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26 Company

27 UNITED STATES DISTRICT COURT

28 DISTRICT OF ARIZONA

29 El Pacifico Mesa, LLC,

30 Case No.: CV-22-01241-PHX-GMS

31 Plaintiff,

32  
**DEFENDANT HARTFORD  
UNDERWRITERS INSURANCE  
COMPANY'S MOTION FOR  
SUMMARY JUDGMENT, OR IN THE  
ALTERNATIVE PARTIAL  
SUMMARY JUDGMENT ON  
PLAINTIFF'S SECOND COUNT FOR  
BAD FAITH, AND/OR PUNITIVE  
DAMAGES ORAL ARGUMENT  
REQUESTED**

33 vs.  
34 Hartford Underwriters Insurance Company,

35 Defendant.

1     **I. INTRODUCTION**

2         This is a commercial property insurance coverage dispute. The issue is whether  
3 the insured policyholder's express refusal to comply with its duties after loss bars its  
4 claim. Under Arizona law, the answer is "yes," thus warranting summary judgment for  
5 its insurer. Alternatively, given the insured's refusal to comply with the policy  
6 conditions, and the questionable facts and circumstances surrounding the loss, the  
7 insurer is entitled to partial summary judgment on the insured's claims for bad faith  
8 and/or punitive damages.

9         Plaintiff El Pacifico Mesa, LLC (El Pacifico or Insured) brought this action for  
10 breach of insurance contract and bad faith against Hartford Underwriting Insurance  
11 Company (Hartford) arising out of a claim for alleged theft and vandalism at the  
12 Insured's restaurant/bar/nightclub located at 1130 W Grove Avenue, Mesa, Arizona (the  
13 Premises) on or about January 26, 2022. Hartford had issued a policy to El Pacifico  
14 effective December 14, 2021 to December 14, 2022 (the Policy). Separate Statement of  
15 Facts in Support of Hartford's Motion for Summary Judgment, or in the alternative,  
16 Motion for Partial Summary Judgment (SS), Fact 1. Hartford initially made a \$5,000  
17 advance payment for the Insured's claimed losses. However, it ultimately denied the  
18 claim because El Pacifico refused to comply with the Policy's conditions which required  
19 it to provide documentation and information in support of its loss and appear at an  
20 Examination Under Oath (E.U.O.).

21         During the claim process, Hartford noted multiple suspicious circumstances and  
22 commenced an investigation of the loss while simultaneously attempting to verify El  
23 Pacifico's claimed business personal property and business income losses at the  
24 Premises. These questionable circumstances included:

- 25             • The Policy had been purchased less than six weeks before the loss despite the fact  
26 that El Pacifico had been in business for over eight months at that time.  
27             • There was no forced entry into the Premises.  
28             • The lists of claimed property supplied by El Pacifico varied substantially from

1 those provided to the Mesa Police.

2     • El Pacifico was unable to provide supporting documentation for many of the  
3 items claimed by it.

4     • El Pacifico made no effort to clean up or repair the Premises.  
5     • El Pacifico was in arrears on its rent at the time of the loss.  
6     • El Pacifico paid its employees in cash.  
7     • El Pacifico made inconsistent statements regarding the security system at the  
8 premises.

9     • El Pacifico made inconsistent statements regarding the reasons for a complete  
10 turnover of the staff the month before the loss.

11     • El Pacifico submitted bank statements for a *different* business to support its  
12 payroll and property purchases.

13                 When Hartford refused to pay further amounts until its investigation was  
14 complete, including obtaining requested supporting documents in El Pacifico's  
15 possession for the Insured's claims, El Pacifico hired counsel. Ultimately, due to  
16 numerous inconsistent statements by the persons interviewed during Hartford's  
17 investigation, including the Insured's owner, various other family members involved in  
18 the insured business, and police department personnel, and the failure of the Insured to  
19 provide requested supporting documentation despite its insistence that it had done so,  
20 Hartford requested numerous times that an Insured representative appear for an  
21 Examination Under Oath to be taken by its counsel. El Pacifico refused, resulting in  
22 Hartford denying the Insured's unsubstantiated claim based on its failure to comply with  
23 Policy conditions precedent to coverage and suit against Hartford, which conditions  
24 include in pertinent part:

25                 **A. Property Loss Conditions**

26                 **1. Duties In The Event Of Loss Or Damage**

27                 a. You must see that the following are done in the event of loss of  
or damage to Covered Property:

28                 (1) Take all reasonable steps to protect the Covered Property from  
further damage. If feasible, set the damaged property aside in the  
best possible order for examination. Also, keep a record of your

1 expenses for emergency and temporary repairs, for consideration  
 2 in the settlement of the claim.

3 . . .

