Neil A. Goteiner (State Bar No. 083524)
ngoteiner@fbm.com
Farella Braun + Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, California 94104
Telephone: (415) 954-4400
Facsimile: (415) 954-4480

Attorneys for Petitioners and Plaintiffs
JON B. EISENBERG and JEFF SENGSTACK

Jon B. Eisenberg (State Bar No. 88278)
Law Office of Jon B. Eisenberg
509 Tucker Street
Healdsburg, CA 95448
Telephone: (707) 395-0111

Attorney for Petitioner and Plaintiff
JEFF SENGSTACK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

JON B. EISENBERG and JEFF SENGSTACK,

Petitioners and Plaintiffs,

vs.

DAVE JONES, in his capacity as California Insurance Commissioner, and CALIFORNIA DEPARTMENT OF INSURANCE, ,

Respondents and Defendants.

Case No. CGC-18-567790

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: September 19, 2018
Time: 9:30 a.m.
Department: 302

Reservation No. 08010910-04

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

STATE CASES

STATE STATUTES

STATE REGULATIONS

OTHER AUTHORITY

INTRODUCTION

Insurance Commissioner Dave Jones and the California Department of Insurance (CDI) assert, if only for purposes of this litigation, that they have no mandatory duties either to (1) investigate and take action on consumer complaints under Insurance Code sections 12921.3 and 12921.4, or (2) investigate unfair or deceptive acts in the business of insurance under Insurance Code section 790.05. They are wrong. They overlook the statutes' plain meaning, compelling indicators of legislative intent, and their own binding stipulated judgment in another lawsuit.

LEGAL DISCUSSION

I. DEFENDANTS' DUTIES TO INVESTIGATE AND TAKE ACTION ON CONSUMER COMPLAINTS AND TO INVESTIGATE UNFAIR OR DECEPTIVE ACTS IN THE BUSINESS OF INSURANCE ARE MANDATORY.

When sections 12921.3 and 12921.4 were created and amended in 1982 and 1990, the Legislature plainly intended to impose mandatory duties. A legislative committee analysis of the 1982 bill that created section 12921.3 explained that the bill would "*[r]equire* the Insurance Commissioner to receive, investigate and respond to consumer complaints," thereby changing existing law under which "[t]he Insurance Commissioner currently has *discretion* with regard to the handling of consumer complaints." (Assem. Com. on Consumer Protection and Toxic Materials, Rep. on Assem. Bill No. 3151 (1981-1982 Reg. Sess.) Apr. 13, 1982, p. 1, emphasis added; see Plfs.' Req. for Jud. Not. Exh. 1.) Another analysis for the 1982 bill described the new requirement to investigate and respond to consumer complaints as a "statutory *mandate*." (Cal. Dept. of Consumer Affairs, analysis of Assem. Bill No. 3151 (1981-1982 Reg. Sess.) Sept. 1, 1982, p. 2, emphasis added; see Plfs.' Req. for Jud. Not. Exh. 2.)

The 1990 bill amended sections 12921.3 and 12921.4 to strengthen their provisions by requiring CDI "to establish a program . . . to investigate consumer complaints and bring enforcement action." (Sen. Rules Com., Off. of Sen. Floor Analyses, Rep. on Sen. Bill No. 2569 (1989-1990 Reg. Sess.) Aug. 22, 1990, p. 2; see Plfs.' Req. for Jud. Not. Exh. 3.) A legislative committee analysis of the 1990 bill explained that the bill's impetus was a 1989 lawsuit in this Court—*Boorhis v. Gillespie*, San Francisco Superior Court No. 907349—in which Judge John Dearman "found that the commissioner had violated the consumer protection laws by failing to

comply with its *mandatory requirements* and . . . , to the extent that the statute gave the commissioner discretion, by *failing to exercise such discretion.*" (*Ibid.*, emphasis added; see Plfs.' Req. for Jud. Not. Exh. 3.) Another bill analysis further explained that Judge Dearman found, among other things, that CDI had systemically "failed to take action" on consumer complaints. (Sen. Com. on Finance and Insurance, 3d reading analysis of Sen. Bill No. 2569 (1989-1990 Reg. Sess.) as amended June 28, 1990, p. 3; see Plfs.' Req. for Jud. Not. Exh. 4.) Yet another bill analysis explained that "[t]he purpose of this measure is to force the Department of Insurance to do a better job." (Assem. Com. on Finance and Insurance, analysis of Sen. Bill No. 2569 (1989-1990 Reg. Sess.) as proposed to be amended June 26, 1990, pp. 2-3; see Plfs.' Req. for Jud. Not. Exh. 5.)[1]

