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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

NALINI KUMAR, an individual, and ALLEN
SINGH, an individual,

Plaintiffs,

v.

NATIONWIDE MUTUAL INSURANCE
COMPANY,

Defendant.

Case No. 3:22-cv-03852-TLT

**NATIONWIDE MUTUAL INSURANCE
COMPANY'S:**

**(1) NOTICE OF MOTION AND
MOTION FOR SUMMARY
JUDGMENT**

**(2) MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION**

Date: July 18, 2023
Time: 2:00 PM
Location: Courtroom 9, 19th Floor

Judge: Trina L. Thompson
Trial Date: March 4, 2024
Date Action Filed: June 29, 2022

NOTICE OF MOTION AND MOTION

TO THE COURT AND TO PLAINTIFFS AND THEIR COUNSEL:

Pursuant to Civil Local Rule 7-2, Defendant Nationwide Mutual Insurance Company gives notice that on July 18, 2023 at 2:00 PM, in the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA 94102, Courtroom 9, 19th Floor, the Honorable Trina L. Thompson presiding, Nationwide will and hereby does move for summary judgment on the claims by plaintiffs Nalini Kumar and Allen Singh (“Plaintiffs”).

Nationwide seeks summary judgment on Plaintiffs’ claims under Federal Rule of Civil Procedure 56 because there is no genuine dispute that Plaintiffs did not comply with the requirement to cooperate with Nationwide in the handling of their insurance claim through their failure to provide Nationwide information it requested, and through their counsel’s interference with the examination under oath process, which bars their claim for breach of the insurance contract. This bars all of their claims under the policy and California law alleged in the complaint.

Nationwide supports this motion by this notice, the following memorandum of points and authorities, the accompanying declarations of Lindsay Lathrum and Samuel D. Jubelirer and documents attached to those declarations, and such other and further argument and evidence that may be presented at the hearing of this motion.

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

This case presents a straightforward question: Can policyholders demand payment for damaged property from their insurer, while refusing to give the insurer evidence that they ever owned the property or how they acquired it? And, when the insurer exercises its rights to ask the policyholders questions about their loss, can the policyholders continue that refusal and otherwise interfere with the insurer's attempt to evaluate their claim, all the while demanding payment for their claimed loss? The insurance policy and law answer the question directly: No.

Yet, that is precisely what happened in this case. There is no dispute about the events here: Plaintiffs withheld from Nationwide the contact information of the single known witness to some of their most substantial claimed property losses, and their counsel repeatedly interfered with Nationwide's attempts to examine Mr. Singh during an examination under oath, suggesting how he should testify, and making clear that he would continue to do so to ensure his client's testimony remained "consistent" with other evidence. Plaintiffs assert they are not only entitled to payment for their claimed – but unsupported – losses, but also that Nationwide *unreasonably* denied their insurance claim, despite their refusal to cooperate and their counsel's active interference in Nationwide's investigation.

A hypothetical policyholder could not reasonably demand payment for an expensive painting they claimed to lose in a fire, all the while refusing to tell the insurer how to contact the only people who could corroborate their ownership, and having their lawyer interject himself into the claim investigation. Any layperson intuitively understands that insurance claims are not paid just because a policyholder asserts, with no objective evidence, they really did own an expensive piece of property that was destroyed. Rather, there must be *some reasonable support* for the claim, but more importantly for this lawsuit, the law and insurance policy require policyholders to cooperate with, not obstruct, their insurers' investigations. And if they do not cooperate, their coverage is forfeit. Here, Plaintiffs' and their counsel's actions forfeited Plaintiffs' potential right to coverage under their policy, and Nationwide reasonably denied their insurance claim. The Court should grant summary judgment.

II. FACTS

A. The Fire and Nationwide's Investigation.

Plaintiffs' property is located in Stockton, California. The property generally consists of a house and a large garage. A fire started on the property on July 4, 2020, damaged part of the house, and burned the garage down, destroying it and its contents. Nationwide insured the property under a homeowners' policy on the date of the fire.

Plaintiffs' Nationwide policy in effect at the time of the loss (the "Policy") stated in relevant part:

SECTION I – CONDITIONS

C. Duties After Loss

In case of a loss to covered property, we have no duty to provide coverage under this policy if you or an "insured" seeking coverage fails to comply with the following duties:

5. Cooperate with us in the investigation of a claim;
6. Prepare an inventory of damaged personal property showing the quantity, description, "actual cash value" and amount of loss. Attach all bills, receipts and related documents that justify the figures in the inventory;
7. As often as we reasonably require:
 - a. Show the damaged property;
 - b. Provide us with records and documents we request and permit us to make copies;
 - c. Make statements to us, including recorded interviews;
 - d. Submit to examination under oath by our representatives and sign same. Upon request, the exams will be conducted separately and not in the presence of any other persons except the legal representative of the person submitting to the examination under oath, our representatives and a court reporter[.]¹

The Policy also provided that Plaintiffs had no coverage if they "[c]oncealed or misrepresented any material fact or circumstance" or "[c]ommitted any fraud or made false statements relating to such loss."² Finally, the Policy stated that "[n]o action can be brought against [Nationwide] unless there has been full compliance with all of the terms under Section I

¹ Declaration of Lindsay Lathrum ("Lathrum Dec."), Ex. A, at NMIC-000030-31.

