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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

ILLINOIS UNION INSURANCE CO.,

Plaintiffs,

vs.

**BROOKSTREET SECURITIES CORP.
ET AL.,**

Defendants.

Case No.: SACV07-01095-CJC(RNBx)

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AS TO CLAIMS THAT
WERE MADE LATE OR NOT
TIMELY NOTICED**

INTRODUCTION

This case arises from several disputes between Brookstreet Securities Corporation, a California financial services company, and its clients. Plaintiff Illinois Union Insurance Company, (“Illinois Union”) provided professional liability insurance to Brookstreet and its employees, officers and directors. (First Amended Compl. (“FAC”) ¶¶ 137- 138.) Illinois Union brought this action for interpleader and provided a \$3 million bond to the

1 clerk of the court. (FAC ¶ 2.) Illinois Union now moves for summary judgment as to
2 Defendants whose claims were not timely made, reported, or noticed. For the following
3 reasons, Plaintiff’s motion for summary judgment is GRANTED.¹

4
5 **BACKGROUND**

6
7 **A. The Policy**

8
9 Illinois Union provided Brookstreet with a Securities Broker-Dealer Professional
10 Liability Insurance Policy (“the Policy”) covering the period from November 8, 2006 to
11 November 8, 2007. The first paragraph of the beginning of the Policy states:

12
13 THIS POLICY IS A CLAIMS MADE AND REPORTED POLICY.
14 EXCEPT AS OTHERWISE PROVIDED HEREIN, THIS POLICY
15 COVERS ONLY CLAIMS FIRST MADE AGAINST THE INSURED
AND REPORTED TO THE INSURER DURING THE POLICY PERIOD.

16 (Decl. Arthur Aizley, Ex. A at 2.) The Policy contains three separate insuring
17 agreements described in Section I and amended by Endorsement Nos. 8 and 13. (Decl.
18 Aizley, Ex. A at 4, 24, 32). These agreements provide coverage for Claims asserted
19 against the Insured Broker-Dealer, Insured Registered Representative, and Insured
20 Representatives acting in the capacity of a Registered Investment Advisor. (Decl.
21 Aizley, Ex. A. at 4, 24, 32.) The agreements have a clause in common, which is that the
22 Insurer shall pay for a “Claim first made . . . during the Policy Period, or any applicable
23 Extended Reporting Period, and reported in writing to the Insurer during the Policy
24 Period, or, if exercised, the Extended Reporting Period in accordance with the terms of

25
26
27 ¹ Having read and considered the papers presented by the parties, the Court finds this matter
28 appropriate for disposition without a hearing. *See* FED. R. CIV. P. 78; LOCAL RULE 7-15.
Accordingly, the hearing set for November 23, 2009 at 3:30 p.m. is hereby vacated and off
calendar.

1 the Policy.” (Decl. Aizley, Ex. A at 4, 24, 32.) Brookstreet never requested Extended
2 Reporting Period coverage. (Illinois Union UF, at ¶ 48.)

3
4 The Policy also includes a provision detailing notice requirements. This section
5 states:

- 6
7 A. The Insured shall, as a condition precedent to their rights under the Policy, give to
8 the Insurer written notice of any Claim made against the Insured as soon as
9 practicable during the Policy Period, or if exercised, during the Extended
10 Reporting Period, but in no event later than thirty (30) days after the Insured knew
11 or should have known, using reasonable diligence, of the existence of the Claim.
- 12 B. If during the Policy Period or the Extended Reporting Period, if exercised, the
13 Insured first becomes aware of a specific Wrongful Act which may reasonably
14 give rise to a future Claim covered under the Policy and during such Policy Period
15 or Extended Reporting Period gives written notice to the Insurer of:
- 16 1. The names of the potential claimants and a description of the
17 specific Wrongful Act which forms the basis of their potential
18 claim;
 - 19 2. The identity of the specific Insureds allegedly responsible for
20 such specific Wrongful Act;
 - 21 3. The consequences which have resulted or may result from such
22 specific Wrongful Act;
 - 23 4. The nature of the potential monetary damages or non-monetary
24 relief which may be sought in consequence of such specific
25 Wrongful Act; and
 - 26 5. The circumstances by which the Insureds first became aware of
27 such specific Wrongful Act,

28 Then any Claim which arises out of such Wrongful Act shall be deemed to have
been first made during the Policy Period or Extended Reporting Period, if
exercised, in which such written notice was received by the Insurer. . . .

