APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2448

IN RE: WILBUR-ELLIS COMPANY, LLC

Petitioner,

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:14-cv-00859-RWS)

JUDGMENT

Before KELLY, BOWMAN, and STRAS, Circuit Judges.

Petition for writ of mandamus has been considered by the court and is denied. Mandate shall issue forthwith.

July 12, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Michael E. Gans

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Filed 01/04/19]

Case No. 4:14 CV 859 RWS

BLUE BUFFALO COMPANY, LTD.,

Plaintiff,

vs.

WILBUR-ELLIS COMPANY, LLC and,
DIVERSIFIED INGREDIENTS, INC.,

Defendants.

AND RELATED ACTIONS

ORDER AND MEMORANDUM

This matter is before me on Blue Buffalo Company's Motion to Compel Production of Wilbur-Ellis's Brief from the *Ironshore* Litigation [ECF. No. 1202]. After fully considering the materials submitted by the parties, and the oral argument presented on the record at the October 19, 2018 hearing before me [ECF Nos. 1329, 1337], I will grant Blue Buffalo's Motion for the reasons set forth below.

Background

While this case has proceeded in the Eastern District of Missouri, Wilbur-Ellis has also engaged in litigation with Ironshore, an insurance provider, in California Superior Court. *Ironshore Specialty Ins. Co.*

v. Wilbur-Ellis Co., Case No. CGC-15-549583 (Cal. Sup. Ct.). That litigation pertains to the extent of Ironshore's duty to cover and defend Wilbur-Ellis in this case.

In 2016, Wilbur-Ellis moved to stay the *Ironshore* litigation pursuant to a California doctrine known as the *Montrose* Doctrine. *See Montrose Chemical Corp. v. Superior Court*, 6 Cal. 4th 287 (1993). Under the *Montrose* Doctrine, a California judge may stay a coverage dispute between an insurer and an insured party when the insured party also faces an underlying litigation related to the insurance coverage dispute. According to the Montrose Court, this stay helps the insured party avoid a scenario in which it must prove facts in the insurance coverage case that prejudice it in the underlying litigation.

In support of its motion for a stay in the *Ironshore* case, Wilbur-Ellis filed its Supplemental Brief in Support of Motion to Stay Case [hereinafter *Ironshore* Brief], under seal on June 13, 2016. California Superior Court Judge Karnow issued an Order staying the case on June 20, 2016. After learning of the *Ironshore* Brief, Blue Buffalo sent Wilbur-Ellis a discovery request for an unredacted copy of it. Wilbur-Ellis has not produced the brief.

Legal Standard

When responding to discovery requests, parties must produce any nonprivileged, responsive materials that are "relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). As applied by federal courts, Rule 26(b) is "liberal in scope and interpretation." *Hofer v. Mack Trucks*, Inc., 981 F.2d 377, 380 (8th Cir. 1992). The party seeking discovery, however, must still make

"[s]ome threshold showing of relevance." *Id.* Once the requesting party makes that showing, "the burden is on the party resisting discovery to explain why discovery should be limited." *CitiMortgage, Inc. v. Allied Mortg. Grp., Inc.*, No. 4:10CV01863 JAR, 2012 WL 1554908, at *2 (E.D. Mo. May 1, 2012).

Discussion

I. Relevance of the *Ironshore* Brief

To obtain discovery of Wilbur-Ellis's sealed brief from the *Ironshore* litigation, Blue Buffalo first has the burden of showing that the document is relevant to this case. Blue Buffalo clearly met this burden.

In its Memorandum of Law supporting the Motion to Compel [Doc. No. 1203], Blue Buffalo cited Wilbur-Ellis's representations to the California Superior Court when Wilbur-Ellis sought the *Montrose* stay. In oral argument in that case, Wilbur-Ellis confirmed that there were potential undeveloped facts that would help Wilbur-Ellis against Ironshore, but that would hurt Wilbur-Ellis here. Blue Buffalo Memorandum of Law Supporting the Motion to Compel, Doc. No. 1203, 3 (citing Ex. 4 (May 3, 2016 Tr.) at 34-35). In allowing Wilbur-Ellis to file its brief arguing for a stay under seal, Judge Karnow cited a "significant adverse impact on [Wilbur-Ellis's] ability to defend itself" in the case against Blue Buffalo. Id. at 4 (citing Ex. 2 (June 10, 2016 Order Sealing Brief) at 2).

Wilbur-Ellis concedes the relevance of the facts contained in the redacted portions of the *Ironshore* Brief. Tr. of October 19, 2018 Hearing, ECF No. 1337, 37 ("We concede this information is relevant."). It argues that its position opposing discovery of the brief does not mean "Blue Buffalo should be denied discovery of facts discussed in the *Ironshore* Brief," but

rather that Blue Buffalo is not entitled to the facts as Wilbur-Ellis presents them in the brief. Wilbur-Ellis Memorandum in Opposition, ECF No. 1208, 9.

II. Judge Karnow's Order Sealing the *Ironshore* Brief

Because the material in the sealed brief is relevant, Wilbur-Ellis bears the burden of showing that Blue Buffalo is otherwise not entitled to it. Wilbur-Ellis principally argues that I should defer to the Judge Karnow's decision to seal the brief so as to prevent Blue Buffalo from discovering the information therein.

At Wilbur-Ellis's invitation, I have reviewed the unredacted *Ironshore* Brief *in camera*. Wilbur-Ellis offered I do so "in order to understand that no relevant facts are being withheld from Blue Buffalo." Wilbur-Ellis Memorandum in Opposition, ECF No. 1208, 9 n.3. My review of the brief leads me to conclude the opposite: the brief contains relevant facts to which Blue Buffalo is entitled.

Judge Karnow's effort to shield Wilbur-Ellis's filing from discovery in the case before me presents me with a difficult scenario. I am aware that my decision here frustrates Judge Karnow's aim of constraining discovery in this litigation. It does not, however, undermine or affect California's interest in the stayed California Superior Court's proceeding. I am not ruling on the propriety of the *Montrose* doctrine in California courts, and my decision has no impact on the stayed California dispute. Both parties in that case already have access to the unredacted copy of Wilbur-Ellis's sealed brief.

During oral argument on this dispute, Wilbur-Ellis directed my attention to *Alleghany Corp. v. McCartney*, 896 F.2d 1138 (8th Cir. 1990), a case centering on

Younger Abstention. Tr. of October 19, 2018 Hearing, ECF No. 1337, 37. In its brief, Wilbur-Ellis cited *Alleghany* for the proposition that "[f]ederal courts should avoid making decisions that would undermine or contravene important state policies." Wilbur-Ellis Memorandum in Opposition, ECF No. 1208, 6.

In *Alleghany*, the Eighth Circuit found "abstention proper where plaintiff sought federal relief from administrative body's denial of application rather than seeking judicial review in state court." *Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042, 1048 n.3 (8th Cir. 1997) (describing *Alleghany*). The discovery matter before me does not raise an abstention issue. Wilbur-Ellis does not argue to the contrary. *Alleghany* is not on point, and it does not stand for the broad avoidance proposition Wilbur-Ellis asserts.

The principles of comity are indeed important in our federal system. But also important is the longstanding admonition that federal courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (citing *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)). California's interest in protecting insureds from developing facts that may hurt them in an underlying litigation does not constrain me from applying Rule 26 to determine whether the document is discoverable.

III. Exceptions to Disclosure Under Rule 26

Wilbur-Ellis also raises arguments against discovery that map onto the language of Rule 26. It argues that producing the *Ironshore* Brief is burdensome, duplicative, and may raise privilege concerns. The brief is not privileged, and the balance of the Rule 26

proportionality factors weighs heavily in favor of my Order of production.

a. Privilege

Wilbur-Ellis suggests, but does not explicitly argue, that the brief is privileged. Wilbur-Ellis argues that the brief contains legal reasoning, that it submitted the brief under seal pursuant to a judicial order, and that it shares tripartite privilege with its opponent in the *Ironshore* litigation. I do not need to address the arguments regarding legal reasoning and the tripartite privilege, because Wilbur-Ellis waived whatever privilege it may have had over the document when it voluntarily filed it with the court.

The California Superior Court may have ordered the seal, but it was Wilbur-Ellis that chose what information to submit to the court in its sealed brief. Judge Karnow did not require Wilbur-Ellis to proffer the potentially prejudicial information that it included in the brief. *Cf.* Order Sealing Portions of Defendants' Brief, Mangi Declaration Ex. 2, ECF No. 1204-2, at 2 (reflecting Judge Karnow's review of Wilbur-Ellis's submitted brief to determine which portions "plaintiffs in the underlying litigation might be able to use . . . to defendant's great disadvantage," and redacting those portions).

The California cases Wilbur-Ellis cites to bolster its privilege argument are not contrary to this Order. The *Ironshore* Brief is not a communication between Wilbur-Ellis and its insurer. *Cf. Am. Mut. Liab. Ins. Co. v. Superior Court*, 38 Cal. App. 3d 579, 593 (Ct. App. 1974) (describing the importance of protecting privileged communication "exchanged in confidence" between an attorney, the insurer, and the insured). It is not similar to a document that a judge reviews *in*

camera in order to make a privilege determination. *Cf. Rockwell Internat. Corp. v. Superior Court*, 26 Cal. App. 4th 1255, 1264, 32 Cal. Rptr. 2d 153 (1994) ("Any claim of privilege asserted is subject to in camera review in the . . . superior court"). Instead, the *Ironshore* Brief is a communication with a third party, the California Superior Court, which resulted from Wilbur-Ellis's strategic calculation to explain certain facts in order to secure a favorable decision from the court.

Wilbur-Ellis contends that "there is no merit to Blue Buffalo's argument that the filing in a coverage case of a brief under seal containing tripartite privileged communications operates as a waiver." Wilbur-Ellis Memorandum in Opposition, ECF No. 1208, 10. On the contrary, I find that there is indeed "merit to Blue Buffalo's argument" that the voluntary "filing in a coverage case of a brief under seal" operates as a waiver of any privilege—tripartite or otherwise—that Wilbur-Ellis may have claimed over brief before filing it.

b. Proportionality Test

The production of this brief is neither burdensome nor duplicative. Wilbur-Ellis argues that producing this document places a burden on Wilbur-Ellis, because the document is so detrimental to its defense in this case. Wilbur-Ellis contends that prejudice against a party is a valid reason to prevent discovery that poses no logistical burden. This is unpersuasive. Relevant documents are not inherently burdensome to produce simply because they contain potentially detrimental information to a party in the case. Discovery is often prejudicial to the party from whom it is sought. If highly prejudicial documents were non-discoverable, parties would have free reign to exclude the docu-

ments most "relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). In this matter, my order to produce the *Ironshore* Brief poses virtually no burden to Wilbur-Ellis. Even if I considered the prejudicial effect of the discovery as burdensome, that burden does not—on its own or in concert with the other balancing factors in Rule 26—outweigh the likely benefit of the brief's production in the case.

That Blue Buffalo may have already obtained the facts in the brief does not tip the scales in favor of Wilbur-Ellis. In discovery, parties often produce different forms of documents and media that may contain substantially similar or identical information. As I explain above, the burden on Wilbur-Ellis is negligible, so it does not "outweigh[] [the] likely benefit" of disclosure. *Id*. Blue Buffalo, not Wilbur-Ellis, has the power to choose the manner in which it organizes its case and presents evidence. When Blue Buffalo requests relevant, non-privileged discovery that is not burdensome to produce, Wilbur-Ellis's attempt to prevent it on the grounds that Blue Buffalo could get the information some other way is not valid.