In *Boorhis*, Judge Dearman also found that the Commissioner's duty to investigate unfair or deceptive acts in the business of insurance under 790.05 is *mandatory* and that the Commissioner had failed to heed this statutory mandate. Judge Dearman based this ruling in part on the fact that between 1985 and 1989, the Commissioner had instituted only three OSC proceedings while receiving more than 50,000 consumer complaints. Judge Dearman ordered the Commissioner to institute OSC proceedings pursuant to the statutory mandate. (See Lindstrom, *Unfair Claims Settlement Practices: A Summary of California Law* (1994) 15 Whittier L. Rev. 691, 711-712.)[2]

In 1991, CDI settled *Boorhis*, stipulating to a judgment that compelled CDI to comply with section 790.05's mandatory duties. Among other things, the 1991 stipulated judgment required CDI to, "institute a comprehensive reform program to ensure the Department's full compliance with Insurance Code sections 12921, 790.03, and 790.05." (*Boorhis v. Gillespie*, San Francisco Superior

---

[1] Defendants claim "'a statement of legislative intent may not give rise to a mandatory duty,'" quoting *Shamsian v. Department of Conservation* (2006) 136 Cal.App.4th 621, 632. (Opp. 17:3-6.) This is but one of many strawmen in defendants' Opposition. *Shamsian* addressed a statement of intent in codified legislative findings, which cannot alone create mandatory duties. Here, in contrast, the source of mandatory duties is the directive "shall" in the governing statutes, the history of which includes multiple expressions of legislative intent to impose mandatory duties. A statute's legislative history is proper confirmation that the use of "shall" is intended to impose a mandatory duty. (*B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 182 ["the statute's legislative history further indicates the Legislature's intent to impose a mandatory duty"].)

[2] Judge Dearman's 1989 ruling is set forth in an order dated November 13, 1989 and a modified order dated December 15, 1989. We have asked the Clerk of this Court to retrieve the two orders from storage, which will take several weeks. Once received, we will lodge them with the Court.

Court No. 907349, Stipulated Settlement and Judgment (May 2, 1991) p. 3; see Plfs.' Req. for Jud. Not. Exh. 6.) Based on that judgment, CDI is now collaterally estopped to deny that section 790.05 imposes mandatory duties. (See *Parklane Hosiery Co., Inc. v. Shore* (1979) 439 U.S. 322; *Bernhard v. Bank of America* (1942) 19 Cal.2d 807.)

Thus, it is frivolous for defendants to insist that "[t]he Commissioner's duty to receive and investigate complaints by members of the public concerning the handling of insurance claims is discretionary, not mandatory," and that "[t]he Commissioner's duty to investigate, and take action against, insurers allegedly engaging in unfair methods of competition or any unfair or deceptive acts or practices defined in section 790.03 is also discretionary, not mandatory." (CDI's Opp. to Motion for Prelim. Inj. 5:21-25 [hereafter "Opp."].) The express purpose of the 1982 bill was to change a previously discretionary duty regarding the handling of consumer complaints into a mandatory duty to investigate, respond to, and take action on consumer complaints. The express purpose of the 1990 bill was to crack down on CDI's failures since 1982 to take action on consumer complaints. And this Court's 1991 stipulated judgment in *Boorhis* precludes defendants' denial that the duties prescribed by section 790.05 are mandatory.

Defendants are also wrong in claiming that their duties under section 790.05 are merely discretionary because Insurance Code section 790.035 states that "[t]he 'commissioner shall have the discretion to establish what constitutes an act.'" (Opp. 14:10-14.) Section 790.035 prescribes civil penalties "for each act" in violation of section 790.03, mandates treatment of multiple acts as "a single act" if conduct is "inadvertent," and otherwise gives the Commissioner discretion to treat multiple acts as a single act for the purpose of imposing a civil penalty. (Ins. Code, § 790.035, subd. (a).) This grant of discretion to treat multiple acts as a single act doesn't change the mandatory nature of defendants' duty to investigate unfair or deceptive acts in the business of insurance. Defendants have wrenched a sentence from section 790.035 out of context, violating the canon that "[t]he words of the statute must be construed in context." (*McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 104, 110.)

