IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

COPPER RIVER SEAFOODS, INC., Plaintiff, v. CHUBB CUSTOM INSURANCE, CO., Defendant.	Case No. 3:16-cv-00039-TMB ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (DKT. 68) AND DEFENDANT'S MOTION FOR SUMMARY AND PARTIAL SUMMARY JUDGMENT (DKT. 70)

I. INTRODUCTION

The matter comes before the Court on Plaintiff Copper River Seafoods, Inc.'s ("CRS") Motion for Partial Summary Judgment[1] and Defendant Chubb Custom Insurance, Co.'s ("CCI") Motion for Summary and Partial Summary Judgment.[2] The motions were fully briefed by the parties.[3] The parties did not request oral argument, and the Court finds that it would not be helpful. For the reasons stated below, Plaintiff's Motion for Partial Summary Judgment is **GRANTED IN PART, DENIED IN PART, AND DEFERRED IN PART** and Defendant's Motion for Summary and Partial Summary Judgment is **GRANTED IN PART, DENIED IN PART, AND DEFERRED IN PART.**

[1] Dkt. 68.

[2] Dkt. 70.

[3] Dkts. 68, 69, 83, 115 (CRS' Motion for Partial Summary Judgment); Dkts. 70, 86, 128 (CCI's Motion for Summary and Partial Summary Judgment)

II. BACKGROUND

A. Factual Summary[4]

This litigation revolves around one object: a commercial fishing dock owned by CRS located in the town of Cordova, Alaska.[5] A partial dock collapse and the subsequent aftermath have now spanned years of litigation over the central question in this litigation: whether CCI, as the insurer of the commercial fishing dock, is liable for monetary damages to the insured CRS for this partial dock collapse under the insurance policy.

B. Procedural Summary

CRS filed its Motion for Partial Summary on May 2, 2018.[6] CCI filed its Motion for Summary and Partial Summary Judgment on May 4, 2018.[7] Both parties subsequently opposed the other's motion on May 23, 2018[8] and May 27, 2018.[9] Each party thereafter filed a reply on June 11, 2018[10] and August 13, 2018.[11] Both motions together have been ripe and ready for review for approximately one month. Trial is set to commence on October 1, 2018.[12]

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[4] The Court assumes familiarity with the facts in this case and, where appropriate, cites to the evidence and undisputed facts in the record. Due to the impending trial deadlines, the Court provides only the briefest of factual summaries to expedite the issuance of this Order.

[5] Dkt. 1 at ¶ 10.

[6] Dkt. 68.

[7] Dkt. 70.

[8] Dkt. 83.

[9] Dkt. 86.

[10] Dkt. 115.

[11] Dkt. 128.

[12] Dkt. 61.

III. LEGAL STANDARD

Summary judgment is appropriate where, viewing the evidence and drawing all reasonable inferences in the light most favorable to the nonmoving party,[13] "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[14] Material facts are those which might affect the outcome of the case.[15] A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party."[16] A movant's burden may be met by "'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case."[17] Once a movant has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify facts which show a genuine issue for trial.[18] "[W]hen simultaneous cross-motions for summary judgment on the same claim are before the court, the court must consider the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them."[19]

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[13] *Scott v. Harris*, 550 U.S. 372, 378 (2007).

[14] Fed. R. Civ. P. 56(a). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

[15] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.").

[16] *Id.* at 248.

[17] *Celotex Corp.*, 477 U.S. at 325.

[18] *Id.* at 323–24.

[19] *Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1134 (9th Cir. 2001).

IV. ANALYSIS

The Court begins by analyzing CRS' Motion for Partial Summary Judgment; the Court concludes with an analysis of CCI's Motion for Summary and Partial Summary Judgment. The Court notes that the parties agree that Alaska law controls this summary judgment analysis,[20] and the Court therefore applies Alaska law to the below analysis.

A. Claims Moved for Summary Judgment by CRS

CRS moves for partial summary judgment on nine of CCI's fifteen affirmative defenses: (1) CRS' failure to state a claim; (2) the equitable doctrines defense; (3) preclusion of coverage by the rust exclusion; (4) preclusion of coverage by the wear and tear exclusion; (5) preclusion of coverage by the Collapse exclusion and the definition of "Building Collapse;" (6) CRS' failure to establish coverage; (7) preclusion of coverage by concealment of material information under AS § 21.42.100; (8) failure to serve or join all indispensable parties; and (9) CCI's reservation to add more affirmative defenses. As CRS is the moving party for its own motion, it bears the burden of showing that there is no genuine dispute as to any material fact, and that it is therefore entitled to summary judgment as a matter of law. The Court addresses each in turn.

1. CCI's First, Thirteenth, and Fifteenth Affirmative Defenses

CRS seeks summary judgment as to CCI's first, thirteenth, and fifteenth affirmative defenses.[21] CRS states that CCI's first affirmative defense—that CRS failed to state a claim upon which relief can be granted—should be dismissed as CRS has asserted a viable claim. CRS further argues that CCI's thirteenth affirmative defense—that CRS failed to name an indispensable

[20] *See e.g.*, Dkt. 69 at 24 ("Alaska law instructs that when interpreting an insurance policy . . . ."); Dkt. 70 at 32 ("Under Alaska law . . . .").

[21] Dkt. 69 at 49–50.

party—is no longer applicable as CCI has not sought to add any such party through required motion practice. Finally, CRS contends that CCI's fifteenth affirmative defense—reserving a right to add additional defenses—is inapplicable because the time for the amendment of pleadings has long since past.

In a footnote, CCI states that these affirmative defenses can be withdrawn or dismissed.[22] Accordingly, the Court **GRANTS** summary judgment for CRS as to CCI's first, thirteenth, and fifteenth affirmative defenses.

2. CCI's Second Affirmative Defense: Equitable Defenses

CRS contends that CCI's second affirmative defense—that CCI has the right to assert equitable doctrines, including estoppel, waiver, unclean hands, and the maxim he who seeks equity must do equity—is inapplicable where CRS does not have an equitable claim, and where CRS is only seeking legal relief in the form of monetary damages. CCI does not address this affirmative defense in its opposition, and CRS does not further discuss the defense in its reply.

Under Alaska law, "the availability of equitable defenses . . . . depends on the nature of the action in which it is raised." [23] "When a party is seeking to enforce a legal right, as opposed to invoking the discretionary equitable relief of the courts . . . . equitable defenses are not available."[24] Moreover, "[t]he doctrine of unclean hands is an equitable defense that, in some cases, bars a

[22] Dkt. 83, at 2 n.1.

[23] *State, Dept. of Rev., Child Support Enforcement Div. ex. Rel. Valdez v. Valdez*, 941 P.2d 144, 152 (Alaska 1997).

[24] *Id.* (internal quotation marks omitted).

plaintiff from claims *in equity*."[25] However, estoppel and waiver are available even where only legal claims are brought in a litigation.[26]

Here, CRS brings legal claims against CCI seeking monetary damages; CRS does not bring any equitable claims against CCI. Under Alaska law, CCI is precluded from bringing an equitable defense based on the maxim that he who seeks equity must do equity or the doctrine of unclean hands. Thus, summary judgment on CCI's second affirmative defense is **GRANTED** to the extent that CCI's second affirmative defense is based on the doctrine of unclean hands or the maxim of he who seeks equity must do equity. As CRS fails to demonstrate that there is not a genuine dispute of any material fact as to waiver or estoppel, summary judgment is otherwise **DENIED**.

