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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

MISTY DAWN REITZ; AND  
NICHOLAS IVEY,

Plaintiffs,

v.

PROGRESSIVE DIRECT  
INSURANCE COMPANY, an Ohio  
Corporation registered to  
do business in the State of  
California; and DOES I  
through CC, inclusive,

Defendants.

No. 2:14-cv-1614-GEB-EFB

**ORDER DENYING IN PART AND  
GRANTING IN PART DEFENDANT'S  
SUMMARY JUDGMENT MOTION, AND  
GRANTING IN PART AND DENYING IN  
PART DEFENDANT'S REQUEST FOR AN  
ORDER TREATING SPECIFICIED FACTS  
AS ESTABLISHED**

Defendant Progressive Choice Insurance Company<sup>1</sup>  
("Progressive") moves under Federal Rule of Civil Procedure  
("Rule") 56 for summary judgment in this insurance dispute  
between Progressive and Plaintiffs Misty Dawn Reitz ("Reitz") and  
Nicholas Ivey ("Ivey") on their breach of contract claim and  
breach of the implied covenant of good faith and fair dealing  
claim. (Def.'s Mot. for Summ. J. ("Mot.") 11:12-16, 12:12-13, ECF  
No. 33.) Progressive seeks in the alternative "an order  
specifying for the purpose of trial that Plaintiffs are not  
entitled to damages over the liability limit specified in the

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<sup>1</sup> Since Defendant states in the motion that it is erroneously sued as  
"Progressive Direct Insurance Company," it is referred to herein as  
"Progressive Choice Insurance Company." (Mot. 2.)

1 insurance agreement." (Mot. 3:27-28.) The insurance dispute  
2 concerns whether Plaintiffs made material misrepresentations  
3 concerning the alleged theft of their insured 2006 Ford Mustang  
4 (the "Mustang").

5 **I. LEGAL STANDARD: SUMMARY JUDGMENT**

6 A party is entitled to summary judgment if  
7 "the movant shows that there is no genuine  
8 dispute as to any material fact and the  
9 movant is entitled to judgment as a matter of  
law." . . . The moving party has the burden  
of establishing the absence of a genuine  
dispute of material fact.

10 City of Pomona v. SQM North Am. Corp., 750 F.3d 1036, 1049 (9th  
11 Cir. 2014) (quoting Fed. R. Civ. P. 56(a)) (citing Celotex Corp.  
12 v. Catrett, 477 U.S. 317, 323 (1986)). "A fact is 'material'  
13 when . . . it could affect the outcome of the case." Thrifty Oil  
14 Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 322 F.3d 1039, 1046  
15 (9th Cir. 2003) (quoting Anderson v. Liberty Lobby, Inc., 477  
16 U.S. 242, 248 (1986)). A "dispute about a material fact is  
17 'genuine[]' . . . if the evidence is such that a reasonable jury  
18 could return a verdict for the nonmoving party." Anderson, 477  
19 U.S. at 248.

20 A party asserting that a fact cannot be or is  
21 genuinely disputed must support the assertion  
22 by . . . citing to particular parts of  
23 materials in the record . . . or . . .  
24 showing that the materials cited do not  
establish the absence or presence of a  
genuine dispute, or that an adverse party  
cannot produce admissible evidence to support  
the fact.

25 Fed. R. Civ. P. 56(c) (1) (A)-(B).

26 Further, Local Rule 260(b) prescribes:

27 Any party opposing a motion for summary  
28 judgment . . . shall reproduce the itemized  
facts in the [moving party's] Statement of

1 Undisputed Facts and admit those facts that  
2 are undisputed and deny those that are  
3 disputed, including with each denial a  
4 citation to the particular portions of any  
5 pleading, affidavit, deposition,  
6 interrogatory answer, admission, or other  
7 document relied upon in support of that  
8 denial.

9 If the nonmovant does not "specifically . . .  
10 [controvert duly supported] facts identified in the [movant's]  
11 statement of undisputed facts," the nonmovant "is deemed to have  
12 admitted the validity of the facts contained in the [movant's]  
13 statement." Beard v. Banks, 548 U.S. 521, 527 (2006).

