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6 INSURANCE COMPANY
7

8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 ANDREA HUMPHREY SCHMIDT

12 Plaintiffs,

13 vs.

14 AMERICAN MODERN HOME
15 INSURANCE COMPANY

16 Defendants.
17

Case No. 2:20-cv-09804-JVS-AFM
[Complaint Filed: October 28, 2020]

DEFENDANT AMERICAN MODERN
HOME INSURANCE COMPANY'S
NOTICE OF MOTION AND MOTION
FOR FOR SUMMARY JUDGMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF

Assinged to the Hon. James V. Selna

Date: December 13, 2021
Time: 1:30 PM
Dept.: 10C

22 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD
23 HEREIN:

24 PLEASE TAKE NOTICE that on December 13, 2021 at 1:30 p.m., or as
25 soon thereafter as the matter may be heard in Courtroom 10C of the above-entitled
26 Court located at 411 W. 4th Street, Santa Ana, CA, 92701, Defendant American
27 Modern Home Insurance Company ("Defendant") will move and hereby does move
28

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1 for summary judgment and/or partial summary judgment pursuant to *Federal Rule of*
2 *Civil Procedure 56*, and corresponding *Central District Local Rule 56-1*, on the
3 complaint of Plaintiff Andrea Humphrey Schmidt. There is no genuine issue as to any
4 material fact; plaintiff cannot prove the essential elements of either of his claims for
5 (1) breach of contract, or (2) breach of the implied covenant of good faith and fair
6 dealing, as a matter of law, based on undisputed facts and admissible evidence.

7 This motion is brought on the grounds that there is no genuine issue as
8 to any material fact and that the Defendant is entitled to judgment as a matter of law
9 based on the points, authorities and uncontroverted evidence submitted herein and
10 herewith. Fed. R. Civ. P. 56(a); see also *Miranda v. City of Cornelius*, 429 F.3d 858,
11 860 n.1 (9th Cir. 2005).

12 Defendant's motion is made following conference of counsel pursuant
13 to *Central District of California Local Rule 7-3*, which took place on November 12,
14 2021. (See Declaration of Mark R. Israel filed concurrently herewith.)

15 Defendant's motion is based on this Notice of Motion, the attached
16 Memorandum of Points and Authorities, the Compendium of Exhibits and Exhibits,
17 Declarations of Mark R. Israel, Will Holleran and Bill Kelly, Statement of
18 Uncontroverted Facts and Conclusions of Law, concurrently filed herewith, as well
19 as all papers and pleadings on file in this action and such other argument or evidence
20 as may be presented at the time of the hearing on this motion.

21
22 Date: November 12, 2021

DANIELS, FINE, ISRAEL,
SCHONBUCH & LEBOVITS, LLP

/s/Mark R. Israel

23
24 By: _____

25 Mark R. Israel
26 Attorneys For Defendant
27 AMERICAN MODERN HOME
28 INSURANCE COMPANY

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 This is an action for breach of contract and breach of the implied
5 covenant of good faith and fair dealing commenced by Plaintiff Andrea Schmidt
6 against American Modern Home Insurance Company (“AMIC”). AMIC insured a
7 manufactured home owned by Ms. Schmidt and located in Malibu. This action arises
8 out of two separate but overlapping claims. The first claim involves smoke damage
9 to the manufactured home caused by the Woolsey Fire, which broke out on
10 November 8, 2018. AMIC investigated this claim and paid tens of thousands of
11 dollars to Ms. Schmidt for cleaning, personal property damage, and Additional Living
12 Expense payments for temporary accommodations and food.

13 While the first claim was pending, Ms. Schmidt submitted a second
14 claim for theft of personal property items allegedly perpetrated by her handyman
15 Pablo Venegas Caro. According to the complaint, the theft occurred on September 14,
16 2020.¹ During the course of the second claim, AMIC, through counsel, established
17 contact with Mr. Venegas. Mr. Venegas denied stealing personal property items from
18 Ms. Schmidt and claimed that she had hired him to remove and dispose of her
19 personal property items in return for a payment of \$3,500. According to Mr. Venegas,
20 Ms. Schmidt directed him as to what to keep and what to discard through a series of
21 text messages, some of which he provided to an AMIC investigator.

22 AMIC requested that Ms. Schmidt produce documents and appear for an
23 examination under oath (“EUO”) as permitted by the policy. Among the document
24 requested: “All records of communications, whether physical or electronic, between
25

26 _____
27 ¹ The claim was submitted to AMIC on October 17, 2019, with a reported date of loss of *September 14, 2019*. However,
28 the Los Angeles County Sheriff’s Department Report indicates that Ms. Schmidt found Mr. Venegas in her home on
October 15, 2019.

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1 you and Pablo Venegas.” As it happened, the first document and EUO request was
2 sent on March 12, 2020, days before the pandemic “Safer at Home” order was issued.
3 Due to the pandemic, the document production and EUO dates were continued at the
4 request of Ms. Schmidt’s former counsel from March 26 to April 23 and subsequently
5 to May 22, June 23, and July 21, 2020. Ms. Schmidt never produced the requested
6 documents, never appeared for the EUO, and never made arrangements to appear.
7 Instead, she filed this action.

8 California law is clear that an insurer has the right to request documents
9 and demand that the insured appear for an EUO. Once this has occurred, the insured’s
10 compliance is a condition precedent to an action on the policy and a bar to any cause
11 of action for breach of contract or breach of the implied covenant of good faith and
12 fair dealing. In this case, in addition to the fact that AMIC had cause to believe that
13 Ms. Schmidt’s theft claim was contrived, there was abundant good cause to request
14 her sworn statement to resolve apparent overlap between the two claims, explore
15 undocumented “cash gratuities” given to hotel staff for which Ms. Schmidt requested
16 reimbursement, question her regarding the listing of the property for rent or sale, and
17 other such claim details and concerns. Ms. Schmidt’s decision to simply ignore
18 AMIC’s requests for documentation and her failure to appear for an EUO acts a bar
19 to this action. Accordingly, AMIC’s motion for summary judgement should be
20 granted.