3. CCI's Fourth Affirmative Defense: Rust Exclusion Provision

The parties dispute whether a provision in the insurance policy, referred to by both parties in their briefings as the "Rust Exclusion," applies and consequently precludes coverage resulting from the collapse of the commercial dock.[27] The Rust Exclusion in total states: "This insurance does not apply to loss or damage caused by or resulting from rust, oxidation, corrosion, or discoloration."[28] The parties' dispute centers on the meaning of the four words in the Rust Exclusion—rust, oxidation, corrosion, or discoloration—and whether the provision applies to only superficial damage as CRS contends, or includes structural damage as CCI contends.

[25] *Cook v. Cook*, 249 P.3d 1070, 1082 (Alaska 2011) (emphasis added).

[26] *See Valdez*, 941 F.2d at 152–54 (dismissing equitable defense of laches because the dispute was legal rather than equitable in nature, before concluding that remand to the superior court was appropriate to consider whether doctrines of waiver or estoppel could bar legal claims at issue).

[27] Dkt. 83 at 24–29.

[28] Dkt. 71-2 at 9.

The Court begins by summarizing Alaska law on the interpretation of insurance contracts. Under Alaska law, interpreting insurance policy language is a matter of law.[29] An insurance policy is generally "construed in such a way as to honor a lay insured's reasonable expectations."[30] In other words, the "objectively reasonable expectations of applicants . . . regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."[31] Thus, where there are ambiguities in an insurance policy, they are to be construed in favor of the insured.[32]

Alaskan courts find that "ambiguities only exist when there are two or more reasonable interpretations of particular policy language."[33] A mere disagreement as to the interpretation of a term between the parties is not evidence of the existence of an ambiguity.[34] "An ambiguity exists only where the contract as a whole and all the extrinsic evidence support two different interpretations, both of which are reasonable."[35]

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[29] *State Farm Mut. Auto Ins. Co. v. Dowdy*, 192 P.3d 994, 998 (Alaska 2008).

[30] *Id. See also C.P. ex rel. M.L. v. Allstate Ins. Co.*, 996 P.2d 1216, 1222 (Alaska 2000).

[31] *Id.*

[32] *See Dowdy*¸192 P.3d at 998 ("Ambiguities in an insurance policies are to be construed most favorably to an insured."). *See also Great Divide Ins. Co. v. Carpenter ex rel. Reed*, 79 P.3d 599, 606 (Alaska 2003) ("We therefore resolve ambiguities in the meaning of insurance contracts against the insurer.").

[33] *Dowdy*¸192 P.3d at 998. *See also United Servs. Auto. Ass'n v. Neary*, 307 P.3d 907, 910 (Alaska 2013) ("Policy language is ambiguous when it susceptible to two or more reasonable interpretations.").

[34] *See C.P. ex rel. M.L.*, 996 P.2d at 1222 n.38 ("An ambiguity does not exist, however, merely because the parties disagree as to the interpretation of a term."). *See also State Farm Fire and Cas. Co. v. Bongen*, 925 P.2d 1042, 1046 (Alaska 1996) ("A policy term is not ambiguous . . . merely because one party assigns a different meaning to it in accordance with his or her own interests.").

[35] *C.P. ex rel. M.L.*, 996 P.2d at 1222 n.38.

In interpreting an insurance policy and its provisions, courts consider four factors: "(1) the language of the disputed provisions in the policy, (2) other provisions in the policy, (3) extrinsic evidence, and (4) case law interpreting similar provisions."[36] When reviewing the language of the disputed provisions, courts "construe[policy language] in accordance with ordinary and customary usage."[37] Courts further "construe grants of coverage broadly and interpret exclusions narrowly."[38] Finally, when reviewing competing interpretations, courts will "if possible give effect to all parts of the instrument and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable."[39]

Here, the Court applies the four factor test above, and concludes that CRS' interpretation—that the Rust Exclusion applies only to superficial damage—is a reasonable interpretation of the policy language of the Rust Exclusion. The Court primarily reaches its conclusions based on the first two factors: (1) from a review of each word's definition and comparing the words within the provision collectively for their meaning; and (2) from a review of the remaining provisions of the insurance policy. The Court addresses the four factors in turn.

First, each word's definition, read together with the other words in the Rust Exclusion, demonstrate that CRS' interpretation is reasonable. Both parties provided the dictionary definitions

[36] *Allstate Ins. Co. v. Teel*, 100 P.3d 2, 4 (Alaska 2004).

[37] *Dowdy*¸192 P.3d at 998.

[38] *C.P. ex rel. M.L.*, 996 P.2d at 1223.

[39] *Modern Construction, Inc. v. Barce, Inc.*, 556 P.2d 528, 530 (Alaska 1976).

for rust,[40] oxidation,[41] corrosion,[42] and discoloration.[43] As CCI correctly points out, rust, oxidation, and corrosion could refer to more than superficial damage, and could also include structural damage. The provision's inclusion of "caused by" and "resulting from" further supports a reading that all such damage is precluded. At the very least, CCI's interpretation—endowing full-effect to the literal text of the Rust Exclusion and to each word's meaning—is reasonable.

CRS also correctly points out that these four words could refer to only visual or superficial damage on an object. But significantly, one word is limited only to superficial damage: discoloration. The term discoloration refers to a change or alteration in the hue or color of an object; it is entirely based on a change of *appearance* of an object and therefore cannot be more than superficial damage. As the term discoloration can only be superficial, it is also reasonable to interpret the other terms in the Rust Exclusion as similarly referring to superficial damage.[44]

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[40] *See* Dkt. 69 at 27 ("the reddish flakey coating of iron oxidize that is formed on iron or steel by the process of oxidation"); Dkt 83 at 25 ("the reddish brittle coating formed on iron especially when chemically attacked by moist air and composed essentially of hydrated ferric oxide" and "a corrosive or injurious influence or effect"); Dkt. 115 at 10 ("The reddish brittle coating formed on iron especially when chemically attacked by moist air and composed essentially of hydrated ferric oxide").

[41] *See* Dkt. 69 at 27 ("a reaction in which the atoms of an element lose electrons and the valence (expansion) of the element is correspondingly increased"); Dkt. 115 at 10 ("The act or process of oxidizing ('oxidizing' is defined as 'to combine with oxygen')").

[42] *See* Dkt. 69 at 27 ("gradual degradation of materials (usually metals by chemical and/or electrochemical reaction with their environment"); Dkt. 83 ("to eat away by degrees as if by gnawing, especially: to wear away gradually usually by chemical action – the metal was corrded beyond repair," and "to weaken or destroy gradually"); Dkt 115 at 10 ("The action, process or effect of corroding ('corroding' is defined as 'to eat away by degrees as if by gnawing')").

