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THE HON. DEBORA K. GRASHAM

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ROYAL PLAZA MASTER OWNERS ASSOCIATION, INC., an Idaho Corporation,

Plaintiff,

v.

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

DEFENDANT TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA'S MOTION FOR SUMMARY JUDGMENT

I. MOTION FOR SUMMARY JUDGMENT

Defendant Travelers Property Casualty Company of America ("Travelers" or "Defendant") submits this Motion for Summary Judgment along with the Declaration of Justin L. Meyer and exhibits attached hereto. Travelers respectfully requests that the Court grant summary judgment on the following claims:

1. On Plaintiff's First Claim for Relief, alleging Breach of Contract – on the grounds that there is no question of material fact that Travelers has not breached its contract with Plaintiff.

2. On Plaintiff's Second Claim for Relief, alleging Bad Faith – on the grounds that there is no question of material fact that Travelers denied Plaintiff's claim in bad faith and that the claim was (and is) fairly debatable.

3. On Plaintiff's Third Claim for Relief, alleging Negligent Adjustment – on the grounds that there is no question of material fact that Travelers has failed to conform or abide by industry standards in adjusting Plaintiff's claims.

4. On Plaintiff's Fourth Claim for Relief alleging recovery of attorney fee's – on the grounds that Plaintiff cannot sustain its First, Second and Third Claims for Relief and are not entitled to attorney's fees.

II. INTRODUCTION

This matter arises from Travelers' denial of the Royal Plaza Master Owners Association (the "HOA") claim for water damage to interior components of the Royal Plaza Condominium building (the "Building") located downtown Boise.

The HOA engaged the Upson Company ("Upson") in August 2019 to perform roof-top maintenance which included debris clean-off and repair of numerous tears, holes and voids in the Building's thermoplastic polyolefin ("TPO") roof membrane.[1] In September 2019, the HOA engaged Hammersmark Building Company ("Hammersmark") to reconfigure the patio rooftop and install new railings.[2] On December 2, 2019, Phil Hugues, owner of unit 602, reported water leaking into his top floor unit.[3] Despite leakage occurring as early as December 2, 2019, the HOA did not have the vendor that would inspect the leak, Weathertight Roofing ("Weathertight"), perform an inspection until January 13, 2020, over a month later. For reasons unknown, the HOA did not contact Travelers until February 11, 2020.[4]

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[1] Plaintiff's Amended Complaint [Dkt. 17] ("Complaint") at ¶ 5.
[2] *Id*. at ⁋6.
[3] Stmt. Of Facts. at ⁋ 3, Ex. 1 at pg. 12:20-13:8.
[4] *Id. at* ⁋6, Ex. 2.

On February 17, 2020, Travelers' adjuster Jake Eiband conducted a site visit and inspection of the roof.[5] Eiband 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 that the cause of loss resulted from rain.[6] Those conditions were in the areas where Upson had presumably repaired the TPO and where Hammersmark had modified rooftop planters and installed the railings. Eiband further found that there were no damages related to the freezing and thawing of snow, sleet or ice.[7]

On March 23, 2020, Travelers issued a letter denying the claim, stating "because there was no damage sustained or other covered loss that occurred prior to water entering the building, coverage is not afforded for this loss."[8] Subsequently, the HOA retained a forensic architect and an engineer that inspected the building on June 2, 2020. Their report concludes that water intrusion had damaged the building's fireproofing, specifically the Sprayed Fire-Resistive Material ("SFRM") that was applied to the steel structure of the building – but does not provide any indication as to how or why the water intrusion is or could be related to a covered loss under the policy. Instead, the structural engineer was advised by the HOA that the water leak had been occurring and became worse when an addition to the roof channeled water into a leaking area over the apartment.[9] The Complaint alleges that "a substantial contributing factor of the water intrusion was the freezing and thawing of ice and snow buildup in Boise, Idaho during the winter months"[10] and, that Defendant "misrepresented the coverage of the policy [in denying the claim] and purposefully did not cite to" a provision of the Policy that provided coverage.[11]

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[5] *Id.* at ⁋7, Ex. 4; *See also Id*. at ⁋8 Ex. 3.
[6] *Id*. at ⁋8 Ex. 3; *See also Id*. at ⁋9 Ex. 5.
[7] Deposition of Jacob Eiband, pg. 41:3-16, Ex. 6, p. 5.
[8] Stmt. Of Facts, ⁋ 9, Ex. 5.
[9] *Id*. at ⁋11, Ex. 7.
[10] Complaint at ⁋10.
[11] *Id.* at ¶12.

