011 and October 30, 2013, and discovered on 10-29-2013." (Def. SUF ¶ 32.)

In June 2014, Defendant assigned the claim to outside coverage counsel, Paul Fonseca of the Patterson & Flannery law firm. (Def. SUF ¶ 35.) On December 12, 2014, Mr. Fonseca sent Plaintiff's counsel a letter denying the claim on the basis that Mr. Guido "was a non-salaried member of Noblita, not an employee" and was therefore not covered by the crime provision of Plaintiff's policy. (*See* Def. SUF ¶¶ 36–37.) Defendant reaffirmed its denial of coverage after April 29, 2015. (Def. SUF ¶ 38.)

B. Procedural Background

Accordingly, on October 26, 2015, Plaintiff filed its Complaint in this Court, bringing two causes of action against Defendant for (1) breach of contract, and, (2) breach of the implied covenant of good faith and fair dealing. (*See* Compl.) Defendant filed its Answer on December 21, 2015, raising sixteen affirmative defenses. (*See* Dkt. No. 18.)

On January 13, 2017, Defendant filed its Motion for Summary Judgment. (*See* Def. MSJ.) On January 16, 2017, Plaintiff filed its Motion for Partial Summary Judgment. (*See* Pl. MSJ.) On February 13, 2017, each party opposed the other's Motion. (*See* Dkt. Nos. 75, 77 (hereinafter, "Pl. Opp'n").) On February 17, 2017, Plaintiff filed its Reply, (*see* Dkt. No. 83), and its objections to Defendant's proffered evidence, (*see* Dkt. No. 84 (hereinafter, "Objs.")). On February 20, 2017, Defendant replied.[6] (Dkt. No. 85.)

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[6] On February 21, 2017, Plaintiff filed an Ex Parte Application to strike Defendant's Reply, arguing that it was untimely under this Court's Standing Order. (*See* Dkt. No. 87.) This Court's Standing Order requires that, whenever a filing is due on a federal holiday, the submission be filed the preceding Friday. (Dkt. No. 9 at 3.) As February 20, 2017, was a federal holiday, the parties' Replies were due on Friday, February 17, 2017. The Court denied Plaintiff's Ex Parte Application, (*see* Dkt. No. 91), but admonishes Defendant to ensure compliance with this Court's Standing Order and Local Rules in the future.

III. EVIDENTIARY OBJECTIONS

Plaintiff is the only party that raises objections to proffered evidence in this case. (*See* Objs.) Specifically, Planitiff makes six objections primarily relating, at least in part, to two expert reports that Defendant proffers in support of its Opposition to Plaintiff's Motion for Summary Judgment. (*See id.*; *see also* Dkt. No. 76-1.) Generally, expert reports are inadmissible hearsay. *See Hunt v. City of Portland*, 599 F. App'x 620, 621 (9th Cir. 2009) (concluding that expert report was inadmissible hearsay); *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1262 (9th Cir. 1984) (explaining that Federal Rule of Evidence 703 "does not allow the admission of [expert] reports to establish the truth of what they assert"). Expert reports may be admissible if they fall under one of the hearsay exceptions, but the report's proponent bears the burden of establishing the basis for such an exception. *See Escobar v. AirBus Helicopters SAS*, No. 13-00589 HG-RLP, 2016 WL 6024441, at *1 (D. Haw. Oct. 4, 2016). Defendant does not argue that any exception applies here. Therefore, the two expert reports written by Ms. Stacy A. Kinsel and Mr. Howard Wollitz that Defendant proffers in this case are inadmissible hearsay and the Court does not rely on them in reaching its decision. Accordingly, the Court **SUSTAINS** Plaintiff's objections number 1, 2, 3, and 6. (*See* Obj. at 2–3, 5.)

In addition, Plaintiff objects to Defendant's contention that "[t]he claimed losses do not appear to be losses resulting from a dishonest or fraudulent act." (*See* Obj. at 4; Pl. SUF ¶¶ 23, 24.) Plaintiff argues that this statement is speculative and lacks foundation. (*See* Obj. at 4.) It appears that Defendant is relying on Ms. Kinsel's expert report to support its contention. (*See* Pl. SUF ¶¶ 23, 24.) As the Court finds Ms. Kinsel's report is inadmissible, the Court **SUSTAINS** Plaintiff's objections number 4 and 5.

