

J. Edward Kerley (175695)
Dylan L. Schaffer (153612)
Kerley Schaffer LLP
1939 Harrison Street, #900
Oakland, California 94612
Telephone: (510) 379-5801
Facsimile: (510) 228-0350

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NALINI KUMAR, an individual, **ALLEN SINGH**, an individual.

Plaintiffs,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY, a corporation and **DOES 1-10**,

Defendants.

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

**ALLEN SINGH'S OPPOSITION TO
NATIONWIDE'S MOTION FOR
SUMMARY JUDGMENT AND JOINDER
IN NALINI KUMAR'S OPPOSITION TO
NATIONWIDE'S MOTION FOR
SUMMARY JUDGMENT**

Date: July 18, 2023

Time: 2:00 p.m.

Location: Courtroom 9, 19th Floor

Judge: Honorable Trina L. Thompson

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INTRODUCTION

In July 2020, Nalini Kumar, with her husband Allen Singh, resided with their two small children in a 900 square foot, two-bedroom, one-bathroom house in Stockton. On July Fourth the house and the family's personal belongings were severely damaged by fire; a large separate structure, used as workshop for Mr. Singh's car restoration hobby, and as family living and storage area, was destroyed. Video of the neighborhood from the night resembles Baghdad during a massive air raid—it is lit up with fireworks, which caused the fire.

Within a few days Nationwide started an arson investigation after learning from neighbors that Mr. Singh had recently moved a car out of the garage (he sold it), that the fire had two points of origin (it was July 4th), and that Mr. Singh had lost his job as a tow truck driver (it was early COVID). The arson investigation petered out quickly—Nationwide's fire investigator found the cause was fireworks. So did the Stockton Fire Department. And unlike your average insurance fraudsters, when Nationwide (days after the loss) illegally conditioned coverage on the insureds allowing the insurer unfettered access to their private financial lives, the insureds signed releases without hesitation.

After weeks spent searching for evidence of financial motivation, Nationwide found nothing except that Mr. Singh had lost his job due to the pandemic. The family had low debt, was current on its house payments, had steady income, close family support in the area, and no foreclosures or bankruptcies. The house and garage were filled with the family's belongings, including many of sentimental value, when the fire started. Nationwide found the house was in tip top shape before the fire.

After the fire, the house was uninhabitable and the contents were unusable. But six weeks into the claim Nationwide had given its customers only a \$2500 advance and a small monthly stipend to move in with Mr. Singh's parents. Nationwide's adjuster produced a laughably low repair estimate but paid nothing to get repairs started. Around the same time Nationwide received a competing estimate for nearly three times its number from a local contractor; the carrier ignored it. That remains the situation three years later: the house is ruined and empty,

1 attracting squatters; the personal property is destroyed; the family, now cut off from all housing
 2 benefits, is increasingly at risk of losing the house altogether.

3 All of that is because Nationwide never lost the scent of criminality in the claim. Lacking
 4 evidence of arson, the carrier, now focused on a personal property inventory from the family,
 5 began a years-long investigation into alleged overstatements of contents on the list. From July to
 6 September 2020, Nationwide took hours of recorded statements of the insureds in which the
 7 customers provided even more details about their financial lives, together with their best
 8 recollections of the circumstances in which they had purchased the items on the inventory, in
 9 most cases many years before the loss. Notwithstanding growing frustration that Nationwide had
 10 done nothing to assist them to move forward with repairs, and a return to their pre-fire lives, Ms.
 11 Kumar and Mr. Singh cooperated fully with the fraud investigation.

12 Nationwide was not satisfied. After months (September 2020-December 2020) during
 13 which the file sat idle, on New Years Eve 2020, a lawyer sent the family a letter demanding
 14 examinations under oath (EUO).

15 An EUO is not a deposition, at which litigants with a broad right to discover facts in civil
 16 litigation have comparatively free reign. To put it mildly, the EUO is an unusual feature of a
 17 consumer contract of adhesion, in which the insurer (which is also the drafter of the contract) has
 18 the right to condition payment of policy benefits on an unlimited number of proceedings in
 19 which the customer is compelled to provide sworn testimony to questions posed by an
 20 experienced insurance litigator. All California property insurance policies contain the EUO
 21 condition, and the condition is expressly authorized by law.¹

22 But as the Court will learn, the California Legislature concluded in 2005 that insurers and
 23 their counsel had long used EUOs to harass and abuse their customers. Here is just one entry
 24 from the Legislative history: the law “[i]n its current form, ... *allows insurers to abuse the EUO*
 25 *process by hiring lawyers to delay claim settlements, conduct fishing expeditions, intimidate and*
 26 *harass innocent claimants. Insurers have turned what used to be a simple information-gathering*

27 ¹ Ins. Code §2071.
 28

1 *EUO process into a time-consuming, formal and expensive process involving attorneys and court*
 2 *reporters. Insureds need basic due process protections for this process.”²*

3 As an ameliorative, the Legislature provided insureds a slew of protections, including the
 4 right to representation at the EUO and, in the same statutory clause, the right to “record the
 5 examination proceedings in their entirety.”³

6 At Nationwide’s request, in advance of a planned 2021 EUO, the insureds produced more
 7 than 1100 pages of requested documents; Nationwide’s lawyer lost them. The insureds appeared
 8 for their EUOs remotely on the Zoom platform. As was their right, they sought to videotape the
 9 proceedings, including all participants. Nationwide’s lawyer and adjuster refused, offered no
 10 justification, and abandoned the EUO when it became clear the insureds would insist on
 11 exercising their right provided by California law. For reasons Nationwide has never shared, and
 12 omits from its latest filing, its representatives do *not* want to be videotaped while doing their
 13 jobs.

14 Shortly thereafter, because Nationwide’s repair estimate was so low, and because the
 15 carrier had ignored the far higher estimate from the local licensed contractor, the insureds
 16 demanded appraisal under their insurance policy, a mandatory procedure for resolving the
 17 dispute over the cost to fix the house in the event of a dispute, which there indisputably was here.
 18 Nationwide refused, breaching the policy.

19 In April 2021 Nationwide denied the claim, relying in part on the allegation that the
 20 insureds had failed to produce the requested documents, which was false, as the carrier’s lawyer
 21 later admitted. Nationwide also denied the claim because the insureds, it said, had breached the
 22 policy’s EUO condition by refusing to participate. But it was Nationwide that breached the
 23 policy by illegally conditioning payment of the claim on the insureds’ sacrificing rights provided
 24 by law. Nationwide could no more insist that the insureds give up their right to record the
 25 proceedings than it could insist the insureds appear without counsel.

26 ² Plaintiffs’ Request for Judicial Notice, Exh. A, p.2 (Order of Alameda Superior Court); Request
 27 for Judicial Notice, Exh. F, p.1 (Legislative Background Information).

28 ³ Ins. Code §2071.1(a)(4).

Under the policy, Nationwide's 2021 denial obligated the carrier to notify the insureds' lenders, additional insureds under the policy with the right to pursue a claim for repair of the home even if the claim is denied as to the named insureds. Nationwide further breached the policy, failing to inform the lenders of the denial, and thus avoiding repair payments.

Prior to the denial, the insureds filed suit in state court seeking declaratory relief as to the statutory issue; Nationwide removed to this Court. Nationwide filed a motion to dismiss, arguing the insureds' breach of the EUO condition resulted in a complete forfeiture of their rights under the policy. At argument, Judge Thomas Hixson indicated he intended to deny the motion, but agreed with Nationwide's view of the statute. Plaintiffs, desperate to get their home repaired, dismissed, and agreed (while reserving their rights) to Nationwide's conditions for the EUO.

