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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

BOTTEGA, LLC; UNA MARCA, LLC dba
OTTIMO; GRUPPO CHIARELLO, INC.; and
SOLO I O, LLC,

Plaintiffs,

v.

NATIONAL SURETY CORPORATION;
ALLIANZ GLOBAL CORPORATE &
SPECIALTY; and DOES 1 through 50,
inclusive,

Defendants.

Case No. 3:21-cv-03614-JSC

Complaint Filed: 4/6/2021

Trial Date: 9/8/2025

Hon. Jacqueline Scott Corley [Crtm. 8 - 19th
Floor]

**PLAINTIFFS’ MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF THEIR MOTION FOR
PARTIAL SUMMARY JUDGMENT RE:
COVERAGE**

*[Filed concurrently with Plaintiffs’ Notice;
Plaintiffs’ Compendium of Evidence; Request
for Judicial Notice; Declarations of Lindsey
Downey, Esq., Michael Rubin and David
O’Malley; and [PROPOSED] Order]*

Hearing date: December 19, 2024

Time: 10:00 a.m.

Dept.: 8 - 19th Floor

Plaintiffs BOTTEGA, LLC; UNA MARCA, LLC dba OTTIMO; GRUPPO CHIARELLO, INC.;
and SOLO I O, LLC (collectively “Plaintiffs”) hereby submit the following Memorandum of Points and
Authorities, in support of their motion for partial summary judgment:

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	Page(s)
I. INTRODUCTION	4
II. STATEMENT OF UNCONTROVERTED FACTS	5
A. Plaintiffs’ Business Operations/Income and Relationships Amongst the Plaintiff Entities ..	5
B. The Loss: October 2017 North Bay Fires	6
C. The Policy	7
D. Smoke, Soot and Ash Damage to the Insured Property Caused Plaintiffs to Cease Operations and Plaintiffs’ Mitigation Efforts	11
E. Defendants’ Denial of Coverage Under the Business Income Provision of the Policy	13
III. LEGAL STANDARDS	14
A. Summary Judgment Standard	14
B. Interpretation of Insurance Contracts Under California State Law	15
IV. LEGAL ARGUMENT	16
A. The Business Income and Civil Authority Coverage Provisions Under the Policy Are Not Mutually Exclusive	16
B. Plaintiffs Are Eligible For Both Civil Authority Coverage And Business Income Coverage Under The Policy As The Requirements Under Both Provisions Have Been Triggered	18
<i>i. Civil Authority Coverage Eligibility Requirements</i>	<i>18</i>
<i>ii. Business Income Coverage Eligibility Requirements</i>	<i>19</i>
<i>iii. Defendants’ Denial and Rational for Denying the Business Interruption Claim are without Merit.....</i>	<i>20</i>
<i>iv. Plaintiffs’ Mitigation of Damages</i>	<i>23</i>
V. CONCLUSION.....	26

TABLE OF AUTHORITIES

Page(s)

Cases

1

2

3

4 *AIU Ins. Co. v. Sup. Ct.*, 51 Cal.3d 807 (1990)..... 15, 16

5 *American Medical Imaging v. St. Paul & Marine*, 949 F.2d 690 (3d Cir. 1991) 19

6 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 742 (1986)..... 15

7 *Bank of the West v. Sup.Ct.* 2 Cal.4th 1254 (1992)..... 15

8 *Bank of the West v. Superior Court*, 2 Cal.4th 1254 (Cal. 1992)..... 15

9 *Buxbaum, et al. v. Aetna Life & Casualty Co.*, 103 Cal.App.4th 434 (2002)..... 19

10 *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) 14

11 *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384 (2d Cir. 2005)..... 23, 24

12 *Home Indem. Co. v. Hyplains Beef, L.C.*, 893 F.Supp. 987 (D.Kan. 1995) 19

13 *Jordan v. Allstate Ins. Co.*, 116 Cal.App.4th 1206 (2004) 15

14 *Keetch v. Mutual of Enumclaw Ins. Co.*, 66 Wash.App. 208 (1992)..... 19

15 *La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.*, 9 Cal.4th 27 (Cal. 1995)..... 15

16 *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)..... 14

17 *Minkler v. Safeco Ins. Co. of America*, 49 Cal.4th 315 (2010)..... 16

18 *Quality Oilfield Pro., Inc. v. Michigan Mut. Ins.*, 971 S.W.2d 635 (Tex.Ct.App. 1998) 19

19 *Silicon Valley Bank v. New Hampshire Ins. Co.*, 203 F.Supp.2d 1152 (C.D. Cal. 2002)..... 15

20 *The Villa Los Alamos Homeowners Assn. v. State Farm General Ins. Co.*, 198 Cal.App.4th 522 (2011)16

21 *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal.4th 1, 18 (Cal. 1995)..... 15

22

23 **Statutes**

24 Cal. Civ. Code §§ 1636-1639 15

25 Civ. Civ. Code § 1641..... 15

26 Fed. R. Civ. P. 56(a) 14

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This is an action for breach of a first-party business insurance policy that was in force and effect
4 in October 2017 when multiple wildfires wreaked havoc in Napa County where Plaintiffs’ businesses and
5 insured premises were located. Plaintiffs asserted causes of action for breach of contract and breach of the
6 implied covenant of good faith and fair dealing against Defendants resulting from their denial of Plaintiffs’
7 business income claim brought under the Policy’s business income coverage provisions and Defendants’
8 underpayment of Plaintiffs’ claim for property damage to their business personal property and tenant
9 improvements and betterments.
10

11 Through this motion, Plaintiffs seek partial summary judgment solely on the issue of insurance
12 coverage for their business income claim because the undisputed facts demonstrate that:
13

- 14 1. Plaintiffs have satisfied the required elements to trigger business income coverage because:
- 15 a. The Insured Property sustained direct physical damage as a result of the 2017
16 North Bay Fires;
 - 17 b. The direct physical damage the Insured Property sustained caused Plaintiffs to
18 completely cease business operations on multiple dates in October 2017; and
 - 19 c. Plaintiffs suffered business income losses beginning in October 2017 and
20 continuing for an extended period of time thereafter during the “period of
21 restoration” as defined in the Policy.
- 22
- 23 2. Defendants’ denial of Plaintiffs’ claim under the business income coverage provisions of
24 the Policy are factually and legally erroneous.

25 Issues regarding (1) the amount of business income damages, (2) the amount of property damages
26 required to fully repair Plaintiffs’ business personal property and tenants improvements and betterments,
27
28

1 and (3) whether Defendants breached the implied covenant of good faith and fair dealing - all involve
2 questions of fact that should be resolved by the jury and are therefore not at issue in this motion.

3 **II. STATEMENT OF UNCONTROVERTED FACTS**

4 **A. Plaintiffs' Business Operations/Income and Relationships Amongst the Plaintiff**
5 **Entities**

6 In October 2017, Plaintiffs were operating several business out of a commercial property located
7 at 6525 Washington Street, Yountville, California, comprised of multiple buildings and suites generally
8 situated at said location (hereinafter "Insured Property"). (Plaintiffs' Compendium of Evidence ("Pltf
9 Comp."), Exhibit ("EXH") 13 at 38:10-21; O'Malley Decl. at ¶ 4; Downey Decl. at ¶¶ 7-8; Rubin Decl.
10 at ¶ 5; Pltf Comp. EXH 2 at 2-15 – 2-16; Pltf. Comp. EXH 14 at 31:19-24, 32:3-5, 32:10-12, 32:23-33:3,
11 33:18-20.) These business included BOTTEGA, LLC, UNA MARCA, LLC dba OTTIMO GRUPPO
12 CHIARELLO, INC., and SOLO I O, LLC (hereinafter collectively "Plaintiffs" or "Plaintiffs'
13 Businesses"). (Pltf Comp. EXH 13 at 38:10-21; Downey Decl. at ¶¶ 7-8; O'Malley Decl. at ¶ 4; Rubin
14 Decl. at ¶ 5; Pltf Comp., EXH 2 at 2-15 – 2-16; Pltf. Comp. EXH 14 at 31:19-24, 32:3-5, 32:10-12, 32:23-
15 33:3, 33:18-20.).

