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10 Attorneys for Plaintiff

11 IRONSHORE SPECIALTY

12 INSURANCE COMPANY

13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA

15 IRONSHORE SPECIALTY
16 INSURANCE COMPANY,

17 Plaintiff,

18 v.

19 COUNTY OF SAN BERNARDINO,

20 Defendant.

Case No.

**IRONSHORE SPECIALTY
INSURANCE COMPANY’S
COMPLAINT FOR
DECLARATORY JUDGMENT;
JURY DEMAND**

(28 U.S.C. § 2201 and 28 U.S.C § 1332)

21
22 Plaintiff Ironshore Specialty Insurance Company (“Ironshore”) brings this
23 complaint seeking a declaratory judgment against defendant County of San
24 Bernardino (the “County”) and, in support thereof, alleges as follows:

25 **NATURE OF THE ACTION**

26 1. This is an action for a declaratory judgment in which Ironshore seeks a
27 declaration that it has no duty to indemnify the County for any portion of a \$69 million
28 settlement paid to Colonies Partners, L.P. (“Colonies”), Jeffrey Burum, Paul Biane,

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1 and Mark Kirk (collectively, the “*Colonies II* Plaintiffs”), or to reimburse the County
2 for any defense costs incurred in defending certain lawsuits brought by the *Colonies*
3 *II* Plaintiffs.

4 2. Those lawsuits (the “*Colonies II* Actions”) were as follows:

- 5 a. *Burum v. Cnty. of San Bernardino*, C.D. Cal., No. 5:18-cv-
6 00672;
- 7 b. *Colonies Partners, LP v. Cnty. of San Bernardino*, C.D. Cal.,
8 No. 5:18-cv-00420;
- 9 c. *Erwin v. Cnty. of San Bernardino*, C.D. Cal., No. 5:18-cv-
10 01216;
- 11 d. *Kirk v. Cnty. of San Bernardino*, C.D. Cal., No. 5:18-cv-01597;
- 12 e. *Biane v. Cnty. of San Bernardino*, C.D. Cal., No. 5:18-cv-
13 02202; and
- 14 f. *DeFazio v. Cnty. of San Bernardino*, C.D. Cal. No. 5:18-cv-
15 00554.

16 3. In the *Colonies II* Actions, the *Colonies II* Plaintiffs alleged that the
17 County, San Bernardino County District Attorney Michael Ramos, Assistant District
18 Attorney James Hackleman, and District Attorney’s Office Investigators Hollis
19 Randles and Robert Schreiber (collectively the “*Colonies II* Defendants”), among
20 others, engaged in a conspiracy to retaliate against the *Colonies II* Plaintiffs as part of
21 a decades-long dispute over land and water rights in Upland, California, culminating
22 in a malicious prosecution of Burum, Biane, Kirk, and other agents of Colonies,
23 resulting in multiple violations of 42 U.S.C. § 1983 (“§ 1983”).

24 4. As detailed more fully in the *Colonies II* Plaintiffs’ respective amended
25 complaints, the *Colonies II* Plaintiffs alleged, *inter alia*, that the *Colonies II*
26 Defendants (1) retaliated against the *Colonies II* Plaintiffs in violation of § 1983;
27 (2) maliciously prosecuted the *Colonies II* Plaintiffs; (3) engaged in a conspiracy
28 against the *Colonies II* Plaintiffs in violation of § 1983; (4) fabricated evidence against

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1 the *Colonies II* Plaintiffs in violation of § 1983; (5) were liable under a *Monell v.*
2 *Dept. of Social Servs.* theory of liability under § 1983; and (6) were liable to the
3 *Colonies II* Plaintiffs under § 1983 supervisory liability.

4 5. Following the denial of significant portions of the *Colonies II*
5 Defendants’ motions for summary judgment in the *Colonies II* Actions, in October of
6 2020, the *Colonies II* Defendants settled the *Colonies II* Actions for \$69 million, paid
7 by the County (the “*Colonies II* Settlement”).

8 6. The *Colonies II* Settlement was entered into without the consent of
9 Ironshore.

10 7. Ironshore issued commercial excess insurance policy no. 000541500 to
11 the County for the policy period July 1, 2010 to July 1, 2011 (the “Ironshore Policy”).
12 A true and correct copy of this policy is attached hereto as Exhibit A.

