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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ROYAL PLAZA MASTER OWNERS ASSOCIATION, INC., an Idaho Corporation Plaintiff, vs. TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, and BUSINESS ENTITY DOES I through X, and DOES I through X, Defendant.	Case No. 1:22-cv-00416 DKG **RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT [DKT. 36]**

COMES NOW the Plaintiff, Royal Plaza Master Owners Association, Inc., by and through its attorneys of record, and pursuant to Federal Rule of Civil Procedure 56, and responds to Defendant Travelers Property Casualty Company of America's Motion for Summary Judgment. Because there exist, at the least, genuine disputes of material fact with regard to all claims, summary judgment should be denied.

I. INTRODUCTION

This case pertains to Travelers' denial of an insurance claim for water damage to a mixed-use residential/commercial building located at 1112 W. Main Street in Boise, Idaho (the "Royal

Plaza building" or the "building"). Plaintiff Royal Plaza Master Owners Association, Inc. ("Royal Plaza"), which owns the building, had obtained Commercial Condominium PAC insurance from Defendant Travelers Property Casualty Company of America ("Travelers"). This policy of insurance, Policy No. 680-4475R388-19-42, had a coverage period of August 24, 2019 through August 24, 2020 (the "Policy").

Prior to the loss, Royal Plaza used a roofing company, Upson Company, to perform quarterly maintenance of the roof, including maintenance that was performed in August 2019.

On December 2, 2019, residents Phil and Rhonda Hugues reported water leaking down into their top-floor unit. Royal Plaza called out Upson to find the source of the leak and to repair it.

After substantial efforts through December 2019 and into January 2020, the intermittent leaking continued. Royal Plaza engaged Weathertight Roofing to investigate and repair the leaking. On January 13th and 20th, 2020, Weathertight personnel performed repairs on the roof of the building. By that time substantial water damage to the interior of the building had occurred, primarily within units 602 and 603, as well as certain common areas.

Royal Plaza submitted a claim for water damage to its insurer, Travelers. Travelers sent an inexperienced adjuster, Jacob Eiband, to inspect the damage. After a cursory inspection, on March 23, 2020, Eiband sent a letter to inform Royal Plaza that Travelers had denied the claim. The stated basis for the denial was that the interior water damage did not arise out of a covered cause of loss under the Policy, and so no coverage was afforded. With regard to the policy language Travelers cited as justification for its denial, however, Eiband conspicuously omitted the very next clause of the provision, which provided coverage. Moreover, and despite now relying upon an allegation of defective construction as a reason for denying coverage for the water-intrusion claim, Travelers did not notify Royal Plaza of this reason for denial, nor provide any policy language about such exclusion, nor provide any analysis of why that would cause Royal Plaza's claim to be denied.

II. FACTUAL BACKGROUND

See Royal Plaza's Statement of Disputed and Additional Facts in Opposition to the Motion for Summary Judgment, submitted herewith.

III. LEGAL STANDARD

Summary judgment is only appropriate where a party demonstrates that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A material fact is a fact "that may affect the outcome of the case." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S.Ct. 2505 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine dispute as to material fact and that it is entitled to judgment as a matter of law. *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986). If the moving party is able to satisfy this initial burden, then the nonmoving party must identify facts sufficient to show a genuine issue for trial. *Cline v. Indus. Maint. Eng'g & Contracting Co.*, 200 F.3d 1223, 1229 (9th Cir. 2000). The nonmoving party cannot rest on the pleadings but must show "by . . . affidavits, or by the depositions, answers to interrogatories, or admissions on file," that a genuine dispute of material fact exists. *Celotex*, 477 U.S at 324, 106 S.Ct. 2548.

On summary judgment, the court must view all of the evidence in the light most favorable to the nonmoving party; "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2505.

IV. LEGAL ARGUMENT

Travelers is not entitled to summary judgment because there exist genuine disputes of material fact regarding whether the loss was caused by or resulted from the thawing of snow and ice on the roof of the building, as well as other questions pertaining to Travelers' bad faith and negligent claims-handling. Accordingly, summary judgment should be denied.

A. Objection to Travelers' proffered exhibits in its declaration of counsel.

As a prefatory matter, it should be noted that several of Travelers' proffered exhibits are not competent evidence on summary judgment. Fed. R. Civ. P. 56(c)(2); *see* Meyer Decl. [Dkt. 37], at Ex. 9 [Dkt. 37-9] (bare printout of web page lacking any authentication, internal indicia to demonstrate accuracy or completeness, or URL from which it was obtained); Ex. 11 [Dkt. 37-11] (incomplete Weathertight Roofing report, omitting the photographs provided with the report that reflect snow, ice, and voided seams); Ex. 12 [Dkt. 37-12] (email from Travelers employee Strachota to Caia McCurdy with summaries of summaries of what unnamed Weathertight and Hammersmark employees supposedly said); *and* Ex. 15 [Dkt. 37-15] (claim note of hearsay statements purported to be from Matthew Taylor). In addition to their other deficiencies, it is difficult to see, and not explained, how counsel can authenticate and provide foundation for these upon personal knowledge. They should be disregarded.