17 Plaintiffs BOTTEGA, LLC (hereinafter "Bottega") and UNA MARCA, LLC dba OTTIMO
18 (hereinafter "Ottimo") are restaurants that operate out of and serve customers at the Insured Property (i.e.
19 customers dine at these restaurant locations). (Pltf Comp. EXH 14 at 31:19-24, 32:3-5; Pltf Comp. EXH
20 13 at 22:4-12; Downey Decl. at ¶¶ 7-8; O'Malley Decl. at ¶ 5.) Thus, the amount of business income
21 generated by Bottega and Ottimo is directly linked to their ability to operate as restaurants and have their
22 doors open to serve customers. (O'Malley Decl. at ¶ 5.)

24 Plaintiff GRUPPO CHIARELLO, INC. (hereinafter "Gruppo Chiarello") is the management
25 company for Bottega and Ottimo. (Pltf Comp. EXH 13 at 26:3-28:1; O'Malley Decl. at ¶ 6; Downey Decl.
26 at ¶¶ 7-8; Pltf Comp. EXH 14 at 33:18-20, 34:16-22.) Gruppo Chiarello's business income included a five
27

1 (5) percent management fee from the sales of Bottega and Ottimo. (Downey Decl. at ¶¶ 7-8; Pltf Comp.
 2 EXH 14 at 35:4-6, 35:11-12, 35:14-36:8; Pltf Comp. EXH 13 at 26:3-28:1; O’Malley Decl. at ¶ 6.) Thus,
 3 Gruppo Chiarello’s business income is directly linked to Bottega and Ottimo’s ability to operate as
 4 restaurants and have their doors open to serve customers. (Downey Decl. at ¶¶ 7-8; Pltf Comp. EXH 14
 5 at 35:4-6, 35:11-12, 35:14-36:8; Pltf Comp. EXH 13 at 26:3-28:1; O’Malley Decl. at ¶ 6.)
 6

7 Plaintiff SOLO I O, LLC (hereinafter “Solo IO”) is a holding company that receives discretionary
 8 distributions from Bottega. (Downey Decl. at ¶¶ 7-8; Pltf Comp. EXH 14 at 36:12-13, 36:22-23; Pltf
 9 Comp. EXH 13 at 26:3-28:1; O’Malley Decl. at ¶ 7.) Solo IO’s business income is generated from
 10 discretionary distributions from Bottega, after salaries and other expenses of Bottega have been paid.
 11 (Downey Decl. at ¶ 7; Pltf Comp. EXH 13 at 26:3-28:1; O’Malley Decl. at ¶ 7.) Thus, Solo IO’s business
 12 income is directly linked to Bottega’s ability to operate as a restaurant and have its doors open to serve
 13 customers. (Id.)
 14

15 Bottega and Ottimo are the income producing entities, and Gruppo Chiarello and Solo IO are the
 16 passive income earners, all of which rely on Bottega and/or Ottimo’s ability to generate business income
 17 through their restaurant operations and ability to serve customers. (Pltf Comp. EXH 13 at 26:3-28:1;
 18 O’Malley Decl. at ¶ 8.)

19 **B. The Loss: October 2017 North Bay Fires**

20 In October 2017 a series of wildfires affected the North Bay area (hereinafter the “North Bay
 21 Fires”), resulting in a proclamation of a State of Emergency on October 9, 2017 for the Napa, Sonoma
 22 and Yuba Counties by Governor Edmund G. Brown, Jr. (Plaintiffs’ Judicial Notice; Pltf Comp. EXH 16.)
 23 The North Bay Fires (1) caused smoke, soot, and/or ash damage to the Insured Property, (2) caused direct
 24 physical loss of the Insured Property, and (3) caused direct physical damage to the Insured Property.¹
 25
 26

27 ¹ (Downey Decl. at ¶¶ 4, 7-8; Pltf Comp. EXH 8 at RFA Nos. 1-3; O’Malley Decl. at ¶¶ 9, 12, 15, 16, 18-
 28

1 Plaintiffs had to completely cease business operations on multiple dates because of the direct physical
 2 damage to the Insured Property caused by the smoke, soot and/or ash that resulted from the North Bay
 3 Fires. (Pltf Comp. EXH 13 at 37:3-25, 39:18-40:6, 75:21-76:5, 80:20-81:11; O'Malley Decl. at ¶¶ 9-11;
 4 Pltf Comp. EXH 11 at 11-20, 11-21, 11-34, 11-35; Pltf Comp. EXH 12 at EXH 12 at 12-17, 12-18, 12-21
 5 – 12-34; Rubin Decl. at ¶ 6; Pltf Comp. EXH 3; Downey Decl. at ¶¶ 4, 7; Pltf Comp. EXH 8 at RFA Nos.
 6 1-3.) As a direct result of the physical loss and damage to the Insured Property caused by the North Bay
 7 Fires, Plaintiffs experienced business income losses beginning in October 2017 and continuing for an
 8 extended period of time thereafter.²

10 C. The Policy

11 At the time of the North Bay Fires, Plaintiffs' Businesses and the Insured Property were insured
 12 by Defendants under a commercial insurance policy that had been marketed, procured, underwritten, sold,
 13 and issued by Defendants, Policy No. S17MZX80978056 (hereinafter the "Policy"). (Pltf Comp. EXH 2;
 14 Rubin Decl. at ¶ 5.) "Smoke causing sudden and accidental loss or damage" is a covered cause of loss
 15 under the Policy. (Pltf Comp. EXH 2 at 2-70; Rubin Decl. at ¶ 5.) The Policy further states in pertinent
 16 part as follows:
 17

18
 19
 20 20; Rubin Decl. at ¶ 13; Pltf Comp. EXH 13 at 37:3-25, 39:18-40:6, 46:24-47:7, 49:18-20, 51:25-52:3,
 21 53:6-9, 53:16-20, 54:11-55:22, 56:24-57:14, 58:12-25, 59:9-20, 62:2-5, 63:9-16, 72:13-18, 72:21-23,
 22 73:9-15, 74:8-16, 74:23-75:4, 75:21-76:5, 78:11-16, 79:7-22, 80:2-6, 80:20-81:11, 83:4-17, 85:14-86:12,
 23 91:8-92:9, 92:22-93:4, 96:19-97:10, 131:2-9, 131:18-132:2, 134:25-165:7, 134:25-135:20, 183:5-185:3;
 24 Pltf Comp. EXH 14 at 49:11-24, 56:11-13, 56:23-57:25, 58:6-8, 58:24-59:2, 60:4-21, 62:18-63:10, 63:16-
 64:15, 65:5-66:10, 67:5-15, 67:24-68:18, 68:24-69:8, 69:19-70:3, 70:7-20, 71:19-72:21, 72:23-73:4,
 73:14-19, 74:3-7, 75:18-21, 76:3-5, 76:9-14, 79:16-80:10, 80:25-81:9, 87:12-88:10, 96:15-24, 97:6-8,
 112:12-15, 118:19-23, 122:14-22, 123:7-14, 123:19-124:1.