14 "Because a district court has no independent duty 'to  
15 scour the record in search of a genuine issue of triable fact,'  
16 and may 'rely on the nonmoving party to identify with reasonable  
17 particularity the evidence that precludes summary  
18 judgment,' . . . the district court . . . [is] under no  
19 obligation to undertake a cumbersome review of the record on the  
20 [nonmoving party's] behalf." Simmons v. Navajo Cnty., Ariz., 609  
21 F.3d 1011, 1017 (9th Cir. 2010) (quoting Keenan v. Allan, 91 F.3d  
22 1275, 1279 (9th Cir. 1996)). However, the district court "may  
23 consider other materials in the record." Fed. R. Civ. P.  
24 56(c)(3).

25 Further, "at this stage of the litigation, the judge  
26 does not . . . make credibility determinations with respect to  
27 statements made in affidavits, answers to interrogatories,  
28 admissions, or depositions. These determinations are within the  
province of the factfinder at trial." T.W. Elec. Serv., Inc. v.  
Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).



1 December 22, 2009 (the "December 22 interview"). (See UMF No.  
2 25.) And on March 22, 2010, Progressive conducted an examination  
3 of each Plaintiff under oath ("EUO"). (Flaherty Decl. ¶ 37.)

4 "On May 18, 2010, . . . Flaherty[] completed a final  
5 summary of the claim . . . and made a determination to deny  
6 coverage based on factual inconsistencies in the [claim's]  
7 presentation[,] . . . 'together with the timing of the events on  
8 the night of the alleged theft, [evidence involving] the  
9 transpondered key,[<sup>2</sup>] the complete burn [of the Mustang] with no  
10 stripping of the car, the cell phone activity, domestic tensions  
11 that became apparent during . . . [the] EUO's, and [Ivey's  
12 brother]'s refusal to cooperate in Progressive's investigation.'" (UMF No. 22; Flaherty Decl. ¶ 1.)

### 14 III. BREACH OF CONTRACT

15 Progressive argues its motion on Plaintiffs' breach of  
16 contract claim should be granted because it "properly determined  
17 that material misrepresentations by Plaintiffs voided coverage"  
18 under the Policy's fraud and concealment provision.<sup>3</sup> (Mot. 13:20-  
19 22.) Specifically, Progressive contends it denied coverage  
20 because of "numerous inconsistencies in [Plaintiffs'] accounts of  
21 the evening before [Plaintiffs] reported the [Mustang's]  
22 loss . . . [that have] led Progressive to conclude that

24 \_\_\_\_\_  
25 <sup>2</sup> There was only one key. (UMF No. 9.)

26 <sup>3</sup> Progressive also cites California Insurance Code section 2071, which  
27 provides in pertinent part: "This entire policy shall be void if, whether  
28 before or after a loss, the insured has willfully concealed or misrepresented  
any material fact . . . ." Cal. Ins. Code § 2071. "By statute . . . , insurance  
policies providing fire insurance on California property must include the  
standard form provisions contained in [section] 2071 or provisions that are  
their substantial equivalent." H. Walter Croskey, et al. California Practice  
Guide: Insurance Litigation § 6:254 (Rutter Grp. 2015).

1 [Plaintiffs] had made material misrepresentations in connection  
2 with their claim." (Mot. 9:5-7.)

3 The following statements are undisputed or are "deemed"  
4 uncontroverted.<sup>4</sup>

5 Progressive asserts Reitz and Ivey gave inconsistent  
6 statements about when they came home on December 2, 2009, the  
7 night of the Mustang's loss. (Mot. 9:10-22.) Specifically,  
8 Progressive cites Ivey's December 3 interview, in which the  
9 following communication is recorded: Flaherty asked Ivey, "when  
10 you . . . came home, you said it was around 8:30 [PM]. . . .  
11 [W]as [Reitz] home at the time?" Ivey responded that Reitz was  
12 not home. (Ex. 3 at 1663; see UMF No. 23.) In his December 22  
13 interview, Ivey stated he was in school "somewhere between 8:30  
14 [PM] and 9:30 [PM]," and he believed he went straight home from  
15 school. (Ex. 20 at 1737; see UMF No. 26.) "At his EUO, Ivey  
16 stated that he arrived home sometime after 8:00 [PM] and that  
17 Reitz was home when he arrived." (UMF No. 27.)