B. Royal Plaza's breach of contract claim hinges on a disputed question of fact.

Travelers contends that Royal Plaza's breach of contract claim fails because the evidence conclusively establishes that freezing and thawing of snow and ice played no role in the water intrusion into the building. This is simply incorrect. There is conflicting evidence as to the cause of the water intrusion that prevents summary judgment on Royal Plaza's breach of contract claim.

In Idaho, "[t]he elements for a claim for breach of contract are: (a) the existence of the contract, (b) the breach of the contract, (c) the breach caused damages, and (d) the amount of those damages." *Mosell Equities, LLC v. Berryhill & Co.*, 154 Idaho 269, 278, 297 P.3d 232, 241 (2013). "When interpreting insurance policies, this [Idaho Supreme] Court applies the general rules of contract law subject to certain special canons of construction." *Arreguin v. Farmers Ins. Co. of Idaho*, 145 Idaho 459, 461, 180 P.3d 498, 500 (2007). "The general rule is that, because insurance contracts are adhesion contracts, typically not subject to negotiation between the parties, any ambiguity that exists in the contract must be construed most strongly against the insurer." *Id.*

(quoting *Farmers Ins. Co. of Idaho v. Talbot*, 133 Idaho 428, 432, 987 P.2d 1043, 1047 (1999); internal quotation marks omitted).

1. The Policy provides coverage for water intrusion caused by or resulting from the thawing of snow, sleet, or ice on the building.

The Policy provides, in pertinent part:

> **A. COVERAGE**
>
> We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from a Covered Cause of Loss.

Knowlton Decl., Ex. A (Policy), at POLICY_000018, at BUSINESSOWNERS PROPERTY COVERAGE SPECIAL FORM (MP T1 02 02 05), ¶ A (COVERAGE). This is the insuring agreement. "Covered Property" is defined as:

> **1. Covered Property**
>
> Covered Property, as used in this Coverage Form, means the type of property described in this Paragraph **A.1.**, and limited in Paragraph **A.2.**, Property Not Covered, if a Limit of Insurance is shown in the Declarations for that type of property.
>
> **a. Building**, meaning the building or structure described in the Declarations, including:
>
> [list of ancillary fixtures and equipment included as Covered Property in addition to the building itself].

Id. at ¶ A.1.a.(1)–(8). The "premises described in the Declarations" is "1112 W MAIN ST SUITE 203 BOISE ID 83702."[1] In short, the structure at 1112 W. Main Street, Boise, Idaho (*i.e.*, the building) is Covered Property.

With regard to "direct physical loss of or damage to Covered Property . . . caused by or resulting from a Covered Cause of Loss," Covered Causes of Loss are defined as:

> **4. Covered Causes of Loss**
>
> RISKS OF DIRECT PHYSICAL LOSS unless the loss is:
>
> **a.** Limited in Paragraph **A.5.**, Limitations; or

[1] The roof of the building does not fall under any of the categories listed in Paragraph A.2., Property Not Covered, which includes such things like aircraft, automobiles held for sale, and contraband. *See id*. at POLICY_000018–19 (¶ A.2.a.–r.).

> **b.** Excluded in Paragraph **B.**, Exclusions.[2]

Id. at POLICY_000020 (¶ A.4.a.–b.). Paragraph A.5., Limitations, provides in pertinent part:

> **5. Limitations**
>
> **a.** We will not pay for loss of or damage to:
>
> **(1)** The "interior of any building or structure" or to personal property in the building or structure, caused by rain, snow, sleet, ice, sand or dust, whether driven by wind or not, unless:
>
> **(a)** The building or structure first sustains damage by a Covered Cause of Loss to its roof or walls through which the rain, snow, sleet, ice, sand or dust enters; or
>
> **(b)** The loss or damage is caused by or results from thawing of snow, sleet or ice on the building or structure.

Id. at POLICY_000021 (¶ A.5.a.(1)(a)–(b)).

In short, the roof and the building itself are Covered Property, they are "the premises described in the Declarations," and they sustained "direct physical loss . . . or damage." None of this is in dispute. What Travelers claims is that the Limitations paragraph applies because the "interior of any building or structure" was damaged by "rain, snow, sleet, [or] ice" and neither of the exceptions to the Limitation applies.[3] *See* Mot. Summ. J. [Dkt. 36], at 14 (claiming "Plaintiff has not established coverage and cannot do so."). Jacob Eiband, Travelers' adjuster, admitted that if freeze/thaw cycles of ice caused the roof membrane to separate and admit water into the building, it would be a covered loss under the Policy. Knowlton Decl., Ex. B (Eiband Dep.) 47:5–10.[4]

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[2] Travelers did not assert any of the listed Exclusions in denying Royal Plaza's claim. To the extent Travelers seeks to do so now, such as for construction defect or wear and tear, such efforts themselves are in bad faith. *Accord* Idaho Code § 41-1329(1) and (14) (prohibiting "[m]isrepresenting . . . insurance policy provisions relating to coverages at issue" and "[f]ailing to promptly provide a reasonable explanation of the basis in the insurance policy . . . for denial of a claim").