25 ² O'Malley Decl. at ¶¶ 9-11, 20, 21; Pltf Comp. EXH 11 at 11-20, 11-21, 11-34, 11-35; Pltf Comp. EXH
 26 12 at 12-17, 12-18, 12-21 – 12-34; Downey Decl. at ¶ 7; Pltf Comp. EXH 13 at 37:3-25, 39:18-40:6,
 27 46:24-47:7, 49:18-20, 51:25-52:3, 53:6-9, 53:16-20, 54:11-55:22, 56:24-57:14, 58:12-25, 59:9-20, 62:2-
 28 5, 63:9-16, 72:13-18, 72:21-23, 73:9-15, 74:8-16, 74:23-75:4, 75:21-76:5, 78:11-16, 79:7-22, 80:2-6,
 80:20-81:11, 83:4-17, 85:14-86:12, 91:8-92:9, 92:22-93:4, 96:19-97:10, 131:2-9, 131:18-132:2, 134:25-
 165:7, 134:25-135:20, 183:5-185:3.

1 **“A. Coverage**

2 [. . .]

3 We will pay for the actual loss of Business Income you sustain due to the
4 necessary suspension of your operations during the period of restoration.
5 The suspension must be caused by direct physical loss of or damage to
6 property at the premises described in the Declarations, including personal
7 property in the open (or in a vehicle) within 100 feet, caused by or resulting
8 from any Covered Cause of Loss.

9 1. **Business Income**

10 Business Income means the:

- 11 a. Net Income (Net Profit or Loss before income taxes) that would
- 12 have been earned or incurred; and
- 13 b. Continuing normal operating expenses incurred, including
- 14 payroll.

15 [. . .]

16 b. **Civil Authority**

17 We will pay for the actual loss of Business Income you sustain and
18 necessary Extra Expense caused by action of civil authority that
19 prohibits access to the described premises due to direct physical loss
20 of or damage to property, other than at the described premises,
21 caused by or resulting from any Covered Cause of Loss. This
22 coverage will apply for a period of up to two consecutive weeks
23 from the date of that action.”

24 [. . .]

25 **D. Loss Conditions**

26 The following conditions apply in addition to the Common Policy
27 Conditions and the Commercial Property Conditions.

28 [. . .]

 2. **Duties in the Event of Loss:**

 [. . .]

(8) If you intend to continue your business, you must resume all or part of your **operations** as quickly as possible.

[. . .]

G. **Definitions**

[. . .]

2. **Operations** means:

- a. Your business activities occurring at the described premises; and
- b. The tenantability of the described premises, if coverage for Business Income including **Rental Value** or **Rental Value** applies.

3. **Period of Restoration** means the period of time that:

- a. Begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and
- b. Ends on the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality.”

(Pltf Comp. EXH 2 at 2-77 – 2-80 and 2-84; Rubin Decl. at ¶ 5.)

Additionally, Plaintiffs have “Extended Business Income” coverage under the Policy which provides the following coverage:

“d. **Extended Business Income**

We will pay for the actual loss of Business Income you incur during the period that:

- (1) Begins on the date property (except **finished stock**) is actually repaired, rebuilt or replaced and **operations** are resumed; and
- (2) Ends on the earlier of:
 - (a) The date you could restore your operations, with reasonable speed, to the condition that would have existed if no direct physical loss or damage occurred; or

(b) 180 consecutive days after the date determined in (1) above.

Loss of Business Income must be caused by direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss.”³

(Pltf Comp. EXH 2 at 2-78, 2-113 and 2-121; Rubin Decl. at ¶ 5.)

The policy also requires the insureds (Plaintiffs) to take all steps to mitigate all losses, and if an insured fails to resume in whole or part as quickly as possible, the insurer will reduce the payment for business income losses:

“b. Protect Property

You shall do what is reasonably necessary to minimize the loss or damage and to protect the covered property from any further loss or damage.”

c. Resumption of Operations

We will reduce the amount of your:

(1) Business Income loss, other than extra Expense, to the extent you can resume your **operations**, in whole or in part, by using damaged or undamaged property (including merchandise or stock) at the described premises or elsewhere.

[. . .]

d. If you do not resume **operations**, or do not resume **operations** as quickly as possible, we will pay based on the length of time it would have taken to resume **operations** as quickly as possible.”

(Pltf Comp. EXH 2 at 2-81 and 2-227; Rubin Decl. at ¶ 5.)

³ The Property-Gard Restaurant Plus Extension Endorsement under the Policy provides that if the insured has Business Income Coverage under Form CP00030 (which Plaintiffs do), then the 30 consecutive days in paragraph (2)b of Section A.3.d. (Extended Business Income) is deleted and replaced with “180 consecutive days after the date determined in (1) above”. The quoted text within body of Motion reflects this replacement of “30 consecutive days” with “180 consecutive days”. (See Pltf Comp. EXH 2 at 2-78, 2-113 and 2-121.)

1 Thus, Plaintiffs were required to resume operations (in whole or in part) as quickly as possible to
2 avoid forfeiting policy benefits, which they did.

3 **D. Smoke, Soot and Ash Damage to the Insured Property Caused Plaintiffs to Cease**
4 **Operations and Plaintiffs' Mitigation Efforts**

5 Plaintiffs had to completely cease business operations because of the direct smoke, soot and/or ash
6 damage to the Insured Property, which again, Defendants do not dispute the Insured Property sustained.
7 (Pltf Comp. EXH 13 at 37:3-25, 39:18-40:6, 75:21-76:5, 80:20-81:11; O'Malley Decl. at ¶ 12; Rubin
8 Decl. at ¶ 6; Pltf Comp. EXH 3; Downey Decl. at ¶ 4; Pltf Comp. EXH 8 at RFA Nos. 1-3.) Bottega's
9 business operations completely ceased on October 9 and 16, 2017 as a direct result of the smoke, soot
10 and/or ash damage to the Insured Property from the North Bay Fires. (O'Malley Decl. at ¶ 10; Pltf Comp.
11 EXH 11 at 11-20, 11-21, 11-34, 11-35.) Ottimo's business operations completely ceased on October 9 and
12 11-17, 2017 as a direct result of the smoke, soot and/or ash damage to the Insured Property from the North
13 Bay Fires. (O'Malley Decl. at ¶¶ 9, 11; Pltf Comp. EXH 12 at 12-17, 12-18, 12-21 – 12-34.)

14
15 In order to mitigate their damages and losses, and comply with the mitigation requirements of the
16 Policy, Plaintiffs diligently worked to clean the Insured Property and make partial/temporary repairs that
17 were economically feasible so that Plaintiffs could at least partially resume business operations of the
18 income producing entities, Bottega and Ottimo, as soon as possible.⁴ These mitigation efforts included, in
19 part, partially opening Bottega and Ottimo, while the declared state of emergency was in effect, so that
20 food could be provided and served to firefighters, PG&E workers and other personnel in the local area.⁵

21
22
23 ⁴ O'Malley Decl. at ¶ 13; Pltf Comp. EXH 13 at 85:14-86:1, 183:14-184:14; Pltf Comp. EXH 11; Downey
24 Decl. at ¶¶ 7-8; Rubin Decl. at ¶ 10; Pltf Comp. EXH 6; Pltf Comp. EXH 14 at 56:11-13, 56:23-57:25,
25 58:6-8, 58:24-59:2, 60:4-21, 62:18-63:10, 63:16-64:15, 65:5-66:10, 67:5-15, 67:24-68:18, 68:24-69:8,
69:19-70:3, 70:7-20, 79:16-80:1, 118:19-23, 123:19-124:1.