21
22 **II.**

23 **SUMMARY OF MATERIAL FACTS**

24 **A. The AMIC Policy**

25 AMIC insured a Skyline mobile home located at 29500 Heathercliff
26 Road, Space 30, in Malibu, California, under policy number 0048430031, in effect
27 from July 13, 2018 to July 13, 2019. The policy was renewed for the subsequent
28

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1 policy period. The insured mobile home was owned by named insured Andrea
2 Schmidt. The policy provides Dwelling replacement cost coverage subject to a limit
3 of \$255,000 and Personal Property coverage subject to a limit of \$127,500. The
4 Manufactured Homeowners Enhanced Coverage – California Endorsement provides
5 an Additional Living Expense (ALE) limit of 20% of the Dwelling limit, which in this
6 case equates to \$51,000. The policy was renewed for the period July 13, 2019 to
7 July 13, 2020. (Statement of Uncontroverted Facts (“SOF”) 1)

8 The policy provides that the insured has certain obligations to cooperate
9 and provide information and documentation in the event of a loss. The policy states,
10 in pertinent part:

11 16. **What You Must Do in Case of Loss**

12 In case of a loss, you must see that the following are
13 done:

14 * * *

15 e. prepare an inventory of damaged personal
16 property showing the quantity, description,
17 **actual cash value** and amount of loss and any
18 other information we request. You must attach
19 all bills, receipts and related documents that
20 justify the figures in the inventory;

21 f. as often as we reasonably require:

22 (1) allow us to inspect the damaged
23 property and allow us to take samples of
24 damaged property for inspecting, testing
25 and analysis;

26 (2) provide us with records and documents
27 that we request and permit us to make
28

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copies. These include but are not limited to, tax records, bank statements, sales slips and receipts.

- (3) submit to examination under oath, while not in the presence of any other **insured person**, and sign the same. (SOF 2)

B. The November 8, 2018 Smoke Claim

The Woolsey Fire ignited on November 8, 2018 and destroyed numerous structures in Los Angeles and Ventura Counties. On November 15, 2018, Ms. Schmidt notified AMIC of a claim due to the fire. (SOF 3)

The fire loss claim was assigned to AMIC adjuster Will Holleran. On November 19, 2018, Mr. Holleran spoke to Ms. Schmidt and explained the benefits, coverages, and time limits potentially applicable to the claim. He offered a \$2,000 advance, which was accepted. Mr. Holleran authorized two weeks of temporary accommodations. (SOF 4)

On November 21, 2018, Mr. Holleran met Ms. Schmidt at the property in Malibu and conducted an inspection. Mr. Holleran documented that the mobile home had suffered no direct fire damage; it did have soot on interior surfaces. Mr. Holleran provided a check for the \$2,000 advance. (SOF 5)

On November 30, 2018, Mr. Holleran spoke regarding the claim, with at Ms. Schmidt’s request, an out of state Public Adjuster by the name of John Donnelly. (SOF 6)

On December 6, 2018, Mr. Holleran sent a letter to Ms. Schmidt asking for the insured’s contractor’s estimate for cleaning the home, damaged personal property inventory and receipts and ALE receipts. (SOF 7)

On December 30, 2018, Ms. Schmidt emailed Mr. Holleran a lease for an alternative residence for the period December 24, 2018 through September 24, 2019. The email states: “As is standard, landlord required first/last/security (\$12,000

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1 in cashier’s check paid by me to Jill Cohen on December 24th.)” (SOF 8)

2 On December 31, 2018, Mr. Donnelly sent a non-detailed estimate from
3 an unidentified contractor to replace all major systems of the manufactured home at a
4 cost of \$300,500. This estimate by the unidentified contractor included, among other
5 items, complete stucco, roof, tile, kitchen, and bathroom tear down and replacement.
6 (SOF 9)

7 On January 2, 2019, Mr. Holleran received an email from Ms. Schmidt
8 requesting a wire payment of \$20,000 to cover her “first/last/security” plus rent for
9 January and February. On the same day, Mr. Holleran emailed Ms. Schmidt
10 responding to her request for a wire payment of \$20,000 to cover her
11 “first/last/security” plus rent for January and February, stating: “It has been my
12 experience with a number of claims in the park where your home is that the restoration
13 takes several days.... Please detail why you are leasing the property for this period of
14 time.” (SOF 10)

15 On January 2, 2019, Mr. Holleran emailed Mr. Donnelly to request the
16 actual identity/name of the contractor who had prepared the estimate. (SOF 11)

17 On January 3, 2019, Mr. Holleran sent Ms. Schmidt a letter enclosing a
18 check with a payment for one month’s rent pursuant to the lease agreement (\$3,950)
19 plus the amount of his estimate to clean the insured property (\$4,058.25). The letter
20 explains that cleaning/remediation of the properties near this location typically takes
21 a matter of days. This letter also requests “receipts for your meal expenses if you find
22 that they are greater than what you normally spent.” (SOF 12)

23 On January 7, 2019, Mr. Holleran received from Mr. Donnelly the
24 structural repair estimate, this time identifying the contractor that prepared it as Casa
25 Blanca Construction. (SOF 13)

26 On January 8, 2019, Mr. Holleran requested that third party
27 environmental toxicologist RiskNomics inspect Ms. Schmidt’s mobile home to
28

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1 determine whether reconstruction of the manufactured home was required or whether
2 cleaning would suffice. Mr. Holleran advised Ms. Schmidt and Mr. Donnelly
3 regarding the retention of RiskNomics the same day. (SOF 14)

4 On January 10, 2019, Mr. Holleran received a message that the home
5 Ms. Schmidt had purportedly leased was now uninhabitable and that she had checked
6 into the Surfrider Hotel on January 4. (SOF 15)

7 On January 10, 2019, Mr. Holleran authorized payment for the room at
8 the Surfrider through the vendor Temporary Accommodations and authorized a stay
9 through January 31. Mr. Holleran further advised Ms. Schmidt that Temporary
10 Accommodations would search for a short-term rental property if she so requested.
11 (SOF 16)

