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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRESNO ROCK TACO, LLC, and ZONE
SPORTS CENTER, LLC

Plaintiffs,

v.

NATIONAL SURETY INSURANCE
CORPORATION,

Defendant.

Case No. 1:11-cv-845-SKO

**ORDER DENYING DEFENDANT'S
MOTION TO ALTER OR AMEND THE
JUDGMENT**

(Doc. 375)

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION TO AMEND THE JUDGMENT
TO INCLUDE PREJUDGMENT AND
POST-JUDGMENT INTEREST**

(Doc. 376)

I. INTRODUCTION

Following a jury trial, on August 22, 2014, the jury returned a verdict in favor of Plaintiffs and awarded damages to Fresno Rock Taco, LLC ("FRT") in the amount of \$2,224,349.00 and to Zone Sports Center, LLC ("Zone") in the amount of \$274,823.00. (Doc. 364.) Judgment was entered against Defendant National Surety Insurance Corporation ("National" or "Defendant") on August 25, 2014. (Doc. 368.)

On September 22, 2014, Plaintiffs filed a motion to amend the judgment to include prejudgment and post-judgment interest. (Doc. 376.) National filed a motion to amend the judgment. (Doc. 375.) A hearing was held on both motions on November 18, 2014. (Doc. 391.)

1 For the reasons set forth below, National's motion to amend the judgment is DENIED; Plaintiffs'
2 motion to amend the judgment is GRANTED in part and DENIED in part.

3 **II. BACKGROUND¹**

4 **A. Factual Background**

5 Plaintiffs are each California limited liability companies. Zone is a real estate developer
6 that owned a Fresno commercial real estate project that did business as Village at Granite Park
7 ("Granite Park"). FRT operated a restaurant/nightclub as a property lessee in Granite Park that did
8 business as Cabo Wabo Cantina and Memphis Blues. Milton Barbis ("Barbis") is FRT's sole and
9 managing member, and he is also the managing member of Zone.

10 In December 2006, FRT entered into an agreement with Red Head, Inc. ("RHI"), a
11 corporation that markets and licenses the intellectual property created by rock musician Sammy
12 Hagar for use in connection with restaurants, nightclubs, and merchandise, to develop a Cabo
13 Wabo Cantina (the "Cantina").² (*Zone Sports Center, LLC, et al., v. Red Head, Inc., et al.*
14 ("*Zone*"), 1:10-cv-1833-AWI (E.D. Cal. Oct. 2010), Doc. 1, ¶ 19.)³ FRT then executed a lease
15 with Zone for the premises where the Cantina was to be located in Granite Park, and Zone began
16 construction on a building for FRT's Cantina restaurant/nightclub. (Zone, 1:10-cv-1833-AWI,
17 Doc. 1, ¶¶ 19, 30, 31.) During the August 2014 trial, Barbis testified⁴ that he purchased the sound
18 equipment for the Cantina from Paul Binder at California Music Express. According to Barbis,
19 Binder was the sound person through whom Hagar insisted Barbis purchase the sound equipment.
20 Barbis stated the cost of the sound equipment was approximately \$414,000, which included labor

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22 ¹ The background summary was assembled in part through reference to the August 2014 trial testimony. Citations to
23 trial testimony are drawn from unofficial transcripts, as official transcripts of the trial have not been requested by
24 either party in full. As the official transcript will be paginated differently, no page numbers or lines of testimony
drawn from the unofficial transcripts shall be referenced. The Court's background summary is not meant to be
binding or dispositive of any issue.

25 ² The name of the Cantina was changed to Memphis Blues in December 2008. For ease of reference, the building will
26 be referred to in this order as the Cantina.

27 ³ This case was transferred from this Court to the Northern District of California on February 7, 2011, and was
28 assigned case number 3:11-cv-00634-JST. The complaint was amended several times while the action was pending
before the Northern District.

⁴ Unofficial Trial Transcript, Aug. 13, 2014, Testimony of Milton Barbis.

1 for the installation. Ultimately, the sound equipment installation was completed, and the Cantina
2 opened for business on August 28, 2008. (*Zone*, 1:10-cv-1833-AWI, Doc. 1, ¶ 58.)

3 Disputes, however, arose between FRT and RHI regarding the scope and nature of their
4 agreement, and Barbis testified within a month of opening the Cantina, his relationship with Hagar
5 had soured and Barbis believed their agreement was not working out. According to Barbis,
6 although Barbis had been working on a plan to remodel the Cantina since September 2008, the
7 agreement with Hagar and RHI was terminated on December 12, 2008. The remodel was roughly
8 estimated to occur between September 2008 and March 2009. In December 2008, after the split
9 with Hagar, Barbis claimed the club stopped functioning as the Cabo Wabo Cantina and the
10 remodel construction commenced during the weekdays. Barbis stated the plan was to close the
11 club for the duration of the remodel after preexisting commitments were completed in December.
12 To meet the existing commitments, however, the club opened for just a few weeks in December as
13 Memphis Blues and then closed entirely to complete the remodel.⁵

14 At some point prior to December 2008, Binder and Barbis began to dispute the amount
15 owed by FRT for the audio/visual/lighting equipment. In an effort to collect what he claimed FRT
16 still owed for the audio/visual/lighting equipment and its installation, Binder testified he
17 repossessed some of the equipment with Barbis' knowledge on December 17, 2008.⁶ Binder
18 testified that after a conversation with Barbis, Howard Young, and John Benjamin – each a
19 member of various LLCs that held interests in Granite Park⁷ – Binder concluded that he could
20 remove certain equipment without interrupting the business operations and credit the outstanding
21 amount owed by FRT. According to Binder, equipment was then removed from the restaurant
22 with Barbis' knowledge, and he sent an email to Barbis, Young, and Benjamin summarizing what
23 he had taken from the restaurant and the new balance owed by FRT. Binder testified that on
24 December 19 or 21, 2008, he returned to the Cantina to reclaim some Hagar merchandise, but did
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26 ⁵ Unofficial Trial Transcript, Aug. 13, 2014 (Day 5), Testimony of Milton Barbis.

27 ⁶ Unofficial Trial Transcript, Aug. 12, 2014 (Day 4), Testimony of Paul Binder.

28 ⁷ Howard Young testified that he partnered with John Benjamin and Barbis to develop Granite Park. Unofficial
Transcript, August 13, 2014 (Day 5), Testimony of Howard Young.

1 not remove any sound or lighting equipment from the club. According to Binder, Barbis was not
2 present when Binder returned to the Cantina to reclaim the Hagar merchandise. Barbis testified he
3 authorized Binder to take four lights at the time of Binder's first visit to the Cantina, but he had no
4 knowledge that Binder had taken anything beyond those four lights.

5 At the end of January 2009, while the club was closed for remodeling, Barbis testified he
6 became aware of a theft at the Cantina after receiving a call from an employee. Barbis travelled to
7 the site and noticed the exterior copper doors of the building were damaged and in the interior of
8 the building, wires were hanging down from the walls and tables had been moved around. Barbis
9 claimed he called his insurance agent at Defendis and Dibudio ("D&D"), Chris Gutilla. At some
10 point the police were contacted regarding the theft, and on February 5, 2009, a community service
11 officer was sent to investigate a report of theft at the club.⁸ A person from D&D contacted
12 National to report the theft on February 17, 2009.⁹

13 After this alleged theft was reported to National, the claim was assigned to Roger Suelzle,
14 a field adjuster at National.¹⁰ Suelzle testified that in late February 2009, he told Barbis that he
15 would come to the site for an inspection and asked Barbis to prepare an inventory list of the items
16 he claimed had been stolen.¹¹ Suelzle testified he sent Barbis a partially-completed proof of loss
17 statement to fill out and return. On March 31, 2009, Barbis returned the proof of loss, apparently
18 on behalf of both FRT and Zone, itemizing the damage to the building itself as well as the stolen
19 equipment. The proof of loss included a list of equipment FRT claimed was stolen. On May 11,
20 2009, National opened a second claim under Zone's policy for damage reported to the copper
21 doors of the building. (Doc. 111, 8:8-9.)

22 John Auenin was the program manager for the western region of National's Special
23 Investigations Unit ("SIU") at the time of FRT and Zone's claim to National.¹² Prior to

24 ⁸ Unofficial Trial Transcript, August 13, 2014 (Day 5), Testimony of Michael Buchbinder.

25 ⁹ Unofficial Trial Transcript, August 11, 2014 (Day 3), Testimony of Roger Suelzle.

26 ¹⁰ Unofficial Trial Transcript, August 11, 2014 (Day 3), Testimony of John Auenin.

27 ¹¹ Unofficial Trial Transcript, August 11, 2014 (Day 3), Testimony of Roger Suelzle.

28 ¹² Unofficial Trial Transcript, August 11, 2014 (Day 3), Testimony of John Auenin.

1 notification from Suelzle about the theft claim, in March 2009, Auvénin received a call from
2 Benjamin Rodriguez, a detective with the California Department of Insurance ("DOI"), fraud
3 unit.¹³ Auvénin testified Rodriguez informed him the Fresno Police Department and the DOI were
4 investigating a suspicious claim involving property at Granite Park.¹⁴

5 After this call from DOI, Suelzle referred Plaintiffs' claim to Auvénin.¹⁵ Auvénin testified
6 there were numerous red flags, or suspicious indicators, related to the claim.¹⁶ According to
7 Auvénin, although there was evidence of Binder's repossession of property in December 2008,
8 some of the repossessed property was apparently included in FRT's claim. Auvénin testified he
9 assigned an outside company to perform field investigations, which included two interviews of
10 Paul Binder and the persons who assisted FRT and Zone in preparing the loss inventory they
11 submitted to National. Meanwhile, Suelzle testified that due to the DOI investigation of FRT and
12 Barbis and the referral of the claim to National's SIU division, he was told to go no further in his
13 investigation of the claim. Accordingly, other than driving by the site in November 2009, Suelzle
14 did not investigate the interior of the club.¹⁷

15 In May 2009, the DOI raided the Barbis home, the Cantina, and other properties as part of
16 a criminal insurance fraud investigation. Due to apparent discrepancies with the claim, National
17 sought an examination under oath ("EUO") of Barbis, which took place on October 29, 2009.
18 (Doc. 111, 8:13-20.) Between October and December 2009, National conducted a follow-up
19 investigation regarding Barbis' EUO testimony, including re-interviewing Binder through
20 National's third-party investigator as well as interviewing a contractor who provided an estimate to
21 repair the copper doors on the outside of the Cantina. (Doc. 111, 8:11-27.)
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24 ¹³ Unofficial Trial Transcript, August 11, 2014 (Day 3), Testimony of John Auvénin (cross-examination).

25 ¹⁴ *Id.*

26 ¹⁵ *Id.*

27 ¹⁶ *Id.*

28 ¹⁷ Unofficial Trial Transcript, August 11, 2014 (Day 3), Testimony of Roger Suelzle.

1 On February 4, 2010, National denied FRT and Zone's claim, disclaiming coverage for the
2 equipment and the damage to the copper doors. National's primary basis for denial of the claim
3 was that Plaintiffs had made material misrepresentations to National regarding the claim, therefore
4 voiding FRT and Zone's policies. (Doc. 111, 9:1-4.)

5 Plaintiffs claimed that National's inadequate investigation and wrongful denial of the claim
6 damaged Plaintiffs in several respects. First, National failed to pay for the property damage and
7 stolen equipment as required under Plaintiffs' policies. Second, both FRT and Zone had business
8 interruption coverage under their policies, and National failed to pay for the business interruption
9 the theft caused to both businesses as required under Plaintiffs' policies. Finally, because National
10 wrongfully and unreasonably delayed denying their claim, FRT was unable to reopen the club and
11 the business failed. FRT lost not only its profits from the restaurant, but lost all its tenant
12 improvements when it was forced to go out of business. Zone, receiving rent from FRT, also
13 alleged economic loss in the form of property damage to the Cantina and lost rental income from
14 FRT.

15 Supporting Plaintiffs' theory of damage to FRT, Jim Mueller ("Mueller"), a former loan
16 officer for Temecula Valley Bank, testified Barbis approached him in mid-2007 seeking a business
17 loan which was approved; however, because of the franchise/licensing agreement issues between
18 FRT and RHI, the loan could not be closed.¹⁸ Mueller testified Barbis approached him again in
19 August or September 2008 for a different loan – approximately \$1.2 million – for tenant
20 improvements FRT made in renovating the Cantina to convert it to Memphis Blues. Mueller
21 testified this loan was approved, but never funded. Mueller stated that for the money to be paid
22 under the terms of that loan, Memphis Blues had to be open and the borrower had to have no
23 outstanding claims or lawsuits.¹⁹ The loan, which was scheduled to close in January 2009, never
24 closed. Mueller stated he became aware of the theft in late 2008 when Barbis told him that
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26 ¹⁸ Unofficial Trial Transcript, August 13, 2014 (Day 5), Testimony of Jim Mueller.