26 ⁵ O'Malley Decl. at ¶¶ 10-13; Pltf Comp. EXH 11 at 11-22 – 11-33, 11-36 – 11-39; Pltf Comp. EXH 12
27 at 12-19, 12-20, 12-35, 12-36; Pltf Comp. EXH 14 at 79:16-80:1; Downey Decl. at ¶¶ 7-8; Pltf Comp.
28 EXH 13 at 37:3-25, 39:18-40:6, 49:18-20, 53:6-9, 54:11-55:22, 56:24-57:14, 58:12-25, 59:9-20, 62:2-5,
72:13-18, 72:21-23, 73:9-15, 74:8-16, 74:23-75:4, 75:21-76:5, 79:7-22, 85:14-86:12, 131:18-132:2,

1 Even after partial business operations had resumed, Plaintiffs continued their mitigation and
 2 cleaning efforts to remove smoke, soot and ash from the Insured Property, including attempts to minimize
 3 and remove the lingering odor from same, for several months after the North Bay Fires. (O'Malley Decl.
 4 at ¶¶ 10, 15, 19; Pltf Comp. EXH 13 at 37:3-25, 39:18-40:6, 75:21-76:5, 80:20-81:11, 85:14-86:1, 183:14-
 5 184:14; Pltf Comp. EXH 11; Pltf Comp. EXH 14 at 63:16-64:15, 65:5-66:10, 67:11-15, 68:4-18, 68:24-
 6 69:8, 69:19-70:3, 70:7-20, 87:12-88:10; Downey Decl. at ¶¶ 7-8 .)

8 On September 20, 2018, almost a year after the loss causing event, Defendants finally inspected
 9 the Insured Property and acknowledged remaining property damage caused by the smoke soot and ash.
 10 (Rubin Decl. at ¶ 6; Pltf Comp. EXH 3; O'Malley Decl. at ¶ 16.)

11 Despite Plaintiffs being able to partially resume business operations of Bottega and Ottimo in
 12 October 2017, Plaintiffs continued to experience business income losses for an extended period of time
 13 well beyond the two-week time period provided for under the Civil Authority provision of the Policy as a
 14 direct result of the physical loss and damage to the Insured Property caused by the North Bay Fires.⁶⁷ As
 15 a result, Plaintiffs are seeking to recover, in part, business income losses under the Policy's Business
 16 Income coverage provisions, which provide additional business income loss coverage extending beyond
 17

18
 19
 20 134:25-135:20, 183:5-185:3; Pltf Comp. EXH 14 at 56:11-13, 56:23-57:25, 58:6-8, 58:24-59:2, 60:4-21,
 21 62:18-63:10, 63:16-64:15, 65:5-66:10, 67:5-15, 67:24-68:18, 68:24-69:8, 69:19-70:3, 70:7-20, 79:16-
 80:1, 118:19-23, 123:19-124:1.

22 ⁶ O'Malley Decl. at ¶¶ 10-12, 15-21; Downey Decl. ¶¶ 7-8; Pltf Comp. EXH 13 at 37:3-25, 39:18-40:6,
 23 46:24-47:7, 49:18-20, 51:25-52:3, 53:6-9, 53:16-20, 54:11-55:22, 56:24-57:14, 58:12-25, 59:9-20, 62:2-
 24 5, 63:9-16, 72:13-18, 72:21-23, 73:9-15, 74:8-16, 74:23-75:4, 75:21-76:5, 78:11-16, 79:7-22, 80:2-6,
 25 80:20-81:11, 83:4-17, 85:14-86:12, 91:8-92:9, 92:22-93:4, 96:19-97:10, 131:2-9, 131:18-132:2, 134:25-
 26 165:7, 134:25-135:25, 183:5-185:3; Pltf Comp. EXH 14 at 49:11-24, 56:11-13, 56:23-57:25, 58:6-8,
 58:24-59:2, 60:4-21, 62:18-63:10, 63:16-64:15, 65:5-66:10, 67:5-15, 67:24-68:18, 68:24-69:8, 69:19-
 70:3, 70:7-20, 71:19-72:21, 72:23-73:4, 73:14-19, 74:3-7, 75:18-21, 76:3-5, 76:9-14, 79:16-80:10, 80:25-
 81:9, 87:12-88:10, 96:15-24, 97:6-8, 112:12-15, 118:19-23, 122:14-22, 123:7-14, 123:19-124:1.

27 ⁷ The amount of Business Income Loss is not relevant to the scope of this motion for partial summary
 judgment. (Downey Decl. at ¶ 10.) That issue will be decided later by a jury after hearing expert testimony.

1 the two-week limitation under the Civil Authority provisions of the Policy. (Downey Decl. at ¶ 9.)

2 **E. Defendants’ Denial of Coverage Under the Business Income Provision of the Policy**

3 Defendants denied Plaintiffs business interruption claim under the Policy’s Business Income
4 Coverage. (Rubin Decl. at ¶¶ 6-12; Pltf Comp. EXH 3 through 7, and 10; Downey Decl. at ¶ 6.)
5 Defendants’ positions are outlined in their denial letter(s) and discovery responses. (Id.)
6

7 Defendants first contend that there was not a complete suspension of operations because of the
8 smoke, soot, and ash damage sustained by the Insured Property. (Rubin Decl. at ¶¶ 7-12; Pltf Comp. EXH
9 4 through 7; Downey Decl. at ¶ 5; Pltf Comp. EXH 9.) In essence, Defendants contend, without evidentiary
10 proof (and contrary to the undisputed evidence) that Plaintiffs completely suspended operations on various
11 dates in October 2017 solely because of the Civil Authority Event (i.e. the State’s emergency
12 proclamation). (Downey Decl. at ¶ 5; Pltf Comp. EXH 9; Rubin Decl. at ¶¶ 7-8; Pltf Comp. EXH 4 at 4-
13 2.) However, Defendants do not dispute that the North Bay Fires (1) caused smoke, soot, and/or ash
14 damage to the Insured Property, (2) caused direct physical loss of the Insured Property, and (3) caused
15 direct physical damage to the Insured Property. (Downey Decl. at ¶ 4; Pltf Comp. EXH 8.) Defendants
16 also do not deny that Plaintiffs had a complete cessation of their business operations at the Insured
17 Property. (Downey Decl. at ¶ 5; Pltf Comp. EXH 4 at 4-2, and EXH 9; Rubin Decl. at ¶¶ 7-8.)
18

19 Secondly, Defendants contend that because Plaintiffs’ suspension of operations occurred when the
20 Civil Authority Event was in effect and there was no complete suspension of Plaintiffs operations *after*
21 the Civil Authority Event expired, no coverage is available under the Business Income Coverage (Rubin
22 Decl. at ¶¶ 7-12; Pltf Comp. EXH 4 through 7.)
23

24 However, Defendants admit the Civil Authority and Business Income coverages are separate and
25 distinct coverages. (Downey Decl. at ¶ 6; Pltf Comp. EXH 10.) The Civil Authority provision is triggered
26 when access to the insured premises is prevented by an act of civil authority caused by direct physical loss
27 or damage to property “**other than at the [insured] premises**”. (Emphasis added). By contrast, the
28

1 Business Income provision provides coverage for losses resulting from the necessary suspension of
 2 operations “**caused by direct physical loss of or damage to property at the [insured] premises**”
 3 (emphasis added). The Business Income provision and Civil Authority provision provide separate
 4 coverages - **and are not mutually exclusive.** (Rubin Decl. at ¶ 5; Plft Comp. EXH 2 at 2-77, 2-78.)

5
 6 Additionally, it is undisputed that Plaintiffs’ partially resumed operations while the Civil Authority
 7 Event was ongoing, (O’Malley Decl. at ¶¶ 10-13; Plft Comp. EXH 11 at 11-22 – 11-33, 11-36 – 11-39;
 8 Plft Comp. EXH 12 at 12-19, 12-20, 12-35, 12-36); showing that the complete cessation, and ultimate
 9 partial reopening were unrelated to the Civil Authority Event.