Mr. Singh's EUO occurred on June 21 and June 22, 2022. Nationwide chose not to take Ms. Kumar's EUO although she was available. Nationwide never sought further examinations of the insureds thereafter. After Mr. Singh's EUO, Nationwide asked for additional help; the insureds cooperated fully. In September, Nationwide again denied the claim, again breaching the policy by failing to notify the additional insured-lenders.

Nationwide seeks summary judgment, indiscriminately, against both insureds in one motion, arguing Mr. Singh's breach of the EUO policy condition at his June 2022 examination relieves the carrier of all policy obligations. Its motion relies on four alleged breaches at the EUO. As appears, as against Mr. Singh, the motion fails:

- on its face, because the carrier never seeks to demonstrate that it has proven as a matter of law Mr. Singh's alleged breach resulted in actual and substantial prejudice to the carrier;
- because there are triable disputes as to the prejudice issue;
- because there are triable disputes to whether Mr. Singh breached the EUO policy condition; and
- because Nationwide's serial breach of the policy prior to Mr. Singh's June 2022 EUO forfeited its right to deny coverage in reliance on any alleged breach by Mr. Singh.

UNDISPUTED FACTS

A July 4, 2020, fire at their home in Stockton left the Kumar/Singh family homeless and without any of their personal property.⁴ They notified Nationwide.⁵ Days later Nationwide's adjuster, Shawn Dalton, violated California law⁶ and breached the contract when he unlawfully conditioned payment of benefits on the insureds' agreeing to sign releases allowing Nationwide unfettered access to their private financial records.⁷ Dalton further violated California law by failing to advise the insureds that their tax returns are privileged.⁸ Lacking an alternative, the insureds signed the releases; thereafter, and today, Nationwide had the ability to obtain "any and all information concerning [their] banking transactions, mortgages, credit accounts, insurance policies, and claims history related to same, utilities service status and payment history, and other financial transactions."⁹ The insureds also signed authorizations for Nationwide to conduct inspections, and to remove items from the property, at will.¹⁰

Nationwide obtained credit reports and ran "financial stress" reports for both insureds.¹¹ The carrier learned the family was under no serious financial strain nor had there been foreclosures or bankruptcies that might motivate them to commit insurance fraud. At Dalton's request, the insureds provided pre-loss photos.¹² Nationwide inspected the house on July 10, 2020, and on July 31, 2020.¹³ Dalton asked about vehicles stored in and around the separate

⁴ Declaration of Nalini Kumar ISO Plaintiffs' Oppositions to Nationwide Summary Judgment Motion, and ISO Motion for Summary Judgment (Kumar Decl.), ¶¶2-6.

⁵ Kumar Decl., ¶7.

⁶ Ins. Code §790.03(h)(1) (unfair claims practice to misrepresent fact to insured).

⁷ Kumar Decl., ¶8; Declaration of Allen Singh, ISO Plaintiffs' Oppositions to Nationwide Summary Judgment Motion, and ISO Motion for Summary Judgment (Singh Decl.), ¶2.

⁸ Ins. Code §2071 ("The insurer shall inform the insured that tax returns are privileged against disclosure under applicable law")

⁹ Kumar Decl., ¶9; Singh Decl., ¶3.

¹⁰ Kumar Decl., ¶10; Singh Decl., ¶4.

¹¹ Dylan Schaffer Declaration ISO Plaintiffs' Oppositions to Nationwide MSJ, and ISO Plaintiffs' MSJ (Schaffer Decl.), ¶¶4-5; Plaintiffs' Evidence, Exhibits F-I.

¹² Kumar Decl., ¶11.

¹³ Kumar Decl., ¶12.

1 structure.¹⁴ The insureds reported a vintage Desoto destroyed by the fire was not operational
 2 before the fire; the car's minimum value was \$15000.¹⁵ Dalton breached the policy and violated
 3 California law when he falsely explained the policy does not cover the car or related parts.¹⁶

4 In August 2020, the insureds submitted an inventory of contents destroyed by the fire.¹⁷
 5 Nationwide's contents adjuster, Elizabeth Clinton, explained the inventory should include an
 6 estimate of the cost to replace the item; Clinton said to look up the costs on the Internet.¹⁸ No one
 7 from Nationwide inspected the house between mid-July and October 2020.¹⁹ During that period
 8 there was easy access to the property.²⁰

9 Between July 2020 and September 2020, the insureds (Ms. Kumar in the first and second,
 10 both insureds in the third) provided *three* recorded statements to Nationwide in which the carrier
 11 asked hundreds of questions about their personal and financial lives, as well as about personal
 12 property that has been the focus of Nationwide's years-long fraud investigation.²¹ In the first
 13 interview, in addition to explaining the circumstances surrounding the fire, Ms. Kumar told
 14 Nationwide the destroyed separate structure contained "a lot of stuff. And we don't have the list
 15 completed yet."²² She mentioned cars, couches, televisions, bikes, clothes, and shoes, but made
 16 clear she would "not be able to sit here and list them all off.... It was a lot of stuff in there."²³

17 In the second interview, by adjuster Dalton ten days after the fire, Ms. Kumar answered
 18 detailed questions about the family finances and related topics, to wit: the total mortgage and
 19 monthly payments, the purchase price of the home, third party financial interests in the property,
 20 other insurers, prior claims, repairs to the home, the insureds' employment and pay, the fact that

21 _____
 22 ¹⁴ Kumar Decl., ¶13; Singh Decl., ¶5.

23 ¹⁵ Kumar Decl., ¶13; Singh Decl., ¶5.

24 ¹⁶ Kumar Decl., ¶13; Singh Decl., ¶5.

25 ¹⁷ Kumar Decl., ¶14; Singh Decl., ¶6.

26 ¹⁸ Kumar Decl., ¶14; Singh Decl., ¶6.

27 ¹⁹ Kumar Decl., ¶15; Singh Decl., ¶7.

28 ²⁰ Kumar Decl., ¶15; Singh Decl., ¶7.

²¹ Schaffer Decl., ¶¶6-8, Plaintiffs' Evidence, Exhibits J-L.

²² Schaffer Decl., ¶6, Plaintiffs' Evidence, Exhibit J, p.3.

²³ Schaffer Decl., ¶6, Plaintiffs' Evidence, Exhibit J, p.3.

1 Mr. Singh (a tow truck driver) had been laid off in July 2020 due to the pandemic, sources of
 2 income, monthly bills, car payments, the ages of her children, the way they used the separate
 3 structure, cars stored in the separate structure, other vehicles, whether business was being run out
 4 of the separate structure, whether anyone was living in or paying rent for the separate structure,
 5 the sale of a car in the weeks before the fire, and the circumstances on the night of the fire.”²⁴

6 Nationwide wanted more. The third interview started just after seven p.m. on Wednesday,
 7 September 9, 2020, and lasted *two and half hours*. During the interview the insureds were
 8 managing their two small children while trying to answer questions about events often many
 9 years ago.²⁵ The family had been out of their home for more than two months and other than a
 10 \$2500 advance, had received no benefits to move forward with repairs of their home or
 11 replacement of their personal property.