On August 20, 2021, the HOA sent a letter to Travelers requesting reconsideration of its coverage position.[12] Notably, the HOA's letter fails to provide any substantive information for Travelers to reconsider its position nor was information provided that would establish that the building sustained a covered cause of loss. Plaintiff then filed the instant suit.

III. POINTS AND AUTHORITIES

A. Summary Judgement Standards

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. When that occurs, the burden then shifts to the non-moving party to present "specific facts" showing there is a "genuine issue for trial."[13] Summary judgment "is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element which is essential to the non-moving party's case and upon which the non-moving party will bear the burden of proof at trial."[14]

B. Insurance Contract Interpretation and Coverage Under Idaho Law

Under Idaho law, an insured must prove coverage exists. *ABK, LLC v. Mid-Century Insurance Company*, 166 Idaho 92 (2019) citing *Robinson v. State Farm Mut. Auto. Ins. Co*., 137 Idaho 173 (2002). In *ABK*, the court states that when anti-concurrent causation language is used in an insurance policy, an insurer need only show an excluded cause is a cause of the damage, not the only or sole cause. In the event the court finds that an anti-concurrent causation provision is excluded or not subject to the provision cited, the Court can conduct a proximate cause analysis to determine if the loss was sustained by a sequence or concurrence of at least two causes, one covered and the other excluded, to determine the cause setting the chain of events in motion or to determine the predominant cause. *ABK* at 102.

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[12] Stmt. Of Facts, ¶13, Ex. 8.
[13] *F.T.C. v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) (citation omitted), citing to *Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir 2007).
[14] *Garriott v. W. Med. Assocs., PLLC,* No. 2:16-CV-00081-CWD, 2017 WL 3015872, at *2 (D. Idaho July 14, 2017) (citations omitted).

There is no dispute that Idaho law governs the interpretation of the Policy itself, because the insurance policy was entered into in Idaho. Under Idaho law, when interpreting an insurance policy, the meaning of the policy provisions and the parties' intent regarding the policy "must be determined from the plain meaning of the insurance policy's own words."[15] An insurance contract is construed "according to the entirety of its terms and conditions."[16] "Unless contrary intent is shown, common, non-technical words are given the meaning applied by laymen in daily usage—as opposed to the meaning derived from legal usage—in order to effectuate the intent of the parties."[17] "If the policy language is clear and unambiguous, coverage must be determined in accordance with the plain meaning of the words used."[18] "Whether an insurance policy is ambiguous is a question of law over which the court exercises free review."[19] A clause in an insurance policy is ambiguous only if it "'is reasonably subject to differing interpretations.'"[20] A policy provision "is not ambiguous merely because it is poorly worded if the meaning is otherwise clear when read in context . . . [or] merely because a reader may have to stop and think about what it means."[21] When a reasonable interpretation of policy wording is provided, "[a]bsent a reasonable alternative interpretation, the provision is not ambiguous."[22]

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[15] *Amanatullah v. United States Life Ins. Co. of the City of New York,* No. 4:15-CV-00056-EJL, 2017 WL 522947, at *4 (D. Idaho Feb. 8, 2017) (citation omitted).
[16] Idaho Code §41-1822 ("Construction of policies").
[17] *United States for use & benefit of Contractor's Equip. Supply Co. v. TK Constr., US, LLC*, No. 1:14-CV-00134-REB, 2017 WL 2805491, at *3 (D. Idaho June 28, 2017) (citations omitted).
[18] *Am. States Ins. Co. v. Edgerton,* No. CV 07-239-S-MHW, 2008 WL 4239000, at *3 (D. Idaho Sept. 3, 2008) (citing *Mut. of Enumclaw Ins. Co. v. Roberts*, 128 Idaho 232, 235, 912 P.2d 119, 122 (1996)); *see also GF & C Holding Co. v. Hartford Cas. Ins. Co*., No. 1:11-CV-00236-BLW, 2013 WL 1091323, at *3 (D. Idaho Mar. 15, 2013) (citing *Buckley v. Orem,* 112 Idaho 117, 122, 730 P.2d 1037, 1042 (Ct. App. 1986).
[19] *Armstrong v. Farmers Ins. Co. of Idaho*, 147 Idaho 67, 69, 205 P.3d 1203, 1205 (2009) (citation omitted).
[20] *Farm Bureau Mut. Ins. Co. of Idaho v. Eisenman*, 153 Idaho 549, 552, 286 P.3d 185, 188 (2012) (citations omitted).
[21] *Purdy v. Farmers Ins. Co. of Idaho,* 138 Idaho 443, 446, 65 P.3d 184, 187 (2003).
[22] *Id.* at 447.