[3] When Travelers denied Royal Plaza's claim, by way of letter dated March 23, 2020, Travelers selectively quoted the policy language of Paragraph A.5., citing the language of Paragraph A.5.a.(1)(a) (which benefits Travelers) and omitting the language of Paragraph A.5.a.(1)(b) (which provides coverage if the water intrusion is caused by or results from thawing snow, sleet, or ice, as alleged here). This is discussed more fully with regard to bad faith and negligent adjustment, below.

[4] "Q. If ice had gotten under some pavers and around the caulk and a freeze/thaw had made it separate and allowed water to penetrate the barrier, that would be a covered loss, wouldn't it, under this policy?

If Royal Plaza can establish that water intrusion was "caused by or result[ed] from thawing of snow, sleet or ice on the building," whether that be from freeze/thaw cycles opening voids in the seams of the roof membrane, or from ice damming, or simply from the thawing of snow or ice, Royal Plaza is entitled to prevail on its breach of contract claim. For current purposes, if Royal Plaza can present **any** evidence of water intrusion caused by, or resulting from, freeze/thaw cycles or ice damming, summary judgment on the breach of contract claim is inappropriate.

2. Royal Plaza's water intrusion damage was caused by or resulted from freeze/thaw cycles and ice damming.

Travelers claims now, seeking summary judgment, that "the HOA's allegation that the leaks were caused by snow or ice is objectively wrong." Mot. Summ. J. [Dkt. 36], at 7. This assertion is supported, as it were, by a printout labelled "Mean Precipitation by Day for Boise Area, ID" that purports to show the precipitation totals for the latter months of 2019 and does appear to show that there was at least some amount of precipitation every day during those months.[5] Meyer Decl., Ex. 9 [Dkt. 37-9]. Travelers also claims that this is supported by various documents generated by Upson and Weathertight roofers during the attempts to repair the roof in December 2019 and January 2020. Mot. Summ. J. [Dkt. 36], at 8–10.

Travelers points to no evidence that conclusively rules out the action of freezing and thawing in opening or widening voids in the roof membrane, through which water then entered the building. Royal Plaza, however, does present evidence that the water intrusion—and consequent damage—was at least in part caused by freezing and "thawing of snow, sleet or ice on the building or structure," as covered by the Policy.

Dave Conway was, until recently, the Building Maintenance Superintendent for the Royal

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A. It would be."

[5] As discussed above, this document, Exhibit 9 to a declaration of Travelers' counsel, is not authenticated, does not have any internal indicia to demonstrate that it is accurate or complete, and despite counsel's averments that it is from "the National Oceanic and Atmospheric Administration web site" counsel does not provide the URL where it may be found and verified. It is of no value to the instant motion and should be disregarded.

Plaza building, a position he held for seventeen (17) years. Conway Decl. ¶ 2. Conway had worked in property management for five (5) years prior to that. *Id*. at ¶ 3. Conway's duties at Royal Plaza included making sure that all regular maintenance of the building was completed and hiring appropriate contractors and vendors when needed. *Id*. at ¶ 5. This included ensuring that the roof underwent regular quarterly inspections. *Id*. at ¶ 7. Conway was, and is, intimately familiar with the Royal Plaza property. *Id*. at ¶ 6.

Conway recalls that in the fall of 2019 Boise had a lot of rainfall, but that during that time he did not observe any water leaks in the Royal Plaza building and there were no reports of leaks in the Royal Plaza building. *Id*. at ¶ 10. On December 2, 2019, however, Royal Plaza residents Phil and Rhonda Hugues contacted Conway after they had heard dripping noises behind a wall and then noticed water dripping from a recessed light in their kitchen. *Id*. at ¶ 11.

Conway then inspected the roof and observed snow and ice buildup on the roof and rooftop patio. *Id*. Conway recalls that the weather in late November and early December 2019 was wet and snowy at times with freezing and thawing occurring. *Id*. Conway observed that the Hugues leak was not continuous and only became apparent when the weather was bad. *Id*.

After being notified of the leak in the Hugues unit, Conway called Upson—the company that performed the building's quarterly roof inspections—to try to identify and correct any issues with the roof. *Id*. at ¶ 13. Due to the intermittent and weather-related nature of the leak, it was a several-week process to try to identify the source of the leak. *Id*. Conway accompanied the Upson personnel while they chased the leak and patched several minor areas of roofing. *Id*. Upson was not able to identify the specific source of the Hugues leak, and in early January 2020 Conway contacted Weathertight Roofing to investigate. *Id*. at ¶ 16.

Conway accompanied Weathertight personnel as they inspected the roof on January 13, 2020. *Id*. at ¶ 17. Conway and the Weathertight personnel had to remove snow and ice buildup on the roof and patio areas to identify potential sources of the leak. *Id*. at ¶ 18. In areas of snow

and ice buildup there were voided membrane seams and holes in the roofing membrane. *Id*. Due to the amount of snow and ice on the roof, Weathertight personnel returned on January 17, 2020, once the snow and ice had been reduced to complete repairs of the roof membrane. *Id*. at ¶ 19.