18 In the December 4 interview, Reitz "stated that she got  
19 home at approximately 8:30 [PM], and Ivey arrived sometime after  
20 10:00 [PM], when she was already in bed." (UMF No. 24.) In her  
21 December 22 interview, Reitz stated: "Ivey arrived home after she  
22 did, at 9:00 or 9:15 [PM], that she did not go to sleep until

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23 <sup>4</sup> Plaintiffs make numerous objections to Progressive's evidence. However,  
24 a ruling on all objections is unnecessary since some of the objections concern  
25 matters immaterial to the motion. See Burrell v. Cnty. of Santa Clara, No. 11-  
26 CV-04569-LHK, 2013 WL 2156374, at \*2 (N.D. Cal. May 17, 2013) (declining to  
27 reach evidentiary objections to evidence not relied upon in deciding summary  
28 judgment motion). Further, Progressive has requested judicial notice of three  
state court documents. This request is denied since Progressive has not shown  
that the referenced documents are relevant to decision on its motion. See  
Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1025 n.2 (9th  
Cir. 2006) ("We decline to take judicial notice of the . . . [documents], as  
they are not relevant to the resolution of this appeal.").

1 10:00 [PM]." (UMF No. 25.) She also stated: "I remember [Ivey]  
2 was home at . . . 9:00-ish or 9:45-ish." (Ex. 19 at 1695.) "In  
3 her EUO, Reitz stated that she was up and awake when . . . Ivey  
4 arrived home between 8:00 [PM] and 9:00 [PM]." (UMF No. 28.)

5 Progressive also cites inconsistent statements from  
6 Ivey about when he last saw the Mustang. (Mot. 9:24-28, 10:1-2.)  
7 "On December 3, 2009, the day Ivey allegedly discovered the  
8 theft, Ivey told Progressive he last saw the Mustang between 9:30  
9 and 9:45 [PM], when he went to retrieve cigarettes from the  
10 vehicle." (UMF No. 29.) "Ivey told police that he last saw the  
11 Mustang at 10:00 [PM]." (UMF No. 30.) "In his [California]  
12 Affidavit of [Vehicle] Theft, Ivey said he last saw the Mustang  
13 at 10:30 [PM]." (UMF No. 31.)

14 "In his December 22, 2009 statement, Ivey claimed he  
15 last saw the Mustang . . . when he parked it upon arriving home  
16 sometime after 8:00 [PM]. In his EUO, Ivey stated that he did not  
17 remember going out to retrieve cigarettes from the Mustang on the  
18 evening of the alleged theft, and did not think that he did."  
19 (UMF No. 32.)<sup>5</sup>

20 Progressive further cites inconsistent statements Reitz  
21 made about whether, on December 2, 2009, she heard the Mustang on  
22 the night of its loss. (Mot. 10:3-12.) In her December 22  
23 interview, "Reitz stated that she heard Ivey return home on the  
24 night of December 2, 2009, because the Mustang has a loud  
25 exhaust." (UMF No. 33.) In her EUO, the examiner asked Reitz:  
26 "[D]o you remember hearing the engine that night?" (Ex. 34 at  
27

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28 <sup>5</sup> Plaintiffs object to the cited evidence in number 32 as "compound." (UMF  
11:20-28.) This objection is overruled.

1 1835.) She responded: "I don't even know. I can't even say  
2 that. . . . But then, I don't want it to lead to where [Ivey]  
3 didn't drive the car home . . . ." (Id. at 1835.) "In his EUO,  
4 Ivey said that, although the Mustang had an aftermarket exhaust,  
5 it was not especially loud." (UMF No. 34.)

6 Progressive also argues Plaintiffs made inconsistent  
7 statements about who discovered the loss on December 3, 2009.  
8 (Mot. 10:13-20.) In the December 3 interview, "Ivey said that he  
9 discovered the loss when he went outside that morning to smoke.  
10 At the time, Reitz was inside getting ready for work, and Ivey  
11 went back inside to advise her of the loss." (UMF No. 36.)