12 On January 11, 2019, Temporary Accommodations advised
13 Mr. Holleran that Ms. Schmidt wished to move from the Surfrider to the Malibu
14 Beach Inn. The cost of the Malibu Beach Inn was reported to be \$700 per night, about
15 double the cost of the Surfrider. (SOF 17)

16 On January 14, 2019, Mr. Holleran emailed Ms. Schmidt regarding
17 personal property items that she reported to be fragile and “historically significant.”
18 He sent a second email on the same day agreeing to Ms. Schmidt’s request to change
19 hotels, suggesting that she contact Temporary Accommodations to facilitate the
20 move. (SOF 18)

21 On January 17, 2019, Mr. Holleran authorized payment of \$3,336.72 for
22 the hotel stay from December 7 through December 17. (SOF 19)

23 On January 17, 2019, AMIC emailed Ms. Schmidt to remind her that
24 AMIC had already paid \$3,950 for one month’s rental pursuant to the lease and had
25 agreed to pay the hotel expense incurred through January 31. This email noted that no
26 receipts had been received for ALE. (SOF 20)

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1 On January 23, 2019, Mr. Holleran emailed Ms. Schmidt to advise her
2 that “you are welcome to submit meal expense receipts for reimbursement as often as
3 you like...you also need to let me know what your normal food expenses were prior
4 to the fire. Your payment will be for the amount you incurred in excess of your normal
5 food expenses.” (SOF 21)

6 On January 25, 2019, RiskNomics conducted an inspection of
7 Ms. Schmidt’s manufactured home. (SOF 22)

8 On January 30, 2019, Mr. Holleran authorized payment of \$3,689.84 for
9 the hotel stay from November 19 through 24 and November 26 through 27 and
10 December 1 through 6. (SOF 23)

11 On January 31, 2019, Mr. Holleran authorized payment of \$12,853.83
12 for the hotel stay from January 4, 2019 through January 25, 2019. (SOF 24)

13 On February 2, 2019, Mr. Holleran sent a status letter requesting
14 “receipts for your additional living expenses and your personal property claim list for
15 any items which cannot be cleaned.” (SOF 25)

16 On February 5, 2019, Ms. Schmidt emailed meal receipts to
17 Mr. Holleran and advised him that she was out of the country and “the only way I can
18 receive payment is via wire transfer...” On the same day, Mr. Holleran emailed
19 Ms. Schmidt requesting certain missing receipts and stating that AMIC did not have
20 the capability of EFT but could mail a check to any U.S. address. (SOF 26)

21 On February 6, 2019, RiskNomics issued its report following an
22 inspection of Ms. Schmidt’s mobile home. The report states that “trace” to
23 “moderate” wildfire smoke particles are located at various parts of the property. The
24 report states that remediation can be accomplished by “cleaning the interior and
25 exterior of the residence...using ordinary cleaning methods.” (SOF 27)

26 On February 16, 2019, Ms. Schmidt emailed personnel at AMIC to
27 register a number of complaints regarding Mr. Holleran. Ms. Schmidt requested that
28

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1 the claim be re-assigned to another adjuster. (SOF 28)

2 On February 19, 2019, AMIC emailed Ms. Schmidt to advise her that the
3 claim had been reassigned to Bill Kelly for further handling. (SOF 29)

4 On February 23, 2019, Mr. Kelly emailed Ms. Schmidt to offer the
5 policy limit balance on her ALE claim in the amount of \$27,196.61 plus an additional
6 \$20,000 advance against her personal property claim. (SOF 30)

7 On February 24, 2019, Ms. Schmidt emailed a lengthy response to
8 Mr. Kelly indicating that she was touring the City of Singapore. She requested an
9 immediate EFT of the amount offered. Mr. Kelly responded that AMIC did not have
10 the capability to perform an EFT but offered to overnight a check for \$47,196.61 to
11 any address in the United States. (SOF 31)

12 Through the efforts of the AMIC accounting department, Mr. Kelly
13 determined that an EFT payment to a policyholder could be issued and AMIC did
14 wire transfer \$47,169.61 to Ms. Schmidt’s account as of February 26, 2019. (SOF 32)

15 On February 27, 2019, Ms. Schmidt sent a lengthy complaint email to
16 multiple personnel at AMIC. (SOF 33)

17 On March 4, 2019, Mr. Kelly sent a detailed letter to Ms. Schmidt
18 recapping claim payments to date (\$77,058.25), citing the “Conditions” section of the
19 policy and requesting access to the mobile home to conduct further investigation.
20 (SOF 34)

21 On March 19, 2019, Ms. Schmidt responded to Mr. Kelly by questioning
22 why her “contractor’s well-advised work plan has not been approved.” She indicates
23 that she is not aware of any “safe” alternative and requests copies of prior reports and
24 test results, proof of licenses and insurance for the experts who prepared reports, and
25 details of what further inspections and tests AMIC was proposing. (SOF 35)

26 On April 5, 2019, AMIC counsel wrote to Ms. Schmidt to provide the
27 RiskNomics report and explain why AMIC was rejecting the tear down and rebuild

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1 estimate prepared by Casa Blanca Construction. This letter requests a re-inspection of
2 the property and additional information regarding Ms. Schmidt’s personal property
3 claim. Ms. Schmidt did not directly respond to this letter but instead retained counsel.
4 (SOF 36)

5 On May 29, 2019, Ms. Schmidt emailed Mr. Kelly a list of “home
6 contents exposed to smoke and ash that cannot be remediated due to public health
7 recommendations.” This communication states: “Point Dume Organic Cleaners was
8 consulted on the remediation of items and fabrics. They completed remediation of one
9 load of items and are storing them (approx. invoice to date is est. \$1,200). More items
10 will be added to the ‘remediate’ verses ‘replace’ list pending cost to successfully treat
11 individual items.” The replacement cost on this spreadsheet totals \$80,187. (SOF 37)