- 4 (3) As often as may be reasonably required, permit us to inspect the  
 5 property proving the loss or damage and examine your books and  
 6 records.  
 7 (4) Send us a signed, sworn statement of loss containing the  
 8 information we request to investigate the claims. You must do  
 9 this within 60 days after our request. We will supply you with  
 10 the necessary forms.  
 11 (5) Cooperate with us in the investigation or settlement of the claim.  
 12 (6) Resume part or all of your "operations" as quickly as possible.

- 13 b. We may examine any insured under oath, while not in the  
 14 presence of any other insured or "employee", at such times as  
 15 may be reasonably required about any matter relating to this  
 16 insurance or your claim, including an insured's books and  
 17 records. At our option and expense, any examination under oath  
 18 may be video or audio taped as well as being recorded by  
 19 stenographic record. If a written transcript is prepared of the  
 20 testimony, then at our request, your answers under oath must be  
 21 signed under penalty of perjury.

22 **2. Legal Action Against Us**

23 No one may bring a legal action against us under this  
 24 insurance unless:

- 25 a. There has been full compliance with all of the  
 26 terms of this insurance; . . .

27 Id.

28 El Pacifico's refusal to comply with the conditions in the Policy was a breach of  
 29 the Policy and a condition precedent to coverage, and thus there can be no breach of  
 30 contract or breach of the covenant of good faith and fair dealing (bad faith).  
 31 Accordingly, Hartford requests summary judgment in its favor on Plaintiff's complaint.  
 32 In the alternative, Hartford requests partial summary judgment on Plaintiff's second  
 33 count for insurance bad faith.

34 **II. FACTUAL BACKGROUND**

35 On or about January 27, 2022, Hartford received notice of a claimed theft and  
 36 vandalism loss that occurred on January 26. SS 2. The notice advised that "Someone  
 37 broke into building, damaged contents and stole contents from insured". Id. On January  
 38 28, 2022, by letter to its Insured, Hartford acknowledged receipt of the claim and  
 39 immediately began its investigation by speaking with insured representatives regarding

1 what was stolen and damaged. SS 3. In the meantime, Hartford issued a \$5,000 advance  
 2 payment for business income losses. SS 4.

3 Hartford retained construction consultants Young and Associates (Y&A) to carry  
 4 out a site inspection and to provide an estimate for repairs to the property. SS 5. Y&A  
 5 performed a site inspection on February 25, 2022 and issued its report on March 8,  
 6 estimating repair costs to the structure at \$31,680, plus a 20% contingency, and also  
 7 confirming no signs of forced entry to the property. Id.

8 Hartford also began an investigation of the facts and circumstances surrounding  
 9 the loss, during which questions regarding the validity of the loss started to mount due to  
 10 conflicting stories regarding the length of time the Insured had been operating,  
 11 inconsistent statements regarding the circumstances surrounding discovery of the loss,  
 12 information learned showing operation of similar businesses which had recently shut  
 13 down or which were operating during the same time period as the Insured, facts  
 14 indicating the Insured was in financial distress at the time of the loss, conflicting  
 15 accounts regarding forced entry, and differing explanations regarding the reasons for a  
 16 complete exodus of the staff shortly before the loss. SS 6, 8-12, 17-22, 25-29, 31-35.

17 Hartford's Special Investigation Unit (SIU) took several recorded statements of  
 18 the family members who discovered the loss when they went to drop off some trash bags  
 19 (owner Raul Castellanos and his wife Diane Slack) as well as of Castellanos' stepson  
 20 Alex Castillo (one of the managers) and Linda Slack, his aunt (a waitress).<sup>1</sup> SS 6. Linda  
 21 Slack was the only employee, other than the other family members mentioned above,  
 22 made available for an interview. SS 6, 32. Hartford learned that the owner of the insured  
 23 business is Raul Castellanos. SS 7. It was run by his stepson, Alex Castillo, and  
 24 Castillo's friend Shawn Hoover. Id. The insured business operated from April 2021  
 25 until the date of loss in January 2022. Id. Castillo stated of the employees are paid in

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26  
 27 <sup>1</sup> Raul Castellanos's statement was taken on April 26, 2022 through an interpreter. UMF  
 28 Castellanos' wife could be heard in the background, and at one point the interpreter  
 objected that she was providing him with answers and informed the SIU investigator of  
 this. Ex. 20, Castellanos RS, p. 2-3.

1 cash, SS 7, although his aunt Linda Slack stated that she was paid by cash and check. Id.  
 2 Castillo claimed that the business did not move from another location but was always at  
 3 this location. SS 8. This contradicted his mother Diane's statement that the business  
 4 was previously located in Chandler, Arizona. SS 9.

5 Castillo and Hoover owned and operated several similar nearby businesses  
 6 together, including El Nuevo Coyote in Chandler Arizona from June 2019 (Castillo  
 7 claimed they subsequently purchased it in October 2019) through March 2020. SS 10.  
 8 Hartford's investigation revealed that El Nuevo Coyote lost its liquor license and shut  
 9 down in March 2020. Id. That newly defunct business then suffered a fire in June 2020  
 10 for which it made claim to its insurance company. Ex. 35, Complaint in action entitled *El*  
 11 *Nuevo Coyote, LLC dba El Coyote Sports Bar v. Farmers Insurance Exchange, et al,*  
 12 Ariz. Sup. Court case no. CV2021-015977; Ex. 34, Castillo depo excerpts, 10:18-24,  
 13 26:12-17. There was an insurance dispute arising from that loss as well, and suit was  
 14 filed against the insurer and the insurance agent primarily alleging that the agent had  
 15 failed to obtain adequate insurance and the insured was grossly underinsured in the  
 16 amount of \$25,000 for its claimed losses in excess of \$500,000 dollars. Id.

17 Castillo and Hoover also operated another nightclub type business called Club  
 18 Sante Fe from November 2021 to June 2022 in Avondale Arizona during an overlapping  
 19 time period that they were operating the insured business. SS 11. Castillo stated the  
 20 owner was Castellanos with an agreement that Castillo and Hoover would split the  
 21 profits 50/50. Id. The police detective investigating the subject theft informed Hartford's  
 22 SIU investigator that Club Sante Fe was owned by the Insured (El Pacifico Mesa LLC).  
 23 Id.

24 Castillo now owns and operates another restaurant/bar/live music venue called El  
 25 Pacifico Mexican Food, located at 1911 Broadway Road in Mesa, Arizona. **SS 12.** This  
 26 business is three miles from the insured location. Id. Castillo testified he started El  
 27 Pacifico Mexican Food from scratch (it was not an existing location) at a vacant location  
 28 in November 2022 and started working there in January 2023. Id. At least one of the

1 insured's former employees now works for this new business. Id.

2 Hartford had significant questions concerning the circumstances surrounding the  
3 loss, which was one reason it ultimately elected to take an EUO of the Insured's  
4 representative Alex Castillo to be followed by additional EUO's if necessary. Castillo  
5 testified at deposition that he left the business at 12:30 a.m. on a Monday and locked all  
6 doors and checked them. SS 13. He testified that he was in Las Vegas when the loss was  
7 discovered on Wednesday afternoon and that his business partner Shawn Hoover was  
8 with him at that time. Id. However, Castillo also inconsistently testified Hoover  
9 returned to Arizona by Wednesday and was at the loss location the same day it was  
10 discovered, but Castillo did not know what day Hoover flew back to Arizona from Las  
11 Vegas. SS 14. Castillo also provided contrary testimony regarding his whereabouts  
12 around the time of the loss. He testified he came back to the restaurant in Mesa on  
13 Thursday in the afternoon because he had an afternoon flight, but later changed this to  
14 state that he returned from Las Vegas on Thursday but did not go to the restaurant,  
15 despite being told about the loss on Wednesday, until Sunday afternoon. SS 15 and 16.

16 During his recorded statement Castillo claimed that the front door was damaged  
17 but that the police fixed it. SS 17. He stated that he had set the alarm the Sunday night  
18 before the Wednesday loss date. Id. Castillo's claim that the front door was damaged  
19 contradicted the police department's and Hartford's construction consultant's findings  
20 that there was no evidence of forced entry, nor did the supposedly functioning alarm  
21 sound. SS 18.

22 Castillo further asserted that there had been a complete staff change about a  
23 month before the loss, and other than two people, all the staff were new. SS 19. The  
24 staff had stopped showing up for work and had gone to work for a competitor about  
25 three and a half miles away, the approximate same distance as his current  
26 restaurant/nightclub. Id. He stated that "everyone left on good terms." Id. This  
27 contradicted his stepdad Castellanos's statement that all the employees were fired in  
28 December for a variety of "different reasons" including "for robbery and for fights." SS

20.

Further inconsistencies and representations didn't add up. Castellanos stated in his recorded statement that the safe containing cash was stolen. SS 21. This contradicted the police investigation showing an undamaged safe was located at the business after the loss. SS 22. Castillo testified he had the security cameras connected to the internet and that he had an App on his phone where he could see what was happening. SS 23. However, he later inconsistently testified that the security cameras recorded to a DVR which he claimed was stolen. SS 24. Raul Castellanos also stated that even though the theft had occurred several months prior, no effort had been made to clean up the premises, but he didn't know what they were waiting for. SS 25.

Hartford’s investigation revealed that while El Pacifico had been in business since April of 2021, it had no insurance prior to taking out the Hartford policy, which it obtained in December 2021, a mere six weeks before the loss, and over eight months after the business began operating. SS 26. The insured contact on the application was listed as Shawn Hoover.<sup>2</sup> SS 27. While the application expressly cautioned that restaurants with less than one year in business under the same ownership were not eligible for coverage, the insured misrepresented that the business was established in 2017, rather than the accurate date of April 2021. Id. Alternatively, if the business start date of 2017 on the application was accurate, then Castillo’s representations in his recorded statement and deposition that the business was new in April 2021 were false.

A police report obtained and reviewed by Hartford noted the police detective from the Mesa Police Department had obtained video from a nearby police department showing a U-Haul truck continuously parked outside the insured's business from 8:33 p.m. on January 24, 2022, until 7:46 a.m. on January 26, 2022, creating questions regarding why thieves would so cavalierly remain at the loss location overtly removing property for almost two days.<sup>3</sup> SS 28. The police report further noted that a former or

<sup>2</sup> Mr. Hoover has disappeared. Mr. Castillo claims to not know his location. Castillo depo, 21:11-19.

<sup>3</sup> The Police Report is not offered as evidence of the truth of the matters stated in it, but

1 current employee of the business, Michael Higgins, had pawned and attempted to pawn  
2 several items matching the description of items claimed as stolen from El Pacifico. Id.  
3 The police report stated that Castillo acknowledged that Shawn Hoover would know  
4 Higgins because they had all worked together when they previously ran hotels. Id. The  
5 police report further noted that an older model SUV that arrived at the business on  
6 January 26 may have been a 2008 Cadillac Escalade (AZ plate MAGMKE) registered to  
7 Michael Higgins. Id. Shawn Hoover used this same vehicle to rent a U-Haul trailer in  
8 December 2021 per a U-Haul representative. Id. A Comprehensive Report run by  
9 Hartford's SIU showed one of Shawn Hoover's addresses from April 2021 to February  
10 2022 was 1255 N. Arizona Ave, Unit 1080 in Chandler, Arizona, with a former address  
11 at 819 Erie Street in Chandler.. SS 29. The report also showed a "Possible Associate" to  
12 be Michael Higgins based on a match of these addresses (the report showed Higgins  
13 lived at 1255 N. Arizona Ave, Unit 1080 in Chandler from May 2021 to February 2022  
14 with a former address at 819 Erie Street in Chandler). Id. Finally, the police report noted  
15 that Shawn Hoover had stated to police that he believed the theft and vandalism were  
16 retaliation by the Mongols (motorcycle gang) for being banned from the establishment  
17 and that "later research showed Shawn to be a documented associate of the Mongols  
18 from previous incidents with the Mesa Police Gang Unit." SS 28. Therefore, substantial  
19 questions existed regarding the circumstances surrounding the loss, and given the above  
20 and Castillo's inconsistent statements regarding Hoover's whereabouts on the day the  
21 loss was discovered, Hartford certainly wanted to question both of them under oath  
22 regarding their whereabouts during the time period surrounding the loss date, and their  
23 association with Higgins.

24 Documents submitted during the claim in response to Hartford's requests  
25 presented more questions and did nothing to substantiate the loss. SS 31. Hartford  
26 repeatedly asked El Pacifico for documents to support business income losses, and for  
27 detail regarding the stolen and damaged property, including documents to support  
28 claimed payroll and lost sales, supporting documentation showing purchase and

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as evidence that Hartford possessed information giving it ample good cause to  
investigate, demand documents, and demand an Examination Under Oath.

1 ownership of business personal property, contact information for the employees,  
2 documents supporting claims for any tenant improvements, documents showing repairs,  
3 as well as for a completed proof of loss form with the claim amount as required by the  
4 Policy. SS 30. In support of employee payroll, El Pacifico submitted a list of 12  
5 employees with no contact information listing claimed weekly cash amounts paid. SS 32.  
6 When Hartford asked for these employees' contact information, El Pacifico refused,  
7 claiming the employees did not want to be contacted. SS 31. El Pacifico submitted Excel  
8 spreadsheets with purported sales information, but provided no actual transaction reports  
9 or supporting documents reflecting sales. Id. The same was true as to the payroll report.  
10 While El Pacifico submitted Excel spreadsheets, it failed to provide actual payroll  
11 reports, or bank statements to support the amounts on the spreadsheets. Id. The list of  
12 property provided to Hartford was significantly greater in magnitude than the list the El  
13 Pacifico had provided to the police. SS 33. The property lists submitted had  
14 approximately 175 separate items but contained no information showing ownership or  
15 purchase. SS 31. Ultimately some invoices were provided for a small fraction of those  
16 items which showed purchases on no less than six different credit cards from six months  
17 before the business began operating until eleven months after the loss, some of which  
18 included payments by unknown parties, and which showed shipping to various locations  
19 and unknown individuals. Id. Castillo testified that most of the kitchen equipment was  
20 purchased from a restaurant that was closing and that "Shawn was responsible" for  
21 getting everything. SS 34. No supporting documents were supplied. Id. Further,  
22 Hartford requested monthly bank statements for the business from its inception through  
23 the period of loss, but only two bank statements dated March 31, 2021 and April 30,  
24 2021 were submitted for supposed support for these purchases and payment of wages  
25 and those statements were for El Nuevo Coyote in Chandler AZ, not for the insured  
26 business. SS 30-31.

27       Further, while El Pacifico submitted a Profit and Loss Statement prepared by  
28 Shawn Hoover showing rent paid of \$41,283 for the period of April 1, 2021-January

1 1,2022, upon further investigation Hartford learned that El Pacifico was in arrears on  
 2 their rent—so much so that it was ultimately evicted—although it claimed the eviction  
 3 was due to Hartford’s refusal to pay the claim. According to records provided by the  
 4 landlord directly to Hartford, as of December 31, 2021, El Pacifico had paid less than  
 5 \$29,000 to the landlord compared to the \$41,283 listed on the P&L presented to Hartford  
 6 - and was substantially in arrears on its rent. SS 31, 35.

7       Despite El Pacifico’s utter failure to substantiate its claims, on May 9, 2022 El  
 8 Pacifico’s counsel sent a letter demanding payment on an interim basis in the amount of  
 9 \$421,171.83, \$166,805.16 of which was for loss of business income through April 27,  
 10 2022. SS 36. In addition, El Pacifico’s counsel claimed business income losses of  
 11 \$55,601.72 a month thereafter. Id. The letter stated the “calculations were based on El  
 12 Pacifico’s performance during 2021.” .Id.<sup>4</sup> Hartford’s internal accountant had  
 13 determined that there was no Business Income loss coverage owed because saved  
 14 expenses were greater than lost sales. SS 37. Having still not received the source  
 15 documents for the various spreadsheets the insured had provided, Hartford retained  
 16 counsel to advise it, and on May 27, 2022, Hartford exercised its right to obtain an  
 17 Examination Under Oath (EUA) from the insured’s representatives. SS 38, 39.  
 18 Hartford’s counsel followed up on June 3, 2022 with an email informing the insured’s  
 19 counsel that he would be sending a letter summarizing what was still needed and asking  
 20 for an EUA of Alex Castillo. Id. On July 8, 2022 Hartford’s counsel sent El Pacifico’s  
 21 counsel a letter summarizing the outstanding information needed, and again requesting  
 22 the EUA of Alex Castillo on any day during the week of July 18, 2022. Id. El Pacifico  
 23 refused to provide any further documentation or information, or to provide an EUA. SS  
 24 40.

25       This lawsuit was filed on June 10, 2022, without El Pacifico having agreed to  
 26 fulfill its obligation to provide EUAs. SS 41.  
 27

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28 <sup>4</sup> Castillo testified that his attorneys were authorized to act for him and that the positions  
 they took were his positions. Ex. 34, Castillo depo excerpts, 162:8-13.

1       On August 31, 2022, counsel for Hartford wrote again on Hartford’s behalf to El  
 2 Pacifico’s attorneys, confirming the items that were required to conclude its  
 3 investigation, setting out again the Policy Conditions concerning “Duties In The Event  
 4 Of Loss Or Damage,” and denying the claim based on the insured’s failure to comply  
 5 with those Policy Conditions. SS 42.

6 **III.    LEGAL STANDARD**

7       Summary judgment is appropriate if the evidence, viewed in the light most  
 8 favorable to the nonmoving party, demonstrates “that there is no genuine dispute as to  
 9 any material fact and the movant is entitled to judgment as a matter of law.”  
 10 Fed.R.Civ.P. 56(a). A genuine issue of material fact exists if “the evidence is such that a  
 11 reasonable jury could return a verdict for the nonmoving party,” and material facts are  
 12 those “that might affect the outcome of the suit under the governing law.” *Anderson v.*  
 13 *Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986). At the summary judgment state, “[t]he  
 14 evidence of the non-movant is to be believed, and all justifiable inferences are to be  
 15 drawn in [its] favor.” *Id.* at 255, 106 S.Ct. 2505; see also *Jesinger v. Nev. Fed. Credit*  
 16 *Union*, 24 F.3d 1127, 1131 (9th Cir. 1994) (“The court must not weigh the evidence or  
 17 determine the truth of the matters asserted but only determine whether there is a genuine  
 18 issue for trial.”).

19       “[A] party seeking summary judgment always bears the initial responsibility of  
 20 informing the district court of the basis for its motion, and identifying those portions of  
 21 the [the record] which it believes demonstrate the absence of a genuine issue of material  
 22 fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A party opposing summary  
 23 judgment must “cit[e] to particular parts of materials in the record” establishing a  
 24 genuine dispute or “show[ ] that the materials cited do not establish the absence of ... a  
 25 genuine dispute.” Fed. R. Civ. P. 56(c)(1).

26 **IV.    DISCUSSION**

27       **1.      Summary Judgment re Breach of Contract and Bad Faith**

28       Arizona case law supports enforcement of the Policy’s Conditions and No Suit

1 against Us provisions. In *Warrilow v. Superior Court of State of Ariz. In and For Pima*  
 2 *County*, 142 Ariz. 250 (1984), the seminal case on this issue, the insured filed a claim for  
 3 loss of firearms which was adjusted and paid. Shortly thereafter, the insured modified its  
 4 firearms coverages and again claimed a theft loss to firearms. The insurer acknowledged  
 5 receipt of the insured's proof of loss but rejected it as insufficient for several reasons  
 6 including because there was no documentation verifying the ownership or values of the  
 7 items, and requested an EUO pursuant to the conditions in the insurance policy issued to  
 8 the insured. Id. at 251-252. The EUO was taken, but the insured refused to answer a  
 9 number of questions. Id. at 252. Counsel for the insurer advised the insured and his  
 10 counsel that refusal to answer might be deemed a failure to cooperate which might cause  
 11 the insurer to void its coverage. Id. Nothing further transpired on the claim until the  
 12 insured filed suit. The insurer filed a motion for summary judgment on the grounds that  
 13 the insured's failure to answer questions at his EUO was a breach of his obligation to  
 14 cooperate with the insurer which constituted a complete defense to his claim for  
 15 coverage. The motion was denied, and the insurer appealed.

16       The appellate court held that an EUO condition is a standard provision in an  
 17 insurance policy and that the law was "well settled" that a failure or refusal to comply  
 18 will constitute a bar to any recovery against the insurer. Id. at 253. The "only  
 19 limitation" the court noted, was that the "questions be material to the circumstances  
 20 surrounding the insurer's liability and the extent thereof." Id. The court found that the  
 21 information sought about the alleged theft of firearms, namely the number of guns the  
 22 insured owned, whether or not he sold any guns he had purchased, and the source of his  
 23 income, was clearly material to coverage under the policy in light of the express  
 24 exclusion for coverage of property pertaining to the business of a gun dealer and the  
 25 policy's requirement that the insured provide satisfactory proof of interest in the property  
 26 and its loss. Id. The court referenced other case authority holding that a complete failure  
 27 to appear for an EUO also bars recovery on a claim. Id. at 255.

28       Although *Warrilow* did not require the insurer to make a showing of substantial

1 prejudice, some subsequent cases refer to this requirement, citing to case law addressing  
 2 breaches of cooperation clauses in liability policies, which is not the case here.  
 3 However, even assuming Hartford must make a showing of substantial prejudice, it has  
 4 easily done so, as El Pacifico completely refused to appear for an EUO. Shawn Hoover  
 5 is now nowhere to be found according to Plaintiff, whose representative Alex Castillo  
 6 claims to have last communicated with Hoover in June 2022 (despite the fact that  
 7 Hoover is his “best friend”) and whose counsel could not produce Hoover for deposition  
 8 in this matter despite identifying him as a witness in Plaintiff’s Initial Disclosures. SS  
 9 43. Both Castillo’s and Hoover’s whereabouts and communications around the time of  
 10 the loss, association with theft suspect Higgins, involvement with other substantially  
 11 similar businesses, knowledge of financial transactions including the lack of funds in the  
 12 businesses’ bank account and nonpayment of rent, were critical questions Hartford  
 13 should have had the chance to address in its investigation in order to verify whether this  
 14 loss is legitimate and/or the nature and amount of the Insured’s claimed losses. As such,  
 15 the Insured’s refusal to appear for an EUO is sufficient basis for granting summary  
 16 judgment in Hartford’s favor.

17 Courts have also held the refusal to provide pertinent information or  
 18 documentation is a breach of the insured’s duty to cooperate and precludes coverage. In  
 19 *Boesel v. State Farm Fire and Cas. Ins. Co.* 565 Fed.Appx. 611 (9th Cir. [Ariz.] 2014),  
 20 the court held the insured breached its duty to cooperate by failing to provide the identity  
 21 and contact information for individuals who possessed information which could verify or  
 22 disprove the value of the insured’s claim. *Id.* at 612-613. This lack of cooperation  
 23 justified the insurer’s denial of coverage and the district court’s grant of summary  
 24 judgment to the insurer on the insured’s breach of contract and bad faith claims. *Id.* at  
 25 613.

26 Likewise, here El Pacifico’s refusal to provide material information to Hartford  
 27 including contact information for its employees, and pertinent source documents for its  
 28 claims such as bank statements, also violated the policy condition requiring cooperation,

1 and impeded Hartford's ability to approximate any business income or expense losses  
 2 (based on, e.g., pre-loss wage expenses, other liabilities, and revenues), evaluate  
 3 causation (i.e., forced entry), and confirm property losses (e.g., payments to vendors or  
 4 suppliers from the bank account). Therefore, like the failure to cooperate justified denial  
 5 of coverage and barred breach of contract and bad faith claims in *Boesel* (*id.* at 612–  
 6 613), El Pacifico's refusal here to satisfy this condition precedent to coverage bars  
 7 coverage under the Policy and Plaintiff's claims for breach of contract and bad faith.

8       Further, given the undisputed circumstances and lack of documentation to show  
 9 ownership of much of the claimed lost and damaged equipment, refusal to provide  
 10 employee contact information other than for employees who were also family members,  
 11 refusal to supply complete bank account information for the relevant time period  
 12 (particularly in light of the Plaintiff's accountant expert's analysis of bank statements for  
 13 the relevant time period which apparently show substantial financial problems at the  
 14 insured business preceding the loss as discussed further below), and the other  
 15 misrepresentations and inconsistencies referenced above, Hartford was entitled to these  
 16 sworn statements to confirm both the legitimacy of the loss, and well as the amounts  
 17 claimed.

18       This latter point is undisputedly underscored by Plaintiff's own damages expert,  
 19 whose conclusions support that Hartford's questions regarding the amount and  
 20 legitimacy of Plaintiff's claims were reasonable and warranted. Plaintiff's expert  
 21 determined that there were *no* lost profits associated with historical operations. SS 45. In  
 22 order to cobble together some kind of financial damage figure, Plaintiff's expert  
 23 calculated "loss of owner compensation" for Alex Castillo and Shawn Hoover.  
 24 However, Castillo and Hoover are undisputedly not owners of the insured business; the  
 25 insured is a corporation, and neither Castillo nor Hoover are plaintiffs. Plaintiff's expert  
 26 also references estimated losses for "expected growth" but provides no calculations.  
 27 Indeed, such claimed damages would be highly speculative given that Plaintiff's expert  
 28 acknowledged the business incurred a loss of \$67,061 in its first ten months of operation.

1 Id. Plaintiff's expert's financial calculation for early termination costs for the lease  
 2 ignores that the insured was in arrears at the time of the loss and further avoids  
 3 explanation of the fact that his spreadsheets (Exhibit 2.1) show severely declining  
 4 revenue from September 2021 to November 2021, negative bank balances in November  
 5 and December 2021 with a zero balance in January 2022, and zero revenue in December  
 6 2021 and January 2022—the month before the alleged theft. Id. The Plaintiff's own  
 7 expert's dismal view of the insured's financial health at the time of the loss, and his  
 8 conclusion that the insured suffered no related business income losses, certainly supports  
 9 Hartford's skepticism regarding Plaintiff's claims, and in fact shows that Hartford would  
 10 have grossly overpaid this claim had it accepted the insured's unsubstantiated claims of  
 11 loss.

12       **2. In the Alternative, Partial Summary Judgment is Warranted re**  
 13       **Plaintiff's Second Count for Bad Faith**

14       An insured alleging breach of the duty of good faith must show both that: a) the  
 15 insurer acted unreasonably in investigating, evaluating, or processing the claim, and b)  
 16 either knew or was conscious of the fact that it acted unreasonably. *Boesel v. State*  
 17 *Farm*, 565 Fed.Appx. at 613; see, also, *Regal Homes, Inc. v. CNA Ins.*, 217 Ariz. 159,  
 18 170 171 (App. 2007). So long as there is a legitimate question of coverage, even an  
 19 invalid denial of a claim, without more, does not give rise to a bad faith claim. *Desert*  
 20 *Mountain Props. Ltd. P'ship v. Liberty Mut. Fire Ins. Co.* 225 Ariz. 194, 215-216 (App.  
 21 2010). Thus, the insurer may challenge claims that are "fairly debatable" without acting  
 22 in bad faith. *Regal Homes, Inc. v. CNA Ins.*, 217 Ariz. at 170.

23       At the time El Pacifico refused to provide EUO's, material questions remained  
 24 regarding the financial state of the business, whether the theft had been orchestrated to  
 25 obtain money for a failing business, and possibly fund or provide equipment or supplies  
 26 to Castillo's new business. Even assuming the legitimacy of the losses, there were  
 27 significant questions regarding the value of El Pacifico's claims. To this day little if any  
 28 source documentation for any of El Pacifico's claimed losses has been produced, and

1 Plaintiff's expert report refers to review of undisclosed financial documents showing the  
 2 dire financial straits the Insured was in right before the alleged theft. Under these  
 3 circumstances, El Pacifico's failure to cooperate with Hartford by providing requested  
 4 contact information for employees, bank statements, and other documents and  
 5 information referred to above, as well as to provide the requested EUO's, was a breach  
 6 of the insured's duties under the Policy, a condition precedent to coverage. Under the  
 7 above referenced case authority such breach relieves Hartford of any obligations under  
 8 the Policy and Plaintiff's claims for breach of contract and bad faith must fail.

9       **3. Alternatively, Partial Summary Judgment re Punitive Damages**  
 10      Should Be Granted

11       At a minimum, summary judgment is appropriate on the punitive damages claim.  
 12 To prevail, El Pacifico must "show 'something more' than the conduct necessary to  
 13 establish the tort" of bad faith. *Thompson v. Better-Bilt Aluminum Prods. Co.*, 832 P.2d  
 14 203, 209 (Ariz. 1992), quoting *Rawlings v. Apodaca*, 726 P.2d 565, 577 (1986); *see,*  
 15 *Symbiont Nutrition LLC v. W. Agric. Ins. Co.*, No. CV-21-00426-PHX-JJT, 2023 WL  
 16 3205529, at \*7 (D. Ariz. May 2, 2023) ("Defendant's alleged unreasonable acts, which  
 17 were sufficient to support Plaintiff's bad faith claim, are not by themselves sufficient to  
 18 support a punitive damages claim."). Punitive damages are recoverable "when, *and only*  
 19 *when*, the facts establish that defendant's conduct was aggravated, outrageous, malicious,  
 20 or fraudulent." *Id.*; *see, Symbiont*, 2023 WL 3205529, at \*6. (*italics in original*). Indeed,  
 21 "action justifying the award of punitive damages is conduct involving some element of  
 22 outrage similar to that usually found in crime." *Id.* "Indifference to facts or failure to  
 23 investigate are sufficient to establish the tort of bad faith but may not rise to the level  
 24 required by the punitive damage rule." *Id.*

25       The plaintiff must prove the defendant's "evil mind" by clear and convincing  
 26 evidence. *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 681 (Ariz. 1986);  
 27 *Sobieski v. Am. Standard Ins. Co. of Wisconsin*, 240 Ariz. 531, 536 (App. 2016);  
 28 *Symbiont*, 2023 WL 3205529, at \*6. Although evidence must be construed in the non-

1 moving party's favor, the plaintiff still must meet this "clear and convincing evidence"  
 2 standard to resist summary judgment. *Thompson*, 832 P.2d at 211.

3 Here, El Pacifico cannot identify clear and convincing evidence of an "evil" mind  
 4 or motives by Hartford in handing the claim. *See, Sobieski*, 240 Ariz. at 536 ("the  
 5 defendant's motives are determinative"). To the contrary, the record shows that Hartford  
 6 sought to comply with its policy obligations. Hartford promptly advanced \$5,000 to El  
 7 Pacifico before any portion of the claim was fully substantiated. Hartford then proceeded  
 8 to adjust the claim by seeking substantiation of El Pacifico's claimed losses, only  
 9 determining not to pay when objectively suspicious loss circumstances combined with El  
 10 Pacifico's apparent unwillingness to present substantiating documents or provide an  
 11 EUO. There is simply no clear and convincing evidence that Hartford was motivated by  
 12 an evil intent to harm El Pacifico, or consciously pursued an outrageous course of  
 13 conduct knowing harm was substantially certain to the level of criminal recklessness.  
 14 Thus, the punitive damages claim fails as a matter of law.

15 **V. CONCLUSION**

16 Plaintiff's claims for breach of contract and bad faith fail as a matter of law based  
 17 on Plaintiff's failure to comply with its Duties In The Event Of Loss Or Damage  
 18 condition in the Policy, a condition precedent to coverage. Accordingly, Hartford  
 19 respectfully requests that summary judgment be granted in its favor on Plaintiff's  
 20 complaint. Alternatively, due to the genuine dispute regarding the legitimacy and  
 21 amount of Plaintiff's claims, Hartford requests partial summary judgment on Plaintiff's  
 22 second count for bad faith and/or punitive damages.

23 DATED: June 2, 2023

BULLIVANT Houser Bailey PC

24

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By /s/ Andrew B. Downs  
 26 Andrew B. Downs

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Attorneys for Defendant Hartford Underwriters  
 Insurance Company

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