12 Carlos Rubio, Nationwide’s fraud investigator, did yet another full review of the family
 13 finances which Nationwide already had because of the Dalton interview and the broad financial
 14 releases Nationwide had compelled the insureds to sign.²⁶ Rubio repeatedly asked *if* the insureds
 15 would be able to obtain their tax returns *if* Nationwide asked for those; like Dalton, Rubio
 16 violated California law by failing to advise the insureds tax returns are privileged.²⁷

17 The insureds answered hundreds of questions relating to the contents inventory.²⁸ When
 18 Rubio asked for contact information for a friend of the family who sent them a piece of furniture
 19 as a housewarming gift,²⁹ Mr. Singh fairly expressed concerns about the privacy rights of third
 20 parties.³⁰ Ms. Kumar told Mr. Rubio that if Nationwide provided a written request, they would
 21 attempt to get authorization from the witnesses.³¹ Rubio responded: “*That’s fine. I’m good with*

22 ²⁴ Schaffer Decl., ¶7, Plaintiffs’ Evidence, Exhibit K, pp.1-10.

23 ²⁵ Schaffer Decl., ¶8, Plaintiffs’ Evidence, Exhibit L, p.1 (kids present).

24 ²⁶ Schaffer Decl., ¶8, Plaintiffs’ Evidence, Exhibit L, pp.3-18.

25 ²⁷ Schaffer Decl., ¶8, Plaintiffs’ Evidence, Exhibit L, pp.3-17 (financial questions), 3, 8, 15, 16,
 17 (questions about tax returns); Ins. Code §2071.

26 ²⁸ Schaffer Decl., ¶8, Plaintiffs’ Evidence, Exhibit L, pp.19 et seq.

27 ²⁹ Schaffer Decl., ¶8, Plaintiffs’ Evidence, Exhibit L, p.31.

28 ³⁰ Schaffer Decl., ¶8, Plaintiffs’ Evidence, Exhibit L, p.31.

³¹ Schaffer Decl., ¶8, Plaintiffs’ Evidence, Exhibit L, p.32.

1 *that.*³² No such written requests ever arrived.³³ Between September of 2020 and the September
 2 2022 second claim denial letter, Nationwide never expressed any change of heart about the
 3 compromise Ms. Kumar proposed, and Nationwide expressly accepted.

4 In the recorded statement Mr. Singh told the investigator he had purchased a used 55-inch
 5 ten drawer cabinet from Craigslist; he recalled paying about \$3500 five or six years ago.³⁴ Mr.
 6 Singh explained he listed the age as five years on the inventory, but that was an estimate; he
 7 brought the cabinet to the house in a flatbed truck.³⁵ He provided similar information regarding a
 8 60-inch storage unit—price paid, circumstances, means of transportation, and so forth.³⁶

9 Between the September recorded statement and the end of the year, Nationwide did one
 10 further inspection (October 22, 2020³⁷); otherwise, the insureds heard nothing. On December 31,
 11 2020, Nationwide’s lawyer sent a letter requiring the insureds to attend an examination under
 12 oath (EUO) and attaching a list of requested documents.³⁸ The insureds hired counsel.³⁹

13 Nationwide’s July 2020 repair estimate was for about \$36,011; it paid nothing.⁴⁰ The
 14 insureds also became aware an estimate for repairs of the house by a local contractor
 15 (Goldencoast) which had done the emergency board-up after the fire; Goldencoast the cost to
 16 repair the house at \$93,738.⁴¹ Goldencoast sent its estimate to Nationwide in August 2020;
 17 Nationwide paid nothing.⁴² Because of the discrepancy between the two estimates, on February
 18 25, 2021, the insureds demanded appraisal of the loss.⁴³ Nationwide had 20 days to name its
 19

20 ³² Schaffer Decl., ¶8, Plaintiffs’ Evidence, Exhibit L, p.33.

21 ³³ Kumar Decl., ¶30.

22 ³⁴ Schaffer Decl., ¶8, Plaintiffs’ Evidence, Exhibit L, pp.52-53.

23 ³⁵ Schaffer Decl., ¶8, Plaintiffs’ Evidence, Exhibit L, pp.53-54.

24 ³⁶ Schaffer Decl., ¶8, Plaintiffs’ Evidence, Exhibit L, p.54.

25 ³⁷ Kumar Decl., ¶15; Singh Decl., ¶7.

26 ³⁸ Kumar Decl., ¶16.

27 ³⁹ Kumar Decl., ¶17.

28 ⁴⁰ Kumar Decl., ¶18.

⁴¹ Kumar Decl., ¶19.

⁴² Kumar Decl., ¶19.

⁴³ Kumar Decl., ¶20.

1 appraiser;⁴⁴ it failed to do so or otherwise move forward with appraisal in breach of the policy.⁴⁵

2 On February 20, 2021, the insureds sent Nationwide more than 1100 pages of documents
3 responsive to its lawyer's December 31, 2020 request.⁴⁶ On February 25, 2021, Mr. Singh
4 appeared for his EUO; Nationwide refused to go forward unless Mr. Singh gave up his right
5 under Insurance Code §2071.1(a)(4) to videotape the examination. Nationwide's lawyer and
6 Dalton objected to being videotaped; they never explained *why*.⁴⁷ Nationwide never took Ms.
7 Kumar's EUO in 2021.⁴⁸

8 Nationwide denied the insureds' claim on April 14, 2021,⁴⁹ relying in part on the
9 allegation that the insureds had not responded to its document request. After, the insureds wrote
10 to Nationwide to alert the carrier that it had overlooked more than 1100 pages produced in
11 advance of the EUO; Nationwide admitted the error but did not withdraw its denial.⁵⁰ The
12 insureds filed a declaratory relief action to clarify their rights regarding the conduct of the
13 EUO.⁵¹

14 In January of 2022, after Ms. Kumar and Mr. Singh dismissed their original lawsuit,
15 Nationwide agreed to withdraw its denial, open the claim, and pay incurred additional living
16 expense (ALE) benefits, but all of it was on the condition the insureds agreed to proceed with the
17 EUOs under Nationwide's terms.⁵² On May 18, 2022, the insureds sent proof of thousands of
18 dollars of incurred ALE to Dalton for; Nationwide paid nothing.⁵³ On May 25, 2022,
19 Nationwide's lawyer told the insureds that notwithstanding its January 2022 promise to pay
20 incurred ALE benefits, the carrier had no intention of paying any such benefits until after their

21 _____
22 ⁴⁴ Lathrum Declaration ISO Nationwide MSJ (Lathrum Decl.), Exhibit A, p.25 of 42.

23 ⁴⁵ Kumar Decl., ¶21.

24 ⁴⁶ Schaffer Decl., ¶10.

25 ⁴⁷ Schaffer Decl., ¶¶11-12.

26 ⁴⁸ Schaffer Decl., ¶13.

27 ⁴⁹ Lathrum Decl., Exhibit F.

28 ⁵⁰ Schaffer Decl., ¶¶14-15.

⁵¹ Schaffer Decl., ¶34.

⁵² Schaffer Decl., ¶16, 17.

⁵³ Kumar Decl., ¶¶23, 24.