And defendants are wrong to cite *Women Organized for Employment v. Stein* (1980) 114 Cal.App.3d 133 as support for their claim that section 790.05's duties are discretionary. (Opp.

14:20-27.) To the contrary, *Stein* held the Commissioner's 790.05 duties to issue an order to show cause and hold a hearing to investigate unfair or deceptive acts in the business of insurance "may be described as 'mandatory,'" and it is only the process of "selecting and taking administrative action pursuant to the statutes reaching him" that is discretionary. (*Stein, supra,* at p. 139-140.)

II. PLAINTIFFS DO NOT SEEK TO COMPEL DEFENDANTS' EXERCISE OF DISCRETION IN ANY PARTICULAR MANNER.

Defendants mischaracterize the first amended petition and complaint (FAC) as seeking to compel them to exercise discretion in a particular manner. (Opp. 13:16-17.) This is another strawman. The FAC seeks only to compel defendants to exercise discretionary duties *one way or another,* where defendants have *refused to act at all*. The controlling precedent is *Ellena v. Department of Insurance* (2014) 230 Cal.App.4th 198, which held that mandate lies to enforce the Commissioner's duty to exercise discretion that he has refused to exercise. "While a party may not invoke mandamus to force a public entity to exercise discretionary powers in any particular manner, if the entity *refuses to act,* mandate is available *to compel the exercise of those discretionary powers in some way*" (*id.* at p. 205, emphasis added), and to do so "'under a proper interpretation of the applicable law'" (*id.* at p. 211, citation omitted).

The FAC falls squarely within the teaching of *Ellena,* in that it seeks to enforce the Commissioner's mandatory duty to exercise discretion "in some way." (*Ellena, supra,* 230 Cal.App.4th at p. 205.) The FAC's text makes this clear:

- It alleges defendants have violated their mandatory duty to determine "whether" to issue a cease and desist order and/or impose monetary penalties pursuant to Insurance Code section 12921.8 for violations of sections 14020 and/or 14022.5 (FAC ¶¶ 41 & 43), and seeks to compel defendants to "address" such violations of sections 14020 and/or 14022.5—that is, to decide *whether* to take action under section 12921.8, rather than to compel any particular action (FAC Prayer ¶¶ 1-3).

- It alleges defendants have violated their mandatory duty to "take final action within a reasonable time" on the consumer complaints submitted by plaintiffs (¶¶ 42 & 44), and seeks to compel defendants to perform their mandatory duty to take such final action "within a reasonable period of time" (FAC Prayer ¶¶ 4-6)—not to take action in any particular manner.

- It alleges defendants have violated their mandatory duty to issue an order to show cause and notice of hearing under section 790.05 for the purpose of determining "whether" to issue a cease and desist order and/or impose monetary penalties under section 790.035 for violations of Insurance Code section 790.03(h) (FAC ¶¶ 45-

> 53), and seeks to compel defendants to "perform their mandatory duty to issue an order to show cause and notice of hearing" under section 790.05—that is, to decide *whether* to take action under section 790.035, rather than to act in any particular manner (FAC Prayer ¶¶ 7-9).

Defendants next assert that the Commissioner *has* exercised his discretion, by (1) issuing the November 17, 2017 notice stating that adjusters "must be properly trained" (Eisenberg Dec. ¶ 11, Exh. 5), and (2) issuing the March 28, 2017 memorandum instructing insurers and adjusting companies to use new forms for registrations and employee lists (Eisenberg Dec. ¶ 17, Exh. 13). (Opp. 8:24-9:14.) But the November 17 notice was silent about the insurers' and adjusting companies' endemic failures to comply with the registration and active supervision requirements of section 14022.5. Proper training alone does not meet those requirements. Nor did the March 28 memorandum said anything about active supervision.