13 8. Because the only remaining claims against the *Colonies II* Plaintiffs
14 following summary judgment were for willful acts in violation of § 1983, coverage
15 for the *Colonies II* Settlement is barred by California Insurance Code § 533, which
16 prohibits insurance coverage for willful acts of the insured.

17 9. Additionally, as detailed below, because the County breached other
18 provisions of the Ironshore Policy, and because other terms and exclusions of the
19 Ironshore Policy and underlying insurance policies apply, the County cannot establish
20 that there is coverage for this matter, as such terms and exclusions preclude any
21 possibility of coverage for the *Colonies II* Settlement.

22 10. For these reasons and those detailed more fully below, Ironshore has no
23 duty to indemnify the County for the *Colonies II* Settlement or reimburse it for any
24 defense costs it incurred in the *Colonies II* Actions.

25 **PARTIES**

26 11. Plaintiff Ironshore is a corporation organized and existing under the laws
27 of Arizona, with its principal place of business in Massachusetts.

28

1 12. Defendant County of San Bernardino is a public entity in California, with
2 its county seat located in the city of San Bernardino, California.

3 **JURISDICTION AND VENUE**

4 13. This Court has subject matter jurisdiction pursuant to 28 U.S.C.
5 §§ 1332(a)(1), because there is complete diversity between plaintiff Ironshore and
6 defendant County, and as the amount in controversy exceeds \$75,000, exclusive of
7 interest and costs.

8 14. This Court also has original jurisdiction by virtue of the Declaratory
9 Judgments Act, 28 U.S.C. § 2201(a), because this matter presents a case of actual
10 controversy. This matter presents a case of actual controversy because the County
11 has demanded Ironshore, upon the exhaustion of underlying insurance, indemnify the
12 County and reimburse its defense costs under the Ironshore Policy in connection with
13 the \$69 million *Colonies II* Settlement, and Ironshore disputes that it owes the County
14 any duty to indemnify for the *Colonies II* Settlement or to reimburse its defense costs.

15 15. Venue is proper in this Court under 28 U.S.C. §§ 1391(b)(1) and (2)
16 because the only defendant resides in the State of California, the only defendant
17 resides in this judicial district, and a substantial part of the events giving rise to the
18 claim occurred in this judicial district.

19 16. This action is filed in the Eastern Division of the United States District
20 Court for the Central District of California in compliance with Central District of
21 California General Order 349.

22 **FACTUAL ALLEGATIONS**

23 **A. The Applicable Insurance Policies**

24 17. The Ironshore Policy is commercial excess insurance policy no.
25 000541500 issued by Ironshore to the County as named insured, subject to all of its
26 terms.

27 18. The Ironshore Policy has an effective period of July 1, 2010 to July 1,
28 2011.

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1 19. The Ironshore Policy provides certain coverage excess of a \$52.5 million
2 retention per occurrence, per claim, or per loss and in the aggregate where applicable.

3 20. The Ironshore Policy is subject to applicable limits of \$10 million per
4 occurrence, per claim, or per loss and in the aggregate where applicable.

5 21. The Ironshore Policy’s Insuring Agreement provides in part as follows:

6 **I. COVERAGE**

7 **A.** This Policy shall provide the Insured with Commercial Excess
8 Liability Insurance coverage in accordance with the same
9 warranties, terms, conditions, exclusions and limitations as are
10 contained, on the Inception Date of this Policy, in the **Controlling**
11 **Underlying Policy**, subject to the premium, limits of liability,
12 retention, policy period, warranties, exclusions, limitations and
13 any other terms and conditions of this Policy, including any and
14 all endorsements attached hereto, inconsistent with or
15 supplementary to the **Controlling Underlying Policy**.

16 * * *

17 *See Exhibit A, p. 13.*

18 22. The Ironshore Policy is a fourth-layer excess policy, meaning there are
19 four underlying policies below the Ironshore Policy in the coverage tower.

20 23. The “Controlling Underlying Policy” identified in the Ironshore Policy
21 is an immediately underlying policy issued by Great American Insurance Company
22 of New York.

23 24. The three immediately underlying policies below the Ironshore Policy
24 provide coverage in accordance with the coverages of their respective underlying
25 policy, subject to applicable limits, retentions, policy periods, warranties, exclusions,
26 limitations, terms, and conditions.

27 25. The three immediately underlying policies below the Ironshore Policy
28 ultimately provide coverage in accordance with the coverages of policy no.