C. Elements of A Bad Faith Claim

The required elements of a first-party bad faith claim under Idaho law include (1) the insurer intentionally and unreasonably denied or withheld payment, (2) the claim was not fairly debatable, (3) the denial or failure to pay was not the result of a good faith mistake, and (4) the resulting harm is not fully compensable by contract damages. *Robinson v. State Farm Mut. Auto. Ins. Co*., 137 Idaho 173, 176, 45 P.3d 829, 832 (2002). Fairly debatable means that there is a reasonable dispute or legitimate question over the "eligibility, amount or value of the claim." *Id,* at 177-78. Although the tort of bad faith is not a breach of contract claim, to find that the insurer committed bad faith there must also have been a duty under the contract that was breached. *Id* at 179. Idaho courts have been very willing to dismiss bad faith claims when the dispute appears to be genuinely debatable.[23]

D. Elements of Negligent Adjustment

To prove a negligent adjustment claim, the HOA must show "(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." *Reynolds v. American Hardware Mut. Ins. Co.*, 115 Idaho 362, (1988).

IV. APPLICATION OF LAW TO FACTS

A. Plaintiff's Breach of Contract Claim Fails as a Matter of Law because the Stated Basis for Denial of the Claim is Proper and Reasonable

During his on-site inspection of the Building, Mr. Eiband determined that the TPO was too short in the area where the planter had been configured and where the fence was installed and that the waterproof membrane and barrier were not properly installed.[24] Eiband concluded that

[23] *See Dat Kim Partners, LLP v. Travelers Casualty Insurance Company of America, et al.*, District Court of the Fourth Judicial District, State of Idaho, County of Ada, Case No. CV-OC-2011-12040:*Rossman v. Farmers Ins. Exchange*, District Court of the Fourth Judicial District, State of Idaho, County of Ada, Case No. CV01-17-11405; *Engineered Structures, Inc. v. Travelers Property and Casualty Company*, USDC Case No. 1-16-cv-00516-CWD.

[24] Stmt. Of Facts, ¶9, Ex. 5.

the void was the result of defective construction, and that the void through which the water entered was not caused by a Covered Cause of Loss.[25]

The coverage denial letter cites section A. COVERAGE, 5. Limitations, a.(1)(a) which provides, in pertinent parts:

> **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;[26]

The HOA's Complaint insists that Travelers misrepresented the Policy terms by not citing to section A.5.a.(1)(b) of the policy which provides that a loss would be covered if the loss was caused by the "thawing of snow, sleet or ice on the building structure."[27] Plaintiff also alleges that Travelers failed to conduct a reasonable investigation.[28] The HOA contends that there was coverage under the policy, but strangely, provide no additional information as to how coverage is established.[29] The HOA's breach of contract theory is flawed and untenable on several fronts.

1. Plaintiff's claims that the "leaks" were caused by damage related to the melting of snow and ice is unsupported.

At the outset, we note that the HOA's allegation that the leaks were caused by snow or ice is objectively wrong. Weather records from the National Oceanic and Atmospheric Administration for Boise show a mean of 0.04 and 0.05 inches of precipitation reported each day between November 27 and November 30, 2019; no precipitation on November 31, 2019; a mean

[25] *Id.*
[26] *Id.*
[27] Complaint at ¶ 20.
[28] *Id.*
[29] *See* Complaint generally.

of 0.06 inches of precipitation on December 1, 2019; and a mean of 0.04 inches of precipitation on December 2, 2019—the date of the reported loss.[30] Dispositively, not a single expert disclosed by Plaintiff can opine on whether sufficient conditions to establish that the roof's damage and subsequent leakage was caused by freezing and thawing of water, snow and ice. In fact, Plaintiff's experts[31] do the opposite.