Based on his experience and contemporaneous observations, Conway concluded that the leak first observed by the Hugueses was the result of ice damming and freezing and thawing related to the bad weather in late November and December 2019. *Id*. at ¶ 22. Conway determined that this leak was a new leak not previously identified and noticed that the leak got worse with weather such as heavy rain and snow melt. *Id*. Conway found that the leak was fixed once the areas of the roofing membrane that had been compromised by freezing and thawing had been repaired. *Id*.

Conway's observation that the leak was a product of freezing and thawing, as well as ice damming, is reinforced by deposition testimony. Matthew Taylor, the president of Royal Plaza at the time of the leak, testified that freeze/thaw cycles and ice damming was a cause of, or resulted in, the water intrusion at issue. When asked whether any of the "experts"—that is, roofers from Upson and Weathertight—attributed the leaks to snow and ice, Taylor answered:

> The ones I do think happened were issues that involved—were in that Upson, and then all the grouting they complained about, things like that, I think they said **how that gets separated is snow, ice gets in there and freezes, creates the gapping, and then that's how you get the leaks**.

Knowlton Decl., Ex. C (Taylor Dep.), at 64:2–10 (emphasis added); *see also id*. at 64:15–20 (regarding ice damming). On questioning regarding the Upson investigation, Taylor provided:

> A. . . .
>
> So the ponding is what they're talking about on Page 3 with Upson, it allowed all that water to pond and freeze and that's where the ice was, and so that's what exacerbated this problem during the wintertime.
>
> Q. That's not what it says in that report, correct?
>
> A. I thought that that's what we had gone over a little bit as the board. And then the same thing with the TPO [membrane] stuff. Once you have kind of a crack in it and get water in there and then it freezes, it lifts that up.

Id. at 65:11–22. Taylor testified that if there had been previous leaks, they were not the same as

the one in 2019–2020. *Id*. at 55:19–24 (". . . but I don't think it was the same because there hadn't been, as far as I was aware, any since I had been on the board and we had had it annually inspected or more.").

To support its attempt at summary judgment, Travelers points to a printout from a webpage that Travelers claims is a weather record, to documents generated by Upson and Weathertight during their repair efforts, and to Travelers' retained expert. *See generally* Mot. Summ. J. [Dkt. 36], at 7–11. With regard to the unauthenticated and unsupported webpage printout, it provides little of value. With regard to Travelers' retained expert, he never visited, walked, or inspected the roof. With regard to the roofing professionals from Upson and Weathertight, Travelers misinterprets the documents to assert that they say more than they actually say.[6]

Travelers asserts that "not a single invoice, photo or report from Upson alleges or demonstrates that the existing issues with the roof resulted from the freezing and thawing of snow, ice or sleet." *Id*. at 8. Were it true, it is nonetheless beside the point: Upson was not hired to, and did not purport to, determine the root cause of the failure of the roof membrane. *See* Conway Decl. ¶ 15 ("The accompanying pictures accurately depict the state of the roof during December 2019 including the ice and snow buildup under and around the deck pavers.") *and* Ex. A (Upson Company Invoice and Report). The Upson report depicts water infiltrating under a door; holes in the membrane; seam voids that had opened up; failed caulking; and cracked EIFS. *Id*. The report does not comment on what may, or may not, have been the cause of those seam voids, failed caulking, and other issues, and certainly does not rule out freeze/thaw cycles. It is misleading at best to claim that the Upson report and photographs fail to show that freezing and thawing of snow and ice resulted in the water intrusion when the Upson report did not take **any** position on the root

[6] Travelers refers to these personnel as "Plaintiff's experts," which is only technically true. Royal Plaza has disclosed these personnel as non-retained expert witnesses, along with others, because they have roofing expertise beyond that of a layperson and were not specially employed to provide expert testimony.

causes of the damage discovered.

So too with the documents generated by Weathertight. The invoice generated after the January 13, 2020 inspection reflects a roof where snow and ice had to be removed to find the voided seams underneath: "Once I removed snow and ice, I found numerous voided membrane seams and holes in roofing membrane, in affected and nearby areas." Conway Decl., Ex. B (Weathertight January 13, 2020 invoice, with photographs).[7] The invoice generated after the January 17, 2020 inspection reflects numerous voided areas in seams that could only be found once the snow and some of the ice had melted away. *Id*. (Weathertight January 17, 2020 invoice).

Of special note are the lengthy quotes that Travelers set forth in its briefing and asserts are directly attributable to unnamed Weathertight and Hammersmark personnel. *See* Mot. Summ. J. [Dkt. 36], at 9–10 ("Weathertight, in an email to Travelers, summarized the following . . ."; "Plaintiff's other non-retained expert, Hammersmark, confirms . . ."). But the evidence presented, attached to a declaration of counsel, is not from Weathertight or Hammersmark, but appears originate from an email by Andy Strachota, a **Travelers** employee, purporting to summarize what he claims unnamed Weathertight and Hammersmark personnel told him. *See* Meyer Decl., Ex. 12 [Dkt. 37-12]. Even if admissible, this is not the conclusive evidence that Travelers claims it to be.