[43] *See* Dkt. 69 at "act of changing colors"); Dkt. 115 at 10 ("The act of discoloring ('discoloring' is defined as 'to alter or change the hue or color of')").

[44] *See* AS § 21.42.230 ("Each insurance contract shall be construed to the entirety of its terms and conditions as set out in the policy and as amplified, extended, or modified by a rider, endorsement or application that is a part of the policy."). *See also Chugach Elec. Ass'n v. Calais Co.*, 410 P.2d

Significantly, the Rust Exclusion provision is not a long laundry list of excludable conditions; the provision *only* contains *four* conditions of exclusion. Discoloration makes up one of only four listed conditions in the provision—meaning that 25% of the conditions can *only* ever refer to superficial damage. This is a significant percentage of the provision. The presence of the term discoloration suggests that the remaining three terms likewise could also reasonably be read to only apply to superficial damage. The cases cited by CCI—for the proposition that rust and corrosion should not be narrowed to superficial damage—are not persuasive; these cases confronted dissimilar policy language—including either including a longer list of conditions, or different conditions entirely—and are otherwise not comparable.[45] Here, the list in the Rust Exclusion provision is limited to a mere four conditions, one of which is facially only applicable to superficial damage. Thus, the provision language itself supports a reasonable interpretation of limiting the Rust Exclusion to only excluding superficial damage.

508, 509–510 (Alaska 1966) (employing the rule of interpretation of *ejusdem generis*); *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406, 413–414 (Alaska 1982) (same).

[45] *See, e.g.*, *Adams-Araphoe Joint School Dist. v. Continental Ins. Co.*, 891 F.2d 772, 776 (10th Cir. 1989) (provision language included "wear and tear, deterioration, rust or corrosion, mold, wet or dry rot, inherent and latent defects . . ."); *City Brewing Co. v. Liberty Mut. Fire Ins. Co.*, 2013 WL 2635847, at *1 (Ill. App. 2013) (coverage excluded under provision of "deterioration, corrosion and inadequate workmanship"); *Alex R. Thomas & Co. v. Mut. Serv. Cas. Ins. Co.*, 119 Cal.Rptr.2d 394, 396 (Cal. App. 2002) (provision language included "contamination, corrosion, deterioration, fungus, pollution, or rust"); *Bettigole v. American Employers Ins. Co.*, 567 N.E.2d 1259, 1260 (Mass. App. 1991) (provision language included "wear and tear, deterioration, rust or corrosion, mould, wet or dry rot; inherent or latent defect; smog; smoke, vapor or gas from agricultural or industrial operations; mechanical breakdown, including rupture or bursting caused by centrifugal force; settling, cracking, shrinkage, bulging or expansion of pavements, foundations, walls, floors, roofs or ceilings, animals, birds, vermin, termites or other insects"); *Gilbane Building Co. v. Altman Co.*, 2005 WL 534906, at *3 (Ohio App. 2005) (provision language included "[r]ust, corrosion, fungus, decay, deterioration, hidden or latent defect or any quality in the property that caused it to damage or destroy itself"); *Kay v. United Pac. Ins. Co.*, 902 F. Supp. 656, 658 (D. Md. 1995) (policy language included "rust, corrosion, decay, fungus, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself").

Second, CRS' interpretation that the Rust Exclusion is limited to superficial damage is reasonable when other provisions of the policy are considered.[46] The strongest support for CRS' interpretation comes from the significant inconsistency created when reading the Rust Exclusion and the Building Collapse provisions together. If—as CCI contends—the Rust Exclusion is broad and includes structural damage, insurance is simply not provided due to any loss or damage from rust, oxidation, corrosion, or discoloration. If loss or damage results from rust, oxidation, corrosion, or discoloration, the Rust Exclusion provision identifies only one instance where the provision will permit recovery: only where the "loss or damage [is] caused by or resulting from a **specified peril**."[47] There are notably no other exceptions to the Rust Exclusion. Thus, once the Rust Exclusion is satisfied, coverage is effectively precluded, period.

Meanwhile, a "Building Collapse" is relevantly defined as "the actual abrupt falling down or caving in of all or any part of a structure caused by or resulting from: . . . [(2)] decay that is hidden from view, unless the presence of such decay is known to an insured prior to the actual abrupt falling down or caving in of all or any part of a structure."[48] The Parties refer to this sub-provision, the second sub-provision above, as the Hidden Decay provision. The Building Collapse definition is relevant to two other exclusions: the Collapse Exclusion and the Wear and Tear Exclusion. Under the Collapse Exclusion, CCI precludes recovery when loss or damage is caused

[46] Both parties contend that the language from the "Specified Peril" provision supports their interpretation of the Rust Exclusion. The Court notes that the Specified Peril provision does not support either party, as the Specified Perils provision appears in harmony with either interpretation of the Rust Exclusion.

[47] Dkt. 71-2 at 9 (emphasis in original).

[48] *Id.* at 12.

by or results from "falling down or caving in of all or any part of a structure."[49] Similarly, CCI precludes recovery under the Wear and Tear Provision when loss or damage is caused by or results from "wear and tear, deterioration or decay."[50] The Building Collapse definition is the only exception to the Collapse Exclusion, which otherwise acts to preclude insurance coverage, and is one of three exceptions to the Wear and Tear Exclusion. In other words, the Building Collapse definition—if satisfied—reinstates coverage where the Collapse Exclusion and the Wear and Tear Exclusion otherwise preclude coverage.

CRS points to the similar use of the word "decay" in the Hidden Decay provision, and the use of the word "corrosion" in the Rust Exclusion, and argues that CCI's broader interpretation effectively removes the Hidden Decay provision in the Building Collapse definition. CCI concedes that corrosion and decay "are often considered synonyms" in the context of hidden decay or corrosion in a building.[51] But CCI contends that the overall policy is still consistent because "had rust and corrosion that caused the collapse been hidden from view and unknown by CRS, there may have been coverage for the loss under the 'hidden decay' provision" of the Building Collapse definition.[52] This is not what the express policy language provides; if the Rust Exclusion is applicable, insurance coverage is denied. There is no exception for corrosion or rust that is hidden under the Rust Exclusion; as previously noted, the only exception to the Rust Exclusion is if the damage or loss was caused by a specified peril, and none of these specified perils contain an exception based on their hidden nature. The Rust Exclusion operates independently of the Hidden

[49] *Id.* at 8.

[50] *Id.* at 10.

[51] Dkt. 83 at 29.

[52] *Id.*

Decay provision. The Hidden Decay provision would only relevantly reinstate coverage under the Collapse Exclusion, and has zero effect in instances where insurance is denied under the Rust Exclusion. CCI's broader interpretation of the Rust Exclusion therefore would make the Hidden Decay provision obsolete because there would never be an instance where hidden corrosion or decay would be present sufficient to trigger the Hidden Decay provision while also escaping from the Rust Exclusion.

In contrast, CRS' narrower interpretation—that the Rust Exclusion only applies to superficial damage—promotes consistency by preserving the operation of the Hidden Decay provision located in the Building Collapse definition while still permitting the Rust Exclusion to function. As previously stated, a Court strives to give all provisions a meaning, and one interpretation that preserves all provisions is preferable to another that leaves a portion useless or inexplicable.[53] CRS' interpretation preserves all provisions, and does not leave a portion useless or inexplicable. Thus, CRS' interpretation is reasonable in light of the other provisions in the insurance policy as CRS' interpretation preserves the operation of each provision in the policy.