1 EUOs.⁵⁴ Nationwide has never paid a dime of the promised ALE benefits after it opened the
 2 claim in January 2022.⁵⁵

3 In advance of the EUOs, as a courtesy, the insureds again sent Nationwide the more than
 4 1100 pages the carrier's lawyer admittedly overlooked prior to the first EUO in February 2021,
 5 and other documents that had been produced to Nationwide's litigation counsel in the original
 6 federal litigation.⁵⁶ Also to ensure the EUOs would go smoothly, Ms. Kumar and Mr. Singh
 7 spent many hours assembling 888 photographs taken by Nationwide in the claim, as well as
 8 photographs they had previously given to Nationwide, into a numbered pdf booklet. They then
 9 used the pdf to annotate the inventory they had submitted in August 2020, identifying which
 10 photographs from the pdf showed items on the inventory.⁵⁷ The insureds sent the 888-page pdf to
 11 Nationwide in advance of the EUO, explaining the provenance and purpose of the document.⁵⁸

12 Nationwide began Mr. Singh's EUO on June 21, 2022.⁵⁹ Again without explaining *why*,
 13 Nationwide's lawyer and its claims representative insisted on keeping their screens blacked out,
 14 which was consistent with the conditions Nationwide imposed to reopen the claim.⁶⁰ By statute
 15 the questioning should have been limited to areas Nationwide had not covered in its hours of
 16 recorded statements, and that the carrier needed to process the claim.⁶¹ But Nationwide strayed
 17 far from that narrow lane.

18 For example, the carrier sought information it had and/or had no need for in its fraud
 19 investigation—the ages of Mr. Singh's children,⁶² the layout and size of the property,⁶³ incidents

21 ⁵⁴ Kumar Decl., ¶24.

22 ⁵⁵ Kumar Decl., ¶24.

23 ⁵⁶ Schaffer Decl., ¶18.

24 ⁵⁷ Kumar Decl., ¶25; Singh Decl., ¶9.

25 ⁵⁸ Schaffer Declaration, ¶19.

26 ⁵⁹ Schaffer Declaration, ¶¶3, 20, Plaintiffs' Evidence, Exhibit B.

27 ⁶⁰ Plaintiffs' Evidence, Exhibit B, p.68:13-20.

28 ⁶¹ Ins. Code §2071.1(a)(2).

⁶² Plaintiffs' Evidence, Exhibit B, p.71:20-21.

⁶³ Plaintiffs' Evidence, Exhibit B, pp.75:12-76:5, 76:6-8, 114:24-117:4

1 in the past three years in which police responded to the house,⁶⁴ the fact that Mr. Singh was
 2 unemployed at the time of the fire due to a COVID-19 layoff,⁶⁵ the name of his employer,⁶⁶
 3 bankruptcies,⁶⁷ Mr. Singh's pursuit in 2022 of a commercial truck drivers' license,⁶⁸ the search
 4 for and purchase of homeowners insurance from Nationwide,⁶⁹ prior cancellations of insurance
 5 policies,⁷⁰ the scope of damage at the house requiring repair,⁷¹ the contents of repair estimates
 6 obtained by the insured which had been delivered to Nationwide,⁷² the dates estimates were
 7 submitted to Nationwide,⁷³ the family's bank at the time of the EUO (two years after the loss),⁷⁴
 8 and destroyed contents *not* on the inventory because the insureds had not recalled them in
 9 August 2020.⁷⁵ And although Nationwide had years earlier investigated and dismissed the idea
 10 that the insureds set the fire, counsel asked many questions about related circumstances—the
 11 presence of accelerants in the garage, notice of the fire, the observable damage, and Mr. Singh's
 12 awareness that there were to points of ignition.⁷⁶

13 Nationwide asked about the 55-inch used tool chest Mr. Rubio had already addressed in
 14 detail in the September 2020 recorded statement.⁷⁷ When asked for the names of the friends who
 15 helped him loading the chest, Mr. Singh—exasperated by the fact that his family had been out of
 16 their home for nearly two years without seeing a dime toward repairs, falsely accused of fraud,
 17 who Nationwide had promised to pay living expense benefits months earlier but reneged, and
 18

19 ⁶⁴ Plaintiffs' Evidence, Exhibit B, p.82:17 et seq.

20 ⁶⁵ Plaintiffs' Evidence, Exhibit B, p.90:17 et seq.

21 ⁶⁶ Plaintiffs' Evidence, Exhibit B, p.94:9-13.

22 ⁶⁷ Plaintiffs' Evidence, Exhibit B, p.96:11.

23 ⁶⁸ Plaintiffs' Evidence, Exhibit B, pp.101:16-103:13.

24 ⁶⁹ Plaintiffs' Evidence, Exhibit B, pp.107:23-110:21.

25 ⁷⁰ Plaintiffs' Evidence, Exhibit B, pp.113:6-114:23.

26 ⁷¹ Plaintiffs' Evidence, Exhibit B, pp.127:8 et seq., 133:2 et seq., 135:16 et seq.

27 ⁷² Plaintiffs' Evidence, Exhibit B, pp.129:2 et seq., 132:14 et seq., 136:9 et seq.

28 ⁷³ Plaintiffs' Evidence, Exhibit B, p.148:2-16.

⁷⁴ Plaintiffs' Evidence, Exhibit C, pp.190:24-191:17.

⁷⁵ Plaintiffs' Evidence, Exhibit B, p.153:3-155:21.

⁷⁶ Plaintiffs' Evidence, Exhibit B, pp.117:5-126:20.

⁷⁷ Plaintiffs' Evidence, Exhibit B, p.156:14 et seq.

1 who Nationwide had already put through hours of questioning Nationwide had no need for—
 2 became frustrated and gave a sarcastic non-response: “Tom, Dick and Harry.”⁷⁸

3 Immediately thereafter, following a short meeting with his lawyer, Mr. Singh answered
 4 the question, giving Nationwide the name of the witness: Timoti Timoti.⁷⁹ Nationwide’s lawyer
 5 then asked for Mr. Timoti’s phone number.⁸⁰ As the insureds had done in their recorded
 6 statement with Mr. Rubio, counsel for Mr. Singh lodged a privacy objection. In an effort to
 7 resolve the dispute, Mr. Singh’s lawyer agreed to ask third party witnesses Nationwide sought to
 8 interview if they would agree to be contacted by Nationwide.⁸¹ That proposal was consistent
 9 with Nationwide’s *agreement* in the September recorded statement to send a written request,
 10 after which Ms. Kumar would attempt to obtain authorization from the witnesses for disclosure
 11 of their contact information.⁸²

12 Nationwide’s counsel did not reject the proposed compromise then, *or ever*. Instead he
 13 said this: “What I will do, because we are getting near the end of the day, is *I will hold off on the*
 14 *phone number request*, and we will deal with this.”⁸³ Mr. Singh then identified the other friends
 15 who assisted him.⁸⁴ He testified regarding the area he made the purchase and other details of the
 16 sale.⁸⁵ During this questioning the witness was never instructed not to answer any question; nor
 17 did he refuse to answer any question. Nationwide never again asked for contact information
 18 during the EUO; its lawyer never returned to the subject with Mr. Singh’s counsel.

19 The second session of Mr. Singh’s EUO began the next morning, June 22, 2022.⁸⁶
 20 Nationwide continued asking questions regarding Mr. Singh’s purchase of the tool chest at least
 21

22 ⁷⁸ Plaintiffs’ Evidence, Exhibit B, p.159:16-21.

23 ⁷⁹ Plaintiffs’ Evidence, Exhibit B, p.162:10-11.

24 ⁸⁰ Plaintiffs’ Evidence, Exhibit B, p.162:12-13.

25 ⁸¹ Plaintiffs’ Evidence, Exhibit B, pp.162:14-21, 163:2-164:7.

26 ⁸² Schaffer Decl., ¶8, Plaintiffs’ Evidence, Exhibit L, p.32-33.

27 ⁸³ Plaintiffs’ Evidence, Exhibit B, p.164:17-19.