- 29 C. All notices under any provision of this Policy shall be in writing and given by
30 prepaid express courier, certified mail or fax properly addressed to the appropriate
31 party. Notice to the Insured may be given to the Insured-Broker Dealer at the

1 address shown in Item 1. of the Declarations. Notice to the Insurer of any Claim,
2 Wrongful Act or Loss shall be given to the Insurer at the address in Item 6.a. of the
3 Declarations. All other notices to the Insurer under this Policy shall be given to
4 the Insurer at the address in Item 6.b. of the Declarations. Notice given as
5 described above shall be deemed to be received and effective upon actual receipt
6 thereof by the addressee or one day following the date such notice is sent,
7 whichever is earlier.

8
9 (Decl. Aizley, Ex. A at 13.)

10 A “Claim” is defined as “1. A written demand for monetary damages; 2. A civil
11 proceeding commenced by service of a complaint or similar pleading; and/or 3. An
12 arbitration proceeding.” (Decl. Aizley, Ex. A at 5.) The “Policy Period” is “the period of
13 time specified in Item 2. of the Declarations of [the] Policy” (Decl. Aizley, Ex. A at
14 6.) The section entitled “Declarations” specifies that the Policy Period is from 12:01
15 A.M. on 11/08/2006 to 12:01 A.M. on 11/08/2007. (Decl. Aizley, Ex. A at 2.)

16 **B. The Claimants**

17 Illinois Union separates the claimants in this motion into two groups. (Mot.
18 Summary Judgment at 2.) The group labeled “Outside Policy Period Defendants”
19 includes Gerard Axel, Benita Axel, Andrew Eisenberg, Joyce Eisenberg, Paulette Haim,
20 Warren Kornfeld, Denise Marino, Scott Magallanes, Herman Nadler, Gloria Nadler,
21 Linda Nadler, Jacqueline S. Mishory, Joseph Nemeth, Lyle Fettig and Claudia Johnson.
22 The group labeled “Late Notice Defendants” includes Richard Lisowski, Stephen Stubbs,
23 Robin Stubbs, Judy Schulman and Murray Bieda. The Court will address each claimant
24 in turn.

LEGAL STANDARD

Summary judgment is proper if the evidence before the Court “show[s] 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(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A factual issue is “genuine” when there is sufficient evidence such that a reasonable trier of fact could resolve the issue in the non-movant’s favor, and an issue is “material” when its resolution might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the initial burden of demonstrating either that there are no genuine material issues or that the opposing party lacks sufficient evidence to carry its burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. at 325; *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630-31 (9th Cir. 1987). Once this burden has been met, the party resisting the motion “must set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256. In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the non moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The court does not make credibility determinations, nor does it weigh conflicting evidence. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992).

ANALYSIS

As noted, the policy is a “claims made and reported policy.” These policies, by definition, only provide coverage for “Claims” made against the insured and reported to the insurer during the Policy Period. *World Health and Educ. Foundation v. Carolina Cas. Ins. Co.*, 612 F. Supp. 2d 1089 (N.D. Cal. 2009).

1 **A. Outside Policy Period Defendants**

2
3 Illinois Union argues that each of the “Outside Policy” Defendants either made a
4 claim outside of the Policy Period or that Brookstreet reported their claim outside of the
5 Policy Period. Since all of the Defendants have different factual circumstances, the Court
6 will address each Defendant’s Claim in turn.