In short, Travelers mischaracterizes or exaggerates what the Upson and Weathertight reports say; rather than conclusively ruling out freeze/thaw cycles as a cause of the water intrusion, as Travelers contends, the reports describe the damage found to the roof without opining as to the ultimate cause.[8] Royal Plaza has presented competent evidence—in the sworn declaration of Dave

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[7] It should be noted that the version of the January 13, 2020 Weathertight invoice submitted by Travelers, *see* Dkt. 37-11, omits the photographs that were taken at that inspection and provided with the invoice. Those photographs are found attached to the Declaration of David K. Conway as Exhibit B, and show the snow, ice, and voided seams discovered in the inspection.

[8] While Travelers makes passing reference to anti-concurrent causation language in its recital of legal standards, it produces no such language of the Policy, and makes no pertinent argument either. *See Perry v. Farm Bureau Mut. Ins. Co.*, 130 Idaho 100, 103, 936 P.2d 1342, 1345 (Ct. App. 1997) ("[A]n insurance policy will generally be construed so that the insurer bears the burden of proving that the asserted exclusion is applicable.").

Conway, the Royal Plaza building's longtime superintendent and percipient witness to the events; in the deposition testimony of Matthew Taylor, then-president of Royal Plaza and deeply involved in the water intrusion investigation and repair; and in the reports and photographs of Upson and Weathertight, which all note the impact of snow and ice on the condition of the roof—that, at the very least, there is a genuine dispute of material fact as to whether the water intrusion was "caused by or result[ed] from thawing of snow, sleet or ice on the building or structure." This is a live question of fact for the jury and not appropriate for summary judgment.

C. Royal Plaza's claim for bad faith is not appropriate for summary judgment.

Travelers contends that Royal Plaza's cause of action for bad faith should be dismissed because, according to Travelers, there was no underlying breach of contract; its adjuster lacked information from outside consultants; the water-intrusion claim was fairly debatable or the denial was a result of a good-faith mistake; because Royal Plaza did not set forth an insurance industry expert; or because Royal Plaza's harm is fully compensable by contract damages. *See* Mot. Summ. J. [Dkt. 36], at 14–18. Travelers appears to take "the spaghetti approach," "heav[ing] the entire contents of a pot against the wall in hopes that something would stick." *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003). Royal Plaza responds to each in turn.

1. Royal Plaza's breach of contract claim is a live issue for the jury.

Travelers contends that Royal Plaza's bad faith "claim fails for lack of an underlying breach of contract." *Id*. at 15. While it is true that "to find that the insurer committed bad faith there must also have been a duty under the contract that was breached," *Harmon v. State Farm Mut. Auto. Ins. Co.*, 162 Idaho 94, 102, 394 P.3d 796, 804 (2017), for the reasons explained more fully above there is a genuine dispute of material fact as to Travelers' breach of contract.

2. Travelers seeks to shift the burden of investigation to Royal Plaza, then blame Royal Plaza.

Travelers next contends that its adjuster, Eiband, "conducted a thorough investigation of

the Building on February 17, 2020," determined "that the TPO roofing membrane on the rooftop patio above Mr. Hugues' unit was too short and did not provide full coverage of the roof," and "further found that there were no damages related to the freezing and thawing of snow, sleet or ice." Mot. Summ. J. [Dkt. 36], at 15; *but see* Meyer Decl., Ex. 5 [Dkt. 37-5] (denial letter that does not cite any "construction defect" or other exclusion). "Critically," Travelers argues, "Eiband never received any information from the consultants the HOA engaged, yet Eiband came to the same conclusion that the HOA's consultants did . . . ." *Id*. at 15–16. Leaving aside that Upson and Weathertight did not come to conclusions regarding the root cause of the water intrusion, more importantly Travelers seeks to blame Royal Plaza for its own adjuster's incomplete investigation.

"If the information provided by the insured is sufficient to give the insurer an opportunity to investigate and determine its liability, the insurer must investigate and/or determine its rights and liabilities, and must do so in a fair and accurate manner." *Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 149 Idaho 299, 323, 233 P.3d 1221, 1245 (2010) (internal quotation marks omitted). "The insurer will determine its liability with the knowledge that it must be fair and accurate or suffer the consequences." *Brinkman v. Aid Ins. Co.*, 115 Idaho 346, 350, 766 P.2d 1227, 1231 (1988), *overruled in unrelated part by Greenough v. Farm Bureau Mut. Ins. Co.*, 142 Idaho 589, 130 P.3d 1127 (2006).