IV. LEGAL STANDARD

A. Summary Judgment

Summary judgment is appropriate when, after adequate discovery, the evidence demonstrates that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A disputed fact is material where its resolution might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine if the

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

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

A court may consider the pleadings, discovery, and disclosure materials, as well as any affidavits on file. Fed. R. Civ. P. 56(c)(2). Where the moving party's version of events differs from the non-moving party's version, a court must view the facts and draw reasonable inferences in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). Although a court may rely on materials in the record that neither party cited, it need only consider cited materials. Fed. R. Civ. P. 56(c)(3). Therefore, a court may properly rely on the non-moving party to identify specifically the evidence that precludes summary judgment. *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996).

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

B. Interpretation of Insurance Contracts

It is well established that the interpretation of an insurance contract is a question of law for the court to determine. *See Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18 (Cal. 1995). General principles of contract interpretation apply to the interpretation of insurance contracts. *See Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.*, 3 Cal. 3d 434, 442 (Cal. 1970). Under California law, "the mutual intention of the parties at the time the contract is formed governs." *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 821–22 (Cal. 1990); *see also* Cal. Civ. Code § 1636 ("A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."). The parties' mutual intent should generally be inferred "solely from the written provisions of the contract." *AIU Ins. Co.*, 51 Cal. 3d at 822. A court should adhere to the clear and explicit meaning of contractual provisions and interpret them in light of their "ordinary and popular sense." *Id.* (internal quotation marks omitted). Accordingly, so long as the contract language is unambiguous, the meaning that a lay person would ascribe controls. *Id.*

To the extent a contract's language is ambiguous, "it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." Cal. Civ. Code § 1649. In the context of insurance contracts, California courts "generally resolve ambiguities in favor of coverage" and interpret policies broadly to protect the insured's "objectively reasonable expectations." *AIU Ins. Co.*, 51 Cal. 3d at 822. This rule, however, is not absolute: "where the policyholder does not suffer from lack of legal sophistication or a relative lack of bargaining power, and where it is clear that an insurance policy was actually negotiated and jointly drafted, [courts] need not go so far in protecting the insured from ambiguous or highly technical drafting." *Id.* at 823 (citing *Garcia v. Truck Ins. Exch.*, 36 Cal. 3d 426, 438 (Cal. 1984)). Whether contract language is ambiguous is a question of law. *Hillman v. Leland E. Burns, Inc.*, 209 Cal. App. 3d 860, 866 (Cal. Ct. App. 1989).

Insurance contract interpretation therefore involves a three-step process. First, a court must determine whether the contract language is ambiguous. If it is not, then the contract's "clear and explicit" terms are controlling. However, if an ambiguity exists, then the court must interpret the terms in accordance with the insured's "objectively reasonable expectations." If this fails to resolve the ambiguity, then the ambiguous term

is construed against the insurer, i.e., in favor of coverage. *See GE Engine Servs. UNC Holding I, Inc. v. Century Indem. Co.*, 250 F. Supp. 2d 1237, 1241 (C.D. Cal. 2001) (explaining the three-step analysis). It is also well-settled that the insurer carries the burden of proving the applicability of a specific policy exclusion. *See Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 406 (Cal. 1989).

When construing the terms of an insurance policy, "[i]t is the burden of the insured 'to bring the claim within the basic scope of coverage,' and the burden of [the insurer] to prove exclusions to the coverage." *Golden Eagle Ins. Corp. v. Cen–Fed, Ltd.*, 148 Cal. App. 4th 976, 984 (Cal. Ct. App. 2007) (citing *Waller*, 11 Cal. 4th at 16).

V. DISCUSSION

The parties primarily dispute one issue: whether Mr. Guido is an "employee" under the terms of the Policy. (*See* Def. MSJ; Pl. MSJ.) Defendant contends that Mr. Guido does not fall within the Policy's definition of "employee" because he was not paid "salary, wages or commissions." (*See* Def. MSJ at 11–14.) Plaintiff, on the other hand, argues that Mr. Guido was an employee under the terms of the Policy because the "owner distributions" by which Mr. Guido was compensated constitutes "salary, wages or commissions" under the Policy. (*See* Pl. MSJ at 11–19.) Plaintiff also moves for summary judgment on each of Defendant's affirmative defenses. (*See* Pl. MSJ at 19–25.) Before reaching the affirmative defense arguments, however, the Court must decide the threshold issue regarding Mr. Guido's employment status under the Policy. For the following reasons, the Court finds that Mr. Guido is not an employee and therefore does not reach the remainder of Plaintiff's arguments.