7 **a. Gerard and Benita Axel**

8
9 Illinois Union argues that since Gerard and Benita Axel first asserted their claims
10 against Brookstreet after the expiration of the Policy Period, their claims are not covered.
11 (Mot. Summary Judgment at 3, 6.) Illinois Union sent a set of interrogatories to Avi
12 Wagner, who is counsel for several of the Defendants,² including Gerard and Benita
13 Axel. (Decl. Aizley, Ex. E.) Interrogatory 2 required each Defendant to “[s]tate whether
14 [he or she] contend[s] that a written demand for monetary damages, a civil or arbitration
15 proceeding was made or commenced by [him or her] against Brookstreet, or one of its
16 Registered Representatives, at any time between 12:01 AM., November 8, 2006 through
17 12:01 AM., November 8, 2007 (the Policy Period), and if [the Defendant’s] answer is
18 anything other than an unqualified ‘no,’ describe the basis for [this] contention, including
19 but not limited to Identifying all supporting Documents and Communications.” (Decl.
20 Aizley, Ex. E at 3.) Defendants represented by Mr. Wagner responded by stating that
21 Claudia Johnson, Warren Kornfeld, Steven Lipschutz, Stuart Miller and Gary Wiesman
22 asserted claims within the period. (Decl. Aizley, Ex. E at 3-4.) The response did not
23 address whether Gerard and Benita Axel had filed their claims within the Policy Period.
24 Additionally, Illinois Union has presented Mr. and Ms. Axel’s Statement of Claim for
25

26
27 ² Mr. Wagner also represents Andrew Eisenberg, Joyce Eisenberg, Claudia Johnson, Stuart Miller, Gary
28 Wiesman, Warren Kornfeld, Steven Lipschutz, Herman Nadler, Gloria Nadler, Linda Nadler, Jacqueline
S. Mishory, Joseph R. Nemeth, Paulette Haim and Denise Marino.

1 FINRA Dispute Resolution, which was dated November 20, 2007, and a copy of the
2 letter from FINRA, dated November 28, 2007, which notified Brookstreet of the claim.
3 (Decl. Aizley, Ex. F at 52, 87.) Finally, Illinois Union has presented Brookstreet's letter
4 to Illinois Union, dated December 11, 2007, in which Brookstreet reported the Axel
5 claim. (Decl. Aizley, Ex. G.) The Axels have not contested this evidence and have
6 provided neither evidence nor argument to rebut Illinois Union's evidence demonstrating
7 that they asserted their claims outside the Policy Period and that their Interrogatory
8 response admits this. Since the only evidence that the Axels made a "Claim" within the
9 definition of the Policy is their Statement of Claim for arbitration, it is undisputed that
10 their "Claim" was made outside of the Policy Period. Accordingly, summary judgment
11 against the Axels is proper since they made their claim and it was reported outside of the
12 Policy Period.

13
14 **b. Andrew and Joyce Eisenberg**

15
16 Similar to the Axels, Illinois Union also argues that it is undisputed that Andrew
17 and Joyce Eisenberg made their claim outside of the Policy Period. (Mot. Summary
18 Judgment at 6.) As noted, the Eisenbergs are also represented by Mr. Wagner and were
19 presented with the same Interrogatories. The Eisenbergs did not address whether they
20 had filed their claims within the Policy Period, as requested by Interrogatory 2. (Decl.
21 Aizley, Ex. E at 3-4.) Illinois Union has also presented a letter, dated October 17, 2006,
22 which demanded that Brookstreet "pay him treble damages in the amount of \$620,430.00
23 for violation of F.S. § 825.103(1)." (Decl. Aizley, Ex. H.) This, Illinois Union argues, is
24 the Eisenberg's "Claim" as defined by the Policy because it was a written "demand for
25 monetary damages." The Eisenbergs have not attempted to refute this evidence in any
26 fashion, instead making what might be described as arguments concerning when the
27 Eisenbergs filed their Statement of Claim for arbitration. As Illinois Union notes in its
28 reply, "the sole reference to the Eisenberg[']s in [the opposition] erroneously indicates

1 that [Illinois Union’s] argument is predicated on the Eisenberg’s Statement of Claim . . .
2 The Eisenbergs are wrong, and the argument that Illinois Union in fact made based on the
3 . . . letter thus stands unopposed.” (Reply Mot. Summary Judgment at 5.) The Policy
4 only covers claims “first made” during the Policy Period, and since the Eisenbergs have
5 failed to rebut Illinois Union’s argument that their written demand of October 17, 2006
6 constituted a claim made outside of the Policy Period, summary judgment against the
7 Eisenbergs is appropriate.

