

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 21-8462-GW-MRWx	Date	November 4, 2022
Title	<i>National Fire &amp; Marine Insurance Company v. California Minimally Invasive Surgical Center, Inc., et al.</i>		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE		
Javier Gonzalez	None Present		
Deputy Clerk	Court Reporter / Recorder	Tape No.	
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:		
None Present	None Present		

**PROCEEDINGS: IN CHAMBERS - TENTATIVE RULING ON PLAINTIFF'S NATIONAL FIRE & MARINE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT [37]**

Attached hereto is the Court's Tentative Ruling on Plaintiff's Motion [37] set for hearing on November 7, 2022 at 8:30 a.m.

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Initials of Preparer JG

*National Fire & Marine Insurance Company v. California Minimally Invasive Surgical Center, Inc. et al.*; Case No. 2:21-cv-08462; Tentative Ruling on Plaintiff’s Motion for Summary Judgment or, in the alternative, Partial Summary Judgment

## **I. Background**

Plaintiff National Fire & Marine Insurance Company (“NFM”) brought this action for rescission and declaratory relief against Defendants California Minimally Invasive Surgical Center, Inc. (“CMISC”), Dr. John C. Chiu, M.D. (“Dr. Chiu”), Stan Gerbrandt (“Gerbrandt”) and Wija Carbajal (“Carbajal”), (collectively “Defendants”) on October 26, 2021. *See* Complaint (“Compl.”), ECF No. 1, ¶¶ 5-7. Plaintiff seeks rescission of the Professional Liability Policy HN03757 issued by Plaintiff to CMISC and a judicial declaration that the policy provides no coverage and no obligation for Plaintiff to defend, indemnify, or otherwise extend any benefits on behalf of CMISC and Dr. Chiu for the claims of Stan Gerbrandt and Wija Carbajal. *Id.* ¶ 8.

Plaintiff filed suit on October 26, 2021. *See* Compl. Defendants CMISC and Dr. Chiu filed an Answer on December 17, 2021. *See* Defendants CMISC and Dr. Chiu Answer (“CMISC Answer”), ECF No. 15. Defendants Carbajal and Gerbrandt filed an Answer on February 19, 2022. *See* ECF No. 23. Plaintiff filed a Motion for Summary Judgment or in the Alternative, Partial Summary Judgment (“Mot.”) on October 10, 2022. ECF No. 37. Defendants CMISC and Dr. Chiu filed an Opposition (“Opp.”) on October 17, 2022. ECF No. 40. Along with the Opposition, Defendants filed objections to Plaintiff’s Request for Judicial Notice, *see* ECF No. 40-1, and a substantial number of evidentiary objections, *see* ECF No. 40-2.<sup>1</sup> Defendants Gerbrandt and Carbajal filed a Joinder in Opposition to NFM’s Motion on October 19, 2022. ECF No. 41. Plaintiff then filed a Reply in Support of the Motion on October 24, 2022. ECF No. 42.

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<sup>1</sup> The Court briefly addresses Defendants’ evidentiary objections. All forty-five of these objections pertain to the Declaration of Leslie Armstrong, ECF No. 37-1, and Exhibits referenced therein. Defendants make the same arguments—foundation and authentication—for almost every objection. The Court denies all of Defendants’ objections for substantive and procedural reasons. Specifically, the Court finds that Leslie Armstrong’s position at MedPro provides sufficient foundation for her to speak to matters involving MedPro policies and procedures. Further, the Court notes that it may consider evidence if the party offering it could satisfy the applicable admissibility requirement at trial. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (noting that factual showing at summary judgment is sufficient to carry burden of proof at trial if capable of being “reduced to admissible evidence”). The Court finds that Plaintiff could sufficiently satisfy foundation and authentication at trial, such that the Court denies all forty-five of Defendant’s objections.