1 71P2000037-101, issued to the County by Everest National Insurance Company (the
2 “Everest Policy”), subject to applicable limits, retentions, policy periods, warranties,
3 exclusions, limitations, terms, and conditions. A true and correct copy of the Everest
4 Policy is attached hereto as Exhibit B.

5 26. The insuring agreement of the Everest Policy provides, in part, as
6 follows:

7 **SECTION I. COVERAGES**

8 **A. INSURING AGREEMENTS**

9 * * *

10 **2. ERRORS AND OMISSIONS LIABILITY**

11 We will pay on behalf of the insured, the “ultimate net loss”, in
12 excess of the “retained limit”, that the insured becomes legally
13 obligated to pay to compensate others for loss arising out of your
14 “wrongful act” to which this insurance applies and takes place in
15 the “coverage territory” during the Policy Period.

16 * * *

17 *See* Exhibit B, p. 5.

18 27. The Everest Policy defines “ultimate net loss” as “the total sum, after
19 reduction for recoveries or salvages collectible, actually paid or payable due to a
20 ‘claim’ or ‘suit’ for which you are liable either by a settlement to which we agreed or
21 a final judgment, and shall include defense costs.”

22 28. The Everest Policy definitions section defines “wrongful act” in part as
23 follows:

24 Any actual or alleged error or misstatement, omission, negligent act, or
25 breach of duty including misfeasance, malfeasance, and nonfeasance by
26 you, including, but not limited to, those constituted by:

27 * * *

28 **2.** Any negligent ministerial act;

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* * *

“Wrongful act” also means any “personal injury offense” or “advertising injury offense.”

See Exhibit B, p. 23.

29. “Personal injury offense” is defined by the Everest Policy in part as follows:

Z. “Personal injury offense” means any act, error, or omission constituted by or arising out of one or more of the following:

* * *

2. Malicious prosecution;

* * *

See Exhibit B, p. 20.

30. The “Exclusions” section of the Everest Policy contains the following exclusions, among others:

This insurance does not apply to a “claim” or “suit” against you for:

* * *

15. Any liability arising out of criminal, fraudulent, dishonest or malicious acts or omissions committed by or at the direction of the insured.

* * *

This exclusion does not apply to liability arising from the managerial, advisory, supervisory, or controlling obligations of any insured over the actions of another insured.

16. Any liability arising out of your "wrongful act" for gain, profit, or advantage to which you are not legally entitled.

* * *

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1 This exclusion does not apply to liability arising from the
2 managerial, advisory, supervisory, or controlling obligations of
3 any insured over the actions of another insured.

4 See Exhibit B, p. 10.

5 31. The Ironshore Policy contains a "Retention" section which provides as
6 follows:

7 A. The Limits of Liability stated in Item 3 of the Declarations of this
8 Policy apply in excess of:

- 9 1. The total of the limits of liability of the **Underlying Policies**
10 applicable on a per occurrence, per claim, or per loss basis, but in
11 no event in an amount less than the total of the per occurrence,
12 per claim or per loss limits of liability of the **Underlying**
13 **Policies** stated in Item 4 of the Declarations of this Policy.
- 14 2. The total of the limits of liability of the **Underlying Policies**
15 applicable on an aggregate basis, where an b [sic] amount is
16 shown in the aggregate limit of liability of the **Underlying**
17 **Policies** stated in Item 4 of the declarations of this Policy, but in
18 no event in an amount less than the aggregate limits of liability
19 of the **Underlying Policies** stated in Item 4 of the Declarations
20 of this Policy.

21 See Exhibit A, p. 13.

22 32. The Everest Policy contains the following condition:

23 3. **Duties in The Event of an "Occurrence", "Wrongful Act",**
24 **"Employment Practice Liability Wrongful Act", "Employee**
25 **Benefit Wrongful Act" or "Claim" or `Suit"**

- 26 a. You must see to it that we are notified as soon as
27 practicable of an "occurrence", "wrongful act",
28 "employment practice liability wrongful act", or

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1 "employee benefit wrongful act", regardless of the
2 amount, which may result in a "claim". . . .

3 **b.** If a "claim" is made or "suit" is brought against any
4 insured, you must:

5 (1) Immediately record the specifics of the "claim" or
6 "suit" and the date received; and

7 (2) Notify us as soon as practicable.