Conclusion

The *Ironshore* Brief is relevant, nonprivileged, and its disclosure is proportional to the needs of this case.

Accordingly,

IT IS HEREBY ORDERED that Blue Buffalo's Motion to Compel Production of Wilbur-Ellis Brief from the Ironshore Litigation [ECF No. 1202] is GRANTED.

/s/ Rodney W. Sippel
RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE

Dated this 4th day of January, 2019.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Filed 06/06/19]

Case No. 4:14 CV 859 RWS

BLUE BUFFALO COMPANY, LTD.,

Plaintiff,

vs.

WILBUR-ELLIS COMPANY, LLC and,
DIVERSIFIED INGREDIENTS, INC.,

Defendants.

AND RELATED ACTIONS

ORDER AND MEMORANDUM

This matter is before me on Wilbur-Ellis's motion for reconsideration, or in the alternative, for certification to the Eighth Circuit, of my ruling on Blue Buffalo's motion to compel production of the *Ironshore* Brief. Wilbur-Ellis contends that I should reconsider that order because I failed to properly consider California's interest in protecting Wilbur-Ellis in this matter, and because I failed to properly articulate my authority to deny Blue Buffalo's motion. In the alternative, Wilbur-Ellis argues that this is a question of extraordinary significance, and I should therefore certify my resolution of this discovery dispute for appeal. For the reasons below, I will deny Wilbur-Ellis's motion.

I. Motion to Reconsider

Wilbur-Ellis moves for me to reconsider the original order under Federal Rule of Civil Procedure 54(b), which provides that an order like the one at issue "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). Under Rule 54(b), I have "wide discretion over whether to grant a motion for reconsideration of a prior order." *SPV-LS, LLC v. Transamerica Life Ins. Co.*, 912 F.3d 1106, 1111 (8th Cir. 2019) (citing *In re Charter Commc'ns, Inc., Sec. Litig.,* 443 F.3d 987, 993 (8th Cir. 2006)), *reh'g denied* (Feb. 1, 2019).

In its original opposition to Blue Buffalo's motion, Wilbur-Ellis discussed the importance of comity. In its memorandum in support of reconsideration, Wilbur-Ellis contends that I did not properly consider the importance of comity. Wilbur-Ellis argues that while "there is no rule requiring a court to deny a motion to compel a sealed document," I should apply a different test and more fully consider California's interest in protecting Wilbur-Ellis from providing discovery material in this litigation. [*See* Wilbur-Ellis Reply, ECF Doc. No. 1380, at 1]. In making this argument, Wilbur-Ellis provides a more in-depth discussion of the comity argument it raised in its original motion. The memorandum comprehensively reviews cases in which other judges facing different circumstances have decided to defer to state court protective orders.

To the extent Wilbur-Ellis discusses comity in a novel way in its memorandum in support of reconsideration, it does so based on "facts or legal arguments that could have been, but were not, raised at the time the relevant motion was pending." *Julianello v. K-V Pharm. Co.*, 791 F.3d 915, 923 (8th Cir. 2015). As part

of the basis for its motion to reconsider, Wilbur-Ellis argues I should consider *Riddell, Inc v. Super. Ct.,* a relatively new case that it contends expanded the *Montrose* Doctrine protections available to California policyholders. *See Riddell*, 14 Cal. App. 5th 755 (Ct. App. 2017) (discussing *Montrose Chem. Corp. v. Super. Ct.*, 6 Cal. 4th 287 (1993)).

Wilbur-Ellis could have submitted *Riddell* between when it filed its original brief and the date of my order, January 4, 2019. Regardless, the case supports my authority to order production of the *Ironshore* Brief. In *Riddell*, the California Court of Appeal determined that the *Montrose* Doctrine supported a stay of discovery so that the insured party could avoid developing facts that are prejudicial to it in the underlying action. This was, in part, because a federal district court "is not bound by a state court confidentiality order in the coverage action." *Riddell*, 14 Cal. App. 5th at 768 (Ct. App. 2017).

When I originally ordered that Wilbur-Ellis must produce the *Ironshore* Brief, I was aware that I could decline to order the brief's production out of deference to the state court. I acknowledged the comity interests at play and ordered production despite the fact that my order ran contrary to the state court's aim of constraining discovery in the litigation before me. In making the determination that Wilbur-Ellis must produce the brief, I considered and gave little weight to the state court's application of California's interest insofar as it was specifically designed to help Wilbur-Ellis avoid discovery in this case.

The California case law that the parties have provided me supports Blue Buffalo's argument that the appropriate effectuation of the *Montrose* Doctrine is a stay, not a protective order. In this case, the pro-

tective order relied on what appears to be a novel, or at best rarely used, application of the *Montrose* Doctrine. I agree with Wilbur-Ellis that the values of comity and federalism are important in our federal system. I do not agree that this is a situation in which I should defer to the state court's sealing order, and I will not reconsider my initial order.

II. Motion to Certify the Question to the Eighth Circuit Court of Appeals

This dispute does not present a question for which certification to the Eighth Circuit is appropriate. A district court may certify an appeal to the circuit court when an order "involves a controlling question of law as to which there is substantial ground for difference of opinion and [] an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see also Union Cty., Iowa v. Piper Jaffray & Co.*, 525 F.3d 643, 646 (8th Cir. 2008) (setting forth the certification factors as a three part test). Interlocutory review under § 1292(b) "must be granted sparingly" and "only in exceptional cases where a decision on appeal may avoid protracted and expensive litigation, as in antitrust and similar protracted cases." *White v. Nix*, 43 F.3d 374, 376 (8th Cir. 1994) (concluding that a district court abused its discretion in certifying an interlocutory appeal of a discovery dispute) (quoting S.Rep. No. 2434, 85th Cong., 2d Sess. (1958)).

Wilbur-Ellis concedes that my decision did not violate an applicable rule of law. [See Wilbur-Ellis Reply, ECF Doc. No. 1380, at 8]. Wilbur-Ellis nonetheless contends that the discovery dispute presents a controlling question of law: the extent to which I correctly considered comity, federalism, judicial administration, and deference to California's applicable

public policy. An "allegation of abuse [of discretion] does not create a legal issue." *White v. Nix*, 43 F.3d 374, 377 (8th Cir. 1994); *see also id.* at 377-78 ("the discretionary resolution of discovery issues precludes the requisite controlling question of law."). Because Wilbur-Ellis has not identified a controlling question of law, and the "the requirements of § 1292(b) are jurisdictional," I will deny Wilbur-Ellis's motion for certification under 28 U.S.C. § 1292(b).

Accordingly,

IT IS HEREBY ORDERED that Wilbur-Ellis's motion for reconsideration, or in the alternative, for certification under 28 U.S.C. § 1292(b) [1371], is DENIED.

/s/ Rodney W. Sippel
RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE

Dated this 6th day of June, 2019.

APPENDIX D

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

[Filed May 4, 2016]

Case No. CGC – 15-549583

IRONSHORE SPECIALTY INSURANCE COMPANY,

Plaintiff,

vs.

WILBUR-ELLIS CO., *et al.,*

Defendants.

ORDER DENYING WILBUR-ELLIS' MOTION RE FORUM NON CONVENIENS AND CONTINUING MOTION TO STAY

I heard argument May 3, 2016 on Wilbur-Ellis' motion to stay the case pending resolution of the underlying litigation, or to dismiss it because the forum is inconvenient.

This is an insurance coverage action. The underlying litigation involves allegations that Wilbur-Ellis is liable for providing less than bargained for ingredients for pet food. The cases include one in the Eastern District of Missouri, *Nestle Purina Pet Care Company v. The Blue Buffalo Company Ltd.* (Case No. 14-cv-00859-RWS) (the Purina Action), and *In re: Blue Buffalo Company, Ltd. Marketing and Sales Practices Litigation* (Case No. 14-md-2562-RWS) (the Consumer Class Actions).

Ironshore issued three primary liability insurance policies to Wilbur-Ellis. They cover "those sums that the

insured becomes legally obligated to pay as damages because of . . . . property damage to which this insurance applies," provided that the damage was caused by an "occurrence." The policies define property damage as:

> a. Physical injury to or destruction of tangible property, including all resulting loss of use and diminished value of that property;
>
> b. Loss of use of tangible property that is not physically injured or destroyed arising out of physical injury to or destruction of other tangible property[.]

Ironshore filed this action against Wilbur-Ellis in December 2015, seeking a declaration that it is not required to cover Wilbur-Ellis in connection with either the Purina Action or the Consumer Class Actions. It also seeks damages in the form of reimbursement. Wilbur-Ellis now moves to stay the case pending resolution of the underlying litigation, or to dismiss it because the forum is inconvenient.

Judicial Notice

Wilbur-Ellis requests judicial notice of various filings and court orders in the underlying litigation. The requests are unopposed and are granted. Evid. Code § 452(d).

Motion to Stay

The parties are in agreement that this case should be stayed. *Montrose Chem. Corp. v. Superior Court*, 6 Cal. 4th 287, 295 (1993) *(Montrose I)* ("To eliminate the risk of inconsistent factual determinations that could prejudice the insured, a stay of the declaratory relief action pending resolution of the third party suit is appropriate when the coverage question turns on facts to be litigated in the underlying action."). They

disagree whether I should nevertheless permit the issue, specifically, whether the property damage definition pretermits Ironshore's defense responsibilities.

There are three types of prejudice that may result from simultaneous litigation of insurance coverage and the underlying cases: (1) that the insurer will "join forces with the plaintiffs in the underlying actions as a means to defeat coverage;" (2) that the insured will be "compelled to fight a two-front war, doing battle with the plaintiffs in the third party litigation while at the same time devoting its money and its human resources to litigating coverage issues with its carriers;" and (3) that "the insured may be collaterally estopped from relitigating any adverse factual findings in the third party action, notwithstanding that any fact found in the insured's favor could not be used to its advantage." *Montrose Chem. Corp. v. Superior Court*, 25 Cal.App.4th 902, 909-10 (1994) *(Montrose II).*

At first blush these factors do not appear to bar the summary adjudication motion. The motion will not necessary have the insurer joining forces with the underlying complainants. One motion does not a war make. And I do not make fact findings when I decide motions for summary adjudication or judgment *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 856 (2001).

If there is a viable summary adjudication motion—that is, there are indeed no material disputed facts—no prejudice to the insured should be generated.

> if the declaratory relief action can be resolved without prejudice to the insured in the underlying action—by means of undisputed facts, issues of law, or factual issues unrelated to

> the issues in the underlying action—the declaratory relief action need not be stayed.

Great Am. Ins. Co. v. Superior Court, 178 Cal. App. 4th 221, 235 (2009) (Croskey, J.). On the other hand, it is at least conceivable in the abstract that to defeat a summary adjudication motion an insured will present, or develop, facts[1] which are useful to establishing a duty to defend but which can be used by the underlying complainants against the insured. It is not possible to ascertain the degree of prejudice involved in the abstract, because the pertinent facts (i) might already be available to, and indeed have been used by, the underlying complainants, or (ii) may be secret, or subject to future discovery in either the underlying case or the insurance dispute litigation, in which case preparation for the summary adjudication motion in the coverage litigation might prejudice the insured.

As discussed at our hearing, Ironshore has a draft of the motion at issue, and has agreed to provide it to Wilbur-Ellis. Ironshore may wish to edit this. Ironshore should provide a draft to Wilbur-Ellis (and lodge a copy with the court) not later than May 19. Each side may then provide supplemental briefing, not more than 5 pages, not later than May 27, on whether I should allow the filing of a motion with substantially that content.

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[1] *Great Am. Ins. Co. v. Superior Court*, 178 Cal. App. 4th 221, 234 (2009) ("In determining whether a duty to defend exists, courts compare the allegations of the underlying complaint with the terms of the policy. *(Horace Mann Ins. Co. v. Barbara B., supra*, 4 Ca1.4th at p. 1081, 17 Cal.Rptr.2d 210, 846 P.2d 792.) **Facts extrinsic to the complaint may also be considered.** *(Montrose Chemical Corp. v. Superior Court, supra*, 6 Cal.4th at pp. 295, 298-299, 24 Cal.Rptr.2d 467, 861 P.2d 1153.)") (Emphasis supplied.)

The matter will be deemed submitted as of May 27, 2016.

Forum Non Conveniens

Wilbur-Ellis asks the case be in effect transferred to the Eastern District of Missouri, where the underlying litigation is pending. C.C.P. § 410.30. *Stangvik v. Shiley Inc.*, 54 Ca1.3d 744, 751 (1991). Wilbur-Ellis has no evidence that the federal court has jurisdiction. Even if it did, the facts weigh strongly in favor of keeping the case in California. First, as Wilbur-Ellis acknowledges, Ironshore's decision to file in California deserves "due deference," albeit not a "strong presumption." Motion, 12. Second, while Wilbur-Ellis claims that many witnesses and most of the evidence is located in Missouri, or at least outside of California, there is no evidence of this. Third, this suit was filed against California corporation and involves an insurance policy issued in California. It should stay here.

Dated: May 4, 2016

/s/ Curtis E.A. Kamow
Curtis E.A. Kamow
Judge Of The Superior Court

APPENDIX E

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

[Filed June 10, 2016]

Case No. CGC – 15-549583

IRONSHORE SPECIALTY INSURANCE COMPANY,

Plaintiff,

vs.

WILBUR-ELLIS CO., *et al.*,

Defendants.

ORDER SEALING PORTIONS
OF DEFENDANT'S BRIEF

On June 1, 2016 I issued an order regarding defendant's attempt to provide me with a lodged but not sealed brief. In response the parties on June 6 filed a one-shot submission[1] on defendant's request to seal. I resolve the request to seal here.

I am sensitive to the legal requirement that my order be narrowly tailored, and that I seal the minimum words consistent with a showing of an overriding interest sufficient to overcome the public's interest in an open file. CRC 2.550 *et seq*.

[1] This optional process by which parties may have me resolve issues is outlined in the Users' Manual at http://wwww.sfsuperiorcourt.org/divisions/civil/litigation. The Manual also explains the use of the Delta document referred to below.

As I understand the plaintiff's position, it does not disagree with the sealing request but contends that some of the sections sought to be sealed should be stricken, not sealed, because they are irrelevant to the underlying motion. Compare, *Overstock.Com, Inc. v. Goldman Sachs Grp., Inc.*, 231 Cal. App. 4th 471, 500, 506, 508 (2014). I am not prepared now to make decision on the underlying merits, which in this particular case likely would have to be done to resolve the relevancy issue; I assume that the sections identified by the plaintiff were presented in good faith by defendant as part of its argument on the merits.

The basis for sealing is that the disclosure of the material would have a significant adverse impact on the defendant's ability to defend itself in underlying litigation. Thus I have scoured the material to determine the extent to which plaintiffs in the underlying litigation might be able to use it to defendant's great disadvantage. I also find that valid reasons for sealing are the very principles of law which, in the appropriate case, allow insureds such as defendant here to secure a stay of the coverage case pending resolution of the underlying litigation. If I do not seal as indicated in this order, defendant will be severely impacted in the underlying litigation, and its rights to be free of the sort of prejudice which may stem from a coverage case will be severely and adversely impacted.

Mindful that my order must be narrowly tailored, these following words and phrases may be redacted from the publicly filed version of the defendant's brief, with an unredacted version filed as a sealed document

(page and line numbers refer to the Delta document provided by the defendant):[2]

- i (table of contents): line 4: last word after "Its".
- 1: line 16, last words after 'about'; line 17, after 'its', the following words to end of the sentence; line 18, after "Whether the" up to "in the underlying"; line 20, everything after "potentially".
- 3: line 5, everything after the comma to the end of the sentence; line 7: after 'interviews' to the end of line 16; line 23-24 (caption): everything in the caption after "ITS".
- 4: line 11, after "having to establish" to the end of line 15 (end of the paragraph); line 18the sentence that begins after footnote call 3 up to the sentence that begins on line 19 "Both Blue . . ."
- 5: line 4 materials which begin "Although" to the end of the paragraph (at line 12); line 14 through to the material on line 19 that ends "issues"; line 21, from the words "that" to the end of the sentence.

I find that there is an overriding interest in having these selected portions sealed, which overcomes the right of public access; this overriding interest supports the sealing of the selected items; there is a substantial probability that the overriding interest will be preju-

[2] I have assumed that the documents referred to in the Delta document at 4-5 such as pleadings in the underlying case are not sealed there.

diced if I do not seal the records, and there are no less restrictive means to achieve the overriding interest.

The filings of the public and private versions of the document at issue must be accomplished not later than June 15, 2016 at which time the underlying motion (to stay or permit the filing of a summary judgment motion) will be deemed submitted.

Dated: June 10, 2016 /s/ Curtis E.A. Karnow
Curtis E.A. Karnow
Judge of the Superior Court

APPENDIX F

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

[Filed June 20, 2016]

Case No. CGC – 15-549583

IRONSHORE SPECIALTY INSURANCE COMPANY,

Plaintiff,

vs.

WILBUR-ELLIS CO., *et al*.,

Defendants.

ORDER RE STAY

One June 10, 2016 I issued an order regarding the sealing of materials in support of a request to extend the stay in this case to Ironshore's contemplated motion for summary adjudication. The underlying motion (whether I should also stay the summary adjudication motion) was deemed submitted June 15, 2016.

Although Wilbur-Ellis might be able to address the issues presented by Ironshore's summary adjudication motion without disclosing materials which might prejudice it in the underlying litigation, if it were free to create all triable issues of fact, it might reasonably allude to facts, in order to show a triable issue regarding diminution in value, or hazard which would prejudice it in the underlying litigation. I say "might" because it is true that Wilbur-Ellis first disagrees with Ironshore's view of the law which, if Wilbur-Ellis is right, might pretermit to the need to develop and

display prejudicial facts. But Wilbur-Ellis' counsel must also account for the possibility that I might agree with Ironshore and so must present all facts in order to contest the summary adjudication motion. I should not put the insured, Wilbur-Ellis, in that position.

The stay extends to the filing of Ironshore's summary adjudication motion.

A case management conference is set for December 1, 2016 at 9:00 a.m. to consider the status of the underlying litigation and estimate when the present matter may proceed. In the meantime, if either party believes events in the underlying litigation suggest a change of status in this one, they should arrange for an informal telephone conference with me.

Dated: June 20, 2016 /s/ Curtis E.A. Karnow
Curtis E.A. Karnow
Judge Of The Superior Court

APPENDIX G

[1] SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

BEFORE THE HONORABLE
CURTIS E.A. KARNOW
DEPARTMENT 304

———

No. CGC-15-549583

———

INRONSHORE SPECIALTY INSURANCE COMPANY,

Plaintiff,

vs.

WILBUR-ELLIS COMPANY, A CALIFORNIA, *et al.*

Defendants.

———

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(MOTION FOR STAY and MOTION FOR FORUM NON CONVENIENS)
May 3, 2016

Taken before HOLLY SAYERS
CSR No. 13678

JOB NO. 106836

[2] APPEARANCES OF COUNSEL:

For the Plaintiff: LAURA RUETTGERS, ESQ.
SEVERSON & WERSON
One Embarcadero Center
San Francisco, CA 94111

For the Defendant: MARTIN MYERS, ESQ.
COVINGTON & BURLING
One Front Street
San Francisco, CA 94111

* * *

[17] MR. MYERS: Thank you, Your Honor.

MS. RUETTGERS: Good afternoon, Your Honor. Laura Ruettgers for the plaintiff.

Your Honor posed it as a very simple question, and we agree with the question posed. There is a question as to whether there is a purely legal issue, which fully resolved the duty, which if found in favor of Ironshore, would terminate duty to defend. And we believe there is a motion. In fact, I have a draft of it. It's not finalized yet, but we're ready to go with that motion.

If I may expand a bit on the questions before the Court. We would submit that one other issue that the Court could also consider at this time, and probably should consider at this time, is whether Wilbur-Ellis's motion is wholly premature at this time and in this context.

THE COURT: In the motion to stay?

MS. RUETTGERS: Yes. The motion to stay, Your Honor. Because if you look at the stay cases in California, what you see is two important things. First of all, the stay motions are decided in the context; all right? So the Montrose – two cases, actually. The case that discussed the stays specifically, there have been a trial that had been set. The matter was at issue. The

* * *

[19] record on that. Number three, what issues have to be determined in the coverage litigation? Number four, do those issues that need to be determined in the coverage litigation – are they the same as the issues that have to be determined in the underlying action? And then finally number five, that's when you get to the balancing of the prejudices.

So what we would submit here, Your Honor, in addition to the question posed - and we can go back to that. But I wanted to lay out that Wilbur-Ellis potentially jumped the gun in this instance, because we filed a complaint. And instead of filing an answer and meeting and conferring and seeing if we could work this out, they filed a stay motion. And most of the things I heard counsel arguing is, "We're afraid Ironshore is going to say, 'X, Y, and Z,' and we're going to have to say, 'A, B, and C,' to respond to it."

As your Honor pointed out, what if we don't say these things?

THE COURT: What would you like to do in this case? Would you – I mean, if the stay doesn't issue, then we would, what, take depositions? You'd ask them for – what would we wait for?

MS. RUETTGERS: No. Your Honor, what Ironshore has proposed is to stay discovery in the case. And we [20] would like an opportunity to file our motion for summary judgment.

And, in fact, we'd be willing to send Wilbur-Ellis an advanced copy that we intend to file so Wilbur-Ellis – either we could discuss any issues that may prejudice them in the underlying action, or we could bring it back to Your Honor. But we have context for the motion.

THE COURT: So it looks like that you're – that both sides are in agreement except for one thing, which is Wilbur-Ellis doesn't want a summary judgment motion, and you do. That's all – no discovery. We're not going to do anything in this case. We're just going to have a stay, except you'd like a summary judgment; right?

MS. RUETTGERS: That's correct on the one legal issue, Your Honor.

THE COURT: So let's focus on that. And that's why I focused, as I tried, at the beginning of the hearing on that issue. One could vaguely pick that up from the papers.

With respect to the summary judgment motion, the central attack that Wilbur-Ellis has is that they can't litigate the summary judgment motion without some facts. You heard them talk the same way I did. What are your thoughts about that?