2. Plaintiff's Experts agree that the leaks in the roof are consistent with wear and tear or faulty workmanship.

Upson was retained by the HOA to locate and repair the leaks at issue.[32] The HOA retained Upson before notifying Travelers of the leak and without any notice to Travelers. Upson's January 31, 2020 invoice to the HOA notes that technicians spent "multiple days chasing the leaks" and that several areas were patched.[33] In an accompanying report, photographs depict water getting under a rooftop door, existing holes in the roof that "will result in water infiltration," voids in the TPO, and counterflashing and caulk failures allowing water penetration.[34] Critically, 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.

The HOA also retained Weathertight Roofing ("Weathertight") to investigate and repair the subject leaks after the date of loss. In response to Travelers' subpoena, Weathertight produced a January 13, 2020, invoice that notes:

> "To prevent further leaks and damage, the areas found are only temporarily watertight. After inspecting roof area's where leaks were reported. Once I removed snow and ice, I found numerous voided membrane seams and holes in roofing membrane, in affected and nearby areas. I dried areas and injected sealant for a temporary seal.
>
> Note: Information given to me about the project, The roofing is a 45 mil TPO membrane, with poly iso insulation, with tapered cricket foam in diverted areas, on a metal fluted

[30] Ex. 9, Weather records from the National Oceanic and Atmospheric Administration for Boise during the year 2019.
[31] Plaintiff's experts consist of non-retained expert who were vendors that inspected and/or repaired the building after the date of loss occurred.
[32] Stmt. Of Facts, ¶4, Ex. 10.
[33] *Id*. at p. 1.
[34] *See Id* generally.

> decking substrate. Its [sic] my understanding that the roof was installed back in 2007 (12-13 years old). Since then I was told **numerous leaks have occurred**. After what I have found, **I can believe that the roof was not installed properly, due to its significant deficiency's [sic] in seam's**. . ."[35]

Although the Weathertight invoice references melted snow and ice, Weathertight does not state that melting snow or ice was the cause of the leaks or the resulting damage. Once again, quite the opposite is true. Weathertight, in an email to Travelers, summarized the following:

> "When we were call to 1112 west main [the Building] to fix the leaks in the roof we checked the door terminations but couldn't find any leaking coming from those areas, then we found out that there was some modifications done to the planter area and that they had been deleted and had been roofed over, so we removed the fence railing [which refers to the railing installed by Hammersmark the previous summer] and found that there was not Dmetal flashing that was installed. The water from on top of the Planter areas and from the rain was running down the walls of the planters and behind the grout of the granite. The roof membrane from the patio roof ran up under the granite but didn't continue all the way to the top of the Planter, so any water getting behind the granite we getting behind the patio wall flashing and was ponding under the patio and causing leaking in several different areas."[36]

Clearly, the admissions by Plaintiff's own experts confirm that there were significant issues with the roofs installation and maintenance which resulted in several areas of the roof to leak., and not the freezing and thawing of snow, ice or sleet which caused such damages.

Plaintiff's other non-retained expert, Hammersmark, confirms what Plaintiff's other experts – and Travelers – already suspected the cause of the leaks resulted from:

> Appears [sic] that the leaks were a result of a lack of continuous waterproofing membrane in floor/wall connection, modifications to the planters to delete them and/or no flashing above granite base to divert water onto deck, none of which was in my scope work. The roof membrane should have been sealed to wall before the base material (granite) was applied to wall. A water proof coating on the wall should have then overlapped sealed seam if possible to prevent water penetration if the seam fails. Doesn't sound like

[35] Stmt. Of Facts, ₱5, Ex. 11.
[36] Id. at ₱12, Ex. 12.

either was done.[37]

Once again, the admissions by Plaintiff's very own experts establish that the result of the damage and subsequent leaking of the roof was due to inadequacies in the roof unrelated to the freezing of snow, ice or sleet. The admissions from Plaintiff's consultants and subsequent experts confirm that the water entered the Building because the TPO was littered with holes, tears and voids and the roof was in need of replacement.