8 *See Exhibit B, p. 14.*

9 33. The Everest Policy also contains a "no action" clause which provides
10 that it may only be sued for an "agreed settlement," meaning a "settlement and release
11 of liability signed by us, the insured and the claimant or the claimant's legal
12 representative."

13 34. The Everest Policy defines "ultimate net loss" in relevant part as liability
14 "either by a settlement to which we agreed or a final judgment[.]"

15 35. There is no provision of the Everest Policy that provides coverage for
16 settlements entered into by the County to which Everest or any other insurer did not
17 agree.

18 36. The Everest Policy confers a right on Everest to defend suits against the
19 County.

20 37. The Ironshore Policy also requires the insured to provide notice to
21 Ironshore of any claim or suit, as follows:

22 a. The Insured shall, as a condition precedent to the obligations of
23 the Insurer under this Policy, give written notice as soon as
24 practicable to the Insurer of any occurrence, offense, claim or
25 suit likely to involve this policy.

26 *See Exhibit A, p. 17.*

27 38. The Ironshore Policy also contains the following provision regarding the
28 insured's assistance and cooperation obligations:

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C. ASSISTANCE AND COOPERATION

* * *

2. The Insured shall not, except at its own expense, settle any claim or suit or incur any defense costs for any amount to which this Policy applies without the Insurer’s written consent.

See Exhibit A, p. 14.

39. The Everest Policy contains the following arbitration provision:

SECTION IV. GENERAL CONDITIONS

* * *

11. Arbitration

Any dispute arising from or relating to this Policy shall be submitted to arbitration. Either party may commence arbitration by making a written demand to the other. When this demand is made, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within thirty (30) days, either may request that selection be made by a judge of a court having jurisdiction. Each party will:

- 1. Pay the expenses it incurs, including the expenses of the arbitrator it appoints; and
- 2. Bear the expenses of the third arbitrator equally.

Unless both parties agree otherwise, arbitration will be in the county or parish in which the address shown in the Declarations is located, and the panel will be relieved of any strict rules of procedure. A decision agreed to by two of the arbitrators will be binding and final.

See Exhibit B, p. 17.

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1 40. The Ironshore Policy provides that disputes under the Ironshore Policy
2 shall be submitted to a “Court of competent jurisdiction within the United States,” as
3 follows:

4 **VI. CONDITIONS**

5 **A. CONSENT TO JURISDICTION**

6 1. The Insurer, at the request of the Insured, will submit to the
7 jurisdiction of a Court of competent jurisdiction within the
8 United States. Nothing in this clause constitutes or should be
9 understood to constitute a waiver of the Insurer’s right to
10 commence an action in any Court of competent jurisdiction of
11 the United States, to remove an action to a United States District
12 Court, or to seek a transfer of a case to another Court as
13 permitted by the laws of the United States or of any State in the
14 United States. It is further agreed that service of process in such
15 suit may be made upon the party named in Item 7 of the
16 Declarations of this Policy, and that in any suit instituted against
17 the Insurer to effectuate arbitration or to enforce any award
18 entered in such arbitration, the Insurer will abide by the final
19 decision of such Court or of any Appellate Court in the event of
20 an appeal.

21 *See* Exhibit A, p. 16.

22 **B. The Colonies II Actions**

23 i. Colonies I Lawsuit, Settlement, and Political Donations

24 41. The allegations in the *Colonies II* Actions originated out of a dispute
25 dating back to 1997 between the County, on one hand, and Colonies, its partners, and
26 agents, on the other. *See* First Amended Complaint, at ¶ 29, *Colonies Partners, L.P.*
27 *v. County of San Bernardino*, No. 18-00420 (C.D. Cal. July 25, 2018), ECF No. 64,
28 2018 WL 8300102.

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1 42. In 1997, Colonies purchased 434 acres of land in Upland, California for
2 development. *See id.*

3 43. As part of the construction of the Highway 210 extension through
4 Colonies’ parcel of land, it allegedly became necessary to designate an area for water
5 runoff from that project and the related 20th Street Storm Drain through the creation
6 of a flood control basin. *See id.*

7 44. Colonies alleged that San Bernardino County Flood Control District
8 executive director Ken Miller attempted to trick Colonies into building the flood
9 control basin on Colonies’ land, at its own expense, without paying for the land. *See*
10 *id.* at ¶ 30.