² *Id.* at NMIC-000045.

1 of this policy[.]”³

2 Plaintiffs were not home at the time of the fire, and submitted a claim to Nationwide on
3 July 5, 2020. Nationwide’s claims handling personnel then began their investigation of Plaintiffs’
4 claim. As part of that process, Plaintiffs provided Nationwide with a list of property they claimed
5 was damaged or destroyed, and their claims as to the property’s value. Plaintiffs told Nationwide
6 the replacement cost of all of this property was \$112,567.69.⁴ Included in that list was
7 approximately \$37,000 of Snap-On brand tools and other equipment, including, among other
8 things:

- 9 • A “60 in[ch] 8 drawer double wide stationary storage” chest worth \$10,255;
- 10 • A “55 in[ch] 10 drawer double bank roll cab” worth \$5,705;
- 11 • 500 sockets worth \$6,750;
- 12 • 120 wrenches worth \$4,920;
- 13 • 10 ratchets worth \$1,455; and
- 14 • 50 screwdrivers worth \$1,042.⁵

15 Nationwide referred Plaintiffs’ claim to its “Special Investigations Unit,” or “SIU” on July
16 24, 2020.⁶ The reason for the referral was “negative financials, [Mr. Singh] recently unemployed,
17 reports from neighbors that vehicles were moved out of the garage a few days prior to the fire, 2
18 separate areas of origin in 2 separate buildings, prior theft claim 1 year prior, members were not
19 home at the time of the fire[.]”⁷ Put another way, based on the evidence available to it at the time,
20 Nationwide was concerned that the insurance claim may have potentially been fraudulent in some
21 way, and referred the claim to its personnel specialized in determining whether fraud had
22 occurred. On October 22, 2020, the Nationwide adjuster assigned to the claim inspected the loss
23 property. He photographed the area where Plaintiffs told Nationwide the tool chests were located.

24
25 ³ *Id.* at NMIC-000033.

26 ⁴ Lathrum Dec., Ex. B, at NMIC-000725.

27 ⁵ *Id.* at NMIC-000725-726.

28 ⁶ Lathrum Dec., Ex. C, at NMIC-001675.

⁷ *Id.*

1 He found no sign that they were there, much less that they were damaged or destroyed.⁸

2 **B. Nationwide Attempts to Take EUOs of Plaintiffs, the Claim is Denied, the**
 3 **First Lawsuit Is Filed and Dismissed, and the Claim Is Reopened.**

4 As part of its investigation, Nationwide exercised its rights under the Policy and
 5 California law to take examinations under oath (“EUOs”) of Plaintiffs. The first EUOs were
 6 eventually scheduled in early 2021. After Nationwide retained counsel to advise it on a coverage
 7 position and to conduct the EUO, Plaintiffs retained the counsel who continued to represent them
 8 in litigation.⁹ Eventually, the first EUOs were set to begin on February 25, 2021. They never went
 9 forward because a dispute arose over Plaintiffs’ counsel’s insistence that Plaintiffs were entitled
 10 to video record Nationwide’s counsel and its adjuster as part of the EUO. Nationwide denied
 11 Plaintiffs’ claim on April 14, 2021 for non-cooperation by their refusal to proceed with the EUOs
 12 without recording Nationwide’s representatives.¹⁰

13 Plaintiffs, through their counsel, then sued Nationwide in Marin County Superior Court,
 14 Nationwide removed the case to this Court, and the case was assigned to Magistrate Judge
 15 Thomas S. Hixson.¹¹ Eventually, Nationwide moved to dismiss. At the December 2021 hearing,
 16 Magistrate Judge Hixson indicated his intent to grant the motion in part, holding that while the
 17 lawsuit could proceed, Nationwide was correct that the law did not give Plaintiffs the right to
 18 insist on video recording Nationwide’s representatives at the EUO.¹² Immediately after he
 19 announced his intent to rule in Nationwide’s favor on this issue, Plaintiffs dismissed their case
 20 without prejudice.¹³ Nationwide eventually agreed to reopen Plaintiffs’ claim based on an
 21 agreement with Plaintiffs’ counsel not to video record Nationwide’s representatives. Mr. Singh’s
 22

23 ⁸ Lathrum Dec., Ex. D, at NMIC-000561, 631-637, 640-645.

24 ⁹ Lathrum Dec., Ex. E, NMIC-001174.

25 ¹⁰ Lathrum Dec., Ex. F, at NMIC-000665-671.

26 ¹¹ Declaration of Samuel D. Jubelirer (“Jubelirer Dec.”), Ex. A.

27 ¹² Jubelirer Dec., Ex. B, at 22:5-10.