8
9 **c. Paulette Haim and Denise Marino**

10
11 Illinois Union also argues that there is no dispute that Paulette Haim and her
12 daughter, Denise Marino, filed a claim against Brookstreet outside of the Policy Period.
13 Just as the Axels and Eisenbergs did not respond to Interrogatory 2, Ms. Haim and Ms.
14 Marino did not state that they had asserted a “Claim” against Brookstreet within the
15 Policy Period. (Decl. Aizley, Ex. E at 3-4.) Illinois Union has presented a transmittal
16 letter from FINRA, dated November 21, 2007, which enclosed Ms. Haim and Ms.
17 Marino’s Statement of Claim for arbitration, dated November 13, 2007. (Decl Aizley,
18 Ex. J at 339, 378.) Since the Policy Period ended on November 8, 2007, the arbitration
19 was commenced after the Policy Period, and Brookstreet received notice of the claim
20 after the Policy Period had ended. Ms. Haim and Ms. Marino have not presented any
21 evidence to suggest that they made their Claim before the expiration of the Policy Period,
22 and their non-response to Interrogatory 2 admits as much. Accordingly, summary
23 judgment against Ms. Haim and Ms. Marino is appropriate.

24
25 **d. Warren Kornfeld**

26
27 Illinois Union argues that Mr. Kornfeld never asserted a “Claim” against
28 Brookstreet as defined by the policy. (Mot. Summary Judgment at 23.) It is undisputed

1 that Mr. Kornfeld emailed Brookstreet on June 25, 2007. (Decl. Aizley, Ex. R; Illinois
2 Union UF ¶ 27.) In his email, Mr. Kornfeld stated that his “account was mis-managed.”
3 (Decl. Aizley, Ex. R.) He also noted that “[a]s of this date, my losses exceed \$800,000.”
4 (Decl. Aizley, Ex. R.) Finally, he stated “[y]ou will be hearing from my attorney.”
5 (Decl. Aizley, Ex. R.) By letter dated July 9, 2007, Illinois Union noted that Mr.
6 Kornfeld’s email did not meet the requirements of a “Claim” because it did not contain a
7 demand for monetary damages. (Decl. Aizley, Ex. S.) Illinois Union did note, however,
8 that it would accept that matter as a “notice of potential claim.” (Decl. Aizley, Ex. S.)
9 Mr. Kornfeld argues that though his email did not demand damages, his email threatened
10 litigation and asserted damages of at least \$800,000, so he made a “Claim” within the
11 Policy’s definition.

12
13 Mr. Kornfeld has never filed a civil suit or arbitration, so he appears to assert that
14 his email constituted a “written demand for monetary damages.” (Decl. Aizley, Ex. A.)
15 However, Mr. Kornfeld’s email never demanded monetary damages. The Policy is clear
16 that the definition of a Claim includes a demand for monetary damages, and Mr. Kornfeld
17 has provided no evidence, other than relying on this email, to suggest that he demanded
18 monetary damages. *Winkler v. Nat’l Union Fire Ins. Co.*, 930 F.2d 1364, 1366 (9th Cir.
19 1991). Accordingly, summary judgment against Mr. Kornfeld is appropriate.

20 21 **e. Scott Magallanes**

22
23 Mr. Magallanes has not opposed Illinois Union’s motion. Illinois Union presented
24 undisputed evidence that Mr. Magallanes was added as a party to an NASD arbitration
25 against Brookstreet on November 27, 2007. (Decl. Aizley, Ex. U.) Since the Policy
26 Period is November 8, 2006 to November 8, 2007, Mr. Magallanes’ claim was not made
27 during the Policy Period. Summary judgment against Mr. Magallanes is warranted.
28

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2 **f. Herman, Gloria and Linda Nadler, and Jacqueline S. Mishory**

3
4 Illinois Union argues that there is no dispute that Herman and Gloria and their
5 daughters Linda Nadler and Jacqueline S. Mishory (“the Nadlers”) made their Claim
6 outside of the Policy Period. Like the Axels, Eisenbergs, Ms. Haim and Ms. Marino, the
7 Nadlers did not respond to Interrogatory 2. (Decl. Aizley, Ex. E.) Additionally, Illinois
8 Union has presented evidence that Brookstreet was notified by NASD’s letter, dated
9 November 30, 2007, that the Nadlers had filed a Statement of Claim for arbitration
10 against Brookstreet, dated November 8, 2007. (Decl. Aizley, Ex. K.) It is undisputed
11 that the Policy Period ended at 12:01 a.m. on November 8, 2007. The Nadlers have not
12 presented any evidence to suggest that they made a “Claim” within the definition of the
13 Policy before November 8, 2007. Additionally, Illinois Union has provided undisputed
14 evidence that Brookstreet notified Illinois Union of the Claim on December 11, 2007,
15 which means that the Claim was “reported” to Illinois Union outside the Policy Period.
16 (Decl. Aizley, Ex. G; Woody Decl. at ¶ 7.)

17
18 Though the Nadlers argue that Illinois Union must demonstrate prejudice from
19 Brookstreet’s late reporting per the notice-prejudice rule, many courts have observed that
20 “the notice prejudice rule does not apply to claims made [and reported] policies, because
21 to apply it as such would essentially convert these policies into occurrence based
22 policies.” *World Health & Educ. Foundation v. Carolina Casualty Ins. Co.*, 612 F. Supp.
23 2d 1089, 1096 (N.D. Cal. 2009); *Root v. Am. Equity Specialty Ins. Co.*, 130 Cal. App. 4th
24 926, 929, 937, 947 (Cal. Ct. App. 2005) (agreeing with the view that “[t]o apply the
25 notice-prejudice rule to a claims made and reported policy would [] convert that policy
26 into a pure claims made policy, and therefore give the insured a better policy than he paid
27 for.”); *Pacific Employers Ins. Co. v. Superior Court*, 221 Cal. App. 3d 1348, 1359-60
28 (Cal. Ct. App. 1990). Since there is no dispute as to when the Claim was first made and

1 reported, and those dates are outside of the Policy Period, summary judgment in favor of
2 Illinois Union as to the Nadlers is appropriate.

3
4 **g. Joseph Nemeth**

5
6 Like many of his fellow Defendants, Mr. Nemeth also did not respond to
7 Interrogatory 2. (Decl. Aizley, Ex. E.) Illinois Union also presented evidence that
8 FINRA first notified Brookstreet about Mr. Nemeth's arbitration on November 30, 2007.
9 (Decl. Aizley, Ex. L.) FINRA also included Mr. Nemeth's Statement of Claim, which
10 was dated November 15, 2007. (Decl. Aizley, Ex. L.) Mr. Nemeth has not presented any
11 evidence to suggest that he made his "Claim" before the Policy Period expired. Since
12 there is no dispute that Mr. Nemeth's Statement of Claim for arbitration, dated November
13 15, 2007, was filed outside the Policy Period, and Brookstreet received notice of the
14 claim outside of the Policy Period, Illinois Union is not responsible for covering Mr.
15 Nemeth's claim and summary judgment is appropriate.

16
17 **h. Lyle Fettig**

18
19 It is undisputed that Mr. Fettig commenced an NASD arbitration against
20 Brookstreet on September 27, 2007. (Decl. Aizley, Ex. M.) Brookstreet received notice
21 of the claim by a transmittal letter from NASD dated November 7, 2007. (Decl. Aizley,
22 Ex. M.) These actions are within the Policy Period. The flaw with Mr. Fettig's claim is
23 that Brookstreet did not report it to Illinois Union until November 26, 2007, which is
24 outside of the Policy Period. (Woody Decl. at ¶ 9.) Mr. Fettig, essentially
25 acknowledging that this late reporting is fatal to his claim, argues that Illinois Union's
26 refusal to honor his claim is in bad faith, and further, that Illinois Union must
27 demonstrate prejudice arising from an insured's failure to provide a timely notice and
28 proof of loss. (Fettig Opp. Mot . Summary Judgment at 4.) As noted previously, "the
notice prejudice rule does not apply to claims made [and reported] policies, because to