27 ¹⁹ On cross examination by National, Mueller's deposition testimony was introduced as impeachment evidence. In his
28 deposition, Mueller was asked whether an outstanding insurance claim would directly affect whether a loan would
close to which Mueller responded "no."

1 equipment had been stolen from the Cantina during its renovation. Mueller testified on cross-
2 examination that this prevented the loan from closing, and that had the equipment been replaced,
3 the loan would have been funded.²⁰

4 Dr. Luna, Plaintiffs' damage expert, testified that at the time it shut down, FRT's club was
5 profitable. Dr. Luna's calculation of damages was as follows: FRT suffered \$124,349 in stolen
6 property (Doc. 371, 45:25-46:2, *see also* Doc. 371, 49:2); FRT incurred \$1,653,726 in
7 consequential damages for constructing the Cantina building, which was lost when the club failed
8 (Doc. 371, 46:13-20); FRT's one-year of lost profits was \$599,673 (Doc. 371, 49:22-23), and the
9 opportunity interest on the year of lost profits was \$216,556 (Doc. 371, 51:24-25; 52:6-7); FRT
10 had \$565,283 of continuing expenses for one year and opportunity interest of \$204,137 (Doc. 371,
11 55:21-25); FRT's projected lost profits for five years were \$3,707,151 and its opportunity interest
12 on the five-year profit loss was \$783,705; and the projected lost profits extending over the term of
13 its lease with Zone were \$4,676,379²¹ (Doc. 371, p. 47-52).

14 As to Zone, Dr. Luna testified it suffered \$14,823 in property damage which was not paid
15 as a result of the wrongful denial of Zone's claim. (Doc. 371, 58:11-14.) As to consequential
16 damages, Dr. Luna testified that Zone charged FRT rent, which was not paid after FRT's club was
17 unable to reopen. The lost rent for a 12-month period was \$433,554, the five-year loss of rents
18 from FRT totaled \$2,167,770, and the loss of rents through FRT's lease term was \$3,303,194
19 (Doc. 371, 60:8-18).

20 Dr. Luna testified that the DOI raid on the properties at Granite Park resulted in FRT's
21 inability to get its liquor license and Zone's inability to refinance. This resulted in the destruction
22 of the entire development, from an accounting standpoint. (Doc. 371, 59:8-17.) Dr. Luna also
23 testified that the consequential damages to Zone that arose out of the failure of the entire
24 development were \$19,653,033. (Doc. 371, 63:4-6.)

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27 ²⁰ Unofficial Trial Transcript, August 13, 2014 (Day 5), Testimony of Jim Mueller.

28 ²¹ Dr. Luna testified the present value of the lost profits for the full lease term was \$5,809,745.

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B. Procedural Background

This case was initially set for trial in October 2013, but it was continued due to calendar conflicts of defense counsel (Doc. 176) and the district court (Doc. 178). In the interim, the parties consented to magistrate judge jurisdiction, and the trial was reset for May 7, 2013, before U.S. Magistrate Judge Sheila K. Oberto. The case proceeded to trial, but ended in a mistrial due to a hung verdict. (Doc. 225.)

The re-trial was then set for July 31, 2013, which was continued due to a motion filed by National. The motion was denied, and the re-trial was then set for May 28, 2014. On May 28, 2014, Plaintiffs were unable to begin trial as FRT's corporate status had been made inactive by the California Secretary of State due to non-payment of taxes. (Doc. 332.) The retrial was continued to August 6, 2014, which proceeded as scheduled. Following presentation of the evidence, the jury returned a verdict on August 22, 2014, awarding contract damages of \$2,224,349 to FRT and \$274,823 to Zone. (Doc. 364.) Judgment was entered on August 25, 2014, and the parties timely filed motions to amend the judgment on September 22, 2014. A hearing was held on the parties' motions on November 18, 2014.

C. FRT Litigation History and Judicial Estoppel

1. *Red Head, Inc. v. Fresno Rock Taco, LLC*, 3:08-cv-5703-EMC (N.D. Cal. 2008)

On December 22, 2008, RHI filed suit against FRT in the U.S. District Court for the Northern District of California, alleging FRT had breached their agreement by, among other things, failing to pay any royalties and refusing to provide books and records needed to perform audits required by the agreement. (*Red Head, Inc. v. Fresno Rock Taco, LLC*, ("*Red Head*"), 3:08-cv-5703-EMC, Doc. 1, ¶ 1.) During the course of that litigation, Milton Barbis filed a declaration stating that he was "the 100% owner of Fresno Rock Taco, LLC." (*Red Head*, 3:08-cv-5703-EMC, Doc. 23 ¶ 1.)

On December 31, 2008, the court in *Red Head* issued a preliminary injunction effective during the pendency of the action precluding FRT from displaying any trademark or trade dress

1 that imitates or is confusingly similar to Cabo Wabo trademarks. (Red Head, 3:08-cv-5703-EMC,
2 Doc. 36.)

3 In March 2009, the Red Head litigation between RHI and FRT was settled pursuant to a
4 confidential agreement; on March 20, 2009, a stipulated judgment was entered along with a
5 permanent injunction barring FRT and its agents from using or selling RHI's trademarks and other
6 intellectual property. (*Red Head*, 3:08-cv-5703 EMC, Doc. 51.)

7 Meanwhile, the California Department of Insurance and the City of Fresno were
8 conducting an investigation of purported fraud related to several businesses located at the Granite
9 Park development, including FRT, Zone, and The Fine Irishman.²² (*See generally Fresno Rock*
10 *Taco, LLC et al. v. Rodriquez, et al. ("Rodriquez")*, 1:11-cv-622-LJO-SKO, Doc. 9.) As a result
11 of the investigation, on May 28, 2009, the business locations of FRT, Zone, and The Fine
12 Irishman, as well as the home of Milton Barbis, were searched by law enforcement pursuant to a
13 search warrant. (*Rodriquez*, 1:11-cv-622-LJO-SKO, Doc. 9, ¶¶ 17-23.)

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15 **2. Milton and Heidi Barbises' Bankruptcy Proceedings and Subsequently Filed**
16 **Civil Actions**

17 On October 30, 2009, Milton and Heidi Barbis filed a Chapter 7 bankruptcy petition. (*In*
18 *re Milton Barbis*, CAEB, 1:09-bk-60548, Doc. 1.) The petition listed the debtor as Milton Peter
19 Barbis, doing business as Granite Park Professional Center, LLC, Sphere Properties, LLC, Granite
20 Park Food and Beverage, Inc., Fresno Rock Taco, LLC, The Public House Fresno, LLC, JEG
21 Ventures, LLC, ECCO Food and Entertainment, LLC, The Zone Sports Center, LLC, and the
22 Brick Oven Investors, LLC. Heidi Barbis was listed as the joint debtor. (*In re Milton Barbis*,
23 1:09-bk-60548, Doc. 1.)

24 Schedule B of the bankruptcy petition indicates that Milton Barbis had a 25% interest in 9
25 separate companies, including FRT. (*In re Milton Barbis*, 1:09-bk-60548, Doc. 1.) The value of
26 the Barbises' interest in the property, without deducting any secured claim or exemption, was
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28 ²² The Fine Irishman was another business located in Granite Park of which John Benjamin was the sole owner.
(*Rodriquez*, 1:11-cv-00622-LJO-SKO, Doc. 64, 5:17-19.)

1 listed as \$0. (*In re Milton Barbis*, 1:09-bk-60548, Doc. 1.) On line 21, the petition required the
2 debtor to identify "other contingent and unliquidated claims of every nature, including tax refunds,
3 counterclaims of the debtor, and rights to setoff claims. Give estimated value of each." (*In re*
4 *Milton Barbis*, 1:09-bk-60548, Doc. 1.) Line 21 of the Barbises' petition was marked "none." (*In*
5 *re Milton Barbis*, 1:09-bk-60548, Doc. 1.)

6 On February 4, 2010, the bankruptcy court issued a "Discharge of Debtor" order. (*In Re*
7 *Milton Barbis*, 1:09-bk-609548, Doc. 15.) On that same day, National issued a letter to FRT and
8 Zone denying their claims for insurance coverage. (Doc. 25, ¶ 26.) Following the February 4,
9 2010, bankruptcy discharge order, the Barbises filed several motions to avoid liens of various
10 creditors; the bankruptcy case was formally closed on September 21, 2010, following the issuance
11 of a final decree. (*In re Milton Barbis*, 1:09-bk-60548, Docs. 16, 29, 42.)

12 On October 4, 2010, Zone, FRT, and Milton Barbis as an individual filed suit against RHI,
13 Sammy Hagar, and others and alleged federal and state law claims arising out of the 2006
14 agreement between RHI and FRT (the "Zone" litigation). (*Zone*, 1:10-cv-01833-AWI, Doc. 1).

15 On October 20, 2010, the Bankruptcy Trustee ("Trustee") overseeing the Barbises'
16 bankruptcy proceeding, motioned the bankruptcy court to reopen the bankruptcy case, indicating
17 that he was informed and believed that the debtors failed to disclose in their bankruptcy schedules
18 Milton Barbis' interest, as plaintiff, in a multi-million dollar lawsuit pending in the United States
19 District Court, Eastern District of California. (*In re Milton Barbis*, 1:09-bk-60548, Doc. 44.) The
20 bankruptcy case was reopened, and the Barbises filed a motion for reconsideration. (*In re Milton*
21 *Barbis*, 1:09-bk-60548, Doc. 48.) The Barbises asserted that the case the Trustee cited was filed
22 on October 4, 2010, and was not known to the Barbises when they filed their petition on October
23 30, 2009. At the time their petition was filed, they believed the settlement agreement between
24 RHI and FRT precluded further claims against RHI. (*In re Milton Barbis*, 1:09-bk-60548, Docs.
25 48-50.) The Barbises' motion for reconsideration was denied. (*In re Milton Barbis*, 1:09-bk-
26 60548, Doc. 54).

27 On February 7, 2011, the *Zone* litigation was transferred to the Northern District of
28 California as it retained continuing jurisdiction arising out of the original 2008 *Red Head* action.

1 (*Zone*, 1:10-cv-01833-AWI, Doc. 39.) On April 16, 2011, Milton and Heidi Barbis, their minor
2 daughter Claire Barbis, *Zone*, FRT, and The Fine Irishman, LLC ("TFI"), filed suit in the U.S.
3 District Court for the Eastern District of California against the City of Fresno, Detective Rhames,
4 and Detective Rodriguez alleging constitutional violations arising out of the searches conducted
5 on May 28, 2009, at the *Zone*, FRT, and TFI business locations and the Barbises' residence (the
6 "Rodriguez" litigation). (*Rodriguez*, 1:11-cv-00622-LJO-SKO, Doc. 1.) On April 20, 2011, FRT
7 and *Zone* filed the instant lawsuit against National asserting breach of contract and bad-faith
8 denial of an insurance claim, arising out of the January/February 2009 theft at the Cantina
9 restaurant/club location (the "*National*" litigation).

10 On June 6, 2011, the Barbises' bankruptcy case was closed, while the three separate civil
11 litigations (*Zone*, *Rodriguez*, and *National*) proceeded. (*In re Milton Barbis*, 1:09-bk-60548, Doc.
12 79.) On June 30, 2011, the defendants in the *Rodriguez* case filed motions to dismiss asserting,
13 among other things, that Milton and Heidi Barbis as individuals as well as each of the limited
14 liability corporations ("LLCs"), should be judicially estopped from pursuing their claims due to
15 the Barbises' failure to disclose the claims in their bankruptcy petition. The *Rodriguez* plaintiffs
16 (Milton and Heidi Barbis, their minor daughter Claire Barbis, *Zone*, FRT, and TFI) responded that
17 the Trustee had examined the *Rodriguez* claims and had determined, for bankruptcy estate
18 purposes, the claims had no value and had been abandoned, resulting in the claims re-vesting to
19 the plaintiffs. The *Rodriguez* plaintiffs also argued that they were not aware of their potential
20 claims until after they filed bankruptcy petitions. Additionally, the plaintiffs maintained that,
21 since the LLCs never declared bankruptcy, the LLCs had standing to assert their claims.