Defendants rightly point out that it is within the Commissioner's discretion whether to enforce sections 14020 and 14022.5 by issuing a cease-and-desist order or monetary penalties under Insurance Code section 12921.8 (Opp. 16:25-17:2.) But the Commissioner must exercise that discretion *in some way*, which has not happened. And if the Commissioner were to have exercised discretion by refusing to enforce those statutes *at all* in the wake of the recent wildfires that have ravaged California, then that would be an *abuse* of discretion. Mandate lies to correct an abuse of discretion that is contrary to "the public interest." (*Manjares v. Newton* (1966) 64 Cal.2d 365, 370; accord, *County of Los Angeles v. City of Los Angeles* (2013) 214 Cal.App.4th 643, 654.)

III. THE STATUTORY MANDATE TO INVESIGATE AND TAKE ACTION APPLIES TO THE CONSUMER COMPLAINTS OF SENGSTACK AND EISENBERG.

Insurance Code section 12921.3 states that the Commissioner "shall receive . . . , investigate . . . and respond to complaints and inquiries by members of the public concerning the handling of insurance claims . . . by *insurers or production agencies*, or alleged misconduct by *insurers or production agencies*." (Ins. Code, § 12921.3, subd. (a), emphasis added.) Defendants contend Eisenberg's consumer complaint "is not a 'consumer complaint' within the definition of section 12921.3"—and thus may be ignored—because it is not "a specific complaint against an *insurer or production agency*." (Opp. 8:2-4, emphasis added.) Defendants are wrong, for two reasons.

First, Insurance Code section 12921.1 states that its meaning of the terms "insurers" and "production agencies" is "as those terms are defined in subdivision (a) of Section 1748.5." (Ins. Code, § 12921, subd. (a).) According to section 1748.5, an "insurer" includes "a subject person of an insurer" who is "not a resident of California" or "operating out of a place of business within California" and is "engaged in . . . conduct of the business of insurance in California." (Ins. Code, § 1748.5, subd. (a)(3).) Claims adjusters are "persons engaged in the business of insurance." (*Bodenhamer v. Superior Court* (1986) 178 Cal.App.3d 180, 181-183.) Eisenberg's consumer complaint against out-of-state adjusters who were conducting the business of insurance in California was a complaint against "subject person[s] of an insurer" (Ins. Code, § 1748.5, subd. (a)(3)) and thus was a complaint against "insurers" within the meaning of section 12921.1.

Second, an adjusting company that contracts to act on behalf of an insurer and is subject to the insurer's control is an agent of the insurer. (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1184.) A principal is liable for the acts of an agent that are within the scope of the agent's authority. (Civ. Code, § 2330.) Thus, Eisenberg's complaint, which asserted that "[t]he independent adjusting companies that supply" insurers with unlicensed out-of-state adjusters "have misinformed CDI that they are regular employees, when in fact they are seasonal or temporary independent contractors" (Eisenberg Dec. ¶ 16, Exh. 12), was effectively a complaint against the insurers themselves as well as against the adjusting companies.

As for Sengstack's consumer complaint, defendants claim they *did* investigate and take final action on his assertion that Jansen and Branham violated section 14022.5, in that "CDI investigated this complaint and provided Mr. Sengstack with final notice on this complaint on March 20, 2018." (Opp. 7:24-26.) But defendants' claim of final action is belied by their own investigator, Lewis Deslauriers, who said in an email message dated April 4, 2018, that "[n]o final actions have been taken regarding Payton Jansen or James Branham." (Eisenberg Dec. ¶21, Exh. 17.)

Defendants' claim of their investigation is belied by the fact that some 2,497 folders of paper records pertinent to any such investigation remain untouched in a storage warehouse, subject to a retrieval process that, at the current pace, will take some 200 years. (See Memo. ISO Motion for Prelim. Inj. 9:4-15.) Indeed, defendants' statement that the false reporting of Jansen and

Branham as employees "may" be attributable to "clerical error on the part of the licensed adjuster" (Opp. 17:17) confirms that no such investigation has ever happened. If defendants had investigated, then they would *know* whether that false reporting was merely a clerical error.