* * *

APPENDIX H

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO

———

Civil Case No.: CGC – 15-549583

———

IRONSHORE SPECIALTY INSURANCE COMPANY, an Arizona Corporation,

Plaintiff,

v.

WILBUR-ELLIS COMPANY, a California Corporation; and DOES 1-10,

Defendants.

———

"ONE SHOT" SUBMISSION REGARDING DEFENDANT'S MOTION TO SEAL SUPPLEMENTAL BRIEF AND EXHIBIT D IN SUPPORT OF MOTION TO STAY

———

Department: 304
Judge: Hon. Curtis E.A. Karnow

Complaint Filed: December 23, 2015
Trial Date: TBD

———

Martin H. Myers (Bar No. 130218)
Christine S. Haskett (Bar No. 188053)
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, California 94111-5356
Telephone: + 1 (415) 591-6000
Facsimile: + 1 (415) 591-6091
E-mail: *mmyers@cov.com*; *chaskett@cov.com*

Nicholas M. Lampros (Bar No. 299618)
COVINGTON & BURLING LLP
2029 Century Park East, Suite 3100
Los Angeles, CA 90067-3044
Telephone: +1 (424) 332-4755
E-mail: *nlampros@cov.com*

Attorneys for Defendant
WILBUR-ELLIS COMPANY

Pursuant to CRC 2.550 *et seq.*, the Court's Users' Manual, and the Court's order of June 1, 2016, Defendant Wilbur-Ellis Company ("Wilbur-Ellis"[1]) hereby moves to seal the following portions of Wilbur-Ellis's Confidential Supplemental Brief in Support of Motion to Stay Case ("Supplemental Brief"), lodged with the Court on May 27, 2016:

- page i, item III
- page 1, lines 10-12
- page 1, lines 15-20

[1] Wilbur-Ellis Company reorganized on January 4, 2016. References to "Wilbur-Ellis" in this memorandum and supporting materials refer to Wilbur-Ellis Company LLC as successor-in-interest to Wilbur-Ellis Company.

- page 3, lines 4-16
- page 3, lines 23-24
- page 4, lines 10-28
- page 5, lines 1-21
- Exhibit D[2]

Plaintiff Ironshore Specialty Insurance Company ("Ironshore") objects to portions of Wilbur-Ellis's designated materials.[3] In accordance with the Court's order of June 1, 2016, the parties' respective arguments are presented herein in the "one-shot" format.

I. ARGUMENT

Wilbur-Ellis's Position

Even a cursory review of the material that Wilbur-Ellis seeks to file under seal will demonstrate the extreme prejudice to Wilbur-Ellis should that material reside in the public record. As this Court has previously noted, Wilbur-Ellis should not be put in the position of needing to scour the world for information potentially harmful to its interests in order to respond to Ironshore's proposed Motion for Summary Adjudication. But that is exactly what is happening here. Ironshore is now compounding the problem by refusing to agree that potentially harmful and prejudicial information may be maintained as confidential. This Court should allow Wilbur-Ellis to file the requested

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[2] Concurrent with this filing, Wilbur-Ellis is providing to the Court (but not filing) the "delta document" required by the Court's Users' Manual, showing with specificity the material sought to be sealed.

[3] Ironshore is separately providing to the Court its own version of the "delta document," showing with strikeouts the objectionable material.

portions of its Supplemental Brief under seal and should then order this case to be stayed before Ironshore continues on its current course of attempting to put information into the public record that will be highly damaging to its own insured, Wilbur-Ellis.

A record may be filed under seal if: "(1) [t]here exists an overriding interest that overcomes the right of public access to the record; (2) [t]he overriding interest supports sealing the record; (3) [a] substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) [t]he proposed sealing is narrowly tailored; and (5) [n]o less restrictive means exist to achieve the overriding interest." CRC 2.550(d). All of these circumstances exist in this case.

A. There Is an Overriding Interest that Overcomes the Right of Public Access, Supports Sealing the Record, and Will Be Prejudiced if the Record Is Not Sealed.

Wilbur-Ellis is a third-party defendant and cross-defendant in *Nestlé Purina Petcare Co. v. Blue Buffalo Co. Ltd.*, Case No. 4:14-cv-00859-RWS (E.D. Mo.) ("the Underlying Litigation"). In the Underlying Litigation, various claims have been asserted against Wilbur-Ellis based on the nature of certain products supplied by Wilbur-Ellis to be used in pet food. As explained in the accompanying declaration of David Granoff, there are several portions of the Supplemental Brief that, if made public, would cause severe and immediate prejudice to Wilbur-Ellis. *See* Declaration of David Granoff in Support of Defendant's Motion to Seal Supplemental Brief and Exhibit D in Support of Motion to Stay ¶ 4. A review of the material sought to be sealed will immediately demonstrate that to be the case. Further, the court in the Underlying Litigation has

already ruled that Exhibit D to the Supplemental Brief should be filed under seal rather than be subject to public disclosure. *Id.* ¶ 5. Accordingly, there is an overriding interest here in maintaining the confidentiality of this information that overcomes the right of public access.

B. The Proposed Sealing Is Narrowly Tailored and No Less Restrictive Means Exist.

Wilbur-Ellis has requested that only specific portions of the Supplemental Brief be sealed, along with one exhibit (Exhibit D) that was previously filed under seal in the Underlying Litigation. Wilbur-Ellis has requested to seal only the information that would cause prejudice, and sealing this material is the most narrowly tailored way to protect Wilbur-Ellis from that prejudice.

Although Ironshore argues below that certain material that Wilbur-Ellis seeks to have sealed is irrelevant, that is not the case. First, on the "diminution in value" issue, it is not true that Ironshore's proposed MSA concedes that diminution in value is alleged, thus relieving Wilbur-Ellis from presenting any evidence of such diminution. *See* MSA at 16 ("Even presuming (without finding) that Blue Buffalo alleges it sustained diminution damages . . . ."). Second, Wilbur-Ellis has explained why the evidence in question would be relevant to diminution in value. Supplemental Brief at 3:10-12.

Next, Ironshore contends that the prejudicial material in Wilbur-Ellis's Supplemental Brief should not be sealed because it is not supported by admissible evidence. But that is not the standard for filing under seal. The Supplemental Brief is not Wilbur-Ellis's response to Ironshore's proposed MSA; it is the brief

requested by the Court to explain why Wilbur-Ellis would be required to develop evidence in response to the MSA that could be prejudicial to Wilbur-Ellis. Wilbur-Ellis was not required to go out and actually develop that evidence for the purposes of the Supplemental Brief.

Ironshore also asserts that its proposed MSA "does not turn upon a finding of hazard in any event." But Ironshore's proposed MSA spends pages discussing Ironshore's contention that it has no duty to defend Wilbur-Ellis unless the claims in the underlying litigation raise the issue of whether the products supplied by Wilbur-Ellis were "hazardous." MSA at 13-16.

Finally, Ironshore argues that Exhibit D is redundant of other material submitted. The citation to page 7 of Exhibit D contained in the Supplemental Brief, however, provides support for the statements at page 4, line 20 through page 5, line 1, and page 5, line 19 of the Supplemental Brief. Exhibit D is not duplicative of any other information provided.

Ironshore's Position

To the extent that Wilbur-Ellis is required to rely upon evidence which could cause it prejudice in the Underlying Action, a motion to seal is the appropriate measure. The so-called "sealed records rules" set forth by the California Supreme Court in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* [(1999) 20 Cal.4th 1178] and subsequently codified in CRC 2.550 and 2.551 permit a court to seal records where the moving party establishes that there "exists an overriding interest that overcomes the right of public access to the record." *McNair v. National Collegiate Athletic Association* (2015) 234 Cal.App.4th 25, 32 (Addressing appellate procedures and noting that "[T]he party

seeking an order sealing [the] records . . . has the burden to 'justify the sealing'.")

However, the rules require any proposed sealing to be "*narrowly tailored*." Further, the information to be sealed must " 'pass the threshold tests of relevance and admissibility'." *Overstock.Com Inc. v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th 471, 497 ("*Overstock*"), *citing, E.E.O.C. v. Dial Corp.* (N.D.Ill. 2000) 2000 WL 33912746, *1. Per *Overstock*, courts should guard against abusive litigation tactics such as submitting documents which are irrelevant (*i.e.*, "material with little to no relevance to the issues to underlying motions") or duplicative (*i.e.*, "multiple documents [] submitted to support a claim, when one would have sufficed"). *Id.* at 257-58. In such circumstances, as "the court's files and records are . . . subject to the court's control," a court should consider *striking* irrelevant or duplicative material and either removing it from the record or *sealing it for good cause*. *Id.* at 259 (emphasis supplied) (Noting that the "public's right to access to court materials exists only as to" material that is "*relevant* to the contentions advocated" and "does not extend to irrelevant materials submitted out of laziness in reviewing and editing evidentiary submissions, or worse, out of a desire to overwhelm and harass an opponent.")

The designations here do not appear to reflect the thoughtful process contemplated by the *Overstock* court.[4] Portions of the material highlighted do not

[4] Indeed there is some question under the circumstances as to whether the obfuscation of this simple issue is, at least in part, intentional. *See, e.g., H.B. Fuller Co. v. Doe* (2007) 151 Cal.App.4th 879, 897 ("Still, their peculiarly attenuated form is sufficient to raise a suspicion that a more direct statement would disclose

appear facially prejudicial. Further, while the brief includes some arguably sensitive information, that information lacks any evidentiary support, and is irrelevant and/or duplicative. While Ironshore does not oppose Wilbur-Ellis's motion to seal generally, Ironshore objects to some of the material submitted. Ironshore's objections can be broadly broken down into three categories; the diminution argument, the hazardous argument, and Exhibit D.

Diminution Argument – Wilbur-Ellis asserts in its brief (see, pg. 3) that it is required to establish diminution damages to oppose Ironshore's MSA and, in order to do so, it must submit the evidence referenced at page 3, lines 6-16 of the brief. Both premises fail. First, the MSA does not turn upon a finding of diminution but a purely legal finding that, even presuming diminution is alleged, the policies do not afford coverage. Second, Wilbur-Ellis makes no showing that the material is relevant to diminution. This is significant where the information proffered appears to be speak to intent, and potentially liability, but not damages and neither intent nor liability are at issue in the MSA. Further, in addition to being doubly irrelevant, the material sought to be submitted is wholly unsupported by any evidence.

"Hazardous" Argument – Wilbur-Ellis's hazard argument (see pgs. 4-5) is a classic red herring. Wilbur-Ellis expressly admits the lack of allegations to date of hazards to pets (see brief pg. 5:4-6.) The remainder of the information provided is once again wholly unsupported by any admissible evidence (indeed, Wilbur-Ellis admits the "sources, by themselves, *may*

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weaknesses in [their] position that the attenuation is intended to conceal.")

not constitute admissible evidence") and also irrelevant for two reasons. First, because it is pure speculation in the absence of any allegations. Second, because Ironshore's MSA does not turn upon a finding of hazard in any event.

Exhibit D – Wilbur-Ellis offers Exhibit D (see pg. 5) to illustrate certain assertions by Diversified. The evidence submitted (without verification), however, is wholly duplicative. These same allegations are contained in Diversified's Crossclaim / Third Party Complaint attached to the brief as Exhibit C (*see, e.g.*, Ex. C pg. 9 ¶¶ 35, 40, by-products and feather meal, and pgs. 11-12 ¶ 51, grade "B meal").

The irrelevant, inadmissible, and/or duplicative material is highlighted in Ironshore's version of the "delta" document by strikethrough and described as follows:

- page 3, lines 6-16
- page 4, lines 13 (starting at "But") – 15, and Fn 3
- page 5, lines 3-4 (reference to Exhibit D), line 4 ("Although"), lines 6 (starting with "perhaps") – 12, and lines 15 (starting with "but") – 19 (through "damages.")
- Exhibit D

Per *Overstock*, this material can be stricken and sealed for good cause. The remaining highlighted portions do not appear to be facially prejudicial (the only basis for sealing offered by Wilbur-Ellis) but Ironshore does not oppose the sealing except for page 5 lines 4-6 concerning Blue Buffalo's and Diversified's allegations (highlighted in blue in Ironshore's version

of the "delta" document) which Wilbur-Ellis has not established to be prejudicial.

II. CONCLUSION

Wilbur-Ellis's Position

Based on the foregoing, Wilbur-Ellis respectfully requests that the following portions of the Supplemental Brief be filed under seal:

- page i, item III
- page 1, lines 10-12
- page 1, lines 15-20
- page 3, lines 4-16
- page 3, lines 23-24
- page 4, lines 10-28
- page 5, lines 1-21
- Exhibit D

Ironshore's Position

As more fully outlined herein, except for page 5 lines 4-6, Ironshore does not seek publication of the information Wilbur-Ellis wants to protect. Instead, Ironshore respectfully objects to certain material submitted. Per *Overstock*, as the court's records are subject to its own control, this Court can seal such information on the motion if Wilbur-Ellis met the requisite burden or, alternatively, it can opt not to consider such information and seal it for good cause on that basis.

DATED: June 6, 2016

Respectfully submitted,

COVINGTON & BURLING LLP

By: */s/Christine S. Hasket*
Martin H. Myers
Christine S. Haskett

Attorneys for Defendant Wilbur-Ellis Company

SEVERSON & WERSON

By: */s/ Laura J. Ruettgers*
Laura J. Ruettgers
Susan M. Keeney
Harry A. Hagan

Attorneys for Plaintiffs Ironshore Specialty Insurance Company

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Filed July 9, 2019]

No. 19-2448

IN RE WILBUR-ELLIS COMPANY LLC

WILBUR-ELLIS COMPANY LLC,
Defendant-Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI,
Respondent,

BLUE BUFFALO COMPANY, LTD.,
Plaintiff-Real Party in Interest.

Petition for Writ of Mandamus to the United States
District Court for the Eastern District of Missouri
The Honorable Rodney W. Sippel, Presiding
Case No. 4:14 CV 859 RWS

PETITION FOR WRIT OF MANDAMUS

Simon J. Frankel
(pro hac vice pending)
Covington & Burling LLP
Salesforce Tower
415 Mission Street,
Suite 5400
San Francisco, CA 94105
(415) 591-6000

Mark. G. Arnold
Husch Blackwell LLP
190 Carondelet Plaza
Suite 600
St. Louis, MO 63105
(314) 480-1500
mark.arnold@
huschblackwell.com

Corporate Disclosure Statement

Wilbur-Ellis Company LLC ("Wilbur-Ellis) is a California limited liability company. The sole member of Wilbur-Ellis Company LLC is Wilbur-Ellis Holdings II, Inc., a private Delaware corporation. No publicly held corporation owns 10% or more of the stock of Wilbur-Ellis Company LLC.

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Table of Authorities

Cases

INTRODUCTION

In May 2015, Blue Buffalo filed a third party complaint against Wilbur-Ellis in the Eastern District of Missouri lawsuit that gives rise to this petition. Shortly thereafter, Wilbur-Ellis' insurance company filed an action in state court in California, seeking a declaratory judgment that it had no obligation to defend or indemnify Wilbur-Ellis in the Blue Buffalo action in Missouri. California courts have discretion to stay such insurance actions pending disposition of the underlying case pursuant to a line of California cases known as the *Montrose* Doctrine. To obtain a stay, the policyholder must demonstrate prejudice—that is, that prosecution of the declaratory judgment insurance action will damage the policyholder's defense in the underlying liability action for which the insurance company disputes coverage.

The California Superior Court granted the stay and sealed Wilbur-Ellis' brief in support based on an explicit finding that disclosure of its contents "would have a significant adverse impact" on Wilbur-Ellis' "ability to defend itself" in the underlying action in Missouri. Here, the District Court in that underlying action has ordered Wilbur-Ellis to produce a copy of the sealed brief to Blue Buffalo, the same party the California Superior Court issued its sealing order to prevent obtaining the brief. The District Court's order therefore effectively reversed the state court's sealing order. Wilbur-Ellis seeks a writ of mandamus to compel the District Court to vacate its January 4, 2019 order directing Wilbur-Ellis to produce the brief and its June 6, 2019 order denying reconsideration. Wilbur-Ellis is entitled to that relief for three reasons.

First, the District Court misunderstood California's *Montrose* Doctrine. The District Court held that its

order would not affect the California insurance-coverage litigation. But the basis for the sealing order was that disclosure would "severely impact[]" Wilbur-Ellis's defense of the *underlying liability case* by giving Blue Buffalo a road map of potential legal and factual bases for recovery against Wilbur-Ellis. If federal courts could *override sister courts and order policyholders to produce to their adversaries in related liability litigation* the very brief outlining the prejudicial theories that trigger the insurer's duty to defend and indemnify, the *Montrose* Doctrine would provide no relief and serve no purpose.

Second, the District Court did not afford appropriate weight to the basic principle of comity between federal and state courts. The California Superior Court held that disclosure of this brief to Blue Buffalo would severely hamper Wilbur-Ellis' ability to defend against Blue Buffalo's claims and that sealing the brief was required by the *Montrose* Doctrine. By ordering production of that same brief to Blue Buffalo, the District Court has effectively stood as an appellate body over the California Superior Court and effectively reversed that state-law finding. A federal court should override a state court's decision, especially on a matter of state law, only in the most extraordinary circumstances and no such circumstances exist here.

Third, setting aside the District Court's effective reversal of the California Superior Court on an issue of California law, the District Court also ignored the general rule that a party seeking to unseal a document must do so in the court that issued the sealing order. While federal courts have the power to order production of such documents, they do so only in extraordinary circumstances. The District Court found no such extraordinary circumstances, and indeed none exist.

Instead, overriding the sealing order struck at the heart of the California Superior Court's authority over its own docket: The brief filed in the insurance action was created at the request of the Superior Court and submitted on its docket only after Wilbur-Ellis was provided a court order assuring it that the brief would remain under seal.

STATEMENT OF THE RELIEF SOUGHT

Pursuant to 28 U.S.C. § 1651(a) and Federal Rule of Appellate Procedure 21, Wilbur-Ellis respectfully requests that the Court issue a writ of mandamus directing the District Court to vacate or reverse its Orders of January 4, 2019 and June 6, 2019 (Dkt. Nos. 1367 and 1393) granting Blue Buffalo's motion to compel.

STATEMENT OF THE ISSUES

Whether the District Court erred in ordering production of the brief sealed by the California Superior Court by (1) failing to properly consider the public policy embodied in California's *Montrose* Doctrine; (2) improperly ignoring principles of comity in effectively reversing an order of a California Superior Court on a point of California law; and (3) overriding the California Superior Court's sealing order in the absence of any extraordinary circumstances.

STATEMENT OF FACTS

A. The *Blue Buffalo* Litigation

On May 6, 2014, Nestlé Purina filed a lawsuit against Blue Buffalo asserting causes of action for false advertising, commercial disparagement, unfair competition, and unjust enrichment (the "*Blue Buffalo* Litigation"). *See* Dkt. No. 1. Specifically, Purina alleged that Blue Buffalo convinced consumers to pur-

chase its pet food by falsely marketing its products as healthier and more nutritious than competing brands. Purina alleged that over a dozen discrete representations within Blue Buffalo's marketing campaign were false, including that its products offered "superior nutrition" to other brands, that that they were purportedly "human grade," and that they did not contain poultry byproduct meal. *See id*.

In May 2015, Blue Buffalo impleaded Wilbur-Ellis and another company, Diversified Ingredients. *See* Dkt. No. 271. Wilbur-Ellis is a marketer and distributor of agricultural products, animal feed, specialty chemicals and ingredients. Blue Buffalo's Third Party Complaint alleged that both Wilbur-Ellis and Diversified were responsible for poultry byproduct contained in Blue Buffalo pet foods, asserting breach of contract, breach of warranty, negligence, misrepresentation, and other claims against both Defendants. *Id*.

Blue Buffalo ultimately settled Purina's claims and is now styled as the plaintiff in the *Blue Buffalo* Litigation. Blue Buffalo seeks recovery of the amounts it paid to settle Purina's claims (and parallel claims in a consumer class action Blue Buffalo also settled), tens of millions of dollars in attorneys' fees, and potentially hundreds of millions of dollars in alleged lost profits from both Diversified and Wilbur-Ellis.

B. The *Ironshore* Insurance Coverage Litigation

On December 23, 2015, Wilbur-Ellis's commercial general liability insurer, Ironshore Specialty Insurance Company, filed a lawsuit against Wilbur-Ellis in San Francisco Superior Court (the "*Ironshore* Litigation"), seeking, among other relief, a declaratory judgment that Ironshore has no obligations to defend or indemnify Wilbur-Ellis in connection with claims in

the *Blue Buffalo* Litigation. Wilbur-Ellis promptly moved to stay the *Ironshore* Litigation pursuant to *Montrose Chemical Corp. v. Superior Court*, 6 Cal. 4th 287, 24 Cal. Rptr. 2d 467 (1993), on the ground that Wilbur-Ellis would be subjected to unfair prejudice if it were forced to litigate against Ironshore while at the same time defending against the claims in the *Blue Buffalo* Litigation.

On May 3, 2016, California Superior Court Judge Curtis Karnow held a hearing in the *Ironshore* Litigation on Wilbur-Ellis's motion to stay. At that hearing, Ironshore's counsel argued that it was prepared to file a motion for summary judgment on the legal issues affecting insurance coverage and that the motion could be decided without unfair prejudice to Wilbur-Ellis. *See* Dkt. No. 1371-3 at 17, 19-20. Based on Ironshore's arguments, Judge Karnow ordered supplemental briefing on whether such a motion should be brought in light of the potential for prejudice to Wilbur-Ellis in the *Blue Buffalo* Litigation. *See* Dkt. No. 1371-4 at 4.