11 45. Colonies claimed that, in response to Miller’s overture, Colonies offered
12 to turn over the necessary acreage to the County to allow the County to build the flood
13 control basin itself. *See id.*

14 46. Colonies alleged that the County refused, insisting that easements dating
15 from the 1930s entitled the County to redirect flood waters onto Colonies’ property,
16 up to 80 million gallons of water per hour. *See id.* at ¶¶ 30-31.

17 47. Colonies also alleged that the County also argued that it had received
18 consent to direct this water onto Colonies’ property from Colonies. *See id.* at ¶ 31.

19 48. In response to this dispute, Colonies filed a quiet title action in San
20 Bernardino County Superior Court (“*Colonies I*”). *See id.* at ¶ 32.

21 49. After seven years of litigation, including appeals, the San Bernardino
22 County Superior Court issued a statement of intended decision in favor of Colonies
23 in the quiet title action. *See id.* at ¶ 34.

24 50. According to Colonies, this decision would have paved the way for
25 Colonies to recover over \$300 million from San Bernardino County in a subsequent
26 inverse condemnation action. *See id.* at ¶ 35.

27 51. Also according to Colonies, despite four of five County supervisors
28 voting in favor of settling the quiet title action, County attorneys and officials

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1 continued to actively oppose a settlement through various actions, including through
2 inserting “poison pills” into proposed settlement agreements. *See id.* at ¶ 36.

3 52. In response to this opposition, Colonies began a public pressure strategy
4 to try to effectuate a settlement. *See id.* at ¶¶ 38-39.

5 53. Specifically, Colonies retained a former state senator and a media
6 consultant to publicly criticize County officials’ handling of the dispute. *See id.* at ¶
7 39.

8 54. Ultimately, on November 28, 2006, County supervisors voted 3-2 to
9 settle *Colonies I* for \$102 million in exchange for Colonies agreeing to release its
10 damages claims and transferring the disputed land to the County for flood control
11 purposes. *See id.* at ¶ 43.

12 55. Following the settlement, Colonies made political donations to political
13 action committees associated with County supervisors and others who had supported
14 the settlement and who, according to Colonies, would advance other pro-development
15 policies. *See id.* at ¶ 44.

16 ii. Prosecution of *Colonies II* Plaintiffs and Taxpayer Action

17 56. According to Colonies, in response to the *Colonies I* settlement, the San
18 Bernardino County District Attorney’s Office and California Attorney General’s
19 Office opened a public integrity investigation into Colonies with respect to the
20 settlement of *Colonies I* and the associated political contributions made by Colonies.
21 *See id.* at ¶ 45.

22 57. The *Colonies II* Plaintiffs claimed that this prosecution was a “vendetta”
23 initiated in response to Colonies’ and Burum’s public criticism of the County and
24 County officials with respect to the handling of *Colonies I*. *See id.* at ¶ 51.

25 58. The *Colonies II* Plaintiffs alleged facts relating to a conspiracy against
26 Colonies dating back to as early as 2005, when the public leak of a key confidential
27 memorandum caused *Colonies I* settlement negotiations to cease. *See id.* at ¶ 46.

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1 59. The *Colonies II* Plaintiffs alleged an escalation of a “vendetta” began in
2 2008, when the San Bernardino County District Attorney’s Office enlisted County
3 Assistant Assessor Adam Aleman as a prosecution witness. *See id.* at ¶¶ 51-54.

4 60. The San Bernardino County District Attorney’s Office was allegedly
5 aware that Aleman had been caught secretly recording a County supervisor related to
6 *Colonies I*, but sought to cover this fact up, and concoct a justification for the
7 recording. *See id.*

8 61. According to Colonies, Aleman also had been caught misleading a grand
9 jury, leading to felony charges of changing subpoenaed documents. *See id.* at ¶ 52.

10 62. Following ongoing investigative efforts, in 2009, the San Bernardino
11 County District Attorney and State Attorney General’s office announced the
12 convening of an “investigative” grand jury with respect to the *Colonies I* settlement.
13 *See id.* at ¶¶ 58-59.

14 63. The *Colonies II* Plaintiffs alleged that this announcement was directly
15 made in response to Colonies partner Jeffrey Burum’s active role with respect to the
16 *Colonies I* lawsuit and in Republican Party politics, as well as to deflect attention from
17 a separate investigation into the San Bernardino County District Attorney Michael
18 Ramos’s improper relationships with subordinates. *See id.* at ¶¶ 57-59.