### A. Factual Background<sup>2</sup>

NFM brought this Complaint against CMISC, Dr. Chiu, Gerbrandt, and Carbajal for rescission of the issued insurance policy and declaratory relief of rescission. RSGD ¶¶ 1-3. The Medical Protective Group (“MedPro”) is an administrator to NFM and services and underwrites health Care Facility Policies issued by NFM. *Id.* ¶ 4. Leslie Armstrong is the Underwriting Manager for the 2018-2019 HN037571 Policy during the initial policy period from September 28, 2018 to September 28, 2019 and the 2019-2020 renewal period from September 28, 2019 to September 28, 2020 policy period (the “Policy”). *Id.* ¶ 5. MedPro’s underwriting file pertaining to CMISC’s renewal application, per MedPro’s custom and practices<sup>3</sup>, contained all documented presented to MedPro and all documents generated by MedPro pertaining to the CMISC renewal application. *Id.* ¶ 6. The CMISC insurance policy was a standard risk policy, and MedPro assesses risk through the application for insurance coverage, which asks questions about past and current liability of the applicant and any of its employees. *Id.* ¶ 7. A non-standard risk is defined to be a facility having a high number of claims or suits, lacking accreditation, subject to license restrictions, or investigations by the

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<sup>2</sup> For purposes of factual background and the Court’s analysis further addressed below, the Court has examined in detail: (1) Plaintiff’s Statement of Uncontroverted Facts and Conclusions of Law (“SUF”), ECF No. 37-3; Defendants’ Statement of Genuine Disputes in Opposition (“SGD”), ECF No. 40-3; Plaintiff’s Response to Statement of Genuine Disputes (“RSGD”), ECF No. 42-3. For the sake of simplicity, any citation to particular paragraphs within the above also references all parties’ statements and responses to those same paragraphs.

The Court has reviewed the materials and has included in the discussion only facts that are supported by the cited evidence, modifying the proffered facts if necessary to accurately reflect the uncontroverted evidence. To the extent the cited underlying “undisputed” facts have been disputed, the Court finds that the stated disputes: (1) fail to controvert the proffered “undisputed” facts; (2) dispute the facts on grounds not germane to the below statements; (3) fail to cite evidence in support of the disputing party’s position; and/or (4) are legal arguments that do not dispute the underlying facts. As such, the Court treats such facts as undisputed. Any proffered facts not included in this Ruling were found to be: (1) unsupported by admissible evidence; (2) irrelevant to the Court’s present analysis; (3) conclusory legal arguments; or (4) some combination thereof.

<sup>3</sup> MedPro’s underwriting department follows practices and procedures when determining whether to underwrite and issue or renew a policy. Underwriters are trained and instructed to follow these practices and procedures when in receipt of an application for Health Care Facilities Professional Liability and Commercial General Liability Insurance Coverage. Underwriters are trained to secure more facts and information if the applicant answers “yes” to questions that ask whether the applicant’s employees or contractors have ever been the subject of disciplinary proceedings by a governmental licensing board, if the applicant’s employees or contractors had their license restricted in the previous five years, or whether the applicant has been involved in a suit arising out of the rendering or failing to rend professional services involving former or present partners. If the applicant answers “yes” to these questions, underwriters are to secure details about how long ago the event occurred. If the applicant answers “yes” to questions about the medical license status, underwriters are then instructed to perform an investigation using publicly available resources. The company does not issue a policy of insurance where the applications answers “yes” to the above questions without the applicant providing additional information to sufficiently explain the “yes” answer. RSGD ¶ 31.

governmental licensing board that may result in revocations or suspense as to the facility or the doctors. *Id.*

On or about September 17, 2018, MedPro received an application for new coverage from CMISC. *Id.* ¶ 8. CMISC submitted its initial insurance application for coverage from September 28, 2018 to September 28, 2019, which included a letter of authorization signed by Dr. Chiu that gave MedPro the authority to furnish an insurance policy. *Id.* ¶ 9. On or around October 3, 2018, MedPro issued HN037571 to CMISC with coverage from September 28, 2018, to September 28, 2019. *Id.* ¶ 10. Ethos, a wholesale insurance broker, who had the appropriate excess and surplus lines license to enable MedPro to receive the Renewal submitted the renewal application for the CMISC insurance policy. *Id.* ¶ 11. Around September 10, 2019, CMISC submitted a MedPro Surgery Liability Renewal Application and a MedPro Surgery Center Supplemental Application for the period of September 2, 2019 to September 28, 2020. *Id.* ¶ 12. At the time of the Renewal Application, CMISC was a physician-owned entity and Dr. Chiu was the Medical Director. *Id.* ¶¶ 13, 14. Dr. Chiu was the Chief Executive Officer, Secretary, Chief Financial Officer, and Director of CMISC. *Id.* ¶ 15.<sup>4</sup> The Renewal Application asks on page 3, Section VI, to identify each physician that practices at the applicant’s facility, and contracted physicians are to be identified with a “C.” *Id.* ¶ 16. Specifically, the Renewal Application identified “Martin Krell, M.D. (C); Yousif Berenji, M.D. (C); Charles Neal, M.D. (C); Jeffrey Peak, M.D. (C); Mohammed Baghdadadi, M.D. (C).” *Id.* ¶ 17. Page 4, Section VII, paragraph E of the Renewal Application asks, “Has the license of any physician, podiatrist or dentists providing services at the center been restricted, revoked or suspended in the last five years? If yes, please explain.” *Id.* ¶ 18. In response, CMISC answered “NO.” *Id.* ¶ 19.