A. Whether Mr. Guido is an Employee Under the Terms of the Policy

As explained above, the Policy's crime coverage provision indicates that Defendant "will pay for loss of or damage to Money, Securities and Other Property resulting directly from Theft or Forgery by any identifiable *Employee* while acting alone or in collusion with others." (*See* Policy at 21 (emphasis added).) The Policy includes a two-prong definition of "employee": (1) Plaintiff must "compensate[] such person directly by salary, wages or commissions"; and, (2) must have "the right to direct and control such person while performing services" for Defendant. (*See* Policy at 22.) It is

the first requirement—whether Mr. Guido received "salary, wages or commissions" that gives rise to the parties' dispute.

1. Whether the Policy's Definition of "Employee" Is Ambiguous

The Policy does not define "salary, wages or commissions," (*see* Policy; *see also* Pl. MSJ at 12); thus, the Court must use their dictionary definitions, *see Gilliam v. Nev. Power Co.*, 488 F.3d 1189, 1195 (9th Cir. 2007) (holding that where retirement plan was "silent as to the definition of the phrase 'wages and salary,' we look to the dictionary definition to determine the ordinary and popular meaning"). The parties agree that the dictionary definitions of "salary, wages or commissions" control, though they disagree on which dictionary the Court should use. (*See* Def. MSJ at 12 (using Webster's II New Collegiate Dictionary); Pl. MSJ at 13–14 (using Black's Law Dictionary).)

Webster's New Collegiate Dictionary defines "salary" as "fixed compensation paid regularly for services." *Salary*, Merriam-Webster Dictionary (Online ed. 2017), https://www.merriam-webster.com/dictionary/salary. It defines "wage" as "a payment usually of money for labor or services usually according to contract and on an hourly, daily, or piecework basis." *Wage*, Merriam-Webster Dictionary (Online ed. 2017), https://www.merriam-webster.com/dictionary/wages. "Commission" is defined, in relevant part, as "a fee paid to an agent or employee for transacting a piece of business or performing a service." *Commission*, Merriam-Webster Dictionary (Online ed. 2017), https://www.merriam-webster.com/dictionary/commission.

Similarly, Black's Law Dictionary defines "salary" as "[a]n agreed compensation for services—esp. professional or semiprofessional services—usu. Paid at regular intervals on a yearly basis, as distinguished from an hourly basis." *Salary*, Black's Law Dictionary (10th ed. 2014). "Wage" is defined as "[p]ayment for labor or services, usu. Based on time worked or quantity produced; specif., compensation of an employee based on time worked or output of production." *Wage*, Black's Law Dictionary (10th ed. 2014). Finally, Black's Law Dictionary defines "commission" as relevant here as "[a] fee paid to an agent or employee for a particular transaction, usu. as a percentage of the money received from the transaction." *Commission*, Black's Law Dictionary (10th ed. 2014).

The parties appear to agree that, regardless which dictionary is used, the common factor between all definitions of "salary," "wages," or "commissions" is that each constitutes compensation for a person's services. (*See* Def. MSJ at 12 ("The key concept of a 'wage, salary or commission' is fixed compensation paid in exchange for services."); Pl. MSJ at 14 ("Accordingly, based on the definitions above, a person could be compensated by either 'salary,' 'wages' or 'commissions' for their services, professional or otherwise under varying ways and combinations.")); *accord Gilliam*, 488 F.3d at 1196 ("The parties do not contend, nor do we believe, that the phrase 'wages and salary' is ambiguous. In short, we are persuaded that the ordinary and common meaning of 'wages and salary,' . . . is remuneration for services.").

Therefore, the Court finds that the definition of "employee" is unambiguous as it is clearly defined in the policy. *See State Farm Gen. Ins. Co. v. Mintarsih*, 175 Cal. App. 4th 274, 283 (Cal. Ct. App. 2009) ("Policy language is ambiguous if it is susceptible of more than one reasonable interpretation in the context of the policy as a whole."). In addition, "salary, wages or commissions"—words used to define "employee"—are not ambiguous as they are only subject to one interpretation in this case as well. Therefore, the issue becomes solely whether there is a triable issue of fact as to whether Plaintiff paid Mr. Guido *for his services*, in turn, meaning whether he was paid "salary, wages, or commissions."[7]