12 In the December 4 interview, "Reitz said she did not  
13 remember who discovered the loss, but thought she noticed the  
14 Mustang was missing when she looked outside and saw it was not  
15 parked in its usual place." (UMF No. 37.) In her December 22  
16 interview, Reitz said, "[Ivey] went out to his car to get the  
17 cigarettes and the car was gone." (Ex. 19 at 1699.)

18 Progressive also cites inconsistencies involving  
19 Plaintiffs' text messages on the night of the Mustang's loss.

20 Plaintiffs object to Progressive's use of Plaintiffs'  
21 text messages, arguing this evidence lacks foundation. (UMF  
22 13:18-23; UMF No. 39.) Specifically, Flaherty declares that  
23 "[b]etween 8:54 [PM] and 12:26 [AM], there were 17 text messages  
24 between Rietz and Ivey's cell phone." (Flaherty Decl. ¶ 36.)  
25 Progressive argues this evidence should be considered because  
26 "Flaherty . . . has demonstrated her competency to testify about  
27 the contents of the claim file." (Def.'s Reply to Opp'n ("Reply")  
28 6:2-4.) Although Flaherty has shown she has personal knowledge of



1 Plaintiffs' claim file, (see Flaherty Decl. ¶¶ 1-4), Progressive  
2 has not shown that she has personal knowledge of the cell tower  
3 records from Plaintiffs' carriers that are attached to her  
4 declaration, and which include the text messaging evidence. See  
5 Orr v. Bank of Am., NT & SA, 285 F.3d 764, 778 (9th Cir. 2002)  
6 ("The district court properly found that Exhibit Q was not  
7 authenticated because Orr introduced the letter by attaching it  
8 to [the affiant]'s affidavit [but the affiant] lacks personal  
9 knowledge of the letter."). Therefore, Plaintiffs' foundation  
10 objection to this text messaging evidence is sustained.

11 Progressive also relies on the following uncontroverted  
12 facts in number 41: "Although Reitz initially said that she was  
13 half asleep in bed when Ivey got home, she later testified that  
14 she called Progressive two times to make sure her payment went  
15 through and made a telephone payment on the car after he came  
16 home." (UMF No. 41.) Plaintiffs make a hearsay objection to this  
17 evidence which is overruled because Plaintiffs have not shown  
18 this evidence is hearsay. See Fed. R. Evid. 801(d)(2)(A)  
19 (opposing party's statements are admissible as non-hearsay when  
20 "offered against an opposing party").

21 Plaintiffs argue that notwithstanding the referenced  
22 inconsistencies, "Progressive has not shown that these  
23 'inconsistencies' amount to justification for refusing to . . .  
24 indemnif[y Plaintiffs] under the [P]olicy." (Pls.' Opp'n to Mot.  
25 ("Opp'n") 3:16-18, ECF No. 46.)

26 An insurer may deny coverage under a policy's fraud and  
27 concealment provision, if an insured's misrepresentation (1)  
28 concerns a material matter and (2) was "knowingly and

1 intentionally made with knowledge of its falsity and with intent  
2 of defrauding the insurer." Cummings v. Fire Ins. Exch., 202 Cal.  
3 App. 3d 1407, 1416-17 (1988) (emphasis removed) (citations  
4 omitted).

5 An insured's misrepresentation relates to a material  
6 matter if it "concerns a subject reasonably relevant to the  
7 insure[r]'s investigation, and if a reasonable insurer would  
8 attach importance to the fact misrepresented." Id. at 1417.  
9 "[M]ateriality is a mixed question of law and fact that can be  
10 decided as a matter of law if reasonable minds could not disagree  
11 on the materiality of the misrepresentations." Id.

12 "[W]hether a false statement was made knowingly and  
13 with the intent to deceive the insurer is usually a question of  
14 fact but may be decided as a matter of law where the insured  
15 admits that he made knowingly false statements with the intent  
16 that the insurer rely upon them." Ram v. Infinity Select Ins.,  
17 807 F. Supp. 2d 843, 853 (N.D. Cal. 2011) (citations omitted).  
18 Further, "the intent to defraud the insurer is necessarily  
19 implied when the misrepresentation is material and the insured  
20 willfully makes it with knowledge of its falsity." Cummings, 202  
21 Cal. App. 3d at 1418.

