Case No. 23-55338

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Erin Hughes,
Plaintiff and Appellant

v.

First National Insurance Company of America,
Defendant and Appellee

United States District Court, Central District of California
Case No. 2:22-cv-01759-MWF-RAO
Hon. Michael W. Fitzgerald

Appellee's Answering Brief

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Corporate Disclosure Statement

Appellee First National Insurance Company of America discloses that its parent company is Safeco Insurance Company of Illinois. First National Insurance Company of America further discloses that: (a) Safeco Insurance Company of America owns 100% of the stock of Safeco Insurance Company of Illinois; (b) Safeco Corporation owns 100% of stock of Safeco Insurance Company of America; (c) Liberty Mutual Agency Corporation owns 100% of the stock of Safeco Corporation; (d) Liberty Insurance Holdings, Inc. owns 100% of the stock of Liberty Mutual Agency Corporation; (e) Liberty Mutual Insurance Company owns 100% of the stock of Liberty Insurance Holdings, Inc.; (f) Liberty Mutual Group Inc. owns 100% of the stock of Liberty Mutual Insurance Company; (g) LMHC Massachusetts Holdings Inc. owns 100% of the stock of Liberty Mutual Group Inc.; (h) Liberty Mutual Holding Company Inc. owns 100% of the stock of LMHC Massachusetts Holdings Inc.

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Introduction

When Appellant Erin Hughes applied for insurance to cover her home in the Malibu hills (the "Property") in December 2020, she told the agent the Property was not used as a business and there were no prior insurance claims in the past five years. Appellee First National Insurance Company of America ("FNICA") relied upon these representations in issuing Hughes a policy. Neither was true. In fact, Hughes had advertised the Property on travel websites for short-term rental under titles such as "Malibu Ultimate Escape Guest House" and "Malibu Ultimate Escape Hotel." The Property was rented no fewer than 31 times in 2020 alone, generating income of more than $100,000. Hughes had also submitted three prior insurance claims on the Property within the past five years.

In early 2021, while the Property was occupied by a short-term renter, a fire broke out that destroyed the house. Hughes subsequently submitted claims to various insurers, including a theft claim to FNICA for alleged loss of personal property such as designer clothing, 45,000 "disposable gowns," a baby grand piano, and a $60,000 body treatment machine. According to Hughes, these items were stored outside of the

destroyed home on the grounds of the Property, and she discovered the alleged theft after the fire.

FNICA opened an investigation. As part of the investigation, FNICA asked Hughes to produce documents related to the claimed losses and to sit for an Examination Under Oath, as required under the terms of her policy and the Insurance Code. Hughes failed to turn over all requested documents, failed to fully answer questions at the first session of her Examination, and failed to complete a second session, which was needed to investigate changes she made to her claim.

Based on her material misrepresentations and lack of cooperation, FNICA denied Hughes's theft claim. In response, Hughes filed this lawsuit against FNICA asserting claims for breach of contract and bad faith denial of an insurance claim. Subsequently, FNICA sought, and the district court granted, summary judgment to FNICA on its counterclaim for rescission of the policy based on Hughes's misrepresentations regarding use of the Property as a short-term rental and the three prior losses. Because rescission of the policy rendered it void *ab initio*, Hughes could not succeed on her breach of contract and

bad faith claims as a matter of law, so the district court also granted summary judgment to FNICA on those claims.

On appeal, Hughes argues there was a triable issue of fact regarding whether she made misrepresentations on the application, primarily because she purportedly misunderstood the question due to limited English proficiency and because the rentals were supposedly handled by Hughes's sister rather than Hughes personally. Both assertions were conclusively contradicted by the record. And even if true, FNICA would still be entitled to rescission under the law because the law allows insurers to rely upon representations made by the applicant, and misrepresentations are grounds for recission even if unintentional.

Hughes also argues summary judgment was improper because the agent purportedly failed to give Hughes a full written copy of the application before proceeding to issue the policy. This was also contradicted by the evidence, but if true it is also no defense against rescission because there is no legal obligation to provide a written copy of the application prior to issuance. None of Hughes's other arguments establishes a triable issue.

The district court's grant of summary judgment was well-supported and should be affirmed.

Statement of Jurisdiction

FNICA agrees with the statement of jurisdiction in Hughes's opening brief. AOB at 1. The district court had diversity jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291, as Hughes timely appealed from a final judgment.

Addendum

There are no statutory authorities necessary for an addendum under Circuit Rule 28-2.7.

Statement of Issues

1. Whether the district court correctly granted summary judgment on Hughes's breach of contract and bad faith claims and FNICA's counterclaim for rescission based on Hughes's material misrepresentations in her insurance application.

2. Whether the district court's order granting summary judgment should be affirmed on the alternative grounds that Hughes's claims for breach of contract and bad faith are forfeited by her failure to cooperate in FNICA's investigation of her insurance claims.

Statement of the Case

A. FNICA's application process and underwriting system

FNICA authorizes insurance agencies to solicit and submit applications for homeowners insurance, among other products. [7-SER-1786.] Authorized agents collect information and applications from prospective insureds, and process those applications through FNICA's online rating platform. [*Ibid.*]

For any insurance company, the quality of risk being insured is a significant factor in determining whether to provide insurance and at what cost. Thus, FNICA's applications for homeowners insurance ask a variety of questions designed to evaluate whether the particular risk, the potential insured, and the property meet the underwriting and eligibility guidelines provided by FNICA. [7-SER-1786.] If the information collected from the applicant meets FNICA's eligibility criteria, the agencies may issue policies that bind FNICA. [*Ibid.*] If, on the other hand, the information collected fails the eligibility guidelines, the online rating platform will automatically reject the application or guidelines require the agent to terminate the application. [*Ibid.*]

One of those eligibility factors includes loss history. [7-SER-1787.] If the prospective insured's application discloses more than one prior

loss in the last five years, the online rating platform will automatically deny the application on that basis alone. [*Ibid*.] Because FNICA's online rating platform and records can only identify FNICA and affiliate-related losses, FNICA must rely on the applicant to disclose losses in the last five years involving non-FNICA-related insurers. [*Ibid*.]

FNICA's eligibility guidelines also consider the applicant's use of the property. [7-SER-1787.] FNICA's application asks the prospective insured to disclose whether they conduct any business on the premises. [*Ibid*.] If an applicant answers "yes" to that question, the system generates additional questions that require, among other things, disclosure of the frequency of the business activity and the business type. [*Ibid*.] If an applicant discloses that they rent the premises as a short-term rental, in whole or in part, FNICA's guidelines require the insurance agency to terminate the application. [*Ibid*.] If a policy is somehow issued and underwriting personnel later discover that the insured premises is used as a short-term rental, FNICA will cancel the policy. [*Ibid*.] That is because the use of an insured location as a short-term rental increases the risk and does not meet FNICA's eligibility guidelines for homeowners insurance. [*Ibid*.] FNICA would not issue

any other type of policy to cover a property used as a short-term rental. [*Ibid.*]

B. Hughes applies for a homeowners policy with an FNICA affiliate

On December 4, 2020, Hughes applied for a homeowners policy with General Insurance Company of America ("GICA")—an FNICA-affiliate—to cover her property located at 2145 Rambla Pacifico in Malibu, California (the "Property"). She applied through her insurance agent, Yuliya Shekhtman of YS Insurance. [2-SER-453–59; 4-SER-1001; 7-SER-1751–52, 1788.] Based on Hughes's application, GICA issued the homeowners policy (the "Homeowners Policy") to Hughes. [7-SER-1788.]

Three days later, GICA notified YS Insurance that it could not continue with coverage under the Homeowners Policy because the Property fell within an ineligible fire hazard area. [4-SER-1067–69; 7-SER-1789–90.] Thus, GICA cancelled the Homeowners Policy effective February 4, 2021, pursuant to policy terms allowing cancellation within 60 days for any reason, upon proper notice to the insured. [4-SER-1040; 7-SER-1790.]