22 On August 9, 2011, the district court determined that the Trustee had abandoned the
23 plaintiffs' claims in the *Rodriguez* action, and all of the plaintiffs therefore had standing to pursue
24 their claims. Further, judicial estoppel was not applicable because the Bankruptcy Court relied on
25 the Trustee's decision to abandon the claims, not on the plaintiffs' initial assertion that there were
26 no claims. (*Rodriguez*, 1:11-cv-00622-OWW, Doc. 17, 5:25-11:25.)

1 On August 31, 2011,²³ *Rodriquez* defendants City of Fresno and Rhames filed a motion for
2 reconsideration of the August 9, 2011, order denying their motion to dismiss. (*Rodriquez*, 1:11-
3 cv-00622-LJO-SKO, Doc. 24.) The *Rodriquez* defendants asserted that the court had been misled
4 by misrepresentations of the plaintiffs' counsel about which claims had actually been disclosed to
5 the Trustee and abandoned.

6 While that motion for reconsideration was pending, the *Zone* defendants sought to dismiss
7 the plaintiffs' claims, asserting that judicial estoppel precluded the plaintiffs from bringing their
8 claims because Barbis had failed to disclose the claims in the Barbises' bankruptcy proceeding.
9 (*Zone*, 3:11-cv-634-JSW, Docs. 14, 16, 56.) In a September 1, 2011, order, the court found that
10 the Barbises' bankruptcy case had been reopened and the Trustee was given an opportunity to
11 administer the unscheduled claims. As such, the court determined that Mr. Barbis' inconsistent
12 positions were remedied and he was not judicially estopped from litigating his claims in the *Zone*
13 case. (*Zone*, 11-cv-634-JSW, Doc. 86; *see also* 2011 WL 3862007, at *3 (N.D. Cal. Sept. 1,
14 2011).)

15 On November 1, 2011, the *Rodriquez* Court granted in part and denied in part the
16 defendants' motion for reconsideration. (*Rodriquez*, 1:11-cv-00622-LJO-SKO, Doc. 35.) The
17 Court concluded that notwithstanding whether the Trustee had actually abandoned the claims that
18 were the subject of the *Rodriquez* action rather than the *Zone* action, the claims were never
19 properly disclosed to the creditors, and thus could not be deemed abandoned. Milton and Heidi
20 Barbis' claims were barred by judicial estoppel and dismissed from the suit. The court then
21 addressed the standing of the LLCs (FRT, *Zone*, and TFI) to assert their claims in *Rodriquez*:

22 One issue remains. Only Milton and Heidi Barbis filed for bankruptcy.
23 Defendants argue that, like Milton and Heidi Barbis, Fresno Rock Taco, LLC, *Zone*
24 Sports Center, LLC, and the Fine Irishman, LLC (the "LLC Plaintiffs") should be
25 judicially estopped from bringing the present claims in this Court. *See* Doc. 15 at
26 5-6. The Bankruptcy Docket indicates Milton Barbis was "doing business as" all
27 three LLC Plaintiffs. *See* 1:09-bk-60548 Docket. In addition, Plaintiffs admit that
the Barbis' bankruptcy petition listed the three LLC Plaintiffs as assets of the estate
with "No Cash Value." Doc. 13 at 5. Although Milton and Heidi Barbis would
arguably be judicially estopped from asserting claims on behalf of the LLC

28 ²³ The City of Fresno and Detective Rhames filed an ex parte motion for reconsideration on August 9, 2011, which
was refiled as a regularly noticed motion on August 31, 2011.

1 Plaintiffs because the Barbis[es] failed to amend their own bankruptcy schedules to
2 indicate that the LLC Plaintiffs possessed a potentially valuable asset (the claims in
3 this case), Defendants provide no legal authority to support an extension of judicial
4 estoppels to the LLC Plaintiffs themselves. According to their bankruptcy petition,
5 *see* 1:09-bk-60548 Doc. 1 at Schedule B, Milton and Heidi Barbis control only
6 25% of the stock in each of these LLCs. (Presumably, others hold the remaining
7 75% interest). The LLCs, which arguably have independent standing to bring
8 Section 1983 civil rights claims, *see Club Retro, LLC v. Hilton*, 568 F.3d 181, 196
9 (5th Cir. 2009), themselves made no representations in the bankruptcy court and
10 therefore are not *per se* judicially estopped from bringing the claims in this case by
11 virtue of Milton and Heidi Barbis' conduct. This ruling is without prejudice to a
12 Federal Rule of Civil Procedure 56 challenge to the LLCs' standing based on a
13 more complete record.

14 (*Rodriguez*, 1:11-cv-00622-LJO-SKO,²⁴ Doc. 35, 10:12-11:5.)

15 Less than two weeks later, on November 11, 2011, the Barbises filed a motion to reopen
16 their bankruptcy case. (*In re Milton Barbis*, 1:09-bk-60548, Doc. 80.) They acknowledged that
17 they failed to disclose in their bankruptcy schedules their interest as plaintiffs in the *Rodriguez*
18 action. As a result of the Barbises' motion, the bankruptcy case was reopened on November 18,
19 2011. (*In re Milton Barbis*, 1:09-bk-60548 Doc. 82.)

20 On February 10, 2012, the Trustee submitted a motion to compromise the Barbises' claims
21 in the *Rodriguez* action. (*In re Milton Barbis*, 1:09-bk-60548 Doc. 95.) In relevant part, the
22 Trustee submitted the following statement:

23 5. Trustee, the City of Fresno (obo Brendan Rhames), and the State of
24 California (obo Ben Rodriguez) are desirous of resolving the controversy without
25 resorting to a lengthy and costly court proceeding as to the alleged claims of the
26 debtor; and, as such, the City of Fresno has offered \$10,000 and the State of
27 California has offered the sum of \$10,000 to settle all claims of the debtors (held in
28 their name directly) and to settle all claims of the debtors held (indirectly) through
entities of the debtors (namely Fresno Rock Taco, LLC; Zone Sports Center, LLC;
and, The Fine Irishman, LLC).

6. As to interests held indirectly the estate makes no warranties;
however, any interest (if any) of the debtors in these causes of action held by those
entities, as against the settling parties, are being transferred/settled through this
compromise.

(*In re Milton Barbis*, 1:09-bk-60548, Doc. 95, ¶¶ 5-6.)

²⁴ *Rodriguez* was reassigned to U.S. District Judge O'Neill following the retirement of Senior District Judge Oliver W. Wanger.

1 On February 29, 2012, the Barbises filed an objection to the Trustee's motion to
2 compromise their claims in *Rodriquez*, asserting that the actual value of the claims was much
3 higher than the \$20,000 settlement amount, and therefore settlement was not in the best interest of
4 the estate. (*In re Milton Barbis*, 1:09-bk-60548, Doc. 101.) The Barbises also objected that the
5 Trustee's motion was seeking to settle the claims not only as to the debtors, but also as to all of the
6 entities owned by the debtor. The Barbises argued that the Trustee had no authority to settle the
7 claims on behalf of the entity LLCs.

8 On March 5, 2012, the City of Fresno (the "City") filed a statement in support of the
9 Trustee's motion to compromise. (*In re Milton Barbis*, 1:09-bk-60548, Doc. 105.) In response to
10 the Barbises' assertion that the Trustee was attempting to settle the claims of the plaintiff LLC
11 entities in *Rodriquez*, the City maintained that the only interests of the LLC entities being settled
12 were those portions of the LLCs owned by the debtors. The City noted that, to the extent some
13 other individual or entity had some interest in the LLCs, "those LLCs remain[ed] viable parties to
14 the surviving portions of the underlying lawsuit." (*Id.*, Doc. 105, 6:19-7:9.)

15 On March 8, 2012, the Trustee filed a reply to the Barbises' objections indicating that the
16 Barbises' assertion regarding the sale of claims by entities owned by the debtor misstated the
17 subject of the compromise. (*Id.*, Doc. 106.) The Trustee maintained that paragraph 6 of his
18 motion (*see id.*, Doc. 95 ¶ 6) stated that no warranties were being made as to the indirect
19 ownership interests being sold.

20 On March 15, 2012, the bankruptcy court issued an order approving the settlement of the
21 claims in the *Rodriquez* case:

22 After reviewing the Motion, the file, and the evidence presented, the Court hereby
23 . . . ORDERS, ADJUDGES AND DECREES that the settlement of the controversy
24 in the civil suit, known as USCD Case No. 1:11-cv-0622 OWW SKO in the
25 Eastern District of California, and the above-referenced debtors estate, is hereby
26 approved under the terms and conditions set forth in the Trustee's Motion for Order
27 Approving Compromise of Controversy. Settlement is as to the complete interest
of the debtors in the above noted suit and the estate's interest, if any, in the suit as
held by the other named plaintiffs in which the bankruptcy estate owns an
ownership interest as of this date.

28 (*In re Milton Barbis*, 1:09-bk-60548, Doc. 109, 1:19-2:4.)

1 On May 2, 2012, National filed a similar motion in this case asserting that Zone and FRT
2 were judicially estopped from asserting their claims against National due to Milton Barbis' failure
3 to list FRT and Zone's tendered insurance claim on his bankruptcy petition. (Docs. 34, 35.) Zone
4 and FRT responded that neither of their debts had been discharged in bankruptcy, nor were they
5 the alter egos of Barbis. Zone and FRT maintained that, if they prevailed in their action against
6 National, the proceeds would be subject to outstanding judgments against Zone and FRT as well
7 as subject to other debts of Zone and FRT; in sum, Barbis would receive none of the proceeds of
8 this action if Zone and FRT prevailed. (Doc. 41.) Additionally, Zone and FRT noted that Zone is
9 not wholly owned by Barbis, and although Barbis is FRT's sole member, there were other
10 investors in FRT. (Doc. 41.)

11 On May 25, 2012, the Court denied National's motion stating the following:
12 [National] fails to establish application of judicial estoppel to plaintiffs. [National]
13 provides no authority to support that Mr. Barbis' chapter 7 bankruptcy
14 representations judicially estop the claims of plaintiffs, corporate entities in which
15 Mr. Barbis has limited interests. [National] relies on authorities involving a
16 debtor's claims, not claims of corporate entities separate from the debtor. Mr.
17 Barbis is the bankruptcy debtor, not plaintiffs. Mr. Barbis' purported knowledge of
18 claims would be relevant if he pursued them as plaintiff. He does not. Plaintiffs
19 are not subject to judicial estoppel because any position asserted in Mr. Barbis'
20 bankruptcy is imputed to him and is not inconsistent with plaintiffs' positions in this
21 action.

22 (Doc. 48, 9:3-9.)

23 On September 5, 2012, National filed a "Notice of Related Case" in this case and in the
24 *Rodriquez* case. (Doc. 117.) National stated that FRT and Zone were seeking the same damages
25 for lost earnings in each case, and that "[h]aving separate trials would result in a duplication of
26 effort and [would result in a waste of] judicial resources." (Doc. 117, 2:2-3.) On September 7,
27 2012, the Court issued an order relating this case to *Rodriquez*.²⁵ On October 1, 2012, Barbis was
28 deposed in the *Rodriquez* case. In relevant part, he provided the following testimony under oath:

Q [Mr. Praet]: All right. So you have an understanding of members or
shareholders. Are there any other members or shareholders of Fresno Rock Taco?

A [Milton Barbis]: No.

Q: Were there ever any other members or shareholders of Fresno Rock Taco?

²⁵ No motion to consolidate the cases was ever filed.

1 A: No.

2 Q: So you were the 100 percent sole owner?

3 A: I was the sole member who owned 100 percent of the company.

4 (*Rodriquez*, 1:11-cv-00622-SKO, Doc. 55-4, p. 3; Barbis Depo., p. 16:2-14.)

5 This case (*National*) was set for an October 30, 2012, trial, but on October 23, 2012, the
6 trial was continued to April 23, 2013.²⁶ On February 6, 2013, the April 23, 2013, trial was vacated
7 and eventually reset for May 7, 2013. (Doc. 178.)²⁷

8 While the parties were awaiting trial in this case, on January 11, 2013, the City and
9 Rhames filed a motion for summary judgment in *Rodriquez*. (*Rodriquez*, 1:11-cv-00622, Doc.
10 55.) Among other issues, these defendants again contended that the LLC plaintiffs (Zone, FRT,
11 and TFI) were precluded from asserting their claims in the *Rodriquez* case because those claims
12 had not been disclosed during the course of the Barbises' bankruptcy proceedings, or the
13 bankruptcy proceedings of the other LLC principals. The *Rodriquez* defendants cited to Milton
14 Barbis' October 1, 2012, deposition testimony indicating that he was the sole member and 100
15 percent owner of FRT, while his bankruptcy petition stated he was only a 25 percent owner of
16 FRT. In opposition to the defendants' motion, Mr. Barbis filed a declaration stating "I did not own
17 100% of FRT. I owned 100% of the equity capital but other investors owned 90% of the total
18 capital investment. I owned only 10% of the total capital." (*Rodriquez*, No. 1:11-cv-00622-SKO,
19 Doc. 58-6, Barbis Decl., ¶ 39.)