Finally, the Court notes that under Alaska law, a court also looks to extrinsic evidence and cases from other jurisdictions as the third and fourth factors to determine whether a competing interpretation is reasonable.[54] Neither party has introduced extrinsic evidence that demonstrate what CRS or CCI intended for or understood about the Rust Exclusion. Although CCI provides cases of insurance policy interpretation in other jurisdictions, none of them are factually similar to the policy language at issue. As CRS notes—and with which the Court agrees—there are no other cases with identical or similar language to the Rust Exclusion provision.

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[53] *See Modern Construction*,556 P.2d 528, 530.

[54] *See Teel*, 100 P.3d 2, 4.

Thus, based on a review of the Rust Exclusion provision, the definitions of each of the four conditions separately and together, and the overall insurance policy and other relevant provisions, the Court is convinced that CRS' narrowing interpretation is also a reasonable interpretation. Of course, the Court recognizes that CCI's interpretation of the Rust Exclusion is also a reasonable interpretation as it gives full effect to the wording of the provision. However, where there are two reasonable interpretations of an insurance policy, under Alaska law, a Court must construe the policy in favor of the insured; thus, the Court construes the policy language in favor of CRS and its interpretation. Accordingly, the Court **GRANTS** summary judgment for CRS as to CCI's fourth affirmative defense regarding the Rust Exclusion provision.

4. CCI's Fifth and Sixth Affirmative Defenses: Wear and Tear Exclusion and the Collapse Exclusion

CRS moves for summary judgment as to CCI's fifth and sixth affirmative defenses regarding the Wear and Tear Exclusion and the Collapse Exclusion. CRS argues that summary judgment is appropriate where it satisfies the Building Collapse exception to the Wear and Tear Exclusion and the Collapse Exclusion. CCI opposes summary judgment, arguing that the dominant cause of the dock's failure is disputed by the parties and that the dispute is more appropriately resolved by a fact-finder; CCI contends that corrosion and rust was the dominant cause of the collapse of the dock,[55] whereas CRS argues that it was the weight of the materials placed on the dock, including fish boxes, packaging materials and box liners, and pallets and pallet jacks.[56] CRS replies that the dominant cause inquiry is not relevant if the Court determines that the Rust Exclusion only applies the superficial damage because the dominant inquiry only applies where

[55] Dkt. 83 at 34–37.

[56] Dkt. 69 at 33–39.

damage occurred as a result of a covered and excluded event; if the Rust Exclusion is narrowed, there is no excluded event, and therefore no need to engage in the dominant cause inquiry.[57] CRS states that all it has to show is that it satisfies the Building Collapse exception, which CRS argues is has satisfied because it has demonstrated that the collapse occurred due to the weight of personal property on the dock, or, in the alternative, due to the ongoing repairs that were being performed by Enviro-Tech Diving that CRS notes CCI argued were defective.

The Court previously discussed the Wear and Tear Exclusion and the Collapse Exclusion.[58] The Court noted that the Building Collapse was the only exception to the Collapse Exclusion, and was one of three exceptions to the Wear and Tear Exclusion. In its entirety, the Building Collapse exception provides:

> **Building collapse:**
> A. Means the actual abrupt falling down or caving in of all or any part of a structure caused by or resulting from:
> 1. a **specified peril** or breakage of glass in **buildings**;
> 2. decay that is hidden from view, unless the presence of such decay is known to an insured prior to the actual abrupt falling down or caving in of all or any part of a structure;
> 3. insect or vermin damage that is hidden from view, unless the presence of such damage is known to an insured prior to the actual abrupt falling down or caving in of all or any part of the structure;
> 4. weight of people or **personal property**;
> 5. weight of rain that collects on a roof; or
> 6. use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation;
>
> B. includes such actual and abrupt falling down or caving in of all or any part of a structure, which is contributed to by the use of defective material or methods in construction, remodeling or renovation; and

[57] Dkt. 115 at 17–21.

[58] *See supra* Section IV.A.3.

C. does not mean:

- a building or any part of a building that is in danger of falling down or caving in;
- a part of a **building** that is standing, even if it has separated from another part of the **building**; or
- a **building** that is standing or any part of a building that is standing, even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.[59]

As defined in the above definition, the "personal property" definition provides:

> **Personal Property** means:
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> - all your business personal property;
> - **patterns, molds, and dies**;
> - personal property you lease for which you have a written contractual responsibility to provide insurance;
> - labor, materials and services furnished or arranged by you on personal property of others;
> - indoor signs, fixtures glass and other **tenant's improvements and betterments**; and
> - glass in **buildings** you do not own if are legally or contractually required to maintain such glass.
>
> **Personal Property** does not mean:
>
> - **building**, except **tenant's improvements and betterments** and glass in **buildings** you do not own if you are legally or contractually required to maintain such glass;
> - land, water or air, either inside or outside of a structure;
> - retaining walls;
> - foundations or supports of structures, machinery or boilers, below the surface of the lowest floor or basement;
> - growing crops;
> - **outdoor trees, shrubs, plants or lawns**;
> - fences, radio or television antennas (including satellite dishes) and their lead-in wiring, mats or towers and outdoor signs not attached to a structure, all while outside of a structure;
> - vehicles or machines required to be licensed for use on public roads;
> - trailers;
> - **contractor's equipment**;
> - watercraft in water;

[59] Dkt. 68-58 at 11–12 (emphasis in original).

- aircraft;
- **money** or **securities**;
- personal property sold under a conditional sale or trust agreement or an installment or deferred payment plan after delivery to customers, except as otherwise stated;
- import shipments prior to either discharge from aircraft or oceangoing vessel or termination of the risk assumed by cargo insurance;
- export shipments after either being loaded on aircraft or oceangoing vessel or having come under the protection of cargo insurance; or
- animals, except animals owned by you and held for sale. [60]

Based on the foregoing sections, CRS argues that two of the six subsections are applicable: (1) that the dock collapsed because of the weight of the materials on the dock that day; and (2) that the dock collapsed because of the allegedly defective methods used by Enviro-Tech Diving during its repair of the dock.

The Court agrees that the dominant cause analysis is inapplicable here, and that CRS has shown that there is no genuine dispute of material fact as to the dock collapsing due to the weight of the material on the dock that day. CCI's opposition disputes that the dominant cause of the dock collapse was due to the weight of the materials, but as CRS correctly points out, such an analysis is irrelevant where there is no excludable cause still at issue. [61] Because the Court has held that the Rust Exclusion only applies to superficial damage, CCI's argument that rust or corrosion was the dominant cause of the collapse is not applicable. There is also no genuine dispute of any

[60] *Id.* at 20–21.