28 ⁸⁴ Plaintiffs’ Evidence, Exhibit B, p.164:22-165:7.

⁸⁵ Plaintiffs’ Evidence, Exhibit B, pp.165:8-170:10.

⁸⁶ Schaffer Declaration, ¶¶3, 20, Plaintiffs’ Evidence, Exhibit C.

seven years earlier.⁸⁷ Mr. Singh answered similar questions about another tool chest.⁸⁸ There was no instruction not to answer, and no refusal to answer, any question.

Mr. Singh had the annotated contents inventory with him at both sessions of the EUO and referred to it to refresh his recollection while answering questions about contents.⁸⁹ Neither Mr. Singh nor his lawyer made any secret of the existence of or Mr. Singh's reliance on the inventory.⁹⁰ After a question about how much Mr. Singh paid for the second tool chest, Nationwide's counsel objected that Mr. Singh's lawyer was "whispering."⁹¹ In the colloquy that followed, Mr. Singh's lawyer referred Nationwide's lawyer to the annotated inventory, and sent it to him.⁹² Thereafter Nationwide suspended Mr. Singh's EUO; it has never sought to continue it.⁹³ Although Ms. Kumar was available to proceed with her EUO, Nationwide did not take it and has never asked to proceed with her EUO since.⁹⁴

Following Mr. Singh's EUO Nationwide sought the following additional information: (a) receipts, (b) photos showing inventory items, (c) addresses of the two tool chests sellers, and (d) contact information for the three people Mr. Singh testified helped him move the tool chests: Mr. Timoti, Ray Arazete, and Michael Moore.⁹⁵

Regarding (a) and (b), the insureds informed Nationwide they had sent all responsive documents and photographs they had.⁹⁶ To address (c), at Nationwide's request, Mr. Singh traveled to the neighborhood where he recalled purchasing the two tool chests seven years earlier, but could not identify the addresses; the insureds conveyed that circumstance to

⁸⁷ Plaintiffs' Evidence, Exhibit C, pp.183:5 et seq., 185:11 et seq. 191:18-195:22.

⁸⁸ Plaintiffs' Evidence, Exhibit C, pp.195:23-

⁸⁹ Singh Decl. ¶11.

⁹⁰ Schaffer Declaration, ¶21; Singh Decl. ¶11; Plaintiffs Evidence, Exhibit C, p.201:17 et seq.

⁹¹ Plaintiffs' Evidence, Exhibit C, p.201:16.

⁹² Plaintiffs' Evidence, Exhibit C, p.201:22 et seq., 207:3-12; Schaffer Decl., ¶21.

⁹³ Schaffer Declaration, ¶22.

⁹⁴ Schaffer Declaration, ¶23.

⁹⁵ Schaffer Declaration, ¶24, Plaintiffs Evidence, Exhibit AA.

⁹⁶ Plaintiffs' Evidence, Exhibit BB.

1 Nationwide.⁹⁷ In response to request (d), the insureds relayed the following information: Mr.
 2 Timoti has no phone and wishes to be contacted via Facebook; Mr. Arazete is dead; the insureds
 3 were unable to reach Mr. Moore.⁹⁸ To assuage Nationwide's baseless concerns about
 4 interference with the witnesses, counsel for the insureds assured Nationwide he had no contacts
 5 with any witness and promised to have no contacts going forward.⁹⁹

6 After Nationwide denied the claim on September 1, 2022, counsel for the insureds wrote
 7 to inform Nationwide that on August 31, 2022, the Alameda Superior Court issued its order
 8 agreeing with the insureds' interpretation of the California EUO statute as relates to their right to
 9 videotape the entirety of the proceedings, all participants included.¹⁰⁰ Nationwide did not
 10 withdraw its denial.

11 SUMMARY JUDGMENT STANDARD

12 "Summary judgment is proper when the record shows that there is no genuine dispute as
 13 to any material fact and the movant is entitled to a judgment as a matter of law.... When the
 14 moving party bears the burden of proof on a claim or defense, it must produce evidence which
 15 would entitle it to a directed verdict if the evidence went uncontroverted at trial.... If the moving
 16 party satisfies its initial burden, the burden then shifts to the party opposing summary judgment
 17 to establish a genuine issue of material fact. ... All reasonable inferences from the evidence must
 18 be drawn in favor of the non-moving party...."¹⁰¹ "If the movant bears the burden of proof on an
 19 issue ... he must establish beyond peradventure *all* of the essential elements of the claim or
 20 defense to warrant judgment in his favor."¹⁰² "Because summary judgment is a drastic device
 21 cutting off a party's right to present its case to a jury, the moving party bears a heavy burden of
 22
 23

24 ⁹⁷ Plaintiffs' Evidence, Exhibits BB, DD.

25 ⁹⁸ Plaintiffs' Evidence, Exhibit BB, FF.

26 ⁹⁹ Plaintiffs' Evidence, Exhibit BB.

27 ¹⁰⁰ Plaintiffs' Evidence, Exhibit GG.

28 ¹⁰¹ *Amer. Nat. Prop. and Cas. Co. v. Stubbs*, 512 F.Supp.3d 1132, 1134–35 (D.Nev. 2021).

¹⁰² *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) (emphasis in original).

demonstrating the absence of any triable issue of material fact.¹⁰³

ARGUMENT

I. The Motion Fails because it Never Addresses an Essential Element of the Claim.

Nationwide is the moving party here; it also has the burden at trial both as to Mr. Singh's alleged breach of the EUO policy condition, and as to whether Mr. Singh's alleged failure of the EUO policy condition resulted in actual and substantial prejudice to the carrier.¹⁰⁴ To justify summary judgment, therefore, it must "establish beyond peradventure" *both* essential elements. But Nationwide's motion ignores the prejudice element entirely.¹⁰⁵ "The overriding purpose of the actual prejudice requirement is to prevent the complete forfeiture of coverage based upon an insured's harmless breach of a policy condition."¹⁰⁶ The prejudice requirement "represents a fundamental public policy of California, to prevent a windfall to the insurer."¹⁰⁷

In *Walker v. Fin. Indem. Co.*,¹⁰⁸ an insured showed up for his EUO, but unlike the insureds here, upon advice of his lawyer, refused to answer questions relating to his financial affairs in reliance on California's financial privacy privilege.¹⁰⁹ The insurer moved for summary judgment on identical grounds asserted here. The carrier argued it has no obligation to demonstrate substantial prejudice as a matter of law. *Walker* rejected that view, holding that under California law,¹¹⁰ carriers relying on an allegation of breach of the EUO policy condition

¹⁰³ *Avalos v. Baca*, 2006 WL 2294878, at *1 (C.D.Cal.,2006) (internal citations and quotation marks omitted).

¹⁰⁴ *Silicon Storage Technology, Inc. v. National Union Fire Insurance Co. of Pittsburgh*, 2015 WL 7293767, at *4 (N.D.Cal., 2015); *Silicon Valley Bank v. New Hampshire Ins. Co.*, 203 F.Supp.2d 1152, 1159 (C.D.Cal.,2002); *Brizuela v. CalFarm Ins. Co.*, 116 Cal.App.4th 578, 591 (2004); *Pitzer College v. Indian Harbor Ins. Co.*, 8 Cal.5th 93, 105 (2019).