C. Hughes's application and inception of the Limited Property Policy at issue in this appeal

On December 16, 2020, FNICA received from Hughes, through YS Insurance, an application for limited property insurance for the Property. [2-SER-463–69; 5-SER-1233; 7-SER-1752, 1755, 1790–91.] In her application, as she did for the Homeowners Policy, Hughes described the Property as a "single family dwelling" with only one family. [2-SER-467; 5-SER-1238; 7-SER-1791.] Under "Loss Information," Hughes represented that she had no losses in the last five years. [2-SER-465–66; 5-SER-1238; 7-SER-1755, 1791.] Hughes also represented that there was "no" "business on the premises." [2-SER-466; 5-SER-1238; 7-SER-1755, 1791.] Hughes provided this information in a phone call with YS Insurance as part of the application process. [2-SER-463–67; 5-SER-1374–75; 7-SER-1755, 1791.] She did not correct any of those representations when she reviewed and electronically signed the application. [2-SER-468–71; 5-SER-1243.] Based on Hughes's application, FNICA issued a limited property policy to Hughes, effective December 16, 2020 through December 16, 2021 (the "Limited Property Policy"). [5-SER-1249–1315; 7-SER-1790–91.]

The Limited Property Policy is a form of homeowners insurance, but does "not cover loss caused directly or indirectly by . . . Fire or Lightning" under its coverages for the dwelling or other structures. [5-SER-1285; 7-SER-1790–91.] Its coverage for personal property is provided on a named-perils basis, meaning that it only covers "accidental direct physical loss . . . caused by a peril listed" within the "Personal Property Losses We Cover" section of the policy. Loss caused by "fire" is not a listed peril. [5-SER-1288–89; 7-SER-1790–91.]

For losses of personal property (or "contents losses") that are caused by a covered peril, the available coverage limit depends on the location of the property. Personal property located "other than [at] the residence premises"—which is defined as the dwelling used principally as a private residence and where the insured resides—are subject to a lower limit. [5-SER-1303; 7-SER-1790–91.]

The Limited Property Policy also sets forth an "An Insured's Duties After Loss," which required Hughes to (1) "cooperate with us in the investigation . . . of any claim," (2) "prepare an inventory of the loss to . . . personal property showing in detail the quantity, description, replacement cost and age," and "[a]ttach all bills, receipts and related

documents that justify the figures in the inventory," and (3) "as often as we reasonably require," provide records and documents and "submit to examinations under oath and subscribe the same." [5-SER-1290–91; 7-SER-1790–91.]

D. Hughes procures replacement coverage for her homeowners insurance that was cancelled by GICA

After Hughes received notice that GICA had cancelled the Homeowners Policy, she applied for and purchased fire insurance through the California FAIR Plan (the "CFP"). [2-SER-460–62; 3-SER-571.] CFP issued her a policy for the Property on December 12, 2020. [4-SER-1110–42.]

Then, Hughes separately applied to Farmers Insurance for another limited property policy that, like the Limited Property Policy issued by FNICA, excluded the risk of fire. [5-SER-1154–1231.] Farmers issued its policy with coverage for the Property effective December 29, 2020, which supplemented the coverage in the CFP policy. [5-SER-1164–1231.]

E. Hughes makes insurance claims following a fire at the Property

On January 17, 2021, a fire occurred at the Property while third-party tenants were occupying it under a short-term rental. [2-SER-549;

3-SER-644–47, 846–49; 6-SER-1448–52.] At different times, Hughes submitted claims to the CFP, FNICA, and GICA for losses to the Property following the fire. [7-SER-1753–55.] CFP accepted coverage and paid over $1 million in benefits to reconstruct the home and replace landscaping. [3-SER-678–79.] FNICA denied Hughes's fire loss claim because the Limited Property Policy did not cover losses caused by fire.[1] [1-SER-270–71.] GICA denied the fire loss claim under its Homeowners Policy, because Hughes "flat-cancelled" that policy before the fire.[2] [5-SER-1358–62; 7-SER-1783.]

Separately, in January 2021, Hughes submitted a claim to FNICA under the Limited Property Policy for the alleged theft of contents from the Property. [7-SER-1753.] That is the claim at issue in this lawsuit. According to Hughes, shortly after the fire, she discovered nearly $1 million in missing contents from the grounds of the Property. [7-SER-1753–54; 4-SER-856.] She also submitted a claim to Farmers arising from the same alleged theft. [7-SER-1754–56.]

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[1] Hughes does not challenge FNICA's denial of her fire loss claim.

[2] Hughes requested the cancellation in late 2020 because she had obtained replacement coverage through Farmers and did not want to pay additional premiums associated with the GICA policy. [5-SER-1409; 7-SER-1781-82.]

F. FNICA's investigation reveals that Hughes made material misrepresentations in her application

At the outset of the claims investigation, FNICA discovered evidence that Hughes operated the Property as a short-term rental. [3-SER-846–49; 4-SER-866; 6-SER-1455–540, 1542–53, 1632–35; 7-SER-1755–56, 1809.] Indeed, at the time of the fire, Hughes had rented the Property to a third party. [2-SER-544–46; ER-110–11.] That rental was not a one-off event.

To the contrary, FNICA discovered that various online rental platforms listed the Property for rent, and a news article of the Fire described the Property as the neighborhood party house. [3-SER-846–49; 4-SER-866; 6-SER-1455–540, 1542–53, 1632–35; 7-SER-1755–56, 1809.] FNICA also found statements for short-term tenants from three different websites: (1) Booking.com; (2) Tripadvisor.com; and (3) VRBO. [6-SER-1455–540, 1542–53, 1632–35.] Those statements and other subsequently discovered documents show that the Property generated rental income in excess of $100,000 in 2020. [6-SER-1455–540, 1542–53, 1632–35; 7-SER-1809.]

Hughes also advertised the Property on Agoda, a popular travel website, as the "Malibu Ultimate Escape Guest House." [6-SER-1542-

43; 7-SER-1755–56.] Other online advertisements described the Property as the "Malibu Ultimate Escape Hotel." [6-SER-1546–53; 7-SER-1755–56.]

The claims investigation also uncovered three prior claims by Hughes, which she omitted in her application. [7-SER-1756.] More specifically, Hughes made separate fire/smoke and theft claims to her prior homeowners insurer, Lexington Insurance, in 2018. [2-SER-415–16; 3-SER-575; 6-SER-1555, 1557–61, 1603–06; 7-SER-1756.] In 2019, Hughes also made a claim to Lexington for wind damage to the Property. [2-SER-415–16; 7-SER-1756.]

At no point in her application, or prior to binding coverage, did Hughes disclose those prior losses to FNICA. [2-SER-463–66; 7-SER-1791–92.] Nor did Hughes disclose that she rented the Property as a short-term rental. [2-SER-463–64, 466; 7-SER-1791–92.] Had FNICA known any of those facts, it would not have extended coverage to Hughes under the Limited Property Policy, or any other policy. [7-SER-1791–92.]

After FNICA issued the Limited Property Policy, Hughes disclosed to Shekhtman of YS Insurance that she rented, or intended to rent, the

Property to third-party tenants. [5-SER-1317, 1322.] Shekhtman documented that conversation with Hughes in an email, explaining that "[t]here are no homeowners policy [sic] that will cover any business exposure that relates to renting out your house." [5-SER-1317.] In another email to Hughes, Shekhtman explained further: "after the policy has been bound you mentioned that you are planning to rent out this property. This is not the policy that has to be written. All information has to be disclosed in the beginning not AFTER policy HAS BEEN ISSUED." [5-SER-1322 (capitalization in original).]

In a recorded interview that FNICA's investigator conducted with Shekhtman, she again explained that Hughes had not disclosed the rental of the Property to YS Insurance until December 23, 2020. [5-SER-1390–91; 7-SER-1777–81.] As she put it, Hughes disclosed her intent to rent the Property like an "Airbnb" only after issuance of the Limited Property Policy. [5-SER-1390–91.]