Defendants tout the fact that "[i]n 2017, CDI's Consumer Services Division handled 151,354 phone calls, opened 44,557 Requests for Assistance (RFAs) and closed 43,657 such claims." (Opp. 9:6-8.) But nowhere does CDI claim that it either found even a single consumer complaint in 2017 to be justified (see Cal. Code Regs., tit. 10, § 2694 [prescribing criteria for determining whether consumer complaint is justified]), or issued a single cease and desist order or monetary penalty under section 12921.8. Evidently, nothing of the sort ever happened in 2017. CDI seems stuck in 1988, when CDI received 37,500 consumer complaints but "never found a valid complaint that an insurer knowingly violated consumer protection laws." (Sen. Com. on Finance and Insurance, 3d reading analysis of Sen. Bill No. 2569 (1989-1990 Reg. Sess.) as amended June 28, 1990, p. 3; see Pls.' Req. for Jud. Not. Exh. 4.)

IV. THE UNDISPUTED EVIDENCE DEMONSTRATES MASS VIOLATIONS OF INSURANCE CODE SECTIONS 14020 AND 14022.5.

Defendants contend "plaintiffs have presented no facts to demonstrate that insurers or adjusting companies have not complied with the licensing and supervision requirements of sections 14020 and 14022.5." (Opp. 14:28-15:2.) Nonsense. Such facts are thoroughly documented in plaintiffs' motion exhibits, and defendants neither dispute nor deny those facts. The exhibits show unfair and deceptive acts or practices in the business of insurance. (Ins. Code, § 790.03.)

And the adjusting companies' demonstrated mass misrepresentations to CDI *still continue*, to this day. On August 1, 2018, Commissioner Jones issued a "Declaration of Emergency Situation" with respect to the adjusting of insurance claims arising from this summer's Carr and Mendocino Complex wildfires. (Eisenberg Reply Dec. ¶ 2, Exh. 1.) On August 28, 2018, Eisenberg made a Public Records Act request to CDI for copies of registrations of unlicensed adjusters and lists of adjusting company employees that were submitted during the month following the Commissioner's August 1 declaration. (Eisenberg Reply Dec. ¶ 3, Exh. 2.) In response, CDI produced just three registrations (containing the names of 57 adjusters) and employee lists from 23

adjusting companies containing the names of 2,013 adjusters who were purported to be recently-hired employees. (Eisenberg Reply Dec. ¶ 4.) Yet again, at least some (and likely most) of those individual adjusters are independent contractors rather than employees, and thus CDI continues even now to knowingly allow itself to be misinformed that independent contractor adjusters are employees who are exempt from sections 14020 and 14022.5. For example, the employee lists submitted by Worley Catastrophe Services include the names Kristo Jano and Tracy Wian, and the employee lists submitted by Eberl Claims Services include the names Kelly Tippets and Donna Culbreth, but on their LinkedIn pages all four of those individuals describe themselves as being "self-employed." (Eisenberg Reply Dec. ¶¶ 5 & 6, Exhs. 3 & 4.)

Defendants insist these misrepresentations are harmless because Insurance Code sections 14022.5 and 14029 require *both* employees *and* registered unlicensed out-of-state adjusters to work under the active supervision of a California-licensed adjuster or California insurer. (Opp. 17:19-23.) But section 14029, which provides that "[t]he business of each licensee shall be operated" under the active supervision of a qualified licensee or manager (Ins. Code, § 14029, subd. (a)), *does not apply to regular and exclusive employees*, who are wholly exempted from all provisions of the Insurance Adjuster Act (Ins. Code, §§ 14000-14099). (Ins. Code, ¶ 14022, subd. (a).)

While it is true that nonexempt registered unlicensed out-of-state adjusters must work under the active supervision of a California-licensed adjuster or California insurer, if they are independent contractors then their very status as independent contractors necessarily means they do *not* work under active supervision. Under the common law, a worker's freedom from the control of the hiring entity—that is, freedom from active supervision—is the principal factor in establishing that the worker is an independent contractor rather than an employee. (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350; see generally *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, 958.) And, indeed, courts have repeatedly concluded that adjusters who work under contract with adjusting companies and insurers are independent contractors *because they work without supervision.* (*Talbert v. American Risk Insurance Co., Inc.* (5th Cir. 2010) 405 F.App'x 848, 855; *Pfohl v. Farmers Insurance Group* (C.D. Cal. Mar. 1, 2004, No. CV03-3080 (DT(RCX)) 2004 WL 554834, at *6; *Eberl's Claim Service, Inc. v. Commissioner*

of Internal Revenue (U.S. Tax Ct. June 25, 1999) 77 T.C.M. (CCH) 2336, at *7.)