¹⁰⁵ *See Nissani v. Jewelers Mutual Insurance Group*, 2022 WL 3013225, at *2 (C.D.Cal., 2022) (court cannot grant summary judgment if carrier presents no evidence on the prejudice issue). Nationwide will try to cure the omission in its reply; the Court should reject that effort. *t'Bear v. Forman*, 359 F.Supp.3d 882, 909 (N.D.Cal., 2019).

¹⁰⁶ *Silicon Valley Bank v. New Hampshire Ins. Co.*, 203 F.Supp.2d at 1159.

¹⁰⁷ *Pitzer College*, 8 Cal.5th at 104-105.

¹⁰⁸ *Walker v. Fin. Indem. Co.*, 2015 WL 3542693 (N.D. Cal. June 5, 2015).

¹⁰⁹ *Id.* at *1.

¹¹⁰ *Id.* at *2, citing Ins. Code §2071.1(a)(6).

are relieved of their obligation to prove *substantial prejudice* only when an insured “fails to sit for an examination at oath *at all*.”¹¹¹ Quoting another opinion from this district, the *Walker* court articulated the rule: “[i]n contrast to the refusal to submit to an examination, which is necessarily prejudicial to the insurer, refusal to cooperate as to particular matters during that examination may be significant or may be trivial, therefore requiring the insurer to show that it has been prejudiced.”¹¹²

Unlike in *Walker*, where the carrier affirmatively (although incorrectly) argued that it had no obligation to show substantial prejudice as a matter of law, but also *addressed* the issue of prejudice, here Nationwide is simply silent on the point. It neither cites nor discusses *Walker* or *Ram*. It points to no evidence that would entitle it to a verdict on the issue of actual and substantial prejudice. The closest Nationwide comes is the assertion that its inability to obtain information by way of an EUO is “prejudicial absent extraordinary circumstances.”¹¹³ But in that case the insured refused to attend the EUO; the case is entirely consistent with *Walker* and *Ram*,¹¹⁴ which hold that absent a refusal to appear the carrier must demonstrate actual and substantial prejudice. Nationwide never attempts to meet its burden here; its motion fails.

II. There are Triable Disputes on the Issue of Actual and Substantial Prejudice.¹¹⁵

Even if Nationwide *had* made a substantial prejudice argument here, its motion would fail. The *Walker* case, which also involved fraud allegations, is on point. By the time of that EUO the carrier had conducted a long investigation. As the court noted, “While more information might have helped further confirm (or allay) FIC’s suspicions, only a jury can decide whether FIC was ‘substantially prejudiced’ by Walker’s refusal to provide this additional

¹¹¹ *Ibid.*

¹¹² *Ibid*, quoting *Ram v. Infinity Select Ins.*, 807 F.Supp.2d 843, 859 (N.D.Cal.2011).

¹¹³ Nationwide Motion, p.10:21-22, quoting *Brizuela*, 116 Cal. App.4th 578, 592 (2004).

¹¹⁴ 116 Cal.App.4th at 590 (to justify a denial, insurer must demonstrate substantial prejudice unless insured refuses to attend EUO).

¹¹⁵ Mr. Singh and Ms. Kumar have separately moved for partial summary judgment as to Nationwide’s “non-cooperation” and EUO defenses (Affirmative Defenses 19, 22, 23). But at a minimum, there are triable disputes which preclude summary judgment in Nationwide’s favor on those defenses, which is the tenor of its motion.

1 information. A reasonable jury could conclude that FIC already had all of the information it
 2 needed to adjust Walker's claim at the time it requested his EUO.”¹¹⁶

3 The same is true here, but to see that clearly, it is necessary to identify the four specific
 4 sources of Nationwide’s concern articulated in its motion:

5 (a) the request for Mr. Timoti’s contact information;¹¹⁷

6 (b) a question relating to the amount Mr. Singh paid for a tool chest;¹¹⁸

7 (c) this question (call it the “Readers Digest” question), as to which Mr. Singh
 8 interposed valid objections on vagueness and misstated evidence grounds: “Q. Mr. Singh, I
 9 understand that -- I've read the file. There is a huge file that's been produced to me several times
 10 by your lawyer. And I have seen a lot of photos of your house, and I got a general understanding
 11 of what occurred. And I'm going to give you a Reader's Digest version, and you tell me if it is
 12 accurate. There was a fire that occurred while you and your family were away in your very large
 13 garage. I think it was 1,200-square-foot garage was utterly destroyed by the fire, and your home
 14 suffered some other damage, a little bit of fire damage and a lot of smoke damage. Is that a fair
 15 summary?”;¹¹⁹ and

16 (d) a question to Mr. Singh about when he was laid off after the COVID-19 shutdowns.¹²⁰

17 As compared to *Walker*, as Mr. Singh has elsewhere argued, Nationwide loses as a matter
 18 of law on the actual and substantial evidence element; at a minimum, there are myriad triable
 19 disputes on the issue, to wit:

20 By the time of the 2022 EUO, Nationwide had spent nearly two years in its fraud
 21 investigation. It had obtained (from its credit and financial stress investigations, as well as from
 22 the family in multiple recorded interviews) detailed and highly specific financial information. It
 23 could have obtained essentially any other financial information it wanted, because it had illegally
 24

25 ¹¹⁶ *Walker*, 2015 WL 3542693, *2.

26 ¹¹⁷ Nationwide Motion, pp.5:2 et seq; 12:8 et seq.

27 ¹¹⁸ Nationwide Motion, pp.7:4 et seq; 12:11 et seq.

28 ¹¹⁹ Nationwide Motion, p.8:6-15; *see* Plaintiffs’ Evidence, Exhibit B, p.73:2-14.

¹²⁰ Nationwide Motion, p.8:16-25.

1 conditioned payment of policy benefits on the insureds financial information releases. The
 2 insureds had provided thousands of pages of documents at Nationwide's request, including
 3 photographs. It had inspected the property three times and had otherwise unfettered access to the
 4 house. It had conducted hours of recorded interviews in which, particularly in September 2020, it
 5 focused on the contents inventory that was likewise the focus of Mr. Singh's June 2022 EUOs.
 6 Before the June 2022 EUO, Mr. Singh sent the 888-page pdf of photographs; in the EUO he
 7 delivered the annotated inventory.

8 Now to the claims of breach Nationwide points to and relies on in its dispositive motion:

9 As for (a), even if there had been a simple refusal to assist Nationwide as relates to
 10 contacting Mr. Timoti, which there was not, the carrier would still be unable to show actual and
 11 substantial prejudice as a matter of law. First, it is a fair inference Nationwide has substantial
 12 resources to root out fraud in its claims. Given those resources, and the fact that the witness
 13 Nationwide solely focuses on here—Timoti Timoti—has what by all standards is a unique name,
 14 Nationwide could easily have avoided any prejudice simply by finding and reaching out to Mr.
 15 Timoti itself. Second, given the tenor of Mr. Timoti's eventual message for Nationwide—more
 16 or less, *leave me alone*—Nationwide cannot demonstrate actual and substantial prejudice from
 17 anything that occurred at the EUO because the Court can infer that had Mr. Singh provided more
 18 information, it would have resulted in the same dead-end Nationwide found itself in after the
 19 EUO. Third, Nationwide, which has the burden here, has no evidence that even if Mr. Timoti
 20 agreed to be interviewed, he would have had information of any investigatory value, let alone
 21 information to support Nationwide's fraud theory. Finally, Mr. Singh *did* give Nationwide
 22 information regarding how to contact the witness, which was his only obligation *under*
 23 *Nationwide's own theory*.