28 ¹³ Jubelirer Dec., Ex. C. Plaintiffs also filed an entirely *separate* case against Nationwide in Alameda County Superior Court, and obtained a ruling holding the opposite (that they were entitled to record Nationwide’s representatives at an EUO). Nationwide has appealed the ruling.

1 EUO proceeded first, on June 21, 2022.

2 **C. Plaintiff Singh and His Counsel Refuse to Provide Information.**

3 The first type of Plaintiffs' noncooperation was their refusal to provide Nationwide with
 4 contact information for a witness who could corroborate – or not – Plaintiffs' claimed losses. As
 5 part of the EUO, Nationwide sought information related to the high-value items Plaintiffs claimed
 6 to have lost in the fire in their garage. Nationwide's counsel questioned Mr. Singh about the
 7 Snap-On 55-inch, 10-drawer double bank roll cab. Mr. Singh stated it was in the garage at the
 8 time of the fire.¹⁴ He "believe[d] he got it from Craigslist" and did not remember the name of the
 9 person who sold it to him.¹⁵ It was heavy enough that it took "[f]our people to unload it" from the
 10 truck that brought it to his house.¹⁶ When asked who those three other people were, Mr. Singh
 11 only answered "[f]riends of mine." When asked for their names, he immediately responded,
 12 "Tom, Dick, and Harry."¹⁷ After his counsel clarified that he did not want, but recognized that he
 13 needed, to give Nationwide their names, he provided "Timoti Timoti," and when asked for his
 14 telephone number, the following exchange occurred:

15 Q. Okay. And what is this gentleman's telephone number?

16 MR. SCHAFFER: So, Mr. Pardini, I think the way we will handle
 17 it, because of this privacy issue, is if you'd like to give me the
 18 names of anyone, whether previously disclosed or disclosed today
 19 or by Ms. Kumar as related to the friends or family, I will act as
 20 intermediary and represent them and make an inquiry to them as to
 21 whether they want to provide information or be interviewed by
 22 Nationwide.

23 MR. PARDINI: Okay. So you want me to give you a list of people
 24 that you can contact and tell them that Nationwide wants to talk to
 25 them about a certain set of facts, and then get their permission for
 26 Nationwide to contact them?

27 MR. SCHAFFER: Not exactly. So the question you are asking is
 28 private and personal information for noninsureds. So Mr. Singh and
 Ms. Kumar would be very much within their rights to say, no, I'm
 not giving you that information. So as a starting point, that is, I
 believe, our position, that you are not entitled to ask insureds for

26 ¹⁴ Jubelirer Dec., Ex. D (6/21/22 EUO Tr.), at 156:8-23.

27 ¹⁵ *Id.* at 157:13-19.

28 ¹⁶ *Id.* at 158:15-159:15.

¹⁷ *Id.* at 159:16-21.

private personal information for third parties not insured.

Plaintiffs’ counsel was clear that “if they [the third parties] want to have a conversation with you, I will set it up and I will represent them.” Otherwise, he objected that Nationwide was not entitled to ask Plaintiffs for “lots of personal information about their friends and family” because it was “an invasion of their privacy” and “an intrusion, unnecessary intrusion.”¹⁸ Mr. Singh then gave the names “Ray Araozete” and “Mike,” full name “Michael Moore” as the other two people involved in the pickup and delivery of the tool chest.¹⁹ He paid for it in cash and did not get a receipt.²⁰

Nationwide’s counsel also asked Mr. Singh about the other Snap-On tool chest in Plaintiffs’ list of damaged property. Mr. Singh testified that his friend Mr. Timoti was with him when he bought it and that he bought it from Craigslist.²¹

Nationwide suspended the EUOs on June 22 because of Plaintiffs’ counsel’s behavior. Nationwide still attempted to work with Plaintiffs to obtain needed information. After a further request, on June 29, 2022 (the same day Plaintiffs filed this lawsuit), Plaintiffs’ counsel claimed that “Mr. Arazete [sic] is dead” and that “Mr. Timoti Timoti has no phone number; he wishes to be contacted via Facebook; in light of privacy concerns, at Mr. Timoti’s request, your insureds decline to provide an address for Mr. Timoti.” Plaintiffs’ counsel also changed his earlier position, and stated he would “withdraw [his] offer to contact these witnesses to assist Nationwide to obtain their statements.”²²

Nationwide responded on July 5, 2022 that the proposed Facebook contact with Mr. Timoti was not appropriate, requested his telephone number (or a number where he could be reached, if he truly did not have one), or to set up an in-person meeting at a time and place

¹⁸ *Id.* at 161:3-164:7.

¹⁹ *Id.* at 164:22-165:10.

²⁰ *Id.* at 169:24-25, 170:9-10.

²¹ Jubelirer Dec., Ex. E (6/22/22 EUO Tr.) at 195:23-196:2, 198:2-11.

²² Jubelirer Dec., Ex. F, at KUMAR_03720.