On May 27, 2016, Wilbur-Ellis lodged with the California court its supplemental brief in support of its motion to stay (the "Ironshore Brief"), and on June 6, 2016, pursuant to explicit instructions from Judge Karnow, Wilbur-Ellis and Ironshore filed a joint submission concerning whether the redacted portions of that supplemental brief should be filed under seal. *See* Dkt. No. 1371-5. On June 10, 2016, the Superior Court issued an order agreeing that the unredacted version of the brief should be sealed. *See* Dkt. No. 1371-6 (the "Sealing Order"). The Superior Court's sealing order reasoned that the sealing was justified under the long-standing public policy articulated in *Montrose*, and was intended to prevent the disclosure

of the Ironshore Brief to Blue Buffalo and the other litigants in the underlying action:

> The basis for sealing is that disclosure of the material would have a significant adverse impact on defendant's ability to defend itself in underlying litigation. Thus I have scoured the material to determine the extent to which plaintiffs in the underlying litigation might be able to use it to defendant's great disadvantage. I also find that valid reasons for sealing are the very principles of law which, in the appropriate case, allow insureds such as defendant here to secure a stay of the coverage case pending resolution of the underlying litigation. If I do not seal as indicated in this order, defendant will be severely impacted in the underlying litigation, and its rights to be free of the sort of prejudice which may stem from a coverage case will be severely and adversely impacted.

Sealing Order at 2. In other words, the Superior Court held that the very same principles that favor a stay of an insurance coverage case—the avoidance of unfair prejudice to the insured—supported the sealing of Ironshore Brief so it could not be used against Wilbur-Ellis in the *Blue Buffalo* Litigation. Wilbur-Ellis then filed a redacted version of the Ironshore Brief, and on June 20, 2016, the Superior Court issued an order staying the *Ironshore* Litigation. *See* Dkt. No. 1371-7.

C. The District Court Orders Production of the Ironshore Brief

Notwithstanding Judge Karnow's sealing order in the *Ironshore* Litigation, Blue Buffalo sought discovery of the unredacted Ironshore Brief through a Rule

34 request for production in the *Blue Buffalo* Litigation. Wilbur-Ellis objected to production on the basis of the Sealing Order and invited Blue Buffalo to seek relief from Judge Karnow through a petition filed in the *Ironshore* Litigation. Blue Buffalo did not do so, but instead on February 1, 2017 moved the District Court in the *Blue Buffalo* Litigation to compel production of the Ironshore Brief. *See* Dkt. No. 1202-1203.

Consideration of that motion was delayed by a stay imposed by the District Court in deference to related criminal proceedings. Those criminal proceedings have so far resulted in charges against several individuals and entities involved in the *Blue Buffalo* Litigation, including Wilbur-Ellis. Consideration of Blue Buffalo's motion was thus delayed until after Wilbur-Ellis and Diversified entered plea agreements admitting to strict liability misdemeanor mislabeling violations. On January 4, 2019, the District Court ordered production of the Ironshore Brief. *See* Dkt. No. 1367 (the "January 4th Order"). But the District Court's January 4th Order got it backwards: rather than consider whether its ruling might implicate California's interest in preventing prejudice to Wilbur-Ellis in the underlying Blue Buffalo litigation as the *Montrose* Doctrine requires, the District Court incorrectly thought it was to consider potential prejudice to Wilbur-Ellis in the *Ironshore* Litigation:

> I am aware that my decision here frustrates Judge Karnow's aim of constraining discovery in this litigation. It does not, however, undermine or affect *California's interest in the stayed California Superior Court's proceeding*. I am not ruling on the propriety of the Montrose doctrine in California courts, and *my decision has no impact on the stayed*

> *California dispute*. Both parties in that case already have access to the unredacted copy of Wilbur-Ellis's sealed brief.

January 4th Order at 5. (emphasis added). The District Court then characterized its analysis as limited by "the longstanding admonition" to federal courts that they "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given," and held that California's law did not constrain the federal court from "applying Rule 26 to determine whether the document is discoverable." *Id*. at 6 (citations omitted).

On January 24, 2019, Wilbur-Ellis moved for reconsideration of the Court's January 4th Order or, in the alternative, for certification under 28 U.S.C. § 1292(b). The District Court denied Wilbur-Ellis's Motion on June 6, 2019. *See* Dkt. No. 1393 (the "June 6th Order"). The Court acknowledged that it gave "little weight to the state court's application of California's interest," but incorrectly believed that that interest was "specifically designed to help Wilbur-Ellis avoid discovery in this case." *Id*. at 4. Although it gave no indication it had studied the circumstances of the Superior Court's issuance of the sealing order in the context of a potential summary judgment motion in the *Ironshore* Litigation after the motion for a stay already had been made, in the District Court's view, the "appropriate effectuation of the *Montrose* Doctrine is a stay, not a protective order." Without authority or analysis, the District Court concluded that the sealing order issued by Judge Karnow "appears to be a novel, or at best rarely used, application of the *Montrose* Doctrine." *Id*. Nor did the District Court consider whether any extraordinary factors justified overriding

the Superior Court's authority to control its own records and files. *Id*.

Wilbur-Ellis now respectfully petitions the Court for a writ of mandamus directing the District Court to deny Blue Buffalo's motion to compel the Ironshore Brief.

REASONS WHY THE WRIT SHOULD ISSUE

Mandamus is reserved for exceptional circumstances. *See Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382–83 (1953). A writ of mandamus "is appropriately issued, however, when there is 'usurpation of judicial power' or a clear abuse of discretion." *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (citation omitted). Although discovery orders are not ordinarily appealable, mandamus is available to preclude discovery that "would be oppressive and interfere with important state interests." *In re Kemp*, 894 F.3d 900, 905-06 (8th Cir. 2018) (citation omitted). The District Court's effective reversal of the California Superior Court's application of California law and its decision to override that court's sealing order is exactly the type of action that warrants this extraordinary relief.

Mandamus relief is available when three conditions are met: (1) the "petitioning party must satisfy the court that he has 'no other adequate means to attain the relief he desires,'" (2) "his entitlement to the writ is 'clear and indisputable,'" and (3) the "issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *In re Lombardi*, 741 F.3d 888, 894 (8th Cir. 2014) (citation omitted). All three conditions are met here.

I. There Are No Other Adequate Means to Attain Relief.

Wilbur-Ellis diligently has exhausted all alternative avenues for relief, and mandamus now is the only way to correct the District Court's erroneous ruling and prevent the very prejudice that the California Superior Court's order sought to avoid under *Montrose*.

Wilbur-Ellis first raised the federalism, comity, and judicial authority considerations that weighed against ordering production of the Ironshore Brief in opposition to Blue Buffalo's motion to compel, but the District Court disregarded them. Wilbur-Ellis then moved for reconsideration or, in the alternative, certification for interlocutory appeal; in denying that motion, the District Court again misinterpreted the California state interest animating the *Montrose* Doctrine and did not analyze any of the factors that might have provided justification for the District Court—rather than the judge who issued the sealing order—to decide the issue. Because the District Court declined certification pursuant to Section 1292(b), no immediate appeal to this Court is possible. *Cf. In re Burlington Northern, Inc.*, 679 F.2d 762, 768 (8th Cir. 1982) (finding mandamus review inappropriate where petitioner had not sought certification under 28 U.S.C. § 1292(b)).

Nor is appeal from a final judgment on the merits an adequate or realistic alternative means of relief here. Much like a dispute over the discoverability of the identities of entities or individuals, or the production of documents protected by the attorney-client privilege, production of the Ironshore Brief is a cat that cannot be put back in the bag. *See Lombardi*, 741 F.3d at 894 (no adequate remedy available for a discovery order compelling the disclosure of identities because disclosure would have collateral consequences

prior to traditional appeal); *In re Gen. Motors Corp.*, 153 F.3d 714, 715 (8th Cir. 1998) (holding that the "extraordinary remedy of mandamus is appropriate because the district court's order would otherwise destroy the confidentiality of the [privileged] communications at issue"); *cf. Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (denying stay of injunction pending appeal because trade secrets disclosed during stay "could not be made secret again if the judgment below ultimately is affirmed").

Absent mandamus, the Orders compelling Wilbur-Ellis to produce the Ironshore Brief will evade meaningful appellate review on important issues of state public policy, comity and judicial authority, resulting in irreparable harm and prejudice to Wilbur-Ellis.

II. Wilbur-Ellis Has a Clear and Indisputable Right to the Writ.

District courts across the country agree that "[c]ourts which have been called upon to decide discovery motions that involve requests to modify or terminate a protective order previously issued by another court, whether state or federal, have frequently felt constrained by principles of comity, courtesy, and where a federal court is asked to take such action with regard to a previously issued state court protective order, federalism." *Donovan v. Lewnowski*, 221 F.R.D. 587, 588 (S.D. Fla. 2004) (collecting cases) (citations omitted). While such courts have discretion to override protective or sealing orders under extraordinary circumstances, *see id.*, those instances are the exception, not the rule.

In this case, the District Court flipped the standard on its head. Instead of weighing the comity and federalism concerns implicated by Blue Buffalo's motion

to compel, the District Court overrode the California Superior Court's sealing order as if the Ironshore Brief was no differently situated than any other document within the ambit of Rules 26 and 34. Specifically, the District Court ordered production: (1) based on an incorrect interpretation of the California public policy articulated in *Montrose*; (2) by improperly acting as an appellate court over the California Superior Court; and (3) without any consideration of the factors that courts generally weigh when determining whether to take this drastic action, all of which favor respecting the California Superior Court's sealing order in this case. Each error is an independent ground for reversing the District Court's Orders compelling production of the Ironshore Brief. Together, they warrant issuance of a writ of mandamus.

A. The District Court Got the State Interest Protected by the *Montrose* Doctrine Backwards.

The District Court justified giving "little weight" to California public policy by misstating the very interest the *Montrose* Doctrine protects, then second-guessing the Superior Court's determination that the state interest required sealing the Ironshore Brief. *See* June 6th Order at 4 (opining that the "appropriate effectuation of the *Montrose* Doctrine is a stay, not a protective order"). The District Court thus improperly eliminated from its analysis any consideration of the federalism and comity concerns implicated by Blue Buffalo's motion to compel. The California Superior Court was correct that production of the Ironshore Brief would inflict the very prejudice that the *Montrose* Doctrine is intended to prevent, and the District Court's refusal appropriately to consider California's strong state public policy was error and a clear abuse of discretion.

1. The *Montrose* Doctrine

The *Montrose* Doctrine addresses a common but vexing problem created when insurance declaratory relief actions are brought at the same time the underlying lawsuit for which coverage is sought is pending. In such situations the facts or theories on which coverage will turn often overlap with the facts or theories that the plaintiff suing the policyholder must prove to establish liability in the underlying action. To take a simple example, if a plaintiff files an action against a policyholder for both intentional and negligent torts, and the insurer then files a declaratory relief action arguing that coverage is not available because the policyholder "expected or intended" injury to occur, the same facts that will determine coverage—that the policyholder expected or intended injury to occur also would establish the policyholder's liability to the plaintiff for the intentional tort.

The California Supreme Court addressed the prejudice created by such simultaneous litigation in *Montrose*, the leading California decision on a liability insurer's duty to defend. In that case, the Court established that a policyholder should not be required to suffer prejudice from litigating in an insurance coverage action the same or overlapping factual issues present in the underlying action. Instead, "a stay of the declaratory relief action pending resolution of the third party suit is appropriate when the coverage question turns on facts to be litigated in the underlying action." *See Montrose*, 6 Cal. 4th at 301.