24 (b) The price paid for one tool chest: contrary to the tenor of Nationwide's motion, Mr.
 25 Singh answered this question before there was any colloquy between counsel. But even if he had
 26 refused to answer it, no actual and substantial prejudice would have resulted. First, in the
 27 recorded statement, Mr. Singh told Nationwide how much he had paid for both tool chests listed
 28

1 on the inventory.¹²¹ Nationwide had no need to ask the question again. Second, the price he paid
 2 has no bearing on the investigation because Mr. Singh's policy is a *replacement cost* policy, as
 3 Nationwide itself told the insureds, the relevant information is the replacement cost, not the price
 4 they paid. Third, Nationwide had photographic evidence that the insureds had many of the items
 5 on the inventory,¹²² *including a tool chest the carrier has been so focused on for years.*¹²³

6 (c) The "Readers Digest" question: Mr. Singh never refused to answer the question; the
 7 objections were correct. Counsel could have asked the question again after the objections but
 8 chose not to do so. But anyway, there could have been no actual and substantial prejudice
 9 because Nationwide had already fully investigated the fire loss, determined it was caused by
 10 fireworks, and completed its investigation of the scope of damage and cost to repair. Mr. Singh's
 11 opinion regarding the scope of damage could have had no bearing on Nationwide's investigation.

12 (d) The question regarding the timing of Mr. Singh's layoff: Mr. Singh never refused to
 13 answer. He provided the information. Also, he had answered the same question in July 2020 and
 14 again in September 2020.¹²⁴ Nationwide cannot demonstrate actual and substantial prejudice.

15 **III. There are Triable Disputes as to whether Mr. Singh Breached the EUO Condition.**

16 To prevail here, also, Nationwide would have to establish as a matter of law a second
 17 essential element, namely, that Mr. Singh failed to answer material questions at the EUO. The
 18 *Walker* court described the issue this way: "An insured must typically answer *material* questions
 19 posed at an examination under oath or else forfeit the right to receive any benefits under the
 20 policy.... Information is *material* if it relates to matters reasonably relevant to [the insurer's]
 21 investigation of [the] claim and determination of its obligations under the policy.... Materiality is
 22 generally a mixed question of law and fact; however, it may be decided as a matter of law if
 23 reasonable minds could not differ as to the materiality of the [information requested]."¹²⁵

24 ¹²¹ Schaffer Decl., ¶8, Plaintiffs' Evidence, Exhibit L, pp.52-54

25 ¹²² Plaintiffs Evidence, Exhibit Z ("Items Appear in Photographs NW had Before the EUO,"
 26 listing photographs where inventory items can be seen).

26 ¹²³ Plaintiffs Evidence, Exhibit Z, p.3, line 30.

27 ¹²⁴ Kumar Decl., ¶31.

28 ¹²⁵ *Walker*, 2015 WL 3542693 at *1 (emphases in original; quotation marks omitted).

1 In *Walker* the insured had facts to support his argument that he had no financial motive to
 2 commit fraud; on the other hand, the carrier deemed questions relating to the insured's financial
 3 condition necessary because it had evidence of fraud.¹²⁶ As Judge Chen put the matter,
 4 "Ultimately, the fact finder will be asked to weigh this competing evidence to determine whether
 5 FIC needed the requested financial information in order to investigate Walker's claim and
 6 determine its obligations under the policy."¹²⁷

7 Here none of the questions asked were material; at a minimum there are triable disputes:

8 (a) The Timoti contact information: Nationwide agreed in September 2020 to submit
 9 written requests for contact information, but never did.¹²⁸ At the EUO, there was a justified
 10 privacy objection and Mr. Singh made reasonable accommodations which the EUO record
 11 reflects Nationwide *accepted*.¹²⁹ After the June 2022 EUO, the insureds contacted Mr. Timoti
 12 and relayed his request to be contacted by way of Facebook. A jury could easily conclude Mr.
 13 Singh reasonably asserted the privacy objection, that Nationwide agreed to rely on Mr. Singh to
 14 approach Mr. Timoti, and that Mr. Singh did what he could to assist.

15 (b) The amount Mr. Singh paid for a tool chest: Mr. Singh answered the question in the
 16 recorded statement and answered the question again at the June 2022 EUO.¹³⁰ There was no
 17 failure to respond. Relatedly, a jury could conclude the question was not material because he had
 18 previously answered the question, the price he paid has no bearing on the issue of indemnity
 19 under the replacement policy, and Nationwide had photographs showing many of the items on
 20 the inventory,¹³¹ *including a tool chest the carrier has been so focused on for years*.¹³²

21 (c) The "Reader's Digest" question: Mr. Singh interposed valid objections. Nationwide
 22

23 ¹²⁶ *Ibid.*

24 ¹²⁷ *Ibid.*

25 ¹²⁸ Kumar Decl., ¶30, Schaffer Decl., ¶8, Plaintiffs' Evidence, Exhibit L, p.32.

26 ¹²⁹ Plaintiffs' Evidence, Exhibit B, p.164:17-19.

27 ¹³⁰ Plaintiffs Evidence, Exhibit C, p.201:12-13; Plaintiffs Evidence, Exhibit L, pp.53-54.

28 ¹³¹ Plaintiffs Evidence, Exhibit Z, column on each page captioned "Items Appear in Photographs NW had Before the EUO," listing photographs where inventory items can be seen.

¹³² Plaintiffs Evidence, Exhibit Z, p.3, line 30.

effectively withdrew the question. Even if Mr. Singh had refused to respond, which he never did, a jury could reasonably conclude his answer regarding the scope of the damage was not material to Nationwide’s investigation, which had long since concluded the fire was an accident and completed its own investigation (albeit flawed) of the scope of damage and cost of repairs.

(d) The question about when Mr. Singh was laid off Mr. Singh answered the question. Also, Nationwide has no materiality argument because the insureds gave Nationwide this information in July and September 2020.

IV. Nationwide’s Serial Breach of the Policy Before the June 2022 EUO Precludes its Reliance here on any Alleged Violation of the EUO Policy Condition.

Nationwide’s summary judgment motion depends on the view that the obligations of the parties to its policy are *dependent*. For example, the carrier asserts Mr. Singh’s breach of the “requirement to cooperate ... bars [his] claim for breach of the insurance contract.”¹³³ Specifically, Nationwide’s view is that it has no obligation to pay benefits to either insured because Mr. Singh failed to satisfy a *dependent* condition in the contract, which condition provides, “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: ... Submit to examination under oath by our representatives”¹³⁴

But the *dependent condition rule* goes both ways. Just as Nationwide can insist that a failure of the EUO condition may relieve it of its duty of coverage under the policy, if the carrier *breached the policy prior to the June 2022 EUO*, that would likewise excuse the insureds from dependent policy conditions, *including the EUO condition*.¹³⁵ The California Supreme Court has contemplated precisely that circumstance.¹³⁶ Nationwide’s serial breaches, prior to any alleged

¹³³ Nationwide Motion, p.1:10-15.

¹³⁴ Lathrum Decl., Exhibit A, pp.23-24.

¹³⁵ *Cnty. of Solano v. Vallejo Redevelopment Agency*, 75 Cal.App.4th 1262, 1276 (1999) (breach excused party from fulfilling conditions under contract, whether precedent or concurrent); *Colaco v. Cavotec SA*, 25 Cal.App.5th 1172, 1182–83 (2018) (same); *Central Valley General Hospital v. Smith*, 162 Cal.App.4th 501, 514 (2008) (same).