20 On March 6, 2013, the court in *Rodriquez* issued an order judicially estopping FRT and
21 TFI from asserting their causes of action in the *Rodriquez* case:

22 Here, Fresno Rock Taco and The Fine Irishman are judicially estopped from
23 asserting their causes of action in the instant case because the undisputed facts
24 show that each is wholly owned by individuals that filed for bankruptcy and did not
25 disclose the causes of action. Mr. Barbis' deposition testimony and a declaration
26 prepared for a case in the Northern District [footnote omitted] provides that Mr.
27 Barbis is the sole owner of Fresno Rock Taco. (Doc. 55-4, p. 3, RT p. 16; Doc. 55-
28 16, p. 5). Mr. Barbis filed for bankruptcy and did not disclose the causes of action
brought by Fresno Rock Taco in the instant case to his creditors. Thus, Fresno
Rock Taco is judicially estopped from pursuing its claims in this Court. *See*

²⁶ The trial was vacated due to defense counsel unavailability. (Doc. 176.)

²⁷ The trial was vacated on February 6, 2013, due to unavailability of the district court. (Doc. 178.)

1 *Hamilton*, 270 F.3d at 783. Mr. Barbis' declaration provides that he did not own
2 100% of Fresno Rock Taco, he "owned 100% of the equity capital but other
3 investors owned 90% of the total capital investment." (Doc. 58-6, p. 6 ¶ 39). The
4 fact that Mr. Barbis owned 100% of the equity in the company shows that he was
5 the sole owner of the company.

6 With regard to The Fine Irishman, the company's response to the City's
7 interrogatories provide that John Benjamin is the sole owner of the company.
8 (Doc. 55-5, p. 3:1-6). Mr. Benjamin did not disclose the instant claims in his
9 bankruptcy petition nor is there any evidence to show that he disclosed the instant
10 claims to his creditors. Thus, The Fine Irishman is judicially estopped from
11 asserting its claims in this court. *See Hamilton*, 270 F.3d at 783. The Fine
12 Irishman argues that the fact Mr. Benjamin did not disclose its current claims to
13 Mr. Benjamin's creditors is not relevant because Mr. Benjamin filed for
14 bankruptcy, not The Fine Irishman. (Doc. 58-1, p. 2). It is true that Mr. Benjamin
15 filed for bankruptcy and not The Fine Irishman however, because Mr. Benjamin is
16 the sole owner of the company he should have disclosed the fact that The Fine
17 Irishman possessed a potentially valuable asset, the claims in this case.
18 Accordingly, defendants' motion for summary judgment on the claims brought by
19 Fresno Rock Taco and The Fine Irishman is GRANTED.

20 With regard to Zone Sports Center, there is a genuine dispute as to whether
21 it is judicially estopped from bringing its claims. It is undisputed that Sphere
22 Properties owns 89.79% of Zone Sports Center and that Granite Park Investors
23 owns the other 10.21%. (Doc. 58-1, p. 3 ¶ 7, 11). It is further undisputed that Mr.
24 Barbis owns 22% of Sphere Properties and failed to disclose Zone Sports Center's
25 claims to his creditors when he filed for bankruptcy. It is also undisputed that Mr.
26 Benjamin owns 16.6% of Granite Park Investors and Howard Young owns 12% of
27 the company. It is further undisputed that both Mr. Benjamin and Mr. Young failed
28 to disclose Zone Sports Center's claims to their creditors when they file for
bankruptcy. Although it is undisputed that three of Zone Sports Center's owners
failed to disclose Zone Sports Center's claims to their creditors when they filed for
bankruptcy it is unclear who the other investors are and whether they are judicially
estopped from bringing Zone Sports Center's claims. Accordingly, Zone Sports
Center is not judicially estopped from bringing its claims in the instant action.

(Doc. 64, 5:6-6:14.)

On April 24, 2013, the twice reopened Barbises' bankruptcy case was once again closed.
(Doc. 139.) On May 7, 2013, this case (*National*) proceeded to trial, while the *Zone* case,
pending in the Northern District of California, was dismissed for lack of subject matter jurisdiction
on May 22, 2013. (*Zone*, 3:11-cv-634-JSW, Doc. 140.) During his direct examination at the May
2013 trial in this case, Milton Barbis testified as follows:

Q [Plaintiffs' Counsel]: And who were you employed by?

A [Milton Barbis]: I was the managing member of two companies.

1 Q: And what were the two companies?

A: The Zone Sports Center and Fresno Rock Taco.

2 Q: Would you explain, if you can, what managing member means?

A: It's sort of like the CEO or the chief operating officer of the company.

3 Q: The fact that you're the managing member, does that mean you own the
4 company?

A: Absolutely not.

5 (*National*, No. 1:11-cv-00845-SKO, Doc. 244, Trial Transcript, Day 1, 223:4-13.)

6 The jury was unable to reach a unanimous verdict, and a mistrial was declared on May 23,
7 2013. The trial was reset for July 31, 2013. In the interim, each side filed motions to amend the
8 pretrial order, which were addressed by the Court. No issues with respect to collateral estoppel or
9 judicial estoppel were raised at that time.

10 While the parties were awaiting retrial in this case, *Rodriquez* was set for trial on August
11 14, 2013. At the pretrial conference in *Rodriquez*, Plaintiffs asserted that FRT was still a party to
12 that case, notwithstanding the March 6, 2013, summary judgment order. The Court reminded the
13 parties of the March 6, 2013, order regarding judicial estoppel of FRT and TFI, and on July 1,
14 2013, the plaintiffs filed a motion to certify the March 6, 2013, order for interlocutory appeal.

15 On July 15, 2013, U.S. District Judge O'Neill, the presiding trial judge who had issued the
16 March 6, 2013, summary judgment order in *Rodriquez*, issued an order correcting the judgment
17 originally issued on March 6, 2013. Due to an oversight, although the Clerk of Court had entered
18 judgment on March 6, 2013, the order failed to expressly direct judgment pursuant to Federal Rule
19 of Civil Procedure 54(b).²⁸ As such, on July 15, 2013, an amended judgment was entered on the
20 March 6, 2013, summary judgment order. (*Rodriquez*, 1:11-cv-00622-SKO, Doc. 96.) As a result
21 of the July 15, 2013, judgment, the Court denied as moot the *Rodriquez* plaintiffs' motion for
22 certification of an interlocutory appeal. On July 16, 2013, the *Rodriquez* plaintiffs filed a notice of
23 appeal as to the July 15, 2013, amended judgment. (*Rodriquez*, 1:11-cv-00622-SKO, Doc. 99.)
24
25
26

27 _____
28 ²⁸ After the summary judgment was issued, the remaining parties consented to the jurisdiction of the undersigned
Magistrate Judge, and the case was reassigned. (*Rodriquez*, 1:11-cv-00622-SKO, Docs. 66, 67, 68.)

1 On Friday, July 26, 2013, at 3:45 p.m., FRT and Zone sought an emergency hearing with
2 the Court in this case (*National*).²⁹ At 4:30 p.m., the parties appeared for a telephonic conference
3 before U.S. Magistrate Judge Boone.³⁰ Ultimately, the parties agreed that the July 31, 2013, trial
4 should be vacated so that the issue of FRT's standing to pursue its claims could be addressed.³¹ As
5 a result, the trial was vacated on Friday, July 26, 2013, the jury was called off, and the parties were
6 permitted to file motions regarding the issue of FRT's standing to pursue its claims as well as FRT
7 and Zone's contention that National should be sanctioned for seeking to file an untimely
8 dispositive motion on the eve of trial.

9 The Court denied as untimely National's motion to dismiss FRT's claims based on
10 collateral and judicial estoppel. The Court noted this case (*National*) and *Rodriquez* had been
11 related at National's request, and National was receiving notice of all docket activity in *Rodriquez*.
12 National conceded it had notice of the March 6, 2013, summary judgment order in *Rodriquez*, but
13 had not reviewed the order. Counsel for National did not review the order until counsel in
14 *Rodriquez* notified them on July 22, 2013, that the summary judgment order may affect the
15 *National* action. Additionally, National had already raised the issue of judicial estoppel based on
16 the Barbises' bankruptcy petition in May 2012, and thus the issue of estoppel was well known to
17 National. In light of its relationship to the *Rodriquez* action and because the judicial estoppel issue
18 was known to National, the Court determined National did not exercise diligence in raising the
19 issue to the Court. Instead, National waited until *after* the first trial and three days before the re-
20 trial to raise the issues it deemed relevant in the *Rodriquez* order. The Court therefore denied
21 National's motion to dismiss as untimely.

22
23 ²⁹ Alerted to the March 6, 2013, summary judgment order in *Rodriquez* by *Rodriquez*' defense counsel on Tuesday,
24 July 23, 2013, National's counsel conferred with FRT and Zone's counsel on Friday, July 26, 2013, regarding
25 National's intention to file a motion asserting that the March 6, 2013, order had preclusive effect with respect to FRT's
standing to assert any claims against National due to the Barbises' failure to disclose the insurance claim on their
bankruptcy petition.

26 ³⁰ The undersigned was unavailable on Friday, July 26, 2013, at 3:45 p.m. when the parties contacted the Court.
27 Judge Boone presided over the hearing based on the parties' representation of an immediate need for judicial
intervention.

28 ³¹ The parties did not stipulate to the propriety of National's subsequent filing of the motion on July 30, 2013.

1 In its order denying National's motion, the Court noted the following with respect to FRT:

2 Where the sole member of an LLC files for bankruptcy, it effectively
3 assigns the entire membership interest in the LLC to the bankruptcy estate, and the
4 Trustee obtains all the debtor's rights in the LLC, including the right to control the
5 management of the LLC. *In re First Protection, Inc.*, 440 B.R. 821, 830 (9th Cir.
6 BAP 2010)³²; *see also In re Albright*, 291 B.R. 538 (Bankr. D. Colo. 2003).

7 The Barbises' bankruptcy petition states that the debtors had only a 25
8 percent interest in FRT.³³ This disclosure, however, is at odds with statements
9 made by Mr. Barbis under penalty of perjury during the course of the *Red Head*
10 and *Rodriguez* civil litigations.³⁴ If FRT's sole member is Milton Barbis, which
11 Mr. Barbis has stated on two occasions is the case, the Bankruptcy Trustee was
12 entitled to step into the shoes of Mr. Barbis and obtain 100 percent management
13 control of FRT through the filing of Mr. Barbis' chapter 7 bankruptcy petition.
14 "Property of the estate that is not scheduled or otherwise administered by the time
15 the case is closed remains property of the estate forever." *Cheng v. K & S*
16 *Diversified Invs., Inc.*, 308 B.R. 448, 461 (9th Cir. BAP 2004) (citing 11 U.S.C. §
17 554(d)). If management and control, i.e., through the 100 percent ownership
18 interest in FRT, remains with the Bankruptcy Trustee as an unscheduled and un-
19 administered asset of the Barbises' estate, then there is a question whether the
20 Bankruptcy Trustee must be joined to this litigation to direct FRT's claims against
21 National. Fed. R. Civ. P. 19(a).

22 The Court served its order on the Trustee, and permitted the Trustee, in his discretion, to
23 file a statement in response. The Trustee filed a declaration that sets forth the following:

24 3. On or about October 1, 2013, I spoke with Peter Fear, the bankruptcy
25 attorney for Mr. Barbis. Mr. Fear and I discussed the status of Fresno Rock Taco,
26 LLC. We discussed the fact that the original schedules filed by Mr. Barbis stated
27 that he owned a 25% interest in Fresno Rock Taco, LLC and that Mr. Barbis, in
28 fact, owned a 100% interest in Fresno Rock Taco, LLC. I have a vague
recollection that Mr. Barbis may have corrected this at the 341 meeting of creditors
in this case several years ago, but neither Mr. Fear nor I saw any indication that an
amended schedule had been filed. Mr. Fear informed me that he intended to file an
amended schedule correcting this.