These are all conditions that preceded the loss and are examples of excluded pre-existing wear and tear issues and/or excluded faulty or inadequate workmanship, repair, renovation and/or maintenance. Even if Travelers failed to cite the inadequate repair and maintenance provision in the policy, such a provision would only supplement the analysis and further support the denial by Travelers. The simple answer is that the building did not first sustain a covered cause of loss in which rain, snow, sleet, ice, sand or dust enters, nor did the thawing of snow, sleet or ice occur that would result in damage to the building, and Mr. Eiband confirms this position in his deposition.[38] Plaintiff has not produced a scintilla of evidence to suggest otherwise.

3. Travelers' experts agree with Plaintiff's experts that the water penetration was facilitated by wear and tear and faulty workmanship.

After suit was filed, Travelers retained Construction Systems Management, Inc. ("CSMI") as its retained expert. CSMI concludes that the damages claimed by the HOA are attributable to defective construction and modifications to the roof and inadequate maintenance.[39] CSMI reviewed all of the invoices and reports prepared by the HOA's consultants (and subsequent experts) and agrees with their findings that there were numerous pre-loss voids, holes and tears in the TPO and deteriorated caulking, all of which facilitated water penetration.

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[37] *Id*.
[38] Ex. 6 at pg. 38:24-39:17.
[39] Ex. 13 at pg. 3, 8.

With regard to the fire beams that were allegedly subject to damage as a result of the leaks, CSMI asserts that corrosion on structural beams suggests that they were subject to *prolonged* water/moisture exposure that pre-dates the loss at issue.[40] Photographs taken of those beams suggest that they had undergone repairs prior to the loss which indicate that the HOA had notice of the condition of the beam before the loss occurred.[41]

Simply put, the HOA cannot point to any evidence that Travelers' investigation of the loss was inadequate. Travelers conducted a site inspection which resulted in the finding that the leaks were the result of problems with the TPO. The HOA did not share any of its consultants' findings with Travelers before the claim was denied. Despite not getting the benefit of the vendor's findings, adjuster Eiband reached the same conclusion. In short, the adequacy of Travelers' investigation has been ratified by the HOA's own consultants.

4. Neither the thawing and melting of snow, ice or sleet nor the defective construction provision of the policy was necessary to include in the denial letter.

Plaintiff asserts that Defendants failure to add in the policy provision A.5.a.(1)(b) which provides that a loss would be covered if the loss was caused by the "thawing of snow, sleet or ice on the building structure" was a purposeful misrepresentation of the Policy.[42] Adjuster Jacob Eiband debunks this theory, stating that in his analysis and in discussions with other Travelers claims representatives, that policy provision A.5.a.(1)(b) was unnecessary to include in the denial letter:

> Q. And so you didn't -- you purposefully didn't include the disjunctive "or" in the subparagraph B because you just didn't think there was anything that was relevant to your denial?
>
> A. I didn't see any damage that would be interpreted in this regard as far as the B is concerned. My interpretation of that is that damage was caused because of thawing of snow, ice, et cetera to the material. And in this instance I didn't see any cause for

[40] *Id*. at pg. 6-7, 8.
[41] *Id* at 3-6, 8.
[42] Complaint at ¶ 20

> including this because I didn't see any damage that I would have considered related to the thawing of snow, ice that would have created a storm-generated opening that would then allow water and moisture to enter the building.[43]

Plaintiff also seems to imply that Travelers failed to address the faulty workmanship provision of the policy, which states the following:

> **B. EXCLUSIONS**
>
> ***
>
> **2.** We will not pay for loss or damage caused by or resulting from any of the following:
>
> ***
>
> **d. (1)** Wear and tear;
>
> ***
>
> **3.** We will not pay for loss or damage caused by or resulting from any of the following under Paragraphs **a.** through **c. . . .**
>
> ***
>
> **c.** Faulty, inadequate or defective:
> **(1)** Planning, zoning, development, surveying, siting;
> **(2)** Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
> **(3)** Materials used in repair, construction, renovation or remodeling; or
> **(4)** Maintenance;
> of part or all of any property on or off the described premises.[44]

Once again, Eiband confirms that while the defective construction exclusion was considered, it was not the basis of the denial.

[43] Ex. 6 at pg. 41:3-15.
[44] Ex. 14, pp. 28-30.