¹³⁶ *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 578 (1973) (“plaintiff’s failure to appear [at EUO] was induced by defendants’ conduct, in breach of their duty of good faith and fair dealing.

violation of the EUO condition by Mr. Singh, preclude summary judgment in the carrier's favor.

A. Nationwide Illegally Conditioned Payment on Financial Releases.

California law gives its citizens a broad right of financial privacy; even in litigation parties must make a strong showing of the need for such materials before they can obtain access.¹³⁷ The insurance policy nowhere obligated Mr. Singh to give Nationwide access to his family's private financial information. Relatedly the law obligates carriers to tell their insureds tax returns are privileged.¹³⁸ At the start of the claim, Dalton misrepresented the policy and the law, and thus breached the contract and violated the law,¹³⁹ telling the insureds payment of benefits was conditioned on their providing a release permitting Nationwide unfettered access to their private financial information, and providing no warning regarding tax returns. The insurer's pre-June 2020 breach bars Nationwide's reliance on the EUO condition precedent here.

B. Nationwide Illegally Conditioned Coverage on Violations of Mr. Singh's Rights Under Ins. Code §2071.1(a)(4).

As Ms. Kumar asserts in her Opposition to Nationwide's Motion for Summary Judgment, which Mr. Singh joins and incorporates here by reference, Nationwide breached the policy:

- in February 2021 when it refused to proceed with the EUO's unless Mr. Singh sacrificed his right to record the entirety of the EUO proceedings pursuant to Ins. Code §2071.1(a)(4);
- in April 2021 when it denied the claim on the basis of Mr. Singh's refusal to participate in the EUO *because* Nationwide had refused to go forward if he exercised his right under §2071.1(a)(4);
- in January 2022 when it conditioned reopening the file on Mr. Singh's agreement to take part in an EUO without asserting his right under Ins. Code §2071.1(a)(4);

Therefore, plaintiff's obligation to appear may be seen as excused by defendants' alleged breach.")

¹³⁷ Cal. Const., art. I, §1; *Sacramento County Employees' Retirement System v. Superior Court*, 195 Cal.App.4th 440, 468 (2011).

¹³⁸ Ins. Code §2071.

¹³⁹ Ins. Code §790.03(h)(1) (unlawful to misrepresent facts or policy provisions).

- in January 2022 when it conditioned payment of additional living expenses on Mr. Singh's agreement to take part in an EUO without asserting his right under Ins. Code §2071.1(a)(4); and
- in June of 2022 when it conditioned going forward with Mr. Singh's EUO on his agreeing to take part in an EUO without asserting his right under Ins. Code §2071.1(a)(4).

Nationwide's repeated breach bars its reliance here on any alleged breach of the EUO policy condition by Mr. Singh.

C. Nationwide Breached the Policy by Refusing to Appraise.

Under the insureds policy, either side can demand appraisal of the amount of the loss.¹⁴⁰ There was a dispute between the parties as of February 2021 as to the value of the loss, the only policy condition precedent to an appraisal demand. The insureds made such a demand in February 2021. Nationwide had 20 days to name its appraiser. It never named its appraiser and otherwise refused to participate. That breach, many months before the June 2022 EUO, bars Nationwide from relying on the EUO policy condition here.

D. Nationwide Twice Breached the Policy by Failing to Provide Additional Insureds the Right to Make Claims for Repairs.

Nationwide denied the claim in April 2021. The policy says this: "If we deny your claim, that denial will not apply to a valid claim of the mortgagee, if the mortgagee: ... c. Submits a signed, sworn statement of loss within 60 days *after receiving notice from us of your failure to do so.*"¹⁴¹ The policy also provides: "The insurance under this policy ... as to the interest only of the Lender ... shall not be invalidated nor suspended: ... by any ... act, omission, neglect, or non-compliance with any of the provisions of this policy ... by the named insured"¹⁴² Nationwide breached the policy by failing to provide notice to the lenders following the April

¹⁴⁰ *Lee v. California Capital Ins. Co.*, 237 Cal.App.4th 1154, 1165–1166 (2015) (appraisal mandatory); *Doan v. State Farm General Ins. Co.*, 195 Cal.App.4th 1082, 1093 (2011) (same).

¹⁴¹ Lathrum Decl., p.27 of 42.

¹⁴² Lathrum Decl., p.1 of 2 (Lender Loss Payment provision).

2021 and September 2022 denial.¹⁴³ The first breach bars Nationwide from relying on its EUO policy condition here.

Mr. Singh has standing to assert the claim. He was a contractee. He had an insurable interest in the property, as well as in the loss of use of the property. He stood to benefit from the separate rights afforded to lenders—had Nationwide not breached, his home would have been repaired, his family could have returned to the home (thus avoiding incurring additional living expenses), and his equitable interest in the home would have been preserved. Also, even if not a party Mr. Singh can sue as intended third-party beneficiary of the rights afforded to the lender under the Policy.¹⁴⁴ The breach precludes Nationwide’s reliance on the EUO condition here.

E. Nationwide Breached the Policy by Failing and Affirmatively Refusing to Pay Incurred Additional Living Expense Benefits.

When it reopened the claim in January 2022, Nationwide promised to restart payment of benefits under the policy’s additional living expense (ALE) coverage.¹⁴⁵ The importance of timely payment of such benefits can hardly be overstated: while insureds wait for repairs to be completed, they typically face rent *and* mortgage payments while they await repairs, along with other costs such as increased mileage and utilities. Unlike payment by the insurer for repair benefits and destroyed contents, the ALE coverage contemplates payment *as incurred*. It affords ongoing payments “*so that your household can maintain its normal standard of living*” In May 2022 Mr. Singh and Mr. Kumar submitted proof of more than \$10,000 in expenses; Nationwide paid nothing. Nationwide later told the insureds it would refuse to pay any benefits until after the June 2022 EUO, in abject breach of the policy. It never paid a dime. The carrier was entitled to pay proven ALE benefits *under a reservation*, but it was not entitled to simply refuse to pay. Its breach precludes Nationwide’s reliance on the EUO policy condition here.

V. Nationwide’s Motion as to Other Claims is Dependent on its “EUO Condition”

¹⁴³ Schaffer Decl., §33; Kumar Decl., §29.

¹⁴⁴ California Civil Code §1559; *Levy v. Only Cremations for Pets, Inc.*, 57 Cal.App.5th 203, 211 (2020); *Harper v. Wausau Ins. Co.*, 56 Cal.App.4th 1079, 1086-1087 (1997); *Northwestern Mut. Ins. Co. v. Farmers’ Ins. Group*, 76 Cal.App.3d 1031, 1042, 1044 (1978).

¹⁴⁵ Lathrum Decl., Exhibit A, p.10 of 42 (“we cover any necessary increase in living expenses incurred by you *so that your household can maintain its normal standard of living.*”)

Argument and is thus Unavailing.

Throughout its motion, and in its Argument, Section D, Nationwide asserts that as it is entitled to summary judgment on the issue of *coverage*, all other claims by Mr. Singh fail.¹⁴⁶ As Nationwide has failed on various grounds to establish a lack of coverage as a matter of law, its attendant arguments are likewise unavailing.

CONCLUSION

For the reasons set forth, the Court should deny Nationwide's Motion for Summary Judgment as to Mr. Singh.

Date: May 1, 2023

/S/ Dylan L. Schaffer
Dylan Schaffer
Kerley Schaffer LLP

¹⁴⁶ Nationwide Motion, pp.13:3-10; 14:26 et seq.