1 convenient for him.²³ After further follow-up requests, Plaintiffs' counsel wrote Nationwide's
 2 counsel on August 7, 2022 that "Insureds have no further response" to Nationwide's request
 3 regarding Mr. Timoti.²⁴

4 **D. Plaintiffs' Counsel Interferes With Nationwide's EUO.**

5 The refusal to provide information was only one kind of noncooperation. As indicated
 6 above, Plaintiffs' counsel also interfered with the EUO process such that Nationwide was unable
 7 to get accurate, unfiltered information from Mr. Singh, without the improper influence of
 8 Plaintiffs' counsel on his answers.

9 At the EUO, Nationwide's counsel asked Mr. Singh how much he paid for the second
 10 Snap-On tool chest. The following exchange occurred. Plaintiffs' counsel thus admitted that, in
 11 the middle of Mr. Singh's testimony, he was directing him to use a document to answer
 12 Nationwide's counsel's questions:

13 Q. First of all, do you recall how much you paid for this item?

14 A. Roughly?

15 Q. Sure.

16 A. Yes, I do.

17 Q. Okay. How much?

18 A. About – close to about eight grand.

19 MR. SCHAFFER: It's on the...

20 MR. PARDINI: Okay, Mr. Schaffer, are you whispering to your
 21 client?

22 MR. SCHAFFER: No, I am pointing him to the fact that he had got
 23 all the information on this inventory that he prepared.

24 MR. PARDINI: So you are whispering to your client?

25 MR. SCHAFFER: No, I am not whispering. I am telling him on the
 26 record, Mr. Pardini, that all of the information you are asking about
 27 the insured spent an immense amount of time putting onto a
 28 document so that they would be able to answer these questions
 intelligently.²⁵

Plaintiffs' counsel also admitted that he "told him [to] look at the work you have done" to

²³ Lathrum Dec., Ex. G, at NMIC-003723.

²⁴ Jubelirer Dec., Ex. G, at KUMAR_03712.

²⁵ Jubelirer Decl., Ex. E (6/22/22 EUO Tr.) at 201:6-202:15.

1 answer the questions, and that he could and should “assist my client, when it’s appropriate, to
 2 look at the work he has done to ensure that his *responses are consistent with* two recorded
 3 statements” and various other documentation previously provided to Nationwide. He stated that
 4 he was “going to tell him, hey, you prepared this document, it’s important that you refer to the
 5 document in answering these questions.”²⁶

6 Plaintiffs’ counsel also interfered with the examination in other ways. At the June 21,
 7 2022 session, Nationwide’s counsel asked Mr. Singh to correct his summary of the loss as “a fire
 8 that occurred while you and your family were away,” and Plaintiffs’ counsel immediately
 9 interjected that the question “misstates the evidence” and that “[t]here were actually two fires.”
 10 When Nationwide’s counsel pointed out that Plaintiffs’ counsel was interfering in the
 11 examination, Plaintiffs’ counsel admitted that he was “going to make sure that the record is clear
 12 when you ask a question about, hey, your Reader’s Digest version says there was a fire. You are
 13 wrong. There were two fires,” and that he “[did]n’t think you should be leading him. I think you
 14 should be asking him open-ended questions, and I think reports are contrary to what you are
 15 describing.”²⁷

16 Similarly, when Nationwide’s counsel asked when Mr. Singh was laid off from his last
 17 job before the date of the fire, Plaintiffs’ counsel interjected, “Before or after COVID?”
 18 prompting Mr. Singh to begin to respond, “It was right when COVID like – when COVID started,
 19 around that time.” Nationwide’s counsel again objected to this interference, and Plaintiffs’
 20 counsel responded that his role was not to make objections, but rather “to assist Mr. Singh to
 21 obtain the policy benefits he is entitled to,” and that “to the extent I can assist my client to refresh
 22 his recollection and so forth, I think it is absolutely appropriate.” He stated that when
 23 Nationwide’s counsel “ask[s] a question that I know the answer to and I – Mr. Singh and I have
 24 discussed this, and I know the history to refresh his recollection to testify truthfully, that is not
 25 coaching.”²⁸

26 *Id.* at 201:6-205:17, 206:4-14 (italics added).

27 Jubelirer Dec., Ex. D (6/21/22 EUO Tr.) at 73:2-75:3.

28 *Id.* at 87:4-90:9

E. Nationwide's Final Claim Denial.

After the incident with the document Plaintiffs' counsel was showing Mr. Singh, Nationwide suspended the remainder of his EUO and did not proceed with Ms. Kumar's EUO because of Plaintiffs' counsel's behavior. At the end of the last session of Mr. Singh's EUO, Nationwide's counsel specifically stated that Nationwide was "suspend[ing]" Mr. Singh's EUO because there was "a fundamental disagreement with [Plaintiffs' counsel] as to what his involvement is in this process" and that "given the circumstances there is no reason or need to try to conduct [Ms. Kumar's] examination either until this fundamental disagreement is resolved."²⁹

Nationwide never completed its investigation and never determined whether any fraud occurred.³⁰ Plaintiffs filed this lawsuit on June 29, 2022, before Nationwide took any further action on Plaintiffs' claim, and the parties continued to discuss the matter through their counsel as described above. After reaching an impasse, Nationwide denied Plaintiffs' claim in a letter dated September 1, 2022.³¹

III. LEGAL STANDARD

Summary judgment is proper where 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); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). There is no "genuine" issue concerning a fact if a reasonable fact finder could only come to one conclusion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

"[T]he burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 323-25. The burden then shifts to the opposing party to show a genuine issue of material fact, and demonstrate that sufficient evidence exists for a reasonable jury to return a verdict in its favor. *Matsushita*, 475 U.S. at 586-87. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury

²⁹ Jubelirer Dec., Ex. E (6/22/22 EUO Tr.) at 209:10-210:8.

³⁰ Lathrum Dec., ¶ 8.

³¹ Lathrum Dec., Ex. H, at NMIC-005700-31.

could reasonably find for the plaintiff.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). In opposing summary judgment, “[a]rguments based on conjecture or speculation are insufficient[.]” *McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1173 (9th Cir. 2016).

IV. ARGUMENT

A. **The Insurance Code and California Law Describe Proper Behavior by Insureds and their Counsel During an EUO.**

As an initial matter, Nationwide was entitled by statute to take Plaintiffs’ EUOs “to obtain information that is relevant and reasonably necessary to process or investigate the claim.” Cal. Ins. Code, § 2071.1, subd. (a)(2). “The right to require the insured to submit to an examination under oath concerning all proper subjects of inquiry is reasonable as a matter of law.” *Globe Indemnity Co. v. Superior Court*, 6 Cal. App. 4th 725, 731 (1992). The Insurance Code and California case law describe what insureds must do – and what they must not do – during the process.

First, the purpose of the EUO is “to enable the insurer to obtain the information necessary to process the claim: As the facts with respect to the amount and circumstances of a loss are almost entirely within the sole knowledge of the insured, . . . it is necessary that it [the insurer] have some means of cross-examining, as it were, upon the written statement and proofs of the insured, for the purpose of getting the exact facts before paying the sum claimed of it.” *Brizuela v. CalFarm Ins. Co.*, 116 Cal. App. 4th 578, 591 (2004). Insureds cannot refuse to comply with a demand for an EUO, because it, “deprives the insurer of a means for obtaining information necessary to process the claim. The inability to obtain such information is prejudicial, absent extraordinary circumstances.” *Id.* at 592.

Second, the insured must answer the insurer’s “material questions” at the EUO, or risk forfeiting coverage. Despite sharing features with depositions taken in litigation, an EUO is *not* a deposition and has different rules. “The purpose of an examination under oath is to obtain information as part of the insurer’s investigation of the insured’s claim rather than for the litigation. The procedures are also different, for an examination under oath is not subject to the Code of Civil Procedure, and the insured’s counsel has no right to examine the insured. Also,

1 unlike a deposition, in an examination under oath, the insured is obligated to volunteer relevant
 2 information.” *Brizuela*, 116 Cal. App. 4th at 592. Objections to EUO questions are not per se
 3 improper – that is, the simple fact that an insured asserted an objection and refused to answer a
 4 question at an EUO is not grounds for denying coverage – but the Insurance Code cautions that
 5 “if as a result of asserting an objection, an insured fails to provide an answer to a material
 6 question, and that failure prevents the insurer from being able to determine the extent of loss and
 7 validity of the claim, the rights of the insured under the contract may be affected.” Cal. Ins. Code,
 8 § 2071.1, subd. (a)(6).

9 While the Insurance Code does not define “material” in the context of EUOs, the overall
 10 purpose of EUOs in part as a tool to detect potential fraud informs the meaning. A matter is
 11 “material” in the insurance fraud context if it “concerns a subject reasonably relevant to the
 12 insurer’s investigation, and if a reasonable insurer would attach importance to the fact
 13 misrepresented.” *Cummings v. Fire Insurance Exchange*, 202 Cal. App. 3d 1407, 1417 (1988).
 14 Put otherwise, “a question and answer are material when they relate to an insured’s duty to give
 15 to the insurer all the information he has as well as other sources of information so that the insurer
 16 can make a determination of its obligations. Thus, materiality is determined by its prospective
 17 reasonable relevance to the insurer’s inquiry.” *Id.* at 1416-17.

18 These rules may be summarized as follows:

- 19 • Insureds must answer all questions at an EUO concerning any subject reasonably
 20 relevant to the insurer’s investigation, if the subject of the questioning would be
 21 important to a reasonable insurer.
- 22 • Insureds may assert objections at an EUO, but if by their objections they do not
 23 answer a material question, and the insurer’s ability to determine whether a claimed
 24 loss occurred is affected, they may forfeit their coverage.
- 25 • Insureds (or their counsel) may not interfere with the EUO process in a way that
 26 prevents the insurer from obtaining accurate answers to its questions or otherwise
 27 frustrates the purpose of the EUO or the insurer’s investigation.

28 Here, Plaintiffs violated all three rules: They refused to provide information about persons who

1 could corroborate their ownership of thousands of dollars of personal property for which they
 2 sought payment; they objected to providing that information on the grounds that it was “private”;
 3 they claimed to offer to have their counsel represent and manage any interaction between, these
 4 persons and Nationwide; and their counsel interfered with the EUO itself, preventing Nationwide
 5 from obtaining testimony from Mr. Singh. This was a failure to cooperate with Nationwide and to
 6 “submit” to an EUO. It was reasonable, as a matter of law, for Nationwide to deny Plaintiffs’
 7 claim under these circumstances.

8 **B. Nationwide Reasonably Denied Coverage Due to Plaintiffs’ Refusal to**
 9 **Disclose Contact Information for Mr. Timoti.**

10 It was proper for Nationwide to ask Mr. Singh to provide the names and contact
 11 information of persons who could corroborate Plaintiffs’ ownership of the Snap-On tool chests.
 12 This information was “reasonably relevant” to Nationwide’s investigation of Plaintiffs’ insurance
 13 claim, because Nationwide was unable to find any other evidence that the tool chests were in
 14 Plaintiffs’ garage when it burned down. A person who could say “I was with Mr. Singh when he
 15 bought the tool chests” would be useful evidence tending to show that Plaintiffs’ claim was valid.
 16 Conversely, if Plaintiffs identified a person they claimed could corroborate the purchase, but that
 17 person denied it happened, that would be some evidence that Plaintiffs were attempting to recover
 18 for a loss they did not suffer. Any reasonable insurer would “attach importance” to an insured’s
 19 representation that they owned an expensive piece of property that was damaged, as well as to an
 20 assertion that a particular person could corroborate the claim. Thus, Nationwide’s questions to
 21 Mr. Singh at the EUO seeking contact information for the witnesses were “material.”

22 Nationwide denied Plaintiffs’ claim in part because Plaintiffs, through their counsel,
 23 would not provide Mr. Timoti’s contact information, and instead purported to impose improper
 24 and unreasonable conditions on Nationwide’s investigation. Essentially, Plaintiffs asserted and
 25 maintained a “privacy” objection to disclosing any contact information for Mr. Timoti. Asserting
 26 the objection is, by itself, not problematic; but the law is clear that if by the assertion of the
 27 objection Nationwide was prevented from investigating the claim, Plaintiffs’ coverage is
 28 jeopardized. Plaintiffs’ explicit refusal to provide Mr. Timoti’s contact information and offer to

facilitate contact over Facebook messages is the antithesis of “cooperation,” and it thus violated their duty in the law and under the Policy to cooperate. That alone is grounds for denying coverage under the Policy. As for bad faith, “the ultimate test of [bad faith] liability in the first party cases is whether the refusal to pay policy benefits was unreasonable.” *Opsal v. United Svcs. Auto. Assn.*, 2 Cal. App. 4th 1197, 1205 (1991). “[B]efore an insurer can be found to have acted tortiously (*i.e.*, in bad faith), for its delay or denial in the payment of policy benefits, it must be shown that the insurer acted *unreasonably* or *without proper cause*.” *Chateau Chamberay Homeowners Assn. v. Assoc. Int’l Ins. Co.*, 90 Cal. App. 4th 335, 346 (2001) (emphasis original). It was reasonable for Nationwide to refuse to pay Plaintiffs’ claim in response to their failure to cooperate.

C. Nationwide Reasonably Denied Coverage Due to Plaintiffs’ Counsel’s Interference in the EUO Process.

Plaintiffs also violated their duty to cooperate with Nationwide by their counsel’s behavior at Mr. Singh’s EUO. His statements about what he was allowed to do evince a fundamental misunderstanding of the purpose of EUOs generally, and the purpose of this EUO specifically. One of the reasons an EUO is conducted is to detect potential insurance fraud. Logically, evidence that fraud may be occurring is the existence of inconsistency between an insured’s testimony at an EUO and other information (including previous statements made by the insured). Similarly, an insured’s inability to remember facts that, if true, logically would be easily recalled could be another sign. Regardless, an EUO is fundamentally useless if the insurer is unable to obtain evidence from the insured directly, without others interfering in the process. Just as in a deposition, a witness’s lawyer is not generally permitted to make factual statements to his or her client during testimony. It is even *more* improper in the EUO context, because key features of EUOs are that “the insured’s counsel has no right to examine the insured. Also, unlike a deposition, in an examination under oath, *the insured* is obligated to volunteer relevant information.” *Brizuela*, 116 Cal. App. 4th at 592 (emphasis added). These rules are broken when, viewed generously, an insured’s lawyer essentially prompts his client to testify a certain way. In a deposition, that may be possible in a direct examination, but an EUO is simply a different

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1 process, subject to different rules, and taken for a different purpose. Likewise, having the
 2 insured's *counsel* suggest facts to the insured is not "the insured . . . volunteer[ing]" anything.
 3 Thus, Plaintiffs' counsel's statement that he would interject when Nationwide asked a question
 4 "that I know the answer to" and that he "know[s] the history to refresh [Mr. Singh's]
 5 recollection," was improper – and he went ahead and did just that, frustrating Nationwide's use of
 6 the EUO in its investigation.