G. Hughes refuses to cooperate in FNICA's investigation of her claims

FNICA's investigation raised several coverage concerns, including as to: (1) Hughes's use of the Property, (2) the scope and amount of Hughes's alleged losses, and (3) Hughes's separate claim to Farmers for

the same or similar losses. [7-SEC-1754–59.] Thus, in February 2021, FNICA provided Hughes with a blank Proof of Loss and Property Loss Sheet, and asked that she complete and return it. [7-SEC-1754; 4-SER-859–64.] Shortly thereafter, FNICA advised that "we are investigating your loss under a Reservation of Rights" and that "[n]o coverage determination can be provided until our investigation has been completed." [1-SEC-291–93; 7-SEC-1756.] FNICA asked Hughes to submit to an Examination Under Oath ("EUO") and to provide a "list of all stolen items" and "proof of ownership for the stolen items." [1-SER-291.]

FNICA retained coverage counsel, Michele Levinson of the Colman Perkins law firm, to assist in the investigation by seeking Hughes's production of records and completing her EUO. [7-SER-1759, 1796.] Levinson noticed the EUO and requested that Hughes provide various categories of documents in advance, including: (1) fire/police reports, (2) communications with Farmers, the CFP, and Hughes's insurance agents relating to fire, theft and policies, (3) documents relating to the use of the Property as a rental, (4) documents sufficient

to establish Hughes's residence, (5) an inventory of all items stolen, and (6) documents reflecting Hughes's income. [7-SER-1759–60, 1796–97.]

Hughes did not appear at the time for her EUO. [7-SER-1797.] Instead, she advised that she had retained counsel, Aleksandr Gruzman. [5-SER-1351; 7-SER-1797.] Levinson rescheduled Hughes's EUO, and again asked that Hughes provide the requested documents beforehand. [7-SER-1798.] In response, Hughes produced "the items list, police reports and cause and origin report," but argued that "[t]he remainder of the documents you requested either does [sic] not exist, or an [sic] invasion of privacy of Ms. Hughes." [4-SER-912; 7-SER-1798–1800.] Hughes's production did not include most of the other requested documents. [7-SER-1799.] Levinson explained the need for all of the documents and postponed the EUO pending receipt of the records. [4-SER-920; 7-SER-1800.]

Hughes thereafter provided a Proof of Loss. [1-SER-249–54; 7-SER-1798–99.] In it, she claimed a contents loss totaling $1.75 million, but the list of contents on the Property Loss Sheet—which was largely illegible—appeared to total less than the amount claimed. [1-SER-251, 253.] Hughes did not individually identify each item, but instead

grouped together items like "designer" clothing for $250,000 and disposable gowns for $270,000. [1-SER-253.] It also omitted key information, like brand name, description, place of purchase, and original cost. [*Ibid.*]

The parties again rescheduled the EUO, and Levinson again asked Hughes to provide a detailed inventory of the claimed lost items. [4-SER-959; 7-SER-1803.] Gruzman then produced some additional records, including various handwritten invoices and another Property Loss Sheet for, among other things, Hughes's alleged purchase of "500 Sports Suits" totaling $500,000, "45,000 Gowns" totaling $225,000, and a body treatment machine totaling $60,000. [4-SER-961–62; 7-SER-1802–03.] In this Property Loss Sheet, Hughes asserted that her theft claim now totaled $841,000. [4-SER-962.]

Levinson responded that the production remained inadequate. Hughes still had not produced a signed Proof of Loss with a detailed inventory. [4-SER-964–69; 7-SER-1803.] Nor had she produced: (1) any of her claim communications with CFP or Farmers, (2) prior claim records, including for the 2018 theft claim, and (3) financial records demonstrating proof of payment for the allegedly stolen items. [4-SER-

968.] As a result, Levinson once again rescheduled Hughes's EUO and advised that she expected FNICA would need at least two separate EUO sessions given Hughes failure "to provide a detailed inventory or identify which receipts correspond with each item." [4-SER-964–65, 979.]

In August 2021, nearly four months after the originally scheduled date, Hughes appeared virtually for the first session of her EUO. [3-SER-558; 7-SER-1805–08.] During the EUO, Hughes obstructed the examination by (1) refusing to respond to questions in a straightforward manner—or at all—based on unjustified relevancy objections, (2) offering argumentative responses, and (3) disconnecting from the examination for lengthy periods of time. [3-SER-564, 572–73, 588–589, 594–97, 600–02, 606–07, 609–10; 7-SER-1806–09.] By this time, Hughes still had not produced the remaining categories of documents requested by Levinson. [7-SER-1805.] Hughes also failed to return her signed EUO transcript.[3] [7-SER-1769, 1812.]

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[3] At a discovery hearing in the subsequent litigation, Hughes's attorney represented that Hughes signed the EUO in September 2021, but did not return it due to a purported "technical error." [2-SER-425; 7-SER-1820.]

After her EUO, Hughes produced some additional (but still incomplete) records. [7-SER-1810–11.] And she provided a new Proof of Loss that now claimed a theft loss totaling $912,241.66. In an attached Property Loss Sheet, Hughes itemized the same alleged theft of Sports Suits ($500,000), disposable gowns ($225,000), a body treatment machine ($60,000) and other items. [1-SER-179–81; 7-SER-1811.] But this time, the Proof of Loss identified clothing losses totaling $87,135 and the theft of a baby grand piano totaling $19,106.66. [1-SER-179–81.] For the first time, it also disclosed that the 45,000 disposable gowns were "donated" by a "branding company" called "DTD" and it described the locations where the listed items had been stored outside of the burned house. [1-SER-180.]

FNICA scheduled a second session of Hughes's EUO. [1-SER-202–07; 7-SER-1812.] Hughes initially refused to appear, but finally participated in another session in November 2021. [7-SER-1812.] She again participated virtually, but this time did so while standing in a public place where she could be overheard arguing with someone "off-camera." [1-SER-226, 228–29; 7-SER-1812–13.] Levinson asked questions to confirm that Hughes was capable of proceeding with the

examination, but Hughes refused to acknowledge that she could proceed. [1-SER-224–25; 7-SER-1812–13.] Thus, Levinson adjourned the EUO. [1-SER-229–30; 7-SER-1813.] Gruzman then disclosed that Hughes was standing outside of a hospital emergency room to seek treatment for "emotional distress" and "post-traumatic stress," which he attributed to FNICA. [1-SER-230-31; 7-SER-1813.] Levinson subsequently requested another session to complete Hughes's EUO, but Hughes refused. [7-SER-1813.]

H. FNICA denies the theft claim

After completing its investigation, FNICA denied the theft claim because Hughes breached the policy conditions based on her repeated failure to cooperate, in particular her refusal to complete the EUO and her failure to produce all requested documents. [1-SER-256–266; 7-SER-1814–15.] FNICA also denied the claim based on its conclusion that Hughes misrepresented the use of the Property in her application. [1-SER-256–266; 7-SER-1814–15.]

I. Hughes sues FNICA, and the district court grants summary judgment to FNICA on the ground that Hughes made material misrepresentations in her insurance application

In January 2022, Hughes filed this lawsuit against FNICA alleging claims for breach of contract and bad faith.[4] [7-SER-1861–70.] According to Hughes, FNICA unreasonably denied Hughes's theft claim. [7-SER-1856–69.] FNICA answered and also filed a counterclaim seeking rescission of the Limited Property Policy based on Hughes's material misrepresentations and omissions in her application. [1-SER-274–87.]

FNICA moved for summary judgment on its rescission claim and Hughes's breach of contract and bad faith claims. [7-SER-1822–55.] In support, FNICA presented declarations from an underwriting manager for FNICA and GICA who described the application and underwriting process (Temple Fournier), the investigator who handled Hughes's claim (Mandi Thornton), the coverage counsel for FNICA who assessed Hughes's claim (Michele Levinson), and litigation counsel who authenticated production and litigation-related documents (Jeffrey

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[4] Hughes filed a separate, nearly identical lawsuit against GICA that is the subject of a concurrent appeal in Case No. 23-55342.