[61] AS § 21.36.094 provides that "[an] insurer may not deny a claim if a risk, hazard, or contingency insured against is the dominant cause of a loss and the denial occurs because an excluded risk, hazard, or contingency is also in a chain of causes but operates on a secondary basis." As the Court has determined that the proper interpretation of the Rust Exclusion is narrow and thus the denial is not based on an excluded risk, there is no excluded risk to review and compare against the covered event, and a dominant cause inquiry is inapplicable.

material fact that the weight of CRS' material was a cause of the dock collapse; CCI explicitly recognizes that the weight of the material is a cause of the dock collapse.[62] As the material that led to the dock collapse is CRS' "business personal property," and that the collapse of the dock was caused by this personal property, CRS has satisfied the Building Collapse exception.[63]

Because the Building Collapse exception has been satisfied, CCI cannot maintain its affirmative defenses under the Collapse Exclusion or the Wear and Tear Exclusion.[64] Accordingly, the Court **GRANTS** summary judgment for CRS as to CCI's fifth and sixth affirmative defenses.

5. CCI's Seventh Affirmative Defense: Failure to Establish Coverage

CRS moves for summary judgment as to CCI's seventh affirmative defense: the failure to establish coverage. The Court notes that neither party discusses this affirmative defense in their briefing, and that neither party has explained why summary judgment is or is not appropriate as to this affirmative defense. However, as the moving party, CRS bears the burden of proving that there are no genuine disputes as to any material fact relating to this affirmative defense. As CRS does not discuss nor explain why summary judgment is appropriate as to this affirmative defense—and this Court cannot determine how summary judgment is appropriate based on a review of the record—the Court **DENIES** summary judgment as to CCI's seventh affirmative defense.

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[62] Dkt. 83 at 30 ("All parties agree that there are at least two causes of the collapse at CRS's facility.").

[63] Because the Court finds that there is no genuine dispute as to any material fact and holds that that the Building Collapse exception is satisfied under subsection 4, the Court declines to consider CRS' alternative argument that it satisfies the Building Collapse exception based on the methods used by Enviro-Tech Diving.

[64] The Court recognizes CCI's argument that the Wear and Tear Exclusion has potential application to this matter if CRS seeks damages for repair costs for components of the dock whose condition did not change before or after the dock collapse. However, as CRS has stated it is not seeking to recover those costs, the Wear and Tear Exclusion is not otherwise applicable.

6. CCI's Tenth Affirmative Defense: Concealment of Material Information Under AS § 21.42.110

CRS moves for summary judgment as to CCI's tenth affirmative defense: concealment of material information under AS § 21.42.110. Under AS § 21.42.110, a misrepresentation, omission, concealment of fact, or incorrect statement voids recovery under an insurance policy if there is fraud, if it is material to either the acceptance of risk or to the hazard assumed by the insurer, or if the insurer in good faith would not have issued the policy or contract. CRS makes three arguments: (1) that the misrepresentation must be made in the four corners of a specific insurance application or in communications accompanying that specific insurance application; (2) that the emails relied upon by CCI are inadmissible hearsay; and (3) any obligation imposed by the Critical Loss Recommendation ("CLR") were satisfied by CRS and could not serve as a basis of a misrepresentation as defined under AS § 21.42.110.

Regarding CRS' first argument, CCI disputes that the statute requires that the misrepresentation be made in the four corners of a specific insurance application or made in communications accompanying that application. CCI disagrees that misrepresentations are tied to specific policy years; CCI cites to an analogous state statute from Alabama to argue that a misrepresentation made during a prior year is still operative—especially where the renewal policy is issued on the basis of the original application.[65] CCI also cites to insurance treatises, which provides that the "issuance of a renewal policy should not operate to void the effect of statements made in the original—and only—application," and that "in the absence of a new application or anything showing a different intention, the renewal of a fire insurance policy is impliedly made on

[65] *See Ex parte Quality Cas. Ins. Co.*, 962 So.2d 242, 246 (Alabama 2006) ("We find no plausible basis on which to read [the statute] as applicable to an original policy and not applicable to a renewal policy, when the renewal policy is issued on the basis of the original application.").

the basis that the statements in the original application or policy are still accurate and operative."[66] As such, CCI contends that statements that were made during prior application periods are relevant to the application period at issue—the policy period from December 31, 2014 to December 31, 2015.

The Court agrees with CCI that the misrepresentation need not be tied to that specific policy period. Both parties have noted that the Alaska statute and its citing authority provides little guidance as to whether the representation is tied to a specific application period. Nothing in the statute facially limits what statements can be considered—only that they were either in the application, or in negotiations relating to a policy application. The Court is persuaded by the analogous Alabama state statute and case, as well as the cited insurance treatise, that holds that renewal applications incorporate prior statements and communications to the extent that the renewal policy is based on the earlier applications.[67] Thus, the Court holds that it can consider earlier statements made to the extent that they were incorporated into the renewal policy for the December 31, 2014 to December 31, 2015 period.

A single hurdle remains that prevents the Court from addressing CRS' remaining arguments: whether the evidence that CCI relies on is admissible, or whether, as CRS contends, the evidence is inadmissible hearsay. "A trial court can only consider admissible evidence in ruling on a motion for summary judgment."[68] CRS contends that the relevant communications and

[66] 43 Am.Jur.2d Insurance § 1020 (1982).

[67] The Court highlights the policy concerns raised by the Alabama Supreme Court for holding otherwise: that a party could lie on an original application or during its initial negotiations, conceal this lie for the first term period, and then rely on this lie going forward during subsequent renewals without consequence. *See Ex parte Quality Cas. Ins. Co.*, 962 So.2d at 246.

[68] *Orr v. Bank of Amer., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002).

emails—that CCI relies on to support its theory that CRS concealed material information—are inadmissible hearsay. CRS filed a separate Motion in Limine seeking to exclude this evidence.[69] The Court notes that it has not ruled on this Motion in Limine and that it intends to address this motion in a subsequent written order. However, because the Court cannot make a final determination until it addresses the Motion in Limine, the Court must at this time defer its ruling as to whether summary judgment is appropriate as to CCI's tenth affirmative defense.

Accordingly, the Court at this time **DEFERS** its ruling on whether summary judgment is appropriate as to CCI's tenth affirmative defense. The Court will issue a final ruling once it has decided CRS' Motion in Limine at docket 66.

B. Claims Moved for Summary Judgment by CCI

CCI moves for summary judgment and partial summary judgment on seven issues: (1) whether Marsh & McLennan Agency ("Marsh") is an agent of CRS; (2) whether coverage is precluded by the Concealment or Misrepresentation Condition; (3) whether CRS' bad faith claim fails as a matter of law; (4) whether CRS can recover punitive damages; (5) whether coverage is limited to $3,122,531 in total building repair/replacement costs; and (6) whether Ordinance or Law coverage is available and/or capped. As CCI is the moving party for its own motion, it bears the burden of showing that there is no genuine dispute as to any material fact, and that it is therefore entitled to summary judgment as a matter of law. The Court addresses each in turn below.