While part of the prejudice contemplated by the *Montrose* Court was the cost and inconvenience of litigating in two forums simultaneously, *see, e.g.*, *George F. Hillenbrand, Inc. v. Ins. Co. of N. Am.*, 104 Cal. App. 4th 784, 803-04, 128 Cal. Rptr. 2d 586, 600

(2002) (noting the "practical difficulties" for insureds "defend[ing] against two actions"), that is not the sole (or even primary) concern. If it were, there would be no need for California judges to consider whether a stay or a confidentiality order is the appropriate method to prevent the policyholder from suffering prejudice in the underlying action. *See Haskel, Inc. v. Super. Ct.*, 33 Cal. App. 4th 963, 981, 39 Cal. Rptr. 2d 520, 530 (1995)*, as modified* (Apr. 25, 1995) (holding that *Montrose* justified either a stay of discovery or a "properly drafted confidentiality order" to the extent that the lower court determined such an order to be "adequate to fully protect [the policyholder] from any prejudice to its interests in the underlying action").

California's interest in protecting its policyholders from prejudice in the underlying lawsuits for which they seek insurance coverage was confirmed and expanded in the most recent California appellate decision on the subject, *Riddell, Inc. v. Super. Ct.*, 14 Cal. App. 5th 755, 222 Cal. Rptr. 3d 384 (2017). In that decision, the Court of Appeals reinforced that California's state interest is not limited to issues of cost or preventing collateral estoppel, but extends to the use of information generated through discovery in the coverage action that could prejudice the policyholder in an underlying lawsuit:

> [T]he declaratory relief action must be stayed because of the risk of prejudice to the insured, including the risk of collateral estoppel. Discovery in the declaratory relief action that is logically related to issues affecting liability in the underlying action poses a similar risk of prejudice.

Id. at 766. The Superior Court in the *Ironshore* Litigation relied on the same *Montrose* principles

when it sealed the Ironshore Brief. *See* Sealing Order at 2.

2. The District Court's Incorrect Interpretation of the *Montrose* Doctrine

The District Court's January 4th Order did not apply the *Montrose* Doctrine at all. Rather than consider the prejudice to Wilbur-Ellis in the *Blue Buffalo* Litigation (as *Montrose* requires and as the California Superior Court properly did), the District Court considered whether its decision to order production of the Ironshore Brief would prejudice Wilbur-Ellis in the *Ironshore* Litigation:

> I am aware that my decision here frustrates Judge Karnow's aim of constraining discovery in this litigation. It does not, however, undermine or affect *California's interest in the stayed California Superior Court's proceeding*. I am not ruling on the propriety of the Montrose doctrine in California courts, and *my decision has no impact on the stayed California dispute*.

January 4th Order at 5 (emphasis added). That is not the state interest contemplated by *Montrose*.

While the District Court's June 6th Order on reconsideration re-cast its prior mis-articulation of *Monstrose*, that Order, without analysis, afforded "little weight" to the actual, protected state interest. *See* June 6th Order at 4. Instead, the District Court suggested that ordering the production of the Ironshore Brief notwithstanding the sealing order did not implicate the *Montrose* Doctrine at all. In the District Court's view, the California Superior Court's analysis was wrong because a stay of the coverage action represented the "appropriate effectuation of the

Montrose Doctrine," and a protective order like the sealing order here was "a novel, or at best rarely used, application" that should be afforded little weight. *Id*. In other words, the District Court concluded that the *Montrose* Doctrine did not militate against production of the Ironshore Brief and so, without actually weighing the interests of comity and federalism implicated, ordered its production.

The District Court's interpretation of the *Montrose* Doctrine is mistaken and fundamentally undermines California's state policy. As an initial matter, the District Court's unsupported conclusion that protective or sealing orders are somehow "novel, or at best rarely used" applications of the doctrine is incorrect. *See Haskel*, 33 Cal. App. 4th at 981 (directing trial court to consider whether confidentiality order in insurance action would adequately protect policyholder from prejudice in underlying action); *Travelers Prop. Cas. Co. of Am. v. City of L.A. Harbor Dep't*, 2016 WL 11522488, at *3 (C.D. Cal. Sept. 9, 2016); ("[A]s an alternative to a stay, courts have issued protective orders limiting the use and dispersal of information obtained through discovery in insurance coverage actions, to prevent prejudice to an insured's position in underlying actions"); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. NVIDIA Corp.*, 2009 WL 2566719, at *6 (N.D. Cal. Aug. 18, 2009) (observing that the policyholder "may seek a protective order and move for filing under seal any documents that could be prejudicial to it in [the underlying] litigation"); *Evanston Ins. Co. v. Russell Assocs*., 2008 WL 11342976, at *4 (C.D. Cal. June 3, 2008) (inviting policyholder to move for a "protective order to restrict the dissemination of any [discovery] information" to the extent that information

may prejudice the policyholder in the underlying action).[1]

Sealing a brief submitted by a policyholder in support of a *Montrose* stay is particularly necessary to effectuate the purpose of the *Montrose* Doctrine. This is because policyholders are not automatically entitled to a *Montrose* stay whenever a coverage action and underlying action are pending simultaneously. Rather, in order to stay a California coverage action under *Montrose*, a policyholder must demonstrate to the California court that the facts at issue in the two cases are sufficiently overlapping such that prejudice is sufficiently likely to occur. *See Riddell*, 14 Cal. App. 5th at 765-66. This leads to exactly the trap that a *Montrose* Doctrine sealing order is intended to avoid. To demonstrate it is entitled to a stay, the policyholder will often be required to play "devil's advocate" and predict the arguments and legal theories that the plaintiffs in the underlying action will make and the prejudice the policyholder will suffer if the coverage action is not stayed.

Providing that "roadmap" to the underlying plaintiff violates the very purpose of the *Montrose* rule, and inflicts the exact prejudice on the policyholder that a stay is intended to prevent. *See Riddell*, 14 Cal. App. 5th at 768 (*Montrose* stays are mandated because they

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[1] Because Superior Court decisions in California are not published (and are largely not contained on services like Westlaw and LexisNexis), there is no readily accessible means of establishing the frequency with which courts issue confidentiality or sealing orders pursuant to *Montrose* and *Haskel*. The primary source of accessible case law on this issue is the (likely small) fraction of California insurance cases that are litigated in federal court, where district court orders are more accessible on legal research platforms.

protect the policyholder from "prejudice caused by having to build the underlying plaintiffs' case for them"). As the Superior Court explained, the "rights to be free of the sort of prejudice which may stem from a coverage case [would] be severely and adversely impacted" by production of a brief seeking a *Montrose* stay. *See* Sealing Order at 2. In fact, production of a brief seeking a *Montrose* stay would exacerbate the prejudice to the policyholder by providing underlying plaintiffs with analysis of potential theories they may never have obtained, or would have received only months or years later in discovery.

The crippling impact of the District Court's decision on the *Montrose* Doctrine is plain. If in order to demonstrate its right to a *Montrose* stay, the policyholder must suffer the very same prejudice the stay is intended to prevent (disclosure of adverse facts to the plaintiff in the underlying action), the doctrine is fatally undermined.

* * * *

For these reasons, the District Court's determination that production of the Ironshore Brief did not implicate the *Montrose* Doctrine was erroneous. While theoretically it is possible for some extraordinary necessity to override California's strong public policy in some instance, the District Court's Orders did not make any finding sufficient to do so here. Instead, the District Court treated Blue Buffalo's request for production as it would any other request for documents, without regard to the impact that its decision would have on California's public policy interests and the California Superior Court's sealing order. This warrants the issuance of a writ of mandamus.

B. Principles of Comity Require Respecting the California Superior Court's Interpretation of California Law.

The California Superior Court did not merely find that the Ironshore Brief was sensitive, embarrassing, or otherwise warranted protection from public view—a determination that itself is afforded substantial deference—as described Section II.C, below. Instead, the California Superior Court applied long-established California law and found that the state interests articulated in *Montrose* and its progeny required sealing the Ironshore Brief. By overriding the Sealing Order on the ground that the California Superior Court misapplied the *Montrose* Doctrine, the District Court acted as a *de facto* appellate court and reversed the California Superior Court's interpretation of California law. That is not the role of the District Court.

A similar circumstance was addressed in *Resolution Trust Corp. v. Castellett*, 156 F.R.D. 89 (D.N.J. 1994), *aff'd*, 1994 WL 411809 (D.N.J. Aug. 2, 1994), where the district court determined that principles of federalism and comity required it to respect a state court's decision to seal exhibits submitted to a state grand jury. *Id*. at 90-91. In that case, the defendants in a federal civil action in New Jersey also had been the subject of a grand jury investigation in New York. The state indictments arising from that investigation ultimately were voluntarily dismissed. *Id*. at 90. Subsequently, the plaintiff in the federal action moved the state court to access the exhibits and evidence submitted to the grand jury. *Id*. The state court denied the plaintiff's application, finding that the records should remain sealed under New York's statutory provision requiring the sealing of records in criminal matters terminated in the defendant's favor. *Id*. at 91. As in this case, the

plaintiff ultimately petitioned the district court in the civil action to override the state court order and compel the disclosure of the state court records.

In denying the plaintiff's request to override the sealing order, the district court rejected the notion that it could compel the state court, in contravention of its own order, to release the grand jury materials sealed pursuant to state law. As the district court explained, "[b]y requesting this Court to file an order requiring the state court to disclose the requested materials, the movant essentially asks this Court to act as a state appellate court . . . . [S]uch a request is 'deeply offensive to the notion of federalism.'" *Id*. at 95 (citation omitted).

The Fourth Circuit Court of Appeals addressed a substantively similar question in *American Tank Transport, Inc. v. First People's Community Federal Credit Union*, 86 F.3d 1148 (Table), 1996 WL 265993 (4th Cir. May 20, 1996). That case also involved a civil plaintiff in federal court seeking access to state court grand jury materials. *Id*. at *2-3. In *American Tank*, however, the state court sealing order the district court declined to override was the state court's reconsideration of a prior order unsealing those materials, whereby the state court "recalled" the grand jury transcripts at issue. *Id*. at *3. In affirming the district court's decision, the Fourth Circuit held that "it was proper, and probably necessary, for the district court to have acknowledged and honored the state courts ruling recalling the grand jury materials." *Id*. at *7. The Fourth Circuit recognized that "it would be improper for a federal court to act as a state appellate court and [overrule] a state court decision concerning state criminal procedures" and that doing so "impermissibly intruded into the province of the state appel-

late courts to review questions concerning state procedural matters." *Id*.

The Ninth Circuit also has invoked similar reasoning to reverse a district court's order enjoining an arbitration proceeding where a state court had already found—under the same provision of the California Code of Civil Procedure—that the arbitration should not be enjoined. *See Se. Res. Recovery Facility Auth. v. Montenay Int'l Corp.*, 973 F.2d 711, 714 (9th Cir. 1992) (holding that effectively overruling the state court decision would create "needless friction between the state and federal forums"). And several district courts have found that overriding a state court's protective order would amount to an impermissible exercise of appellate jurisdiction over the state court proceeding. *See Feinwachs v. Minn. Hosp. Ass'n*, 2018 WL 882808, at *4 (D. Minn. Feb. 13, 2018) ("This Court will not exercise what amounts to appellate jurisdiction and effectively overrule or vacate a state court protective order shielding documents from the public. Comity between state and federal courts and constraints placed on a federal district court's jurisdiction dictate nothing less."); *Glickman, Lurie, Eiger & Co. v. I.R.S.*, 1975 WL 706, at *4 (D. Minn. Oct. 14, 1975) ("The Federal courts are not empowered to review the propriety of protective discovery orders in State court proceedings. . . . [The contrary position], if accepted, would result in deep and repeated intrusions by the Federal courts into the discovery process in State courts").