Crowe). [7-SER-1749–820.] Documentary evidence included excerpts from the transcripts for the two sessions of Hughes's EUO in this case [3-SER-557–655] and the transcript for Hughes's EUO taken by Farmers in connection with her claim to Farmers [2-SER-513–54]. FNICA also presented evidence of, among other things, the relevant applications and policies, and advertisements and statements relating to use of the Property as a short-term rental. [3-SER-846–49; 4-SER-866; 6-SER-1455–540, 1542–53, 1632–35; 7-SER-1755–56, 1809.]

The district court granted the motion. [ER-1–15.] The court held there was no dispute of material fact that Hughes had misrepresented both the use of the Property as a business and the prior losses on her application for the Limited Property Policy. [ER-9–15.] The district court did not reach the question on whether summary judgment was also justified based on Hughes's refusal to cooperate in FNICA's investigation, but remarked that "summary judgment might well have also been appropriate because the undisputed facts suggest Hughes refused to cooperate in the requested second EUO." [ER-14.]

Hughes appealed.

Summary of Argument

Issue #1 – Summary judgment was proper based on Hughes's material misrepresentations in her insurance application. The district court correctly concluded there was no genuine issue of material fact regarding whether Hughes misrepresented both the use of the Property as a business and the prior losses on her application for the Limited Property Policy.

First, it is undisputed that Hughes told her insurance agent there was no business use on the Property when completing the application by phone, and it is undisputed that this question is material for FNICA. Ample evidence—including reservation statements, rental confirmations, and screenshots of advertisements for the property on rental platforms—demonstrated that Hughes in fact frequently used the Property for short-term rentals. Hughes confirmed this in her EUO. Hughes now purports to have misunderstood the question in the application, but even if true, that would not undermine the district court's summary judgment order. That is because even unintentional misrepresentations give rise to a right by the insurer to rescind the policy.

Second, it is also undisputed that (i) Hughes told her insurance agent there were no prior losses when completing the application by phone, (ii) there were in fact prior losses, and (iii) the claims history is material for FNICA. Hughes purports to have misunderstood this question as well, but even a mistaken misrepresentation still gives rise to a right by the insurer to rescind the policy.

Thus, FNICA is entitled to summary judgment on its claim for rescission, and because rescission renders the policy void *ab initio*, Hughes cannot pursue claims for breach of contract or bad faith against FNICA.

Issue #2 – Summary judgment should also be affirmed on the alternative grounds that Hughes failed to cooperate in the investigation of her claims. The district court did not reach the issue of whether Hughes's breach of contract and bad faith claims also fail based on her refusal to complete her EUO and her refusal to cooperate with the investigation, but its summary judgment order can be affirmed on this ground as well. Hughes was obligated by the policy and by California law to cooperate with her insurer's investigation of her claim, including by submitting to an EUO and providing requested documents.

Undisputed evidence presented at summary judgment shows Hughes appeared for an initial EUO, but repeatedly obstructed the examination by, among other things, refusing to fully answer questions. Hughes then failed to complete a second EUO, which was needed to investigate new records and a new "Proof of Loss" she submitted. Hughes also refused to adequately respond to requests for relevant documents regarding her claimed losses. Her failure to cooperate breached her duties under the policy and precludes her from pursuing claims of breach of contract or bad faith against FNICA.

Standard of Review

This Court reviews de novo a district court's order granting summary judgment. *Lowry v. City of San Diego*, 858 F.3d 1248, 1254 (9th Cir. 2017) (en banc). "Viewing the evidence in the light most favorable to the nonmoving party, [this Court] must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001).

Additionally, this Court "may affirm the district court's grant of summary judgment on any ground supported by the record, regardless

of whether the district court relied upon, rejected, or even considered that ground." *Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist.*, 17 F.4th 950, 966 (9th Cir. 2021) (quoting *Am. Fed'n of Musicians of U.S. & Canada v. Paramount Pictures Corp.*, 903 F.3d 968, 981 (9th Cir. 2018)); *see also Afewerki v. Anaya Law Grp.*, 868 F.3d 771, 777 (9th Cir. 2017) (disagreeing with the district court's reasons for granting summary judgment, but affirming on alternative grounds).

Legal Discussion

I

The District Court Correctly Entered Summary Judgment for FNICA Based on Hughes's Material Misrepresentations

A. California law entitles insurers to rescind insurance policies based on material misrepresentations or omissions

In California, insurers have the right to full and truthful information from insurance applicants, and the applicants have a corresponding duty to disclose all material facts in their insurance applications. *See* Cal. Ins. Code § 332; *Williamson & Vollmer Eng., Inc. v. Sequoia Ins. Co.*, 64 Cal. App. 3d 261, 273 (1976) ("An insurance company is entitled to determine for itself what risks it will accept, and therefore to know all the facts relative to the [risk]."); *Tran v. Kan. City*

Life Ins. Co., 228 F. Supp. 3d 1068, 1074 (C.D. Cal. 2017) (explaining California has a "long-held policy that 'an insurance company has the unquestioned right to select those whom it will insure and to rely upon him who would be insured for such information as it desires as a basis for its determination to the end that a wise discrimination may be exercised in selecting its risks.'").[5] When applicants breach this duty by making material misrepresentations or omissions in an insurance application, insurers are entitled to rescind the policy *ab initio*. *West Coast Life Ins. Co. v. Ward*, 132 Cal. App. 4th 181, 186–187 (2005) (citing *O'Riordan v. Fed. Kemper Life Assurance*, 36 Cal. 4th 281, 286–87 (2005)).

An insurer is entitled to rescission if it can show: (1) the concealment or misrepresentation of a fact in the application, and (2) the materiality of the fact concealed or misrepresented. *See Superior*

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[5] None of the parties dispute that California law applies to this case. It was removed to district court from California Superior Court based on diversity jurisdiction and it concerns property located in California. Under these circumstances, California law applies. *See Gov't Emps. Ins. Co. v. Nadkarni*, 391 F. Supp. 3d 917, 924-25 (N.D. Cal. 2019) ("Because the defendants are California residents, and the parties' dispute relates to an insurance policy covering property located in the state, California substantive law applies in this diversity action"). The Limited Property Policy is governed by California law. [*See* 5-SER-1258.]

Dispatch, Inc. v. Insurance Corp. of New York, 181 Cal. App. 4th 175, 191 (2010); *U.S. Specialty Ins. Co. v. Bridge Capital Corp.*, 482 F.Supp.2d 1164, 1168 (C.D. Cal. 2007); Cal. Ins. Code §§ 358 and 359. The Insurance Code defines "concealment" as "[n]eglect to communicate that which a party knows, and ought to communicate," and provides that "[c]oncealment, whether intentional or unintentional," entitles the injured party to rescind the insurance policy. Cal. Ins. Code §§ 330-332.

Materiality of the misrepresentation or omission is "determined solely by the probable and reasonable effect which truthful answers would have had on the insurer." *Thompson v. Occidental Life Ins. Co.*, 9 Cal. 3d 904, 916 (1973); *see also* Cal. Ins. Code § 334. Materiality is a subjective inquiry requiring the court to ask whether truthful answers would have affected the insurer's decision to enter into the contract, its assessment of the degree or character of the risk, its determination of premiums, or its setting of policy terms. *Mitchell v. United Nat'l Ins. Co.*, 127 Cal. App. 4th 457, 474 (2005). The misrepresentation need not relate to the loss ultimately claimed by the insured to justify recission. *Torbensen v. Family Life Ins. Co.*, 163 Cal. App. 2d 401, 405 (1958). "The fact that the insurer has demanded answers to specific questions

in an application for insurance is in itself usually sufficient to establish materiality [of that information] as a matter of law." *West Coast Life Ins. Co.*, 132 Cal. App. 4th at 187; *LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co.*, 156 Cal. App. 4th 1259, 1270 (2007).

B. There is no genuine dispute that Hughes made misrepresentations in her application

1. Hughes misrepresented that the Property was not being used as a short-term rental

It is undisputed that FNICA's application for insurance required Hughes to disclose any business operated on the premises of the Property. [4-SER-1001, 1006; 7-SER-1788.] It is also undisputed that Hughes stated during the phone call to complete the application that she was not operating any business on the Property and that Hughes did not disclose that the Property had been used for short-term rentals. [2-SER-463–67; 5-SER-1374–75; 7-SER-1755, 1791.] The representative from YS Insurance recorded Hughes's answer in the application and Hughes later signed it.[6] [2-SER-466, 468–71; 5-SER-1243; 7-SER-1755, 1791.]

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[6] Hughes has disputed whether the person she spoke to from YS Insurance was Shekhtman or a staff member from her agency [ER-150], but this makes no difference for FNICA's rescission claim because Hughes was obligated to provide truthful information, regardless of

The evidence also established that the Property had in fact been frequently used for short-term rentals. Evidence included uncontroverted reservation statements, rental confirmations and screenshots of advertisements for the Property on rental platforms such as Booking.com, HomeAway and VRBO. [6-SER-1455–540, 1542–53, 1632–35.] Reservation statements show the Property was rented at least 31 times in 2020 alone, for a collective revenue of more than $100,000. [6-SER-1455–540, 1542–53, 1632–35; 7-SER-1809.]

Hughes herself testified in a sworn EUO that she was involved in advertising the Property for rental, submitting photos and descriptions for use in the various listings, and communicating with personnel at the rental platforms. [2-SER-520, 522–24.] Hughes later contradicted this testimony in a declaration opposing summary judgment, stating instead that she has never run a business on the Property and that her sister was the one renting it. [ER-106.] The district court, however, correctly discounted this self-serving declaration, explaining that Hughes cannot create an issue of fact by contradicting her prior testimony. [ER-11.] As this Court has repeatedly held, "[t]he general rule in the Ninth Circuit

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whether the application was being completed by Shekhtman or her staff.

is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009); *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012)). Thus, Hughes cannot avoid summary judgment by directly contradicting the facts she previously admitted.

Moreover, Hughes conceded in her declaration that she personally handled the rental of the Property to the short-term tenant who was using it at the time of the January 2021 fire. [ER-110–11.] And yet Hughes did not disclose this rental business to FNICA when she applied for insurance. [2-SER-463–64, 466; 7-SER-1791–92.] That standing alone is sufficient to affirm the district court's summary judgment order. Certainly taken together, the evidence was sufficient for the district court to conclude there was no genuine issue of material fact as to whether Hughes misrepresented in her insurance application that the Property was not being used for business purposes.

2. Hughes misrepresented that there were no prior losses on the Property

FNICA's application for insurance also required Hughes to disclose all losses in the last five years. [2-SER-465–66; 5-SER-1238; 7-SER-1755, 1791.] Hughes told her agent there were none, the agent

recorded this answer in Hughes's application, and Hughes signed it. [2-SER-463–66; 7-SER-1791–92.] Yet uncontroverted evidence presented at summary judgment showed there were in fact three prior insurance claims at the Property within the past five years. [2-SER-415–16; 3-SER-575; 6-SER-1555, 1557–61, 1603–06; 7-SER-1756.]

In response to FNICA's summary judgment motion, Hughes did not deny there were prior claims or that she failed to disclose them in her application. Rather, she argued that she misunderstood the question in the application because English is not her first language, and she mistakenly believed that the agent would verify whether there were any prior insurance claims. [ER-36.] Hughes also argued she mistakenly believed the question was limited to claims with Safeco (FNICA's parent company), as opposed to other insurers. [*Ibid*]

The district court, however, correctly concluded that material misrepresentations, such as this one, justify rescission whether they were intentional or unintentional. *See West Coast Life Ins. Co.*, 132 Cal. App. 4th at 181 (insurers are entitled to rescission based on material misrepresentations "whether intentional or unintentional"). [ER-13 (citing *West Coast Life Ins. Co.*).]

Even if Hughes's attempts to explain her misstatements were relevant to rescission, the court concluded those assertions were contradicted by the rest of the record and, therefore, could not create a disputed material issue of fact. Hughes testified that she can read, write and understand English, and the EUO transcripts and Hughes's declarations further support her literacy. [ER-13; 1-SER-80, 82–115; 3-SER-558–55.] The application itself shows the question about prior losses was unambiguously broad and not limited to Safeco claims. [5-SER-1238.]

Hughes also argued that she was not at fault for failing to disclose one of the three claims—a lawsuit with Lexington Insurance—because it was publicly available through court records. [ER-36.] The district court correctly rejected this defense because insurers have no duty to search for prior losses and may rely on applicants' answers without verifying their accuracy. *See Mitchell*, 127 Cal. App. 4th at 476 (explaining that "an insurer has the right to rely on the insured's answers to questions in the insurance application without verifying their accuracy").

Accordingly, the district court correctly concluded that there was no genuine dispute of material fact regarding whether Hughes misrepresented that there were no prior claims on the Property in her application.

C. There is no genuine dispute that Hughes's misrepresentations and omissions were material

There is also no dispute that FNICA's questions about prior losses and use of the Property as a business were material. The mere fact that these questions were included on the application is *prima facie* evidence of their materiality. *See LA Sound*, 156 Cal. App. 4th at 1270. Courts have recognized that an applicant's loss history and the use of the property are material information as a matter of law. *Ibid.*; *see also Thompson*, 9 Cal. 3d 904 at 915-16; *Imperial Cas. Indem. v. Sogomonian*, 198 Cal. App. 3d 169, 177-79 (1988); *Fed. Ins. Co. v. Curon Med. Inc.*, 2004 WL 2418318 at *4 (N.D. Cal. 2004).

To further support materiality, FNICA provided a declaration from a senior underwriting manager describing the importance of prior losses and use of the property in assessing risk under underwriting guidelines. [7-SER-1787.] That declaration also demonstrated that, had Hughes truthfully disclosed either the use of the Property as a short-

term rental or the three prior losses, her application would have been rejected or terminated. [*Ibid*.] Hughes did not dispute any of this evidence.

Because Hughes made misrepresentations in and omitted important information from her insurance application, and because those misrepresentations and omissions were material, FNICA was entitled to summary judgment on its counterclaim for rescission of the insurance policy. The effect of the rescission is that the policy is deemed void. *LA Sound*, 156 Cal. App. 4th at 1267. Hughes's breach of contract and bad faith claims are predicated on the existence of the insurance policy, so they fail as a matter of law and the district court properly granted summary judgment on these claims in favor of FNICA.

D. Hughes fails to identify any genuine issues of fact that would preclude summary judgment

Hughes's primary contention on appeal is that the district court erred in granting summary judgment because there were issues of fact regarding whether she misrepresented the use of the Property as a short-term rental and the prior losses. Hughes asserts a number of factual disputes, but most of them recycle the arguments the district court properly rejected.

First, Hughes argues she did not understand the question about whether the Property was used for business purposes because English is not her first language, and because the agent did not explain the question over the phone. [AOB 4, 7–9]. Hughes claims the question is "vague as to the time period" and she misinterpreted it as encompassing only future business uses at the Property rather than past business uses. [AOB 7–8.] Hughes also claims she misunderstood the question about prior losses as requesting only claims with Safeco, as opposed to other insurers. [AOB 8.]

These assertions do not create a triable fact. Even assuming Hughes mistakenly believed the application only asked for prospective business use, her answer was false because it is undisputed that she did subsequently rent the Property. [3-SER-846–49; 4-SER-866; 6-SER-1455–540, 1542–53, 1632–35; 7-SER-1755–56, 1809.] Indeed, she was renting the property at the time of the losses she now claims FNICA improperly denied coverage for. [2-SER-544–46; ER-110–11.]