> Q: That you're going to deny the claim based on defective construction exclusion in the policy?
>
> A. Correct.
>
> Q. Why wasn't that in this letter?
>
> A. At the time I applied what I felt was the main portion of the denial or the basis of the denial.
>
> Q. Which is that Travelers won't pay for the loss of or damage to 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. That was the exclusion?
>
> A. That's the exclusion. It was my interpretation, my understanding of my inspection and the interpretation of the policy that coverage would not apply because there was not first a storm-generated opening that allowed water to enter the property. It was a lack of adequate construction or remodel of that section, which allowed the water into the building and caused the damage, which is an exclusion in this policy.
>
> …
>
> Q: Do you think that that is contained in this [denial] letter?
>
> A. I do not see it in this letter.
>
> Q. I would expect that you would put that in your denial if that was the basis for denying it, isn't that how you were trained?
>
> A. Well, it wasn't -- as I mentioned, it wasn't the main basis of my denial. It was a section of my denial. The main basis is listed here for the denial.[45]

Travelers maintain the position that there was not a covered cause of loss since the Building did not sustain damage by a covered cause of loss through which rain, snow, sleet, ice, sand or dust entered. Policy section A.5.a.(1)(a) is applicable and is the basis for denial by Travelers. While Plaintiff suggests that Travelers misrepresented the policy by failing to include Policy section A.5.a.(1)(b) or the defective construction exclusion, the matter of fact is

[45] Ex. 6 at pg. 45:8-46:19

Traveler's denial was grounded in the evidence and investigation that was known to Travelers at the time of the denial which concluded that the Building did not first sustain a covered cause of loss.

Should this court be persuaded that Travelers should have asserted section A.5.a.(1)(b) or the defective construction exclusion of the policy, Travelers notes that failure to include these provisions does not suddenly establish a breach of contract claim. Travelers did not "misrepresent" the policy when each of the policy provisions (if included) further establish that coverage was not afforded to Plaintiff. There is no breach of contract claim that can be sustained by Plaintiff. Plaintiff's experts, Travelers' adjusters and Travelers' expert all agree that the Building first sustained damage that was not an applicable covered cause of loss under policy section A.5.a.(1)(a).

5. Plaintiff has failed to establish coverage as required by Idaho Law.

Under Idaho law, an insured must prove coverage exists. *ABK, LLC v. Mid-Century Insurance Company*, 166 Idaho 92 (2019) citing *Robinson v. State Farm Mut. Auto. Ins. Co*., 137 Idaho 173 (2002). Critically, Plaintiff has asserted claims insisting that Travelers have taken a wrongful position – but the issue persists: Plaintiff has not established coverage and cannot do so. As stated above, Plaintiff's own experts confirm that the cause of leakage into the building was not a result of a covered cause of loss, but instead, defective construction or wear and tear. Plaintiff has not and cannot meet its burden to establish coverage exists.

B. <u>Bad Faith Claims</u>

As discussed above, the required elements of a first-party bad faith claim under Idaho law include that the *plaintiff must show* (1) the insurer intentionally and unreasonably denied or withheld payment, (2) the claim was not fairly debatable, (3) the denial or failure to pay was not the result of a good faith mistake, and (4) the resulting harm is not fully compensable by contract damages. *Robinson v. State Farm Mut. Auto. Ins. Co*., 137 Idaho 173, 176, 45 P.3d 829, 832 (2002) (emphasis added). Fairly debatable means that there is a reasonable dispute or legitimate

question over the "eligibility, amount or value of the claim." *Id,* at 177-78. Although the tort of bad faith is not a breach of contract claim, to find that the insurer committed bad faith there must also have been a duty under the contract that was breached. *Id* at 179. Idaho law is also clear that Plaintiff must establish that, based on the denial of coverage, the resulting loss is not fully compensable by contract damages. *See Weekes v. Ohio Nat. Life Assur. Corp*., No. 1:10-CV-566-BLW, 2011 WL 5835596, at *2 (D. Idaho Nov. 21, 2011).

1. Plaintiff has failed to establish the underlying breach of contract claim.

Travelers' denial of the claim was not made in bad faith. As a threshold matter, the claim fails for lack of an underlying breach of contract. As discussed above, the HOA has not put forth any information that suggests the loss was not caused by pre-existing issues with the Building's roof or that the loss is otherwise covered. Accordingly, the HOA has not and cannot meet it the burden of proving that Travelers' denial of the claim was *not* "fairly debatable."

2. Plaintiff never provided supplemental information to establish that Travelers decision was wrong or that a covered cause of loss existed.

Plaintiff alleges that the basis for Travelers bad faith includes "callously engaging in a course of conduct… [that] deprived the Plaintiff of rights and interest was entitled to receive" and that "Travelers misrepresented pertinent facts or insurance policy provisions relating to coverages at issue and refused to pay claims without conducting a reasonable investigation upon all available information."[46] Plaintiff alleges that such conduct was "an extreme deviation from the standards of the industry."[47]

Plaintiff fails to bring these allegations full circle. Eiband conducted a thorough investigation of the Building on February 17, 2020. Eiband 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 that there were no damages related to the freezing and thawing of snow, sleet or ice. Critically, Eiband never received any information from the

[46] Complaint at ₱28 and ₱29
[47] *Id*. at ₱28

consultants the HOA engaged, yet Eiband came to the same conclusion that the HOA's consultants did: That there were issues with the construction of the roof and the building therefore did not sustain a overed cause of loss under the policy. Eiband subsequently discussed this claim with his superiors at Travelers and issued the proper denial of coverage letter on March 23, 2020. The HOA never attempted to supplement such information in response to this denial.

The HOA has failed to establish how Travelers' conduct was "an extreme deviation from the standards of the industry" and have further failed to establish that Travelers did not conduct a reasonable investigation. There is simply no factual support for Plaintiff's bad faith claims.

3. Even if the Plaintiff could somehow establish that coverage existed, the claim was and is fairly debatable or the denial was a result of a good faith mistake.

In discussing this matter with Travelers, the HOA's president (Matthew Taylor) relayed that flooding of units has been an issue since the building was built and that the HOA was requesting to amend its claim for water intrusion for the previous 13 years.[48] Further, the HOA represented to its consultants that the building had a recurring leak for at least 10 years prior to the date of loss.[49] Regardless of the HOA's position, Jake Eibands visit to the Building and subsequent inspection of the roof resulted in the finding that pre-existing problems with the TPO was the cause of the leaks. Despite not having information from the HOA's own consultants, Travelers denial mirrors the HOA's own experts – that there is no shred of evidence to suggest that a covered cause of loss first occurred to the building which would enact coverage, but instead, defective construction and wear and tear was the cause of the leakage that damaged the building.

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

[48] Stmt. Of Facts, ₱10, Ex. 15.
[49] Id at ₱11, Ex. 7.

and the HOA's own consultants' determination of the matter. Plaintiff is unable to show that this claim was not fairly debatable or a result of a good faith mistake or that Travelers engaged in bad faith conduct.

4. Plaintiff's Bad Faith Claims fail as there is no support for Plaintiff's allegations through its experts.

Plaintiff has failed to produce a single expert that can opine on the standards of the insurance industry or even address how Travelers' denial of coverage was done in bad faith. In *Cedillo v. Farmers Ins. Co*., the Supreme Court of Idaho found that, despite an expert report discussing whether the claim was fairly debatable, there were no specific facts presented by the expert that could be established as not fairly debatable. *Cedillo v. Farmers Ins. Co*., 163 Idaho 131, 408 P.3d 886, 892–93 (2017). The court upheld summary judgment in the favor of the insurer on their motion for summary judgment on plaintiff's bad faith claims. *Id*. Unlike *Cedillo*, where the plaintiff's produced experts and expert reports discussing whether the claims were fairly debatable, Plaintiff here has presented no experts here that show any part of the claim was not fairly debatable or how Travelers has engaged in bad faith. As such, Plaintiff's claims should fail under the precedent set forth in *Cedillo.*

5. Plaintiff resulting harm is fully compensable by contract damages.

Should 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. In *Weekes v. Ohio Nat. Life Assur. Corp*., a plaintiff had allegedly misrepresented a statement in an application on his life insurance policy regarding another life insurance policy that was already in place. See *Weekes*, No. 1:10-CV-566-BLW, 2011 WL 5835596, at *2 (D. Idaho Nov. 21, 2011). Importantly, the court established that "the bad faith claim fails because the undisputed facts show that plaintiff will be fully compensated by contract damages. [plaintiff] testified that other than her claim for $2 million from Ohio National, she has not been otherwise harmed… She also testified that she has not suffered any substantial emotional

distress… and there is no evidence of any financial distress…" *Id*. at 8. The court ultimately found that " [u]nder these undisputed facts, [plaintiff] cannot proceed on her bad faith claim."