10 **III. LEGAL STANDARDS**

11 **A. Summary Judgment Standard**

12
 13 Plaintiffs bring this motion for partial summary judgment on the issue of Plaintiffs’ claim for
 14 business interruption under the Policy’s business income provisions. “A party may move for summary
 15 judgment, identifying each claim or defense—or the part of each claim or defense—on which summary
 16 judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine
 17 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” (Fed. R. Civ. P.
 18 56(a).) Under Rule 56, the moving party has the initial burden to prove that no genuine issue of material
 19 fact exists. (*Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 580, 106 S. Ct. 1348
 20 (1986).) Once the moving party has carried its burden, “its opponent must do more than simply show that
 21 there is some metaphysical doubt as to the material facts.” (*Id.*) The party opposing summary judgment
 22 must go beyond the pleadings to designate specific facts establishing a genuine issue for trial. (*Celotex*
 23 *Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548 (1986).) If the adverse party does not so respond,
 24 summary judgment shall be entered against the adverse party. (Fed. R. Civ. P. 56(e).) Further, the mere
 25 existence of some alleged factual dispute between the parties is not sufficient to overcome an otherwise
 26 properly supported motion for summary judgment. (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 742, 106
 27
 28

1 S. Ct. 2505 (1986).) Thus, to defeat the Plaintiffs’ motion, Defendants must affirmatively identify material
2 facts showing there is a genuine dispute on which a reasonable jury could find in Defendants’ favor. (*Id.*
3 at 252.)

4 **B. Interpretation of Insurance Contracts Under California State Law**

5 Insurance contracts are contracts governed by the ordinary rules of contract interpretation. (*La*
6 *Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.*, 9 Cal.4th 27, 37 (Cal. 1995).) An insurance
7 policy is interpreted, like all contracts, to effectuate the mutual intent of the parties. (*Silicon Valley Bank*
8 *v. New Hampshire Ins. Co.*, 203 F.Supp.2d 1152, 1156 (C.D. Cal. 2002) citing *California Civil Code*
9 §1636.) “If contractual language is clear and explicit, it governs.” (*Bank of the West v. Superior Court*,
10 2 Cal.4th 1254, 1264 (Cal. 1992).) The interpretation of an insurance policy is a question of law,
11 determined, if possible, solely from the terms of the policy and their clear and explicit meaning
12 (understood in their ordinary and popular sense). (*Waller v. Truck Ins. Exchange, Inc.*, 11 Cal.4th 1, 18
13 (Cal. 1995).) The intent of the parties is to be determined from the plain meaning of the policy’s written
14 provisions, construed within the context of the entire contract. (*AIU Ins. Co. v. Sup. Ct.*, 51 Cal.3d 807,
15 821-822 (1990); *Civ. Code* §§1636-1639 and 1641.)

16
17
18 If the Court determines that the Policy is ambiguous as to whether business income coverage is
19 available because the Policy has no “plain meaning”, and is thus ambiguous, the Court must then try to
20 interpret the Policy based upon the Plaintiffs’ objectively reasonable expectations. (*Bank of the West v.*
21 *Sup.Ct.* 2 Cal.4th 1254, 1265 (1992); *Jordan v. Allstate Ins. Co.*, 116 Cal.App.4th 1206, 1213-1214
22 (2004).)

23
24 “Similarly, [the California Supreme Court] generally interpret[s] the coverage clauses of insurance
25 policies broadly, [to] protect the objectively reasonable expectations of the insured.” (*AIU Ins. Co. v. Sup.*
26 *Ct.*, *supra*, 51 Cal.3d at 822 (1990).) Conversely exclusionary clauses are interpreted narrowly against the
27 insurer. (*The Villa Los Alamos Homeowners Assn. v. State Farm General Ins. Co.*, 198 Cal.App.4th 522,
28

1 530 (2011).) Because the business income provisions are a “coverage clause”, to the extent they are
2 deemed ambiguous by this Court, it must interpret the provisions broadly to protect Plaintiffs’ objectively
3 reasonable expectations of coverage. Similarly, any limitations or exclusions to this coverage must
4 therefore be interpreted narrowly against Defendants.

5
6 In the event that the previous rule fails to resolve an ambiguity, the Court is then required to resolve
7 any ambiguity against Defendants, as the drafter of the policy. (*Minkler v. Safeco Ins. Co. of America*,
8 49 Cal.4th 315, 321 (2010) (This “tie-breaker” rule of construction against the insurer stems from the
9 recognition that the insurer generally drafted the policy and received premiums to provide the agreed
10 protection.)) In practice, this means that “[i]n the insurance context, [the California Supreme Court]
11 generally resolve[s] ambiguities in favor of coverage. (*AIU Ins. Co. v. Superior Court*, supra, 51 Cal.3d
12 at 831 (1990).)

14 **IV. LEGAL ARGUMENT**

15 **A. The Business Income and Civil Authority Coverage Provisions Under the Policy Are** 16 **Not Mutually Exclusive**

17 The Civil Authority provision does not supersede the Business Income provisions, and the two are
18 not mutually exclusive. For example, the Civil Authority provision is triggered when access to the insured
19 premises is prevented by an act of civil authority caused by direct physical loss or damage to property
20 “**other than at the [insured] premises**”. (Pltf Comp. EXH 2 at 2-78, emphasis added; Rubin Decl. at ¶
21 5.) By contrast, the Business Income provision provides coverage for losses resulting from the necessary
22 suspension of operations “**caused by direct physical loss of or damage to property at the [insured]**
23 **premises**” (Pltf Comp. EXH 2 at 2-77, emphasis added; Rubin Decl. at ¶ 5.) Furthermore, under the Civil
24 Authority provision, business income losses are only covered for a period of up to two consecutive weeks
25 from the date of the civil authority action. (Pltf Comp. EXH 2 at 2-78; Rubin Decl. at ¶ 5.) Under the
26 Business Income provisions of the Policy, business income losses are covered for the “period of
27
28

1 restoration”, which begins with the date of direct physical loss or damage caused by a covered loss at the
2 Insured Property, and ends on the date with the Insured Property should be repaired, rebuilt or replaced
3 with reasonable speed and similar quality. (Pltf Comp. EXH 2 at 2-77, 2-78 and 2-84; Rubin Decl. at ¶ 5.)
4 Plaintiffs also have Extended Business Income coverage under the Policy that “Begins on the date the
5 Insured Property is actually repaired, rebuilt or replaced and **operations** are resumed” and that ends on
6 the earlier of (1) the date Plaintiffs could restore their operations with reasonable speed to condition as if
7 no loss occurred, or (2) 180 consecutive days after the Insured Property is actually repaired, rebuilt or
8 replaced and operations are resumed. (Pltf Comp. EXH 2 at 2-78, 2-113 and 2-121; Rubin Decl. at ¶ 5.)

10 **Defendants admit the Civil Authority and Business Income coverages are separate and**
11 **distinct coverages.** (Downey Decl. at ¶ 6; Pltf Comp. EXH 10.) It is undisputed that the two provisions
12 are triggered by *different* causes. The business income coverages are triggered when (1) insured property
13 sustains direct physical loss or damage that results in (2) a complete cessation of operations and (3)
14 business income losses that occur during the period of restoration and/or during the extended period of
15 indemnity once repairs have been completed. As explained herein, all elements have been met.

17 The civil authority coverage on the other hand is triggered when (1) there is direct physical damage
18 to property “*other than the Insured Property*”, (2) the action of a civil authority prevents access to the
19 Insured Property, and (3) the insured sustains business income losses as a result.

21 It is also undisputed that the recoverable damage period under each provision are different – the
22 civil authority provision provides a maximum of 2 weeks of coverage for business income losses, while
23 the business income provisions provide coverage well beyond two weeks, and no more than 180
24 consecutive days after the Insured Property is actually repaired, rebuilt or replaced and operations are
25 resumed, under the business income coverage.