32 Like the Arizona LLC Act that governed the formation and operation of the LLC at issue in *In re First Protection, Inc.*, the California Revised Uniform LLC Act also provides that a membership interest and an economic interest in an LLC constitute personal property of the member. Cal. Corp. Code § 17300.

33 (*In re Milton Barbis*, 1:09-bk-60548, Doc. 1, Schedule B, Line 13.)

34 (*Red Head*, No. 3:08-cv-5703-EMC, Doc. 23, ¶ 1 (Barbis stated that he was "the 100% owner of Fresno Rock Taco, LLC"); *Rodriguez*, 1:11-cv-00622-SKO, Doc. 55-4, p. 3; Barbis Depo., p. 16:2-14 (Barbis provided deposition testimony that he was "the sole member who owned 100 percent of the company").)

1 4. Mr. Fear also provided me with additional documentation regarding the
2 assets and liabilities of Fresno Rock Taco, LLC and asked me whether I intended to
3 exercise control of the LLC and to become involved in the above-captioned
4 litigation.

5 5. I have reviewed those documents and I have discussed said documents with
6 Mr. Fear.

7 6. Based on this information, I, on behalf of the bankruptcy estate, do not
8 intend to replace the current management of Fresno Rock Taco, LLC and I will not
9 be taking any involvement in the above-captioned litigation. I intend to abandon
10 any interest the estate has in Fresno Rock Taco, LLC to the Debtors in the
11 Bankruptcy Case. I have filed a final report that will likely result in the Bankruptcy
12 Case closing within the next two to three months. That will result in Fresno Rock
13 Taco, LLC being abandoned to the debtors in the Bankruptcy Case.

14 7. I have not taken any action to replace the current management of the
15 Fresno Rock Taco LLC and have no intention of taking any such action.

16 (Doc. 312, Declaration of James E. Salven, Bankruptcy Trustee.)

17 On September 19, 2013, the Barbises' bankruptcy case was reopened for administrative
18 purposes. (*In Re Milton Barbis*, 1:09-bk-60548, Doc. 141.) On September 20, 2013, the Trustee
19 filed a Final Account and Distribution Report, and the Bankruptcy case was closed on October 28,
20 2013.

21 In November 2013, the re-trial in this case was set for May 28, 2014. (Doc. 316.) On
22 December 17, 2013, in the bankruptcy case, the Barbises filed an Amended Summary of
23 Schedules and an Amended/Modified Voluntary Petition reflecting the Barbises' 100% interest in
24 FRT. (Doc. 150, 151.) The Bankruptcy Case was not reopened, and as of the date of this order,
25 there are no further docket entries in that case.

26 **III. DISCUSSION**

27 **A. Legal Standard**

28 Courts may alter or amend a judgment pursuant to Federal Rule of Civil Procedure 59(e).
Rule 59(e) is generally seen as "an 'extraordinary remedy, to be used sparingly'" and at the
discretion of the Court. *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (citations omitted);
see also *McQuillion v. Duncan*, 342 F.3d 1012, 1013 (9th Cir. 2003). A motion to alter or amend
a judgment "should not be granted, absent highly unusual circumstances, unless the district court

1 is presented with newly discovered evidence, committed clear error, or if there is an intervening
2 change in the controlling law." *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (en
3 banc) (citations omitted). "To succeed [on a motion to alter or amend judgment], a party must set
4 forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision."
5 *United States v. Westlands Water Dist.*, 134 F. Supp. 2d 1111, 1131 (E.D. Cal. 2001). "Mere
6 doubts or disagreements about the wisdom of the prior decision of this or a lower court will not
7 suffice[.]" *Campion v. Old Republic Home Protection Co.*, 2011 WL 1935967, at *1 (S.D. Cal.
8 May 20, 2011) (quoting *Hopewood v. Texas*, 236 F.3d 256, 273 (5th Cir. 2000) (citations
9 omitted)). "To be clearly erroneous, a decision must strike [a court] as more than just maybe
10 wrong or probably wrong; it must be dead wrong." *Id.* A Rule 59(e) motion may not be used to
11 relitigate old matters or to raise arguments or present evidence that could have been raised prior to
12 entry of judgment. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008); accord *Kona*
13 *Enters, Inc.. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) ("A Rule 59(e) motion may not
14 be used to raise arguments or present evidence for the first time when they could reasonably have
15 been raised earlier in the litigation.").

16 **B. National's Motion to Amend the Judgment Pursuant to Rule 59 is DENIED**

17 **1. National Provides No Authority to Support Reconsideration of a One-**
18 **Year-Old Interlocutory Order Denying a Dispositive Motion**

19 National contends the Court should *now* reach the merits of its motion to dismiss that was
20 denied as untimely in September 2013. National asserts since the trial is now over, the scheduling
21 order is irrelevant, and the Court can now reach the merits of the motion which it previously
22 denied as untimely. National cites *Smith v. Clark County School Dist.*, 727 F.3d 950 (9th Cir.
23 2013) for the proposition that this Court may, after trial and judgment, reconsider a prior
24 interlocutory order denying a dispositive motion. In *Smith*, the district court denied the
25 defendant's motion for summary judgment and upon an immediate motion for reconsideration by
26 the defendant, reversed its order, granted the defendant's motion, and entered judgment. The
27 plaintiff then filed a post-judgment motion for reconsideration under Rule 59, which was denied
28 and the case was appealed.

1 The procedural facts of *Smith* are *not* similar to this case. The original motion for
2 reconsideration in *Smith* came immediately after the denial of a dispositive motion and was not
3 made pursuant to Rule 59. The plaintiff's post-judgment motion under Rule 59 sought
4 reconsideration of the court's order *granting* summary judgment which resulted in an appealable
5 judgment. The defendant did not wait to file its motion for reconsideration on the court's original
6 order denying summary judgment until after a trial on the merits. Here, National waited until *after*
7 a trial on the merits to seek reconsideration of an interlocutory order denying a dispositive motion.
8 *Smith* does not stand for the proposition that the Court may reconsider a prior denial of a
9 dispositive order after a trial on the merits pursuant to Rule 59.

10 **2. No Manifest Error of Law in the September 17, 2013, Order**

11 Despite the lack of authority that Rule 59 may be used as a procedural method to review a
12 prior interlocutory order, the Court will nonetheless address National's remaining arguments
13 regarding the September 17, 2013, order.

14 National argues the Court's decision to deny its motion to dismiss FRT's claims on grounds
15 of collateral and judicial estoppel as untimely was error. National maintains that it could not have
16 filed its motion to dismiss any sooner than July 15, 2013, when the summary judgment order in
17 *Rodriquez* became appealable because of the amended judgment issued by the Court. According
18 to National, the doctrine of collateral estoppel can *never* apply to an order that is not appealable,
19 thus it could not have pursued that theory when the *Rodriquez* summary judgment order was
20 issued in March 2013. National claims it was therefore diligent in seeking to file a motion to
21 dismiss FRT's claims 3 days before the July 2013 re-trial. National maintains the Court's finding
22 that it was not diligent was manifest error and unjust as FRT was permitted to proceed to trial on
23 its claims and was not judicially estopped from asserting them.

24 First, Rule 59 is not a vehicle to relitigate old matters that could have been previously
25 addressed. *Exxon Shipping Co.*, 554 U.S. at 485 n.5. The Court denied National's motion to
26 dismiss in September 2013, and the retrial was reset for May 2014; thus National could have
27 sought reconsideration of any asserted error of law in the Court's September 2013 order prior to
28 the August 2014 retrial.

1 Second, there was no manifest error of law. The appealability of the order in *Rodriquez*
2 was not dispositive of its finality for purposes of collateral estoppel.³⁵ The appealability of an
3 order may be the linchpin of any finality determination for purposes of collateral estoppel (issue
4 preclusion), but it is not the *only* consideration nor is it *the* bright-line requirement in determining
5 finality for purposes of collateral estoppel. *Free Speech Coalition, Inc. v. Attorney General of the*
6 *United States*, 677 F.3d 519, 541 (3d Cir. 2012) (citing same factors for determining finality for
7 issue preclusion as *Luben Industries, Inc. v. United States*, 707 F.2d 1037 (9th Cir. 1983) and
8 stating "[t]here is no bright-line rule regarding what constitutes a 'final judgment' for issue
9 preclusion").³⁶

10 Third, National could have timely raised the issue of collateral estoppel immediately after
11 the *Rodriquez* order was issued, thereby allowing the Court to consider the finality of that order,
12 among other things, without disrupting the scheduled retrial. National's lack of diligence centered
13 on National's failure to timely read and appreciate the order in *Rodriquez*, not on the precise
14 remedy it chose to pursue. As discussed in the original decision,

15 . . . National's failure to timely review the March 6, 2013, order in *Rodriquez* was
16 problematic for several reasons. First, *Rodriquez* was not simply an unrelated case

17 ³⁵ National cites cases relating to finality for purposes of application of the res judicata doctrine; this is distinct from
18 collateral estoppel and the terms are not interchangeable. *Johnson v. Mateer*, 625 F.2d 240, 243 n.5 (9th Cir. 1980)
19 ("Although often used interchangeably, the terms 'res judicata' and 'collateral estoppel' apply to related but distinct
20 doctrines.").

21 ³⁶ The Restatement Second of Judgments provides the following discussion:

22 Usually there is no occasion to interpret finality less strictly when the question is one of issue
23 preclusion, that is, when the question is whether decision of a given issue in an action may be
24 carried over to a second action in which it is again being litigated But to hold invariably that
25 that kind of carry-over is not to be permitted until a final judgment in the strict sense has been
26 reached in the first action can involve hardship – either needless duplication of effort and expense in
27 the second action to decide the same issue, or, alternatively, postponement of the issue in the second
28 action for a possibly lengthy period of time until the first action has gone to complete finish. In
particular circumstances the wisest course is to regard the prior decision of the issue as final for
purposes of issue preclusion without awaiting the end judgment. Before doing so, the court should
determine that the decision to be carried over was adequately deliberated and firm, even if not final
in the sense of forming a basis for a judgment already entered. Thus preclusion should be refused if
the decision was avowedly tentative. On the other hand, that the parties were fully heard, that the
court supported its decision with a reasoned opinion, that the decision was subject to appeal or was
in fact reviewed on appeal, are factors supporting the conclusion that the decision is final for
purposes of preclusion.

Restatement (Second) of Judgments § 13 (Comment g) (West 2014).

1 involving FRT, to which National was not a party. National was aware of the
2 issues in *Rodriquez* because it filed a notice of related cases on September 5, 2012,
3 asserting the cases were so closely linked they should be tried together. Given
4 National's knowledge of the relationship between *Rodriquez* and the present case,
5 National should have been aware that the issue of judicial estoppel of FRT had
6 already been raised in *Rodriquez* and the court in *Rodriquez* had expressly stated it
7 would be willing to entertain the issue again on a more complete record at
8 summary judgment.

9
10 Second, because National had filed its own motion to judicially estop FRT
11 and Zone from asserting claims against National in May 2012, it was fully aware of
12 the relevance of any subsequent findings made in *Rodriquez* with respect to Milton
13 Barbis' ownership interest in FRT and Barbis' obligation to report any potential or
14 contingent claims of FT on his personal bankruptcy petition.

15
16 (Doc. 311, 18:14-28.)

17 Moreover, even if National had reviewed the *Rodriquez* order in March 2013 but
18 determined it could not seek collateral estoppel based on finality considerations, it could have filed
19 a motion for reconsideration of the May 2012 order in this case denying its motion for judgment
20 on the pleadings, which was based on the same judicial estoppel grounds as the *Rodriquez*
21 defendants' motion.

22 National notes finally that Mr. Barbis amended his bankruptcy petition in December 2013
23 to reflect his 100 percent ownership of FRT, but failed again to disclose FRT's claims against
24 National. National contends that Mr. Barbis has played fast and loose with the court system and
25 the jury verdict in FRT's favor should not be permitted to stand. At the November 18, 2014,
26 hearing, National also argued Mr. Barbis' amended bankruptcy filing in December 2013 was new
27 evidence that justifies reconsideration.