2. Whether the Operating Agreement Indicates that Noblita Paid Mr. Guido for His Services

The parties agree that Noblita's Limited Liability Company Operating Agreement (the "Operating Agreement"), under which Noblita operates and which defines Mr. Guido's role as Noblita's President, provides significant guidance in determining whether Noblita intended to pay Mr. Guido for his services or for his role as an owner. (*See* Def. MSJ at 12–13; Pl. MSJ at 15.) Indeed, California law indicates that courts are "to give maximum effect to the principles of freedom of contract and to the enforceability of

[7] There is some disagreement between the parties as to whether the dictionary definition of "salary," "wages," or "commissions" requires "fixed" or "regular" payments for services. (*See* Pl. Opp'n at 13–14.) It is not the "fixed" or variable nature of Mr. Guido's payments that are dispositive in this case, however. Therefore, this dispute is immaterial.

operating agreements."[8] Cal. Corp. Code § 17701.07(a); Cal. Corp. Code § 17701.10(a) (providing that an operating agreement governs, among other things, relationships amongst members of a limited liability company). Thus, the Court examines the terms of the Operating Agreement.

Noblita's Operating Agreement provides that Mr. Guido was to serve as President of Noblita. (*See* Operating Agreement § 5.2(b).) In addition, the Operating Agreement stated:

> Mr. Guido will not be paid for such services, but so long as (1) he is President of the Company and rendering his full time services to the Company (and in compliance with the terms of this Agreement) and (2) the company has adequate monies, Mr. Guido will receive a Distribution of TWENTY-SEVEN THOUSAND FIVE HUNDRED DOLLARS ($27,500) per month.

(*Id.*) The Operating Agreement also defines "distribution" as "the transfer of money or property by [Noblita] to one or more Members without separate consideration." (Operating Agreement § 1.15.)

Thus, based on the terms of the Operating Agreement, Defendant contends that Mr. Guido was not paid "salary, wages or commissions" because the Operating Agreement (1) clearly indicates that he "will not be paid for . . . services," and, (2) indicates that his distribution payments were intended to be made "without separate consideration." (Def. MSJ at 13.) Plaintiff argues that the Operating Agreement indicates that Mr. Guido *was* paid for his services, because in order to receive his distributions he was required to remain President of Noblita and render his full time services to Noblita. (*See* Pl. MSJ at 15.) As explained below, the Court agrees with Defendant and disagrees with Plaintiff.

As Plaintiff itself explains, the Court is to read corporate agreements according to the same "general rules governing the construction of statutes and contracts." *English &*

[8] In addition, Diana Fitzgerald, Plaintiff's counsel, sent a letter, dated April 29, 2015, to Mr. Fonseca, Defendant's outside coverage counsel, in which he stated that the Operating Agreement was "instructive with respect to Guido's status as an employee and his compensation structure." (*See* Sorkowitz Decl., Ex. O.) Plaintiff does not object to the admissibility of this letter and agrees that the Operating Agreement is instructive. (*See* Pl. MSJ at 15.)

Sons, Inc. v. Straw Hat Rests., Inc., 176 F. Supp. 3d 904, 914 (N.D. Cal. 2016) (internal quotation marks omitted). Under California law, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Cal. Civ. Code § 1641. "Contract interpretations that deprive words of meaning are to be avoided." *Lennar Mare Island, LLC v. Steadfast Ins. Co.*, 176 F. Supp. 3d 949, 955 (E.D. Cal. 2016); *see also In re Tobacco Cases I*, 186 Cal. App. 4th 42, 49 (Cal. Ct. App. 2010) ("We must give significance to every word of a contract, when possible, and avoid an interpretation that renders a word surplusage.").

If the Court agreed with Plaintiff and found that the Operating Agreement indicates that Noblita was providing Mr. Guido $27,500 payments in exchange for his services, this interpretation would deprive several of the Operating Agreement's clauses of their meaning. For instance, if the Court adopted Plaintiff's view, the definition of distribution that specifically indicates distributions are made "without separate consideration" would have no meaning, nor would the provision indicating that "Mr. Guido will not be paid for" his services as President. On the other hand, in adopting Defendant's view, the Court may give these provisions their plain meaning and may still read the Operating Agreement as a cohesive whole. In other words, in the Court's view, it appears that the parties, as reflected in the Operating Agreement, intended to appoint Mr. Guido as President of Noblita and to provide him with ownership distributions. (*See* Operating Agreement § 5.2(b).) The Operating Agreement did not intend, however, to compensate Mr. Guido *for his services* as President; rather, it compensates him in his role as an owner through distributions *only*. Though the Operating Agreement indicates that Mr. Guido is entitled to his owner distributions only so long as he served as President, this does not mean that his owner distributions are intended to compensate him *for* his services.[9]