22 Progressive argues that Plaintiffs' inconsistent  
23 statements involve material matters since "[their statements]  
24 affected the timing of the alleged theft, which had to have  
25 occurred within an implausibly small window of time." (Mot.  
26 14:20-22.)

27 However, Progressive has not shown the absence of a  
28 genuine issue of material fact on the issue of whether any

1 statement a Plaintiff made was made "with knowledge of its  
2 falsity and with intent of defrauding [Progressive]." Cummings,  
3 202 Cal. App. 3d at 1417. Therefore, Progressive's motion on  
4 Plaintiffs' breach of contract claim is denied.

#### 5 IV. BAD FAITH CLAIM

6 Progressive argues it is entitled to summary judgment  
7 on Plaintiffs' breach of the implied covenant of good faith and  
8 fair dealing ("bad faith") claim, because "a genuine dispute  
9 existed as to coverage." (Mot. 16:3-6.) Progressive further  
10 argues, *inter alia*, "the factual inconsistencies in Plaintiffs'  
11 narrative of the events on the night of the loss . . . [and] the  
12 [North American Technical and Forensic Services ("NATS")]  
13 report," which it obtained on the coverage issue, establish a  
14 genuine dispute as to its liability under the Policy, and  
15 Progressive's investigative record shows it "conducted a  
16 reasonable and thorough investigation of Plaintiffs' claim."  
17 (Mot. 16:4-6, 17:14-15.)

18 Plaintiffs counter that Progressive did not "fully and  
19 fairly investigate[] [Plaintiffs'] claim[]." (Opp'n 6:7-23.)

20 Further, Plaintiffs make numerous objections to  
21 evidence involved with Progressive's investigation. Specifically,  
22 Plaintiffs object on foundation grounds to paragraph five of  
23 Flaherty's Declaration, where she discusses the steps taken to  
24 investigate Plaintiffs' claim. (UMF 7:17-24; see UMF No. 18  
25 (citing Flaherty Decl. ¶ 5).) This objection is overruled since  
26 Progressive has shown Flaherty handled Plaintiffs' claim and that  
27 she has personal knowledge of the referenced investigative steps.  
28 (Flaherty Decl. ¶¶ 1-4.)

1 Plaintiffs further object to the admissibility of the  
2 NATS report, on the following grounds: compound, lacks  
3 foundation, unqualified opinion testimony, and hearsay. (UMF 8:7-  
4 8; UMF No. 19.) Progressive responds "Flaherty . . . has  
5 demonstrated her competency to testify about the contents of the  
6 claim file." (Def.'s Reply to Opp'n ("Reply") 6:2-4.) It further  
7 responds that "the underlying statements [in the claim file] are  
8 not hearsay because they are offered to show their effect upon  
9 Progressive's investigation and evaluation of Plaintiffs' claim."  
10 (Reply 5:28, 6:1-2.)

11 Plaintiffs' compound objection is overruled.  
12 Plaintiffs' foundation objection is also overruled since Flaherty  
13 declares "Progressive obtained a report from [NATS]," and the  
14 NATS report is addressed to Flaherty and Progressive. (Flaherty  
15 Decl. ¶ 30; Ex. 27 at 1331.)

16 Further, the NATS report is not hearsay since  
17 Progressive offers it for its effect upon Progressive in  
18 evaluating Plaintiffs' claim, rather than for the truth of the  
19 opinions expressed therein. See Fed. R. Evid. 801(c) (stating the  
20 rule concerns evidence offered "to prove the truth of the matter  
21 asserted in the statement"). Nor have Plaintiffs shown that what  
22 they contend are unqualified opinions in the NATS report  
23 constitutes a meritorious objection in light of how Progressive  
24 asserts it considered that evidence. Therefore, Plaintiffs'  
25 hearsay and unqualified opinion testimony objections to the NATS  
26 report are overruled.

1           The NATS report "noted that the Mustang was  
2 electronically protected by an OEM<sup>6</sup> transponder-based antitheft  
3 system and concludes there was no evidence of engine tampering,  
4 that the Mustang's ignition lock/column Jock/starter switch  
5 assembly had not been compromised or otherwise defeated, and that  
6 nothing other than a properly cut mechanical key had been used to  
7 rotate the ignition lock core." (UMF No. 19.)

8           "[T]o establish a breach of the implied covenant of  
9 good faith and fair dealing under California law, a plaintiff  
10 must show: (1) benefits due under the policy were withheld; and  
11 (2) the reason for withholding benefits was unreasonable or  
12 without proper cause." Guebara v. Allstate Ins. Co., 237 F.3d  
13 987, 992 (9th Cir. 2001).

14           Moreover, "a court can conclude as a matter of law that  
15 an insurer's denial of a claim is not unreasonable, so long as  
16 there existed a genuine issue as to the insurer's liability."  
17 Lunsford v. Am. Guarantee & Liab. Ins. Co., 18 F.3d 653, 656 (9th  
18 Cir. 1994) (citation omitted). Further, "an insurer denying or  
19 delaying the payment of policy benefits due to the existence of a  
20 genuine dispute with its insured as to the existence of coverage  
21 liability or the amount of the insured's coverage claim is not  
22 liable in bad faith even though it might be liable for breach of  
23 contract." Wilson v. 21st Century Ins. Co., 42 Cal. 4th 713, 723  
24 (2007) (citation omitted). "A *genuine* dispute exists only where  
25 the insurer's position is maintained in good faith and on  
26 reasonable grounds." Id. In addition, "[t]he genuine dispute rule

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27  
28 <sup>6</sup> "OEM" likely means "Original Equipment Manufacturer," but Progressive  
has not defined this term.

1 does not relieve an insurer from its obligation to thoroughly and  
2 fairly investigate, process and evaluate the insured's claim."  
3 Id.

4 Plaintiffs also argue that Progressive's investigation  
5 was deficient because Progressive did not "attempt to determine  
6 if the Mustang had been towed or hauled away on a flatbed truck,  
7 which would have offered a harmless explanation for the  
8 'inconsistencies' Progressive relied upon to deny the claim."  
9 (Opp'n 5:17-23.) However, Flaherty declares: "[I]t did not make  
10 sense that a thief would steal the Mustang (presumably by having  
11 it towed . . . away), only to set fire to it within a very short  
12 time and without stripping it of valuable parts." (Flaherty Decl.  
13 ¶ 42.)

14 Progressive has shown that its denial of Plaintiffs'  
15 claim was not unreasonable since "there existed a genuine issue  
16 as to [its] liability," Lunsford, 18 F.3d at 656, and therefore,  
17 Progressive's summary judgment motion on Plaintiffs' bad faith  
18 claim is granted.

#### 19 **V. DAMAGES ISSUES**

20 Progressive requests "an order specifying for the  
21 purpose of trial that Plaintiffs are not entitled to damages over  
22 the liability limit specified in the [Policy]." (Mot. 3:27-28.)  
23 Rule 56(g) authorizes, but does not require, the order requested  
24 by Progressive as follows: "If the court does not grant all the  
25 relief requested by the motion, it may enter an order stating any  
26 material fact—including an item of damages or other relief—that  
27 is not genuinely in dispute and treating the fact as established  
28 in the case." Fed. R. Civ. P. 56(g).

1 Progressive argues: "There is no evidence that  
2 [portions of] the damages [Plaintiffs seek in their Complaint]  
3 were contemplated by the parties at the time of contracting," and  
4 hence such damages are not recoverable. (Mot. 21:23-24.)  
5 Concerning this, Plaintiffs allege as follows in their Complaint:

6 Reitz and Ivey suffered damages, contemplated  
7 by the Policy, in that they were unable to  
8 replace the Mustang, they were accused of and  
9 prosecuted for criminal activity, they were  
10 subjected to arrest and detention, they lost  
11 past and future income, and lost the  
12 bargained for peace and security of knowledge  
that their financial losses covered by the  
Policy would be indemnified by Progressive,  
all to their damages in the sum of nine  
million, nine hundred fifty thousand dollars  
(\$9,950,000.00) or according to proof.

(Compl. ¶ 19, ECF No. 1 (emphasis added).)

13 Progressive asserts that under the Policy between  
14 Plaintiffs and Progressive, "[t]he relevant limit of  
15 liability . . . for loss to a covered auto was 'the actual cash  
16 value of the stolen or damaged property at the time of loss  
17 reduced by the applicable deductible.'" (UMF No. 5; see also UMF  
18 No. 3 (discussing the Policy's terms).)

19 Plaintiffs counter that Progressive "has not  
20 offered . . . evidence to support its contention that the parties  
21 contemplated nothing more than casualty damages." (Opp'n 7:6-9.)

22 "Contract damages are generally limited to those within  
23 the contemplation of the parties when the contract was entered  
24 into or at least reasonably foreseeable by them at the time;  
25 consequential damages beyond the expectations of the parties are  
26 not recoverable." Erlich v. Menezes, 21 Cal. 4th 543, 558 (1999)  
27 (citations omitted).  
28

1 Plaintiffs have not shown the existence of a genuine  
2 disputed issue of fact on whether the parties contemplated  
3 damages beyond the Policy's liability limit set forth in the  
4 Policy, and in light of the pled contract-based claim.<sup>7</sup>  
5 Therefore, Progressive's request for an order specifying that  
6 Plaintiffs are not entitled to damages over the liability limit  
7 specified in the Policy is granted. See Fed. R. Civ. P. 56(g)  
8 (stating: "If the court does not grant all the relief requested  
9 by the motion, it may . . . treat[] the fact as established in  
10 the case"). Progressive also seeks an order specifying for the  
11 purpose of trial that "Plaintiffs are not entitled to damages for  
12 emotional distress or mental suffering because such damages were  
13 not proximately caused by [P]rogressive's alleged breach of its  
14 contractual duties." (Mot. 3:22-24.) Plaintiffs do not oppose  
15 this portion of the motion, and the undisputed facts establish  
16 that the Policy's liability limit only provides for contractual  
17 compensatory damages for the Mustang's actual cash value (minus  
18 the applicable deductible).

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19  
20 <sup>7</sup> In their Opposition Brief to Progressive's previous motion to dismiss,  
21 Plaintiffs admitted their Complaint "pleads a cause of action for breach of a  
22 contractual promise to . . . investigate claims in good faith," meaning  
23 Plaintiffs based their bad faith claim in contract. (Pls.' Opp'n to Def.'s  
24 Mot. to Dismiss Pls.' Compl. 5:4-14, ECF No. 4 (emphasis added).) However,  
25 Plaintiffs also indicated in that Opposition Brief that they may also have  
26 alleged a tort claim as follows: "There is no indicia in the complaint as to  
27 the time the tort cause of action accrued because it is not clear when the  
28 tort damages accrued." (Id. at 6:21-23.) The Court subsequently dismissed  
Plaintiffs' tort-based bad faith claim on statute of limitations grounds, and  
granted Plaintiffs leave to amend that claim, (Order Granting in Part and Den.  
in Part Mot. to Dismiss, ECF No. 7), but Plaintiffs did not timely file a  
successful amendment. Although Plaintiffs subsequently filed a First Amended  
Complaint, that amended complaint was stricken since it only amended the  
existing contract claim without having leave. (Order Granting Def.'s Mot. to  
Strike Pls.' First Am. Compl., ECF No. 23.) Plaintiffs admitted this by  
stating: their "First Amended Complaint does not sound in tort in any manner  
whatsoever. It is clearly and explicitly an action for breach of contract."  
(Pls.' Opp'n to Def.'s Mot. to Strike First Am. Compl. 2:18-19, ECF No. 11.)

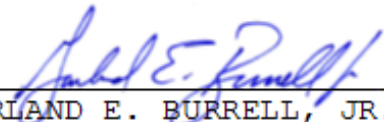


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**VI. CONCLUSION**

For the stated reasons, Progressive's motion is DENIED in part and GRANTED in part.

Dated: October 20, 2015

  
\_\_\_\_\_  
GARLAND E. BURRELL, JR.  
Senior United States District Judge