On page 4, Section VII, “Other Liability & Rating Exposures,” Section F, the Renewal Application asks, “Have any current or former employees or contractors: (Please attach an explanation of any ‘yes’ answers) 1) Ever been the subject of disciplinary or investigation proceedings, or reprimand by a governmental license board or administrative agency, hospital or professional services? . . .” *Id.* ¶ 20. CMISC answered “No.” *Id.* ¶ 21. Page 4, Section

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<sup>4</sup> The Court notes that NFM’s Response to Plaintiff’s objection provides the proper citation to the exhibits supporting the statement. Specifically, NFM states that it unintentionally labeled Exhibits 32 and 33 as Exhibits 47 and 48 in its SUF.

VIII, “Loss Information (Important! Complete Fully),” asks:

“For each claim, potential claim or suit mentioned below, please complete Section I (Loss History of the Surgery Center Supplemental Application. A. Has the applicant (independently or through a named insured) been involved now or in the past, directly or independently, in a claim, potential claim, or suit arising out of the rendering or failing to render professional services involving former or present partners, members of the corporation, or any former or present employee or independent contractor of the corporation, partnership, or organization? If yes, how many?”

*Id.* ¶ 22. CMISC answered “YES” and “1.” *Id.* ¶ 23.

Page 1, Section I, “Loss History,” asks “If the applicant has been insured under a policy issued by a MedPro Group Company for less than ten years, provide a recently valued claims exhibit for all claims arising during the last ten full years, but only for those claims which are not being handled directly by a MedPro Group Company . . .” *Id.* ¶ 24. In response, CMISC answered “Claimant Name: Yvonee Bovee.” *Id.* ¶ 25. Attached to the Renewal Application is a supplement signed by Dr. Chiu that describes the medical facts, type of treatment and surgery Yvonne Bovee received. *Id.* ¶¶ 27-28.

Finally, the Renewal Application requires that the applicant sign that the application includes responses that are complete and accurate, and any documents, supplemental pages, or attachments are true, and that the applicant did not knowingly suppress or misstate any material facts. *Id.* ¶ 29. Section XIII further requires a signature for the statement “I agree that if I fail to comply with these terms the applicant will have no coverage for any claim under any policy of insurance for which we are applying.” *Id.* ¶ 29. Finally, Section XIII required that the application be signed by “the President, Chief Executive Officer, or other Officer, Shareholder, or Partner of a PC or PA, or the equivalent Authorized Representative.” *Id.* Dr. Chiu signed the Renewal Application on September 1, 2019. *Id.* ¶ 30.

Based on MedPro’s practices, *see supra* n.3, MedPro learned additional information about the one disclosed prior suit, including details of the status of the suit, nature of allegations of the suit, and a narrative description submitted by Dr. Chiu of the medical facts. Based on such information, MedPro determined that one prior suit did not present a high-risk exposure to CMISC. *Id.* ¶ 32. Based upon the responses in the Renewal Application and the Renewal Supplemental Application, MedPro renewed the Policy for CMISC as the insured with effective dates from September 28, 2019 to September 28, 2020. *Id.* ¶ 33. A Condition of the Policy under Section Q includes, “1. By acceptance of this policy, each insured agrees,

represents, and warrants that the statements and particulars made in all applications, including any statements and particulars made in any and all documents, supplemental pages or other attachments for the purposes of any application, are true and correct. . . .” *Id.* ¶ 34. Further, the Policy states as a Condition under Section Q that:

“ . . . Therefore, it is understood and agreed that, to the extent permitted by law, the company reserves all rights, including the right to rescind this policy, or deny any coverage provided for a claim or potential claim, based upon any material misrepresentation made by any insured. As used in this condition, ‘material misrepresentation’ means concealment, misrepresentation, omission or fraud which, if known by the company, would have led to refusal by the company, would have led to refusal by the company to make this contract or provide coverage or to make this contract or provide coverage on different terms or conditions.”