[9] At oral argument, Defendant noted that section 5.3 of the Operating Agreement provides that Daylight and National Multifamily Investors, LLC materially relied on Mr. Guido's continued service as president when they provided capital to Noblita. (*See* Operating Agreement § 5.3.) Therefore, it appears that Mr. Guido was receiving consideration for his services in the form of capital invested in Noblita, rather than through the distributions identified in section 5.2. In fact, in the Superior Court lawsuit brought against Mr. Guido, Daylight sought to recover its investment in Noblita after discovering that Mr. Guido apparently never intended to act as Noblita's president. (*See* Dkt. No. 64-3 ¶ 13.) In other words, Daylight sought to recover the consideration it provided Mr. Guido for his

In addition, Plaintiff argues that section 5.3 of the Operating Agreement establishes that Mr. Guido was paid for his services. (*See* Pl. Opp'n at 6–7.) The Court disagrees. Section 5.3, entitled "Employment Commitment,"[10] provides Mr. Guido's obligations as President of Noblita. (*See* Operating Agreement § 5.3.) Nowhere in this provision, however, does it indicate that Mr. Guido is to be *compensated* for these services; rather, as explained above, section 5.2 indicates to the contrary. (*See* Operating Agreement §§ 5.2, 5.3.) Therefore, there is a fatal disconnect in Plaintiff's argument; Plaintiff contends that Mr. Guido performed services for Noblita—an undisputed contention—and that Mr. Guido received monies (or was entitled to receive monies) in the form of owner or member distributions[11]—also an undisputed contention. The flaw in Plaintiff's argument is that the Operating Agreement indicates that Mr. Guido is *not* to receive any distribution *for* performing services as President; to the contrary, the Operating Agreement indicates that the distributions are wholly divorced from any such services

services. This provides further support for the Court's conclusion that it was the capital provided to Noblita—not the distributions—that constituted Mr. Guido's compensation for his services as president.

[10] The fact that this provision is entitled "Employment Commitment" is of no moment; the issue is whether Mr. Guido is considered an employee under the provisions of the Policy, meaning whether he was paid "salary, wages or commissions." (*See* Policy at 22.) Even if the parties otherwise considered Mr. Guido an employee (which is contrary to the evidence before the Court), if he was not paid "salary, wages or commissions" he may not be considered an "employee" under the Policy's terms. (*See id.*) The Court considers evidence beyond the definition of policy terms only when it is required to interpret ambiguous terms of a contract, *see AIU Ins. Co.*, 51 Cal. 3d at 822 ("[I]f the meaning a lay person would ascribe to the contract language is not ambiguous, we apply that meaning.")—which, as determined above, is not the case here.

[11] Plaintiff also contends that the definition of "distribution" is ambiguous. (*See* Pl. Opp'n at 12–13.) The Court disagrees. "A contract is ambiguous only if it is reasonably susceptible of two or more interpretations." *In re Tobacco Cases I*, 186 Cal. App. 4th at 48. "Distribution" is defined in the Operating Agreement as "the transfer of money or property by the Company to one or more Members without separate consideration." (Operating Agreement § 1.15.) "Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists." *Smith v. Simmons*, 638 F. Supp. 2d 1180, 1193 (E.D. Cal. 2009). Thus, while Plaintiff urges the Court to find an ambiguity here, the Court declines to do so. The definition of distribution in the Operating Agreement is clear and is not susceptible to multiple interpretations.

and are intended to compensate him as an owner or member of Noblita. (*See* Operating Agreement §§ 1. 15, 5.2(b).)

In support of its position, Plaintiff relies on two out-of-circuit cases. First, Plaintiff cites *Charm Promotions, Ltd. v. Travelers Indemnity Co.*, 447 F.2d 607 (7th Cir. 1971). (*See* Pl. MSJ at 16–17.) There, the district court granted summary judgment in favor of defendant after finding that there was no genuine issue of material act that two directors of a company did not receive salaries for their services relying, in part, on the company's bylaws. *See Charm Promotions*, 447 F.2d at 610. The Seventh Circuit reversed, finding that a triable issue of fact existed because at least one of the directors testified that "he was paid a salary, depending on the availability of funds," there was evidence that the company withheld taxes from the director's paychecks, and the directors' income tax returns indicated that they represented their payments as salaries. *See id.* Here, there is no similar evidence to create a triable issue of fact; rather, the facts are undisputed and Plaintiff is merely urging the Court to interpret the Operating Agreement in line with its view.[12]

Next, Plaintiff relies on the Fourth Circuit's decision in *Phoenix Savings & Loan, Inc. v. Aetna Casualty & Surety Co.*, 427 F.2d 862 (4th Cir. 1970). (*See* Pl. MSJ at 17.) There, the court—applying Maryland law—held that "periodic cash payments and stock for services rendered by them as corporate officers" constituted a "salary" for purposes of insurance coverage. *See Phx. Sav.*, 427 F.2d at 873. Missing in that case, however, was a provision like section 5.2 of the Operating Agreement here indicating that any distributions are *not* intended to be for Mr. Guido's services and that distributions are independent of other consideration. Accordingly, the Court finds *Phoenix Savings* inapposite.

Therefore, in sum, the Court finds that there is no genuine issue of material fact; rather, the parties' only dispute is to the proper interpretation of the Operating Agreement and whether Mr. Guido's distributions were intended to be payment for his services.

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[12] Further, to the extent the Court considers additional facts beyond the Operating Agreement, they support Defendant's contention that Mr. Guido was not an employee. For example, Plaintiff provided Defendant with Mr. Guido's personnel file. The personnel file did not contain any W-2s or W-4s for Mr. Guido, and Plaintiff does not provide evidence indicating that Mr. Guido reported his distributions as income on his tax returns, unlike the employees in *Charm Promotions*. (*See* Def. SUF ¶ 40.)

Such issues of contract interpretation are legal—not factual—issues. *See Travelers Cas. & Sur. Co. v. Am. Int'l Surplus Lines Ins. Co.*, 465 F. Supp. 2d 1005, 1012 (S.D. Cal. 2006) ("Contract interpretation is a legal issue to be resolved by the court. When a contract is not ambiguous, summary judgment may be entered based on the court's interpretation of clear and unambiguous provisions which present only questions of law."). Under California's canons of contract interpretation, the Court finds that the Operating Agreement in this case establishes that Mr. Guido was not paid for his services and, therefore, did not receive "salary, wages or commissions." Plaintiff has presented no evidence to the contrary to create a genuine dispute of material fact. Accordingly, as the Policy provides theft coverage only for employees who were paid "salary, wages or commissions," the Court finds that Mr. Guido was not an employee under the terms of the Policy and Defendant did not breach the terms of the Policy by refusing to provide theft coverage as to Mr. Guido's conduct. Accordingly, the Court **GRANTS** Defendant's Motion for Summary Judgment as to Plaintiff's first claim for breach of contract.

B. Breach of the Implied Covenant of Good Faith and Fair Dealing

Defendant also moves for summary judgment on Plaintiff's second claim for breach of the implied covenant of good faith and fair dealing, relying on the purported lack of coverage. (*See* Def. MSJ at 17.) Under California law, "breach of the implied covenant is not established 'without first establishing that coverage exists.'" *O'Keefe v. Allstate Indem. Co.*, 953 F. Supp. 2d 1111, 1115 (S.D. Cal. 2013) (quoting *Cal. State Auto. Ass'n Inter-Ins. Bur. v. Superior Court*, 184 Cal. App. 3d 1428, 1433 (Cal. Ct. App. 1986)). Therefore, "[w]here benefits are withheld for proper cause, such as lack of coverage under the policy, there is no breach of the implied covenant." *Id.*; *accord Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1151–52 (Cal. Ct. App. 1990) (explaining that one requirement to establish a breach of implied covenant claim requires "benefits due under the policy" having been withheld). As the Court has determined above that Defendant did not withhold benefits due Plaintiff, Plaintiff's implied covenant claim necessarily fails. Accordingly, the Court also **GRANTS** Defendant's Motion for Summary Judgment as to Plaintiff's second claim for breach of the implied covenant of good faith and fair dealing.

VI. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant's Motion and **DENIES** Plaintiff's Motion. Defendant is **ORDERED** to file a proposed judgment that complies with this Order no later than **Tuesday, March 28, 2017, at 4:00 p.m.**

IT IS SO ORDERED.

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