Moreover, it is not even true, as defendants claim, that the active supervision requirements of sections 14022.5 and 14029 are "**exactly the same**." (Opp. 18: 20-26.) Section 14022.5 requires active supervision of *the work performed by nonlicensed adjusters* (Ins. Code, § 14022.5, subd. (a)(1)), whereas section 14029 requires active supervision of *a licensee's business operations* (Ins. Code, § 14029, subd. (a)). Although work performed by independent contractor adjusters is within the scope of section 14022.5, it is beyond the scope of section 14029 because it is not part of the hiring entity's business operations, which do not include supervision of independent contractors.

V. THE CONDITIONS FOR ISSUANCE OF A PRELIMINARY INJUNCTION ARE PRESENT HERE.

Defendants claim that preliminary injunctive relief is unavailable here because the writ of mandate plaintiffs seek is an adequate legal remedy. (Opp. 9:18-10:8.) But this action cannot possibly be adjudicated on its merits before the end of this year's fire season. Mandate alone will be no remedy at all for this year's fire survivors. They need help *now*.

Although defendants are wrong in contending that the preliminary injunction will be mandatory rather than prohibitory (Opp. 10:15-11:28; see Memo. ISO Motion for Prelim. Inj. 14:19-15:6 [explaining why injunction will be prohibitory]), they rightly concede that even a mandatory preliminary injunction may issue "'in extreme cases where the right thereto is clearly established and it appears that irreparable injury will flow from its refusal.'" (*Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 446, citation omitted; see Opp. 12:12-15.) This case is extreme, given the extraordinary devastation that the recent wildfires have wreaked on California, and the right to a preliminary injunction is clearly established.

Regarding irreparable injury, defendants contend "[p]laintiffs have presented no evidence of harm as a result of the alleged failure of defendants to act on their consumer complaints." (Opp. 18:5-6.) But ongoing harm is demonstrated by the fact that even now, in the wake of the Carr and Mendocino Complex wildfires, the adjusting companies continue to perpetrate their mass misreporting of independent contractors as exempt employees, with the result that unlicensed out-of-state adjusters continue to handle California insurance claims without proper supervision. And

the evidence plainly demonstrates that these unlicensed out-of-state adjusters have been misinforming fire survivors about their rights under California law (Eisenberg Dec. ¶ 12 & Exh. 6), and that defendants have known of this problem since at least May 2016 (Eisenberg Dec. ¶ 21, Exh. 17). The irreparable harm to thousands of fire survivors trying to reconstruct their lives is iconic.

Defendants claim the preliminary injunction would "cause harm to the public" because CDI's resources "would be diverted" from other enforcement efforts described by CDI's Lucy Jabourian. (Opp. 19:20-23; see Jabourian Dec. ¶¶ 20-23.) But nowhere does she assert that the preliminary injunction would cause such diversion. To the contrary, she gives her assurance that "CDI will continue these efforts in the face of the ongoing wildfires." (Jabourian Dec. ¶ 22.)[3]

CONCLUSION

For the foregoing reasons and for those set forth in the memorandum of points and authorities in support of this motion, this Court should issue the preliminary injunction.

Dated: September 12, 2018

FARELLA BRAUN + MARTEL LLP

By: _____
Neil A. Goteiner

Attorneys for Petitioners and Plaintiffs
Jon B. Eisenberg and Jeff Sengstack

LAW OFFICE OF JON B. EISENBERG

By: _____
Jon B. Eisenberg

Attorney for Petitioner and Plaintiff Jeff Sengstack

[3] Finally, we correct a misstatement by defendants' counsel that when Eisenberg spoke with Jabourian on November 9, 2017, Eisenberg misrepresented himself as a representative of United Policyholders. (Opp. 15:24-16:4.) Jabourian's declaration makes no such claim, and nothing of the sort ever happened. Eisenberg simply mentioned that he had been working at the United Policyholders table at the Disaster Recovery Center in Santa Rosa (Eisenberg Reply Dec. ¶ 7 & Exh. 5)—which is precisely how Jabourian describes their conversation (Jabourian Dec. ¶ 15).)