1 shortly.

2 MR. CAMERON: Yes, sir. Thank you,

3 Judge.

4 MR. McGAVIN: Thank you, Your Honor.

5 (Thereupon, a recess was taken from 5:57

6 to 6:21 p.m.)

7 THE COURT: First of all, I'd like to

8 thank counsel on both sides of the aisle.

9 You're very good at presenting the issues in a

10 way that's understandable to the Court, at least

11 hopefully understandable to the Court; you may

12 disagree once you hear my ruling. But I

13 appreciate the professionalism that everybody

14 has exhibited. And even though this is, for me,

15 a difficult decision, it could have been much

16 more difficult had we not had competent and

17 really helpful counsel on both sides of the

18 issues here.

19 I also thank you for the forbearance you

20 have shown today. I have taken a full day to

21 reach my decision, and I know it's been a long

22 day for everybody.

1 In making my ruling, I'm not going to
2 spend a lot of time on background. I think
3 that's well known and it's not in dispute, and
4 given the lateness of the hour, I'm going to go
5 straight to the issues that are presented. And
6 I sort of used as my guide the Uniwest closing
7 document which I believe sets out the issues
8 presented, and they pretty much mirror the
9 issues as presented by Amtech, of course they're
10 couched in different terms.
11 The first issue I'm going to address is
12 the corporation issue, that is, Uniwest's
13 argument that the prime contracts within the
14 provisions are made part of the subcontract
15 that's in question here. Given that the
16 indemnity provision in the subcontract between
17 Uniwest and Amtech is void, the question is,
18 Does the indemnity provision in the prime
19 contract obligate Amtech to indemnify Uniwest?
20 The Court has concluded that the answer is no.
21 The subcontract would only incorporate
22 into it those obligations owed by Uniwest to the

1 owner with regard to, for a better word,
2 elevator work, and thus it would make Amtech the
3 subcontractor responsible to the owner, as
4 Uniwest would be responsible to the owner given
5 those parameters.
6 Paragraph 3 of that subcontract makes
7 the subcontractor -- makes the subcontractor to
8 be obligated to the owner with regard to work
9 specified in the contract. Assuming arguendo
10 that the indemnification in the prime contract
11 is an obligation owed from the subcontractor to
12 the owner, then all paragraph 3 of the
13 subcontract does is require Amtech, the
14 subcontractor, to indemnify the owner. It does
15 not require indemnification of Uniwest by
16 Amtech.
17 The second argument is whether or not
18 there is a second indemnity agreement that was
19 created out of various correspondence,
20 conversations, and documents between Amtech and
21 Uniwest, and the Court has concluded no. The
22 correspondence and communications that took

1 place after the subject loss was concerned with
2 whether Amtech would accept tender defense and
3 would indemnify Uniwest. Its tender is
4 predicated on the subcontract indemnity clause,
5 which both parties believe are valid.
6 The subsequent argument -- I'm sorry,
7 the subsequent agreement of January 2004 was
8 based on the subcontract provision and its
9 obligations. The additional terms that were
10 negotiated between the parties were to implement
11 that provision and was incidental to the
12 indemnity provision in the subcontract. The
13 parties were not contemplating replacing the
14 subcontract indemnity provision with a new
15 indemnity provision.
16 The next question is, Did Amtech have a
17 duty under the subcontract to procure insurance
18 to protect Uniwest? The answer to that is yes.
19 The requirements under Exhibit B of the
20 subcontract are made a part of the subcontract
21 through the subcontract's paragraph 2 scope of
22 work provision. In turn, paragraph 2,

1 subparagraph -- I'm sorry, in turn, paragraph 2
2 and subparagraph 1 of Exhibit B includes by
3 reference the elevator installation and
4 modernization specifications. The elevator
5 installation and modernization specifications
6 contain its own insurance provision. Although
7 there is a general insurance provision in the
8 subcontract, this provision within the elevator
9 installation specs must also be given effect as
10 are all the terms of the agreement.
11 Under the provision, Amtech was required
12 to procure insurance for Uniwest, who was
13 referenced in that document as the construction
14 manager. The minimum coverage required was a $2
15 million umbrella policy under paragraph D. It
16 is noted that Amtech did have $1 million of
17 coverage with CNA, but that coverage does not
18 meet the minimum requirements of the elevator
19 installation specifications.
20 But, additionally, there's paragraph F
21 of the elevator installation specifications
22 which requires that the construction manager,

1 that is, Uniwest, to be named as an additional
2 insured. It is clear that the parties
3 contemplated that Uniwest would be named in any
4 policy that complied with the minimum coverage
5 requirements. The only policy that met that
6 criteria was the AIU policy, which had limits of
7 $25 million, clearly above the minimum required.
8 Therefore, Uniwest was expected to have up to
9 $25 million of coverage had Amtech complied with
10 the provisions of the contract.
11 That addresses the Amtech arguments.
12 With regard to AIU, whether AIU owes
13 defense indemnification to Uniwest as an
14 additional insured under the AIU policy under --
15 again, these aren't exact reference points, but
16 you'll know what I'm referring to -- E-4 of the
17 AIU policy, the answer is no.
18 The AIU policy states that a named
19 insured is a person who was an additional
20 insured in the policies listed in the schedule
21 underlying insurance. When one turns to that,
22 the schedule of underlying insurance, we see

1 that CNA is listed there under it.

2 As referenced earlier, it's referred to

3 as SIPF specs, the SIPF specs obligate Amtech to

4 insure or add as additional insured Uniwest.

5 The CNA contract recognizes as an additional

6 insured anyone who Amtech was obligated to

7 insure. And this is provided under the errors

8 and omissions part of the policy of the CNA

9 policy at page 0115.

10 However, that recognition by CNA that

11 Uniwest, as an additional insured, is limited to

12 circumstances where there is a written agreement

13 to indemnify Uniwest, and these are the provisos

14 that are set forth in CNA 0116, the next page.

15 So, here, such an obligation to indemnify was

16 held void, so CNA does not recognize Uniwest as

17 an additional insured under its policy,

18 therefore, E-4 of the AIU policy is not

19 applicable.

20 Is Uniwest an additional insured under

21 E-7 of the AIU policy? The answer to that is

22 no. Paragraph E-7 of the AIU policy is not

1 applicable because it applies only in the event
2 Amtech was obligated to another by "insurance
3 contract." Insurance contract has a special
4 meaning in the policy, which requires Amtech to
5 assume the tort liability of another party. In
6 this context, it would be Amtech assuming the
7 tort liability of Uniwest.
8 The basis of Amtech's assumption of tort
9 liability for Uniwest was the indemnity
10 provisions, which was declared void. Therefore,
11 Amtech could not have an obligation under an
12 insured contract when the indemnity provision
13 thereunder is held invalid, so E-7 does not
14 provide coverage.
15 The next issue is whether AIU owes
16 defense and indemnity to Uniwest because of
17 acquiescence or by hiring counsel to defend
18 Uniwest. The Court finds that the answer is no.
19 The evidence does not support acquiescence by
20 AIU. From the beginning, AIU monitored the
21 claim but never expressly committed to covering
22 Uniwest. Although AIU provided Mr. Devine to be

1 damages counsel for Uniwest, he had a defined
2 role in the litigation and did not replace Mr.
3 Lynn, who was lead counsel. Also, he did not
4 participate in discussions that ultimately
5 resulted in a settlement of the subject claim.
6 As to the reservation of right asserted
7 by AIU, even though Mr. Devine was hired to
8 defend, Mr. Carucci sent a letter dated December
9 6, 2005, to Amtech where AIU asserted a full and
10 complete reservation of right. The evidence
11 shows that counsel for Uniwest, Mr. Gibley,
12 never contacted AIU directly to ascertain their
13 position on the coverage. Under the
14 circumstances of this case and consistent with
15 the California law, there was no waiver or
16 acquiescence by AIU.
17 I think that covers the arguments. Who
18 will do the order?
19 MR. McGAVIN: Judge, I think there's
20 going to be a number -- there may be issues --
21 there may be motions to reconsider some small
22 piece of this, and I know it's been fully

1 briefed, but I would certainly anticipate as to
2 some small piece of this, we may seek some
3 reconsideration. I don't know that, but we
4 would want to consider that. So what I was
5 going to suggest is -- most of these rulings
6 were in our favor, so we will take the burden of
7 preparing the first order. And could we pick a
8 Friday when we would be presenting the order,
9 the form, and the parties can go back and forth
10 on how the form looks, preserving errors, and if
11 there are to be some post-trial or post-verdict
12 motions, that those could be all heard or
13 briefed on that same Friday?
14 THE COURT: I doubt they could be done
15 on a Friday. Anything in this case -- I don't
16 know that it can be done on a Friday. This is a
17 long brief, and I'm not sure that's -- given how
18 much documentation there is, I don't want you to
19 be relying on any additional motions, but I find
20 that the ability to talk to you directly is
21 probably -- well, maybe we could do it on a
22 Friday. I don't know. We don't have to decide

1 that now, but I'll set it for entry of an order,
2 and if you need more time at that time to do
3 something, then you can advise me accordingly,
4 and we can decide what it is. Hopefully, by
5 that time, you'll have in mind what you need and
6 see whether it's on a Friday or a date certain.
7 MR. McGAVIN: Right, and I'll need to
8 sit down --
9 THE COURT: It probably will be a
10 Friday. This won't involve evidence, probably.
11 MR. McGAVIN: Because I'll need to sit
12 and consult with Mr. Bonnie and go over the
13 rulings which you have crafted and read into the
14 record and make sure that we understand them
15 completely and the bases and study them. So we
16 wouldn't do this lightly of course, Judge
17 Williams, but we would certainly want to set it
18 out and pick a date. And we'll take the initial
19 draft at the order on behalf of AIU and Amtech
20 and then, of course, cooperate with counsel
21 going forward on that.
22 THE COURT: Mr. Cameron?

1 MR. CAMERON: Your Honor, I think that
2 approach makes a lot of sense.
3 I have one question for Your Honor.
4 With respect to the ruling in favor of Uniwest
5 and its carriers against Amtech on the insurance
6 policy issue, we asked for prejudgment interest
7 in the case, and I don't know that that's
8 something that Your Honor wants us to brief
9 or --
10 THE COURT: If you could. I mean, it
11 seems like -- you know, I don't know, I assume
12 they might have something to say about it. They
13 can just simply submit something prior to the
14 time we have entry of the order and I can decide
15 based on that. Can it be limited to five pages,
16 though?
17 MR. CAMERON: Absolutely. I think it's
18 just provided for by statute.
19 THE COURT: Yeah, I know.
20 MR. McGAVIN: Well, it's not quite that
21 simple, Judge. There's a number of factors and
22 it's purely discretionary with the Court.

1 THE COURT: Can you do it in five pages,
2 though?
3 MR. CAMERON: Yes, sir.
4 THE COURT: Can you?
5 MR. McGAVIN: Well, if you want us to,
6 we will.
7 THE COURT: How much more do I need to
8 know about the case than already?
9 MR. McGAVIN: We want to start at the
10 beginning and talk about -- no, we'll do it in
11 five pages, yes, Judge --
12 THE COURT: That would be much
13 appreciated.
14 MR. McGAVIN: -- and we recognize that.
15 THE COURT: And maybe you could have
16 yours ten days before whenever we set this for
17 entry of the order and maybe his response could
18 be submitted what, five days before entry of the
19 order?
20 MR. CAMERON: Yes, sir.
21 THE COURT: Or unless you agree
22 differently, just as long as I get it in advance

1 of the day for entry of the order.

2 MR. McGAVIN: Yes.

3 MR. CAMERON: Yes, sir.

4 THE COURT: So I can make at least a

5 decision on that. And when do you want entry of

6 the order?

7 MR. McGAVIN: I would think 30 days,

8 Judge.

9 THE COURT: Is there any chance this

10 might settle now?

11 MR. CAMERON: Always possible, Your

12 Honor.

13 THE COURT: Is it more possible?

14 MR. McGAVIN: Judge, I could tell you

15 how to make it more possible, but you might have

16 to change your mind on a couple of things.

17 THE COURT: All right.

18 MR. CAMERON: I was going to say the

19 same thing, Judge.

20 THE COURT: I'm sure. How is April 3rd?

21 MR. CAMERON: Your Honor --

22 MR. McGAVIN: Is that spring break?

1 MR. CAMERON: It is spring break. Could
2 we do it the week after that or the week before?
3 THE COURT: The week after is the 17th.
4 How is that?
5 MR. CAMERON: April 17th?
6 MR. McGAVIN: Mr. Bonnie, John, how is
7 your availability on April 17th?
8 MR. BONNIE: My calendar, unfortunately,
9 is not sitting in front of me. That's not the
10 week of Easter; right?
11 MR. CAMERON: Right.
12 MR. BONNIE: Yes, that's fine.
13 THE COURT: Well, it's Orthodox Easter,
14 Eastern Orthodox.
15 MR. BONNIE: Okay.
16 THE COURT: The 12th is Easter.
17 MR. BONNIE: So this is the --
18 MR. CAMERON: That would probably be the
19 Sunday before, John.
20 MR. McGAVIN: Your Honor, I'm sorry,
21 that 17th --
22 THE COURT: How about the 24th then?

1 MR. CAMERON: That's fine.
2 MR. BONNIE: Yes.
3 THE COURT: All right. April 24th.
4 MR. McGAVIN: Yes, Your Honor.
5 THE COURT: At 10:00 a.m.?
6 MR. McGAVIN: Yes, thank you.
7 MR. CAMERON: And that's for entry of
8 the final order in the case?
9 THE COURT: Yes. In the meantime, the
10 prejudgment issue will be briefed by Uniwest ten
11 days -- or Uniwest and parties and other parties
12 ten days before, and five days before the entry
13 of the order of the response will be due.
14 MR. CAMERON: Yes, sir.
15 THE COURT: All right.
16 MR. CAMERON: Judge, we appreciate your
17 time in this case.
18 THE COURT: Thank you.
19 MR. BONNIE: Thank you, Judge.
20 MR. McGAVIN: Judge Williams, we
21 appreciate you -- I know you worked hard
22 studying these documents, and we certainly

1 appreciate your time.

2 THE COURT: It's my duty and I'm happy

3 to do it. Thank you.

4 (Thereupon, at 6:54 p.m., the above

5 excerpt was concluded.)

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1 C E R T I F I C A T E

2 COMMONWEALTH OF VIRGINIA AT LARGE:

3 I, Bobbi Spencer, a stenographic reporter
4 and notary public in and for the Commonwealth of
5 Virginia at Large do hereby certify that the
6 foregoing was reported by stenographic means by
7 me, which matter was held on the date and at the
8 time and place set forth on the title page
9 hereof, and that the foregoing constitute a true
10 and accurate transcript of same to the best of
11 my ability.

12 I further certify that I am not related to
13 any of the parties, nor am I an employee of or
14 related to any of the attorneys representing the
15 parties, and I have no financial interest in the
16 outcome of this matter.

17 Given under my hand and seal this
18 27th day of May, 2009.

19

20 Bobbi Spencer

21

22