The District Court's decision to order production of the Ironshore Brief in this case is the same unwarranted intrusion into state court proceedings. The Superior Court's decision to seal the brief was based on California law. California courts are best suited to

adjudicate Blue Buffalo's request for the Ironshore Brief, and California law provides an avenue for Blue Buffalo to do so. *See* Cal. R. Ct. 2.551(h)(2) (providing than any "member of the public may move, apply, or petition . . . to unseal a record"). Blue Buffalo thus had (and still has) the opportunity to convince the California Superior Court that its interpretation of the *Montrose* Doctrine was mistaken. Had Blue Buffalo done so and the Superior Court declined to unseal the Ironshore Brief, Blue Buffalo could then have appealed to the California Court of Appeals. *See Mercury Interactive Corp. v. Klein*, 158 Cal. App. 4th 60, 76, 70 Cal. Rptr. 3d 88, 99 (2007) (order sealing or unsealing a court record is immediately appealable as a final determination of a collateral matter). Blue Buffalo could then argue to a *California* appellate court that the Superior Court had misinterpreted the scope of the *California* state interest expressed in the *Montrose* Doctrine.

That is the path that the parties' dispute over the scope and application of the *Montrose* Doctrine should have taken, and this Court should issue a writ that forecloses Blue Buffalo's attempt to skirt the proper court and procedure.

C. The District Court Failed to Consider Relevant Factors When Deciding to Override the Superior Court's Sealing Order.

The District Court's decision to override the Sealing Order would represent a clear abuse of discretion even if the basis for the California Superior Court's decision had nothing to do with substantive California law. When a party seeks production of a document subject to any protective or sealing order issued in another case, the "general rule" is that "any request necessitating the modification of the protective order be directed

to the issuing court." *Ohio Willow Wood Co. v. ALPS S., LLC*, 2010 WL 3470687, at *2 (S.D. Ohio Aug. 31, 2010) (citation omitted), *aff'd and adopted*, 2011 WL 1043474 (S.D. Ohio Mar. 18, 2011); *Nat'l Benefit Programs, Inc. v. Express Scripts, Inc*., 2011 WL 6009655, at *4 (E.D. Mo. Dec. 1, 2011) (refusing to override state court protective order and holding that "requests for its modification should be directed to the Court that issued it").[2]

Although courts make exceptions under unique circumstances, *see, e.g., Santiago v. Honeywell Int'l, Inc.*, 2017 WL 3610599, at *3 (S.D. Fla. Apr. 6, 2017) (comparing various "exceptions" and "test[s]"), none exists here, and the District Court did not examine any. Every relevant factor courts have applied weighs in favor of denying Blue Buffalo's motion and directing Blue Buffalo to seek relief from the Superior Court.

First, courts consider whether the case in which the document was sealed is still pending. When the case is no longer pending, courts are more likely to make their own determinations about discoverability without sending the moving party back to petition the judge in a non-existent case, recognizing that a "practical solution" is needed in such circumstances. *LeBlanc v. Broyhill*, 123 F.R.D. 527, 531 (W.D.N.C. 1988); *see also Ohio Willow Wood*, 2010 WL 3470687 at *2. The

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[2] *See also Axcan Scandipharm Inc. v. Ethex Corp*., 2008 WL 11349882, at *9 (D. Minn. Dec. 31, 2008) ("[T]he law is clear that it is the court that issued the protective order to which any request for modification of that order must be directed."); *Intermedics, Inc. v. Cardiac Pacemakers, Inc.*, 1998 WL 35253496, at *5 (D. Minn. July 7, 1998), *aff'd*, 1998 WL 35253497 (D. Minn. Sept. 4, 1998) (holding requests to modify protective order should be directed to the issuing court); *Doe v. Doe Agency*, 608 F. Supp. 2d 68, 71 (D.D.C. 2009) (same).

Ironshore Litigation is still pending, so this factor weighs against ordering production of the Ironshore Brief over the Sealing Order.

Second, courts consider whether the procedures of the court that sealed the document or issued the protective order provide an avenue for third parties to petition the court for access. *See P.R. Aqueduct & Sewer Auth. v. Clow Corp.*, 111 F.R.D. 65, 67-68 (D.P.R. 1986) (ordering moving party to seek deposition transcripts ordered sealed by a Texas state court directly from the sealing judge, noting that Rule 60 of the Texas Rules of Civil Procedure provided plaintiff an avenue to intervene). Here, as noted, California provides such an avenue. *See* Cal. R. Ct. 2.551(h)(2). This factor too weighs against granting Blue Buffalo's motion to compel.

Third, courts are particularly inclined to defer to state court sealing or protective orders where the order was not a simple administrative act, but rather was the result of a deliberative process. For example, in *Donovan*, a federal district court in Florida quashed a subpoena seeking documents sealed by a state court in part because the state court's protective orders were "deliberative [in] nature" (as opposed to a "ministerial" consent order). *See Donovan*, 221 F.R.D. at 591. The same is true for the order that sealed the Ironshore Brief. Judge Karnow invited briefing on what portions of the Ironshore Brief should be sealed and why. *See* Dkt. No. 1371-4. Judge Karnow considered these arguments, and ordered portions of the brief sealed specifically to protect Wilbur-Ellis from the prejudice of Blue Buffalo accessing those portions in this action. *See* Sealing Order at 2. This factor too weighs against Blue Buffalo's motion to compel.

Fourth, a "court should consider whether it is possible to incorporate terms in [a new protective] order which will further the protections originally ordered by the [state court]." *City of Rome, Ga. v. Hotels.com, LP*, 2011 WL 13232091, at *3 (N.D. Ga. Sept. 12, 2011) (second modification in original). This is not possible here. Judge Karnow ordered the sealing of the redacted language in the Ironshore Brief specifically to preclude Blue Buffalo from accessing that portion of the brief to use in this action. The District Court could not order production of those redacted passages to Blue Buffalo without contravening the specific purpose of Judge Karnow's order. This factor too weighs in favor of deferring to Judge Karnow's decision and instructing Blue Buffalo to petition the California Superior Court for modification of its sealing order.

Fifth, deference to Judge Karnow's sealing order is warranted because production of the Ironshore Brief would substantially undermine litigants' ability to rely on the integrity of judicial orders. In evaluating motions to modify state court protective orders, "one of the factors the court should consider . . . is the reliance by the original parties on the confidentiality order." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 790 (3d Cir. 1994); *see also Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992); *Donovan*, 221 F.R.D. at 588 (holding that "respect for the effect of preexisting judicial orders" compels quashing federal subpoena of documents protected by state court protective order).

In this case, Wilbur-Ellis submitted the Ironshore Brief in the *Ironshore* Litigation only because it was assured by the California Superior Court that Blue Buffalo could not access it. Had Judge Karnow refused

to seal the brief, Wilbur-Ellis would not have submitted it at all, or Wilbur-Ellis would have substantially altered it to avoid the prejudice the District Court's action in this case will inflict. Circumventing Judge Karnow's sealing order by ordering production of the Ironshore Brief would be inequitable given that the brief would not exist but for Wilbur-Ellis's reliance on that order. *See Palmieri v. New York*, 779 F.2d 861, 862, 865 (2d Cir. 1985) (reversing modification of protective order where "the very papers and information [sought] apparently would not even have existed but for the sealing orders and the magistrate's personal assurances of confidentiality, upon which the appellants apparently relied in agreeing to enter closed-door settlement negotiations").

Finally, the fact that the Superior Court's sealing order applies only to a single brief created by Wilbur-Ellis at the specific request of the Superior Court places the Superior Court's authority at its zenith. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) ("Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes"). The Superior Court's sealing order applies only to the legal arguments submitted by Wilbur-Ellis on the Superior Court's own docket. Nothing in the Superior Court's order prevents Blue Buffalo from seeking discovery in the *Blue Buffalo* Litigation of any facts or documents that may have been addressed in the Ironshore Brief. The Superior Court sealing order does not, for example, seek to shield from discovery in other actions primary source documents, such as underlying records or data, that could be directly relevant to discovery in other lawsuits.

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The District Court's did not mention—let alone evaluate and weigh—any of these considerations. Nor did the District Court identify any other extraordinary circumstances that could warrant a departure from the general rule that modifications to protective or sealing orders must be sought from the issuing judge who issued the order. It is clear that each factor applicable weighs strongly against overriding the Superior Court's sealing order, and a writ should issue directing the District Court to deny Blue Buffalo's motion to compel the Ironshore Brief. The appropriate method if any for Blue Buffalo to pursue the Ironshore Brief is to petition the Superior Court for access pursuant to California Rule of Court 2.551(h)(2).

III. A Writ is Appropriate Under the Circumstances.

"[I]f the first two prerequisites [for mandamus relief] have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *In re Mo. Dep't of Corr.*, 839 F.3d 732, 735 (8th Cir. 2016) (citation omitted, first modification in original). In this instance, there are no other means for Wilbur-Ellis to secure the relief to which it is entitled, and no other factors militate against mandamus.

Mandamus is particularly appropriate in this case because the District Court's decision implicates significant questions of federalism, comity, and judicial authority that this Court has not squarely addressed in this context. *Cent. Microfilm Serv. Corp. v. Basic/Four Corp.*, 688 F.2d 1206, 1212 (8th Cir. 1982) ("Other factors which bear on the appropriateness of mandamus review include the need to correct error

which is likely to recur and to provide guidelines for the resolution of novel and important questions"). Although several district courts have addressed (and largely agree on) the standards that apply where a court is asked to override a sister court's protective or sealing order, there is scant appellate authority on the subject, and none from this Court. Issuance of the requested writ will provide the direct guidance that writ review is intended to foster.

The state and judicial interests implicated by this writ petition also support granting review. California law has long sought to prevent California insurance coverage actions from prejudicing the policyholder's defense in the underlying action for which coverage is disputed. *See Montrose*, 6 Cal. 4th at 301-302. And, as noted, courts are imbued with broad supervisory powers to control their own records and files. *Nixon*, 435 U.S. at 598. Resolving the interplay between these interests and a district court's authority under Rules 26 and 34 of the Federal Rules of Civil Procedure is exactly the situation where mandamus review is appropriate. *See Cent. Microfilm Serv.*, 688 F.2d at 1212; *see also In re MSTG, Inc.*, 675 F.3d 1337, 1341 (Fed. Cir. 2012) ("It is appropriate to rely on mandamus to address a novel and important question of power to compel discovery") (citation omitted).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of mandamus directing the District Court to vacate or reverse its Orders of January 4, 2019 and June 6, 2019 (Dkt. Nos. 1367 and 1393) in the action captioned *Blue Buffalo Company, Ltd. v. Wilbur-Ellis Company LLC, et al.*, Case No. 4:14 CV 859 RWS (E.D. Mo.).

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Respectfully Submitted,

/s/ Mark G. Arnold

Mark. G. Arnold

Husch Blackwell LLP
190 Carondelet Plaza Suite 600
St. Louis MO. 63105
(314) 480-1500 (Phone)
(314) 480-1505 (Fax)
mark.arnold@huschblackwell.com

Martin H. Myers
(*pro hac vice* pending)
Covington & Burling LLP
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, CA 94105-2533
Telephone: 415-591-6000
Fax: 415-591-6091