*Id.* ¶ 35.

Based on the Renewal Application, MedPro also offered CMISC an extended reporting endorsement or “tail” endorsement per the Policy terms on or about October 21, 2020 with an effective date of September 28, 2020. *Id.* ¶ 36. CMISC accepted the extended reporting endorsement or “tail” endorsement around December 15, 2020, and MedPro issued the endorsement with an effective endorsement date of September 28, 2020. *Id.* ¶ 37. The CMISC insurance policy was renewed through NFM as underwritten by MedPro as excess and surplus line business. *Id.* ¶ 38. Once MedPro renewed the Policy, the company learned that the Medical Board of California, Department of Consumer Affairs, State of California had accused Dr. Chiu of disciplinary causes in four disciplinary proceedings. *Id.* ¶ 39. MedPro learned that the Medical Board filed three Disciplinary Order decisions regarding Dr. Chiu taking effect on July 21, 2008, April 27, 2012, and June 26, 2015. *Id.* ¶¶ 40-42. Further, MedPro learned that a disciplinary accusation against Dr. Chiu was brought on January 28, 2019, and the Medical Board considered a Stipulated Surrender of Dr. Chiu’s license on October 14, 2019. *Id.* ¶ 43.

Based on MedPro’s training, policies, and procedures for its underwriters, if CMISC had disclosed that Dr. Chiu had multiple Medical Board disciplinary proceedings, MedPro would have performed its own investigation to determine if Dr. Chiu presented a high risk of exposure to CMISC. *Id.* ¶¶ 44, 45. Given the disciplinary proceedings, MedPro would have determined that CMISC presented a non-standard risk, and it would have rejected the Renewal Application. *Id.*

After MedPro renewed the Policy, MedPro learned Dr. Chiu was a named defendant in thirty prior lawsuits that arose out of the rendering or failure to render professional services, excluding the disclosed *Bovee* lawsuit. *Id.* ¶ 46. After MedPro renewed the Policy, MedPro also learned that CMISC was a named defendant in twelve of the thirty previously undisclosed lawsuits that arose out of the rendering or failing to render professional services. *Id.* ¶ 47. MedPro also learned that Dr. Krell was a named defendant in two of the thirty previously undisclosed lawsuits and Dr. Neal was a named defendant in one of the thirty previously undisclosed lawsuits. *Id.* ¶¶ 48, 49.

Based on MedPro’s policies and procedures, MedPro would have determined that CMISC’s Renewal Application posed a high risk of exposure given the thirty prior lawsuits, and CMISC’s Policy would have, thus, been deemed a non-standard risk and MedPro would have rejected the Renewal Application. *Id.* ¶ 50. These undisclosed lawsuits, in combination with the Medical Board disciplinary proceedings involving Dr. Chiu and the restrictions on Dr. Chiu’s license in the previous five years, would have resulted in NFM not issuing the Policy to CMISC. *Id.* ¶ 51.

Stan Gerbrandt and Wija Carbajal are plaintiffs in the underlying litigation, Stan Gerbrandt, et al. v. John C. Chiu, M.D., et al., No. 56-2021-00551038-CU-MM-VTA, Superior Court of California. *Id.* ¶ 52. This lawsuit was filed on February 23, 2021, and it involves allegations arising from a procedure Dr. Chiu performed on Mr. Gerbrandt on February 27, 2020. *Id.* ¶¶ 53, 54. On June 25, 2021, plaintiffs filed an amendment to the complaint and named CMISC as an additional defendant. *Id.* ¶ 55.

## II. Legal Standard

### A. Rule 56

Summary judgment shall be granted when a movant “shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d

474, 480 (9th Cir. 2000) (internal quotation marks and citations omitted). However, when the nonmoving party bears the burden of proving the claim or defense, the moving party does not need to produce any evidence or prove the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 325. Rather, the moving party’s initial burden “may be discharged by ‘showing’ – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party’s case.” *Id.*

Once the moving party meets its initial burden, the “party asserting that a fact cannot be or is genuinely disputed must support the assertion.” Fed. R. Civ. P. 56(c)(1). “The mere existence of a scintilla of evidence in support of the [nonmoving party]’s position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party].” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

The opposing party must “cit[e] to particular parts of materials in the record” or show that the materials the moving party cited do not establish the absence of a genuine dispute. Fed. R. Civ. P. 56(c)(1); *see also* Fed. R. Civ. P. 56(c)(3) (“The court need consider only the cited materials, but it may consider other materials in the record.”); Phillips & Stevenson, RUTTER GROUP PRAC. GUIDE, FEDERAL CIV. PRO. BEFORE TRIAL (The Rutter Group 2021) (“Phillips & Stevenson”), ¶¶ 14:101.10 – 101.12, 14:102. In addition, under this Court’s Local Rules, where the moving party on a motion for summary judgment has “claimed and adequately supported” material facts, those facts “are admitted to exist without controversy except to the extent that such material facts are (a) included in the ‘Statement of Genuine Disputes’ [described in Local Rule 56-2] and (b) controverted by declaration or other written evidence filed in opposition to the motion.” *See* C.D. Cal. L.R. 56-3; *see also Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1058 (9th Cir. 2009) (“The ‘party opposing summary judgment must direct [the court’s] attention to specific, triable facts,’ and the reviewing court is ‘not required to comb through the record to find some reason to deny a motion for summary judgment.’”) (quoting *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir. 2003) and *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001)); *Carmen*, 237 F.3d at 1029 (“[W]hatever establishes a genuine issue of fact must *both* be in the district court file *and* set forth in the response.”).

Further, “[o]nly disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Liberty Lobby*, 477 U.S. at 248. At the summary judgment



stage, a court does not make credibility determinations or weigh conflicting evidence. *See id.* at 249. A court must draw all inferences in a light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

#### B. Rescission

The right to rescind an insurance policy in California is governed by statute. The California Insurance Code outlines two grounds for statutory rescission: concealment or misrepresentation of a material fact. Cal. Ins. Code §§ 331, 359. Concealment is defined as “[n]eglect to communicate that which a party knows, and ought to communicate.” *Id.* § 330; *see id.* § 332 (Each party to an insurance contract “shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract ... and which the other has not the means of ascertaining.”). Concealment cannot form a basis for rescission unless the insured “conceals facts that he is under a duty to disclose.” *Rallod Transp. Co. v. Cont'l Ins. Co.*, 727 F.2d 851, 853 (9th Cir. 1984). Misrepresentation occurs when the insured makes a representation that “is false in a material point, whether affirmative or promissory.” Cal. Ins. Code § 359. “A representation is false when the facts fail to correspond with its assertions or stipulations.” *Id.* § 358. An intent to deceive is not required. *LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co.*, 156 Cal. App. 4th 1259, 1269-70 (2007). Rather, an insurer may rescind its policy even if the insured’s failure to disclose was inadvertent or negligent. *Id.*

Concealment or misrepresentation of facts entitles an insurer to rescission only if the fact at issue was “material” to the insurer's decision to enter into the contract. *Id.*, 156 Cal. App. 4th at 1266-67. Materiality is determined “solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries.” Cal. Ins. Code § 334. Accordingly, the Court asks “whether the information [omitted or misrepresented] would have caused the underwriter to reject the application, charge a higher premium or amend the policy terms, had the underwriter known the true facts.” *Mitchell v. United Nat'l Ins. Co.*, 127 Cal. App. 4th 457, 474 (2005). It has been held that “[t]he fact that an insurer has demanded answers to specific questions on an application for insurance is usually sufficient to establish the materiality of that information as a matter of law.” *U.S. Specialty Ins. Co. v. Bridge Capital Corp.*, 482 F. Supp. 2d 1164, 1168 (C.D. Cal. 2007), citing *W. Coast Life Ins. Co. v. Ward*, 132 Cal. App. 4th 181, 186-87 (2005). For example, in *U.S. Specialty Ins. Co.*, it was held that “[a] directors and officers liability insurance

application[‘s] ask[ing] for information on ‘any claim made’ against the company ‘or any of its officers and directors in the past 5 years’ . . . established as a matter of law the materiality of undisclosed sexual harassment claims by a former employee against a corporate officer.” 482 F. Supp. 2d at 1168.

### III. Discussion

Plaintiff moves for summary judgment on its cause of action for rescission. Plaintiff argues that Defendant CMISC made material misrepresentations when applying for renewal of the Policy that entitle Plaintiff to rescind the 2019 Policy under the California Insurance Code. Specifically, Plaintiff claims that Defendant CMISC failed to disclose four Medical Board Disciplinary Proceedings against Dr. Chiu and thirty lawsuits arising out of a rendering or failing to render services against CMISC and its various physicians, which render the Policy void *ab initio* and are grounds for rescission. Mot. at 3.

The Court begins its analysis by noting that there are very few, if any, facts in dispute. In fact, Defendants’ responses to Plaintiff’s SUFs contain no factual statements or citations to evidence. Rather, Defendants’ responses are simply evidentiary objections which this Court has found to be insufficient. Thus, the Court finds there to be very few facts actually in dispute. Rather, the parties dispute whether such facts represent legal misrepresentations on the Renewal Application for purposes of rescission of the Policy.

#### A. Dr. Chiu’s Disciplinary Proceedings

Plaintiff argues Defendant CMISC’s failure to report that the Medical Board had placed restrictions on Dr. Chiu’s license on June 26, 2015, constitutes a material misrepresentation for purposes of the renewed policy. Further, Plaintiff contends that Dr. Chiu had three other disciplinary proceedings<sup>5</sup> that Defendant CMISC failed to disclose, and such failure also constitutes a basis for rescission. *See* Mot. at 7-8.

Defendants argue that because Dr. Chiu was only “publicly reprimanded and ordered to enroll in and complete a recordkeeping course,” the Medical Board did not place a restriction on Dr. Chiu’s practice of medicine. Opp. at 7. Thus, Defendants assert that the Renewal Application did not request CMISC to disclose the 2015 disciplinary hearing. *Id.*

The Court finds that the Renewal Application is clear. *See Buss v. Superior Court*, 16 Cal.

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<sup>5</sup> *See* RSGD ¶¶ 40, 41, 43.

4th 35, 45 (1997) (“[w]here [the Policy language] . . . is clear, the language must be read accordingly”). Contrary to Defendants contentions, the Renewal Application form did require Defendant CMISC to provide information about Dr. Chiu’s former disciplinary proceedings and consequences thereof. RSGD ¶¶ 18, 20. Specifically, in Section VII on page 4, the Application asks “Has the license of any physician . . . providing services at the center been restricted, revoked or suspended in the last five years? If yes, please explain.” RSGD ¶ 18. Defendant CMISC answered “NO” on its Renewal Application form. *Id.* ¶ 19. But Plaintiff states and substantiates that as the result of a Stipulated Settlement and Disciplinary Order, the Medical Board placed a restriction on Dr. Chiu’s medical license that required him to enroll in a recordkeeping course within six months. *Id.* ¶ 42. Such decision took effect on June 26, 2015. *Id.* The Renewal Application was filed and approved in September 2019; clearly, June 26, 2015 is within the five years preceding September 2019. Thus, Defendant CMISC should have (but did not) answer this question accurately.

The Court notes that Defendants argue but do not substantiate their contention that Dr. Chiu’s 2015 disciplinary order was not a restriction on his license. If being ordered to take a course within an allotted amount of time or risk further disciplinary action from the Medical Board is not a restriction on one’s medical license, this Court is not clear on what would constitute a restriction. But the Court need not solely rely on the June 2015 disciplinary order as a basis for finding misrepresentation here.

Section VII on page 4 of the Renewal Application asks “Have any current or former employees or contractors . . . Ever been the subject of disciplinary or investigation proceedings, or reprimand by a governmental license board . . . .” RSGD ¶ 20. CMISC answered “NO.” *Id.* ¶ 21. Even if Plaintiff is correct that Dr. Chiu’s disciplinary order in June 2015 does not constitute a “restriction, revocation or suspension,” Plaintiff offers no argument about why it is not a “reprimand by a governmental license board.” *Id.* ¶ 21. Plaintiff also offers no argument about why the June 2008<sup>6</sup> and March 2012<sup>7</sup> disciplinary orders issued to Dr. Chiu would not similarly

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<sup>6</sup> “[O]n or about June 20, 2008, the Medical Board filed a Stipulated Settlement and Disciplinary Order regarding Dr. Chiu’s patient care that resulted in the Medical Board revoking Dr. Chiu’s Physician’s and Surgeon’s Certificate, however, the Medical Board stayed the revocation and placed Dr. Chiu on three years-probation subject to certain terms and conditions.” RSGD ¶ 40.

<sup>7</sup> “[O]n or about March 29, 2012, the Medical Board filed a Stipulated Settlement and Disciplinary Order regarding Dr. Chiu’s patient care resulted in the Medical Board revoking Dr. Chiu’s Physician’s and Surgeon’s Certificate, however, the Medical Board stayed the revocation and placed Dr. Chiu on seven months of probation from

constitute “reprimand[s] by a governmental license board.” *Id.*

In light of the above, there is no dispute that Dr. Chiu was the subject of a disciplinary proceeding and reprimand by a Medical Board in June 2015. *Id.* ¶ 42. There is also no dispute that Dr. Chiu also received disciplinary orders from the Medical Board in June 2008, *see* RSGD ¶ 40, and March 2012, *see* RSGD ¶ 41. There is also no dispute that as of January 2019, the Medical Board was actively investigating another disciplinary order against Dr. Chiu. *Id.* ¶ 43. Because there is no dispute that these disciplinary proceedings occurred and disciplinary orders were issued, the dispute, then, is whether the provision of these disciplinary orders was required by the language of the Renewal Application.

The Court finds that the Renewal Application clearly requested such information.<sup>8</sup> RSGD ¶¶ 18, 20. In fact, these questions seem to have been aimed at discerning the existence of the exact proceedings and orders levied against Dr. Chiu. Thus, such disciplinary proceedings and orders directly fall within the Renewal Application’s prompt regarding whether any current or past employee/contractor had “been the subject of disciplinary or investigation proceedings, or reprimand by a governmental board.” *Id.* ¶ 20. Thus, Defendant CMISC made misrepresentations on the Renewal Application.

The question then becomes whether such misrepresentations were material. *LA Sound*, 156 Cal. App. 4th at 1268 (“The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law.”). Here, Plaintiff’s Renewal Application directly asked about whether any employee’s license had been restricted, revoked or suspended and whether any current or former employee/contractor had been the subject of disciplinary or investigation proceedings, or reprimand by a governmental license board. RSGD ¶¶ 18, 20. Thus, the Court finds that Dr. Chiu’s prior disciplinary proceedings and orders from the Medical Board were material to Plaintiff’s Policy renewal determination.<sup>9</sup> Defendant CMISC’s failure to disclose Dr. Chiu’s disciplinary history thereby

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July 21, 2011 through February 28, 2012 . . . [and] placed restrictions on Dr. Chiu’s license including, but not limited to, Dr. Chiu being barred from engaging in solo practice and supervising physician assistants during probation.” RSGD ¶ 41.

<sup>8</sup> Defendants argue that Plaintiff has failed to establish that Dr. Chiu is/was an employee of CMISC such that it was required to supply information as to him in the renewal application. *See* Opp. at 2. That contention fails. There is no dispute that Dr. Chiu is/was CMISC’s Medical Director. RSGD ¶ 14.

<sup>9</sup> Plaintiff argues that it was MedPro policy to conduct further investigation into any purported disciplinary order to assess the level of risk exposure. Here, because Dr. Chiu’s disciplinary proceedings were not provided, Plaintiff states that MedPro did not conduct additional analysis to determine the risk of issuing a policy in light of Dr.

results in a rescission of the Policy. For this reason, the Court grants summary judgment of rescission to Plaintiff.

B. Previous Lawsuits Against CMISC, Dr. Chiu, and Others

While the Court finds that the failure to disclose Dr. Chiu’s disciplinary proceedings and license restrictions sufficient to grant summary judgment to Plaintiff on rescission, the Court also addresses Plaintiff’s additional argument for rescission based on the undisclosed lawsuits. Plaintiff contends that the failure to identify thirty other lawsuits<sup>10</sup> involving Defendants CMISC, Dr. Chiu, and other physicians at the Center, *see* RSGD ¶¶ 46-49, in the Renewal Application also constitute material misrepresentations that render the policy void *ab initio*. RSGD ¶ 50.<sup>11</sup>

Defendants argue that the Renewal Application sought only information for “claims arising during the last ten full years.” Opp. at 8. Because the Renewal Application was filed on September 10, 2019, only information regarding lawsuits or claims filed on or after September 10, 2009, was required. *Id.* Each of the lawsuits referenced by Plaintiff, however, were filed prior to July 20, 2009. Thus, Defendants contend that the Renewal Application did not require the disclosure of the lawsuits referenced by Plaintiff. *Id.* at 9.

The Court finds that there were different prompts related to the disclosure of past lawsuits involving the applicant or the applicant’s employees. RSGD ¶¶ 22, 24. First, Section VIII of the Renewal Application – which sought “loss information” and cautioned the insured that the section was “IMPORTANT! COMPLETE FULLY” – asked “Has the applicant (independently or through a named insured) been involved now or in the past, directly or independently, in a claim, potential claim, or suit arising out of the rendering or failing to render professional services involving former or present partners, members of the corporation, or any former or present employee or independent contractor of the corporation, partnership, or organization? If yes, how many?” *See* RSGD ¶ 22.

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Chiu’s disciplinary history, which further demonstrates materiality. RSGD ¶¶ 31, 33.

<sup>10</sup> Plaintiff requests that this Court taken Judicial Notice of these lawsuits. *See* Plaintiff’s Request for Judicial Notice (“RJN”), ECF No. 37-4, ¶¶ 27-36. While Defendants argue against this Court taking judicial notice of these lawsuits on the basis that courts cannot take notice of proceedings or records in another case to supply facts essential to the cause before it, the Court notes that Plaintiff is not requesting judicial notice of the facts alleged in these other cases. Rather, Plaintiff simply requests judicial notice of the existence of these lawsuits against CMISC, Dr. Chiu, Dr. Krell and Dr. Neal. Under Fed. R. Evid. 201(b), a court make properly take judicial notice of previously filed lawsuits. *See Harris v. Cnty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012). Thus, the Court denies Defendants’ objections and takes judicial notice of the existence of the lawsuits as stated in RJN, ¶¶ 27-36.

<sup>11</sup> The Court notes that Defendants did not dispute RSGD ¶ 50.

The second was contained in the Supplemental Renewal Application which asked the applicant to “provide a recently valued claims exhibit for all claims arising during the last ten full years, but only for those claims which are not being handled directly by a MedPro Group Company.” *See* ECF No. 37-12. Defendants simply attempt to conflate these separate prompts seemingly to impute the ten-year time limitation onto the Renewal Application’s request for lawsuit disclosures generally. The Court disagrees with Defendants, as it is clear the Renewal Application requested the disclosure of all lawsuits Defendant CMISC has been involved in under Section VIII. *Id.* Defendant CMISC’s failure to then disclose the twelve lawsuits brought against CMISC, *see* RSGD ¶ 47 and RJN ¶¶ 27-36, constitutes a misrepresentation. For the same reasons Dr. Chiu’s undisclosed disciplinary proceedings are material, so too are the undisclosed lawsuits also material. The Court need not repeat its analysis, as the materiality is obvious considering MedPro’s policies and procedures and the common understanding about how the insurance industry operates.

Thus, the failure to disclose the various lawsuits, *see* RJN 27-36, represents a material misrepresentation and is a sufficient ground for rescission.

C. Declaratory Judgment of No Duty to Defend/Indemnify

Because the Court finds that Plaintiff’s claim for rescission of the Policy should be granted for the reasons discussed above, the Court also finds that Plaintiff does not owe a duty to defend or indemnify Defendants CMISC and Dr. Chiu. In fact, the request for declaratory relief becomes moot. *See LA Sound*, 156 Cal. App. 4th at 1267 (“[A]” rescission effectively renders the policy totally unenforceable from the outset so that there was never any coverage and no benefits are payable.”) (citing to *Imperial Casualty & Indemnity Co. v. Sogomonian*, 198 Cal. App. 3d 169, 182 (1988)).

**III. Conclusion**

Based on the foregoing discussion, the Court **GRANTS** the motion for the reasons stated above.