19 64. The *Colonies II* Plaintiffs alleged this investigation was retaliatory for
20 multiple reasons relating to their litigation successes and support for County political
21 opponents. *See id.* at ¶ 62.

22 65. In February 2010, the San Bernardino County District Attorney’s Office
23 filed criminal complaints against several individuals, including the former Chairman
24 of the County Board of Supervisors, Colonies’ lobbyist, and the founder of a political
25 action committee that received a \$100,000 donation from Colonies. *See Colonies*
26 *Partners LP v. County of San Bernardino*, 2020 WL 5102160, at *9 (C.D. Cal. July
27 28, 2020).

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1 66. In May 2011, the County District Attorney’s office obtained a grand jury
2 indictment against Colonies partner Jeffrey Burum, Colonies lobbyist James Erwin,
3 County Supervisor Paul Biane, and Mark Kirk, Chief of Staff for another county
4 supervisor. *See id.* at *10.

5 67. According to Colonies, the indictment alleged these individuals
6 conspired to settle *Colonies I* on terms favorable to Colonies in exchange for political
7 contributions. *See* Second Amended Complaint, at ¶¶ 107, 125, *Burum v. County of*
8 *San Bernardino*, No. 18-00672 (C.D. Cal. July 25, 2018).

9 68. In February of 2012, two private taxpayer groups filed a civil lawsuit
10 against Colonies seeking to invalidate the *Colonies I* settlement under Government
11 Code §1090. *See* First Amended Complaint, at ¶ 118, *Colonies Partners, L.P. v.*
12 *County of San Bernardino*, No. 18-00420 (C.D. Cal. July 25, 2018), ECF No. 64,
13 2018 WL 8300102.

14 69. This taxpayer action was dismissed in 2016. *See id.* at ¶ 126.

15 70. Colonies demanded that the County defend and indemnify it pursuant to
16 the terms of the *Colonies I* Settlement, but the County refused to do so. *See id.* at ¶
17 118.

18 71. On October 23, 2017, Colonies demanded that the County indemnify it
19 for legal fees and costs incurred in the taxpayer groups lawsuit in an amount in excess
20 of \$32 million. *See id.* at ¶ 131.

21 72. On August 28, 2017, Jeffrey Burum was acquitted in the criminal action
22 following a trial. The remaining charges against the remaining defendants were
23 dropped. *See id.* at ¶¶ 5, 47. Nevertheless, the County District Attorney continued to
24 attempt to pursue an investigation of Burum even after his acquittal. *See Colonies*
25 *Partners, LP v. County of San Bernardino*, 2020 WL 5102160, at *35 (July 28, 2020).

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iii. Colonies II Wrongful Prosecution Lawsuits

73. As listed in Paragraph 2 above, in 2018, Colonies, Burum, and four other individuals sued San Bernardino County in the United States District Court for the Central District of California.

74. Those complaints brought claims against the County for First Amendment retaliation under 42 U.S.C. § 1983 (“§ 1983”), malicious prosecution under § 1983, and other related claims under § 1983.

75. In those complaints, the Colonies II Plaintiffs also brought causes of action for breach of contract, negligence, and intentional infliction of emotional distress.

76. As part of the claims in those complaints, the Colonies II Plaintiffs alleged that the defendants initiated fraudulent and illegitimate criminal investigations into Colonies and its management, publicly threatened to use the criminal process to take back the \$102 million Colonies I settlement, and manipulated and fabricated false evidence against the plaintiffs.

77. In those complaints, the Colonies II Plaintiffs alleged that the investigations were retaliatory with the preordained goal of convicting the plaintiffs, in retaliation for exercising their First Amendment rights and for obtaining a favorable settlement against the County.

78. In those complaints, the Colonies II Plaintiffs sought damages in the form of lost income, lost business opportunities, loss of reputation, litigation expenses, attorneys’ fees, exemplary and punitive damages.

v. Partial Summary Judgment, Settlement of Colonies II, Tender to Ironshore, and Arbitration Demand

79. On July 28, 2020, the Colonies II court issued an order and opinion in part granting in part and denying in part San Bernardino County’s motion for

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1 summary judgment. *See Colonies Partners, LP v. County of San Bernardino*, 2020
2 WL 5102160 (July 28, 2020).