Hughes's claim of limited English proficiency also does not undermine the district court's summary judgment order. Hughes acknowledged in her deposition that she could understand English, and

her proficiency is also supported by the EUO transcripts and her declarations in this case, which are all in English. [ER-105–13, 149–53; 2-SER-513–53.] More importantly, even assuming Hughes was genuinely mistaken about the meaning of the questions on her application, FNICA would still be entitled to rescission. *West Coast Life Ins. Co.*, 132 Cal. App. 4th at 181 (insurers are entitled to rescission based on material misrepresentations "whether intentional or unintentional"). Indeed, the Legislature has explicitly provided that "[c]oncealment, whether intentional or unintentional, entitles the injured part to rescind insurance." Cal. Ins. Code § 331. Thus, the only material facts for purposes of summary judgment are (1) whether Hughes concealed facts that should have been communicated to FNICA and (2) whether the concealed facts were material. Because there is no genuine dispute regarding either of those facts, the district court properly granted FNICA summary judgment.

Second, Hughes claims her sister was the one who handled the short-term rentals on the Property and created the rental listings, not Hughes herself. [AOB 2–3; ER-110–11.] According to Hughes, her "family and friends were house sitting" at the Property from 2017

through 2019, while Hughes was traveling overseas to attend international art shows. [AOB 2–3; ER-110–11.] Hughes acknowledged that she personally handled one rental in January 2021, but claims that she did it “out of sympathy for the loss of her son” and “intended to return the money.” [ER-111.]

As described in Part I.B.1, ante, the district court correctly rejected this explanation because it contradicted Hughes’s own prior testimony that she wrote descriptions for the short-term rentals, handled advertisements and communicated with the rental platforms. [2-SER-520, 522–24.] Hughes cannot create a disputed issue of fact by controverting her own past testimony. *See*, *e.g.*, *Yeager v. Bowlin*, 693 F.3d at 1080–81. Moreover, even if it were true that Hughes’s sister handled the rentals, this would not absolve Hughes of her duty as the property owner to provide accurate information in her insurance application. *See* Cal. Ins. Code § 332.

Third, Hughes claims the agent did not send the entire application for her signature, but sent only the signature page. [AOB 8, 10–11.] This assertion is dubious, as the only supporting evidence for it is Hughes’s own declaration opposing summary judgment and an

unauthorized supplemental declaration she filed following FNICA's reply brief. [ER-107–08, 150.] But even assuming there was an evidentiary basis for this assertion, it does not create a material issue of fact regarding whether FNICA is entitled to rescission. It is undisputed that Hughes failed to disclose the use of the Property as a short-term rental, and also failed to disclose the prior losses, when providing answers to the agent who was completing the application by phone. [2-SER-465–67; 5-SER-1238; 7-SER-1755, 1791.]

Her application, therefore, accurately represented the information she intended to provide, and FNICA is entitled to rely on these representations without independently verifying them. *See Mitchell*, 127 Cal. App. 4th at 476; *Robinson v. Occidental Life Ins. Co.*, 131 Cal. App. 2d 581, 585 (1955) (disapproved on other grounds in *MacDonald v. California-Western States Life Ins. Co.*, 203 Cal. App. 2d 440 (1962)).

FNICA also proved, and Hughes did not dispute, that the prior claims history and use of the Property as a business are material information. [7-SER-1786–87.] Hughes's misrepresentations through her agent together with the materiality of the information are sufficient to justify rescission, regardless of when the agent delivered a full copy

of the application to Hughes, or whether Hughes had an opportunity to review in writing the answers she gave to her agent before the application was submitted. Importantly, as noted above, rescission is available even if the misrepresentation was unintentional. *See* Cal. Ins. Code § 331; *West Coast Life Ins. Co.*, 132 Cal. App. 4th at 181.

Fourth, Hughes argues the "articles in the Malibu times regarding my property being a fire house are false and defamatory" and "[b]ased on information and belief Malibu times have [sic] relied on unverified defamatory statements by third parties." [AOB 9; ER-39.] Hughes is apparently referring to a Malibu Times article submitted in support of summary judgment, in which neighbors of Hughes's Property described raucous parties, trash, noise, traffic hazards, and the January 2021 fire originating from the Property.[7] [3-SER-846–49.] The district court, however, did not rely on this article and it was not necessary to support the district court's finding that Hughes failed to disclose the use of the Property as a short-term rental. Moreover, the statements in the article about use of the Property as a short-term rental were corroborated by

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[7] The article describes Hughes's Property as a short-term rental used for large parties, but does not describe it as a "fire house." [3-SER-846-49.]

voluminous evidence presented to the district court, including copies of rental advertisements for the Property, booking confirmations, financial statements, and Hughes's own testimony at the EUO by Farmers. [2-SER-520, 522–24; 3-SER-846–49; 4-SER-866; 6-SER-1455–540, 1542–53, 1632–35; 7-SER-1755–56, 1809.] And Hughes also failed to disclose her prior claims history on the Property, which is an independent misrepresentation that entitles FNICA to rescission regardless of Hughes's prior rental history.

Fifth, Hughes argues there is a triable issue of fact as to whether her insurance policy in fact permits rentals "on an occasional basis for the exclusive use of a residence, as well as residence by no more than two rooms or boarders." [AOB 9–10.] Even if true, this is irrelevant. FNICA sought and the district court ordered summary judgment based on Hughes's material misrepresentations during the application process. The undisputed evidence shows that if Hughes had disclosed that she operated the Property as a short-term rental, FNICA would not have issued the policy and the agent would have been required to terminate the application. Thus, it does not matter whether or not the terms of the policy would permit short-term rentals going forward

because the material misrepresentations at the application stage render the policy void *ab initio*.

Hughes is also incorrect that the Limited Property Policy would allow short-term rentals. The policy provision on which she relies only applies to liability coverage, not coverage for first-party property claims like the one Hughes made to FNICA. [AOB 9–10; 5-SER-1288–89.] That provision is, therefore, inapplicable here.

Moreover, even if that provision did apply, Hughes could not rely on it because the frequent use of the Property as short-term rental subjects her to an exclusion. Hughes relies on a policy provision that excludes liability coverage for bodily injury and property damage "arising out business pursuits of any insured or the rental or holding for rental of any part of any premises by any insured." [AOB 9-10; 5-SER-1298.] The Limited Property Policy defines business to include a "trade, profession, or occupation." [5-SER-1302.] This business pursuits exclusion has three exceptions. Hughes relies on the exception for "the rental or holding for rental of a residence of yours . . . on an occasional basis for the exclusive use as a residence" or "in part, unless intended

for use as a residence by more than two roomers or boarders." [AOB 9-10.]

The business pursuits exclusion turns on a profit motive—if the motive for renting the property is for profit, the exclusion applies (and not the exception to that exclusion). *Uhrich v. State Farm Fire & Cas. Co.*, 109 Cal. App. 4th 598, 618 (2003). The exclusion applies even if the Property was rented only for part-time activities and businesses. *Terrell v. State Farm Gen. Ins. Co.*, 40 Cal. App. 5th 497, 504–06 (2019) (insureds' income-generating rental activity did not fall within exception to business pursuits exclusion because it involved multiple tenants over extended period of time). The undisputed evidence here demonstrated that Hughes used the Property as a short-term rental at least 31 times in 2020 alone, generating income of more than $100,000. That kind of consistent business activity for a substantial profit would be excluded under the Limited Property Policy, and would not fit under the exception for "occasional" rental use.

Lastly, Hughes contends she was not required to disclose one of the three prior losses—a lawsuit with prior insurer Lexington—because "Safeco could have easily found the prior Lexington lawsuit online as it

is part of court records available through a public domain." [AOB 9.] Of course, even if true, this would not excuse Hughes's failure to disclose the other two prior losses, which would independently justify the district court's decision regarding FNICA's entitlement to rescission. In any event, insurers have no duty to search for prior claims and, instead, may rely on representations by the insured. *See Mitchell*, 127 Cal. App. 4th at 476.

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In short, none of Hughes's arguments create an issue of material fact regarding whether she misrepresented the use of the Property for business purposes or concealed the prior losses on the Property. And there is no dispute that those misrepresentations and concealments were material to FNICA's decision to issue the policy as Hughes's application would have been rejected if she had provided accurate information. Therefore, the district court's order granting FNICA's motion for summary judgment should be affirmed.

II

FNICA Was Also Entitled to Summary Judgment Based on Hughes's Failure to Cooperate with the Claims Investigation

Because the district court granted summary judgment based on Hughes's misrepresentations, it did not reach FNICA's alternative argument that it was also entitled to summary judgment on Hughes's affirmative claims (for breach of contract and bad faith) based on Hughes's failure to complete her EUO and her failure to produce requested documents during the investigation of her claims. [ER-14–15.] The court noted, however, that "summary judgment might well have also been appropriate because the undisputed facts suggest Hughes refused to cooperate in the requested second EUO." [ER-14.] While the court did not decide this issue, the evidence presented shows summary judgment would have been proper on this ground as well. *See Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) ("[W]e may affirm based on any ground supported by the record.").

Both the Limited Property Policy and the California Insurance Code required Hughes to cooperate in FNICA's investigation by producing records, preparing a detailed inventory, and, as often as

reasonably required, submitting to an EUO and "subscribing" it (*i.e.*, signing the transcript of the examination). *See* Cal. Ins. Code § 2071; *Prudential-LMI Comm. Ins. v. Sup. Ct.*, 51 Cal. 3d 674, 684 (1990) ("When a clause in an insurance policy is authorized by statute, it is deemed consistent with public policy as established by the Legislature."). [5-SER-1290–91; 7-SER-1790–91.] Her failure to perform these contractual duties constitutes material non-performance that defeats her breach of contract and bad faith claims. *See Wall Street Network, Ltd. v. New York Times Co.*, 164 Cal. App. 4th 1171, 1178 (2008) (to prove breach of contract, plaintiff must prove "plaintiff's performance or excuse for nonperformance"); *Brizuela*, 116 Cal. App. 4th at 590 (an insured's compliance with the policy "is a condition precedent to any claim," so refusing "to submit to such an examination causes a forfeiture of any rights under the policy").

A. Hughes's failure to complete her EUO was sufficient to warrant summary judgment in FNICA's favor

Under California law, insurers have the right to require insureds to "submit to an examination under oath" and answer all material questions as "a prerequisite to the right to receive benefits under the policy." *Brizuela,* 116 Cal. App. 4th at 587; *Robinson v. National Auto.*

& Cas. Ins. Co., 132 Cal. App. 2d 709, 714 (1955). An insurance policy term requiring an EUO "concerning all proper subjects of inquiry is reasonable as a matter of law." *Globe Indem. Co. v. Sup. Ct.,* 6 Cal. App. 4th 725, 731 (1992); *Hickman v. London Assur. Corp.,* 184 Cal. 524, 529-530 (1920) (explaining that EUOs serve the purpose of affording the insurer "some means of cross-examining, as it were, upon the written statement and proofs of the insured, for the purpose of getting at the exact facts before paying the sum claimed of it").

An insured's failure "to submit to such an examination causes a forfeiture of any rights under the policy." *Brizuela*, 116 Cal. App. 4th at 590; *Abdelhamid v. Fire Ins. Exch.,* 182 Cal. App. 4th 990, 1002, 1005 (2010). Importantly, failure to complete an EUO establishes prejudice as a matter of law, and the insurer need not prove prejudice before denying benefits. *Brizuela*, 116 Cal. App. 4th at 590-592. Failure to submit to an EUO is *per se* prejudicial. *Ibid.* Courts, including this one, have consistently rejected breach of contract and bad faith claims by insureds who failed to complete a required EUO. *Brizuela*, 116 Cal. App. 4th at 588-89 & 595 (insured's failure to attend or schedule EUO eliminated right to sue insurer for breach of contract or bad faith based

on denial of insurance claim); *Sarkisyants v. State Farm Mutual Auto. Ins. Co.*, 256 Fed.Appx. 52, 53 (9th Cir. 2007) (affirming summary judgment in favor of insurer because the insured "did not attend a reasonably requested second examination under oath, despite numerous requests."); *Chan v. Empire Fire & Marine Ins. Co.*, 2011 WL 3267765 at *6 (N.D. Cal., July 29, 2011) (granting summary judgment in insurer's favor where insured attended EUO but obstructed examination, refused to answer questions, and refused to complete it in another session).

Here, the undisputed evidence shows that, while Hughes appeared for one session of the EUO, she obstructed the examination, failed to provide straightforward answers (and, in some instances, any answer at all) based on improper claims of privacy and relevancy, and she left the examination for long periods of time. [3-SER-564, 572–73, 588–589, 594–97, 600–02, 606–07, 609–10; 7-SER-1806–09.] She also failed to sign and return the EUO transcript. [7-SER-1769, 1812.] Following the EUO, she produced additional documents, including a new Proof of Loss. [1-SER-179–81; 7-SER-1811.] Yet she refused to sit for another EUO to fully examine her on those documents and the theft

claim, as she was obligated to do under the policy terms and by statute. [7-SER-1813.] *Sarkisyants*, 256 Fed.Appx. at 53 (summary judgment for insurer warranted in part because insured failed to attend second examination under oath).

Hughes did not contest that she failed to answer all material questions, that she failed to return a signed EUO transcript, or that she refused to attend a second EUO session. Rather, she argued that she satisfied her obligation based on attending the first session, and that she was not required to attend others because the insurer's counsel was harassing. [ER-41–42.] She did not, however, substantiate either assertion with evidence and the transcript expressly contradicts any claims of harassment. [1-SER-219–32; 3-SER-557–652.]

Together, the evidence of Hughes's failure to fully comply with her duties to attend and thoroughly answer questions under oath would also have been sufficient for the district court to grant summary judgment in FNICA's favor on Hughes's bad faith and breach of contract claims.

B. Hughes's failure to cooperate with FNICA's document requests was also sufficient to warrant summary judgment in FNICA's favor

Summary judgment on Hughes's breach of contract and bad faith claims would also have been justified based on Hughes's failure to cooperate with FNICA's document requests. Under the terms of her policy and by statute, Hughes was obligated to comply with the investigation, including by providing all requested documents relating to her claimed loss. Cal. Ins. Code § 2071. [5-SER-1290–91; 7-SER-1790–91.] An insured's failure to cooperate with the insurer's investigation is a complete defense to breach of contract and bad faith claims when the insurer was "substantially prejudiced" by the insured's conduct. *Campbell v. Allstate Ins. Co.*, 60 Cal. 2d 303, 305-306 (1963); *see Abdelhamid v. Fire Ins. Exch.,* 182 Cal. App. 4th 990 (2010) (affirming grant of summary judgment in insurer's favor based on failure to cooperate where insured attended one EUO, provided incomplete proof of loss, failure to provide repair estimate, inventory or documents relating to insured's motives).

For example, in *Abdelhamid v. Fire Ins. Exch.*, the insured claimed her homeowners insurer wrongfully denied her claim for fire

damage to her home. *Id.* at 990. The insurer suspected arson, so it asked the insured for a proof of loss, production of relevant documents, and completion of an examination under oath. *Id.* at 994-95, 999. The insured appear for one examination, but without providing a complete proof of loss or document production. *Ibid.* The Court of Appeal affirmed the trial court's grant of summary judgment to the insurer, holding that "[t]he record firmly establishes [the insurer] was substantially prejudiced by [the insured's] failure to produce documentation, failure to answer material questions, failure to submit a complete proof of loss with supporting documentation, and refusal to cooperate." *Id.* at 1007.

Like the insured in *Abdelhamid*, Hughes breached her obligation to make a complete production of documents requested by FNICA during its investigation, including the following: (1) documents to establish her residency (which were material to the available contents coverage limits), (2) documents concerning the operation of the Property as a short-term rental (which were relevant to residency issues and representations as to its use), (3) documents supporting proof of payment for and ownership of the allegedly stolen documents (which were directly relevant to evaluating the scope and amount of Hughes's

alleged losses), and (4) financial records relevant to establishing the means to purchase the contents and/or evaluating any motive to exaggerate or stage the loss, in whole or in part (which were relevant to evaluating Hughes's credibility and the accuracy of the loss). [7-SER-1759–60, 1796–97.] FNICA documented Hughes's failure to make a complete production of these documents in detail. [7-SER-1798–1814.] Hughes did not contest this evidence, other than making a conclusory assertion that she provided "all the documents supporting plaintiff's loss" and asserting privacy objections. [ER-42, 72–73.] *See Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1043 (9th Cir. 2013) ("[C]onclusory allegations, standing alone, are insufficient to prevent summary judgment.").

FNICA was prejudiced by Hughes's failure to produce these records, which are highly relevant to her claimed loss and whether that loss is covered. Therefore, Hughes's failure would also be sufficient to justify the district court's grant of summary judgment in favor of FNICA on Hughes's breach of contract and bad faith claims. This Court may affirm the district court's grant of summary judgment on this alternative basis.

III

Hughes's Argument that FNICA Is Liable for Its Agent's Purported Negligence Is Both Waived and Meritless

Hughes argues for the first time on appeal that FNICA should be held vicariously liable for YS Insurance's purported negligence in failing to send Hughes a copy of the full application before submitting that application to FNICA. [AOB 10–11.] This argument is both waived and meritless and certainly cannot salvage Hughes's breach of contract and bad faith claims.

First, Hughes failed to make this argument to the district court and has, therefore, waived it on appeal. *GoPets Ltd. v. Hise*, 657 F.3d 1024, 1033 (9th Cir. 2011) ("The Hises waived that [unclean hands] argument by failing to present it to the district court in a timely fashion."); *Walsh v. Nevada Dep't of Hum. Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006) ("Issues not presented to a district court generally cannot be heard on appeal.").

Second, Hughes's argument is meritless. As noted in Part I.B.1, ante, Hughes's assertion that she did not receive a full copy of the application is dubious, given that she relies entirely on her own declarations. [ER-107–08, 150.] Moreover, the last page of the

application includes an electronic transaction history showing delivery to Hughes—which indicates she did in fact receive it. [5-SER-1247.] But, even if it were true that Hughes did not receive a copy of the application, that would not be a defense to rescission.

It is undisputed that Hughes told the YS Insurance agent there was no business on the Property and no prior losses within the past five years. [2-SER-465–66; 5-SER-1238; 7-SER-1755, 1791.] The evidence demonstrated that both of these answers were false and were material to FNICA's decision to issue the policy. [*See* 2-SER-415–16, 544–46; 3-SER-575, 846–49; 4-SER-866; 6-SER-1455–540, 1542–55, 1557–61, 1603–06, 1632–35; 7-SER-1755–56, 1787, 1809.] Thus, Hughes's claim that she never received a written copy of her application before it was submitted does not create any genuine dispute of fact relevant to FNICA's entitlement to rescission.

As a matter of law, FNICA was entitled to rely on the answers Hughes provided to the insurance application, even if those answers were provided to the agent by phone. *Mitchell*, 127 Cal. App. 4th at 476. Hughes cites no law requiring insurers to obtain multiple confirmations from an insured that her answers in the application were accurate. The

cases cited by Hughes certainly do not hold that an insurer must obtain multiple confirmations of an insured's application answers. Rather, each of those cases concern negligent acts that are totally dissimilar to Hughes's allegation that she did not receive a written copy of her application—for example, allegations that an agent negligently represented facts about the policy's coverage to the insured before the policy was issued, or that the agent "pre-checked" boxes in an application, or that the agent owed a special duty to recommend additional coverage. *See Desai v. Farmers Ins. Exch.*, 47 Cal. App. 4th 1110, 1118–19 (1996) (agent negligently represented policy's coverage at the time insured applied for policy); *R&B Auto Ctr., Inc. v. Farmers Group, Inc.*, 140 Cal. App. 4th 327, 344 (2006) (agents misrepresented scope of coverage at the outset); *James River Insurance Co. vs DCMI Inc. James River Ins. Co. v. DCMI, Inc.*, 2012 U.S. Dist. LEXIS 96808, 2012 WL 2873763 (N.D. Cal. July 12, 2012) (denying motion to dismiss negligence claim because agent allegedly failed to accurately complete application by "pre-checking boxes" without reviewing information with insured); *Vulk v. State Farm General Ins. Co.*, 69 Cal. App. 5th 243, 254-55 (2021) (insured alleged agent owed special duty to advise

purchase or additional or different coverage, but court found no special duty under the circumstances).

For these reasons, Hughes's new argument—asserted for the first time on appeal—that YS Insurance negligently failed to give her a written copy of her application provides no basis for reversing the district court's order granting summary judgment. That order should be affirmed.

IV

The Court Did Not Err in Overruling Hughes's Objection to the Transcript of Her Examination Under Oath by Farmers

Hughes makes the conclusory argument that the district court abused its discretion by overruling her objection to an excerpt of her EUO by Farmers in connection with the theft claim made to Farmers. [AOB 12; 1-SER-82–102.] According to Hughes, the district court should have refused to consider it because it was "not signed by Plaintiff," it was "irrelevant," and it was hearsay under Federal Rule of Evidence 602.

None of Hughes's objections has merit. The fact that Hughes refused to sign the transcript of her examination does not exempt it from consideration. Hughes does not deny that she was examined by

Farmers. [AOB 12.] Nor does she claim that the transcript is an inaccurate transcription of what she was asked and what she answered under oath. Moreover, FNICA provided adequate foundation for presenting it to the district court. The transcript was produced in this litigation by Farmers in response to a subpoena, and foundation was provided by an attorney declaration explaining it was a true and correct copy of the transcript Farmers produced. [1-SER-75.] The transcript was also signed and certified by the reporter who attended and transcribed the examination. [1-SER-102.] Hughes's refusal to sign the transcript has no significance, except to show she also failed to cooperate with Farmers in its investigation. Were it otherwise, insureds like Hughes would have free reign to shield their own damaging statements from consideration by refusing to sign them.

The transcript excerpts were also highly relevant to the summary judgment motion and are also relevant to this appeal. The excerpts include, among other things, admissions from Hughes that she was involved in the rental of the Property. [1-SER-95–98, 101.] These admissions establish the facts on which summary judgment properly was based, despite Hughes's later declarations contesting the facts

admitted. *See*, *e.g.*, *Van Asdale*, 577 F.3d at 998; *Yeager*, 693 F.3d at 1080).

The transcript excerpts are also admissible. Hughes's statements in the transcript are admissible under the hearsay exception for party admissions because they are her statements and FNICA offered them against her. Fed. R. Evid. 801(d)(2)(A). The transcript itself is also admissible as a business record under Rule 803(6), and is supported by a signed declaration from the court reporter. [1-SER-102.]

The district court did not abuse its discretion in overruling Hughes's objections and considering Hughes's testimony in granting summary judgment.

Conclusion

For the foregoing reasons, the district court's judgment should be affirmed.

Dated: October 20, 2023

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Certificate of Compliance

The undersigned certifies that pursuant to Federal Rule of Appellate Procedure, Rule 32(a)(7)(C), and Circuit Rule 32-1(a), this brief uses a 14-point proportionally-spaced font and contains 10,881 words according to the word count feature of the word processor used to prepare this brief, exclusive of the matters that may be omitted under Rule 32(f).

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Statement of Related Cases

Pursuant to Circuit Rule 28-2.6, FNICA provides notice of the following related case: *Hughes v. General Insurance Company of America*, Case No. 23-55342 (9th Cir. 2023).

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Certificate of Service

I hereby certify that on October 20, 2023, I electronically filed the foregoing **Appellee's Answering Brief** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system which will send notification of such filing to the following:

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