1. Whether Marsh & McLennan Agency is an Agent of CRS

CCI moves for summary judgment on the issue that Marsh is an agent of CRS, and therefore that statements and communications from Marsh are binding on CRS. CCI contends that Marsh—as CRS' insurance broker and insurance agent—is an agent of CRS under Alaska state

[69] *See* Dkt. 66.

law, and acted as such under actual or apparent authority from CRS.[70] CRS disputes that Marsh was an agent of CRS, and argues that Marsh had neither actual or apparent authority to discuss the CLR.[71]

At the outset, the Court recognizes that this determination is closely intertwined with CRS' pending Motion in Limine seeking to exclude the communications from Marsh. As CRS points out, this inquiry ties directly to whether such evidence is admissible under the Federal Rules of Evidence, as statements by an agent of a party are admissible under Fed. R. Evid. 801(d)(2).[72] Indeed, if Marsh is an agent of CRS, such communications would be admissible under Fed. R. Evid. 801(d)(2). CCI argues this very point in its opposition to CRS' Motion in Limine seeking to exclude communications from Marsh.[73] As this very argument is tied directly to CRS' pending Motion in Limine, the Court must defer its ruling on this issue until it considers CRS' motion.

Accordingly, the Court at this time **DEFERS** its ruling on whether Marsh is an agent of CRS. The Court will issue a final ruling once it has decided CRS' Motion in Limine at docket 66.

2. Whether Coverage is Precluded by the Concealment or Misrepresentation Condition

CCI moves for summary judgment as to the issue that coverage is precluded by the Concealment or Misrepresentation Condition in the policy. CCI argues that Marsh made material misrepresentations in communications and emails to CCI as to the repairs and the quality of the

[70] Dkt. 70 at 29–32.

[71] Dkt. 86 at 59–72.

[72] Fed. R. Evid. 801(d)(2) provides that a statement is not hearsay and therefore admissible if the statement is offered "against an opposing party" and "was made by a person whom the party authorized to make a statement on the subject," or "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed."

[73] Dkt. 82 at 3, 9–12.

dock prior to the collapse, and that these material misrepresentations void the contract under the Concealment or Misrepresentation Condition in the policy.[74] The Concealment or Misrepresentation Condition states that the "insurance is void if you or any other insured intentionally conceals or misrepresents any material fact or circumstance at any time."[75] CRS responds that none of these statements were false or concealed information or evidence, that CCI cannot prove CRS acted with any intent to deceive or conceal material information, and that the false or concealed information must relate to the policy period of the insurance application.[76] CCI replies by pointing to evidence that it claims shows that CRS concealed and misrepresented material information as to the condition of the dock and as to its compliance with the CLR, that this concealment and misrepresents were intentional, and that the concealed facts and misrepresentations were material to CCI's decision to insure CRS' commercial facility.

The Court remarks once again that a determination of this matter revolves around whether the evidence of emails and communications from Marsh are admissible. As CCI relies on emails and communications from Marsh, and such emails and communications are the subject of the pending Motion in Limine filed by CRS, the Court is unable to resolve whether summary judgment is appropriate until it determines the admissibility of these documents. Thus, the Court must defer its ruling on this issue until it considers CRS' Motion in Limine.

Accordingly, the Court at this time **DEFERS** its ruling on whether coverage is precluded by the Concealment or Misrepresentation Condition. The Court will issue a final ruling once it has decided CRS' Motion in Limine at docket 66.

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[74] Dkt. 70 at 32–37.

[75] Dkt. 71-2 at 11.

[76] Dkt. 86 at 73–79.

3. Whether CRS' Bad Faith Claim Fails as a Matter of Law

CCI moves for summary judgment as to CRS' bad faith claim, arguing that the claim fails as a matter of law. CCI makes two arguments that the bad faith claim fails as a matter of law: (1) that—under the evidence in the record—CCI's denial was reasonable and, at a minimum, fairly debatable; and (2) that CCI conducted a fair, thorough, and good faith investigation before denying coverage.[77] CRS responds that an insurer's reasonableness in conducting its claims handling process is normally a question of fact for a jury to resolve, and adds that there is a genuine dispute as to material facts that preclude summary judgment from being appropriate.[78] In its reply, CCI reiterates its prior two arguments, and also argues that a bad faith claim does not survive where an insured has concealed or misrepresented material information from its insurer.[79]

"Under Alaska's contract law, 'the covenant of good faith and fair dealing . . . is implied in all contracts.'"[80] "For insurance contracts, breach of this covenant by the insurer gives the insured a cause of action sounding in tort because of the special relationship between the insured and insurer in the insurance context and because tort liability provides needed incentive to insurers to honor their implied covenant to their insureds."[81] Prior Alaska precedent has "declined to define the elements of the tort of bad faith in an insurance contract," but has "ma[de] clear that the element

[77] Dkt. 70 at 38–42.

[78] Dkt. 86 at 81–83.

[79] Dkt. 128 at 17. *See also Mut. of Enumclaw Ins. Co. v. Cox*, 110 Wash.2d 643, 645, 757 P.2d 499, 503 (Wash. 1988) (affirming trial court's ruling that the insured's fraud voided his policy notwithstanding insurer's conduct in processing insured's claim).

[80] *Lockwood v. Geico General Ins. Co.*, 323 P.3d 691, 697 (Alaska 2014) (quoting *State Farm Mut. Auto. Ins. Co. v. Weiford*, 831 P.2d 1264, 1266 (Alaska 1992)).

[81] *Id.* (internal quotation marks and alterations omitted).

of breach at least requires the insured to show that the insurer's actions were objectively unreasonable under the circumstances."[82] While bad faith in insurance cases may involve fraudulent or deceptive conduct by the insurer, "it necessarily requires that the insurance company's refusal to honor a claim be made without a reasonable basis."[83] Some courts have identified two elements necessary to maintain a bad faith claim: "(1) that the insurer lacked a reasonable basis for denying coverage and (2) that the insurer had knowledge that no reasonable basis existed to deny the claim or acted in reckless disregard for the lack of a reasonable basis for denying the claim."[84] "Although questions of reasonableness often must be resolved at trial . . . . where an insurer establishes that no reasonable jury could regard its conduct as unreasonable, the question of bad faith need not and should not be submitted to the jury."[85]

The Court finds instructive a case cited by both parties, *Hillman v. Nationwide Mut. Fire Ins. Co.*[86] In *Hillman*, the Alaska Supreme Court addressed whether summary judgment was appropriate as to an insured's bad faith claim against the insurer. The insured argued that summary judgment was inappropriate where there were fact questions as to whether the insurer conducted an inadequate investigation, whether the insurer violated its own guidelines and policies, and whether a settlement offer was insufficient.[87] The Alaska Supreme Court rejected plaintiff's

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[82] *Id.*

[83] *Hillman v. Nationwide Mut. Fire Ins. Co.*, 855 P.2d 1321, 1324 (Alaska 1993).

[84] *KICC-Alcan General, Joint Venture v. Crum & Forster Specialist Ins. Co., Inc.*, 242 F.Supp.3d 869, 880 n.98 (D. Alaska 2017).

[85] *Hillman*, 855 P.2d at 1325.

[86] 855 P.2d 1321

[87] *Id.* at 1325.

contention that these facts "raise[d] a factual question as to whether [the insurer's] denial of coverage lacked a reasonable basis" as the "denial was based on an explicit exclusion in the policy" and the "question in this case [was] whether [the insurer] was unreasonable in treating the exclusion as valid."[88] The Alaska Supreme Court concluded that—because the state court had found the provision reasonable but invalid on statutory and public policy grounds—these other facts did "not suffice to create a fact question as to whether [the insurer's] decision to deny coverage lacked a reasonable basis, as they have little or no relevance on that point."[89] In a prior decision interpreting *Hillman*, this Court recognized that the "Alaska Supreme Court has clearly held that insurers act reasonably where they take a defensible legal position about the extent of their liability or the interpretation of the law."[90]

After reviewing the evidence in the record, the Court concludes that CCI has established that no reasonable jury could regard its conduct as unreasonable and that summary judgment is appropriate as to CRS' bad faith claim. As previously stated, under Alaska law, a bad faith claim requires that an insurance company's refusal to honor a claim be made without a reasonable basis. Here, CCI argues that coverage is precluded based on several exclusions and one condition: (1) the Rust Exclusion; (2) the Collapse Exclusion; (3) the Wear and Tear Exclusion; and (4) the Concealment and Misrepresentation Condition. In reviewing the Rust Exclusion, this Court noted that CCI's literal interpretation of giving full effect to each of the four words in the provision was

[88] *Id.*

[89] *Id.* at 1326.

[90] *United States ex rel. North Star Terminal & Stevedore Co. v. Nugget Const. Inc.*, 2006 WL 2251122, at *5 (D. Alaska July 28, 2006).

a competing reasonable interpretation.[91] The Court's ultimate holding for CRS was based on the requirement under Alaska law to construe the policy in favor of the insured where there are two competing reasonable interpretations. At a minimum, therefore, CRS' initial reliance on the Rust Exclusion was reasonable given that its own interpretation of the exclusion as being broad was also a reasonable interpretation of that exclusion. As the Rust Exclusion was intertwined with the Collapse Exclusion and the Wear and Tear Exclusion, CCI's original determination that these exclusions further precluded recovery was also reasonably based.

Moreover, there is nothing in the record to demonstrate that it was unreasonable for CCI to rely on the Rust Exclusion, the Wear and Tear Exclusion, the Collapse Exclusion, or the Concealment or Misrepresentation Condition. CCI clearly undertook a defensible legal position about the extent of its liability under the insurance policy, and grounded its position in the relevant explicit exclusions and a condition in the policy. This is not a matter where an insurer casts a wide net over numerous exclusions to deny coverage to the insured; CCI specifically targeted the exclusions it believed precluded coverage of the dock collapse. It is not unreasonable for CCI to adopt the view that coverage is precluded under the identified exclusions and condition, especially where there is evidence in the record to support the possibility that such exclusions and condition are relevant and possibly operate to preclude coverage.

The evidence cited to by CRS does not contradict the Court's holding that no reasonable jury could regard CCI's conduct as unreasonable. The evidence pointed to by CRS does not create a factual dispute as to whether CCI's decision to deny coverage lacked a reasonable basis. For instance, CRS highlights certain evidence, and suggests that CCI set out to gather evidence in

[91] *See supra* Section IV.A.3.

support of their coverage denial and ignored evidence that would have led to coverage.[92] However, under *Hillman*, an insurer's conduct in its own investigation, and an insurer's violations of or lack of adherence to its own internal guidelines and practices do not suffice to create a fact question as to whether an insurer's decision to deny coverage under an explicit exclusion or condition lacked a reasonable basis, as they have little or no relevance on that point. Even construing the evidence in favor of CRS, CRS' evidence does not demonstrate that CCI's denial of coverage lacked a reasonable basis. Instead, the evidence demonstrates that CCI undertook defensible legal positions on a set of exclusions and a condition that it reasonably believed precluded coverage and sought evidence to supports its position. Such an undertaking cannot be said to be unreasonable, and therefore summary judgment is appropriate as to this claim.[93]

Accordingly, the Court **GRANTS** summary judgment in favor of CCI as to CRS' bad faith claim.

4. Whether CRS Can Recover Punitive Damages

CCI moves for summary judgment as to CRS' request to recover for punitive damages. CCI argues that Alaska law limits the use of punitive damages to certain circumstances, none of which are present in this case.[94] CRS opposes summary judgment, arguing that whether CCI's

[92] Dkt. 86-29 at 2 (citing Exhibits 1 through 10 of the Appendix).

[93] Because the Court has determined that CCI had a reasonable basis for relying on its explicit exclusions and condition, the Court declines to address at this time whether CCI conducted a fair and thorough and good faith investigation or whether CCI acted in reckless disregard for the lack of a reasonable basis for denying coverage. The Court further declines to discuss CCI's argument that an insured's bad faith claim does not survive as a matter of law where an insured undertook deception or concealment of material facts.

[94] Dkt. 70 at 42–43.

conduct is sufficient to sustain an award of punitive damages is an issue for the jury to determine.[95] CCI replies that CRS relies on inapposite state authority, and that there is no evidence in the record that demonstrates that punitive damages are appropriate.[96]

Under Alaska law, punitive damages "are a harsh remedy not favored in law."[97] Punitive damages are appropriate only where a party "proves by clear and convincing evidence that the [opposing party's] conduct was (1) outrageous, including acts done with malice or bad motives; or (2) evidenced reckless indifference to the interest of another person."[98] "Where there is no evidence that gives rise to an inference of actual malice or conduct sufficiently outrageous to be deemed equivalent to actual malice, the trial court need not, and indeed should not, submit the issue of punitive damages to the jury."[99]

After a review of the evidence in the record, the Court agrees that summary judgment is appropriate on the issue of punitive damages. As the moving party, CCI bears the burden of demonstrating that there are no genuine disputes as to any material facts as to its request. Here, CCI points to an absence of evidence in the record demonstrating that its behavior was either of actual malice or of such outrageous behavior that was equivalent to malice. CCI also points to other evidence that it acted reasonably in its determination, and that it conducted a reasonable

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[95] Dkt. 86 at 83–87.

[96] Dkt. 128 at 21–22.

[97] *Ross Laboratories v. Thies*, 725 P.2d 1076, 1081 (Alaska 1986) (internal quotation marks omitted).

[98] AS § 09.17.020(b). *See also State Farm Fire & Cas. Co. v. Nicholson*, 777 P.2d 1152, 1158 (Alaska 1989) (holding that the trial court erred in instructing the jury on punitive damages where there was no evidence of wrongdoer's conduct being "outrageous, such as acts done with malice or bad motives" or being "reckless[ly] indifferen[t] to the interests of another").

[99] *Weiford*, 831 P.2d 1264, 1266.

investigation in determining which exclusions—if any—were applicable. Thus, CCI has met its initial burden as the movant to demonstrate that there is no genuine dispute as to any material fact.

As CCI has met its initial burden, the burden shifts to CRS as the nonmoving party to go beyond the pleadings and identify facts which show a genuine issue for trial. Here, CRS fails to identify facts which show a genuine issue for trial. CRS spends its opposition citing out of state authority for the propositions that punitive damages are appropriate in certain insurance policy disputes, and that punitive damages are generally a question for a jury.[100] However, CRS fails to identify one single fact in the record that demonstrates that there remains a genuine issue for trial. Even after a review of the evidence in the record, nothing demonstrates that CCI acted with malice in its conduct or that its conduct was in any way outrageous and equivalent to malice. For instance, CRS argues that CCI acted in a "vindictive manner" when CCI became aware of a third party report.[101] But there is no evidence that shows that CCI acted in such a manner and CRS does not cite to any evidence for this argument.[102] As CRS fails to identify facts which show a genuine issue for trial, summary judgment is appropriate on the issue of punitive damages.

Accordingly, the Court **GRANTS** summary judgment in favor of CCI as to CRS' punitive damages request.

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[100] Dkt. 86 at 83–87.

[101] Dkt. 86 at 85.

[102] Even when reviewing the exhibits at docket 86 that are attached in support of CRS' bad faith claim, the Court does not find that there was *actual* malice or outrageous behavior that was *equivalent* to malice. Construing the facts in these documents in the best light possible for CRS only reveals that CCI strongly focused on collecting evidence to support its determination that coverage was not available for the dock collapse. Such a strong focus is not malice toward CRS, especially where CCI was reasonable in its reliance on the chosen explicit exclusions.

5. Whether Coverage is Limited to $3,122,531 in Total Building Repair/Replacement Costs

CCI moves for summary judgment as to the damage amount recoverable for building repair and replacement costs. CCI argues that such costs are limited to $3,122,531, and that CRS' damages calculation is flawed because it does not differentiate between repair costs attributable to pre-existing damage, code-required upgrade costs, or the physical damage caused directly by the subject collapse.[103] In its opposition, CRS argues that its damages model seeking recovery for $4,615,258 is appropriate, as it made a distinction between covered and uncovered costs, and that summary judgment is inappropriate where the dispute is factual, and should be resolved by a jury.[104] In reply, CCI argues that CRS has failed to provide evidence as to the distinction between pre-existing damage and damage caused by the collapse, and has failed to clarify the amount of its damages calculations as to code upgrade expenses.[105]

At this stage, the Court determines that summary judgment is inappropriate on the issue of whether damages are limited to any specific amount. Both parties primarily rely on their respective expert witnesses to argue that their damages calculation is correct and dispute which methodology accurately reflects the amount actual recoverable for building repair and replacement costs. For instance, CCI states that CRS' damage model inappropriately seeks costs for pre-existing damage, but CRS denies that its model does so; CRS states that its model only seeks recovery for damage related to the dock collapse and excludes uncovered costs.[106] CRS states that its expert witness,

[103] Dkt. 70 at 44–45.

[104] Dkt. 86 at 89–90.

[105] Dkt. 128 at 22–24.

[106] Dkt. 86 at 89–90.

Louis Wu, relied in part on another engineering expert, Scott Kuebler, for his determination as to the damages amount, and that the analysis distinguished between covered and uncovered repairs.[107] Given the evidence cited to and statements made by CRS, the Court cannot conclude that summary judgment should be entered in favor of CCI. The disputes over expert witness methodologies and whether each damage model appropriately allocated expenses as recoverable costs should be resolved by the jury weighing the methodologies and underlying facts and evidence relied upon by each expert witness. The Court therefore declines to wade into the parties' dispute.

Accordingly, the Court **DENIES** summary judgment as to the issue of whether coverage is limited to $3,122,531 in total building repair or replacement costs.

6. Whether Ordinance or Law Coverage is Available and/or Capped

CCI seeks summary judgment on the issue that Law or Ordinance coverage is available for cost repairs on the dock, and that—if it is available—such amount is capped to $10,000.[108] CCI argues that Ordinance or Law coverage applies to only buildings, and expressly excludes bulkheads, pilings, piers, wharves, or docks.[109] CCI also states that it is unsure if CRS is seeking such coverage, but states that such cost recovery is limited to $10,000.[110] CRS does not dispute that the Ordinance or Law coverage applies only to buildings and excludes the bulkheads, piling, piers, wharves, or docks; instead, CRS states that it seeks reimbursement of code upgrade cost spent as to the processing building.[111]CRS argues however that the policy provides cost recovery

[107] *Id.*

[108] Dkt. 70 at 45–46.

[109] *Id.* at 45.

[110] *Id.* at 46.

[111] Dkt. 86 at 92.

up to $100,000, and that CRS seeks recovery of $69,012 of code upgrade cost spent on the processing building.[112] CRS contends that the policy is ambiguous as to whether the $100,000 or the $10,000 limit applies, that its interpretation is reasonable, and that the Court should therefore construe the policy in its favor.[113] CCI in reply states that there is no ambiguity that there is a $10,000 limit as to Ordinance or Law coverage and that the $100,000 limit does not apply.[114]

The Court agrees that the Ordinance or Law coverage is unambiguously limited to $10,000. The $100,000 limit cited by CRS applies to the Blanket Limit of Insurance, which further provides that the coverages included in the Blanket Limit of Insurance are "accounts receivable," "electronic data processing property," and "valuable papers."[115] Meanwhile, the Ordinance or Law coverage is located in a separate section of the Supplementary Declarations titled, "Additional Property Coverages."[116] This section begins by saying "The Limits Of Insurance shown below are provided for the Additional Coverages shown at no additional cost to you."[117] The Ordinance or Law coverage is located on the subsequent page, and to the right of the entry, contains a numerical value of $10,000, located below a column heading that states "Limit of Insurance."[118] CRS' argument—that the limit of the insurance category is meaningless and that the $100,000 limit applies to the Ordinance or Law coverage—is not a reasonable interpretation of the policy. Based

[112] *Id.* at 93–92.

[113] *Id.*

[114] Dkt. 128 at 24–25.

[115] Dkt. 86-26 at 3.

[116] *Id.* at 4.

[117] *Id.* at 3.

[118] *Id.* at 4.

on the foregoing, the Court holds that the insurance policy unambiguously imposes a limit value of $10,000 as to Law or Ordinance coverage.

As CRS does not dispute that the Law or Ordinance coverage excludes pilings, piers, wharves, or docks, summary judgment for CCI is appropriate. Accordingly, the Court **GRANTS** summary judgment as to the following issues: (1) there is no coverage for code upgrades for "pilings, piers, wharves, or docks," and (2) to the extent CRS proffers argument and evidence that some element of its repair costs for buildings or otherwise pre-existing damage is for covered code upgrades, the maximum coverage available under the insurance policy is $10,000. Thus, to the extent that CRS proves that it incurred $69,012 of code upgrade cost as to the processing building, CRS may only recover—under the Law and Ordinance coverage—costs up to $10,000.

V. CONCLUSION

For the above reasons, CRS' Motion for Partial Summary Judgment, filed at docket 68, and CCI's Motion for Summary and Partial Summary Judgment, filed at docket 70, are **GRANTED IN PART, DENIED IN PART, AND DEFERRED IN PART**. The Court will address the issues deferred in a subsequent order that resolves the Motion in Limine at docket 66.

IT IS SO ORDERED.

Dated at Anchorage, Alaska, this 19th day of September, 2018.

/s/ *Timothy M. Burgess*
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE