Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-014007 06/16/2020

HONORABLE DANIEL G. MARTIN

CLERK OF THE COURT
J. Eaton
Deputy

MARTINS CRUDE CONNECTION L L C — MICHAEL N POLI

v.

CERTAIN UNDERWRITERS AT LLOYDS OF LONDON WHO SUBSCRIBE TO CERTIFICATE NO WMC141356, et al. — PATRICK C GORMAN

JUDGE DANIEL MARTIN

UNDER ADVISEMENT RULING

Pending before the Court are (1) Defendants' Motion for Summary Judgment, and (2) Plaintiff's Cross-Motion for Partial Summary Judgment on Apparent Authority for a Binding Agreement on the Freightliner Loss Repair. The parties have submitted the following in support of and in opposition to these motions: Defendants' Motion for Summary Judgment filed December 13, 2018; Defendants' Statement of Facts in Support of Defendants' Motion for Summary Judgment filed December 13, 2018; Plaintiff's Response to Defendants' Motion for Summary Judgment and Cross-Motion for Partial Summary Judgment Based on Apparent Authority for a Binding Agreement on the Freightliner Loss Repair filed October 28, 2019; Plaintiff's Controverting Statement of Facts and Separate Statement of Facts in Support of 1) Plaintiff's Response to Defendants' Motion for Summary Judgment and 2) Plaintiff's Cross-Motion for Partial Summary Judgment on the Freightliner Repair Number filed October 28, 2019; Defendants' Reply in Support of Defendants' Motion for Summary Judgment and Response to Plaintiff's Cross-Motion for Partial Summary Judgment filed January 10, 2020; Plaintiff's Reply in Support of its Cross-Motion for Partial Summary Judgment Based on Apparent Authority for a Binding Agreement on the Freightliner Loss Repair filed March 23, 2020; Notice of Filing Signed Declaration of Martin Zabala filed March 24, 2020; and Defendants' Objection to New Evidence

Attached to Reply in Support of Cross-Motion for Summary Judgment filed March 24, 2020. The Court heard oral argument on April 23, 2020, at which time the matters were taken under advisement.

Having now considered the arguments presented, and for the reasons set forth herein, the Court enters its ruling granting Defendants' motion in part, and denying Plaintiff's cross-motion.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Martin's Crude Connection, LLC ("MCC") is a transportation business which owns several tractor-trailer trucks. MCC obtained coverage for its trucks through an insurance policy issued by Defendant Certain Underwriters at Lloyd's of London Who Subscribe to Certificate No. WMC141356 ("Lloyd's"), which was assigned the policy number 70 TRS059843 (the "Policy").

Over the course of a year, MCC submitted damage claims for three of its trucks arising from separate incidents. There is no dispute that the Policy was in full force and effect and covered the three losses. Lloyd's retained Defendant National Transportation Adjusters, Inc. ("NTA") to handle the claims on its behalf. NTA retained outside adjusters to inspect the damage and calculate repair costs.

2014 Freightliner Fire Loss

On June 12, 2015, MCC's 2014 Freightliner sustained damage caused by a fire on the highway near Odessa, Texas. MCC reported the loss the same day. On June 23, 2015, NTA assigned Custard Insurance Adjusters ("Custard"), which was located in Texas, to inspect the Freightliner and "secure an agreed repair figure with the insured's shop."

Sandra Swarm of Custard performed an inspection and took photographs of the vehicle on June 25, 2015. This was Ms. Swarm's first heavy truck inspection, and MCC admitted that "she didn't have a clue." The Freightliner was not torn down so the full extent of the damage could not be assessed. Brenda Enriquez ("Enriquez"), the branch manager and heavy equipment specialist for Custard, was assigned to adjust the claim. She has worked on "several thousand tractor-trailer" insurance clams.

On July 2, 2015, Enriquez issued a Heavy Equipment Appraisers Report stating her initial estimate of the loss was $14,324.98. The Report stated it "included all visible damages on the tractor; however, there could be additional damage upon teardown."

On July 24, 2015, MCC obtained an estimate for repairs from Chuck Cherek ("Cherek") of CRC Western LLC ("CRC'), a repair service company. The CRC estimate totaled $56,622.23 for parts and labor. The CRC estimate provided for replacing the right frame rail.

Whether the frame rail should be replaced or repaired was in dispute. MCC claims that the frame rail was damaged by the fire and needed to be replaced. The frame rail had a warning label, which stated "Warning – Do not cut, weld or drill frame rail." Cherek believed that if the frame rail were to break while carrying a load of crude oil the situation could be catastrophic.

On August 6, 2015, MCC contacted NTA to complain about the delay. MCC expressed concern that the Freightliner had been out of service "for almost 2 months" and explained that "we need to get payments processed so [MCC] can get BOTH of these units [the Freightliner tractor and the trailer] repaired asap and back to work." On August 13, 2015, MCC contacted NTA again to express concern about delay. MCC told NTA "[t]his is costing us money sitting. . . [I]t needs to be finished so we can get these units back on the road."

On August 14, 2015, Custard issued its Final Report prepared by Enriquez. The Final Report estimated the repairs at $56,506.45, which included replacement of the right frame rail. Enriquez told NTA she had "agreed with [Cherek] to repair the unit per [Custard's] estimate vs. his." She later denied having authority to reach an agreement on the repairs and stated she never would have told Cherek she was so authorized. Cherek says he believed Enriquez had reached an agreement on the repairs and had authority to do so based on two other instances where she had authorized repairs.

On August 17, 2015, NTA notified Custard of things it found "odd" and noted several "errors" in Enriquez's Final Report. NTA expressed concern that an estimate had been given even though the tractor had never been torn down. NTA also was concerned that the vehicle had been moved from Texas, where Custard is located, to Colorado for repairs. NTA stated that it was "now forced to start over in CO."

Thereafter, NTA arranged for Defendant Joseph Minnick ("Minnick"), an adjuster with Defendant Transportation Claims Service, LLC ("TCS"), to make a second estimate. On August 25, 2015, Minnick contacted his friend Lin Manning asking for guidance on replacement of the frame rail. He told Mr. Manning that MCC was concerned that the fire had damaged the frame rail and might crack and pose a hazard if the frame was not replaced. Minnick said he was not sure if the fire was hot enough to damage the strength of the frame rail. Later, Mr. Manning expressed skepticism that the fire was hot enough to alter the frame material, but added, "I'd sure not like to rely on sectioning the frame, that is so dependent on the quality of the welder and is almost sure to leave weak places at the joints, plating, etc., also is dependent on the quality of work and looks repaired."

On August 31, 2015, Minnick gave an estimate of $22,454.83 to repair the Freightliner, which did not provide for replacement of the frame rail. Cherek expressed concern that Minnick had an agenda to "cut costs at all corners to save money regardless of the outcome." Minnick allegedly told him he had promised Lloyd's he would "bring claims in at half their real value."

In a September 17, 2015 Report to NTA, Minnick recommended settlement of the claim for his August 31 estimate of $22,454.83. Minnick stated that he had consulted with three experts, all of whom agreed with Minnick that the fire was not hot enough to damage the frame rail.

On September 25, 2015, Defendants offered to settle the Freightliner claim for $25,304.83, which included Minnick's estimate plus towing charges. MCC rejected the settlement. On October 21, 2015, Minnick advised NTA that the replacement of the frame rail was "approximately an additional $30,000 of work that we do not feel would be necessary to put this unit back into the condition it was in prior to the loss." Minnick recommended that Defendants invoke the appraisal clause in the Policy.

On March 3, 2016, NTA issued a check to MCC for $25,304.83, with a notation on the check stating, "Full Settlement of Collision Loss." On March 9, 2016, NTA advised MCC that although there was a dispute, Defendants "wanted to send this undisputed amount."

On May 19, 2016, Lloyd's lawyer confirmed with MCC that the March check for $25,304.83 represented the undisputed amount of the loss. Lloyd's advised it was investigating the claim subject to a full reservation of rights and invoked the appraisal clause, appointing Minnick to serve as its appraiser.

The Kenworth Truck Losses

While the claim on the Freightliner was pending, MCC experienced two more losses. The first loss involved a hit-and-run involving a 2006 Kenworth on August 14, 2015 (the "Hit-and-Run Loss"). The second was a deer collision involving a 2008 Kenworth on December 3, 2015 (the "Deer Accident").

2006 Kenworth Hit-and-Run Loss

MCC submitted a loss notice on the Hit-and-Run Loss on August 14, 2015, the day the accident occurred. The broker listed "National Indemnity" on the Automobile Loss Notice. Lloyd's claims it did not receive notice of this claim until February 2016. Lloyd's believes notice was delayed because the loss notice was initially sent to "National Indemnity."

J. Wayne Bevers ("Bevers") of Chaparral Claims and Investigations, LLC ("Chaparral") became aware of Hit-and-Run Loss when he was investigating the Deer Accident on January 26, 2016. Bevers inspected the Hit-and-Run Loss on January 26 to save time and money. Misti Jenkins ("Jenkins"), a claims supervisor at NTA, had recommended Bevers to adjust the Deer Accident, describing him as a "very experienced adjuster" and, "given [Lloyd's and NTA's] history with this insured," he was "just the type of adjuster we need."

On February 8, 2016, the broker resubmitted the Loss Notice, identifying "Lloyd's of London" as the insurer. NTA acknowledged the claim the following day. On March 9, 2016, Bevers estimated the repairs for the Hit-and-Run Loss to be $18,785.60. On April 12, 2016, Bevers reported to NTA that "the damage observed at the time of our inspection appeared reasonable and related." Bevers told NTA he had shared the estimate with MCC as it was "common practice" to share an estimate with the insured and he had not been instructed otherwise.

On April 13, 2016, Jenkins of NTA told MCC that the Bevers' estimate had been rejected. Jenkins explained that Bevers' estimate was "written at a shop that is not capable of completing the required repairs" and was prepared by an "incompetent appraiser." On April 14, 2016, Chris Barreira ("Barreira") of NTA prepared a new estimate of $13,957.95 for Hit-and-Run Loss. Barreira never inspected the vehicle.

On May 19, 2016, Lloyd's advised MCC that it was investigating the Hit-and-Run Loss under a full reservation of rights. The following day, Lloyd's invoked the appraisal provision in the Policy. Lloyd's informed MCC it was sending a check for $12,957.95, which Lloyd's claimed was the "undisputed payment." On July 27, 2016, Lloyd's issued a check to MCC in the amount of $12,957.98. The check stated it was for "Full Settlement of Collison Loss Re: Undisputed Portion."

2008 Kenworth Deer Accident

MCC reported the Deer Accident on December 3, 2015, the day of the accident. Bevers inspected the damage on January 26, 2016, which MCC admitted was "not very long afterwards."

On January 29, 2016, Bevers estimated the repairs for the Deer Accident to be $16,931.97. On April 12, 2016, Bevers reported to NTA that "the damage observed in (sic) not uncommon in that type of accident [deer impact] and appeared reasonable and related." Bevers again noted that he had shared the estimate with MCC as that was "common practice."

On April 14, 2016, Barreira estimated the repairs to be $9,652.93 for the Deer Accident. Barreira never inspected the vehicle.

On May 19, 2016, Lloyd's advised MCC that it was investigating the Deer Accident under a full reservation of rights. On May 23, 2016, NTA issued a check to MCC in the amount of $8,652.93, which represented the revised estimate of $9,652.93, less the $1,000 deductible. The check stated that it was for "Full Settlement of Collision Loss." On July 13, 2016, Lloyd's paid $8,652.93 on the Deer Accident claim. Lloyd's made a demand for an appraisal and appointed Minnick to serve as its appraiser.

The Appraisal Process

The Policy included an appraisal provision, which provided the mechanism for resolving disputes over the amount of loss. The Appraisal Clause provided:

> APPRAISAL. In case the Assured and Underwriters shall fail to agree as to the amount of loss or damage each shall on the written demand of either, select a competent and disinterested appraiser. Before entering upon the reference, the appraisers shall first select a competent and disinterested umpire and failing for fifteen (15) days to agree upon such umpire, then on the request of the Assured or the Underwriters such umpire shall be selected by a judge of a court of record in the County and State in which the appraisal is pending. The appraisers shall then appraise the loss or damage stating separate the sound value and loss or damage; and failing to agree, shall submit their differences only to the umpire. The award in writing of any two, when filed with the Underwriters, shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him and the expenses of the appraisal and of the umpire shall be paid by the parties equally.

Defendants invoked the appraisal process in July 2016. The appraisal process stalled because the parties disagreed over the appointment of the appraisers and the umpire. MCC objected to Minnick as Lloyd's appraiser, claiming he was not "disinterested." Minnick proposed three umpires to MCC, two of whom had previously discussed the damage to the frame rail with Minnick. Minnick did not disclose these prior discussions or his personal relationship with one of the proposed umpires. MCC proposed two umpires who Defendants objected to as being unqualified.

Before the parties could agree upon an umpire, MCC filed this action on November 16, 2016. The Complaint asserted three causes of action: Count 1 against Lloyd's for breach of insurance contract, including breach of the covenant of good faith and fair dealing; Count 2 against Lloyd's for tortious bad faith claims handling; and Count 3 against NTA, TCS and Minnick for aiding and abetting bad faith claims handling. The Complaint demands an award of compensatory and punitive damages.

The appraisal process resumed in February 2017. The parties ultimately agreed upon Craig Phillips ("Phillips") to serve as umpire.

Lloyd's selected Michael Kinder ("Kinder") as its appraiser to replace Minnick. Kinder estimated repairs for each claim as follows: $15,189.61 for the Freightliner; $3,230.81 for the Hit-and-Run Loss; and $5,065.58 for the Deer Accident.

MCC selected Mark Moorehead as its appraiser. Mr. Moorehead estimated repairs for each claim as follows: $51,372.70 for the Freightliner; $17,845.08 for the Hit-and-Run Loss; and $16,594.92 for the Deer Accident.

Conflicting evidence was presented during the appraisal on the need for replacement of the Freightliner frame rail. Kinder believed that the fire was not heat intensive enough to require the frame rail to be replaced and that it could be repaired and repainted. R. Craig Jerner, a metallurgist, opined that the fire had damaged the frame rail and it needed to be replaced before the vehicle could safely operate on public roads. Jamie Petty-Galis confirmed Mr. Jerner's opinion after he died.

All three appraisers signed the May 9, 2018 Appraisal Awards. The appraisers found that the "actual and reasonable cost of repairs due" for each claim were as follows: $24,829 for the Freightliner fire loss; $8,800 for the Hit-and-Run Loss; and $7,500 for the Deer Accident. The following day, Moorehead asked to have his signature removed from the Appraisal Awards, claiming he did not agree with the conclusions and had been intimidated into hastily signing the awards.

On May 29, 2018, Plaintiff filed a Motion for Court Order Rejecting and/or Setting Aside the May 9, 2018 Appraisal Awards. Defendants filed a Cross-Motion for Order Confirming Appraisal Awards on June 18, 2018. On October 16, 2018, the Court denied MCC's motion and granted Defendants' motion and confirmed the Appraisal Awards.

Defendants now move for summary judgment on all claims. MCC moves for partial summary judgment on the issue of whether Enriquez had apparent authority to enter into a binding agreement to settle the Freightliner claim for $56,506.45.

STANDARD OF REVIEW

Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Rule 56(a), Ariz. R. Civ. P.; *see also Delmastro & Eells v. Taco Bell Corp.*, 228 Ariz. 134, 137-38, ¶ 7, 263 P. 3d 683, 686-87

(Ct. App. 2011). In deciding a motion for summary judgment, the Court must view the facts and the reasonable inferences to be drawn from those facts in the light most favorable to the non-moving party. *See, e.g., Espinoza v. Schulenburg*, 212 Ariz. 215, 216, ¶ 6, 129 P.3d 937, 938 (2006).

DISCUSSION

Defendants' Motion for Summary Judgment

Breach of Contract Claim

To bring an action for breach of contract, "the plaintiff has the burden of proving the existence of the contract, its breach and the resulting damages." *Thomas v. Montelucia Villas, LLC*, 232 Ariz. 92, 96, ¶ 16, 302 P.3d 617, 621 (2013). In the Complaint, MCC alleges Lloyd's breached the Policy by failing to pay the claims in full and failing to handle MCC's claims in a reasonable manner. Complaint at ¶ 91.

Lloyd's argues that summary judgment is appropriate on the breach of contract claim for three reasons: (1) invoking the Policy's appraisal clause was not a breach of contract because the parties did not agree on the amount of loss; (2) Lloyd's paid more than what it owed under the Policy as determined by the appraisers and confirmed by the Court; and (3) MCC has no contract damages because it received more than it was entitled to receive for its losses under the Policy.

MCC does not deny that it received the undisputed amounts owed under the Policy. The undisputed amounts, as determined by the appraisers, exceeded the actual and reasonable cost of repairs for each of the losses. Thus, there is no evidence MCC was denied any contractual benefit under the Policy and has suffered no damage by an alleged breach. Regardless, Plaintiff did not address the breach of contract claim in its response to Defendants' motion. It is not incumbent upon the Court to decipher and develop arguments not clearly presented. *See Ace Auto. Products, Inc. v. Van Duyne,* 156 Ariz. 140, 143, 750 P.2d 898, 901 (Ct. App. 1987).

Defendants' Motion for Summary Judgment on the contract claim is granted.

Bad Faith Claim

A policy of insurance contains an implied covenant of good faith, meaning that the insurer must deal fairly with the insured, giving equal consideration to the insured's interests. *Rawlings v. Apodaca*, 151 Ariz. 149, 157, 726 P.2d 565, 573 (1986). "The tort of bad faith arises when the insurer 'intentionally denies, fails to process or pay a claim without a reasonable basis.'" *Zilisch v. State Farm Mut. Auto. Ins. Co.,* 196 Ariz. 234, 237, ¶ 20, 995 P.2d 276, 279 (2000) (*quoting*

Noble v. National Am. Life Ins. Co., 128 Ariz. 188, 190, 624 P.2d 866, 868 (1981)). A failure to pay a claim is unreasonable unless the claim's validity is "fairly debatable" after an adequate investigation. *Noble*, 128 Ariz. at 190, 624 P.2d at 868. Thus, an insurer may not defend a claim that is not fairly debatable and must exercise reasonable care and good faith in defending a fairly debatable claim. *Zilisch*, 196 Ariz. at 237, ¶ 19, 995 P.2d at 279. "[T]he insurer's eventual performance of the express covenant – by paying the claim -- does not release it from liability for 'bad faith.'" *Rawlings*, 151 Ariz. at 156, 726 P.2d at 572; *see also Deese v. State Farm Mutual Auto. Ins. Co.*, 172 Ariz. 504, 509, 838 P.2d 1265, 1270 (1992).

Bad faith requires more than just negligence or inadvertence. *Deese*, 172 Ariz. at 507, 838 P.2d at 1268. The question is whether there is sufficient evidence from which a reasonable jury could conclude that in the investigation, evaluation, processing and payment of the claim, the insurer acted unreasonably and either knew, or was conscious of the fact, that its conduct was unreasonable. *Zilisch*, 196 Ariz. at 238, ¶ 22, 995 P.2d at 280. Summary judgment can be appropriate if no reasonable person could find against the insurer. *Lasma Corp. v. Monarch Ins. Co. of Ohio*, 159 Ariz. 59, 63-64, 764 P.2d 1118, 1122-23 (1988). However, "[b]ad faith connotes a state of mind, which inherently and nearly always avoids summary dismissal in deference to jury determination." *State Farm Fire & Casualty Co. v. Trumble*, 663 F. Supp. 317, 321 (D. Idaho 1987).

MCC points to two areas of alleged bad faith. First, it claims that Lloyd engaged in bad faith claims handling by failing to conduct a timely and adequate investigation and delaying payment of the undisputed amounts. MCC also asserts that Lloyd's engaged in "lowballing" to try to coerce settlements for lower amounts. The second area concerns Lloyd's alleged bad faith participation in the appraisal process.

Bad Faith Claims Handling

MCC argues that the delay in processing the claims and paying the undisputed amounts supports an inference of bad faith. MCC has presented evidence that there was delay in the investigation, processing and payment of the undisputed portions of all three claims.

The Freightliner Claim. MCC reported the Freightliner loss in June 2015. Lloyd's determined that the undisputed amount of the claim was $25,304.83 on September 25, 2015. The first check issued by Lloyd's in March stated it was for "Full Settlement," even though Lloyd's knew there was a substantial dispute over the frame rail portion of the claim. MCC did not receive payment of the undisputed amount until May 2016, almost one year after the claim was made. Lloyd's was on notice that the Freightliner was out of commission and costing MCC money while waiting for repairs.

Defendants contend the delay was not unreasonable. They point out that the Freightliner was inspected within a few weeks of the accident. They also note that the replacement of the frame rail was in dispute and fairly debatable. Lloyd's argues it acted within the letter of the Policy in its investigation of claim and paid more than the appraisers determined was required to be paid under the Policy.

Lloyd's has offered no explanation why it waited so long to pay the undisputed portion of the claim. "Where coverage is not contested but the amount of the loss is disputed, the insurer is under a duty to pay any undisputed portion of the claim promptly. Failure to do so amounts to bad faith." *Borland v. Safeco Ins. Co of Am.*, 147 Ariz. 195, 200, 709 P.2d 552, 556 (Ct. App. 1985). A reasonable jury could conclude that the delay in processing and payment of the undisputed portion of this claim was bad faith.

Hit-and-Run Loss. There is also evidence of delay in the processing and payment of the Hit-and-Run Loss. MCC reported the claim in August 2015, but Lloyd's did not acknowledge it until February 2016. Where the fault lies for that delay is a question for the fact finder.

The first estimate was made in March, the second in April. However, MCC did not receive the undisputed portion of the claim until July 27, 2016, almost a year after reporting the loss and more than three months after the second estimate was completed. A reasonable jury could conclude that the delay in processing and payment of the claim was consciously unreasonable. *Id.*

Deer Accident. Although the Deer Accident was reported on December 3, 2015, MCC did not receive payment of the undisputed amount until July 13, 2016, more than seven months later. The first check issued by Lloyd's in May stated it was for "Full Settlement" even though there was a dispute over the full amount owed. A reasonable jury might conclude that this was an unreasonable delay. *Id*.

Defendants claim they were diligent in processing the claims. They inspected the vehicles, procured repair estimates and paid the undisputed portions of the claims. They assert that any delay in paying the undisputed sums was inadvertent. They argue they had they had no motive or incentive to delay the payments. However, the Court finds that an inference could be drawn that the delays were not merely inadvertent, but conscious. The fact that there was some delay in payment of all three claims undercuts Defendants' claim of inadvertence. Requiring multiple estimates due to perceived errors in the first estimates may have also contributed to the delays. In any event, this is an issue for the fact finder that cannot be resolved on summary judgment.

"Lowballing." "Lowballing" is the practice of offering low settlement offers hoping the insured will settle for less than the value of the claim. *See Zilisch*, 196 Ariz. at 238, ¶ 21, 995 P.2d

at 280. MCC claims that Defendants engaged in "lowballing" by requiring multiple, lower estimates on all three claims.

Defendants claim they found errors and oddities in Enriquez's estimate for the Freightliner repairs, even though she had extensive experience in estimating truck repairs. It may have been reasonable to request a second estimate. On the other hand, there is some evidence Minnick was retained to give a second estimate because he had allegedly given Lloyd's assurance he could cut repair estimates in half. It is possible a jury could conclude Lloyd's discarded Enriquez's estimate despite her experience evaluating truck claims in favor of an adjuster who would work to get a lower settlement.

There is also some evidence of "lowballing" on the Hit-and-Run Loss and Deer Accident. NTA recommended Bevers based on his experience and belief that he would be suitable for estimating MCC's claims. When Defendants did not like Bevers' estimates, however, they rejected the claim on the grounds he was an "incompetent appraiser." The second estimates, which were accepted by Defendants, were prepared by an adjuster who did not do a physical inspection of the vehicles.

There are facts that Defendants contend cut against any finding of bad faith. The fact that the appraisers affirmed awards that were less than the undisputed amounts suggests that the initial estimates were overstated. However, a jury question is presented when the facts and inferences from those facts are considered in the manner most favorable to MCC.

Bad Faith Aspects of Appraisal Process

Lloyd's had the right under the Policy to invoke the appraisal process because there were disputes over the amount of each claim. MCC has presented no evidence that Lloyd's invoked the appraisal process in bad faith. The appraisal did not delay payment of the undisputed amounts. No reasonable jury could conclude this was bad faith.

MCC has presented no evidence that the appraisal process was conducted in bad faith. MCC's complaints about Minnick not being disinterested or trying to find a "ringer" to serve as umpire are not relevant. Minnick was not an appraiser and his suggested umpires were not selected. There is no evidence Minnick had any improper influence over the appraisal process.

MCC's claims that Kinder was not disinterested and his estimates were made in bad faith also are not supported. The claim that Kinder intentionally "lowballed" his estimates to get the umpire to "split the difference" is speculation. There is no evidence of any such strategy. No reasonable jury could find otherwise. The Court has already considered MCC's challenges to the

Appraisal Awards and affirmed them. There is simply no evidence that the appraisal process was somehow tainted or conducted in bad faith.

Causation

Bad faith requires that plaintiff come forward with evidence that their losses were "caused by defendant's conduct," including pecuniary losses. *Rawlings*, 151 Ariz. at 161, 726 P.2d at 577. Defendants argue that MCC has no causally related damages because it received more than the amounts in the Appraisal Awards.

MCC claims that it lost significant revenue because three of its vehicles were out of commission and not timely repaired. MCC alleges that by the time the claims were paid months or, in some cases almost a year after the accident, MCC suffered financially. A jury could reasonably find MCC was damaged by the delay in processing and paying the claims.

Defendants contend MCC did not think the undisputed amounts were insufficient to make the necessary repairs to get the trucks back on the road safely. Thus, according to Defendants, even if the undisputed amounts had been paid sooner, MCC would not have made the repairs and put the trucks back in operation. Defendants also claim that MCC did not timely cash the checks or used the funds for other things than repairing the trucks. These may be valid points and undercut MCC's damages. However, these are issues to be considered by the jury, not resolved by the Court on summary judgment.

Conclusion

There is a jury question on whether Lloyd's acted in bad faith in how it processed and paid these claims. Thus, that portion of the Motion for Summary Judgment is denied. The Motion for Summary Judgment is granted as to the allegations of bad faith in the appraisal process.

Aiding and Abetting Bad Faith Claim Handling

MCC alleges that the adjuster defendants, NTA, TCS and Minnick, aided and abetted Lloyd's bad faith in the handling and processing the claims. Aiding and abetting requires proof that a primary tortfeasor committed a tort and that the defendant knowingly provided substantial assistance. *Security Title Agency, Inc. v. Pope*, 219 Ariz. 480, 491, ¶ 44, 200 P.3d 977, 988 (Ct. App. 2008).

Defendants argue that summary judgment is proper on the aiding and abetting claim because there is no evidence a primary tort has been committed.[1] *See Wells Fargo Bank v. Arizona Laborers, Teamsters & Cement Masons Local No. 395 Pension Tr. Fund*, 201 Ariz. 474, 485, ¶ 36 (2002) ("Because aiding and abetting is a theory of secondary liability, the party charged with the tort must have knowledge of the primary violation."). Defendants' argument assumes their Motion for Summary Judgment will be granted on the bad faith claim.

The Court has concluded that there are triable issues concerning the processing and payment of the three claims. There is also evidence the adjuster defendants participated in the processing and payment of these claims. Therefore, the Motion for Summary Judgement on the aiding and abetting claim is denied.[2]

Punitive Damages

Punitive damages can be awarded when it is established that the defendants acted to serve their own interests, knowing or consciously disregarding a substantial risk of significantly injuring the insured. *Bradshaw v. State Farm Mutual Auto. Ins. Co.*, 157 Ariz. 411, 422, 758 P.2d 1313, 1324 (1988). "Even if the defendant's conduct was not outrageous, a jury may infer evil mind if defendant deliberately continued his actions despite the inevitable or highly probably harm that would follow." *Gurule v. Illinois Mutual Life and Casualty Co*., 152 Ariz. 600, 602, 734 P.2d 85, 87 (1987). Punitive damages require a showing of an evil hand guided by an evil mind. *Rawlings*, 151 Ariz. at 162, 726 P.2d at 578. There must be some showing of actual malice. *Id.* The evidence of evil mind must be clear and convincing. *Thompson v. Better-Bilt Aluminum Products Co., Inc*., 171 Ariz. 550, 557, 832 P.2d 203, 210 (1992). "Clear and convincing evidence means 'that which may persuade that the truth of the contention is highly probable.'" *Id. (quoting In re Neville*, 147 Ariz. 106, 111, 708 P.2d 1297, 1392 (1985)). "The question of whether punitive damages are justified should be left to the jury if there is any reasonable evidence which will support them." *Farr v. Transamerica Occidental Life Ins. Co. of California*, 145 Ariz. 1, 9, 699 P.2d 376, 384 (Ct. App. 1984).

In support of its claim for punitive damages, MCC argues "there is substantial evidence that Lloyd's, through its agents, dealt with Plaintiff in bad faith, attempted to deceive Plaintiff with regard to the selection of an appraisal umpire, and preyed upon Plaintiff's financial vulnerability

[1] For the first time in the Reply, Defendants argue that the adjusters cannot be liable for aiding and abetting because a corporation cannot aid and abet itself. *See Rowland v. Union Hills Country Club*, 157 Ariz. 301, 306, 757 P.2d 105, 110 (Ct. App. 1988). The Court declines to consider this untimely argument. *Marquette Venture Partners II, L.P. v. Leonesio*, 227 Ariz. 179, 184 n.8, ¶ 18, 254 P.3d 418, 423 n.8 (Ct. App. 2011).

[2] Defendants argue for the first time in the Reply that there is no evidence the adjuster defendants substantially assisted Lloyd's bad faith. MCC had no opportunity to address this issue. The Court will not consider arguments raised for the first time in a reply. *Marquette Venture Partners, supra*.

to coerce Plaintiff to accept low-ball, inadequate and unreasonable claims payments." That is MCC's entire argument in support of punitive damages. MCC essentially repeats the same argument it made to support its bad faith claim. It makes no claim that Defendants acted with an evil mind or with malice. *See Rawlings*, 151 Ariz. at 161, 726 P.2d at 577 ("punitive damages may not be awarded in a bad faith tort case unless the evidence reflects 'something more' than the conduct necessary to establish the tort.").

The Court has carefully considered the evidence submitted. MCC has not presented any facts from which a reasonable jury could conclude by clear and convincing evidence that Defendants acted with an evil mind or knowingly creating a substantial risk of significant harm. *Tritschler v. Allstate Ins. Co.*, 213 Ariz. 505, 517-18, ¶¶ 39-40, 144 P.3d 519, 531-32 (Ct. App. 2006) ("In opposing Allstate's summary judgment motion, Tritschler did not produce any evidence that Allstate had exhibited the requisite evil mind and intent to harm his interests; instead, he simply argued that the record "demonstrates a pattern of misconduct and disregard of the rights of the insured."). Defendants' Motion for Summary Judgment is granted as to the claim for punitive damages.

MCC's Cross-Motion for Partial Summary Judgment on Apparent Authority

MCC claims that an agreement was reached between Brenda Enriquez and Chuck Cherek to repair the Freightliner for $56,506.45. MCC asserts that Enriquez had apparent authority to make this agreement on behalf of Lloyd's.[3] Lloyd's denies Enriquez had any such authority or that any agreement was reached.

"The touchstone of apparent authority is conduct of a principal that allows a third party reasonably to conclude that an agent is authorized to make certain representations or act in a particular way." *Miller v. Mason-McDuffie Co. of Southern California*, 153 Ariz. 585, 589, 739 P.2d 806, 810 (1987). "[T]he principal must make some manifestation to the third party which could reasonably be relied upon to indicate that the agent had the alleged authority." *Hudlow v. Am. Estate Life Ins. Co.*, 22 Ariz. App. 246, 248, 526 P.2d 770, 772 (1974) (*citing Restatement (Second) of Agency* §§ 8, 27, 49).

Defendants assert MCC has failed to identify any conduct by Lloyd's manifesting that Enriquez had apparent authority to bind it to a settlement. Enriquez stated in a report she had reached an agreement with MCC. Later, she denied having authority to settle Lloyd's claim. Cherek thought Enriquez had authority based on her prior conduct.[4]

[3] The relevance of this Motion is not clear. Count One is for Breach of Insurance Contract, not breach of an alleged settlement agreement. There is no allegation of such an agreement in the Complaint.

[4] The Declaration of Martin Zabala and other new evidence MCC submitted with its Reply add nothing new to the apparent authority argument. As noted by Defendants in their Objection to the new evidence, adding new evidence

As demonstrated in the many cases cited by MCC, whether an adjuster has apparent authority is generally a question of fact. *See, e.g., Hartford v. Industrial Commission of Arizona,* 178 Ariz. 106, 870 P.2d 1202 (Ct. App. 1994) (evidentiary hearing before administrative law judge); *Buchanan v. Switzerland General Ins. Co.*, 76 Wash.2d 100, 109, 455 P.2d 344, 350 (1969) (finding triable issue of fact on question of adjuster's authority); *Ferguson v. Universal Prop. & Cas. Ins. Co*., 46 So. 3d 1037, 1039 (Fla. App. 2010) (concluding that "the jury should have been permitted to decide whether the adjuster had apparent authority."); *McCarter v. Nat'l Union Fire Ins. Co*., 147 So.2d 104, 107 (La. App. 1963) ("As a general rule, the authority of an independent adjuster is a question of fact to be found from all the evidence on the subject.").

The facts concerning Enriquez's authority are in dispute. Summary judgment is denied.

DISPOSITION

Based on the foregoing,

IT IS ORDERED granting Defendants' Motion for Summary Judgment as to Count One for Breach of Insurance Contract and Plaintiff's claim for Punitive Damages.

IT IS FURTHER ORDERED granting Defendants' Motion for Summary Judgment on Count Two for Bad Faith based on allegations of bad faith in the appraisal process. The remainder of the Motion for Summary Judgment as to the Bad Faith Claim is denied.

IT IS FURTHER ORDERED denying Defendants' Motion for Summary Judgment on Count Three for Aiding and Abetting Bad Faith Claims Handling.

IT IS FURTHER ORDERED denying Plaintiff's Cross-Motion for Partial Summary Judgment based on Apparent Authority for a Binding Agreement on the Freightliner Loss Repair.

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with the reply to a motion for summary judgment does not comport with the rules of civil procedure. While Rule 56(c)(2) contemplates that a reply memorandum may include "supporting material", there is nothing in the rule to suggest that such "supporting materials" may include new evidence that could have, and should have, been included with the original motion and statement of facts. *Wells Fargo Bank, N.A. v. Allen,* 231 Ariz. 209, 214 n.3, ¶ 20, 292 P.3d 195, 200 n.3 (Ct. App. 2012) ("[I]t was improper to introduce new evidence with the reply memorandum.").