3 80. As part of this opinion, the court cited to multiple examples of retaliatory
4 motives on the part of the County and evidence of fabrication of evidence, declining
5 to dismiss § 1983 claims against the County, its district attorneys, and investigators.
6 *See, e.g., id.* at *12.

7 81. The court granted the defendants’ motion for summary judgment with
8 respect to the plaintiffs’ negligence and intentional infliction of emotional distress
9 claims, and with respect to Colonies’ breach of contract claims. *See id.* at *15.

10 82. The court also granted summary judgment against two plaintiffs, James
11 Erwin and John DeFazio, with respect to all their claims. *See id.* at *14.

12 83. Following various complaint amendments, and after dismissal of certain
13 claims by the court, the following claims brought by Colonies, Burum, Kirk, and
14 Biane remained: (1) retaliation under § 1983 against District Attorney Ramos and
15 Assistant District Attorney Hackleman; (2) *Monell* municipal liability under § 1983
16 against San Bernardino County; (3) supervisory liability under § 1983 against Ramos
17 and Hackleman; (4) malicious prosecution against Ramos and Hackleman under §
18 1983; (5) conspiracy under § 1983 against Ramos and Hackleman; and (6) fabrication
19 of evidence under § 1983 against Hollis Bud Randles and Robert Schreiber, San
20 Bernardino County Public Integrity Unit investigators. *See generally id.*

21 84. The surviving claims brought by Colonies itself were claims for
22 retaliation, *Monell* municipal liability, supervisory liability, and conspiracy. *See id.*

23 85. The County defended these claims with counsel that it appointed.

24 86. The County did not actually notify Ironshore of the *Colonies II* Actions
25 until June of 2022.

26 87. The County first attempted to tender the *Colonies II* Actions to Ironshore
27 over two years after the *Colonies II* Actions were first filed and served upon the
28 County.

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1 88. On September 29, 2020, and October 1, 2020, the County engaged in a
2 two-day mediation.

3 89. The County settled the *Colonies II* lawsuit for a total of \$69,000,000 (the
4 “*Colonies II* Settlement”).

5 90. The County paid for the *Colonies II* Settlement with its own funds.

6 91. This mediation occurred less than two months after the County first
7 attempted to provide notice to Ironshore.

8 92. Ironshore never received notice of the mediation before it occurred.

9 93. Ironshore did not have an opportunity to participate in the mediation
10 because of its lack of notice.

11 94. The County did not seek Ironshore’s written consent before entering into
12 the *Colonies II* Settlement.

13 95. The County did not receive the written consent of Ironshore before
14 entering into this settlement.

15 vi. Arbitration Demand

16 96. On June 17, 2022, the County for the first time properly tendered this
17 matter to Ironshore at “usclaims@ironshore.com.”

18 97. Less than a month thereafter, on July 15, 2022, the County demanded
19 that Ironshore participate in an arbitration regarding the *Colonies II* Settlement.

20 **FIRST CLAIM FOR RELIEF**

21 **(Declaratory Judgment – No Duty to Indemnify)**

22 98. Ironshore incorporates by reference the allegations of paragraphs 1
23 through 97 as though the same were set forth herein.

24 99. Pursuant to the DECLARATORY JUDGMENTS ACT, 28 U.S.C. § 2201,
25 Ironshore is entitled to a judicial determination concerning the parties’ rights and
26 obligations, if any, under the Ironshore Policy in connection with the *Colonies II*
27 Actions.
28

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1 100. Ironshore has no duty under the Ironshore Policy to indemnify the
2 County for the *Colonies II* settlement.

3 101. The *Colonies II* Actions and resulting *Colonies II* Settlement all arose
4 out of the willful or intentional acts of the County, its district attorneys, or
5 investigators.

6 102. The *Colonies II* Settlement did not resolve any claims for negligent
7 conduct, as such claims had been dismissed by the *Colonies II* court on summary
8 judgment.

9 103. California Insurance Code § 533 prohibits coverage for willful conduct
10 as a matter of law.

11 104. Therefore, there can be no coverage for the *Colonies II* Settlement as a
12 matter of law.

13 105. Alternatively, there is no coverage for the *Colonies II* Settlement under
14 the Ironshore Policy because coverage is excluded by one or more of the Everest
15 Policy’s exclusions, including the following:

- 16 • SECTION I. COVERAGES, D. EXCLUSIONS, 15. Liability arising
17 out of criminal, fraudulent, dishonest or malicious acts or omissions.
- 18 • SECTION I. COVERAGES, D. EXCLUSIONS, 16. Liability arising
19 out of your "wrongful act" for gain, profit, or advantage to which you are
20 not legally entitled.