7 Plaintiffs' insurance claim was initially referred to Nationwide's SIU because there were
 8 signs the claim may have been fraudulent in some way. Nationwide's personnel investigated, took
 9 two recorded statements from Plaintiffs *before* the EUOs, and determined the EUO was the next
 10 appropriate step – but Plaintiffs' counsel prevented Nationwide from using the EUO process as a
 11 tool to detect potential insurance fraud. Plaintiffs' counsel, for example, explicitly asserted that
 12 the "reports" about the loss were "contrary" to what Nationwide's counsel stated. That prevented
 13 Nationwide from determining whether Mr. Singh's own testimony – unaffected by his counsel's
 14 statements – was inconsistent with other information Nationwide had.

15 Likewise, Plaintiffs' counsel's direction to Mr. Singh to look at a document to help him
 16 answer Nationwide's questions – explicitly for the purpose of "ensur[ing] that his responses are
 17 consistent with two recorded statements" – completely defeats the purpose of the EUO to
 18 determine if the insured is attempting to commit fraud. The result is that Nationwide did not get
 19 *Mr. Singh's* testimony. Instead, it obtained some combination of Mr. Singh's testimony and
 20 Plaintiffs' counsel's statements and suggestions about what Mr. Singh should say in order to
 21 maintain "consisten[cy]." Any testimony taken under those circumstances is useless to determine
 22 whether Plaintiffs' insurance claim was fraudulent. Mr. Singh did not "submit" to an EUO under
 23 these circumstances, and violated his duty of cooperation under the Policy and the law. When
 24 Plaintiffs' counsel made clear he was going to proceed in this manner, Nationwide reasonably
 25 denied Plaintiffs' claim.

26 **D. All of Plaintiffs' Claims Fail Because They Are Premised Upon the Existence**
 27 **of Coverage.**

28 As discussed above, there is no genuine dispute that Nationwide acted reasonably in

1 denying Plaintiffs’ claim under the circumstances. However, because the reason for the denial
 2 was non-cooperation – that is, a violation of Plaintiffs’ duties under the Policy – *all* of their
 3 claims fail. Plaintiffs allege four causes of action against Nationwide: breach of contract, breach
 4 of the covenant of good faith and fair dealing (“insurance bad faith”), “negligent failure to obtain
 5 insurance coverage,” and “negligent misrepresentation” of the adequacy of Plaintiffs’ insurance
 6 coverage for their garage. Dkt. 1 at ¶¶ 83-112. They are all premised upon the existence of
 7 coverage under the Policy. That is, if Nationwide is entitled to summary judgment on Plaintiffs’
 8 breach of contract claim because there was no coverage – and thus no possible breach of the
 9 insurance contract – every other claim fails.

10 Simply put, there is no genuine dispute that no coverage existed – and that Nationwide’s
 11 September 2022 denial was proper – because Plaintiffs failed to cooperate with Nationwide and
 12 obstructed its investigation of their insurance claim. If the denial was proper, there is no coverage
 13 for Plaintiffs’ claim, and there can be no liability under any theory alleged in the complaint.

14 There is no dispute that Plaintiffs did not comply with the cooperation requirement in the
 15 Policy, so their contract claim fails, and there is no coverage under the Policy. Plaintiffs were
 16 required by the Policy to cooperate with Nationwide, and the requirement is enforceable: “[A]n
 17 insurer may contractually require, as a condition of coverage, that an insured submit to an EUO
 18 and answer all proper questions as part of the insurer’s investigation of the insured’s claim . . .
 19 even when the insured might have a legitimate legal basis for not wanting to comply.”
 20 *Abdelhamid v. Fire Ins. Exch.*, 182 Cal. App. 4th 990, 1003-04 (2010); *Her v. State Farm Ins.*
 21 *Co.*, 92 F. Supp. 3d 957, 971 (E.D. Cal. 2015) (“Provisions of an insurance policy that require an
 22 insured to cooperate and meet various conditions are enforceable”); *Martinez v. Infinity Ins. Co.*,
 23 714 F. Supp. 2d 1057, 1062 (C.D. Cal. 2010) (“California recognizes [] cooperation clauses in
 24 insurance contracts as valid, necessary, and enforceable”).

25 Plaintiffs cannot provide evidence to create a genuine dispute that they cooperated with
 26 Nationwide, they cannot prove that there has been “full compliance with all of the terms” of the
 27 Policy, and Plaintiffs’ suit cannot proceed. *Enger v. Allstate Ins. Co.*, 407 F. App’x 191, 193 (9th
 28 Cir. 2010) (affirming dismissal where plaintiff did not comply with policy terms because “full

1 compliance with the policy terms” is a contractual prerequisite to bringing suit); *Pavlina v. Safeco*
 2 *Ins. Co. of Am.*, 2012 WL 5412796, at *6 (N.D. Cal. Nov. 6, 2012) (dismissing contract and bad
 3 faith claims for failure to comply with terms of the policy).