1 apply it as such would essentially convert these policies into occurrence based policies.”
2 *World Health & Educ. Foundation*, 612 F. Supp. 2d at 1096. Illinois Union’s Policy
3 language quite clearly states that the Policy is a claims made *and* reported policy. To
4 require Illinois Union to show prejudice would circumvent the Policy’s very purpose and
5 provide Brookstreet with more coverage than it bargained for. Since it is undisputed that
6 Mr. Fettig’s claim was reported outside the Policy Period, his claim is not covered and
7 summary judgment is appropriate.

8
9 **i. Claudia Johnson**

10
11 It is undisputed that on June 25, 2007, Ms. Johnson sent a letter to National
12 Financial Services (“NFS”), Brookstreet’s clearing broker, in which she alleged that NFS
13 had been “negligent in their oversight” of her account. (Decl. Aizley, Ex. N.) She
14 demanded that NFS deliver stock to her immediately. (Decl. Aizley, Ex. N.) The letter
15 did not request monetary damages from NFS. (Decl. Aizley, Ex. N.) By letter dated July
16 11, 2007, NFS forwarded Ms. Johnson’s letter to Brookstreet and stated that the
17 “documents concerning your direct customers are not processed by National Financial.
18 Please review these documents and forward to the appropriate department within your
19 organization.” (Decl. Aizley, Ex. O.) Illinois Union, by letter dated November 8, 2007,
20 advised Brookstreet that Ms. Johnson’s letter to NFS did not constitute a “Claim” or a
21 notice of a potential claim. (Decl. Aizley, Ex. P.) As a result, Illinois Union denied
22 coverage. (Decl. Aizley, Ex. P.) Ms. Johnson has not introduced any evidence or
23 persuasive legal authority to suggest that where a claim is asserted against one party who
24 then forwards a copy of that claim to a second party, the second party is to understand
25 that a claim has been asserted against it. Here, Ms. Johnson did not name Brookstreet in
26 her letter to NFS and did not appear to be making a claim against Brookstreet. Ms.
27 Johnson has not presented any additional evidence to suggest that she did make a Claim
28 against Brookstreet. Accordingly, there is no dispute of material fact that Ms. Johnson

1 did not make a “Claim” against Brookstreet within the definition of the policy and
2 summary judgment is proper.

3
4 **B. Late Notice Defendants**

5
6 Illinois Union argues that Richard Lisowski, Stephen and Robin Stubbs, Judy
7 Schulman and Murray Bieda notified Brookstreet within the Policy Period, but
8 Brookstreet notified Illinois Union more than 30 days after Brookstreet received notice of
9 the claim. The Court considers each of these claimants in turn.

10 **a. Richard Lisowski**

11
12 It is undisputed that Mr. Lisowski submitted his claim for arbitration regarding his
13 complaints against Brookstreet in December 2006. (Decl. Aizley, Ex. W.) Additionally,
14 NASD notified Brookstreet of Mr. Lisowski’s claim by letter dated January 16, 2007.
15 (Decl. Aizley, Ex. W.) It is also undisputed that Illinois Union received notice of Mr.
16 Lisowski’s claim in March of 2007. (Lisowski Opp. Summary Judgment at 2.) All of
17 these activities occurred within the Policy Period. Illinois Union argues that Mr.
18 Lisowski’s claim is not covered, however, because Brookstreet notified Illinois Union of
19 its claim after 30 days had passed.

20
21 As noted previously, the Policy states: “The Insured shall, as a condition precedent
22 to their rights under the Policy, give to the Insurer written notice of any Claim made
23 against the Insured as soon as practicable during the Policy Period, or if exercised, during
24 the Extended Reporting Period, but in no event later than thirty (30) days after the
25 Insured knew or should have known, using reasonable diligence, of the existence of the
26 Claim.” (Decl Aizley, Ex. A at 13.) Brookstreet received notice of Mr. Lisowski’s claim
27 in January of 2007 but did not report the claim to Illinois Union until March of 2007.
28 More than 30 days had elapsed from the time Brookstreet learned of the claim, and

1 reporting within 30 days was a condition precedent to coverage, so it appears that there
2 should be no coverage for Mr. Lisowski's claim.