28 The Court's September 2013 order was served on Mr. Salven, the U.S. Bankruptcy Trustee
who oversaw the Barbises' bankruptcy estate. After reviewing the order and with notice of FRT's
claims against National, Mr. Salven filed a declaration stating he was aware of Mr. Barbis' 100
percent interest in FRT and expressly disclaimed an interest in FRT on behalf of the bankruptcy
estate and abandoned the interest in FRT to the debtors. (Doc. 312.) Due to the Trustee's
knowledge of FRT's claims prior to the August 2014 retrial, it is questionable whether equity

1 would dictate judicial estoppel of FRT's claims against National, particularly as FRT was not a
2 debtor in the Barbises' bankruptcy proceeding.

3 As to "new" evidence in Barbis' bankruptcy case filed in December 2013, Barbis' failure to
4 list FRT's claim against National in the Barbises' amended schedule changes nothing. As
5 Plaintiffs note, the December 2013 amended bankruptcy schedule indicated Barbis' ownership
6 interest in FRT which reflected a correction made by Barbis at a 341 creditor hearing years ago of
7 which Mr. Salven was aware – it was not a wholesale or substantive change to the petition.
8 Additionally, Mr. Salven was on notice of FRT's claims against National in September 2013, and
9 nonetheless declared his intent to abandon any interest in FRT to the debtors.³⁷ And, Judge
10 O'Neill's order in *Rodriguez* notwithstanding, National has never presented any case authority that
11 an individual debtor's failure to list the contingent claims of a separate corporate entity of which
12 that debtor has a 100 percent ownership interest may judicially estop the entity from pursuing its
13 claims.

14 In sum, National's motion that the Court reconsider its September 2013 denial of National's
15 motion to dismiss is DENIED.

16 **3. National's Motion to Amend the Judgment Due to Jury Error is DENIED**

17 National's motion to amend challenges the jury's verdict with respect to elements of
18 damages awarded. Pursuant to National's request, the special verdict form requested that the jury
19 enter an aggregated damage amount for any contract damages awarded. National now asserts the
20 jury's damage award improperly included certain elements of damages that are either not
21 recoverable or are limited by the terms of Plaintiffs' policies.

22 Where a jury awards damages in a lump sum, or in an aggregated amount, the award is
23 generally not disturbed unless the resulting award exceeds the amount sustainable by the evidence
24 in the record. *L.A. Mem. Coliseum Comm'n v. NFL*, 791 F.2d 1356, 1366 (9th Cir. 1986). "Even a
25 total inadequacy of proof on isolated elements of damages claims submitted to a jury will not
26 undermine a resulting aggregated verdict which is nevertheless reasonable in light of the totality of
27 the evidence." *Id.*

28

³⁷ The Court takes no position on whether such abandonment was effective.

1 Plaintiffs presented evidence that they suffered property damage and lost profits and that
2 FRT lost tenant improvements. As to FRT and Zone's lost profits, Dr. Luna testified regarding
3 lost profits for five years and lost profits extending to the end of FRT's lease with Zone. Because
4 the award is aggregated, it is not clear precisely what damage elements the jury included in its
5 award. Dr. Luna testified to lost profits of FRT and Zone that far exceeded the amount of the
6 aggregated contract damages awarded. Whether other elements of damages were not sustainable
7 or awardable does not necessarily undercut the jury's damage award. Nevertheless, the Court
8 considers National's argument as to individual elements of damages below.

9 **a. Tenant Improvements Were Properly Considered As Damages**

10 National argues the jury's award of damages was solely for breach of contract, rather than
11 for the breach of the covenant of good faith and fair dealing. According to National, damages are
12 therefore limited to covered benefits under the policy, and the jury award violates that rule because
13 it necessarily includes the cost of tenant improvements that Dr. Luna opined FRT incurred as
14 damage as a result of National's failure to pay FRT's claim.³⁸ National maintains tenant
15 improvements cannot be recovered as consequential damages because such damages were not
16 foreseeable at the time the parties entered the contract. Specifically, National contends that when
17 FRT purchased the insurance policy, it was not foreseeable that a burglary would require
18 constructing an entirely new restaurant. National cites *California Shoppers, Inc. v. Royal Globe*
19 *Ins. Co.*, 175 Cal. App. 3d 1 (1985) as analogously instructive to the foreseeability of FRT's tenant
20 improvements. Because this damage was not foreseeable as a matter of law, National contends the
21 jury made a manifest error of law in awarding tenant improvements as consequential damages
22 which should be corrected by the Court under Rule 59.³⁹

23 Plaintiffs argue that consequential damages are recoverable for breach of contract and are
24 not limited by the contract terms. (Doc. 385, 17:20-22.) Plaintiffs maintain that when issuing an
25

26 ³⁸ Because of National's breach, FRT claimed it was forced to walk away from its business, including the tenant
improvements it made, as FRT rented the structure's "pad" from Zone.

27 ³⁹ The parties disputed whether the special verdict form should include a breakdown of damages or whether it should
28 provide only an aggregated damage amount that did not break down the different elements of the damage award.
National sought to have the jury aggregate the damages into a single number, which was ultimately granted.

1 insurance policy that provides business interruption coverage, an insurer should foresee that any
2 breach of its obligations could potentially result in the demise of the insured's business. "That
3 National did not literally contemplate having to pay for FRT's tenant improvements if it breached
4 the contract does not mean the damages are not recoverable." (Doc. 385, 22:16-17.) Plaintiffs
5 contend National inspected the property in question prior to selling and binding the insurance
6 policy and knew the inability to use the entertainment system valued at \$414,000 (25 percent of
7 FRT's assets) was critical to the operation of the business. It was foreseeable that a breach of
8 contract at a vulnerable time could, and did in this case, lead to a greater loss than simply the
9 claimed amount for property loss. According to Plaintiffs, business interruption coverage is
10 designed to ensure the financial support necessary to sustain business operations in the event of a
11 disaster. If an insurer fails to promptly and honestly evaluate a business interruption claim, it is
12 logical that the breach could destroy the insured's business. (Doc. 385, 18:25-19:2.)

13 The statutory measure of damages for breach of contract is "the amount which will
14 compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the
15 ordinary course of things, would be likely to result therefrom." Cal. Civ. Code § 3300. "Contract
16 damages are generally limited to those within the contemplation of the parties when the contract
17 was entered into or at least reasonably foreseeable by them at that time; consequential damages
18 beyond the expectations of the parties are not recoverable." *Applied Equipment Corp. v. Litton*
19 *Saudi Arabia Ltd.*, 7 Cal. 4th 503, 515 (1994). The insured party's damage cannot, however,
20 exceed what it would have received if the contract had been fully performed on both sides. Cal.
21 Civ. Code § 3358. This damage limitation for breach of contract "serves to encourage contractual
22 relations and commercial activity by enabling parties to estimate in advance the financial risks of
23 their enterprise." *Applied Equipment Corp.*, 7 Cal. 4th at 515.

24 Contractual damages are comprised of two types: general damages (also called direct
25 damages) and special damages (also called consequential damages). *See e.g., Erlich v. Menezes*,
26 21 Cal. 4th 543, 558 (1999). "General damages are often characterized as those that flow directly
27 and necessarily from a breach of contract, or that are a natural result of a breach." *Lewis Jorge*
28 *Const. Mgmt., Inc. v. Pomona Unified Sch. Dist.*, 34 Cal. 4th 960, 968-69 (2004) (citing Cal. Civ.

1 Code § 3300 and *Mitchell v. Clark*, 71 Cal. 163, 167-68 (1886)). As general damages are both a
2 natural and necessary consequence of a contract breach, "they are often said to be within the
3 contemplation of the parties, meaning that because their occurrence is sufficiently predictable the
4 parties at the time of contracting are 'deemed' to have contemplated them." *Id.* (citing Calamari &
5 Perillo, *The Law of Contracts* (2d ed. 1977) § 14-5, p. 525; *Hunt Bros Co. v. San Lorenzo Water*
6 *Co.*, 150 Cal. 51, 56 (1906)).

7 Special damages, on the other hand, are "those losses that do not arise directly and
8 inevitably from any similar breach of any similar agreement. Instead they are secondary or
9 derivative losses arising from circumstances that are particular to the contract or to the parties."
10 *Lewis Jorge Const. Mgmt.*, 34 Cal. 4th at 969. Special damages are not presumed from mere
11 breach, but represent loss that occurred by reason of injuries following from the breach. *Id.*

12 In *California Shoppers*, a jury verdict was entered against a defendant insurer for failing to
13 defend and indemnify its insured against a third-party claim. *California Shoppers*, 175 Cal. App.
14 3d at 59. California Shoppers was an outgrowth of a company called Adco Advertising, Inc.
15 ("Adco") that published a give-away type newspaper called the Pennysaver. Some of the
16 principals of Adco decided to form a separate company, California Shoppers, to distribute the
17 same type of paper in a different area. California Shoppers sought an insurance policy from Royal
18 Globe, who also insured Adco. When California Shoppers began distributing its paper, it was
19 sued by Uneedus Corporation, a local competitor who alleged California Shoppers was violating
20 the Unfair Practices Act. California Shoppers tendered defense of the Uneedus' complaint to
21 Royal Globe, but Royal Globe denied the tender mistakenly believing the tender came from Adco.
22 The Uneedus case ultimately resulted in a damage award against California Shoppers, and
23 California Shoppers sued Royal Globe for breach of contract and breach of the duty of good faith
24 and fair dealing. The jury awarded California Shoppers \$86,500 to satisfy the Uneedus judgment,
25 expenses of \$39,000 incurred in defending the Uneedus action, \$3 million in economic or business
26 loss, as well as other items of damages. The insurer, Royal Globe, appealed the judgment. The
27 appellate court affirmed the jury's award of damages for indemnity and the failure to defend, but
28

1 reversed the \$3 million in economic loss damages finding that it could not be awarded under either
2 a tort or a contract theory.

3 California Shoppers based its entitlement to economic damages on the premise that it was
4 forced to sell its assets for \$1.5 million after the verdict was announced in the *Unedus* action.
5 According to California Shoppers, it had started the business with the goal of selling it for a profit;
6 had it been able to sell at a different time, it would have realized a much greater profit.

7 In reversing the award of economic damages, the appellate court noted that the sale of
8 California Shoppers' assets occurred in June 1977, more than two years after Royal Globe refused
9 tender of the *Unedus* action belying California Shoppers' allegation that it was immediately
10 harmed as a result of the refusal to defend. *Id.* at 28. The court reasoned the insurance policy
11 providing for Royal Globe's duty to defend third-party actions was only a peripheral item in terms
12 of the business conducted by California Shoppers. "In other words, California Shoppers was not
13 primarily in business to defend itself against litigation, it was primarily in business to publish an
14 'advertiser' type newspaper which depended for income on the sale of advertising. Its day-to-day
15 successful functioning had very little, if any, relationship to whether it was insured against the
16 possibility of having to hire its own lawyer if sued within the area of risk otherwise covered by the
17 policy." *Id.* at 60.

18 The court further reasoned that to bring the \$3 million of consequential damages into the
19 realm of foreseeability at the time the duty-to-defend coverage was purchased, the following series
20 of assumptions would have to be made: (1) California Shoppers would violate the Unfair Practices
21 Act; (2) a competitor would sue for the violation; (3) Royal Globe would decline coverage and
22 tender of the defense; (4) because of \$39,000 incurred in attorney's fees to defend the action,
23 Shoppers would be forced to sell the publishing enterprise for \$1.5 million; and (5) Royal Globe
24 was aware of the California Shoppers' long-range plan to sell the business at a later date after it
25 had greatly appreciated in value. *Id.* The court noted that a former shareholder of California
26 Shoppers testified that he did not think any of the other shareholders considered the *Unedus*
27 action "a big deal," and that the "prevailing sentiment was not like 'Oh my God, we're in deep
28 trouble. It was, Royal Globe won't defend us, we'll let Kindel and Anderson do it. We'll just keep

1 going.'" *Id.* at 60, n.5. The court found the mere recital of the requisite combination of items the
2 parties would have had to consider demonstrated the economic loss could not be awarded as
3 consequential damages for breach of the duty to defend. "In short, measured by the terms of
4 section 3300 of the Civil Code, there was no evidence that a breach of the contractual duty to
5 defend contemplated California Shoppers' loss of \$3 million under California Shoppers' theory of
6 how it suffered economic loss.'" *Id.* at 60.

7 The attenuated link between the insurance denial and the damages claimed in *California*
8 *Shoppers* is distinguishable from this case. Unlike the pertinent defense coverage in *California*
9 *Shoppers*, the audio/visual equipment loss here was directly tied to FRT's business operations.
10 While the appellate court noted California Shoppers was not in the business of defending itself,
11 FRT was in the nightclub business and alleged it was unable to reopen without the audio/visual
12 equipment. When insuring the property and/or operating equipment of a business, it is reasonably
13 foreseeable that an insurer's refusal to pay for replacing equipment necessary to the functioning of
14 a business would result in the businesses' inability to resume operations and could result in
15 complete failure and closure of the business. Although National contends it was not foreseeable
16 that such a relatively small property damage claim would lead to the entire shut-down of the
17 business, if the property loss is essential to the functioning of the business, then it *is* reasonably
18 foreseeable that the loss – if not remedied – could cause the business to fail.

19 Moreover, FRT's policy included business interruption coverage. If a business suffers a
20 covered loss which is wrongfully denied, thereby causing a drawn-out period of ceased business
21 operations, it is reasonably foreseeable that the business would fail. Given the nature of the
22 coverage at issue, it was within the parties' contemplation at the time of entering into the contract
23 that if National wrongfully failed to pay a claim for property loss directly tied to FRT's
24 functioning or failed to pay for business interruption arising out of the loss of necessary
25 equipment, the business may not be able to resume operations and may fail.

26 Due to the nature of the relationship between an insurer and its insured, and the type of
27 insurance coverage in this case, FRT's loss of its tenant improvements was reasonably foreseeable.
28

1 As such, to the extent the jury awarded tenant improvements as a consequential damage for breach
2 of contract, it was not manifest error of law.

3 **b. Period of Restoration**

4 National challenges whether the jury award, which undoubtedly included FRT's lost
5 profits, is legally permissible in light of FRT's policy language. FRT's business interruption
6 coverage states as follows:

7 We will pay for the actual loss of Business Income you sustain due to the necessary
8 suspension of your operations during the period of restoration. The suspension
9 must be caused by direct physical loss of or damage to property at the premises
described in the Declarations . . . caused by or resulting from any Covered Cause of
Loss.

10 The policy also defines "Business Income" as follows:

11 Business income means the:

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

15 Finally, the policy limits payments for Business Income to the length of the Period of
16 Restoration, which is defined as follows:

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

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

22 According to National, the maximum legally supportable award for breach of contract is
23 limited under the policy terms to the Period of Restoration from theft. National contends the
24 Period of Restoration is an objective measure which is defined as the theoretically reasonable time
25 required to rebuild under the circumstances – it does not take into account subjective issues faced
26 by the insured, such as its ability to pay. National notes Plaintiffs did not provide any evidence of
27 how long it would take them to recover from the theft, but argues Barbis testified a "complete
28 renovation" of the premises from the Cabo Wabo Cantina to Memphis Blues would take no longer

1 than three months from December 12, 2008, to the end of March 2009. National reasons a
2 complete remodel is much more extensive than repairing theft damage and therefore it is manifest
3 "error of fact" to award business income loss for a period longer than three months. Based on Dr.
4 Luna's testimony, three months of FRT's *lost profits* equals \$204,057.24. National maintains this
5 is the maximum amount of business income that can be awarded under the terms of the contract.

6 Plaintiffs argue that by not paying for the repairs or replacing the stolen equipment, and
7 then denying coverage all together, National lost any claim to a limited Period of Restoration.
8 Plaintiffs argue the burden of proving that the losses could have been avoided lies with the party
9 who has breached the contract, and National's delay in conducting an investigation of damage to
10 the interior of the premises extended the Period of Restoration. National failed to introduce any
11 evidence that Plaintiffs failed to mitigate their damages, and it is disingenuous for National to
12 argue that Plaintiffs had a duty to get the restaurant/nightclub "back up and running" in 90 days.

13 While the interpretation of policy language is a legal issue under California law, what
14 constitutes a reasonable period to carry out the necessary repairs and resume business for purposes
15 of the period of restoration is a question for the jury. *See Michel Family Trust v. Travelers Indem.*
16 *Co. of Conn.*, No. 09-cv-4144-PSG, 2011 WL 207955, at *5 (N.D. Cal. Jan. 21, 2011)
17 (determining factual dispute regarding the length of the Period of Restoration was an issue for the
18 jury that could not be resolved on summary judgment). Here, the jury was not instructed or asked
19 in the special verdict form to consider the time it would take to repair, rebuild, or replace FRT's
20 damaged property with reasonable speed and similar quality. No trial testimony directly
21 applicable to this issue was solicited by either party. Mr. Barbis testified that a remodel of the
22 insured premises to convert it from Cabo Wabo Cantina to Memphis Blues began in September
23 2008, and they anticipated completion in March 2009. In December 2008, the club was closed
24 completely so the remodel could occur. As Plaintiffs note, however, this testimony is not related
25 to the amount of time it would take to reinstall stolen equipment and repair damage to the interior
26 of the building as a result of the theft. Moreover, as Barbis testified that the remodel was started
27 in September 2008, while the club was still open, it is not entirely accurate that Barbis estimated
28 the entire remodel would take only three months.

1 Plaintiffs also argue Binder testified that the original installation of the equipment took
2 approximately 6 months. National notes the original installation involved more and different
3 types of equipment than that associated with repairing the theft damage, thus six months is not an
4 accurate estimate for the repairs necessary after the theft.

5 Neither Barbis' nor Binder's testimony directly addresses the length of time required to
6 repair the damage to the property after the theft and to replace missing equipment. And, as
7 Plaintiffs note, the period of restoration has been extended where events occurred outside the
8 control of the insured. In *Hampton Foods, Inc. v. Aetna Casualty & Surety Co.*, 843 F.2d 1140,
9 1144 (8th Cir. 1988) (applying Missouri law), the court held there was evidence offered which
10 sustained a finding that delay in resumption of business was due to the insurer's failure to pay
11 under the policy and the insured was thus entitled to recover its business interruption losses during
12 the period of delay in resuming business. Here, there was evidence that National never inspected
13 the property, delayed denial of the claim for nearly a year after it was submitted, and then – as the
14 jury determined – wrongfully denied the claim. This delay and refusal to pay the claim was a
15 basis to extend the period of restoration as in *Hampton Foods*. 843 F.2d at 1143-44 (affirming
16 district court's finding that insurer's refusal to pay insured amounts owed under the policy
17 prevented prompt restoration of the business).

18 National also maintains that FRT's poor financial condition cannot be a basis to extend the
19 period of restoration. National essentially asserts FRT had a duty to repair the premises prior to
20 National's payment of the claim – the fact that FRT could not afford to repair the premises is not a
21 basis to extend out the period of restoration. The insured's poor financial condition is only
22 irrelevant to extending the period of restoration if the insurer paid the insured the amount owed
23 under the policy, but the insured was *still* unable to complete the restoration timely because of its
24 own financial condition. See *Hampton Foods, Inc.*, 843 F.2d at 1143-44. National provides no
25 authority for the proposition that Plaintiffs were required to complete repairs arising from the theft
26 where National was found to have wrongfully denied the claim for the stolen equipment in the
27 amount of \$124,349.

28

1 Assuming the jury award included \$124,349 for FRT's stolen property and \$1,653,726 for
2 tenant improvements, the remaining amount of damages awarded (\$446,274) would consist of
3 business interruption losses. Dr. Luna testified that one year of FRT's lost profits totaled
4 \$599,673. Evidence was offered at trial that National failed to conduct a site inspection of the
5 Cantina after the theft and National did not deny the claim for nearly a year; moreover, the jury
6 found National wrongfully denied the claim. Even if three months was a reasonable estimate for
7 completing the repair work, there was evidence to support an extended period of restoration well
8 beyond three months. In view of the evidence offered at trial, the court **cannot** conclude the jury's
9 aggregate award of \$2,246,349 to FRT constituted manifest error.

10 National also argues that the award to Zone must likewise be reduced to account for the
11 Period of Restoration. Dr. Luna testified Zone's loss of rent from FRT was \$433,554 for a 12-
12 month period. Given that the Period of Restoration was subject to extension due to evidence of
13 National's failure to investigate the site and wrongful denial of the claim, the jury verdict of
14 \$274,823 for Zone is sustainable. As such, the damage award to Zone does not constitute manifest
15 error.⁴⁰

16 For the reasons stated above, National's motion to amend the judgment is DENIED.

17 **C. Plaintiffs' Motion to Amend the Judgment to Include Prejudgment and Post-**
18 **judgment Interest is GRANTED in part and DENIED in part**

19 **1. Post-judgment Interest**

20 In a diversity action, federal law governs the award of post-judgment interest. *AT&T Co.*
21 *v. United Computer Sys., Inc.*, 98 F.3d 1206, 1209 (9th Cir. 1996). Post-judgment interest "shall
22 be allowed on any money judgment in a civil case recovered in a district court . . . [and] shall be
23 calculated from the date of the entry of judgment . . . " 28 U.S.C. § 1961. The parties do not
24 dispute that Plaintiffs are entitled to post-judgment interest. As such, Plaintiffs' motion to amend
25 the judgment to include post-judgment interest is GRANTED.

26
27
28

⁴⁰ At the November 18, 2014, hearing National withdrew its arguments regarding a double-recovery to Zone.

1 **2. Prejudgment Interest**

2 "In diversity actions, state law determines the rate of prejudgment interest, and
3 postjudgment interest is governed by federal law." *AT&T Co.*, 98 F.3d at 1209. In California,
4 prejudgment interest is governed by Civil Code section 3287, which provides:

5 (a) Every person who is entitled to recover damages certain, or capable of being
6 made certain by calculation, and the right to recover which is vested in him upon a
7 particular day, is entitled also to recover interest thereon from that day, except
8 during such time as the debtor is prevented by law, or by the act of the creditor
9 from paying the debt

10 (b) Every person who is entitled under any judgment to receive damages based
11 upon a cause of action in contract where the claim was unliquidated, may also
12 recover interest thereon from a date prior to the entry of judgment as the court may,
13 in its discretion, fix, but in no event earlier than the date the action was filed.

14 Cal. Civ. Code § 3287.

15 Prejudgment interest is recoverable where the damages awarded at trial were "certain, or
16 capable of being made certain by calculation" as of a particular prior date. Cal. Civ. Code §
17 3287(a). "The test for recovery of prejudgment interest under [Section 3287(a)] is whether
18 defendant (1) actually knows the amount of damages owed to plaintiff, or (2) could have
19 computed that amount from reasonably available information." *KGM Harvesting Co. v. Fresh*
Network, 36 Cal. App. 4th 376, 391 (1995).

20 **a. The Jury's Damage Award Did Not Include Interest**

21 Plaintiffs seek prejudgment interest on the jury's damage award from the date of National's
22 wrongful denial of their claim on February 4, 2010. National opposes Plaintiffs' request asserting
23 that because Dr. Luna testified about opportunity interest, the question of prejudgment interest was
24 already presented to the jury. Whether or not the aggregated jury award includes interest was
25 solely in the hands of the jury. If the jury awarded interest, then Plaintiffs cannot recover
26 prejudgment interest again. If the jury did not award interest, it was within their province not to
27 do so. Either way, according to National, Plaintiffs are not entitled to prejudgment interest on the
28 jury verdict.

1 National cites no authority for the proposition that the jury may award prejudgment interest
2 pursuant to California Civil Code Section 3287(a), particularly in the absence of any instruction on
3 the ascertainability of elements of the damage award. As observed by the Ninth Circuit, the issue
4 of prejudgment interest under Section 3287(a) is primarily a question of law. *Brocklesby v. United*
5 *States*, 767 F.2d 1288 (9th Cir. 1985). Moreover, Section 3287 provides that a party is *entitled* to
6 prejudgment interest on any liquidated claims for which he recovers. Cal. Civ. Code § 3287(a)
7 ("A person who is entitled to recover damages certain . . . is entitled also to recover interest
8 thereon from that day . . . "). If the jury simply refused to award prejudgment interest on the
9 liquidated damages awarded, it is difficult to synthesize such a result with the language of the
10 statute.

11 In any event, notwithstanding the aggregated damage award, the verdict form indicates the
12 jury did not award interest, despite Dr. Luna's testimony regarding various opportunity interest
13 calculations for each damage figure. The verdict form asked the jury to indicate "the amount of
14 the covered loss that National Surety Corporation failed to pay to Fresno Rock Taco, LLC." (Doc.
15 364.) The term "covered loss" was referred to in Jury Instruction No. 32.⁴¹ Interest was not
16 presented as a covered loss under the policy, nor was it presented in Dr. Luna's damage testimony
17 as a covered loss. Given the precise call of the question in the verdict form, the jury had no
18 opportunity to award interest to Plaintiffs, despite Dr. Luna's testimony regarding opportunity
19 interest. Rather, the jury was asked very specifically to determine "the amount of the covered
20 loss" under the policy.