4 Nor can Plaintiffs prove their compliance with the Policy was excused or that they
 5 complied by being “prepared” to proceed even though Nationwide suspended the EUOs. As
 6 discussed above, the evidence shows that Plaintiffs’ counsel’s behavior was the cause of Mr.
 7 Singh’s EUO being suspended, and that this behavior would continue in Ms. Kumar’s EUO. It is
 8 not “compliance” with the requirement to “submit” to an EUO while at the same time insisting on
 9 interfering with it. “An offer to perform upon terms and conditions not designated in the contract
 10 is not only not binding on the offeree, unless he accepts the new conditions or fails to make [an]
 11 objection thereto, *but is also tantamount to a refusal to perform.*” *Lewis v. James*, 134 Cal. App.
 12 2d 15, 21 (1955) (emphasis added) (citing Cal. Civ. Code §§ 1494 (“An offer of performance
 13 must be free from any conditions which the creditor is not bound, on his part, to perform”), 1501
 14 (requiring objections to be made to offers of performance, or imposing waiver of same)).

15 Plaintiffs may also argue that even if they did fail to give Nationwide information it
 16 requested, and even if their counsel did interfere with the EUO process, that should not preclude
 17 coverage because they were “relying” on their counsel’s advice when making these decisions.
 18 Their motivations in not cooperating are irrelevant. Advice of counsel has been an invalid excuse
 19 for refusing to submit to an EUO for over 100 years in California. *Hickman v. London Assurance*
 20 *Corp.*, 184 Cal. 524, 534 (1920). In *Hickman*, the insurer suspected arson, and demanded an
 21 EUO. The insured refused to answer questions or produce documents, on advice of counsel, on
 22 the grounds that any answer he gave or document he produced would be used against him in an
 23 arson prosecution. *Id.* at 527-28. “The Supreme Court concluded the insured’s refusal . . . was not
 24 justified, as the constitutional privilege did not apply and examination was a ‘condition
 25 precedent’ to his right to benefits under the policies.” *Abdelhamid*, 182 Cal. App. 4th at 1003
 26 (citing *Hickman*, 184 Cal. at 532, 534).

27 Likewise, in *Abdelhamid* the insured refused, “based on purported legal advice,” to
 28 provide certain documents in advance of, and answer certain questions at, an EUO. 182 Cal. App.

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4th at 996. The insurer denied the claim on the grounds that the insured’s “failure to produce requested documentation and her refusal to answer questions during her EUO breached a condition precedent to her recovery under the policy,” and that the insured’s “failure to cooperate was an independent basis for denying the claim.” *Id.* at 996. The Court of Appeal noted that “performance or excuse for nonperformance” is a “standard element” of a breach of contract claim, and agreed with the trial court that the insured’s failure to produce documents or answer questions at the EUO on the advice of her counsel showed she “could not prove that she had performed the conditions precedent for coverage” and “had therefore materially breached her obligations under the insurance contract.” 182 Cal. App. 4th at 999. The court rejected the insured’s “advice of counsel” excuse, citing *Hickman*, and pointing to “[s]ubsequent cases [that] have confirmed an insurer may contractually require, as a condition of coverage, that an insured submit to an EUO and answer all proper questions,” all of which “reflect a strong insistence on an insured’s performance of the contractual conditions required for coverage, *even where the insured might have a legitimate legal basis for not wanting to comply.*” *Id.* at 1003-04 (emphasis added).

Because the contract claim fails, the bad faith claim fails. “It is clear that if there is no *potential* for coverage and hence, no duty to defend under the terms of the policy, there can be no action for breach of the implied covenant of good faith and fair dealing because the covenant is based on the contractual relationship between the insured and the insurer.” *Waller v. Truck Ins. Exchange*, 11 Cal. 4th 1, 35-36 (1995) (emphasis original); *see also Jordan v. Allstate Ins. Co.*, 148 Cal. App. 4th 1062, 1078 (2007) (“Before [an insured] can successfully assert her claim for damages arising from Allstate’s alleged bad faith claims-handling activities, she must first demonstrate that there is in fact coverage under the policy”); *Barbizon Sch. of San Francisco v. Sentinel Ins. Co.*, 2021 U.S. Dist. LEXIS 62796, at *27-28 (N.D. Cal. Mar. 31, 2021) (Hixson, J.) (citing *Waller*).

Additionally, because the contract claim fails and there is no coverage, any alleged failure to obtain insurance coverage, or an alleged misrepresentation of the adequacy of that coverage, had no effect on Plaintiffs because they had no coverage *at all* for their insurance claim. The coverage-related claims are simply moot.

V. CONCLUSION

Nationwide repeatedly tried to obtain needed information from Plaintiffs to investigate their insurance claim. There is no genuine dispute that Plaintiffs refused to provide it or that their counsel substantially interfered in Nationwide's investigation. Those choices resulted in Plaintiffs failing to comply with their duty under the Policy and the law to cooperate with Nationwide's investigation of their insurance claim. Accordingly, their breach of contract claim is barred, and their derivative claims are moot. The Court should grant summary judgment for Nationwide.

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