3
4 Mr. Lisowski argues that Illinois Union has failed to demonstrate prejudice under
5 the notice-prejudice rule, and additionally, that the doctrine of equitable excuse should
6 apply so as to avoid his forfeiture. As Mr. Lisowski has noted, California courts have
7 refused to apply the notice-prejudice rule to claims made and reported policies. *World*
8 *Health & Educ. Foundation v. Carolina Casualty Ins. Co.*, 612 F. Supp. 2d 1089, 1096
9 (N.D. Cal. 2009); *Root v. Am. Equity Specialty Ins. Co.*, 130 Cal. App. 4th 926, 929, 937,
10 947 (Cal. Ct. App. 2005). He asserts, however, that these cases focus on reporting
11 outside of the policy period, and here, though Brookstreet reported his Claim to Illinois
12 Union more than 30 days after Brookstreet received notice of it, his Claim was reported
13 within the Policy Period. Mr. Lisowski has presented no persuasive authority to rebut the
14 authority that states that the notice prejudice rule does not apply to claims made and
15 reported policies. To force Illinois Union to demonstrate prejudice would be to rewrite
16 the insurance contract, and the Court is unwilling to take this step.

17
18 Additionally, the doctrine of equitable excusal applies where "a claim is made very
19 late in the policy period and the insured learns of the claims under highly ambiguous
20 circumstances, so the claim is not reported until there is confirmation of that claim, which
21 is shortly after the policy has expired." *Root*, 130 Cal. App. 4th at 929. Mr. Lisowski's
22 claim was made well within the Policy Period, and he has provided neither persuasive
23 argument nor evidence to suggest that the doctrine should apply to excuse Brookstreet's
24 late reporting. Accordingly, summary judgment in favor of Illinois Union as to Mr.
25 Lisowski is appropriate.

1
2 **b. Stephen and Robin Stubbs**

3
4 In its reply to the Stubbs' opposition, Illinois Union stated that it withdraws its
5 motion for summary judgment as to the Stubbs without prejudice. This motion is
6 withdrawn as to the Stubbs.

7
8 **c. Judy Schulman and Murray Bieda**

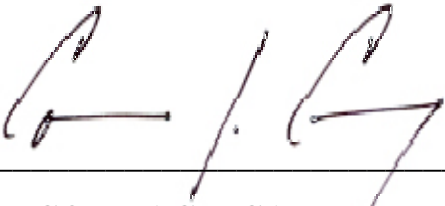
9
10 Judy Schulman and Murray Bieda asserted their Claim for arbitration against
11 Brookstreet in a single arbitration, and the Court will consider their claims together.
12 Illinois Union presented undisputed evidence that Ms. Schulman, through her attorney,
13 sent Brookstreet a letter, dated February 12, 2007, in which she alleged that she had
14 suffered \$706,627 in losses and demanded payment. (Decl. Aizley, Ex. BB.) Illinois
15 Union also presented evidence that Brookstreet reported Ms. Schulman's claim on March
16 28, 2007, which is 44 days after Ms. Schulman's letter. (Decl. Aizley, Ex. CC.) Ms.
17 Schulman and Mr. Bieda have not responded directly or offered evidence to rebut Illinois
18 Union's argument that this was outside of the Policy's 30-day notice period. Instead,
19 they explicitly adopt arguments asserted by Defendants who are represented by Mr.
20 Wagner, including his argument that Illinois Union must demonstrate prejudice under the
21 notice-prejudice rule and that the doctrine of equitable excusal should apply. As noted
22 previously, the notice-prejudice rule does not apply to claims made and reported policies.
23 Additionally, Ms. Schulman and Mr. Bieda have not submitted any evidence or offered
24 any persuasive argument as to why the doctrine of equitable excusal should apply.
25 Accordingly, summary judgment as to their claims is appropriate.
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CONCLUSION

For the foregoing reasons, Illinois Union’s motion for summary judgment is GRANTED.

DATED: November 20, 2009



CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE