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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SM 10000 PROPERTY, LLC, et al.,  
Plaintiffs,  
v.  
ALLIANZ GLOBAL RISKS US  
INSURANCE COMPANY,  
Defendant.

Case No. 19-cv-03054-PJH

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT  
AND GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

Re: Dkt. Nos. 63, 68

Plaintiff SM 10000 Property LLC's ("SM") and Swinerton Builders, Inc.'s ("Swinerton") (collectively, "plaintiffs") motion for summary judgment came on for hearing before this court on January 28, 2021. Defendant Allianz Global Risks US Insurance Company's ("defendant") motion for summary judgment came on for hearing before this court that same day. Plaintiffs appeared through their counsel, Valentine Hoy and Linda Kornefeld. Defendant appeared through its counsel Matthew Ponzi and Christopher Snow. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court **GRANTS IN PART** and **DENIES IN PART** plaintiffs' motion for summary judgment and **GRANTS IN PART** and **DENIES IN PART** defendant's motion for summary judgment.

**BACKGROUND**

This case is an insurance coverage action arising out of an accident during the construction of a luxury residential building west of downtown Los Angeles. On May 1, 2019, plaintiffs filed the action against defendant in the San Francisco County Superior Court. Dkt. 1. On June 3, 2019, defendant removed it to this court. Id. In their

1 complaint, plaintiffs allege the following three claims:

- 2 • Breach of contract. Dkt. 1-1 at 31-42 (Compl.) ¶¶ 25-28.
- 3 • Breach of the implied covenant of good faith and fair dealing. Id. ¶¶ 29-34 (the  
4 “bad faith claim”).
- 5 • Declaratory relief. Id. ¶¶ 35-37.

6 Plaintiffs seek punitive damages on their bad faith claim. Id. ¶ 34. In its answer,  
7 defendant alleges reformation as an affirmative defense. Dkt. 1-1 at 2-28 ¶¶ 72-77 (the  
8 “reformation defense”).

9 On December 2, 2020, the parties filed the instant cross-motions for summary  
10 judgment. Dkt. 68 (plaintiffs’ motion); Dkt 63 (defendant’s motion); Dkt. 75 (defendant’s  
11 opening brief errata). During their briefing, the parties filed multiple erratas to their briefs  
12 and associated exhibits. Unless otherwise specified, the court will cite the revised filings.

13 The sequence of events, insurance policy provisions, and the parties’ prelitigation  
14 communications are key to understand their dispute. The court will detail the relevant  
15 facts as necessary below.

16 **I. The Parties**

17 SM is a limited liability company formed by principals of a firm that develops,  
18 owns, and operates real property in major United States cities. Dkt. 71 (Palermo Decl.) ¶  
19 2. SM owns the real property (“Ten Thousand”) at issue. Id. In 2013, SM hired  
20 Swinerton as a general contractor to build Ten Thousand.

21 Defendant is an insurer. It issued to plaintiffs the policy underlying plaintiffs’  
22 claims. Dkt. 68-2 (“Policy”) at 47, § 1B (endorsement adding SM and Swinerton as  
23 additional insureds).

24 **II. The Ten Thousand Building and Its Construction**

25 Ten Thousand is a characteristically Los Angeles high-rise located at 10000 Santa  
26 Monica Boulevard. Dkt. 71 ¶ 4. It comprises 40 floors and 283 units. Id. ¶ 4. It includes  
27 an outdoor park, movie theaters, and an 80-person staff to “see to its residents’ every  
28 wish.” Id. Its monthly rent ranges from \$10,000 to \$65,000. Id. The building’s projected

1 construction cost was over \$198 million. Dkt. 71 ¶ 5.

2 **A. The Construction Agreement Between Plaintiffs**

3 On November 14, 2013, plaintiffs entered an “Agreement Between Owner and  
4 Contractor” (the “Construction Contract”). Dkt. 71 ¶ 6. Under the Construction Contract,  
5 Swinerton would provide SM the complex’s units in multiple phases. Dkt. 71 ¶ 8. As part  
6 of that plan, SM would gain early occupation of an on-site leasing office. Id. From there,  
7 Swinerton would deliver the subject units on a lower floor to upper floor basis. Id.

8 Under the Construction Contract, Swinerton would begin working on the project on  
9 November 18, 2013. Dkt. 71-2 (Construction Contract) at 12 ¶ 4.1.1. The Construction  
10 Contract details four “completion deadlines/milestones.” Dkt. 71-2 at 13, ¶ 4.1.2. The  
11 subject deadlines range from September 4, 2015 to May 10, 2016. Id. Each deadline  
12 calls for the construction of a certain number of units in the building. Id.

13 The court will detail the milestones as necessary in its analysis below.

14 **B. Pre-December 2, 2015 Delays**

15 Aspirations aside, plaintiffs encountered a handful of delays during construction.  
16 First, because of SM’s unspecified delays in obtaining loans, Swinerton did not break  
17 ground until April 2, 2014, Dkt. 71 ¶ 7, thereby adding around 4.5 months to the original  
18 break ground date. Second, because of the discovery of methane gas on some  
19 unspecified date, Swinerton had to install a vapor barrier. Dkt. 69 ¶ 3. That installation  
20 delayed the project by approximately 30 days. Id.

21 **C. The Revised November 30, 2015 Construction Schedule**

22 On November 30, 2015, just days before the accident giving rise to this action,  
23 Swinerton issued a revised construction schedule to SM. Dkt. 69 ¶ 4 (attaching revised  
24 schedule, Dkt. 69-1). Under that schedule, Swinerton’s delivery on the four milestones  
25 referenced above was extended approximately five to six months, respectively. Id. ¶ 5.

26 **D. The December 2, 2015 Concrete Accident**

27 On December 2, 2015, workers poured concrete into a wooden frame outlining the  
28 elevator core walls on Ten Thousand’s 36th floor. Dkt. 69 ¶ 6. The wooden frame failed.

1 Id. Two tons of concrete cascaded into the elevator shaft, smashing numerous wooden  
2 crash decks along the way. Id. The wet concrete and wood fell to the pit of the elevator.  
3 Id. While money was lost, nobody was hurt.

4 **E. The Dates of Actual Completion and Delivery of the Milestones**

5 On July 1, 2016, Swinerton completed and delivered Ten Thousand's leasing  
6 office. Dkt. 71 ¶ 11. In January 2017, Swinerton completed and delivered the 1st  
7 through 21st units to SM. Id. ¶ 12. Between January 2017 and March 9, 2017,  
8 Swinerton completed and delivered the 22nd through 96th units. Id. ¶ 13. Between  
9 March 9, 2017 and April 20, 2017, Swinerton delivered the 97th through 225th units. Id.  
10 Between April 20, 2017 and April 27, 2017, Swinerton delivered the 226th through 275th  
11 units. Id. The delivery dates for the remaining eight units are not at issue.

12 A wait list of prospective tenants formed before Swinerton completed the above  
13 units. Dkt. 71 ¶ 12. SM leased the units as quickly as Swinerton delivered them. Id.

14 **III. The Parties' Post-Accident Communications and Tendered Claims**

15 On December 21, 2015, SM, through its broker of record the Aon company  
16 ("Aon"), emailed defendant a notice of loss concerning the damage caused by the  
17 December 2, 2015 accident. Dkt. 64 (Reyes Decl.) ¶ 9. Defendant opened a claim.

18 On December 22, 2015, defendant's adjuster, Lourdes Reyes ("Reyes"), spoke  
19 with Swinerton's project manager for Ten Thousand, Keith Dancey ("Dancey"), about the  
20 accident and resulting damage. Id. ¶ 10. That same day, Reyes inspected the scene of  
21 the accident. Id. ¶¶ 11-12. In 2016, Reyes sent Swinerton several requests for  
22 information "relevant to the evaluation" of its claim under the policy. Id. ¶¶ 14, 16-24.

23 On January 3, 2017, Reyes received a link with various documents concerning  
24 Swinerton's tendered claim (the "Property Damage Claim"). Id. ¶ 25. Swinerton initially  
25 sought \$2,695,241.56 in property damage related costs. Id. Reyes, Aon, and Swinerton  
26 engaged in numerous follow-up conversations. Id. ¶¶ 26-31. Reyes later received an  
27 updated claim from Swinerton seeking an additional \$10,014,930.92. Id. ¶ 31.

28 On April 10, 2017, Reyes received an email from Aon detailing SM's tendered

1 claim (the “Delay Claim”). Dkt. 64 ¶ 36. SM sought \$19,169,367 in loss purportedly  
2 resulting from Ten Thousand’s delayed opening. Id. Reyes sought and received  
3 additional information from both plaintiffs through 2017. Id. ¶¶ 38-44, ¶¶ 49-50.

4 On November 21, 2017, JS Held (“Held”) (a consulting company “hired” by  
5 defendant to help evaluate plaintiffs’ tendered claims, id. ¶ 32) issued a 62-page report.  
6 Id. ¶ 51. In it, Held concluded that the accident did not cause a delay in the completion of  
7 any construction milestones or Ten Thousand’s development. Id. ¶ 51; Dkt. 71-3 (the  
8 “Held Report”). In its report, Held further concluded that there were delays attributable to  
9 other causes. Dkt. 64 ¶ 51. Defendant then provided plaintiffs a copy of the Held Report.  
10 Id. ¶ 54. On December 6, 2017, the parties had a dramatic meeting, which apparently  
11 ended with plaintiffs walking out of the room. Id.

12 Following the failed meeting, throughout 2018, plaintiffs provided defendant  
13 additional information. Dkt. 64 ¶¶ 55-57. JS held drafted two additional reports analyzing  
14 that information. Id. ¶¶ 56-58. Both reports concluded that the new information did not  
15 alter the original Held Report’s conclusions. Id.

16 In February 2019, defendant paid plaintiffs the undisputed amount on Swinerton’s  
17 Property Damage Claim (\$285,854.46). Id. ¶ 58. The remaining portion of that claim  
18 was not paid. Id. On April 25, 2019, Reyes sent SM a letter denying coverage for the  
19 Delay Claim. Id. ¶ 59. This action followed.

20 **IV. The Policy**

21 Plaintiffs’ insurance policy includes coverage for numerous sorts of first-party risk  
22 that they faced in course of Ten Thousand’s development. Only two sorts of risk are  
23 relevant to this action: (1) coverage for loss resulting from a delayed start; and (2)  
24 coverage for loss resulting from physical property damages.

25 The policy provides coverage for the first sort of loss under a supplemental  
26 Delayed Opening Insurance Extension Coverage Form. Policy at 23-29. For simplicity,  
27 the court will refer to this portion of the policy as the “Delayed Start Coverage Form.”

28 The policy provides coverage for the second sort of loss under its primary

1 Contractors Installation/Builders Risk Form. Id. at 3-22. The court will refer to this portion  
2 of the policy as the “Property Damage Coverage Form.” The court details the relevant  
3 policy provisions below.

4 **A. Delayed Start Coverage Form Provisions**

5 The Delayed Start Coverage Form is a seven-page addition to the parties’  
6 underlying insurance policy. Boiled down, this form protects against certain economic  
7 loss resulting from a delay in the completion of Ten Thousand’s development, provided  
8 certain conditions. Four of its provisions and one of its endorsements (Endorsement 10)  
9 are relevant to the viability of the tendered Delay Claim.

10 First, the Delayed Start Insuring Agreement states the following in relevant part:

11 subject to the terms, conditions, and limitations of the Policy . .  
12 . . and terms, conditions, and limitations of this extension, this  
13 Policy is extended to indemnify the Insured, specified in the  
14 Delayed Opening Insurance Extension Schedule, for Delayed  
15 Start-Up Expenses, Loss of Gross Earnings, and/or Loss of  
16 Rental Income . . . incurred during the Period of Delay, when  
17 such delay is caused by direct physical loss or direct physical  
18 damage to Insured Property during the Period of Insurance,  
19 provided such loss or damage is indemnifiable under the policy  
20 to which this extension is attached or would have been able  
21 except for the application of the Deductible. Policy at 25, § 9.

22 Second, “Period of Delay” means:

23 [T]he period of time between the Scheduled Date of Completion  
24 and the actual date on which commercial operations or tenant/  
25 owner occupancy commenced or could have commenced;  
26 however, not exceeding such delay as would result if the loss  
27 or damage were repaired or replaced with the exercise of due  
28 diligence and dispatch, but in no event exceeding the Period of  
Indemnity stated in the Schedule for all indemnifiable  
Occurrences combined. The Period of Delay shall not be  
terminated by the expiration or cancellation of the Policy with  
respect to indemnity payable hereunder in direct consequence  
of insured loss or damage occurring prior to such expiration or  
cancellation. Policy at 26, § 12(B).

Third, the “Scheduled Date of Completion” means the *later* of the following:

- (i) The date stated in the Schedule; or
- (ii) The date on which, but for the insured loss or damage, commercial operations or tenant/owner occupancy would have commenced. Policy at 25, § 12A(i)-(ii).

1 Fourth, "Delayed Start-Up Expenses" include various expenses defined in the  
2 policy. Policy at 26-28, § 12(F). In relevant part, such expenses include "General  
3 Overhead," "Construction Loan Fees," "Additional Construction Financing Interest," "Real  
4 Estate and Property Taxes," and "Loss of Rents." Id. The court need not define those  
5 expenses to decide the instant motions.

6 Fifth, the Delayed Start Coverage Form includes a Basis for Indemnity section,  
7 which provides that "subject to the Limit of Liability specified in the Schedule, the Insured  
8 will be indemnified for:"

- 9 A. Delayed Start-Up Expenses, during the Period of Delay, to  
10 the extent that such expenses are actually and necessarily  
11 incurred, to enable the Insured to commence commercial  
12 operations in the manner originally planned.
- 13 B. Loss of Gross Earnings and/or Loss of Rental Income  
14 which, but for the delay, would have been derived from the  
15 Insured Project, during the Period of Delay. Loss of Gross  
16 Earnings and/or Loss of Rental Income shall be adjusted,  
17 as may be necessary, to provide for market trends or special  
18 circumstances. The amount thus adjusted shall represent  
19 as near as may be reasonably practicable the Loss of Gross  
20 Earnings and/ or Loss of Rental Income.
- 21 C. The Delayed Start-Up Expenses, Loss of Gross Earnings,  
22 and/or Loss of Rental Income Coverage indemnifiable  
23 under this extension shall be reduced by the following:
  - 24 (i) Any income realized from commercial operations at  
25 the Location of the Insured Project during the Period of  
26 Delay, or any increase in the Insured's income from  
27 any other property due to the delay;
  - (ii) Any amount saved in respect of labor costs, charges  
and expenses payable out of the anticipated revenue  
that do not arise or are reduced during the Period of  
Delay;
  - (iii) Any liquidated damages and/or penalties the Insured  
is entitled to receive;
  - (iv) Any income realized from deferred sales or from  
increased production or profits during a period of 12  
months immediately following the Period of Delay  
resulting as a direct consequence of the delay. Policy  
at 25, §10A-C.

28 ///

1           **B.     Endorsement 10**

2           At the heart of defendant’s reformation defense is “Endorsement 10,” a seemingly  
3 benign amendment to the policy. Policy at 48-49. Defendant issued Endorsement 10  
4 effective January 1, 2016. Id. In relevant part, Endorsement 10 amends the “Expiration  
5 Date” detailed in the “Period of Insurance” boxes of the Property Coverage Form, id. at 8,  
6 and the Delayed Start Coverage Form, id. at 23, from January 1, 2016 to December 31,  
7 2016, id. at 48.

8           This endorsement is important because of what it purportedly omits. In support of  
9 its reformation defense, defendant sets forth the following course of events to show that  
10 the parties made a mutual mistake by omitting a commensurate December 31, 2016  
11 amendment to the “Scheduled Date of Completion” under Section 12A(i).

12           First, on January 13, 2016, defendant sent Irene Chung (“Chung”), an Aon  
13 employee, an email stating the following:

14                     On January 01, 2016, the above captioned policy expired.  
15                     Please be advised that we now consider that the project  
16                     declared under this policy has been completed and formally  
17                     accepted by the purchaser, tenant, or owner as of January 01,  
18                     2016. The coverage provided by said policy is no longer in  
19                     effect beyond 12:01 am or the above-mentioned expiration date  
20                     or the actual completion date, whichever is earlier. Dkt. 67-2 at  
21                     5.

22           In response, Chung had a phone call with an underwriter for defendant, Greg  
23 Mason (“Mason”). Id. Chung then followed-up with an email, stating the following:

24                     I know the work is still ongoing. Please provide us with a soft  
25                     30-day extension while we figure out what the remaining  
26                     timeline for work is. Id. at 4-5.

27           On January 20, 2016, Mason then responds to Chung. Dkt. 67-2 at 4. In relevant  
28 part, he asks that Chung provide him a description of the work remaining on the Ten  
Thousand, its completed percentage, and a “new estimated completion date.” Id.

          On January 21, 2016, Chung responds. Dkt. 67-2 at 3-4. In relevant part, she  
states the following:

                  As of 12/31/15, the cost to complete is \$80,148,274.61.



1 Crescent Heights [SM's principal] will need insurance through  
2 the end of 2016 to complete this project. There is no change in  
scope, just pushed back due to delays." Id.

3 That same day, after exchanging a round of emails with Mason concerning  
4 potential changes in Ten Thousand's total value, Dkt. 67-2 at 2-3, Chung then follows-up  
5 with him, stating:

6 Please confirm extension to 12/31/16 as I need to issue certs  
7 to lenders. Id. at 3.

8 Later that morning, Mason emails Chung, quoting a premium for the requested  
9 extension and stating the following:

10 [W]e need to understand why a project that was supposed to  
11 be completed already needs to be extended for an entire year.  
12 What are the reasons for the delay? In addition, please provide  
the revised Gantt chart (construction timeline). This information  
is critical. Id. at 2.

13 Later that afternoon, Chung emails Mason with an excerpted response from SM  
14 (apparently sent to Chung as a conduit) stating the following:

15 There are no new delays on the books. Contract substantial  
16 completion date was originally 9/22/16 and was formally  
17 changed to 10/27/16 back in 2014 due to the vapor barrier  
being added to the project at the City's request. The contract  
substantial completion date has not changed since that time.

18 . . .

19 We are requesting coverage through end of 2016 as a buffer  
20 since there's always the possibility for delays, last minute  
21 changes, or lingering punch list items that would result in some  
work taking place beyond 10/27. Id. (italics removed).

22 In her own words, Chung added that the following:

23 Just as additional backup, the casualty [policy] was originally  
24 bound to expire until Oct 2016. I'm not sure why the term on  
25 BR [Builders Risk portion of the policy] was set so short but this  
26 plus the setbacks due to loss is what is driving the date. Let  
me know if this is sufficient and forward endorsement as soon  
as possible. Id.

27 In a declaration proffered in support of defendant's motion, Mason states that  
28 "based on the information provided by Aon [through Chung]," Mason "authorized an

1 extension of the policy from January 1, 2016 to December 31, 2016, which was reflected  
2 in Endorsement No. 10 to the policy.” Dkt. 63-1 ¶ 7. He adds the following:

3 I intended and understood that amending the “Expiration Date”  
4 of the policy’s Delayed Opening Insurance Extension Schedule  
5 also amends the “Scheduled Date of Completion” stated in the  
6 policy’s Delayed Opening Insurance Extension Schedule.

6 ...

7 I intended and understood that amending the “Expiration Date”  
8 of the policy’s Delayed Opening Insurance Extension Schedule  
9 to December 31, 2016 in Endorsement No. 10 also amended  
10 the “Scheduled Date of Completion” stated in the policy’s  
11 Delayed Opening Insurance Extension Schedule to December  
12 31, 2016.

10 ...

11 I understood that Aon, as the broker of record for SM 10000,  
12 also understood that amending the “Expiration Date” of the  
13 policy’s Delayed Opening Insurance Extension Schedule to  
14 December 31, 2016 also amended the “Scheduled Date of  
15 Completion” stated in the policy’s Delayed Opening Insurance  
16 Extension Schedule. Id. ¶¶ 8-10.

15 In her deposition, Chung testified in relevant part that:

16 Q: To your knowledge, did the Allianz builders risk policy expire  
17 on January 1st, 2016?

18 A: Yes. Dkt. 67-1 at 13 (Certified Tr. 47:16-18).

19 ...

20 Q: Did you intend for Allianz to issue an endorsement to the  
21 policy that amended the expiration date shown in the schedule  
22 for the policy's delayed opening insurance extension coverage  
23 form from January 1st, 2016, to December 31st, 2016?

24 A: No. They would issue an endorsement to the entire policy,  
25 and this delayed opening insurance extension coverage form is  
26 just a part of the policy in its entirety.

27 Q: So what did you intend for the endorsement that extended  
28 the policy to provide for?

A: It would restate the new expiration date.

Q: And did you intend for the endorsement that contained the  
new expiration date of December 31st, 2016, to also contain a  
new scheduled date of completion that’s shown in the schedule  
for the delayed opening insurance extension coverage form?

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A: I am not exactly sure if that is reiterated on Allianz's extension endorsement.

Q: Would you have intended for the extension endorsement to have amended the scheduled date of completion?

[Objection omitted]

A: I would expect that it be understood that the scheduled date of completion is no sooner than the expiration date of the policy.

Q: Okay. So if the expiration date of the policy was changed from January 1st, 2016, you would understand that the scheduled date of completion in the policy would also be changed from January 1st, 2016, to December 31st, 2016?

[Objection omitted]

A: As I understand it, yes. Dkt. 67-1 at 25-26 (Certified Tr. 79:13-80:25)

...

Q: When Endorsement 10 was issued to the builders risk policy, was it your understanding that the scheduled date of completion shown in the schedule for the policy's delayed opening insurance extension coverage form was inaccurate?

A: It's my understanding that this endorsement amends the completion date.

Q: And you're referring to the completion date for purposes of the insurance policy?

A: Yes, which includes the delayed opening insurance extension.

Q: Right. So that would include the scheduled date of completion, item number 5 on the – on page 22 of Exhibit 17 (Endorsement 10)?

[Objection omitted]

A: Correct.

[Objection omitted]

Q: If Endorsement No. 10 was reissued to specifically address the scheduled date of completion in the policy's delayed opening insurance extension coverage form to read December 31st, 2016, instead of January 1st, 2016, would that change make the policy more accurate in your opinion?

[Objection omitted]

A: I would -- I mean, I would understand that amending the

1 expiration date amends the completion date.

2 Q: And again, when you say "the completion date," that's the  
3 scheduled date of completion that's shown in the delayed  
4 opening coverage form?

5 A: Yes. Dkt. 67-1 at 27-29 (Certified Tr. 83:15-85:5).

6 **C. Property Damage Coverage Form Provisions**

7 The Property Damage Coverage Form serves as the primary portion of the policy.  
8 Boiled down, this form protects against various first-party losses resulting from physical  
9 damage to Ten Thousand. The parties' motions primarily focus on the tendered Delay  
10 Claim. Given that, the court will detail the relevant Property Damage Coverage  
11 provisions only as necessary in its analysis below.

12 **V. The Instant Cross-Motions for Summary Judgment**

13 In their motion, plaintiffs move for an order on its claim for declaratory relief that  
14 would "confirm" the following "interpretations" of the Delayed Start Coverage Form:

- 15 • The Delayed Start Insuring Agreement's "Period of Delay" started on the date  
16 of the completion that was reasonably expected immediately before the  
17 accident, without consideration of the accident. Dkt. 68 at 4.
- 18 • Endorsement 10 did **not** alter the preexisting January 1, 2016 "Scheduled Date  
19 of Completion" to December 31, 2016. Id. (emphasis added).
- 20 • The "Period of Delay" ended when all Ten Thousand's units "were ready for  
21 use by the owner in the manner originally planned," which, in plaintiffs' words,  
22 means "substantially complete as defined in the Construction Contract, with all  
23 units being deemed complete on or before April 27, 2017." Id.
- 24 • The "Period of Delay" is measured by either (i) "beginning on the Scheduled  
25 Date of Completion of Milestone 1 and ending when all four Milestones were  
26 actually achieved" or (ii) "four separate periods of delay associated with each  
27 planned phase." Id.

28 In its motion, defendant requests the following relief:

- Summary judgment granting its reformation defense, thereby amending

1           Endorsement 10 to detail December 31, 2016 as the Scheduled Date of  
2           Completion under Section 12A(i). Dkt. 75 at 9.

- 3           • Summary judgment of the breach of contract claim based on both the Delay  
4           Claim and Property Damage Claim tendered to defendant. Id.
- 5           • Summary judgment of the bad faith claim. Id.
- 6           • Summary adjudication of the prayer for punitive damages. Id.

7           Given the complexity of the requests presented in the parties' cross-motions, the  
8           court provides a brief executive summary of its analysis of each request. First, the court  
9           analyzes the reformation issue simultaneously raised in plaintiffs' second and defendant's  
10          first requests. The parties primarily focus on that issue in their briefing and, from what  
11          the court can tell, a determination on it would significantly affect the coverage available  
12          for the Delay Claim. The court finds that both sides proffered evidence shows a triable  
13          factual issue on the elements necessary to show the reformation defense. Thus, the  
14          court denies both sides' competing requests for summary judgment on that defense.

15          Second, the court turns to plaintiffs' first, third, and fourth requests. Because of an  
16          ambiguity in Section 12A(ii)'s use of the phrase "but for," the court finds that the  
17          interpretation proffered by plaintiffs in their first request controls. Accordingly, the court  
18          grants plaintiffs' request for summary adjudication on that aspect of their claim for  
19          declaratory relief. However, plaintiffs attempt to lace disputed factual determinations into  
20          their third and fourth requests. Given that, the court denies their remaining requests for  
21          summary adjudication on those aspects of their claim for declaratory relief.

22          Third, with the above interpretative determinations in mind, the court analyzes  
23          defendant's second request for summary judgment of the breach of contract claim. The  
24          court will analyze the viability of that claim under two separate bases, namely the Delay  
25          Claim and Property Damage Claim. The court finds that triable factual issues underlie  
26          both bases and, thus, denies summary judgment of the breach of contract claim.

27          Lastly, the court analyzes the viability of plaintiffs' bad faith claim and prayer for  
28          punitive damages. The court finds that defendant maintained a good faith, reasonable

1 basis to deny coverage of the tendered Delayed Start and Property Damage Claim. On  
2 that basis, the court concludes that defendant is entitled to summary judgment of the bad  
3 faith claim and summary adjudication of the prayer for punitive damages.

## 4 DISCUSSION

### 5 I. Legal Standard

6 Summary judgment is proper where the pleadings, discovery, and affidavits show  
7 that there is “no genuine dispute as to any material fact and the movant is entitled to  
8 judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those which may  
9 affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
10 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a  
11 reasonable jury to return a verdict for the nonmoving party. Id. “A ‘scintilla of evidence,’  
12 or evidence that is ‘merely colorable’ or ‘not significantly probative,’ is not sufficient to  
13 present a genuine issue as to a material fact.” United Steelworkers of Am. v. Phelps  
14 Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989).

15 Courts recognize two ways for a moving defendant to show the absence of a  
16 genuine dispute of material fact: (1) proffer evidence affirmatively negating any element  
17 of the challenged claim or (2) identify the absence of evidence necessary for plaintiff to  
18 substantiate such claim. Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099,  
19 1102 (9th Cir. 2000) (“In order to carry its burden of production, the moving party must  
20 either produce evidence negating an essential element of the nonmoving party's claim or  
21 defense or show that the nonmoving party does not have enough evidence of an  
22 essential element to carry its ultimate burden of persuasion at trial.”). Rule 56(c)(1)  
23 expressly requires that, to show the existence or nonexistence of a disputed fact, a party  
24 must “cit[e] to particular parts of materials in the record.” Fed. R. Civ. Pro. 56(c)(1).

25 The party moving for summary judgment bears the initial burden of identifying  
26 those portions of the pleadings, discovery and affidavits which demonstrate the absence  
27 of a genuine issue of material fact. Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986).  
28 Where the moving party will have the burden of proof on an issue at trial, it must

1 affirmatively demonstrate that no reasonable trier of fact could find other than for the  
2 moving party. S. California Gas Co. v. City of Santa Ana, 336 F.3d 885, 888 (9th Cir.  
3 2003) (“As the party with the burden of persuasion at trial, [plaintiff] must establish  
4 beyond controversy every essential element of its [claim under the Constitution’s  
5 Contract Clause].”); Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986) (“Thus,  
6 if the movant bears the burden of proof on an issue, either because he is the plaintiff or  
7 as a defendant he is asserting an affirmative defense, he must establish beyond  
8 peradventure *all* of the essential elements of the claim or defense to warrant judgment in  
9 his favor.”) (italics in the original). That said, on an issue for which the opposing party will  
10 have the burden of proof at trial, the moving party need only point out “that there is an  
11 absence of evidence to support the nonmoving party’s case.” Celotex Corp. v. Cattrett,  
12 477 U.S. at 325; In re Brazier Forest Prod., Inc., 921 F.2d 221, 223 (9th Cir. 1990) (“[I]f  
13 the nonmoving party bears the burden of proof on an issue at trial, the moving party need  
14 not produce affirmative evidence of an absence of fact to satisfy its burden. The moving  
15 party may simply point to the absence of evidence to support the nonmoving party’s  
16 case. The nonmoving party must then make a sufficient showing to establish the  
17 existence of all elements essential to their case on which they will bear the burden of  
18 proof at trial.”) (quoting Celotex Corp. at 322-23).

19 “Where a moving party carries its burden of production, the nonmoving party must  
20 produce evidence to support its claim or defense.” Friedman v. Live Nation Merch., Inc.,  
21 833 F.3d 1180, 1188 (9th Cir. 2016) (internal citations omitted). The court is only  
22 concerned with disputes over material facts and “factual disputes that are irrelevant or  
23 unnecessary will not be counted.” Anderson, 477 U.S. at 248. It is not the task of the  
24 court to scour the record in search of a genuine issue of triable fact. Keenan v. Allen, 91  
25 F.3d 1275, 1279 (9th Cir. 1996). The nonmoving party has the burden of identifying, with  
26 reasonable particularity, the evidence that precludes summary judgment. Id.

27 The court must view the evidence in the light most favorable to the nonmoving  
28 party: if evidence produced by the moving party conflicts with evidence produced by the

1 nonmoving party, the judge must assume the truth of the evidence set forth by the  
2 nonmoving party with respect to that fact. Tolan v. Cotton, 134 S. Ct. 1861, 1865 (2014);  
3 Leslie v. Grupo ICA, 198 F.3d 1152, 1158 (9th Cir. 1999). If the nonmoving party fails to  
4 produce evidence rebutting the moving party’s initial showing, “the moving party is  
5 entitled to judgment as a matter of law.” Celotex Corp., 477 U.S. at 323.

6 Lastly, without granting summary judgment of an entire claim, courts may rely  
7 upon Rule 56 to determine certain facts or elements of a claim as established and  
8 thereby dispose of the need to adjudicate them at trial. Lahoti v. VeriCheck, Inc., 586  
9 F.3d 1190, 1202 n. 9 (9th Cir. 2009) (Citing with approval then-existing Rule 56(d)’s  
10 advisory committee note that “[t]he partial summary judgment is merely a pretrial  
11 adjudication that certain issues shall be deemed established for the trial of the case . . .  
12 and likewise serves the purpose of speeding up litigation by eliminating before trial  
13 matters wherein there is no genuine issue of fact.”).

## 14 **II. Analysis**

### 15 **A. Preliminary Evidentiary Objections**

16 The parties raise five evidentiary objections in their briefing. Three of the five  
17 objections pertain to evidence that is immaterial or otherwise unnecessary to determine  
18 the viability of the claims at issue. Given that, the court overrules the following objections  
19 as moot:

- 20 • Plaintiffs’ objection to Reyes declaration (Dkt. 64) at 2:1 to 3:8. Dkt. 99-1 at 7.
- 21 • Plaintiffs’ objection to Granger Stuck’s (“Stuck”) declaration (Dkt. 65) at 3:9 to  
22 5:2. Id.
- 23 • Defendant’s objection to various unauthenticated or uncertified deposition  
24 transcripts attached. Dkt. 98 at 6-9. Plaintiffs initially attached those exhibits to  
25 the Kornefeld declaration Exhibits 54-58 (Dkt. 95-12 through Dkt. 95-16) and  
26 Exhibits 60-66 (Dkt. 95-18 through Dkt. 95-24).

27 With respect to the third objection, the court notes that plaintiffs refiled various  
28 deposition transcripts following defendants’ objection. Dkt. 99-101. To the extent the



1 court cites the revised exhibits in its analysis, the court finds that plaintiffs cured the  
2 authentication and certification issues identified by defendant.

3 That said, the remaining two objections are material to the court’s decision. The  
4 court analyzes each remaining objection in turn below.

5 **1. The Mason Declaration**

6 Plaintiffs object to Mason’s declaration at paragraphs 8 through 10. Dkt. 99-1 at 7.  
7 Plaintiffs assert that the all three paragraphs are inadmissible under Federal Rules of  
8 Evidence 401 and 402. Id. Plaintiffs further assert that the third paragraph is separately  
9 inadmissible under Rule 602. Id.

10 Federal Rules of Evidence 401 and 402 set forth the basic rules on relevance.  
11 Fed. R. Evid. 401; Fed. R. Evid. 402. Rule 602 permits a witness to “testify to a matter  
12 only if evidence is introduced sufficient to support a finding that the witness has personal  
13 knowledge of the matter.” Fed. R. Evid. 602.

14 The court finds that Mason’s testimony about his intention and understanding of  
15 Endorsement 10’s effect on the Scheduled Date of Completion is relevant to defendant’s  
16 reformation defense. As detailed below, to prove that defense, defendant must show that  
17 the parties’ mutually intended an agreement to give rise to a certain effect. While  
18 perhaps not dispositive, Mason’s testimony about his understanding is, at minimum,  
19 probative of defendant’s purported intent for Endorsement 10 to revise the preexisting  
20 January 1, 2016 Scheduled Date of Completion with December 31, 2016. Given that, the  
21 court overrules plaintiffs’ Rule 401 and 402 objections.

22 The court also finds that Mason satisfies the personal knowledge requirement to  
23 testify to his belief about Chung’s understanding about the effect of Endorsement 10 at  
24 the time it was negotiated. Mason communicated with Chung numerous times over the  
25 course of January 2016 concerning the requested policy extension. Such  
26 communications occurred by both email and phone. They provide a sufficient ground to  
27 permit Mason to form a conclusion about Aon’s (i.e., Chung’s) understanding of  
28 Endorsement 10’s effect. Given that, the court overrules plaintiffs’ Rule 602 objection.

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**2. The Chung Declaration**

Defendant objects to the Chung declaration as inadmissible under the sham affidavit rule. Dkt. 98 at 8-11. Chung provided her declaration in support of plaintiffs' opposition to defendant's motion. In it, she states the following in relevant part:

When a policy extension is requested I would ordinarily expect the new policy expiration date to be congruent with the scheduled date of completion in the contractor's updated schedule. That is because, as noted above, the insured would not typically want to pay for "extra" coverage beyond the anticipated completion date. That is what I meant when I answered Mr. Snow's questions on page 80 at line 10-17 and 19 - 25 and on page 81 at lines 6-9 of my deposition. That does not mean, however, that when the policy expiration date is changed by endorsement it automatically adjusts the Scheduled Date of Completion in the policy schedule. Such a change could have implications far beyond a change to the term of the policy. If a change to the date for the Scheduled Date of Completion in the policy schedule is intended I would expect the parties to agree upon that change separately, to consider the implications of such a change, and to include language in the endorsement to memorialize any agreement. That did not happen in the case of SM 10000.

...

Here, the insured requested a policy extension of December 31, 2016 in order to provide a buffer, in case of further delays. In other words, the insured was willing to incur the premium expense for a term that went beyond the expected completion date in order to be conservative and potentially avoid having to document another policy extension. I clearly communicated that intent to Mr. Mason.

...

When I was discussing Endorsement No. 10 with Allianz and Mr. Mason, I did not ever intend or understand the Scheduled Date of Completion in the policy schedule was, or had to be, December 31, 2016. I also did not intend or expect Endorsement No. 10 to change the Scheduled Date of Completion or to narrow coverage for the pending claim based on the December 2, 2015 loss event. To the extent Allianz is arguing in its motion for summary judgment that I intended or understood Endorsement No. 10 to modify the Scheduled Date of Completion in the policy schedule, that is not correct. If my deposition testimony indicates that I had such an understanding or intent when discussing Endorsement No. 10 with Mr. Mason, then I was confused. My only understanding is as set forth above. Dkt. 92-2 ¶¶ 7-9.

Defendant contends that Chung's declaration statements concerning her intent

1 about Endorsement 10 are inconsistent with those previously testified to under oath in  
2 her deposition. Dkt. 98 at 8-11.

3 “The general rule in the Ninth Circuit is that a party cannot create an issue of fact  
4 by an affidavit contradicting his prior deposition testimony.” Yeager v. Bowlin, 693 F.3d  
5 1076, 1080 (9th Cir. 2012) (citations omitted). This rule “prevents a party who has been  
6 examined at length on deposition from raising an issue of fact simply by submitting an  
7 affidavit contradicting his own prior testimony, which would greatly diminish the utility of  
8 summary judgment as a procedure for screening out sham issues of fact.” Id.

9 However, the sham affidavit rule “should be applied with caution because it is in  
10 tension with the principle that the court is not to make credibility determinations when  
11 granting or denying summary judgment.” Id. To trigger the sham affidavit rule, “the  
12 district court must make a factual determination that the contradiction is a sham” and “the  
13 inconsistency between a party’s deposition testimony and subsequent affidavit must be  
14 clear and unambiguous to justify striking the affidavit.” Id.

15 The court concludes that the sham affidavit rule does not apply to Chung’s  
16 declaration. Critically, the subject statements fall short of clear inconsistency with her  
17 prior testimony. Instead, when read in context, it appears that her declaration expands  
18 on and explains her prior testimony. Given that, the court overrules defendant’s sham  
19 affidavit objection.

20 In light of its above rulings, the court considers both Mason’s and Chung’s  
21 declaration in deciding the instant motion.

22 **B. The Court Denies Summary Judgment of the Reformation Defense**

23 In Hess v. Ford Motor Co., 27 Cal. 4th 516 (2002), the California Supreme Court  
24 collected a litany of rules relating to a reformation defense under California law. Id. at  
25 524-25. In relevant part, the Hess court recognized that “[w]hen, through . . . mistake a  
26 written contract fails to express the real intention of the parties, such intention is to be  
27 regarded, and the erroneous parts of the writing disregarded. . . . If there is ‘a mutual  
28 mistake of the parties,’ a written contract may be revised, on the application of a party

1 aggrieved, so as to express that intention, so far as it can be done without prejudice to  
2 rights acquired by third persons, in good faith and for value.” Id. at 524.

3 When reforming a written agreement, a court may “transpose, reject, or supply  
4 words,” but has “no power to make new contracts for parties.” Id. Instead, the court may  
5 “only reform the writing to conform with the mutual understanding of the parties at the  
6 time they entered into it, if such an understanding exists.” Id.

7 To raise mutual mistake as a defense, an aggrieved party “need only allege and  
8 prove mutual mistake in order to avoid enforcement of the erroneous terms.” Id. at 525.  
9 To determine whether a mutual mistake occurred, a court may consider parol evidence.  
10 Id. Such evidence is admissible to show mutual mistake even if the contracting parties  
11 intended the writing to be a complete statement of their agreement. Id.

12 Lastly, California state courts recognize that “to reform a written instrument, the  
13 party seeking relief must prove the true intent by clear and convincing evidence.” Shupe  
14 v. Nelson, 254 Cal. App. 2d 693, 700 (1967).

15 The court denies defendant’s request to reform Endorsement 10 to include  
16 December 31, 2016 as the Scheduled Date of Completion. First, defendant cannot show  
17 the absence of a genuine dispute concerning SM’s intent to include the requested  
18 information in Endorsement 10. Critically, in her January 21, 2016 email, Chung copies  
19 SM’s own representation (via Frohlich) that:

20 ***Contract substantial completion date*** was originally planned  
21 09/22/16 and was formally changed to ***10/27/16*** back in 2014 .  
22 . . . The ***contract substantial completion date has not***  
23 ***changed since that time*** . . . We are requesting coverage  
through end of 2016 as a ***buffer*** since there’s always the  
possibility for delays . . . that would result in some work taking  
place beyond 10/27.” Dkt. 67-2 at 2 (emphasis added).

24 The above bolded language supports a triable issue that, as of January 21, 2016,  
25 SM understood the Ten Thousand’s Scheduled Date of Completion was October 27,  
26 2016. SM’s statement that it sought the December 31, 2016 policy extension as a  
27 “buffer” further supports the existence of such an issue.

28 Second, even putting aside the above contemporaneous email, defendant failed to

1 proffer “clear and convincing” evidence that *it*, in fact, understood that the Scheduled  
2 Date of Completion would likewise be extended when issuing Endorsement 10. Mason’s  
3 declaration shows only an unexpressed belief about such effect. Dkt. 63-1 ¶¶ 8-9. At  
4 best, his self-serving statement is probative of defendant’s intent. It does not clearly  
5 establish that intent.

6 Third, while not helpful to plaintiffs’ position, Chung’s deposition testimony does  
7 not eliminate a triable factual issue concerning SM’s intent for Endorsement 10. Chung’s  
8 deposition testimony stands for the proposition that she “**would expect** that it be  
9 understood that the scheduled date of completion is no sooner than the expiration date of  
10 the policy.” Dkt. 67-1 at 25-26 (Certified Tr. 79:30-80:25) (emphasis added).

11 At best, this testimony shows Chung’s understanding about standard industry  
12 practices when renegotiating an extension on a policy. It says **nothing** about the intent  
13 of the specific insured (SM) at hand. In any event, Chung’s testimony cannot ameliorate  
14 the inference that the court must draw about SM’s intent when viewed in light of  
15 Frohlich’s contemporaneous statement included in the January 21, 2016 email.

16 Relatedly, in her declaration, Chung states that “[w]hen a policy extension is  
17 requested I would ordinarily expect the new policy expiration date to be congruent with  
18 the scheduled date of completion in the contractor’s updated scheduled. **That is**  
19 **because**, as noted above, **the insured would not typically want to pay for ‘extra’**  
20 **coverage beyond the anticipated completion date.**” Dkt. 92-2 ¶ 7 (emphasis added).

21 The bolded statement plausibly explains how Chung could simultaneously  
22 maintain (1) the general understanding that an expiration date and Scheduled Date of  
23 Completion move together and (2) a belief that SM did not intend to correspondingly  
24 extend the Scheduled Date of Completion to December 31, 2016. Put simply, SM did not  
25 mind paying more money for **non-coextensive** dates if it could get the coverage desired.

26 Fourth, plaintiffs persuasively argue that reforming the Scheduled Date of  
27 Completion would have an inequitable effect on benefits already accrued under the  
28 policy. As they point out, the Period of Delay states that, for purpose of coverage under

1 the Delayed Start Insuring Agreement, it “**shall not be terminated by the expiration . . .**  
2 of the Policy with respect to indemnity payable hereunder in direct consequence of  
3 insured loss or damage **occurring prior to such expiration** or cancellation. Policy at  
4 26, § 12B (emphasis added).

5 The December 2, 2015 accident fell within that form’s October 1, 2013 to January  
6 1, 2016 period of insurance. Policy at 23, § 3. The court finds it fair to infer that, had  
7 plaintiffs known that the requested extension would compel an amendment to the  
8 Scheduled Date of Completion that would result in a loss of future potential benefits, they  
9 might have found an alternative carrier for the post-January 1, 2016 period.

10 In short, the evidence shows triable factual issues concerning the parties’ intent  
11 about the scope of Endorsement 10. Given that, the court denies defendant’s request for  
12 summary judgment of its reformation defense and plaintiffs’ competing request for an  
13 order confirming that the Scheduled Date of Completion under Section 12A(i) remains  
14 January 1, 2016. The parties may still pursue and prove their positions at trial. Until  
15 then, however, the court will treat the Scheduled Date of Completion under Section 12A(i)  
16 as presently stated in Endorsement 10—January 1, 2016.

17 One final point. Plaintiffs repeatedly cite Getty v. Getty, 187 Cal. App. 3d 1159  
18 (1986) for the proposition that defendant **must** have expressed its intent that  
19 Endorsement 10 would revise the preexisting Scheduled Date of Completion. Dkt. 99-1  
20 at 9-10. The court is not yet convinced that an outward expression is a necessary  
21 condition to obtain reformation. In Getty, the court ruled (without cited authority) that “[a]  
22 reformation action lies **when** a written instrument does not accurately reflect the oral  
23 understanding which gave rise to it.” 187 Cal. App. 3d at 1178 (emphasis added). The  
24 placement of the “when” condition in that statement of the rule makes it ambiguous as to  
25 whether an oral understanding is a sufficient or necessary element to substantiate a  
26 reformation defense. In any event, given the reasoning above, the court need not now  
27 resolve that legal question. The parties should, however, be prepared to address it in  
28 their pretrial filings.

1           **C.     The Court Grants Summary Adjudication of Plaintiffs' First Proffered**  
2           **Policy Interpretation**

3           Plaintiffs' first request raises a complicated interpretative question. As detailed  
4 above, the Delayed Start Coverage Form defines Scheduled Date of Completion to mean  
5 the later of (1) the date stated in the Schedule (Section 12A(i)) **or** (2) the date on which,  
6 **but for** the insured loss or damage, commercial operations or tenant/owner occupancy  
7 would have commenced (Section 12A(ii)). Policy at 28 (emphasis added). Naturally,  
8 because the Scheduled Date of Completion affects the length of the Period of Delay, the  
9 parties dispute how to determine the Scheduled Date of Completion under the Section  
10 12A(ii) prong.

11           Plaintiffs ask that the court interpret Section 12A(ii) to require a sort of prospective  
12 analysis to determine the Section 12A(ii) date. Dkt. 68 at 17-18. Under that analysis, a  
13 factfinder would look to plaintiffs' planned dates for completing Ten Thousand's  
14 development milestones immediately prior to the December 2, 2015 accident. Id.

15           Defendant, on the other hand, asks that the court interpret Section 12A(ii) to  
16 require a sort of retrospective analysis to determine its date. Dkt. 76 at 22-23. Under  
17 that analysis, a factfinder would consider all pre- and post-December 2, 2015 events to  
18 determine how much delay (if any) the accident added to the building's development. Id.  
19 Whether plaintiffs' or defendant's preferred analysis controls depends on the meaning of  
20 Section 12A(ii)'s use of the phrase "but for."

21           The court finds plaintiffs' prospective interpretation more persuasive. Critically, the  
22 Delayed Start Coverage Form does not define the phrase "but for." Neither side cites  
23 any binding authority interpreting that phrase. The court searched for such  
24 authorities. It did not identify any authority interpreting that phrase under California law  
25 in the insurance context.<sup>1</sup>

26 \_\_\_\_\_  
27 <sup>1</sup> The court identified authority interpreting that phrase in the tort context. In that context,  
28 the California Supreme Court recently described that phrase as asking "if the injury would  
have happened anyway, whether the defendant was negligent or not, then his or her  
negligence was not a cause in fact." South Coast Framing, Inc. v. Workers' Comp.

1 In the absence of a definition or binding legal authority identified by the parties, the  
2 court looks to the policy in its entirety to determine whether the parties' competing  
3 analyses are reasonable. The court agrees with plaintiffs that there is at least one  
4 provision in the Delayed Start Coverage Form that cuts against defendant's retrospective  
5 analysis. That form excludes coverage for expenses resulting from delays "**beyond the**  
6 **Scheduled Date of Completion** of the Insured Project directly or indirectly due to"  
7 various specific events including, for example, "enforcement of any ordinance" and  
8 "strikes, protests, [or] lockouts." Policy at 28, § 14 (emphasis added).

9 If defendant's interpretation of the meaning of the "but for" phrase did, indeed, call  
10 for a retrospective analysis, then the bolded portion's use of the word "beyond" would be  
11 unnecessary. Critically, the retrospective analysis would already correct for delay  
12 resulting from non-covered events such as strikes or lockouts. Absent any necessity for  
13 that provision, the court finds that defendant's proffered retrospective analysis would  
14 render it improper surplusage.

15 To be sure, the court understands that there are other provisions in the Delayed  
16 Start Coverage Form that undermine plaintiffs' prospective analysis—namely, Sections  
17 15 and 16. Section 15 requires an insured to "immediately advise the Company of any  
18 change between the planned and the actual project progress schedule." Policy at 28, §  
19 15. In the event of an incident giving rise to a potential claim, Section 16 requires an  
20 insured to "immediately submit to the Company any revisions to the original progress  
21 schedule where such revisions could delay the Scheduled Date of Completion." *Id.*, § 16.

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22  
23 Appeals Bd., 61 Cal. 4th 291, 298 (2015). The California Supreme Court then  
24 confusingly added that the "but for" test has been "subsumed" by the "substantial factor"  
25 test, which "require[es] only that the contribution of the individual cause be more than  
26 negligible or theoretical." South Coast Framing, Inc., 61 Cal. 4th at 298.

27 This recent construction of the "but for" phrase does not appear to resolve the instant  
28 interpretative question. On the one hand, the South Coast Framing court's description of  
the "but for" test as asking whether an "injury would have happened anyway" supports  
defendant's retrospective analysis. However, it appears that inquiry has effectively been  
abrogated by the substantial factor test, which, cuts in plaintiffs' favor. In any event,  
neither side proffered this authority. Thus, the court need not consider it when reaching  
its decision on plaintiffs' first request.



1 If plaintiffs are correct that the Scheduled Date of Completion contemplates a  
2 prospective planned date of completion, then Section 15 would have simply used the  
3 term “Scheduled Date of Completion” when requiring plaintiffs to provide information  
4 about the “planned project progress schedule.” Similarly, Section 16 would have omitted  
5 its reference to an “original progress schedule” and its associated “revisions.”

6 Regardless, under the circumstances at hand, the court finds that Section 12A(ii)'s  
7 "but for" phrase is ambiguous and, thus, open to multiple reasonable constructions.  
8 California law requires courts to construe ambiguous insurance policy provisions in  
9 accordance with an insured's objectively reasonable expectations and in favor of  
10 coverage. St. Mary & St. John Coptic Orthodox Church v. SBC Ins. Servs., Inc., 57 Cal.  
11 App. 5th 817, 825 (2020), review denied (Mar. 10, 2021) ("If the terms are ambiguous,  
12 they must be interpreted in accordance with the insured's 'objectively reasonable  
13 expectations,' and, if this does not eliminate the ambiguity, ambiguous language is  
14 construed against the party who caused the uncertainty to exist."). Plaintiffs' forward-  
15 looking analysis for interpreting the term “but for” as used in the Scheduled Date of  
16 Completion is objectively reasonable. Given that, the court adopts plaintiffs' proffered  
17 interpretation of Section 12A(ii). Accordingly, the court declares that Section 12A(ii)'s  
18 requires a prospective analysis to determine Ten Thousand's Scheduled of Completion.

19 **D. The Court Denies Summary Adjudication of Plaintiffs' Third and**  
20 **Fourth Proffered Policy Interpretations**

21 The court denies plaintiffs' requests for their third and fourth policy interpretations.  
22 Both purported interpretations rest on an application of the relevant policy language to  
23 facts at hand. In particular, the third request would require the court to determine that  
24 “actual date” triggering the Period of Delay’s endpoint takes on a **specific** meaning—  
25 namely, when all units "were ready for use by the owner in the manner originally  
26 planned." Dkt. 68 at 4. Similarly, the fourth request would require the court to determine  
27 that the completion of Milestone 1 and Milestone 4 mark the beginning and end of the  
28 Period of Delay, respectively. The determination of such beginning and end dates are

1 factual issues properly resolved at trial. Given that, the court denies plaintiffs' requests  
2 for summary adjudication of their third and fourth proffered policy interpretations.

3 **E. The Court Denies Summary Judgment of the Breach of Contract Claim**

4 In its motion, defendant alternatively argues that, in the event the court denies its  
5 request for summary judgment of its reformation defense, plaintiffs' breach of contract  
6 claim still fails. According to defendant, plaintiffs fail to proffer evidence showing that  
7 they suffered covered loss for their tendered Delay Claim and Property Damage Claim.  
8 Dkt. 75-1 at 21-23. The court disagrees.

9 **1. The Delay Claim**

10 As a preliminary matter, the court has determined that defendant's reformation  
11 defense raises triable factual issues. Absent a determination on that defense, the court  
12 observes that there is an open question on the relevant Scheduled Date of Completion  
13 and, incidentally, the relevant Period of Delay.

14 First, plaintiffs presented evidence to support their position on various potential  
15 Periods of Delay. Dkt. 71 ¶¶ 11-13 (Palermo declaration listing differences between  
16 anticipated and actual milestone completion dates). In light of the court's prior  
17 determinations, as well as the above evidence presented by plaintiff, defendant cannot  
18 maintain that the Period of Delay is necessarily limited to 44 days. Dkt. 98 at 13.

19 Separately, the court considered defendant's request to strike the October 2020  
20 initial delay report (Dkt. 94-2) of plaintiffs' expert, Ted Bumgardner ("Bumgardner"), as  
21 inadmissible under Rule 37(c)(1). Dkt. 98 at 12-15. The court denies that request. As  
22 just indicated, neither the court (nor a jury) need rely on an expert's testimony to  
23 determine the relevant Period of Delay. Second, even if Bumgardner omits an  
24 explanation about how certain delays following the accident could have been avoided  
25 "but for" such accident, Dkt. 98 at 14-15, that omission does not necessarily amount to a  
26 failure to disclose under Rule 26(a)(2).

27 Second, plaintiffs claim that they suffered numerous sorts of Delayed Startup  
28 Expenses between February 9, 2016 and December 31, 2017. Dkt. 68-4 at 5-7. Such

1 expenses include millions of dollars in Additional Construction Financing Interest, Loss of  
2 Rents, Real Estate and Property Taxes, Insurance Premiums, and other General  
3 Overhead Costs. Id. The court understands defendant’s general contention that plaintiffs  
4 failed to explain how or why such expenses qualify as indemnifiable or were not subject  
5 to an offset under Section 10. Dkt. 75-1 at 22-23. Those questions, however, are factual  
6 issues better suited for a jury.

7 The same holds true with respect to defendant’s argument that the Period of Delay  
8 may not exceed the sort of delay that would result if the damage from the accident were  
9 repaired “with the exercise of due diligence and dispatch.” Id. at 21-22. Any dispute that  
10 defendant has with plaintiffs’ exercise of “due diligence” (or lack thereof) in repairing the  
11 elevator shaft is a fact-intensive determination that depends in part on the relevant Period  
12 of Delay. Given that such period is itself an open question, the court cannot now  
13 determine whether plaintiffs acted reasonably in their repairs.

14 That said, the court agrees with defendant that the evidentiary basis underlying  
15 plaintiffs’ claimed Additional Construction Financing Interest expenses appears vague  
16 and relatively insubstantial. In his deposition, however, plaintiffs’ other expert, Brian  
17 Bergmark (“Bergmark”), explains that he relied on certain “accounting information and  
18 invoices,” as well as his communications with his client, to form a conclusion about such  
19 amounts. Dkt. 101-3 at 12-15 (Certified Tr. 199:16-202:8). Given that testimony, as well  
20 as the primary information cited by Bergmark, the court finds a triable factual issue on  
21 this set of claimed Delayed Startup Expenses.

22 In sum, the court denies summary judgment of plaintiffs’ breach of contract claim  
23 to the extent it is based on the tendered Delay Claim.

24 **2. The Property Damage Claim**

25 In its motion, defendant principally asserts that the policy’s sub-limits control the  
26 amount of coverage available for the tendered Property Damage Claim. Dkt. 75-1 at 23.  
27 Defendant explains that Swinerton fails to apply those sub-limits to its over \$12 million in  
28 purportedly covered losses. Id. at 23-24. While not forthrightly stated, defendant

1 challenges this basis of the breach of contract claim on grounds that coverage under the  
2 Property Damage Coverage form may not exceed the sub-limit amounts. Id.

3 The court agrees that various sub-limits control the amount available to Swinerton  
4 for the tendered Property Damage Claim. Based on summary spreadsheets attached to  
5 Bumgardner's declaration, Swinerton seeks coverage under various Property Damage  
6 Coverage Form provisions. Dkt. 94-6 (December 9, 2020 spreadsheet categorizing  
7 claimed loss per insuring agreement under the Property Damage Coverage Form); Dkt.  
8 94-5 (November 18, 2020 spreadsheeting doing the same).

9 In particular, Swinerton seeks coverage under the following provisions of that form:

- 10 • General Property Insuring Agreement. Policy at 11, § 8.
- 11 • Expediting Expenses. Id. at 16, § 26.
- 12 • Debris Removal. Id. at 17, § 27.
- 13 • Temporary Repairs. Id. at 21, § 44.
- 14 • Contractor's Extra Expenses. Id. at 21, § 46.

15 The policy includes a sub-limit of liability for coverage under the last four  
16 provisions. Policy at 8-9, § 4. In particular, the policy limits coverage under those  
17 provisions as follows:<sup>2</sup>

- 18 • The Expediting Expenses provision limits per occurrence coverage to the  
19 lesser of 25 percent of the "adjusted loss" or \$5 million. Id. at 9, § 4N.
- 20 • The Debris Removal provision limits per occurrence coverage to the lesser of  
21 10 percent of the adjusted loss or \$50 million. Id. at 8, § 4A.
- 22 • The Temporary Repairs provision limits per occurrence coverage to the lesser  
23 of 20 percent of the adjusted loss or \$2.5 million. Id., § 4C.
- 24 • The Contractor's Extra Expense provision limits per occurrence coverage to

25  
26 \_\_\_\_\_  
27 <sup>2</sup> Technically, the Policy includes an endorsement that controls the first three sub-limits.  
28 Policy at 42, § 4. However, the endorsement does not affect the prior schedule's stated  
limits and the parties do not bother to mention the endorsement. Thus, the court need not  
and will not consider it.

1 the lesser of 10 percent of the adjusted loss or \$ 5 million. Id., § 4D.

2 Plaintiffs fail to explain how or why the above-referenced sub-limits do not restrict  
3 the scope of their recoverable loss under the Property Damage Coverage Form. Thus,  
4 these amounts provide an upward bound for the amount that plaintiffs may recover under  
5 such provisions at trial.

6 With the above limitation in mind, the court finds defendant’s two remaining main  
7 arguments for summary judgment of this claim unpersuasive. First, defendant contends  
8 that Bumgardner fails to outline the basis and reasons for his covered loss conclusions.  
9 Dkt. 75-1 at 25. Perhaps. But that disagreement is better suited for a pre-trial motion in  
10 limine, **not** the instant motion for summary judgment.

11 Critically, in his declaration, Bumgardner states that:

12 [He] identif[ied] and categoriz[ed] Swinerton’s damages  
13 resulting from the Loss Event” and “[w]orking with Swinerton’s  
14 counsel . . . created categories for those expenses[] that were  
15 intended to align with categories identified in the Policy. Then  
16 we assigned the expenses to the categories and presented the  
17 information in a spreadsheet. Dkt. 94 ¶ 12.

18 Bumgardner attaches two versions of that spreadsheet to his declaration. Dkt. 94-  
19 5 (November 18, 2020 spreadsheet); Dkt. 94-6 (December 9, 2020 spreadsheet). Both  
20 versions of those spreadsheets identify numerous invoices for charges that Swinerton  
21 incurred and separates each charge into the “Direct,” “Expediting Expenses,” “Debris  
22 Removal,” “Temporary Repairs,” or “GC’s Extra Expense” provision categories. Id. For  
23 each version, Bumgardner characterizes most of the claimed loss (approximately \$ 12.5  
24 million) as either a Contractor’s Extra Expense or Expediting Expense. Id.<sup>3</sup> While not  
25 identical, these spreadsheets are similar to that attached to a summary of Bumgardner’s  
26 October 26, 2020 damages report. Compare Dkt. 98-4 at 6-7.

27 <sup>3</sup> There appears to be a discrepancy between the Property Damage Claim amount stated  
28 by plaintiffs in their opening brief (\$12,210,172), Dkt. 68 at 10, and the amount listed by  
Bumgardner in his spreadsheets (appx. \$ 13.4 million). The court need not now untangle  
that discrepancy. Plaintiffs should, however, be prepared to reconcile this apparent  
discrepancy or clearly state the total amount at issue in their pretrial filings.

1 Separately, in his declaration, Dancey (Swinerton’s project manager) attaches two  
2 documents describing the various repair costs incurred in apparent connection with the  
3 accident. Dkt. 70-1; Dkt. 70-2. Given the sheer volume of invoices testified to by  
4 Bumgardner and expenses identified by Dancey, the court finds a triable factual issue  
5 about the scope of costs incurred under the Property Coverage Form.

6 Second, defendant contends that the claimed property damage losses come within  
7 the consequential loss exclusion. Policy at 13, § 10C. Again, perhaps. But, in light of  
8 Bumgardner’s declarations and spreadsheets, the court finds that plaintiffs identified  
9 sufficient evidence showing a triable factual issue on whether, in fact, such loss qualifies  
10 as consequential.

11 One final point. The court disagrees with defendant’s construction of the  
12 undefined term “adjusted loss.” Dkt. 75-1 at 23-24. In its opposition, defendant asserts  
13 that that term means “the adjusted amount of the direct physical loss covered by the  
14 insuring agreement of the Property Damage Form.” *Id.* at 23. That construction is  
15 circular and, thus, by definition, unreasonable. Accordingly, for purposes of pretrial  
16 rulings, the court will adopt plaintiffs’ proffered construction that “adjusted loss” includes  
17 “the total amount of loss” generally “arising from” a covered accident and measured  
18 **before** the application of any applicable deductible or limit of liability. Dkt. 99-1 at 22.

19 That construction is supported by the apparent purpose of the Property Damage  
20 Coverage form provisions to provide supplemental coverage for loss suffered separate  
21 and apart from that covered under the General Property Insuring Agreement. Compare  
22 Policy at 11, § 8.

23 In sum, the court denies summary judgment of plaintiff’s breach of contract claim  
24 to the extent it is based on the tendered Property Damage Claim.

25 **F. The Court Grants Summary Judgment of the Bad Faith Claim**

26 Under California law, “there is an implied covenant of good faith and fair dealing in  
27 every contract that neither party will do anything which will injure the right of the other to  
28 receive the benefits of the agreement.” Kransco v. Am. Empire Surplus Lines Ins. Co.,

1 23 Cal. 4th 390, 400 (2000), as modified (July 26, 2000). “This principle applies equally  
2 to insurance policies, which are a category of contracts.” Id. In most cases, because the  
3 covenant is a contract term, compensation for its breach is limited to contract rather than  
4 tort remedies. Id. However, “[a]n exception to this general rule has developed in the  
5 context of insurance contracts where, for a variety of policy reasons, courts have held  
6 that an insurer’s breach of the implied covenant will provide the basis for an action in  
7 tort.” Id. “The availability of tort remedies in the limited context of an *insurer’s* breach of  
8 the covenant advances the social policy of safeguarding an insured in an inferior  
9 bargaining position who contracts for calamity protection, not commercial advantage.” Id.  
10 (emphasis in the original).

11 Tort liability for breach of the implied covenant of good faith and fair dealing has  
12 been “variously measured.” Love v. Fire Ins. Exch., 221 Cal. App. 3d 1136, 1151 (1990).  
13 “The primary test is whether the insurer withheld payment of an insured’s claim  
14 unreasonably and in bad faith.” Id. “Where benefits are withheld for proper cause, there  
15 is no breach of the implied covenant.” Id. Thus, California courts have explained that  
16 “there are at least two separate requirements to establish breach of the implied covenant:  
17 (1) benefits due under the policy must have been withheld; and (2) the reason for  
18 withholding benefits must have been unreasonable or without proper cause.” Id.

19 With respect to the second element, California courts have ruled that:

20 Where there is a *genuine issue* as to the insurer’s liability under  
21 the policy for the claim asserted by the insured, there can be  
22 no bad faith liability imposed on the insurer for advancing its  
23 side of that dispute. Chateau Chamberay Homeowners Ass’n  
v. Associated Int’l Ins. Co., 90 Cal. App. 4th 335, 347 (2001),  
as modified on denial of reh’g (July 30, 2001) (emphasis in the  
original).

24 Thus, a court may “conclude as a matter of law that an insurer’s denial of a claim  
25 is not unreasonable,” provided that “there existed a genuine issue as to the insurer’s  
26 liability.” Id. The court may find a “genuine issue” if an insurer denies a claim “based on  
27 the opinions of experts.” Id. That said, “an expert’s testimony will not *automatically*  
28 insulate an insurer from a bad faith claim based on a biased investigation.” Id. at 348

1 (emphasis in the original).

2 The court grants defendant’s motion for summary judgment of the bad-faith claim.  
3 The court finds that the events surrounding this action undisputedly show a genuine issue  
4 on defendant’s obligation to cover the Delay Claim and Property Damage Claim.

5 First, the coverage determination for the Delay Claim rests in large part on the  
6 meaning of the “but for” phrase used to define the Scheduled Date of Completion.  
7 Plaintiffs fairly argue that the Held Report’s use of the retrospective method to determine  
8 the “Scheduled Date of Completion” under Section 12A(ii) is confusing and amounts to a  
9 misnomer. However, the Scheduled Date of Completion’s “but for” phrase is clearly  
10 indicated in that term and observably undefined in the Delayed Start Coverage Form.  
11 Given that, plaintiffs cannot complain of any unfair surprise because of its use.

12 More importantly, though, the “but for” phrase has a rich (and often confusing)  
13 meaning in the law. While a retrospective analysis of prior actual events does not control  
14 that phrase’s interpretation in the policy at hand, such analysis nonetheless bears a  
15 rational basis for determining a counterfactual event.

16 Second, defendant reasonably disputes the meaning and application of the  
17 endpoint for the Period of Delay. Defendant’s position that the term “commence,” as  
18 used in that definition, means what it says (i.e., to begin) is not just reasonable—it’s likely  
19 correct. From the court’s perspective, the only real question on the Period of Delay’s  
20 endpoint is whether the “commercial operations” or “tenant/owner occupancy” served as  
21 the triggering event. Defendant could more-than-reasonably argue that the delivery of  
22 Ten Thousand’s leasing office, which is intended to sign-up prospective tenant  
23 (seemingly a commercial operation), triggered that endpoint.

24 The court notes that plaintiffs’ remaining critiques of the Held Report are valid.  
25 The arguments and evidence support an inference that Held was not impartial when  
26 conducting its retrospective analysis. Moreover, such analysis does appear to  
27 necessarily stack the deck against an insured. Thus, the existence of the Held report  
28 itself does **not** automatically insulate defendant from bad-faith liability. Chateau



1 Chamberay Homeowners Ass'n, 90 Cal. App. 4th at 348. However, because defendant  
2 does not need an insulating expert report to preclude a finding of bad faith liability,  
3 plaintiffs' remaining critiques are legally irrelevant.

4 Third, in its opposition, plaintiffs dedicate eight pages to discuss how and why  
5 defendant's treatment of their Delay Claim was unreasonable. Dkt. 99-1 at 22-29.  
6 Plaintiffs omit any corresponding explanation for defendant's treatment of the Property  
7 Damage Claim. Given that failure, plaintiffs may not rely on defendant's treatment of the  
8 Property Damage Claim to salvage a triable factual issue on their bad faith claim. In any  
9 event, based on the arguments presented in their briefing, it appears that plaintiffs have  
10 ignored that sub-limits control their claimed losses under the Property Damage Coverage  
11 Form. Defendant pointed out that exact shortcoming in its opening brief. Dkt. 75-1 at 23-  
12 24. Despite the opportunity in their opposition, plaintiffs again fail to even acknowledge  
13 the existence of such sub-limits. Under these circumstances, the court finds that  
14 defendant genuinely disputed its liability for the Property Damage Claim.

15 For the above reasons, the court grants defendant's motion for summary judgment  
16 of the bad faith claim.

17 **G. The Court Grants Summary Adjudication of Punitive Damages**

18 California Civil Code § 3294 permits an award for punitive damages when a  
19 plaintiff "prove[s] by clear and convincing that the defendant has been guilty of  
20 oppression, fraud, or malice . . ." Cal. Civ. Code § 3294(a). As used in § 3294(a), the  
21 following definitions apply:

22 (1) "Malice" means conduct which is intended by the defendant  
23 to cause injury to the plaintiff or despicable conduct which is  
24 carried on by the defendant with a willful and conscious  
disregard of the rights or safety of others.

25 (2) "Oppression" means despicable conduct that subjects a  
26 person to cruel and unjust hardship in conscious disregard of  
that person's rights.

27 (3) "Fraud" means an intentional misrepresentation, deceit, or  
28 concealment of a material fact known to the defendant with the  
intention on the part of the defendant of thereby depriving a  
person of property or legal rights or otherwise causing injury.

1 Cal. Civ. Code § 3294(c)(1)-(3).

2 “Evidence that an insurer has violated its duty of good faith and fair dealing does  
3 not thereby establish that it has acted with the requisite malice, oppression or fraud to  
4 justify an award of punitive damages.” Mock v. Michigan Millers Mut. Ins. Co., 4 Cal.  
5 App. 4th 306, 328 (1992). However, in the absence of a viable claim for breach of the  
6 implied covenant of good faith and fair dealing, punitive damages are unavailable.  
7 Chateau Chamberay Homeowners Ass'n, 90 Cal. App. 4th at 351 n.10 (“In view of this  
8 result [the dismissal of a breach of the implied covenant claim], we need not reach or  
9 discuss AIIIC's attack on HOA's punitive damage claim. It was an integral part of, and falls  
10 with our rejection of, HOA's bad faith cause of action.”).

11 The court grants defendant’s motion for summary adjudication of plaintiffs’ prayer  
12 for punitive damages. First, plaintiffs failed to substantiate a bad faith claim. Thus, the  
13 court lacks any basis on which to award punitive damages.

14 Second, plaintiffs fail to show a triable factual issue that defendant acted with the  
15 requisite mental state when handling the Delay Claim and Property Damage Claim. To  
16 be sure, plaintiffs identify a January 2020 article published by defendant’s consultant  
17 generally acknowledging that insurers know but do not inform their insureds that they  
18 would likely reach a different result when calculating a period of delay **because** of the  
19 retrospective versus prospective analysis each applies to determine a covered period.  
20 Dkt. 74-1. Based on that, plaintiffs extrapolate that defendant knowingly withheld critical  
21 information concerning the coverage available on the Delayed Claim. Dkt. 99-1 at 30.

22 Plaintiffs’ theory, however, has a major problem: it assumes that defendant has a  
23 legal obligation to affirmatively disclose its understanding of a policy term prior to the  
24 agreement’s execution. Plaintiffs fail to proffer any authority to support that assumption.

25 Still, even if defendant were required to disclose such understanding, the court  
26 finds that its mere failure to do so would not provide a sufficient basis to find a triable  
27 factual question under the “clear and convincing” evidence standard that defendant acted  
28 with malice, oppression, or fraud when issuing the policy. Accordingly, the court grants

1 defendant's motion for summary adjudication of the prayer for punitive damages.

2 **III. Remaining Pretrial Matters**

3 Given this order's substantive rulings, the court will address a couple outstanding  
4 pretrial matters. First, on January 22, 2021, defendant filed a letter requesting that the  
5 court strike third-party Christopher Lape's ("Lape") revised deposition testimony or  
6 continue the January 28, 2021 hearing and permit defendant leave to further depose  
7 Lape about his changes in testimony. Dkt. 104. The following Sunday, on January 24,  
8 2021, the court denied the request to continue the hearing. Dkt. 105. The court noted,  
9 however, that it would take defendant's substantive requests under submission. Id.

10 The court now permits defendant the opportunity to further depose Lape about the  
11 changes made to his deposition testimony (and only those changes or any other part of  
12 his deposition that such changes might effect). The court limits his follow-up deposition  
13 to two hours. The parties should work together with Lape to identify a mutually agreeable  
14 time to conduct this deposition sometime by **Wednesday, May 5, 2021**.

15 Second, the court orders the parties to appear for a conference via Zoom on  
16 **Thursday, May 13, 2021 at 2:00 pm**. The parties should be prepared to discuss how to  
17 proceed on what remains of this action and potential availability to shorten the existing  
18 pretrial and trial dates and deadlines.

19 Third, the court will refer this action to a magistrate judge for a settlement  
20 conference to occur by **Wednesday, June 9, 2021**, if possible, or, if not, at the earliest  
21 convenience of the assigned judge. The court will issue that referral as a separate order.

22 **CONCLUSION**

23 In light of the above, the court **GRANTS IN PART** and **DENIES IN PART** plaintiffs'  
24 motion for partial summary judgment. Dkt. 68. The court also **GRANTS IN PART** and  
25 **DENIES IN PART** defendant's motion for summary judgment, or in the alternative, partial  
26 summary judgment. Dkt. 63.

27 **IT IS SO ORDERED.**

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Dated: April 7, 2021

/s/ Phyllis J. Hamilton  
PHYLLIS J. HAMILTON  
United States District Judge