21 106. Alternatively, there is no coverage available or limited under the
22 Ironshore Policy because the County has failed to satisfy all applicable retentions and
23 exhaust available underlying insurance.

24 107. Additionally, Ironshore is not obligated to indemnify the County for
25 those portions of the settlement attributable to actions that did not trigger the Ironshore
26 Policy.

27
28

1 108. In defending the *Colonies II* Actions and entering into the *Colonies II*
2 Settlement, the County was in breach of the notice, cooperation, and consent to
3 settlement provisions of the Ironshore Policy.

4 109. Ironshore has complied with all of its obligations under the Ironshore
5 Policy.

6 110. Accordingly, Ironshore is entitled to a declaration that it has no duty
7 under the Ironshore Policy to indemnify the County for the *Colonies II* Settlement.

8 **SECOND CLAIM FOR RELIEF**

9 **(Declaratory Relief – No Obligation to Reimburse Defense Costs)**

10 111. Ironshore incorporates by reference the allegations of paragraphs 1
11 through 110 as though the same were set forth herein.

12 112. The Ironshore Policy and underlying policies only have a duty to defend
13 for claims where coverage is available those policies, subject to all of their terms.

14 113. Furthermore, any duty to defend under the Ironshore Policy is only
15 triggered upon notice of a claim being provided to the insurers, including Ironshore.

16 114. Ironshore had no duty to defend the *Colonies II* Actions because the
17 County failed to provide notice of those lawsuits before the *Colonies II* Settlement
18 was reached, abrogating the duty to defend.

19 115. Because coverage is not available under the Ironshore Policy, Ironshore
20 had no duty to defend the County for the *Colonies II* Actions.

21 116. Ironshore also can have no duty to defend until all underlying coverage
22 is exhausted.

23 117. Because Ironshore had no obligation to defend the County for the
24 *Colonies II* Actions, it also has no obligation to reimburse the County for defense
25 costs it incurred in the *Colonies II* Actions.

26 118. Accordingly, Ironshore is entitled to a declaration that it has no duty
27 under the Ironshore Policy to reimburse the County for any defense costs it incurred
28 in defending the *Colonies II* Actions.

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THIRD CLAIM FOR RELIEF

(Declaratory Relief – No Arbitration Obligation)

119. Ironshore incorporates by reference the allegations of paragraphs 1 through 118 as though the same were set forth herein.

120. There is no arbitration provision in the Ironshore Policy.

121. The Ironshore Policy provides that Ironshore will submit to a court of competent to jurisdiction in the United States for resolution of disputes arising under the Ironshore Policy.

122. The Ironshore Policy provides that it retains the right to commence an action in any court of competent jurisdiction in the United States.

123. Accordingly, Ironshore is entitled to a declaration that it has no obligation to submit any dispute with the County to arbitration.

PRAYER FOR RELIEF

WHEREFORE, Ironshore Specialty Insurance Company respectfully requests the Court to enter an order:

1. Declaring that, under the Ironshore Policy, Ironshore has no duty to indemnify the County for the *Colonies II* Settlement or reimburse the County for defense costs incurred in defending the *Colonies II* Actions;
2. Declaring that Ironshore has no obligation to arbitrate its disputes with the County under the Ironshore Policy; and
3. Declaring and granting such other and further relief as may be necessary and appropriate under the circumstances, including all other relief available at law or in equity to which Ironshore may be entitled and which this Court deems just and proper.

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1 Dated: August 29, 2022

CLYDE & CO US LLP

2



By: _____

3

Alexander E. Potente

4

Matthew Elmaraghi

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Attorneys for Plaintiff

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IRONSHORE SPECIALTY

7

INSURANCE COMPANY

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DEMAND FOR TRIAL BY JURY

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PLEASE TAKE NOTICE that Ironshore Specialty Insurance Company

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hereby demands a trial by jury as to all issues so triable.

11

Dated: August 29, 2022

CLYDE & CO US LLP

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By: _____

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Alexander E. Potente

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Matthew Elmaraghi

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Attorneys for Plaintiff

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IRONSHORE SPECIALTY

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INSURANCE COMPANY

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