12 On June 1, 2019, Ms. Schmidt sent another email enclosing a second
13 spreadsheet with “additional items for reimbursement” at a total replacement cost of
14 \$40,150. The June 1, 2019 email indicates that “additional documentation is available
15 on these items and/or additional detail.” This email states: “Condition of all items
16 except antiques and vintage items was universally new/almost new due to being
17 purchased in the year prior.” (SOF 38)

18 On June 26, 2019, AMIC counsel wrote to counsel for Ms. Schmidt
19 pointing out: “Your spreadsheets and cover emails indicate your claim that the vast
20 majority of the listed items are destroyed and must be replaced. However, the only
21 support for that proposition in your emails is a vague allusion to ‘public health
22 recommendations’ and a consultation with Point Dume Organic Cleaners.” This letter
23 requests the following: “[A]t this time, AMIC sees no basis for the wholesale
24 replacement of personal property items, but it will further investigate this issue. Please
25 provide the contact person at Point Dume Organic Cleaners, your bill(s), and any
26 documentation from Point Dume or any other source that supports the position that
27 the listed personal property, if damaged, cannot be cleaned.” The June 26, 2019 letter

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1 further requests: “Regarding the personal property items, if covered, the policy
2 provides for payment of actual cash value pending replacement. Accordingly,
3 depreciation will be assessed. Please provide to me proof of purchase of the personal
4 property items on your spreadsheets. This may consist of receipts, credit card
5 statements, or any other information that demonstrates the purchase date and price.”
6 (SOF 39)

7 On July 25, 2019, AMIC counsel wrote to counsel for Ms. Schmidt
8 requesting, among other things: “Please provide the contact person at Point Dume
9 Organic Cleaners, your bill(s), and any documentation from Point Dume or any other
10 source that supports the position that the listed personal property, if damaged, cannot
11 be cleaned.” The July 25, 2019 letter continues: “AMIC again requests that you make
12 the structure (and the personal property) available for inspection.” (SOF 40)

13 Access to the property was granted and on September 9, 2019, the
14 property was inspected by industrial hygienist Jason Mosman of J.S. Held LLC. (SOF
15 41)

16 On September 23, 2019, JS Held issued its Smoke Damage Assessment
17 and Remediation Protocol regarding the manufactured home. The report states, in
18 part: “J.S. Held did not detect smoke related odors inside the property. Visible soot
19 deposition was observed on the troughs of door and windows that may have been
20 opened during or subsequent to the fire. Visible soot was also observed on several
21 exterior surfaces and contents located around the property. There were no visible or
22 physical signs of smoke pressurization impacting the wall cavities at the time of the
23 inspection.” (SOF 42)

24 On November 26, 2019, AMIC arranged to have Biosweep Services
25 perform smoke remediation services at the insured mobile home. (SOF 43)

26 On February 26, 2020, AMIC through counsel made a settlement offer
27 to conclude all aspects of Ms. Schmidt’s claims. (SOF 44)

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1 By email of March 2, 2020, Ms. Schmidt rejected the AMIC offer.
2 Ms. Schmidt instead demanded payment of “ALE Meals” for meals not taken at the
3 Malibu Beach Inn totaling \$12,118; ALE Meals for meals taken at the Malibu Beach
4 Inn totaling approximately \$4,500 at the Malibu Beach Inn, and \$2,000 for cash
5 gratuities “distributed” at the Malibu Beach Inn. (SOF 45)

6
7 **C. The Theft Loss**

8 On October 17, 2019, Ms. Schmidt notified AMIC of a “theft” loss at
9 the insured location with a reported date of loss of September 14, 2019. This claim
10 was assigned to property adjuster Matthew Dopp. (SOF 46)

11 On October 18, 2019, Mr. Dopp emailed a letter to Ms. Schmidt
12 requesting a copy of the police report, photographs of damaged items, information
13 regarding prices paid and a list of missing or damaged items. (SOF 47)

14 On October 23, 2019, Ms. Schmidt uploaded a personal property
15 inventory with a list of 85 allegedly stolen items with a reported replacement cost of
16 \$39,026.28. (SOF 48)

17 On October 28, 2019, Mr. Dopp wrote to Ms. Schmidt requesting a copy
18 of the police report. (SOF 49)

19 On November 5, 2019, Joshua Pirro of Cross Country Adjusting
20 inspected the property and met with Ms. Schmidt. Mr. Pirro prepared a report
21 regarding the inspection. (SOF 50)

22 On November 6, 2019, Ms. Schmidt uploaded an additional inventory of
23 21 items of “stolen” personal property totaling \$878. (SOF 51)

24 On November 22, 2019, AMIC received a copy of the Incident Report
25 prepared by the Los Angeles County Sheriff’s Department. The report is dated
26 October 15, 2019. The report indicates that Ms. Schmidt had been out of the country
27 and returned home “today” when she encountered Pablo Venegas and two

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1 unidentified females. Ms. Schmidt had previously hired Mr. Venegas as a handyman
2 and had given him access to the residence and permission to enter the property while
3 she was away. Ms. Schmidt claimed that Mr. Venegas and his companions were
4 smoking marijuana and looking through her personal belongings. She ordered them
5 to leave and she then noticed missing items of personal property. (SOF 52)

6 On December 16, 2019, Ms. Schmidt requested accommodations at
7 Malibu Beach Inn. Mr. Dopp agreed to the request. (SOF 53)

8 On January 6, 2020, Mr. Dopp agreed to an extension of the temporary
9 accommodations. (SOF 54)

10 On January 8, 2020, AMIC received an invoice from Temporary
11 Accommodations for Ms. Schmidt’s stay at the Malibu Beach Inn from December 16,
12 2019 through January 7, 2020 in the amount of \$12,810.16. (SOF 55)

13 On January 10, 2020, Mr. Dopp received a claim from Ms. Schmidt for
14 meal expenditures at the Malibu Beach Inn totaling \$2,695.59 incurred between
15 December 16, 2019 and January 8, 2020. (SOF 56)

16 On January 21, 2020, Mr. Dopp indicated that he would review
17 Ms. Schmidt’s meal claim and asked for information regarding her typical meal
18 expenses. (SOF 57)

19 On January 27, 2020, the theft claim was transferred from Matthew
20 Dopp to Bill Kelly, the adjuster handling Ms. Schmidt’s smoke/soot claim. (SOF 58)

21 On February 5, 2020, AMIC received an invoice from Temporary
22 Accommodations for Ms. Schmidt’s stay at Malibu Beach Inn from January 7, 2020
23 through January 28, 2020 totaling \$13,318.20. (SOF 58)

24 On February 26, 2020, AMIC authorized a settlement offer to
25 Ms. Schmidt which included payments for ALE, meals and personal property items.
26 (SOF 59)

27
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1 By email dated March 2, 2020, Ms. Schmidt rejected the settlement offer
2 and demanded payment of the ALE policy limits or “all expenses included in this
3 report...” plus “forthcoming/unreported expenses” for transportation, housing and
4 added meal expenses. (SOF 60)

5 By email dated March 3, 2020, Ms. Schmidt demanded payment of
6 \$16,979.30 in “pre-theft” replacement items and concluded: “I would appreciate
7 prompt reimbursement for these items while I prepare additional supporting
8 documentation of items by claim.” (SOF 61)

9
10 **D. Contact With Pablo Venegas Caro**

11 On or about March 8, 2021, AMIC counsel was able to reach Pablo
12 Venegas by telephone. When asked about the circumstances of Ms. Schmidt’s theft
13 claim, Mr. Venegas denied stealing any of Ms. Schmidt’s personal belongings.
14 According to Mr. Venegas, he had frequently acted as a handyman for Ms. Schmidt.
15 After the fire, Ms. Schmidt hired him to clean the residence and dispose of her
16 personal property items in return for payment of \$3,500. She also requested his
17 assistance in selling her car. Mr. Venegas claimed that Ms. Schmidt had directed him
18 by text message as to what items to keep and what to discard. Ms. Schmidt desired to
19 clear and clean the property as she had hired a realtor and desired to rent or sell it.
20 (SOF 62)

21 AMIC hired an investigator who subsequently made contact with
22 Mr. Venegas. The investigator was able to obtain a copy of Mr. Venegas’ driver’s
23 license as well as an invoice stating “dumped all beds mattress, pillow, sheet, blankets,
24 towels, clothes, toys and some furniture...” Mr. Venegas supplied screen shots of
25 text messages from Ms. Schmidt. The screen shots are fragmentary but include
26 statements such as: “Hi Pablo I just want to make sure you did not get rid of the shoes
27 or clothes that were in the house.” (SOF 63)

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1 **E. AMIC Requests Documents And An Examination Under Oath**

2 By letter dated March 12, 2020, AMIC counsel requested that
3 Ms. Schmidt appear for an examination under oath on March 26, 2020 and provide
4 the following categories of documents for review by March 23, 2020:

- 5 1) A complete inventory of personal property damaged
- 6 in connection with the November 9, 2018 smoke loss
- 7 showing the quantity, description, actual cash value
- 8 and amount of loss along with invoices or receipts
- 9 showing the purchase price and date of purchase for
- 10 each item to justify the figures in the inventory;
- 11 2) A complete inventory of personal property damaged
- 12 in connection with the September 14, 2019 theft loss
- 13 showing the quantity, description, actual cash value
- 14 and amount of loss along with invoices or receipts
- 15 showing the purchase price and date of purchase for
- 16 each item to justify the figures in the inventory;
- 17 3) **All records of communications, whether physical**
- 18 **or electronic, between you and Pablo Venegas;**
- 19 4) All records of communications, whether physical or
- 20 electronic, between you and any law enforcement
- 21 officer or entity regarding the claim of theft of
- 22 personal property;
- 23 5) All documents, receipts, evidence of payment and
- 24 communications regarding all expenses incurred for
- 25 lodging of any type following the September 14,
- 26 2019 theft loss;
- 27 6) All documents, receipts, evidence of payment and
- 28 communications regarding all expenses incurred for
- meals or food of any type following the
- September 14, 2019 theft loss;
- 7) All documents, receipts, evidence of payment and
- communications regarding all expense incurred for
- other expenses of any type following the
- September 14, 2019 theft loss;
- 8) All documents showing proof of cash gratuity
- payments to any employee of any lodging or
- restaurant following the September 14, 2019 theft
- loss, including the proof of the source of such cash
- payments such as ATM receipts, bank withdrawals
- or otherwise;

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- 9) All documents evidencing the rental, attempt to rent, or rental receipts for the property at 29500 Heathercliff Road, Spc. 30 from November 9, 2018 to the present;
- 10) Any other documents you contend evidence your claims to AMIC.

Ms. Schmidt did not produce any documents in response to this request and she did not appear for the examination under oath. (SOF 64)

By letter dated March 24, 2020, due to the City of Los Angles "Safer at Home" order, AMIC counsel reset the document production for April 20, 2020 and reset the examination under oath for April 23, 2020. Ms. Schmidt did not produce any documents in response to the document request. (SOF 65)

On April 21, 2021, Ms. Schmidt's then counsel requested a continuance of the EUO due to the "lock down." By letter dated April 22, 2020, counsel for AMIC agreed to change the date of the EUO to May 27, 2020 and requested production of responsive documents by May 18, 2020. Once again, Plaintiff failed to produce any of the requested documents. (SOF 66)

On May 26, 2020, Ms. Schmidt's prior counsel again requested that AMIC continue the EUO in light of the continuing pandemic conditions. (SOF 67) By letter of May 26, 2020, AMIC continued the EUO date to June 23, 2020 and requested production of documents by June 15, 2020. Once again, Plaintiff failed to produce any of the requested documents. (SOF 68)

On June 22, 2020, AMIC counsel emailed Plaintiff and her prior counsel, stating:

Ms. Schmidt,

My prior letters have requested various categories of documents to be mailed or delivered to me in advance of your EUO.

As of now, I have not received any of the requested documents.

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Please make arrangements to have the documents requested in my prior letters mailed or delivered to me by July 14.

I will continue the date of the EUO to July 21, 2020 in my office at 10:00 AM. In that the Los Angeles Safer at Home order has been relaxed to permit certain activities to resume, you should prepare to proceed on that date. All proper social distancing protocols will be observed.

Please feel free to contact me if you have questions about this procedure.

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(SOF 69)

Once again, Plaintiff failed to produce any of the requested documents and she did not appear for, or make arrangements to appear for, her Examination Under Oath. Rather, she retained new counsel and filed the current complaint. (SOF 70)

III.
ARGUMENT

A. Summary Judgment Standard

A motion for summary judgment provides a procedure for terminating trial actions “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). Although summary judgment deprives a party of the right to a jury trial, the “summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every

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1 action.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 91 L. Ed. 2d 265, 106 S. Ct.
2 2548 (1986). A party seeking summary judgment bears the initial burden of
3 informing the court of the basis for its motion and of identifying those portions of the
4 pleadings and discovery responses that demonstrate the absence of a genuine issue of
5 material fact. *Celotex*, 477 U.S. at 323. Where the nonmoving party will have the
6 burden of proof at trial, the movant can prevail merely by pointing out that there is an
7 absence of evidence to support the nonmoving party’s case. *Id.*

8 In deciding whether to grant summary judgment, the District Court need
9 only consider evidence set forth in the moving or opposing papers and the parts of the
10 record specifically referred to therein. *Carmen v. San Francisco Unified Sch. Dist.*,
11 237 F.3d 1026, 1029 (9th Cir. 2001) (summary judgment proper though genuine issue
12 of fact raised in affidavit that was on file but not mentioned in opposing papers filed
13 with the court). The court must view the evidence presented in the light most
14 favorable to the opposing party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-55,
15 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). At the summary judgment stage, the judge’s
16 function is not to weigh the evidence and determine the truth of the matter, but rather
17 to determine whether there is a genuine issue for trial. *Id.* at 249. If the non-moving
18 party presents evidence that is “merely colorable” or is not “significantly probative,”
19 summary judgment may be granted. *Id.*

20
21 **B. The Insured’s Failure to Appear for an Examination Under Oath Is A**
22 **Material Breach of the Policy**

23 “The right to require the insured to submit to an examination under oath
24 concerning all proper subjects of inquiry is reasonable as a matter of law.” *Globe*
25 *Indemnity Co. v. Superior Court*, 6 Cal.App.4th 725, 731 (1992) Numerous cases
26 applying California law have confirmed that an insurer may contractually require, as
27 a condition of coverage, that an insured submit to an examination under oath (EUO)

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1 and answer questions as part of the insurer’s investigation of the insured’s claim. See,
2 e.g., *Robinson v. National Automobile & Casualty Co.*, 132 Cal.App.2d 709, 716
3 (1955); *West v. State Farm Fire & Casualty Co.* 868 F.2d 348, 351 (9th Cir.1989)

4 “An insured’s compliance with a policy requirement to submit to an
5 examination under oath is a prerequisite to the right to receive benefits under the
6 policy.” *Brizuela v. Calfarm Insurance. Co.*, 116 Cal.App.4th 578, 587 (2004), citing
7 *Hickman v. London Assurance Corp.* 184 Cal. 524, 534 (1920). “[A]n insured
8 materially breaches an insurance policy by failing to submit to an examination under
9 oath, as often as may reasonably be required, or failing to answer material questions.”
10 13 *Couch on Insurance* (3d ed. 1999) § 196:24, p. 196–32. A “refusal of the insured
11 to answer material questions at an examination under oath (provided for in the policy),
12 shows a failure to give to the insurer that degree of cooperation required by the
13 provisions of the policy ..., and is a violation of the agreement of the insured to submit
14 to such examination under oath.” *Robinson, supra.*,132 Cal.App.2d at 716.

15 In *Hickman*, the insured and his employee were criminally charged with
16 arson. *Hickman*, 184 Cal. at 526. While the charges were pending, the insured
17 appeared for an EUO, but refused to answer questions and produce documents on the
18 advice of counsel that his answers could be used against him at his criminal trial. *Id.*
19 at 527–528. The insured asserted his constitutional right against self-incrimination.
20 *Id.* at pp. 531–532. He offered to submit to an examination after the conclusion of the
21 criminal prosecution. *Id.* at p. 528. The California Supreme Court concluded the
22 insured’s refusal to submit to examination and to produce his books and papers on the
23 ground of his constitutional immunity was not justified, as the constitutional privilege
24 did not apply, and his production of documents and examination was a “condition
25 precedent” to his right to benefits under the policies. *Id.* at 532. The California
26 Supreme Court stated: “If the insured cannot bring himself within the terms and
27 conditions of the policy he cannot recover. The terms of the policy constitute the

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1 measure of the insurer’s liability. If it appears that the contract has been violated, and
2 thus terminated by the assured, he cannot recover. He seeks to recover by reason of a
3 contract, and he must show that he has complied with such contract on his part.” *Id.*
4 at 534.

5 In *West v. State Farm Fire & Casualty Co.* (9th Cir.1989) 868 F.2d 348,
6 an unknown person allegedly burglarized West’s home and took items worth
7 approximately \$10,000. West filed a police report and submitted a claim to State
8 Farm. State Farm’s claims representative conducted a preliminary interview of West.
9 During this interview, West stated that he would submit documentation to substantiate
10 the loss. He did not do so. State Farm requested that West submit to an examination
11 under oath. An attorney for State Farm interviewed West in the presence of a court
12 reporter. West was accompanied by his attorney. During the EUO, West refused to
13 answer any question that he had been asked during the interview by the State Farm
14 claims representative because he claimed the prior interview had been a statement
15 under oath. West based his claim that the interview was a statement under oath on a
16 question that Stone asked West at the end of the interview, namely, whether West had
17 answered Stone’s questions truthfully. After the EUO of West, State Farm sought to
18 interview Mrs. West who also was a named insured under the policy. In addition,
19 State Farm attempted to interview West’s two teenaged daughters. The three women
20 failed to appear for the scheduled interviews. State Farm sent West a letter stating that
21 State Farm would not pay the claim until West complied with the terms of the policy.
22 State Farm indicated that it would be willing to review the claim if further information
23 was provided. West did not provide any further information. Instead, he filed suit. The
24 District Court for the Eastern District granted State Farm’s motion for summary
25 judgment based on West’s failure to comply with policy conditions requiring him to
26 provide documentation and submit to an EUO. The summary judgment in favor of
27 State Farm was affirmed by the Ninth Circuit.

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1 In *Abdelhamid v. Fire Ins. Exch.*, 182 Cal.App.4th 990 (1992), an initial
2 investigation into a fire claim revealed certain suspicious circumstances that led FIE
3 to request that the plaintiff complete a proof of loss, produce documents, and submit
4 to an EUO. *Id.* at 993, 994–95. In response, the plaintiff produced limited records.
5 *Id.* at 995. At her EUO, the plaintiff repeatedly declined to answer questions relating
6 to her personal and business finances, answering only limited questions in relation to
7 her bankruptcy and no questions regarding receipt of government assistance. *Id.* at
8 996. FIE denied the plaintiff’s claim based on her refusal to cooperate, and the
9 plaintiff filed suit. *Id.* at 996, 998. The Court of Appeal affirmed the lower court’s
10 grant of summary judgment for FIE and held that “where an insurer has reason to
11 suspect arson, it is relevant and material to inquire into the financial condition of the
12 insured because an insurer is entitled to develop circumstantial evidence of the
13 insured’s involvement in the suspected arson.” *Id.* at 1001. The plaintiff’s refusal to
14 answer material questions constituted a material breach of the insurance contract. *Id.*
15 The trial court’s summary judgment in favor of FIE was affirmed on appeal: “Our
16 independent review establishes that summary adjudication of Abdelhamid’s breach
17 of contract action was properly granted. FIE showed Abdelhamid did not comply with
18 the conditions precedent for coverage and had materially breached her obligations
19 under the insurance contract. Abdelhamid failed to submit evidence showing there
20 was any triable issue of material fact regarding her compliance or breach.” *Id.* at
21 1007.

22 In *Brizuela v. CalFarm Ins. Co.*, 116 Cal.App.4th 578 (2004), Brizuela
23 submitted a claim to CalFarm after a fire occurred at his market one month after
24 Brizuela had closed escrow. Brizuela’s public adjuster faxed documents to CalFarm,
25 including alarm company information, checks and checking account statements, and
26 documents related to the purchase of the business. CalFarm’s counsel sent a letter to
27 Brizuela’s adjuster advising him that CalFarm had scheduled examinations under oath

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1 for Brizuela and Brizuela's wife. CalFarm's counsel asked that Brizuela produce
 2 certain documents by June 10, 1999 and confirm the examination date by June 11,
 3 1999. Brizuela's public adjuster responded by requesting copies of recorded
 4 statements that Brizuela and his wife had given to CalFarm shortly after reporting the
 5 claim. CalFarm's counsel denied this request. Neither Brizuela nor his adjuster
 6 confirmed the proposed examination date, and on June 14, 1999, CalFarm's counsel
 7 offered to reschedule the examination and extend the time to produce documents.
 8 Brizuela's adjuster responded by reiterating the request for copies of the recorded
 9 statements, and CalFarm's counsel again denied the request.

10 Letters and telephone calls regarding CalFarm's document request and
 11 EUO demand were exchanged between counsel. On October 5, 1999, Brizuela's
 12 counsel wrote a letter to CalFarm's counsel, criticizing CalFarm's conduct but
 13 offering no dates for the long-delayed examination. Instead, Brizuela's counsel
 14 suggested that CalFarm's counsel "contact my office regarding proposed
 15 Examination Under Oath dates." On November 15, 1999, Brizuela's counsel wrote
 16 CalFarm's counsel requesting proposed dates "immediately." On November 24,
 17 1999, CalFarm's counsel responded by noting that he had himself had "been involved
 18 in answering ready for trial and appearing for trial" and that he would continue to be
 19 so involved "into the new year" but then stated: "As a result, we have the following
 20 available dates for the completion of the examination under oath of Mr. Brizuela: The
 21 available dates include December 20, 21, 22, 23, 27 and 28." It was not until
 22 January 6, 2000 that Brizuela's counsel communicated his complaint that he received
 23 CalFarm's letter "after Thanksgiving" and determined that the proposed dates were
 24 "neither reasonable nor practical." The next day, Brizuela's counsel received a letter
 25 from CalFarm denying the claim.

26 Brizuela sued CalFarm for breach of contract and for tortious bad faith
 27 breach of insurance contract. CalFarm filed a motion for summary judgment, which

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1 the trial court granted. The summary judgment in favor of CalFarm was affirmed on
2 appeal. The Court of Appeal noted: “An insured’s compliance with a policy
3 requirement to submit to an examination under oath is a prerequisite to the right to
4 receive benefits under the policy.” *Id.* at 587. The court rejected Brizuela’s contention
5 that he had never “refused” to appear for EUO: **“After Brizuela failed to comply
6 with CalFarm’s initial demand for an examination under oath, it became
7 incumbent upon him to fulfill the requirement of being examined by offering to
8 submit to such an examination at a later time.”** *Id.* at 588. The court rejected
9 Brizuela’s argument that a complete forfeiture of policy benefits was too severe a
10 sanction for his failure to appear: **“In the absence of a reasonable excuse, when an
11 insured fails to comply with the insurance policy provisions requiring an
12 examination under oath and the production of documents, the breach generally
13 results in a forfeiture of coverage, thereby relieving the insurer of its liability to
14 pay, and provides the insurer an absolute defense to an action on the policy.”** *Id.*
15 at 590. The court rejected Brizuela’s argument that CalFarm was required to
16 demonstrate prejudice because of his failure to appear for EUO: “There is no
17 California authority . . . that requires an insurer to show prejudice before denying
18 policy benefits to an insured who has violated a policy provision requiring submission
19 to an examination under oath. The cases do provide that compliance with the policy
20 requirement for an examination under oath is a condition precedent to any claim, and
21 the refusal to submit to such an examination causes a forfeiture of any rights under
22 the policy.” *Id.* at 590.

23
24 **C. The Insured’s Failure to Produce Documents Related to the Claim and**
25 **Requested by the Insurer Is a Material Breach of the Policy**

26 As with the failure to appear for an EUO, California law is quite clear
27 that the insured’s failure or refusal to produce documents relevant to the claim and

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1 requested by the insurer is a material breach of policy conditions which excuses the
2 insurer’s obligation to pay under the policy.

3 In *Gilbert v. Infinity Ins. Co.*, 186 F.Supp.3d 1075 (C.D. Cal. 1075), the
4 insured submitted a claim to Infinity that allegedly arose from a single vehicle
5 accident in which the insured vehicle suffered water and mud damage. However, the
6 area where the accident allegedly occurred had been dry. Infinity could find no
7 evidence of any quicksand or sinkholes at the location where Gilbert’s truck was
8 allegedly damaged. Infinity requested one month of the insured’s cell phone records
9 to verify the insured’s whereabouts at the time of loss and whom he had called for
10 help. The insured provided partial, redacted cell phone records. Infinity denied the
11 claim and the insured filed suit. The Court granted Infinity’s motion for summary
12 judgment based on failure to cooperate: “Defendant required the cellphone records in
13 order to determine if there was coverage for the damage sustained to Plaintiff’s truck,
14 and Plaintiff’s failure to provide them constitutes failure to cooperate.” *Id.* at 1086.

15 See also *Martinez v. Infinity Ins. Co.*, 714 F.Supp.2d 1057, 1062
16 (C.D.Cal.2010) (granting summary judgment because “Infinity required at least the
17 car payment records, if not Martinez’s financial records, to substantiate her claim,
18 evaluate the bizarre inconsistencies in her testimony, and calculate the value of the
19 vehicle.”)

20
21 **IV.**

22 **PLAINTIFF’S FAILURE TO PRODUCE**
23 **DOCUMENTS AND APPEAR FOR EXAMINATION**
24 **UNDER OATH ACTS A BAR TO HER ACTION ON**
25 **THE POLICY**

26 As set forth in detail above, the insurer has a contractual right to request
27 that the insured produce documents in support of her claim and to demand appearance

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1 at an examination under oath. As stated by the court in *Brizuela*: “An insured’s
2 compliance with a policy requirement to submit to an examination under oath is a
3 prerequisite to the right to receive benefits under the policy.” 116 Cal.App.4th at 587.

4 In this case, in response to Ms. Schmidt’s increasing claim demands,
5 potential overlap between the personal property components of the smoke claim and
6 the theft claim, discrepancies in the date and details of the theft claim, information
7 indicating that Ms. Schmidt had placed the property on the rental market, and
8 information from Pablo Venegas that no theft had occurred at all, AMIC requested
9 that Ms. Schmidt produce relevant documents and appear for an examination under
10 oath. Ms. Schmidt repeatedly ignored the document requests, failed to appear for any
11 of the EUO dates and failed to make alternative arrangements to appear. Once the
12 formal EUO request and document demand was issued, AMIC counsel extended the
13 EUO date several times *at the direct request of Ms. Schmidt’s prior counsel!* Rather
14 than produce the requested documents or make arrangements for an EUO date or
15 methodology suitable for her, Ms. Schmidt simply blew off all of the requests and
16 filed suit.

17 In *Brizuela*, the court rejected the insured’s contention that he had never
18 “refused” to appear for EUO: “After *Brizuela* failed to comply with CalFarm’s initial
19 demand for an examination under oath, it became incumbent upon him to fulfill the
20 requirement of being examined by offering to submit to such an examination at a later
21 time.” 116 Cal.App.4th at 588. See also *Abdelhamid*, 182 Cal.App.4th at 1007 (“FIE
22 had no reason to set a second EUO without Abdelhamid’s cooperation in fully
23 submitting all material documentation necessary for its investigation.”)

24 AMIC had multiple grounds to request additional documents and an
25 examination under oath from Ms. Schmidt. In addition to the suspicions raised by
26 Mr. Venegas’s contention that he stole nothing and that Ms. Schmidt hired him to
27 dispose of her property, there were issues of overlap between the personal property

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1 claims, undocumented cash gratuity payments, and other such issues that required
2 additional investigation. Under California law, Ms. Schmidt was obligated to comply
3 with these requests. Ms. Schmidt, however, completely failed to respond and failed
4 to offer even an explanation as to why she would not or could not respond. She simply
5 filed this suit. That is not permitted under the contract or by California law. The failure
6 to comply with reasonable document requests and failure to appear for EUO is a basis
7 to dismiss this action in its entirety. *Brizuela*, 116 Cal.App.4th 578 (“Brizuela’s
8 persistent failure to provide CalFarm with available dates for the examination under
9 oath evidences a pattern of noncooperation...The trial court properly dismissed
10 Brizuela’s action.”)

11
12 V.

13 CONCLUSION

14 Based upon the evidence submitted herein and the legal authorities cited,
15 defendant American Modern Home Insurance Company respectfully requests that the
16 Court grant its motion for summary judgment on the complaint of Plaintiff Andrea
17 Schmidt.

18
19 Date: November 12, 2021

DANIELS, FINE, ISRAEL,
SCHONBUCH & LEBOVITS, LLP

/s/Mark R. Israel

21 By: _____

22 Mark R. Israel
23 Attorneys For Defendant
24 AMERICAN MODERN HOME
25 INSURANCE COMPANY