Here, Travelers seeks to invert its obligation to investigate and determine its rights and liabilities by attempting to place this burden on its own insured, and then blaming its insured for providing insufficient information. It is undisputed that Royal Plaza provided Travelers with sufficient information "to give the insurer an opportunity to investigate," as evidenced by the fact that Travelers did send someone, adjuster Eiband, out to investigate. Travelers cites to no policy language that requires Royal Plaza to have provided every bit of information and documentation that Travelers—now, in retrospect, and in the context of bad faith litigation—claims it should have. In fact, adjuster Eiband's own claim notes confirm that, at the time of the inspection, he was aware

of the contractors' estimates and chose not to obtain them. Meyer Decl., Ex. 3 [Dkt. 37-3], at TRAV_000004 ("I did not obtain a copy of the repair and/or mitigation estimate(s)."). An insurance carrier may only deny for lack of information when the information provided is insufficient to allow the insurer to even investigate; if the insurer is given enough information to allow investigation, "the insurer **must** investigate and/or determine its rights and liabilities. *Weinstein*, 149 Idaho at 323, 233 P.3d at 1245 (emphasis added).

By seeking to blame Royal Plaza for not providing enough information, after Travelers had enough information to send an adjuster to physically inspect on-site, Travelers essentially takes the position that it was Royal Plaza's duty to investigate and provide the results of that determination to Travelers. This is backwards: Travelers, and its selected adjuster, Eiband, are the insurance professionals; Royal Plaza is a condo owners' association, consisting of laypersons. Travelers is tasked with making a fair, accurate, and complete assessment of an insurance loss, not Royal Plaza. If Travelers believed that it lacked sufficient information to do so, it was Travelers' responsibility to continue investigating.

3. Travelers cannot shield itself by claiming that its bad faith was a result of a fairly debatable claim or that it made a good faith mistake.

Travelers contends that if coverage existed, then its actions were nonetheless blameless because "the claim was and is fairly debatable" or "the denial was a result of a good faith mistake." Mot. Summ. J. [Dkt. 36], at 16. Travelers mentions previous leaks at the Royal Plaza building, but never explains nor provides any authority as to why this would make the claim at issue here "fairly debatable."[9] Travelers does not acknowledge or recognize that a large mixed-use condominium building might have had several unrelated leaks over the course of its existence, and provides no evidence that the water intrusion at issue was related in any way to previous leaks. To

[9] To the extent that Travelers relies on an inferential leap from "previous leaks years before" to "fairly debatable claim," it should be recalled that Travelers had a duty of good faith to explain all bases for its denial, and that on summary judgment all reasonable inferences are drawn in favor of the nonmovant—Royal Plaza.

the contrary, Dave Conway, the longtime building superintendent, has indicated that even though the fall of 2019 was rainy, he did not observe or receive reports of any leaks until after it got cold enough in Boise for freeze/thaw cycles to occur. Conway Decl. ¶¶ 10–12, 22. In short, Travelers cannot point to leaks from previous years to establish a "fairly debatable" defense when there were no leaks immediately prior to the events that gave rise to the claim.

With regard to Travelers' alternative argument of good faith mistake, Travelers devotes one sentence: "Should Plaintiff establish that the building first sustained a covered cause of loss or provide some evidence that coverage exists for this claim, Plaintiff would have significant trouble establishing that Travelers did not make a good faith mistake based on the investigation and the HOA's own consultants' determination of the matter." Mot. Summ. J. [Dkt. 36], at 16–17. This is not an argument. The applicability of coverage is addressed above. Royal Plaza's "consultants"—that is, the roofers that Royal Plaza called out—did not make a "determination of the matter." They were just trying to get a roof to stop leaking, not conduct a root-cause analysis. There can be no good faith "mistake" in choosing to deny a claim by citing part of a coverage provision (that helps Travelers) and intentionally omitting the other half of the coverage provision (that helps Royal Plaza, the insured). And there is no good faith "mistake" in a denial relying, at least in part, on vague assertions of construction defect without providing any policy language or explanation to show the basis for denial.[10] This was not just the act of a single adjuster, Eiband, either; testimony reflects that Eiband's supervisor ratified Eiband's actions. Knowlton Decl., Ex. E (Powe Dep.), at 10:16–22 (reviewed claim for coverage determination), 11:15–20 (approved Eiband's denial letter to Royal Plaza). In sum, Travelers presents no evidence in support of its fairly debatable or good faith mistake arguments and is not entitled to summary judgment.

[10] Travelers cites in its brief to certain policy language regarding wear and tear and defective construction. *See* Mot. Summ. J. [Dkt. 36], at 12. This was never included in Travelers' denial provided to Royal Plaza. Far from being exculpatory, it is itself a badge of bad faith that Travelers would deny a claim on one stated and incomplete basis, force its insured to institute litigation to obtain benefits it is entitled to, then turn around and assert a new basis for denial some four years after the fact.

4. In Idaho a claim of bad faith does not require expert testimony.

Travelers next contends that Royal Plaza's bad faith claim fails for lack of a specific expert to opine on standards in the insurance industry. *Id*. at 17. Travelers provides no authority for the proposition that every bad faith claim must be supported by expert testimony. Bad faith cases sometimes do involve claim-specific expert witnesses—such as in *Cedillo*, the only authority cited by Travelers[11]—but Idaho law does not require expert testimony in bad faith cases, and Travelers gives no explanation why it should.