26 Critically, there is absolutely nothing in the Policy that remotely suggests Plaintiffs are only
27 entitled to benefits under *either* the Civil Authority provision or the Business Income provision, and not
28

1 both. Particularly, when both policy provisions have been triggered (discussed in more detail below) and
 2 when Plaintiffs have experienced business income losses well beyond the two consecutive week Civil
 3 Authority limitation (discussed in more detail below).

4 **B. Plaintiffs Are Eligible For Both Civil Authority Coverage And Business Income**
 5 **Coverage Under The Policy As The Requirements Under Both Provisions Have**
 6 **Been Triggered**

7 *i. Civil Authority Coverage Eligibility Requirements*

8 In order to trigger coverage under the Civil Authority provision of the Policy there must be
 9 “[A]ction of civil authority that prohibits access to the [Insured Property] due to direct physical loss of or
 10 damage to property, **other than at the described premises**, caused by or resulting from any Covered
 11 Cause of Loss.” (Pltf Comp. EXH 2 at 2-78; Rubin Decl. at ¶ 5.) Once coverage is triggered, the question
 12 then becomes, did the insured sustain an actual loss of business income as a result of the triggering event
 13 and if so, in what amount? Under the Civil Authority provisions of the Policy, business income losses are
 14 covered for up to two consecutive weeks. (Pltf Comp. EXH 2 at 2-78; Rubin Decl. at ¶ 5.)

15 Here, on October 9, 2017, in response to the havoc of the North Bay Fires, Governor Edmund G.
 16 Brown, Jr. declared a State of Emergency for Napa County where the Insured Property was located.
 17 (Plaintiffs’ Judicial Notice; Pltf Comp. EXH 16.) There is no dispute that this declared state of emergency
 18 (i.e. Civil Authority Event) was the result of direct physical loss of or damage to property, **other than at**
 19 **the described premises**, as a result of the North Bay Fires (a covered cause of loss). There is also no
 20 dispute that this Civil Authority Event resulted in various road closures that restricted access to the Insured
 21 Property from approximately October 9 to 18, 2017. (O’Malley Decl. at ¶ 14.)

22 Thus, Plaintiffs’ eligibility for coverage of business income losses for a maximum of two
 23 consecutive weeks under the Civil Authority provisions of the Policy was triggered.

24 ///

1 *ii. Business Income Coverage Eligibility Requirements*

2 The business income coverages are triggered when (1) insured property sustains direct physical
3 loss or damage that results in (2) a complete cessation of operations and (3) business income losses that
4 occur during the period of restoration and/or during the extended period of indemnity once repairs have
5 been completed. All elements have been met here.
6

7 First, it is undisputed that the Insured Property sustained direct physical damage as a result of the
8 North Bay Fires. Indeed, Defendants admit that the North Bay Fires (1) caused smoke, soot, and/or ash
9 damage to the Insured Property, (2) caused direct physical loss of the Insured Property, and (3) caused
10 direct physical damage to the Insured Property. (Downey Decl. at ¶ 4; Plft Comp. EXH 8.) Thus, the first
11 element has been met.

12 The second issue is whether the damage sustained at the Insured Property resulted in a complete
13 cessation of operations. “Operations” as defined in the Policy means, “[Plaintiffs’] business activities
14 occurring at the [Insured Property]” and “The tenantability of the [Insured Premises, if coverage for
15 Business Income including Rental Value or Rental Value applies.” (Pltf Comp. EXH 2 at 2-84; Rubin
16 Decl. at ¶ 5.)
17

18 What constitutes a “suspension” of business operations for the purpose of triggering business
19 income coverage is not defined in the Policy. However, the Courts have examined this issue ad nauseum,
20 concluding that a “suspension of business operations” requires a *total cessation* of the insured’s business
21 activities. (*Buxbaum, et al. v. Aetna Life & Casualty Co.*, 103 Cal.App.4th 434, 443-444 (2002); See
22 *American Medical Imaging v. St. Paul & Marine*, 949 F.2d 690 (3d Cir. 1991); See *Home Indem. Co. v.*
23 *Hyplains Beef, L.C.*, 893 F.Supp. 987, 991–992 (D.Kan. 1995); See *Quality Oilfield Pro., Inc. v. Michigan*
24 *Mut. Ins.*, 971 S.W.2d 635, 638 (Tex.Ct.App. 1998); See *Keetch v. Mutual of Enumclaw Ins. Co.*, 66
25 Wash.App. 208, 210–212 (1992).)
26

27 Critically here, **Defendants admit that Plaintiffs had a *total cessation* of their business**
28

1 **operations at the Insured Property.** (Downey Decl. at ¶ 5; Plft Comp. EXH 9; Rubin Decl. at ¶¶ 7-8;
 2 Plft Comp. EXH 4 at 4-2.) Additionally, the undisputed evidence is that the total cessation of Plaintiffs’
 3 business operations that occurred on multiple dates in October 2017 was caused by the direct physical
 4 damage the Insured Property sustained.⁸ Thus, the second element has been met.

5
 6 Lastly, as a direct result of the physical loss and damage to the Insured Property caused by the
 7 North Bay Fires, Plaintiffs experienced business income losses beginning in October 2017 and continuing
 8 for an extended period of time thereafter.⁹ There can be no doubt that these losses occurred during the
 9 “period of restoration”, given that almost a year after the North Bay Fires, Defendants had not yet assisted
 10 Plaintiffs to restore the Insured Property, and that given the ongoing dispute over the cost of repairs,
 11 Plaintiffs have, to date, still not been able to fully repair and restore the Insured Property. (O’Malley Decl.
 12 at ¶ 20.) Thus, the last element needed to trigger the business income coverage was met.

13
 14 ***iii. Defendants’ Denial and Rational for Denying the Business Interruption Claim
 are without Merit***

15 Defendants have taken the unsubstantiated position that no coverage is available under the
 16 Business Income Coverage provision of the Policy because (1) the suspension of operations was due to
 17 the civil authority event, not because of the direct physical damage to the Insured Property, and (2) there
 18 was no complete suspension of Plaintiffs operations *after* the Civil Authority Event expired. (Rubin Decl.
 19

20
 21
 22 ⁸ Downey Decl. at ¶¶ 4, 7; Plft Comp. EXH 13 at 37:3-25, 39:18-40:6, 75:21-76:5, 80:20-81:11; O’Malley
 23 Decl. at ¶¶ 10-12; Plft Comp. EXH 11 at 11-20, 11-21, 11-34, 11-35. Plft Comp. EXH 12 at 12-17, 12-
 18, 12-21 – 12-34; Rubin Decl. at ¶ 6; Plft Comp. EXH 3; Plft Comp. EXH 8.

24 ⁹ O’Malley Decl. at ¶¶ 9-11, 20, 21; Plft Comp. EXH 11 at 11-20, 11-21, 11-34, 11-35; Plft Comp. EXH
 25 12 at 12-17, 12-18, 12-21 – 12-34; Downey Decl. at ¶¶ 7-8; Plft Comp. EXH 14 at 49:11-24, 56:11-13,
 26 56:23-57:25, 58:6-8, 58:24-59:2, 60:4-21, 62:18-63:10, 63:16-64:15, 65:5-66:10, 67:5-15, 67:24-68:18,
 27 68:24-69:8, 69:19-70:3, 70:7-20, 71:19-72:21, 72:23-73:4, 73:14-19, 74:3-7, 75:18-21, 76:3-5, 76:9-14,
 28 79:16-80:10, 80:25-81:9, 87:12-88:10, 96:15-24, 97:6-8, 112:12-15, 118:19-23, 122:14-22, 123:7-14,
 123:19-124:1; Plft Comp. EXH 13 at 37:3-25, 39:18-40:6, 49:18-20, 53:6-9, 54:11-55:22, 56:24-57:14,
 58:12-25, 59:9-20, 62:2-5, 72:13-18, 72:21-23, 73:9-15, 74:8-16, 74:23-75:4, 75:21-76:5, 79:7-22, 85:14-
 86:12, 131:18-132:2, 134:25-135:25, 183:5-185:3

1 at ¶¶ 7-12; Plf Comp. EXH 4 through 7.) Defendants' position is erroneous and without factual or legal
2 merit.

3 First, there is zero evidence to indicate Plaintiffs' *total cessation* of business operations was for
4 any reason separate and apart from the direct physical damage to the Insured Property. Contrary to
5 Defendants' assertions, the undisputed facts and evidence show that Plaintiffs had to completely cease
6 business operations because of the direct smoke, soot and/or ash damage to the Insured Property.¹⁰ The
7 Ottimo and Bottega restaurants could not operate in their then condition as they were inundated with
8 smoke soot, ash, and char, and similarly could not serve customers due to the physical condition of the
9 Insured Property. (Id.) **In other words, even without the state of emergency going into effect, Plaintiffs**
10 **would have been forced to suspend their business operations as a direct result of the smoke, soot**
11 **and/or ash damage that had completely infiltrated Plaintiffs' Businesses.** This is further supported by
12 the fact that Plaintiffs partially resumed operations while the Civil Authority Event was ongoing,
13 (O'Malley Decl. at ¶¶ 10-13; Pltf Comp. EXH 11 at 11-22 – 11-33, 11-36 – 11-39; Pltf Comp. EXH 12 at
14 12-19, 12-20, 12-35, 12-36). If, as Defendants contend, the complete cessation of operations was due
15 solely because of the civil authority event, Plaintiffs would not have been able to operate while the
16 declared state of emergency and road closures persisted. The fact that Plaintiffs' were able to partially
17 resume operations while the civil authority event continued establishes that the closing and partial re-
18 opening were completely disconnected from the Civil Authority Event.

19 Second, there is absolutely nothing contained within the Policy to suggest that business income
20 coverage is not triggered when an insured has a complete cessation of business operations due to physical
21

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23
24
25 ¹⁰ (Downey Decl. at ¶¶ 4, 7, 8; Plft Comp. EXH 13 at 37:3-25, 39:18-40:6, 75:21-76:5, 80:20-81:11;
26 O'Malley Decl. at ¶¶ 10-12; Pltf Comp. EXH 11 at 11-20, 11-21, 11-34, 11-35. Pltf Comp. EXH 12 at
27 12-17, 12-18, 12-21 – 12-34; Rubin Decl. at ¶ 6; Plft Comp. EXH 3; Pltf Comp. EXH 8; Plft Comp.
28 EXH 14 at 49:11-24, 63:16-64:15, 65:5-66:10, 67:5-15, 71:19-72:21, 72:23-73:4, 73:14-19, 74:3-7,
75:18-21, 76:3-5, 76:9-14, 79:16-80:10, 80:25-81:9, 87:12-88:10, 96:15-24, 97:6-8, 112:12-15, 122:14-
22, 123:7-14, 123:19-124:1.)

1 damage at the Insured Property just because the complete cessation of business happens to occur while a
2 civil authority event is in effect that restricts access to the Insured Property. The Civil Authority Coverage
3 and Business Income Coverages are not mutually exclusive and whereas here, a civil authority event
4 overlaps in time with a business income triggering event, the civil authority coverage does not supersede
5 the Business Income coverage. If that were the case, as Defendants seem to argue, the business income
6 coverage would be illusory and the lesser civil authority coverage spanning only two weeks would control.
7 While it is understandable that an insurance company seeking to limit its payments to an insured might
8 take such a position to limit its obligations for the benefit of itself at the expense of its insured, such a
9 position has absolutely zero basis in the Policy or California law.
10

11 Critically, the state of emergency and road closures that went into effect as a result of North Bay
12 Fires did not require Plaintiffs to cease business operations, they merely restricted access (i.e. limited the
13 customer pool) for a limited period of time. Defendants position that business income coverage has not
14 been triggered because Plaintiffs' *total cessation* of business operations occurred during the civil authority
15 event, as opposed to *after* the civil authority restrictions were lifted is not only entirely unsubstantiated,
16 but goes against public policy and Plaintiffs' contractual obligation to mitigation damages (e.g., to reopen
17 as quickly as possible, in whole or part, even if doing so requires using damaged property). (Pltf Comp.
18 EXH 2 at 2-81 and 2-227; Rubin Decl. at ¶ 5.)
19

20 **The period of indemnity (duration) of a business income claim (e.g., the time period lost**
21 **income is sought) is not framed or limited by the duration of the cessation of business operations.**
22

23 This is for two distinct reasons. One, as discussed below, insureds have an obligation to mitigate their
24 damages and resume operations, in whole or in part as quickly as possible (even if doing so requires using
25 damaged property). If an insured could only recover business income losses while their operations
26 remained completely shut down, they would be dissuaded from mitigating their damages. Not only would
27

1 this create a moral hazard, but such a requirement would directly conflict with the contractual and legal
 2 requirement to mitigate damages and reopen in whole or part as quickly as possible.

3 Lastly, the period of indemnity or duration of a business income claim is specifically spelled out
 4 in the policy as being framed by the **period of restoration** – the time it takes to restore the insured
 5 Property, *not the period that business operations are suspended*. The policy specifically states, “We will
 6 pay for the actual loss of Business Income you sustain due to the necessary suspension of your operations
 7 **during the period of restoration.**” (Rubin Decl. at ¶ 5; Pltf Comp. EXH 2 at 2-84, emphasis added).
 8 Defendants’ insinuation to the contrary (that Plaintiffs can’t recover business income beyond the time
 9 period they were actually closed) is entirely meritless and contrary to the plain and ordinary meaning of
 10 the Policy.
 11

12 *iv. Plaintiffs’ Mitigation of Damages*

13 The Policy states that Plaintiffs must take all steps to mitigate all losses, and if they fail to resume
 14 business operations in whole or part as quickly as possible (even if doing so requires using damaged
 15 property), then the insurer (Defendants) will reduce the payment for business income losses. (Pltf Comp.
 16 EXH 2 at 2-81 and 2-227; Rubin Decl. at ¶ 5.) Aside from the fact that the terms of the Policy require
 17 Plaintiffs to mitigate their damages and resume business operations, in whole or in part, as soon as
 18 possible, (Pltf Comp. EXH 2 at 2-81 and 2-227; Rubin Decl. at ¶ 5,) there is a common law duty to mitigate
 19 damages. **The courts do not condone attempts by an insurer to penalize their insured for mitigating**
 20 **damages and multiple courts have disfavored rulings that would disincentivize mitigation efforts by**
 21 **an insured.**
 22

23 In *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384 (2d Cir. 2005), the appellate
 24 court reversed the district court’s interpretation of a “period of restoration” clause and stated in pertinent
 25 part:
 26

1 “The Restoration Period clause establishes that BI coverage lasts only for
 2 the reasonable amount of time it would take [the insured] ‘exercis[ing] ...
 3 due diligence and dispatch to rebuild, repair, or replace such property that
 4 has been destroyed or damaged.’ Courts have consistently construed this or
 5 similar language as entitling the insured to continue to recover its lost profits
 6 until it can build a reasonably equivalent store in a reasonably equivalent
 7 location. *See, e.g.,* Lee R. Russ, 12 *Couch on Insurance* §§ 183:55, 185:7
 8 (3d ed. 1998 & Supp.2003); *Beautytuft, Inc. v. Factory Ins. Ass’n*, 431 F.2d
 9 1122, 1128 (6th Cir.1970) (holding that insured’s resumption of partial
 10 operations in inferior, temporary premises did not terminate business
 11 interruption coverage); *see also* *Anchor Toy Corp. v. Am. Eagle Fire Ins.*
Co., 4 Misc.2d 364, 155 N.Y.S.2d 600, 603 (N.Y.Sup.Ct.1956) (holding
 12 that insured was entitled to modernize premises upon rebuilding). **The
 13 rationale behind such holdings has generally been that insureds would
 14 lack any incentive to resume partial operations in temporary locations or
 15 under other inferior circumstances in order to mitigate damages if such
 16 actions would terminate their BI coverage.”** (*Duane Reade, Inc.*, 411 F.3d
 17 at 392-393, emphasis added.)

18 As can be seen from *Duane Reade* and the several cases cited to therein, **there is an accepted
 19 general principle that an insured exercising a duty to mitigate under the policy does not forfeit the
 20 right to recover simply because they resumed operations, in whole or in part as part of mitigation
 21 efforts.** Imposing a duty to mitigate, while simultaneously arguing that satisfying that duty terminates the
 22 right to recover under a business interruption claim is disfavored as it would disincentivize mitigation by
 23 the insured and ultimately lead to an anomalous result.

24 Here, to mitigate their losses as contractually and legally required, Plaintiffs partially resumed
 25 business operations as soon as possible, even while the property damage remained unrepaired and
 26 damaged. These mitigation efforts included, in part, partially opening Bottega and Ottimo, even while
 27 mitigation efforts continued, so that food could be provided and served to firefighters, PG&E workers and
 28 other personnel in the local area.¹¹ These mitigation efforts do not in any way forfeit Plaintiffs’ rights to

26 ¹¹ O’ Malley Decl. at ¶ 13; Downey Decl. at ¶¶ 7-8; Pltf Comp. EXH 14 at 56:11-13, 56:23-57:25, 58:6-
 27 8, 58:24-59:2, 60:4-21, 62:18-63:10, 63:16-64:15, 65:5-66:10, 67:5-15, 67:24-68:18, 68:24-69:8, 69:19-
 70:3, 70:7-20, 79:16-80:1, 118:19-23, 123:19-124:1; Pltf Comp. EXH 13 at 37:3-25, 39:18-40:6, 49:18-

1 recover damages under the business income coverage provisions of the Policy.

2 Even after Plaintiffs were able to partially resume business operations, mitigation and cleaning
3 efforts to remove smoke, soot and ash from the Insured Property continued for several months after the
4 North Bay Fires, including attempts to minimize and remove the lingering odor from same.¹² Due to the
5 level of damage from smoke, soot and/or ash to the Insured Property, Plaintiffs were not able to provide
6 the same level of customer service and ambiance at Bottega and Ottimo for an extended period of time.
7 (Id.) Plaintiffs did everything they could to clean the Insured Property and remove the remnants and smell
8 of smoke, soot and ash. (Id.) It was particularly difficult to clean the fabric and upholstery throughout the
9 Insured Property. (O' Malley Decl. at ¶ 18.) Plaintiffs even rented a machine to clean the fabric and
10 upholstery materials as they did not have the financial means to be able to pay a professional cleaning
11 company to assist with the cleaning and mitigation efforts. (O' Malley Decl. at ¶ 18.) Despite Plaintiffs'
12 efforts, the odor of smoke, soot and ash continued to permeate throughout the Insured Property for several
13 months, and was still present at the time of Defendants very first site inspection of the Insured Property a
14 year later on September 20, 2018. (O' Malley Decl. at ¶ 18; Rubin Decl. at ¶¶ 7-12; Pltf Comp. EXH 4
15 through 7.)

16
17
18 Plaintiffs did not have the financial means to be able to immediately make the necessary repairs at
19 the Insured Property following the North Bay Fires, including but not limited to professional post-fire
20 cleaning and painting of the premises, and replacement of the upholstery, awnings and flooring.¹³
21

22
23 20, 53:6-9, 54:11-55:22, 56:24-57:14, 58:12-25, 59:9-20, 62:2-5, 72:13-18, 72:21-23, 73:9-15, 74:8-16,
74:23-75:4, 75:21-76:5, 79:7-22, 85:14-86:12, 131:18-132:2, 134:25-135:20, 183:5-185:3

24 ¹² O' Malley Decl. at ¶ 13; Downey Decl. at ¶¶ 7-8; Pltf Comp. EXH 14 at 56:11-13, 56:23-57:25, 58:6-
25 8, 58:24-59:2, 60:4-21, 62:18-63:10, 63:16-64:15, 65:5-66:10, 67:5-15, 67:24-68:18, 68:24-69:8, 69:19-
26 70:3, 70:7-20, 79:16-80:1, 118:19-23, 123:19-124:1; Pltf Comp. EXH 13 at 37:3-25, 39:18-40:6, 49:18-
20, 53:6-9, 54:11-55:22, 56:24-57:14, 58:12-25, 59:9-20, 62:2-5, 72:13-18, 72:21-23, 73:9-15, 74:8-16,
74:23-75:4, 75:21-76:5, 79:7-22, 85:14-86:12, 131:18-132:2, 134:25-135:20, 183:5-185:3.

27 ¹³ (O' Malley Decl. at ¶ 19; Downey Decl. at ¶¶; Pltf Comp. EXH 13 at 37:3-25, 39:18-40:6, 49:18-20,
53:6-9, 54:11-55:22, 56:24-57:14, 58:12-25, 59:9-20, 62:2-5, 72:13-18, 72:21-23, 73:9-15, 74:8-16,
28

1 However, as funds have become available, Plaintiffs have continued to make piecemeal repairs to the
 2 Insured Premises as a result of the damages caused by the North Bay Fires. (Id.) To date, almost 7 years
 3 later, Plaintiffs have still not been able to afford to complete all the necessary repairs. (O' Malley Decl. at
 4 ¶ 20.)

5 For the reasons stated herein, Plaintiffs have satisfied the requirements to trigger business income
 6 coverage under the Policy.
 7

8 **V. CONCLUSION**

9 While the amount of business income damages Plaintiffs are entitled to is a question of fact for the
 10 jury to decide, a determination as to whether or not the Civil Authority and Business Income provisions
 11 under the Policy are mutually exclusive, and if the eligibility requirements under Business Income
 12 provisions under the Policy have been triggered are matters of law to be decided by the Court.
 13

14 **The undisputed facts show that Plaintiffs have satisfied the required elements to trigger**
 15 **business income coverage under the Policy.** One, the Insured Property sustained direct physical damage;
 16 two, there was a complete suspension of business operations caused by the direct physical damage or loss
 17 to the Insured Property, and three Plaintiffs suffered income losses during the period of restoration.

18 The fact that Plaintiffs satisfied their contractual and legal obligation to mitigate their damages by
 19 resuming partial business operations as soon as possible (while the property was still damaged) in no way
 20 justifies a denial of business income coverage benefits. There is no contractual requirement that Plaintiffs
 21 can only recover business income losses while their operations are completely closed; quite the contrary,
 22 **business income losses are recoverable *after a complete cessation of operations, while efforts to***
 23 ***mitigate occur, during the entire period of restoration, and 180 days thereafter.*** Defendants wrongfully
 24

25
 26
 27 74:23-75:4, 75:21-76:5, 79:7-22, 85:14-86:12, 131:18-132:2, 134:25-135:20, 183:5-185:3; Pltf Comp.
 28 EXH 14 at 56:11-13, 56:23-57:25, 58:6-8, 58:24-59:2, 60:4-21, 62:18-63:10, 63:16-64:15, 65:5-66:10,
 67:5-15, 67:24-68:18, 68:24-69:8, 69:19-70:3, 70:7-20, 79:16-80:1, 118:19-23, 123:19-124:1.

1 denied Plaintiffs' business income claim.

2 Plaintiffs respectfully request this Court grant their motion for partial summary judgment.

3

4 DATED: September 19, 2024

ROBINS CLOUD LLP

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By: /s/ Lindsey Downey

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