In the instant case, Plaintiff alleges bad faith and that there was an extreme deviation under the "standards of the industry."[50] As required under *Robinson*, Plaintiff must show that the resulting harm is not fully compensable by contract damages. *Robinson*, 137 Idaho 173, 176, 45 P.3d 829, 832 (2002). Plaintiff has not alleged or provided any evidence of financial distress or other types of harm. Critically, Plaintiff's damages can be wholly remedied through the insurance contract. Defendant respectfully requests that this Court, like the court found in Weekes, that Plaintiff cannot proceed on its bad faith claim when it is clear that Plaintiff can be fully compensated under contract damages.

C. Negligent Adjustment Claims

To prove a negligent adjustment claim, the HOA must show "(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." *Reynolds v. American Hardware Mut. Ins. Co.*, 115 Idaho 362, (1988).

Plaintiff further fail to establish any breach of duty owed by travelers to the HOA. As discussed above, Travelers' denial of the claim was based on Mr. Eiband's finding that pre-existing problems with the TPO was the cause of the leaks, a finding that mirrors the HOA's own consultants. Travelers even confirmed that if there was a "grey area" in terms of coverage, that adjusters "encouraged… to err on the side of the insured."[51] There is no grey area in the instant matter. 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. No other covered cause of loss has been identified by any other fact witness or expert in this matter. Adjustment of the claim was carried

[50] Complaint at ¶30.
[51] Ex. 6 at pg. 29:7-19.

out in accord with the terms of the Policy and was consistent with all extracontractual obligations. There is no negligent adjustment claim that can be sustained under these facts.

Specifically, the District court of Idaho has also clearly laid the groundwork that "an independent tort action arises only where the insured can show bad faith—that the insurer intentionally or unreasonably denied or withheld payment and as a result of the insurer's conduct, the plaintiff was harmed in a way not fully compensable by contract damages." *Peck v. Cincinnati Ins. Co.*, No. 1:14-CV-00500-BLW, 2016 WL 5746351, at *6 (D. Idaho Sept. 30, 2016), aff'd, 727 F. App'x 448 (9th Cir. 2018). The court found in *Peck* that "Because [p]laintiff's bad faith claim fails, it follows that her negligence claim based on the same facts similarly fails. [plaintiff] provides no evidence that Cincinnati's denial was based on carelessness or mistake… [plaintiff] provides no evidence that [plaintiff] unreasonably delayed the settlement of her claims." *Id*. The court granted summary judgment regarding plaintiff's negligent adjustment claim. *Id*. Should this Court find that there is no evidence of bad faith, it stands that a negligent adjustment claim cannot follow suit. Simply, there is no evidence presented by Plaintiff for bad faith claims to withstand summary judgment. Therefore, any allegations of negligence adjustment claims cannot be sustained and likewise should be dismissed by this Court.

V. CONCLUSION

There is no question that the Building did not sustain a covered cause of loss that establishes coverage for damages related to the leaking roof of the Building. Plaintiff has failed to establish any evidence suggesting otherwise, and have further failed to prove coverage as required by Idaho law. Despite the clear facts that a covered cause of loss did not occur, any indication that there was a covered cause of loss under the policy is fairly debatable, or such a denial was made in the result of a good faith mistake based on the reasonable investigation of known facts at the time Travelers issues a denial of coverage. Further, because the underlying claims of breach of contract cannot be sustained, then the negligent adjustment allegations against Travelers also fail.

Accordingly, Travelers respectfully requests that summary judgment be entered in favor of Travelers on Plaintiff's Bad Faith claim.

DATED: July 29, 2024

BULLIVANT HOUSER BAILEY PC

By */s/ Justin L. Meyer*

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4871-4800-8903.1

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of July, 2024, I caused to be served the foregoing DEFENDANT TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA'S MOTION FOR SUMMARY JUDGMENT on the following party or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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