5. Royal Plaza has suffered extracontractual damages.

Finally, Travelers contends that "[s]hould Plaintiff establish that the claim is fairly debatable, Plaintiff still loses on the legal standard that the denial of coverage and the resulting harm is not fully compensable by contract damages." Mot. Summ. J. [Dkt. 36], at 17–18.[12] Proof of bad faith in Idaho requires the existence of extracontractual damages. *Robinson v. State Farm Mut. Auto. Ins. Co.*, 137 Idaho 173, 176, 45 P.3d 829, 832 (2002). Here, contract damages would consist of the cost to repair the direct physical damage caused by the water intrusion. Knowlton Decl., Ex. A (Policy), at POLICY_000018, at BUSINESSOWNERS PROPERTY COVERAGE SPECIAL FORM (MP T1 02 02 05), ¶ A (COVERAGE) ("We will pay for direct physical loss of or damage to Covered Property at the premises . . . ."). Any harm suffered by Royal Plaza beyond that is, by definition, extracontractual damages.

The evidence reflects that Royal Plaza did suffer harm not fully compensable by contract damages.[13] After the December 2, 2019 water intrusion in the Hugues unit began, the Royal Plaza

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[11] *Cedillo* does not stand for the proposition that bad faith claims necessarily require expert testimony. *See generally Cedillo v. Farmers Ins. Co.*, 163 Idaho 131, 408 P.3d 886 (2017). Rather, Travelers cites to a portion of that opinion that discusses that Cedillo had retained an expert, that that expert opined regarding the manner in which Farmers handled the claim rather than the real dispute, regarding amount, and this was not sufficient for purposes of that case. *Cedillo*, 163 Idaho at 137–38, 408 P.3d at 892–93. It is difficult to see the applicability here.

[12] This is phrased somewhat confusingly in the original, but Royal Plaza understands Travelers' meaning.

[13] Travelers cites to a case, *Weekes v. Ohio Nat'l Life Assur. Corp.*, as an example of the need to establish at least some evidence of extracontractual damages. Case No. 1:10-cv-566-BLW, 2011 U.S. Dist. LEXIS 134671 (D. Idaho Nov. 21, 2011). There, unlike here, the plaintiff admitted that there were no extracontractual damages.

board was required to take the time, effort, and expense of calling extra board meetings to attempt to rectify the situation. Then-president of Royal Plaza, Matthew Taylor, testified to the immediate difficulties caused by the denial from Travelers:

> But ultimately I think the claim—we got a denial letter and we spent a few board meetings, you know, trying to figure out how to make Phil happy because he had some habitual problems with his unit. He demanded that we kind of get a structural engineer because he had concerns with the fire retardant materials I think that covered the I-beams of his unit. So we had to find somebody, I think I had to call many, many different types of vendors . . . .

Taylor Dep. 23:21–24:7. Increased administrative costs, lost time and resources, inconvenience, and frustration are all cognizable harms not fully compensable by contract damages. *See also id.* at 24:24–25:12 ("So [Hugues] was just very, very, not maybe upset—I wouldn't say he's an upset kind of guy, but definitely frustrated. And so he wanted things to be done right. . . . And so Phil wanted his done very particularly and that was kind of a frustrating middle between him and the board because they were hoping that certain scopes would be okay, but we had to do additional stuff and all this was coming out of the pocket of the HOA."). Due to the length of time it took to complete repairs after the Travelers denial, Hugues moved out, costing Royal Plaza the monthly dues he had been paying and, presumably, lowering the value of the building itself when Hugues was required to disclose to any new buyer the history of his unit. Knowlton Decl., Ex. D (Hugues Dep.) 17:23–18:2 (forced to move out); 28:3–8 (required disclosure statements on purchasing unit).

In addition, due to the wrongful denial of the claim, Royal Plaza has had to shoulder the burden of a lawsuit—with the concomitant costs, lost time, inconvenience, and frustration—to obtain the benefits Royal Plaza was already entitled to. Because Royal Plaza can, and does, demonstrate at least some measure of harm not fully compensable by contract damages, Travelers

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Royal Plaza does not dispute that on summary judgment a bad faith claim needs to set forth some evidence of extracontractual damages, and does so here.

is not entitled to summary judgment.

D. Royal Plaza has established a viable claim for negligent adjustment.

Travelers contends that Royal Plaza cannot maintain a cause of action for negligent adjustment because Royal Plaza cannot establish the breach of duty element. This is incorrect.

Idaho recognizes a cause of action for negligent adjustment in "cases where an insurer negligently denies or delays payment of an insurance claim." *Selkirk Seed Co. v. State Ins. Fund*, 135 Idaho 649, 653, 22 P.3d 1028, 1032 (2000). The elements of negligent adjustment are "(1) a duty, recognized by law, requiring a defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage." *Id*. Here, Travelers challenges only the second element, breach: "Plaintiff further fail[s] to establish any breach of duty owed by [T]ravelers to the HOA." Mot. Summ. J. [Dkt. 36], at 18. Travelers contends that there is no gray area in this case, and that "the loss that occurred to the Building was a result of defective construction methods and not a covered cause of loss as required by the policy." *Id*.; *but see* Meyer Decl., Ex. 5 [Dkt. 37-5] (denial letter that does not cite any "construction defect" or other exclusion).

First, in Idaho, breach of duty is a question for the jury and is not susceptible of summary judgment. The Idaho Supreme Court has held that "[i]n negligence actions, the determination of whether there is a duty is a question of law to be decided by the court. Breach and proximate cause, on the other hand, are **factual questions to be determined by the trier of fact**." *Bramwell v. S. Rigby Canal Co.*, 136 Idaho 648, 650, 39 P.3d 588, 590 (2001) (emphasis added).

Second, while Travelers insists there is no question that the water intrusion was the "result of defective construction methods," and that there is no evidence of any other cause, there is at least a genuine dispute of material fact as to issue. Dave Conway, the longtime building superintendent, determined that the water intrusion was a result of freezing and thawing, as well as ice damming; that there were no observed or reported leaks during the rainy fall; and that the

water intrusion only began after Boise got cold enough to freeze. Conway Decl. ¶¶ 10–11, 18, 22. Matthew Taylor, then-president of Royal Plaza, testified similarly. *See* Taylor Dep. 55:19–24, 64:2–10, 64:15–20, *and* 65:11–22. A genuine dispute of material fact as to the cause of the water intrusion, as discussed here and more fully above, is fatal to Travelers' summary judgment on breach. *Accord* Idaho Code § 41-1329(4) (prohibiting practice of refusing to pay without conducting a reasonable investigation based upon all available information).

Third, Travelers omits the other breaches that Royal Plaza alleges. It is not only that Travelers denied a covered claim. There is also negligent breach of Travelers' obligation to act in good faith in the manner of the denial. This took the form, *inter alia*, of the denial letter only presenting the policy language that supports Travelers' position, but which truncated that policy language literally mid-sentence to omit the remainder of the language that provides coverage to Royal Plaza. *Compare* Meyer Decl., Ex. 14, at POLICY_000021 (full language of ¶ A.5.a.(1)(a)–(b)) *with id*., Ex. 5 (denial letter omitting ¶ A.5.a.(1)(b)). Travelers had a duty to accurately present all relevant policy language, even if it cut against Travelers' interests. *See* Idaho Code § 41-1329(1) (prohibiting practice of "[m]isrepresenting pertinent facts or insurance policy provisions relating to coverages at issue"); *see also* Taylor Dep. 75:1–76:18 (then-president led to believe that denial "was a complete and accurate representation of the coverages under the policy").

In addition to omitting policy language from the denial that supports Royal Plaza's position (*i.e.*, granting coverage if "[t]he loss or damage is caused by or results from thawing of snow, sleet or ice on the building or structure"), Travelers' denial letter also omitted policy language that it now relies on to continue denying coverage. After Travelers took the position that the water intrusion was excluded as being caused by defective construction, Travelers never bothered to inform Royal Plaza of that fact. *See* Eiband Dep. 45:4–11 ("A. That determination was made after my initial inspection and upon reviewing the policy. . . . . Q. That you're going to deny the claim based on defective construction exclusion in the policy? A. Correct."). Travelers still maintains

this position, despite it not being included in the formal denial. *Compare* Mot. Summ. J. [Dkt. 36], at 18 ("The loss that occurred to the Building was a result of defective construction methods . . . .") *with* Meyer Decl., Ex. 5 (denial letter that cites no policy language or other "defective construction" exclusion); *see also* Idaho Code § 41-1329(14).

Finally, Travelers' citation to *Peck v. Cincinnati Ins. Co.*, Case No. 1:14-cv-00500-BLW, 2016 U.S. Dist. LEXIS 136465 (D. Idaho Sept. 30, 2016), is unavailing. Travelers cites it for the proposition that if a bad faith claim fails, so too does any accompanying negligent adjustment claim. Mot. Summ. J. [Dkt. 36], at 19. This is not so. Idaho law does not hold that the failure of a bad faith claim is necessarily fatal to a negligent adjustment claim, and Travelers cites to no Idaho authority that says so. Nor can Travelers do so: a bad faith claim has different elements than a negligent adjustment claim, and facts that may sustain one may not sustain the other. This makes sense; if the two different causes of action necessarily stood or fell together, there would be no need for two different causes of action. The only lesson of *Peck* is that under the particular facts of that case, the court found that summary judgment on both claims was appropriate. *See Peck*, 2016 U.S. Dist. LEXIS 136465, at *16 (carelessness or mistake could maintain negligent adjustment claim); *see also Cedillo*, 163 Idaho at 137, 408 P.3d at 892 (providing example of when a bad faith claim might fail when negligent adjustment claim survives).

Because Travelers cannot show a failure of the breach of duty element of Royal Plaza's negligent adjustment claim, summary judgment is inappropriate.

V. CONCLUSION

For the foregoing reasons, Plaintiff Royal Plaza Master Owners Association, Inc. respectfully requests that the Court deny Travelers' Motion for Summary Judgment.

DATED this 19th day of August 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on the August 19, 2024, I caused a true and correct copy of the within and foregoing to be forwarded by the method(s) indicated below, to the following:

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