21 **b. Discrepancy Between Pre-Trial Damage Demand and Verdict Amount**

22 ⁴¹ Jury Instruction 32 states as follows (Doc. 366, p. 37):

23 Plaintiffs Fresno Rock Taco, LLC and Zone Sports Center, LLC claim that Defendant National
24 Surety Corporation breached its duty to pay it for a covered loss under an insurance policy. To
25 establish this claim, Plaintiffs Fresno Rock Taco, LLC and Zone Sports Center, LLC must prove all
of the following:

- 26 1. That Plaintiffs Fresno Rock Taco, LLC and Zone Sports Center, LLC suffered a loss which was
covered under an insurance policy with Defendant National Surety Corporation;
- 27 2. That Defendant National Surety Corporation was notified of the loss as required by the policy;
and
- 28 3. The amount of the covered loss that Defendant National Surety Corporation failed to pay.

1 National also argues Plaintiffs may not recover interest under Section 3287(a) because of
2 the large discrepancy between Plaintiffs' pre-trial demand and the ultimate amount awarded by the
3 jury. According to National, such a large discrepancy is evidence that the awarded damages were
4 not certain or capable of being made certain such that they are considered liquidated for purposes
5 of Section 3287(a). National cites *Polster, Inc. v. Swing*, 164 Cal. App. 3d 427, 345 (1985) for the
6 proposition that where the amount of the original demand differs drastically from the ultimate jury
7 award, it indicates the damages were not certain at the time of the breach. National notes that
8 Plaintiffs made a \$4,745,477 pre-trial demand for FRT's damages and a \$13,678,927 demand for
9 Zone's damages, but the jury awards were significantly less than those demands. National
10 maintains that throughout the life of this case, there were sharp conflicts within Plaintiffs' own
11 evidence of damages which signifies that the damages were not liquidated.

12 Plaintiffs assert it is misleading for National to equate terms such as "original claim," and
13 "initial claim" with "pre-trial demand." National ignored Plaintiffs' business interruption claim
14 and never opened and investigated the business interruption claim. As a result, National never
15 acquired Plaintiffs' original demand or claim for business interruption. National's opposing brief
16 instead uses amounts which National admits were damage amounts for 5 and 10 years after the
17 initial demand. According to Plaintiff, those numbers are higher and different because it was too
18 late for National to go back and simply do "[its] job by investigating the claim and ascertaining the
19 amount owed under the policy." (Doc. 386, 4:2-4.) Plaintiffs also assert *Polster, Inc.* is
20 distinguishable because the plaintiff in that case was obligated to provide the defendant with an
21 estimate of damages within a reasonable time after their loss, but failed to do so. Further, the
22 defendant in *Polster, Inc.* "actually made an effort to resolve the case by doing their own estimates
23 and providing their own descriptions of the damage." (Doc. 386, 2:14-16.) After the two parties
24 failed to agree, the plaintiff filed suit but received a jury award far lower than the plaintiff's
25 original damage estimate. Here, Plaintiffs maintain National never opened or investigated their
26 claim for business interruption and thus there was no legitimate dispute as to the amount owed.

27 Where there is a large discrepancy between the amount of damages demanded in the
28 complaint and the size of the eventual award, that fact militates against a finding of the certainty

1 mandated by Section 3287(a). *Chesapeake Industries, Inc. v. Togova Enterprises, Inc.*, 149 Cal.
2 App. 3d 901, 910 (1983). Plaintiffs' damage award ostensibly includes different types of damages
3 such as property loss, tenant improvements as consequential damage for the breach, and lost
4 profits as part of Plaintiffs' business interruption coverage under the policy. Plaintiffs' claim for
5 property damage has remained constant at \$124,349 for FRT and \$14,386 for Zone, since the
6 initial proof of loss was submitted to National. The business interruption claim was never,
7 according to Plaintiffs, developed or investigated by National such that there was an original
8 demand for those amounts. The differing damage numbers presented by Plaintiffs reflected
9 different time periods for calculating the business interruption losses. Here, the vacillation
10 between Plaintiffs' pre-trial demand and the ultimate amount awarded militates against a finding
11 that Plaintiffs' damages were unascertainable. The discrepancy between Plaintiffs' pre-trial
12 demand and the ultimate jury award says little about the ascertainability of the differing elements
13 of Plaintiffs' damages.

14 **c. Plaintiffs' Request for Prejudgment Interest Under Section 3287(a) is**
15 **DENIED in part and GRANTED in part**

16 Section 3287(a) applies to situations "where there is essentially no dispute between the
17 parties concerning the basis of computation of damages if any but where their dispute centers on
18 the issue of liability giving rise to damage." *Esgro Central, Inc. v. Gen. Ins. Co.*, 20 Cal. App. 3d
19 1054, 1060 (1971).

20 Here, National disputed not only its liability to pay any lost profits for either Zone or FRT
21 as a measure of damages, but also whether FRT and Zone suffered lost profits. For example,
22 National presented expert testimony that FRT's business was not profitable.⁴² Thus, the amounts
23 of any lost profits were a subject of dispute among the parties' experts, and they did not agree on a
24 calculation of those damages. *Esgro*, 20 Cal. App. 3d at 1062 (prejudgment not authorized where
25 the amount of damage "depends upon a judicial determination based upon conflicting evidence
26 and is not ascertainable from truthful data supplied by the claimant to his debtor"). Where the
27 parties dispute the amount or computation of damages, Section 3287(a) does not apply. *Canavin*

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⁴² Unofficial Trial Transcript, August 19, 2014 (Day 8), Testimony of Gary Gray.

1 v. *Pacific Southwest Airlines*, 148 Cal. App. 3d 512, 524 (1983) ("because there was considerable
2 dispute between the parties concerning the relevant elements by which to compute damages,
3 rendering them not reasonably susceptible to ready and certain calculation, prejudgment interest
4 may not be awarded under section [3287(a)]" (citing *In re Pago-Pago Air Crash of January 1974*,
5 525 F. Supp. 1007, 1011-12 (C.D. Cal. 1981))).

6 Regarding FRT's tenant improvements, Plaintiffs maintain the improvements were insured
7 under the contract National breached and constituted a fixed amount which could have been
8 calculated had National investigated the claim or requested damage figures from Plaintiffs. The
9 Court agrees these damages were subject to calculation. However, it is not clear how much of the
10 aggregated award for FRT was comprised of tenant improvements and how much consisted of
11 business interruption damages – which would have included lost profits, the calculation and
12 amount of which the parties dispute. Because of the aggregated damage award, even though
13 FRT's tenant improvements were ascertainable and subject to calculation, it is not clear what
14 portions of FRT's tenant improvements were awarded.

15 However, the amounts of the aggregated damage award reflect that the jury awarded FRT
16 \$124,349 for its stolen equipment claim and \$14,823 to Zone for its property damage. The Proof
17 of Loss statement Plaintiffs' submitted to National was offered as evidence and sought the
18 amounts of \$124,349 for stolen equipment and \$14,823 for damage to the Cantina's doors. The
19 jury found National breached the contract, and the property damage and stolen equipment were the
20 direct result of the breach. It is also apparent the property damage and the stolen equipment were
21 included in the jury's aggregated verdict: FRT was awarded \$2,224,349 and Zone was awarded
22 \$274,823. The dollar amount of the damage award logically reflects inclusion of the damaged
23 property and stolen equipment. Moreover, National conceded at the November 18, 2014, hearing
24 that the property damage and stolen equipment represented ascertainable and liquidated claims.

25 Prejudgment interest is appropriate for the stolen property and property damage under
26 Section 3287(a). *See Cal-Agrex, Inc. v. Tassell*, 258 F.R.D. 340, 353 (N.D. Cal. 2009) (awarding
27 prejudgment interest on ascertainable deposit amount where jury rendered aggregated verdict),
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1 *aff'd* 408 F. App'x 58 (9th Cir. Jan. 7, 2011). Prejudgment simple interest at a rate of 10 percent⁴³
2 from February 4, 2010,⁴⁴ on a principle amount of \$124,349 is \$56,621 (($\$124,349 \times 10\%$) x
3 (1662 / 365 days). Prejudgment interest at 10 percent from February 4, 2010, on a principle
4 amount of \$14,823 is \$6,750 ($\$14,823 \times 10\%$) x (1662 / 365). The judgment shall be amended to
5 include these interest amounts.

6 **d. Plaintiffs' Request for an Award of Prejudgment Interest Under Section**
7 **3287(b) is DENIED.**

8 Plaintiffs assert they are alternatively entitled to a rate of 10 percent per annum interest on
9 the jury award under Section 3287(b). Section 3287(b) provides that "[e]very person who is
10 entitled under any judgment to receive damages based upon a cause of action in contract where the
11 claim was unliquidated, may also recover interest thereon from a date prior to the entry of
12 judgment, as the court may, in its discretion, fix, but in no event earlier than the date the action
13 was filed." Cal. Civ. Code § 3287(b). "The discretion conferred [under Section 3287(b)] is
14 limited by the purposes underlying interest awards" *Gourley v. State Farm Mut. Auto Ins.*
15 *Co.*, 53 Cal. 3d 121, 133 (1991). Prejudgment interest is intended to compensate a party for the
16 loss of the use of his or her property. *Nordahl v. Dep't of Real Estate*, 48 Cal. App. 3d 657, 665-
17 66 (1975). "It has long been settled that section 3287 should be broadly interpreted to provide just
18 compensation to the injured party for loss of use of money during the prejudgment period."
19 *Gourley*, 53 Cal. 3d at 132.

20 Unlike prejudgment interest under Section 3287(a), an award of prejudgment interest on
21 unliquidated amounts under Section 3287(b) is within the trial court's discretion. Section 3287(b)
22 was "designed to allow trial courts flexibility in circumstances . . . where the exact amount of
23 damage is in dispute." *A&M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 496 (1982).
24 Courts may consider a variety of factors in determining an award of prejudgment interest under
25 Section 3287(b), including (1) whether the party seeking interest was at fault for any delay in

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⁴³ Cal. Civ. Code § 3289(b).

27 ⁴⁴ February 4, 2010, is the date National denied Plaintiffs' claim; 1662 is the number of days **between** February 4,
28 2010, and the date of judgment, August 25, 2014, excluding both February 4, 2010, and August 25, 2010. This is the
number of days Plaintiffs requested to calculate prejudgment interest. (Doc. 376, 5:4-6.)

1 resolution of the case; (2) whether interest penalizes the defendant for litigating a bona fide
2 dispute; and (3) whether the defendant refused a definite demand for settlement at the outset.
3 *A&M Produce Co.*, 135 Cal. App. 3d at 495-96.

4 Plaintiffs offer no reason why the Court should exercise its discretion under Section
5 3287(b) to award interest. The undersigned presided over two trials in this matter and, considering
6 the evidence offered, finds that Plaintiffs were fully and fairly compensated by the jury's verdict.
7 A further award of interest would not achieve the purpose of the statute, but would instead result
8 in a penalty to National for litigating a bona fide dispute over coverage, particularly the dispute
9 whether Plaintiffs made material misrepresentations voiding their policies. The first trial resulted
10 in a hung verdict, and a re-trial was required. The first jury's inability to reach a verdict speaks to
11 both the evidence offered as well as the bona fide nature of aspects of the dispute. *See generally*
12 *A&M Produce Co.*, 135 Cal. App. 3d at 495-96. Plaintiffs' request for prejudgment interest under
13 Section 3287(b) is DENIED.

14 IV. CONCLUSION

15 For the reasons stated above, it is HEREBY ORDERED that:

- 16 1. National's motion to amend the judgment is DENIED;
- 17 2. Plaintiffs' motion to amend the judgment to include post-judgment interest,
18 accruing as of August 25, 2014, is GRANTED;
- 19 3. Plaintiffs' motion to amend the judgment to include prejudgment interest is
20 GRANTED IN PART and DENIED IN PART:
 - 21 a. Plaintiffs' request for prejudgment interest under Cal. Civ. Code § 3287(a)
22 is granted in the amount of \$56,621 for Plaintiff Fresno Rock Taco, LLC,
23 and \$6,750 for Zone Sports Center, LLC;
 - 24 b. Plaintiffs' alternative request for prejudgment interest under Cal. Civ. Code
25 § 3287(b) is DENIED; and

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4. The Court shall issue an amended judgment that reflects the award of
prejudgment and post-judgment interest consistent with this order.

IT IS SO ORDERED.

Dated: January 8, 2015

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE