SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JAY ALIFF,

Plaintiff,

v.

CALIFORNIA FAIR PLAN ASSOCIATION,

Defendant.

Case No. 21STCV20095

The Honorable Stuart M. Rice,
Dept. 1

RULING ON SUBMITTED MATTER RE: MOTION FOR SUMMARY ADJUDICATION

Hearing Date: June 4, 2025

Moving Party: Plaintiff Jay Aliff

Responding Party: Defendant California Fair Plan Association

Ruling: **Motion for Summary Adjudication granted as to the declaratory relief cause of action with respect to the unlawful nature of certain provisions of the CFP Policy and denied as to the UCL cause of action.**

This is an action arising out of a coverage dispute concerning fire insurance. Plaintiff Jay Aliff (Plaintiff) alleges that defendant California Fair Plan Association (Defendant or CFP) issues property insurance policies whose fire coverage is unlawfully restrictive with respect to claims for smoke damage. On December 31, 2024, the Court denied Plaintiff's motion for class certification. Plaintiff now moves for summary adjudication of his first cause of action for declaratory relief and his second cause of action for violation of the Unfair Competition Law (UCL, Bus. & Prof. Code §

17200 et seq.).

Procedural History

Plaintiff filed this action on May 27, 2021. On October 21, 2022, Defendant demurred to and moved to strike portions of Plaintiff's operative Second Amended Complaint (the SAC), which the Court overruled on December 16, 2022. Specifically, Defendant demurred to Plaintiff's class allegations, and the Court expressed concern that Plaintiff might face obstacles to obtaining class certification based on the cases of *Basurco v. 21st Century Ins. Co.* (2003) 108 Cal.App.4th 110 (*Basurco*) and *Newell v. State Farm Gen. Ins. Co.* (2004) 118 Cal.App.4th 1094 (*Newell*), in which similar claims based on earthquake coverage had been found inappropriate for class treatment.

Nonetheless, the Court overruled that demurrer, holding that considering the strong judicial preference for deferring questions of class sufficiency to class certification, this was a matter better addressed at a later stage. Plaintiff then requested dismissal of the causes of action for breach of the insurance policy and bad faith, which the Court entered on March 15, 2024. The only remaining causes of action in the SAC are for declaratory relief and unfair business practices (Bus. & Prof. Code § 17200 et seq.).

On December 31, 2024, the Court denied Plaintiff's motion for class certification. Plaintiff's motion for summary adjudication followed. After hearing oral argument from the parties at the June 4, 2025 hearing, the Court took the matter under submission and now issues its final ruling as follows.

Legal Standards

The function of a motion for summary judgment or adjudication is to allow a determination as to whether an opposing party cannot show evidentiary support for a pleading or claim and to enable an order of summary dismissal without the need for trial. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) "A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to

any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs." (Code Civ. Proc. § 437c(f)(1).)

Section 437c(c) "requires the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1119.) "The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues; the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings." (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 67, citing *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381-382.)

A plaintiff meets their burden of showing there is no defense to a cause of action "if that party has proved each element of the cause of action entitling the party to judgment on the cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (Code Civ. Proc. § 437c(p)(1).)

Courts "liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389.) To establish a triable issue of material fact, the party opposing the motion must produce substantial responsive evidence. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 166.) "Supporting and opposing affidavits or declarations shall be made by a person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations." (Code Civ. Proc. § 437c(d).) "A court generally cannot resolve questions about a declarant's credibility in a summary judgment proceeding …unless admissions against interest have been made which justify disregard of any dissimulation." (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179

Cal.App.3d 1061, 1065 (*AARTS Productions*).)

"A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc. § 437c(f)(1).)

Request for Judicial Notice

Plaintiff requests judicial notice of the following:

1. The CDI's Market Conduct Examination of California FAIR Plan Association, adopted May 25, 2022. This evidences official acts of an executive department of the State of California subject to judicial notice under Evid. Code § 452(c), and the Court **grants** judicial notice of it, although not for the truth of its contents.

2. The CDI's disposition of CFP's 2012 form approval application, State Tracking #12-6223. This evidences official acts of an executive department of the State of California subject to judicial notice under Evid. Code § 452(c), and the Court **grants** judicial notice of it, although not for the truth of its contents.

3. The CDI's disposition of CFP's 2016 form approval application, State Tracking #16-6646. This evidences official acts of an executive department of the State of California subject to judicial notice under Evid. Code § 452(c), and the Court **grants** judicial notice of it, although not for the truth of its contents.

4. An order on summary judgment from *Marrufo v. Automobile Club of Southern California,* No. BC597839. The decisions of other departments of the Superior Court, although they may be persuasive, are not properly the subject of judicial notice, and the request is **denied.**

5. An order on summary judgment from *Vasquez v. Residence Mutual Insurance Co.,* Orange County Case No. 30-2019-01054332. Likewise, the decisions of other Superior Courts, though they may be persuasive, are not properly the subject of judicial notice, and the request is **denied.**

6. The declaration of Estee Natale submitted in opposition to the motion for

class certification. This is a court record under Evid. Code § 452(d), and judicial notice is **granted**, although not for the truth of the assertions therein.

7. That smoke is "a collection of airborne particulates and gases emitted when a material undergoes combustion or pyrolysis." This is a matter so universally known that it cannot reasonably be the subject of dispute and is therefore subject to judicial notice under Evid. Code § 451(f). The request is **granted.**

In support of the reply, Plaintiff requests judicial notice of the following documents:

8. Defendant's Notice of Motion and Motion to Stay Action in *Mapel v. California FAIR Plan Association,* Santa Cruz Superior Court No. 22CV00631; and

9. Defendant's Notice of Demurrer and Demurrer in *Arteno et al. v. California FAIR Plan Association*, Alameda Superior Court No. 24CV084506.

These are both court records and subject to judicial notice under Evid. Code § 452(d). The request is therefore **granted.**

With its objections to Plaintiff's reply evidence, Defendant has filed a supplemental request for judicial notice only four court days before the hearing. As discussed below, the filings by Plaintiff to which the supplemental request pertain did not change the Court's analysis and this untimely request is **denied.**

Objection to Separate Statement

Defendant objects to Plaintiff's separate statement on the ground that it fails to comply with the requirements of Cal. Rules of Court, rule 3.1350(d). The objection is well-taken. Rule 3.1350 requires that each cause of action, and the facts supporting that cause of action, be set forth separately. (Rules of Court, rule 3.1350(d)(1).) Plaintiff's separate statement instead contains a single recitation of 45 facts, ostensibly in support of both causes of action. Moreover, many of the facts forwarded by Plaintiff are significantly compound. For example, consider fact 9:

> 9. During Crawford's inspection Mr. Aliff identified damage around the house, and the inspecting adjuster agreed there was fire debris damage to the walls, floors, and contents. The adjuster told Mr. Aliff he would be submitting a repair estimate for approximately $8500. The adjuster

> explained that his estimate would include removal and replacement of damaged insulation, painting of interior walls, sealing of unsealed sheathing and framing in the attic, roof and window repairs, along with professional remediation of ash and soot from throughout the home.

This fact is actually several facts, no fewer than the following:

1. That during the inspection, Mr. Aliff identified damage around the house;

2. That during the inspection, the inspecting adjuster agreed there was fire debris damage to the walls, floors, and contents;

3. That the adjuster told Mr. Aliff he would be submitting a repair estimate for approximately $8,500; and

4. That the adjuster told Mr. Aliff that the estimate would include removal and replacement of damaged insulation, painting of interior walls, sealing of unsealed sheathing and framing in the attic, roof and window repairs, and professional remediation of ash and soot from throughout the home.

That said, the Court is inclined to rule on Plaintiff's motion on its merits given that Defendant has had a fair opportunity to respond to Plaintiff's facts. It is a valid exercise of the Court's discretion to rule on a motion for summary judgment or summary adjudication where the statement substantially complies with the requirements for separate statements and does not preclude the responding party from being able to substantively consider and respond to the movant's arguments. (See *Brown v. El Dorado Union High School Dist.* (2022) 76 Cal.App.5th 1003, 1019-1021.)

Evidentiary Objections

Defendant's objections 1-10 and 12-13 are not material to the disposition of this motion but are preserved for review. (Code Civ. Proc. § 473c(q).) Objections 14 and 15 are moot, as the Court has denied the request for judicial notice of those materials.

Objection 11: Defendant objects to the Market Conduct Examination, item 1 of the Request for Judicial Notice, to the extent that Plaintiff requests notice of the truth of the contents of the document. The contents evidence the determinations of the Department of Insurance with respect to certain matters, including whether Defendant's fire policy complied with applicable provisions

of the Insurance Code. The Court is making its own determination on that question, but the analysis contained in this document is nonetheless instructive, though the Court will not accept it for its truth. The objection is therefore overruled.

Plaintiff's objection to the declaration of Nicholas J. Boos is not material to the disposition of this motion but is preserved for review. (Code Civ. Proc. § 473c(q).)

Defendant objects to new evidence and matter for judicial notice submitted by Plaintiff on reply. Nothing Plaintiff presented was material to the Court's ruling on this motion, and therefore Defendant's objection also lacks materiality but is preserved for review.

Discussion

The gist of Plaintiff's claims in this lawsuit involves Ins. Code § 2071 which contains a standard form policy of fire insurance (the Standard Form Policy). (Ins. Code § 2071(a).) In addition, a policy of fire insurance need not comply with the standard form so long as "coverage with respect to the peril of fire, when viewed in its entirety, is substantially equivalent to or more favorable to the insured than that contained in such standard form fire insurance policy." (Ins. Code § 2070.) There is no dispute that the CFP policy at issue (the CFP Policy) provides the following pertinent language:

> PERILS INSURED AGAINST
>
> Unless the loss is excluded in the General Exclusions, or below, we insure for "direct physical loss", which is defined as any actual loss or physical damage, evidenced by permanent physical changes, to the covered property caused by:
> [¶…¶]
> 3. Smoke Damage.
> a. When used in this policy, "smoke damage" means sudden and accidental direct physical loss from smoke (including airborne, windborne, or wind-driven combustion by-products or particulates such as carbon/soot/ash/char/debris) that is visible to the unaided human eye, or odor from smoke or ash that is detected by the unaided human nose of an average person, and not by the subjective senses of you or by laboratory testing.
> [¶…¶]
> d. Dispute resolution of smoke damage claims:

> i. any dispute regarding whether smoke damage has occurred will be resolved by either Method 1 or 2 below (at your election):
>
> Method 1: You and we will each select a competent and disinterested person, and those two will select a third person (the Umpire) all in the same manner provided in the Condition 9, Appraisal, below. The three people will inspect the premises and decide by majority vote whether they can see or smell smoke damage, and their decision is binding. If there is smoke damage, the claim will then be adjusted to determine the amount of the loss.
>
> Method 2: A single, sole neutral Umpire can decide whether there is smoke damage. If the parties cannot agree on the identity of that individual, a judge of a court of record in the State of California will select the Umpire. Each side will pay 1/2 of the fee for the Umpire.
>
> ii. if the parties agree there is smoke damage, or smoke damage has been found using Method 1 or 2 above, but the amount of the loss is in dispute, that issue of the amount of loss will be decided by a new appraisal, as set forth at Condition 9, Appraisal below.
> (Aliff Decl., Ex. B, pp. 5-6.)

Plaintiff contends that this language causes the CFP policy to have less coverage for certain losses from fire than the standard form policy in Ins. Code § 2071 and is therefore not "substantially equivalent to or more favorable to the insured" than that policy, meaning that it is violative of the law. (See Ins. Code § 2070.)

I. Declaratory Relief

Plaintiff's operative second amended complaint (the SAC) requests a declaration as to the following issues:

> Aliff and the Class [the class is no longer part of the case] seek an order of the Court that Fair Plan is barred from:
>
> (a) unlawfully restricting mandatory coverage for loss or damage caused by fire by reliance on the policy's definition of "direct physical loss," which limits coverage to loss or damage to the covered property evidenced by permanent physical changes;
>
> (b) unlawfully restricting mandatory coverage for loss or damage caused by fire by reliance on the policy's "smoke damage" provision, which supplies restricted coverage for "direct physical loss from smoke (including airborne, windborne, or wind-driven combustion by-products or particulates such as carbon/soot /ash/char/debris) that is visible to the unaided human eye, or odor from smoke or ash that is detected by the

> unaided human nose of an average person, and not by the subjective senses of you or by laboratory testing";
>
> (c) unlawfully mandating resolution of disputes regarding benefits for loss or damage caused by fire by means of a dispute resolution process that does not appear in Insurance Code §2071, is not otherwise permitted by California law, reduces fire coverage overall, and lacks the declared disaster exception that appears in §2071[.]

A. Propriety of Declaratory Relief

As explained in *Artus v. Gramercy Towers Condominium Association* (2018) 19 Cal.App.5th 923:

> [D]eclaratory relief is an equitable remedy and need not be awarded if the circumstances do not warrant.
>
> The propriety of a trial court's denial of declaratory relief involves a two-prong inquiry. The first prong concerns whether "a probable future dispute over legal rights between parties is sufficiently ripe to represent an 'actual controversy' within the meaning of the statute authorizing declaratory relief (Code Civ. Proc., § 1060), as opposed to purely hypothetical concerns." [Citation.] This is a "question of law that we review de novo on appeal." [Citations.] The second prong concerns "[w]hether such [an] actual controversy merits declaratory relief as necessary and proper (Code Civ. Proc., § 1061)." [Citations.] This is a matter within the trial court's sound discretion "except in the extreme circumstances where relief is 'entirely appropriate' such that a trial court would abuse its discretion in denying relief ... or where relief would never be necessary or proper."
> (*Id.* at 930-931.)

Defendant contends that declaratory relief is inappropriate because Plaintiff seeks declaratory relief only as to past wrongs (the adjustment of his fire insurance claim) and not as to any future dispute. However, as the parties are aware, Plaintiff did have a breach of contract and breach of implied covenant claims, which the Court dismissed on March 15, 2024 at Plaintiff's request. The Court declined to sustain Defendant's previous demurrer to those causes of action and there was no finding that those claims were not ripe. A future dispute over the policy is therefore sufficiently ripe to constitute an actual controversy, and in the Court's discretion, a proper subject of declaratory relief.

The Court recognizes Plaintiff's argument, made on reply and supported by judicial notice, that Defendant has argued in cases in Santa Cruz and Alameda Courts that the pending proceedings herein on the coverage issues support a stay or abstention there. Those arguments were made before this Court denied Plaintiff's motion for class certification and Defendant might not have made them had class treatment already been foreclosed. That said, the proliferation of cases on these same issues, including in newly filed cases in this County brought to this Court's attention in a notice of related cases, indicates that this is an issue of importance (although the Court is not relying on the existence of those cases in exercising its discretion).

B. Merits

"[W]here the facts are undisputed, the interpretation of an insurance policy is a question of law." (*Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 453.)

1. Concession by Defendant that the CFP Policy is less inclusive

The Court observes the following. For a start, the Standard Form Policy in the Insurance Code provides simply for coverage for all "LOSS BY FIRE" without any distinction between that and smoke or smoke damage (Ins. Code § 2071(a)). Training materials that were provided to CFP claims staff and site inspectors provides the following example of a loss by fire (i.e. a loss caused by the peril of fire):

> A wildfire in the vicinity of the property produces smoke, a mix of gases and fine particles from burning trees and plants, buildings and other materials, which then enters the dwelling causing damage.
>
> The peril would be fire as it is the wildfire that set the other causes of damage in motion.
> (Schaffer Decl., Ex. D, p. CFP 1005; Ex. J, pp. 14-15.)

On or about April 25, 2017, CFP transmitted a memorandum to registered insurance brokers concerning recent revisions to the CFP Policy which included a notice to be sent to customers. (Schaffer Decl., Ex. H.) The notice read:

> **Enclosed are your Renewal Declarations and your new policy contract. <u>Please read these documents carefully as several significant changes have been made to your policy.</u>**

> Policies of insurance contain many pages of basic contract terms and conditions, and are usually followed by endorsements that modify or change coverage. Since our main policy contract dated back over a decade, it had many different endorsements. To make your policy even easier to read, we have updated the formatting and moved language from the endorsements into the main contract.
>
> While these changes were being made, we updated the policy language and in some areas made the exclusions clearer and broader. **These changes are substantive and in some circumstances there has been a reduction of limits and elimination of coverage.** We do not set forth every change here because to do so would make this notice too long; we do set forth and summarize some of the more significant changes:
>
> **The following may be viewed as <u>reducing</u> or <u>limiting</u> coverage:**
>
> Direct physical loss has been newly defined at page 5 of the contract to require permanent physical changes to covered property. This limitation on what is considered direct physical loss will result in denial of claims that might have been paid under prior policy wording.
>
> (Schaffer Decl., Ex. H, p. 2, emphasis in original.)

This notice seems to admit that the CFP Policy is less favorable to insureds than the Standard Form Policy. Defendant's arguments against this interpretation focus on the construction "the following *may be viewed* as reducing or limiting coverage" as an equivocal, speculative statement, made entirely hypothetically. These are, of course, Defendant's own equivocations, but that language is also unnecessary to the analysis, because there is nothing equivocal about the sentence that follows it: "This limitation on what is considered direct physical loss **will result in denial of claims** that might have been paid under prior policy wording." (Emphasis added by the Court.) This is an admission that the CFP Policy's definition of "direct physical loss" had undergone a change for the worse such that it fell beneath the statutory minimum it had previously tracked.

2. Requirement of "permanent" damage

Plaintiff further contends that the definition of "direct physical loss" as excluding damage not visible to the naked eye or detectable by the human nose is violative of the California Supreme Court's holding in *Another Planet Entertainment, LLC v. Vigilant Ins. Co.* (2024) 15 Cal.5th 1106 (*Another Planet*). There, the plaintiff had purchased commercial property insurance covering

"direct physical loss or damage" to a building or personal property. (*Id.* at 1118-1119.) When the COVID-19 pandemic broke out, public health orders prohibited the plaintiff from using its properties for its live event business, and the plaintiff made a claim to the defendant, its insurer, which was denied. (*Id.* at 1120-1121.) The plaintiff sued in federal court, and the Ninth Circuit certified a question to the California Supreme Court asking whether the presence or potential presence of the COVID-19 virus could constitute "direct physical loss or damage to property" so as to trigger coverage. (*Id.* at 1121.)

The Supreme Court conducted a review of pertinent authorities, after which it dug into the nature of "direct physical damage" to property. Wrote the Court:

> It is also evident, based on the plain meaning of direct physical damage, that the general requirement of a distinct, demonstrable, physical change or alteration to property applies here. …
>
> Such a change or alteration need not be visible to the naked eye to constitute direct physical damage to property; "alterations at the microscopic level may meet this threshold." [Citation.] Instead, it is the effect of the change or alteration of the property that is determinative. If the change or alteration causes harm or injury to the property itself, such a change or alteration may constitute direct physical damage to property. Conversely, if a change or alteration does not cause any damage or harm to the property, it does not constitute direct physical damage to property. Many physical forces, such as heat and cold, cause physical changes or alterations to property, but these changes or alterations do not necessarily cause physical damage.
> (*Id.* at 1136.)

The Court went on, affirming reasoning from lower courts or other jurisdictions concerning similar questions:

> As one court explained, a physical contaminant may cause direct physical loss or damage where it is "so connected to the property that the property effectively becomes the source of its own loss or damage." [Citations.] Notably, such a connection will not be found where the substance or biological agent can be easily cleaned or removed from the property. [(*Inns-by-the-Sea v. California Mutual Ins. Co.* (2021) 71 Cal.App.5th 688, 703 fn. 17 (*Inns-by-the-Sea*).)] "While saturation, ingraining, or infiltration of a substance into the materials of a building or persistent pollution of a premises requiring active remediation efforts is sufficient to constitute 'direct physical loss of or damage to property,' evanescent

> presence is not." (*Verveine Corp. v. Strathmore Ins. Co.* (2022) 489 Mass. 534, [184 N.E.3d 1266, 1276] (*Verveine*).)
> (*Another Planet, supra,* 15 Cal.5th at 1140.)

Applying these principles, the Supreme Court rejected the plaintiff's argument that closures ordered because of the spread of COVID-19 could constitute direct physical loss, as "[a] property insurance policy does not cover a particular intended use; it covers the property itself." (*Ibid.*) "[W]hile we cannot and do not decide whether the COVID-19 virus can ever constitute direct physical loss or damage to property, we conclude [the plaintiff's] allegations are insufficient to meet the definition of direct physical loss or damage to property under California law." (*Id.* at 1148.)

> Turning back to the policy at hand, the CFP Policy limits coverage to "direct physical loss", which is defined as any actual loss or physical damage, **evidenced by permanent physical changes,** to the covered property[.]
> (Aliff Decl., Ex. B, p. 5.)

Plaintiff argues that this requirement of permanence is more restrictive than *Another Planet* allows, which provides only that "While saturation, ingraining, or infiltration of a substance into the materials of a building or persistent pollution of a premises requiring active remediation efforts is sufficient to constitute 'direct physical loss of or damage to property,' evanescent presence is not." (*Another Planet, supra,* 15 Cal.5th at 1140, quoting *Verveine Corp. v. Strathmore Ins. Co.* (2022) 489 Mass. 534 (*Verveine*).) The *Verveine* case that *Another Planet* examined uses "evanescent" to refer to the "presence of a harmful airborne substance that will quickly dissipate on its own, or surface-level contamination that can be removed by simple cleaning[.]" (*Verveine, supra,* 489 Mass. at 543; see also American Heritage Dict. (5th ed. 2022), <https://ahdictionary.com/word/search.html?q=evanescent>, accessed May 29, 2025 ["evanescent" means "Vanishing or likely to vanish like vapor."]

Defendant argues that *Another Planet* supports a requirement that the loss be "permanent," in that it requires a substance be "sufficiently harmful and persistent to cause a distinct, demonstrable, physical alteration to property." (*Another Planet, supra,* 15 Cal.5th at 1140.) However, "persistent" is not the same as "permanent," and *Another Planet* does not equate the two. As recognized in *Inns-by-the-Sea,* a case *Another Planet* draws from, direct physical loss may occur

where a property does not incur permanent or structural damage. (See *Inns-by-the-Sea, supra,* 71 Cal.App.5th at 702, citing *Oregon Shakespeare Festival Association v. Great American Ins. Co.* (D.Or. June 7, 2016, No. 1:15-cv-01932-CL) 2016 WL 3267247 at p. 9 [theater suffered physical damage where harmful air quality rendered theater unusable "even though the property did not incur any permanent or structural damage"] and *Matzner v. Seaco Ins. Co.* (Mass.Super.Ct., Aug. 12, 1998, No. CIV. A. 96-0498-B) 1998 WL 566658 [unsafe carbon monoxide levels caused by chimney was direct physical loss].) As Plaintiff points out, "persistent pollution of a premises requiring active remediation efforts" is not permanent, but nonetheless "sufficient to constitute 'direct physical loss of or damage to property[.]'" (*Another Planet, supra,* 15 Cal.5th at 1140, quoting *Verveine, supra,* 489 Mass. at 544.)

Defendant's discussion of contamination "so connected to the property that the property effectively becomes the source of its own loss or damage" takes that language out of context. (See Opposition, p. 28, quoting *Another Planet, supra,* 15 Cal.5th at 1140.) *Another Planet* discusses this as just one circumstance in which "a physical contaminant may cause direct physical loss or damage." (*Ibid.*) The extensive analysis possible concerning the meaning of "permanent" is a problem in and of itself, as exceptions to the performance of the basic underlying obligation in an insurance contract "must be so stated as clearly to apprise the insured of its effect[,]" i.e. "[t]he exclusionary clause 'must be *conspicuous, plain and clear.*'" (*State Farm Mutual Auto Insurance Co. v. Jacober* (1973) 10 Cal.3d 193, 201-202 (*State Farm*), emphasis in original.)

Defendant contends that *State Farm* is not applicable here, because the language challenged does not appear in a formal exclusion. This elevates form over substance. The Supreme Court has held:

> [T]o be enforceable, any provision that takes away or limits coverage reasonably expected by an insured must be "conspicuous, plain and clear." [Citation.] Thus, any such limitation must be placed and printed so that it will attract the reader's attention. Such a provision also must be stated precisely and understandably, in words that are part of the working vocabulary of the average layperson. [Citations.] The burden of making coverage exceptions and limitations conspicuous, plain and clear rests with the insurer.

(*Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204 (*Haynes*), citing *State Farm, supra,* 10 Cal.3d at 201-202.)

The clause requiring that a loss be "evidenced by permanent physical changes" to covered property "limits coverage reasonably expected by an insured," bringing it within the requirements of *State Farm.* (See *Haynes, supra,* 32 Cal.4th at 1204.)

For the foregoing reasons, it appears that the requirement that damage cause "permanent physical changes" offers less coverage than the general coverage for "LOSS BY FIRE" contained in the Standard Form Policy. (See Ins. Code § 2071.)

3. Requirement that smoke damage be "visible to the unaided human eye" or "detected by the unaided human nose of an average person"

As Plaintiff argues, this too has no basis in the definition of "direct physical loss" forwarded by *Another Planet.* The Supreme Court was clear: the change or alteration constituting the loss "need not be visible to the naked eye to constitute direct physical damage to property; "alterations at the microscopic level may meet this threshold." (*Another Planet, supra,* 15 Cal.5th at 1117.) A definition of physical damage or physical loss which requires perception by the senses and excludes "laboratory testing" is inconsistent with *Another Planet*, which Defendant does not meaningfully dispute. Rather, Defendant contends that at the time Plaintiff made his claim under the CFP Policy, this definition complied with the law as laid out in *Ward General Ins. Services, Inc. v. Employers Fire Ins. Co.* (2003) 114 Cal.App.4th 548, wherein the plaintiff claimed to have suffered a loss when its computer crashed, resulting in the deletion of its business information database:

> The word "physical" is defined, inter alia, as "having material existence" and "perceptible esp. through the senses and subject to the laws of nature." (Merriam–Webster's Collegiate Dict. (10th ed.1993) p. 875.) "MATERIAL implies formation out of tangible matter." (*Id.* at p. 715.) "Tangible" means, inter alia, "capable of being perceived esp. by the sense of touch." (*Id.* at p. 1200.) Thus, relying on the ordinary and popular sense of the words, we say with confidence that the loss of plaintiff's database does not qualify as a "direct physical loss," *unless* the database has a material existence, formed out of tangible matter, and is perceptible to the sense of touch.
> (*Id.* at 556.)

Defendant further argues that this makes UCL relief unavailable against it, citing *Janis v. California State Lottery Commission* (1998) 68 Cal.App.4th 824, 832 [statements about legality of Keno, made before it was declared to be illegal gambling, could not support Bus. & Prof. Code § 17500 claim] (*Janis*). Whether the law might have supported the perceptibility requirements of the CFP Policy at the time of Plaintiff's claim says nothing about whether those requirements violate the law as it currently exists, nor whether a declaration as to the legality is proper. *Janis* is more properly discussed in connection with the UCL claim if at all.

The perceptibility requirements in the CFP Policy also raise issues under *State Farm,* in that they are not sufficiently clear and unmistakable as to apprise an insured of what is covered and what is not. (See *State Farm, supra,* 10 Cal.3d at 201-202.) The perceptibility requirements refer to the "naked eye" and the "unaided human nose of an average person," but exclude the "subjective senses" of the insured:

> **3. Smoke Damage.**
> a. When used in this policy, "smoke damage" means sudden and accidental direct physical loss from smoke (including airborne, windborne, or wind-driven combustion by-products or particulates such as carbon/soot/ash/char/debris) that is visible to the unaided human eye, or odor from smoke or ash that is detected by the unaided human nose of an average person, and not by the subjective senses of you or by laboratory testing.
> (Aliff Decl., Ex. B, p. 5.)

Being unable to resort to their own senses or laboratory tests, it is entirely unclear how an insured could determine whether a particular loss is covered or not. As Plaintiff points out, the "unaided human eye" and "average human nose" are not exact terms, and a lay insured would be in no position to know what sort of smoke damage this clause would or would not cover. This is an additional insufficiency. As discussed above, "any provision that takes away or limits coverage reasonably expected by an insured must be 'conspicuous, plain and clear' and "must be stated precisely and understandably[.]" (*Haynes, supra,* 32 Cal.4th at 1204.) This language falls short of that requirement.

Both parties discuss *Gharibian v. Wawanesa General Ins. Co.* (2025) 108 Cal.App.5th 730 (*Gharibian*). There, debris from the 2019 Saddle Ridge wildfire sent ash, soot, and smoke over and

into the plaintiff's home, but there was no burn damage. (*Id.* at 733.) The plaintiffs' cleaning contractor estimated it would cost $4,308.90 to clean the property inside and out, although the plaintiffs did not actually hire them to do the work. (*Ibid.*) While the insurer's hygienist thought minimal cleaning was necessary, the insurer paid the amount of the plaintiff's estimate. (*Ibid.*) While the parties continued to go back and forth on higher estimates, and the insurer paid some $16,000 in additional concessions, the plaintiffs eventually sued the insurer for breach of contract and bad faith. (*Id.* at 735.) The Trial Court granted the insurer's motion for summary judgment on the ground that there had been no physical loss to the property, and the plaintiffs appealed. (*Id.* at 735-736.)

The Court of Appeal affirmed. (*Id.* at 737.) Relying on *Another Planet Entertainment, LLC v. Vigilant Ins. Co.*, the Court reaffirmed the rule that physical alteration "need not be visible to the naked eye, nor must it be structural, but it must result in some injury to or impairment of the property as property." (*Gharibian, supra,* 108 Cal.App.5th at 738, quoting *Another Planet, supra,* 15 Cal.4th at 1117.) In the case at bar, "all the evidence indicat[ed] that the debris was 'easily cleaned or removed from the property'" such that it did "not constitute 'direct physical loss to property.'" (*Gharibian, supra,* 108 Cal.App.5th at 738.)

As Plaintiffs articulates, the *Gharibian* case did not concern the minimum requirements of the Insurance Code for fire insurance policies in particular. The "easily cleaned or removed from the property" language of *Another Planet* on which *Gharibian* (and Defendant) relies must be considered in its context. (See *Another Planet, supra,* 15 Cal.5th at 1140.) *Another Planet* contrasts the situation where a substance "can be easily cleaned or removed from the property" with a situation of "saturation, ingraining, or infiltration of a substance into the materials of a building or persistent pollution of a premises requiring active remediation efforts[,]" the latter situation being "sufficient to constitute 'direct physical loss of or damage to property'" as opposed to the "evanescent presence" of an easily-removed contaminant. (*Ibid.,* quoting *Verveine, supra,* 184 N.E.3d at 1276.)

In *Gharibian,* there was evidence from the plaintiff's own hygienist that "soot and char debris do not cause physical damage, and the ash did not cause damage at plaintiffs' property; and [the plaintiff] testified that he was unaware of any physical damage." (*Gharibian, supra,* 108 Cal.App.5th at 735.) Here there is no such evidence, and further, it appears undisputed that the fire caused pitting to two windows on the west side of the property, as well as the complete destruction of all the landscaping on the property. (See Defendant's Additional Material Fact (AMF) 9.) It may be that in a future dispute, Plaintiff could not prevail for lack of direct physical loss as defined in *Another Planet.* That is not the issue before the Court here, and the Court does not today rule that anyone whose claim was adjusted under the improper standard is entitled to any particular relief. Rather, the issue is whether Defendant's policy language accords with *Another Planet* and the Insurance Code. The Court now determines that it does not.

4. Dispute resolution provision

Plaintiff contends that the dispute resolution provision is unlawful because it uses a dispute resolution process that does not appear in the Standard Form Policy, is not otherwise permitted by California law, reduces coverage, and lacks the declared disaster exception contained in the Standard Form Policy.

The Standard Form Policy contains the following appraisal provision:

> Appraisal
>
> In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written request of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of the request. Where the request is accepted, the appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon the umpire, then, on request of the insured or this company, the umpire shall be selected by a judge of a court of record in the state in which the property covered is located. Appraisal proceedings are informal unless the insured and this company mutually agree otherwise. For purposes of this section, "informal" means that no formal discovery shall be conducted, including depositions, interrogatories, requests for admission, or other forms of formal civil discovery, no formal rules of evidence shall be applied, and no court reporter shall be used for the proceedings. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each

item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him or her and the expenses of appraisal and umpire shall be paid by the parties equally. **In the event of a government-declared disaster, as defined in the Government Code, appraisal may be requested by either the insured or this company but shall not be compelled.**
(Ins. Code § 2071, emphasis added.)

The CFP Policy provides:

d. Dispute resolution of smoke damage claims:

i. any dispute regarding whether smoke damage has occurred will be resolved by either Method 1 or 2 below (at your election):

Method 1: You and we will each select a competent and disinterested person, and those two will select a third person (the Umpire) all in the same manner provided in the Condition 9, Appraisal, below. The three people will inspect the premises and decide by majority vote whether they can see or smell smoke damage, and their decision is binding. If there is smoke damage, the claim will then be adjusted to determine the amount of the
loss.

Method 2: A single, sole neutral Umpire can decide whether there is smoke damage. If the parties cannot agree on the identity of that individual, a judge of a court of record in the State of California will select the Umpire. Each side will pay 1/2 of the fee for the Umpire.

ii. if the parties agree there is smoke damage, or smoke damage has been found using Method 1 or 2 above, but the amount of the loss is in dispute, that issue of the amount of loss will be decided by a new appraisal, as set forth at Condition 9, Appraisal below.
[¶…¶]
9. Appraisal. If you and we fail to agree on the amount of loss, either may request an appraisal of the loss:

a. if the loss arises out of a government-declared disaster, as defined in the California Government Code, appraisal may be requested by either party but may not be compelled;
[¶…¶]
(Aliff Decl., Ex. B, pp. 5, 14.)

As discussed above, the focus on "seeing" and "smelling" smoke damage imposes requirements narrower than in the Standard Form Policy, because they do not conform to the meaning of direct physical loss articulated by *Another Planet, supra,* 15 Cal.5th at 1140, and the dispute resolution provision is therefore unlawful to that extent. However, as shown above, the CFP Policy does include the declared disaster exception. Plaintiff has therefore failed to carry his burden to show that it is unlawful on that ground.

Plaintiff has carried his burden to show that there is no dispute as to the contents of the CFP Policy, and that he is entitled to judgment as to the legality of the CFP Policy's provisions as a matter of law. For the foregoing reasons, the Court declares as follows:

- The CFP Policy's definition of "direct physical loss" as "actual loss or physical damage, evidenced by permanent physical changes" is unlawful under Ins. Code § 2070, in that this language limits coverage to be less favorable than and not substantially equivalent to the Standard Form Policy contained in Ins. Code § 2071;
- The CFP Policy's definition of "direct physical loss" as "actual loss or physical damage, evidenced by permanent physical changes" is unlawful under *State Farm Mutual Auto Insurance Co. v. Jacober* (1973) 10 Cal.3d 193, 201-202 and *Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204, in that this language limits coverage reasonably expected by an insured in a manner which is not conspicuous, plain and clear;
- The CFP Policy's requirements that smoke damage be "visible to the unaided human eye" or capable of being "detected by the unaided human nose of an average person" rather than being perceptible "by the subjective senses of [the insured] or by laboratory testing" are unlawful under Ins. Code § 2070, in that this language limits coverage to be less favorable than and not substantially equivalent to the Standard Form Policy contained in Ins. Code § 2071;
- The CFP Policy's requirements that smoke damage be "visible to the unaided human eye" or capable of being "detected by the unaided human nose of an average person" rather than being perceptible "by the subjective senses of [the insured] or by

laboratory testing" are unlawful under *State Farm Mutual Auto Insurance Co. v. Jacober* (1973) 10 Cal.3d 193, 201-202 and *Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204, in that this language limits coverage reasonably expected by an insured in a manner which is not conspicuous, plain and clear;

- The CFP Policy's dispute resolution procedure for smoke damage claims is unlawful to the extent it is derived from or relies on the definition of "direct physical loss" or the requirements that smoke damage be "visible to the unaided human eye" or capable of being "detected by the unaided human nose of an average person" rather than being perceptible "by the subjective senses of [the insured] or by laboratory testing" which the Court has declared unlawful for the reasons discussed above; and

- The CFP Policy's dispute resolution procedure for smoke damage claims is not unlawful for the failure to include the declared disaster exception contained in Ins. Code § 2071, as the CFP Policy incorporates that exception under section 9.a of the Conditions.

II. Unfair Competition Law

The Unfair Competition Law (UCL), Bus. & Prof. Code § 17200 et seq., prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code." (Bus. & Prof. Code § 17200.) "Its coverage is sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law. [Citations.] It governs anti-competitive business practices as well as injuries to consumers and has as a major purpose the preservation of fair business competition. [Citations.] By proscribing 'any unlawful' business practice, section 17200 'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 (*Cel-Tech*), internal quotation marks omitted.) The law is disjunctive, in that a practice may be prohibited as "unfair" or "deceptive" even if the practice is lawful, and vice versa. (*Ibid.*)

The "unfairness" prong of the UCL is intentionally broad, but not unlimited. (*Shvarts v. Budget Group, Inc.* (2000) 81 Cal.App.4th 1153, 1157 (*Shvarts*).) There is no overriding standard for what constitutes an unfair practice under the UCL, but rather, there are several competing standards. The *Camacho* test, also called the FTC test, originates from the Federal Trade Commission's standards, and provides that a practice is unfair where 1) the consumer injury from the practice is substantial; 2) the injury is not outweighed by any countervailing benefits to consumers or to competition; and 3) the injury is one that consumers themselves could not reasonably have avoided. (*Camacho v. Automobile Club of Southern California* (2006) 142 Cal.App.4th 1394, 1403; *Davis v. Ford Motor Credit Co. LLC* (2009) 179 Cal.App.4th 581, 597-598.)

To show a "fraudulent" business practice, a plaintiff need only show that members of the public are likely to be deceived. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267; see also *Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 647-648 ["The 'fraud' prong of Business and Professions Code section 17200 is unlike common law fraud or deception. A violation can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage. Instead, it is only necessary to show that members of the public are likely to be deceived."])

a. Standing

Defendant contends that Plaintiff lacks standing to bring any claims under the UCL. Only "a person who has suffered injury in fact and has lost money or property as a result of the unfair competition" may bring suit under the UCL. (Bus. & Prof. Code § 17204; see also Bus. & Prof. Code § 17203 ["Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204[.]"])

"Standing is a threshold issue necessary to maintain a cause of action, and the burden to allege and establish standing lies with the plaintiff." (*People ex rel. Becerra v. Superior Court (Ahn)* (2018) 29 Cal.App.5th 486, 495, quoting *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 810.)

Plaintiff contends that he lost money or property under the UCL because after the fire, the outside adjusted hired by CFP wrote a repair estimate for over $7,000, but then CFP reduced that amount due to the policy language challenged in this lawsuit. Specifically, Plaintiff contends that "[b]ecause of its restrictive policy language, CFP removed various items from the scope [of the estimate], thereby reducing benefits payments" and causing him injury. (Plaintiff's Memo., p. 29.)

It is not clear from the record that any estimate was reduced because of the language Plaintiff is challenging. This is critical, because Plaintiff has the burden of establishing standing and there must be no dispute as to any material fact. (See Code Civ. Proc. § 437c(c); see also *People ex rel. Becerra v. Superior Court, supra,* 29 Cal.App.5th at 495.) Plaintiff presents the following evidence.

Plaintiff cites a portion of an estimate from Crawford & Company, an independent adjuster hired by CFP. (See Plaintiff's Undisputed Fact (UF) 8; see also Natale Decl., ¶ 6.) The pertinent portion of the estimate indicates an "Estimate Total" for the "Ownership Period" from 12/1/2020 to 12/28/2020 as $7,034.14, for 49 "Total Items." (Schaffer Decl., Ex. A [claim file], p. ALIFFCF 000108.) It is followed by an "Estimate Total" for the "Ownership Period" from 1/8/2021 to 2/26/2021 of $2,903.27, with only 24 total items. (*Ibid.*) The estimate is labeled "ALIFF__JAY4" and is dated February 26, 2021, but there is no date for when the $7,034.14 was entered. (*Ibid.*) The estimate contains an audit trail apparently listing increases and decreases to the amount of the estimate, which indicates that the "price" of the estimate steadily increased due to "item(s) pasted from estimate ALIFF__JAY3" (Schaffer Decl., Ex. A, pp. 110-112) but as Plaintiff admits, that other estimate is not in the record (see UF 11). The ALIFF__JAY4 estimate indicates that its price was reduced from $7,034.14 to $4,328.49 on January 29, 2021, and then increased and decreased until a drop to an eventual price of $2,903.27. (Schaffer Decl., Ex. A, pp. 113-118.)

Plaintiff cites to other evidence in support of his purported fact that CFP "[r]el[ied] on its policy language relating to the definition of *damage*" when it "deleted various portions of its inspecting adjuster's repair estimate" (UF 14), but none of the cited evidence in the claim file (Schaffer Decl., Ex A) supports that. Page 38 is an email from Plaintiff to CFP's claims examiner, Kwanza Johnson, stating that "I know James Ramsey took numerous pictures of the house that was

covered in 1/2 inch of ash and sand. The walls were also covered in a black soot film. I'm sure they were in his original estimate. Please confirm James Ramsey's original report had no pictures. The reason he asked for cleaning was because he recommended the walls be painted as well." This has nothing to say about the reasons any items were removed from the estimate. Page 47 is a letter from CFP accompanying a payment of $2,724.03 (the eventual $3,741.74 estimate minus $17.71 in depreciation and a $1,000 deductible). Likewise, it says nothing about any reduction or the reasons therefor. Pages 52-61 are a March 2, 2021 version purporting to be of the ALIFF__JAY4 estimate (see page 52) which again, contains no information about why any reductions occurred. Page 62 is a March 2, 2021 e-mail internal to CFP in which James Garner, Independent Claims Manager, told Kwanza Johnson to remove certain highlighted items from an estimate (ostensibly resulting in the immediately preceding estimate, pp. 52-61). It makes no reference to the reason for the reductions or removals.

Pages 76-77 are a status report from Crawford & Company to CFP in which they reference removing "the requested line items and labor minimums[,]" again giving no reason for the removals. (See Schaffer Decl., Ex. A, pp. 76-77.) Page 158 is an e-mail from CFP to Crawford & Co. requesting that they:

> revise the estimate to adhere to CFP guidelines: 1 hydroxyl generator for every 1500 sqft or 1 per floor and one in the attic. However, for this claim since we will be replacing the attic insulation there would be no need to put a hydroxyl treatment in the attic.
> For the carpet please change it to clean the carpet instead of replacing it as there is no ADPL to the carpet and remove the line item to seal the truss.
> I did inform my manager there are no pictures of the inside of the attic and he confirmed it is okay to keep the line items to replace the insulation.

"ADPL" ostensibly stands for "accidental direct physical loss," discussed above. However, there is no evidence that the lack of ADPL to the carpet is a result of application of the challenged terms. Plaintiff's claim in UF 10 that the prior $7,034 estimate "included replacement of the carpet at the home" rather than carpet cleaning is not supported by any evidence. Page 198 is simply the audit trail, indicating the drop from $7,034 to $4,328.49, with no reason given or apparent. Pages 205-207 are a January 29, 2021 status report from Crawford to CFP, again removing certain line

items for unclear reasons. Page 228 is a January 19, 2021 e-mail from James Ramsay at Crawford to Kwanza Johnson at CFP saying that "Per your request, we will be removing the cleaning and painting as you requested."

Although not referenced in support of Plaintiff's standing argument, the Court observes that on March 12, 2021, CFP sent Plaintiff a partial denial letter stating:

> The inspection report indicates that there did not appear to be any visible ash or soot inside your home. There is no coverage for cleaning of the smoke smell.
>
> As set forth in the policy language quoted below, the California FAIR Plan Association policy covers smoke damage only if there is "direct physical loss" to covered property, defined as "any actual loss or physical damage, evidenced by permanent physical changes, to the covered property". If there is no permanent physical damage to the structure caused by smoke, there is no coverage. If permanent physical change to the structure (*e.g.,* permanent staining) is evident after cleaning is complete, please advise us so that the California FAIR Plan Association can determine whether covered "direct physical loss" exists.
>
> Additionally, for the reasons discussed above, costs associated with the general cleaning of the home (*e.g.,* interior and exterior, patios, personal belongings/contents, and ductwork) are not covered, because deposits of soot, ash and the like that can be remedied by cleaning do not constitute "direct physical loss" as defined by the policy. Accordingly, the California FAIR Plan Association denies coverage for cleaning costs.
> Please note that this is the final correspondence to be issued relating to the cleaning of your home.
> (Aliff Decl., Ex. D.)

"The declarations in support of a motion for summary judgment should be strictly construed, while the opposing declarations should be liberally construed." (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761.) Under this strict construction, Plaintiff's evidence does not supply the basis for an inference that any policy benefits were withheld because of the unlawfully restrictive policy terms discussed above, rather than for any other reason or some unknown reason. It is not ascertainable from the evidence that Plaintiff was due any more money for the remediation of the damage to his home than CFP paid him (less the deductible and depreciation), or that CFP paid him any less than he might otherwise have received in reliance on the unlawful portions of the CFP Policy.

Evidence might exist showing that Crawford reduced the price of its estimate based on exclusions compelled by the unlawful language Plaintiff has challenged. However, that evidence is not in the record before this Court. The Court would be speculating as to the meaning of the audit trail's rising and falling prices, which are not explained by Plaintiff's evidence. Likewise, the mere mention of the CFP Policy's limiting language in the March 12, 2021 denial letter does not necessarily support an inference that any funds were withheld as a result of that particular language.

In sum, the evidence cited in support of the facts in the separate statement purporting to support Plaintiff's UCL standing does not support an inference that he lost money or property because of CFP's unlawful conduct. "This is the Golden Rule of Summary Adjudication: if it is not set forth in the separate statement, *it does not exist.*" (*City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1238 fn. 4, quoting *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337.)

The Court recognizes that given its ruling on declaratory relief, this result may seem incongruous. However, standing under the UCL and the proprietary of declaratory relief are distinct inquiries. Given the Court's determination as to the legality of the challenged policy provisions, Plaintiff would likely have prevailed on the UCL portion of his motion had he met his burden to establish standing. However, a moving plaintiff's burden on summary adjudication is a high one, as the movant must establish the absence of any dispute of material fact, all elements of their causes of action, and the existence of standing. (See Code Civ. Proc. § 437c(c), (p)(1); *People ex rel. Becerra v. Superior Court, supra,* 29 Cal.App.5th at 495; see also *Aguilar, supra,* 25 Cal.4th at 857 ["[I]f a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not."])

While Plaintiff might carry the day on this issue at trial, the Court must deny Plaintiff's motion for summary adjudication as to the UCL claim at this stage for failure to meet that burden. Because Plaintiff has not carried his burden as to standing, it is unnecessary to consider this cause of action any further, and the Court leaves its resolution for another day.

Conclusion

For the foregoing reasons, the motion is **granted** as to the first cause of action for declaratory relief. The Court issues the following declaration:

- The CFP Policy's definition of "direct physical loss" as "actual loss or physical damage, evidenced by permanent physical changes" is unlawful under Ins. Code § 2070, in that this language limits coverage to be less favorable than and not substantially equivalent to the Standard Form Policy contained in Ins. Code § 2071;
- The CFP Policy's definition of "direct physical loss" as "actual loss or physical damage, evidenced by permanent physical changes" is unlawful under *State Farm Mutual Auto Insurance Co. v. Jacober* (1973) 10 Cal.3d 193, 201-202 and *Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204, in that this language limits coverage reasonably expected by an insured in a manner which is not conspicuous, plain and clear;
- The CFP Policy's requirements that smoke damage be "visible to the unaided human eye" or capable of being "detected by the unaided human nose of an average person" rather than being perceptible "by the subjective senses of [the insured] or by laboratory testing" are unlawful under Ins. Code § 2070, in that this language limits coverage to be less favorable than and not substantially equivalent to the Standard Form Policy contained in Ins. Code § 2071;
- The CFP Policy's requirements that smoke damage be "visible to the unaided human eye" or capable of being "detected by the unaided human nose of an average person" rather than being perceptible "by the subjective senses of [the insured] or by laboratory testing" are unlawful under *State Farm Mutual Auto Insurance Co. v. Jacober* (1973) 10 Cal.3d 193, 201-202 and *Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204, in that this language limits coverage reasonably expected by an insured in a manner which is not conspicuous, plain and clear;
- The CFP Policy's dispute resolution procedure for smoke damage claims is unlawful to the extent it is derived from or relies on the definition of "direct physical loss"

or the requirements that smoke damage be "visible to the unaided human eye" or capable of being "detected by the unaided human nose of an average person" rather than being perceptible "by the subjective senses of [the insured] or by laboratory testing" which the Court has declared unlawful for the reasons discussed above; and

- The CFP Policy's dispute resolution procedure for smoke damage claims is not unlawful for the failure to include the declared disaster exception contained in Ins. Code § 2071, as the CFP Policy incorporates that exception under section 9.a of the Conditions.

The motion is **denied** as to the second cause of action under the UCL.

Clerk to give notice.

DATED: June 24, 2025

Stuart M. Rice / Judge

THE HONORABLE STUART M. RICE
JUDGE OF THE SUPERIOR COURT