

No. 68117-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA;
STEADFAST INSURANCE COMPANY; and
HEFFERNAN INSURANCE BROKERS, INC.

Appellants;

v.

THE ESPLANADE CONDOMINIUM ASSOCIATION, AFE
SPINNAKER, LLC, AF EVANS COMPANY, AF EVANS
DEVELOPMENT INC., RICHARD BELL, JACK ROBERTSON AND
TORY LAUGHLIN TAYLOR,

Respondents.

BRIEF OF RESPONDENTS THE ESPLANADE CONDOMINIUM
ASSOCIATION, AFE SPINNAKER, LLC, AF EVANS COMPANY, AF
EVANS DEVELOPMENT INC., RICHARD BELL, JACK
ROBERTSON AND TORY LAUGHLIN TAYLOR

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COURT OF APPEALS
STATE OF WASHINGTON
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I. INTRODUCTION

In this condominium construction defect case, respondent Esplanade Condominium Association (“the Association”) entered into a written settlement agreement with the Defendants which provided in relevant part that certain Defendants would stipulate to a judgment in an agreed principal amount, plus an amount to be determined by the Court for reasonable attorney fees and punitive damages based on the Association’s Consumer Protection Act Claims. Paragraph 2.2 of the settlement agreement provided that upon the determination by the trial court of the additional amount to be added to the judgment, Defendants would “... sign and deliver to the Association the Stipulated Judgment against each of them, substantially in the forms attached hereto as Appendices A, B and C, in favor of the Association...” (CP 1039). The form judgments in the appendices specified 12% interest. (CP 1050-1063).

In addition, Paragraph 2.3 of the settlement agreement provided that the Association would file a Motion requesting a ruling that the settlement was reasonable, pursuant to *Chausee v. Maryland Casualty Co.*, 60 Wn. App. 504, 803 P.2d 1339 (1991), and that if the Trial Court determined that the settlement was not reasonable, the stipulated judgment would be adjusted to whatever amount the court found reasonable, while leaving the remaining terms of the agreement undisturbed.

Appellants Travelers Property Casualty Company Of America (“Travelers”) and Steadfast Insurance Company (“Steadfast”) intervened in the underlying action and opposed the Association’s Reasonableness Motion.¹ While Travelers and Steadfast vigorously contested what the principal amount of the judgment should be, they never objected at the reasonableness hearing to the 12% judgment interest rate that was specified in the settlement agreement.

Travelers and Steadfast were able to convince the Court that the approximately \$8 million settlement provided for in the Settlement Agreement was unreasonable, and that the reasonable settlement value of the Association’s claims was \$5.1 million.² Whereupon, pursuant to Paragraph 2.3 of the settlement agreement, the Defendants stipulated to the \$5.1 million judgment using the form of the judgment attached to the settlement agreement - which included the 12% interest.

When Travelers and Steadfast objected to the inclusion of the 12% interest rate in the judgment, the Court denied their objection finding that:

¹ Travelers and Steadfast shall be collectively referred to as “Intervenors”.

² As explained below, in determining the reasonable settlement value of the case the trial court found the Association’s complete scope of repair to be reasonable, but used a lower cost estimate submitted by the Appellants in calculating the main damages portion of the judgment. To this \$4.4 million dollar cost of repair amount, the trial court added approximately \$700,000 in attorney fees and CPA penalties that had been determined at a prior contested motion. The trial court did not find that the settlement was the product of collusion. Nor did it change any other provision of the settlement agreement, beyond the principal judgment amount.

“The interest rate was indicated in the Attachments to the Settlement Agreement.” (CP 3755)

As demonstrated below, RCW 4.56.110(1) provides that judgments founded on written contracts providing for the payment of interest at a specified rate, shall bear interest at the rate specified in the contract. Thus, based upon the express terms of the settlement agreement, the trial court was clearly correct in entering the judgment in the form agreed upon by the settling parties, which included 12% interest.

In its appeal, Travelers simply ignores the actual provisions of the settlement agreement and claims that the settlement agreement contains no provision specifying the interest rate. For example, at page 22 of its Opening Brief, Travelers argues: “Even if, however, the settlement agreement had been reasonable, **that agreement did not contain an interest rate upon which to base the post-judgment interest rate.** CP 3616-3630.”³ (Emphasis Added).

Steadfast takes a slightly different approach. Steadfast acknowledges that the form of the judgment provides for a judgment interest rate of 12%, but argues that these proposed judgments never

³ Similarly, at page 23 of its Opening Brief Travelers again argues that there never was an agreement between the Association and the settling Defendants with respect to the interest rate when it claims: “The case at bar differs from *Fenix* in two material respects: 1) **the parties here did not agree to an interest rate in the settlement agreement ...**” (Emphasis Added).

became operative given the determination that the Settlement was unreasonable.” (Steadfast Brief at 17). In making this argument, Steadfast ignores the fact that the settlement agreement specifically provides at paragraph 2.3 that it remains operable even if the trial court should find a lesser settlement amount for the judgment to be reasonable. In that event, the parties agreed *in advance* that the stipulated judgment would be adjusted to whatever amount the court found reasonable, while leaving the remaining terms of the agreement undisturbed.⁴

Because it is the clear law of Washington that regardless of the type of claim being settled, a judgment based on a settlement may bear interest at the contract rate of 12% (if the parties so agree), this Court need not reach Intervenors’ arguments that the underlying action was primarily a tort-based action.

However, even assuming, that Travelers and Steadfast can somehow convince this Court to hold that the agreed upon interest rate should not apply, the claims at issue in the underlying action were still predominately warranty and contractual claims in nature, and would justify application of the contract interest rate. As explained below, and as discussed in the Motion for Reasonableness Determination below (CP

⁴ Travelers and Steadfast have never contended that this advance agreement to be bound by the court’s reasonableness determination is in any way impermissible, improper, or unenforceable.

993-1105), the case was primarily a warranty of suitability case; it would therefore, have been subject to the contract rate of judgment interest had it gone to verdict.

II. STATEMENT OF ISSUES

(1) When parties to a written settlement agreement agree to entry of a judgment in accordance with an approved form of judgment which bears interest at 12%, does the interest rate for judgments based on a written contract set forth in RCW 4.56.110(1) apply?

(2)(a) Where a settlement agreement contemplates adjusting the principal amount of a consent judgment to match any amount that is determined to be reasonable by the trial court, is the parties' agreement as to the judgment interest rate vitiated by the court's finding at a reasonableness hearing that one portion of the damages contemplated by the judgment is excessive, and substituting a lower reasonable amount for that portion, when the parties thereafter enter a judgment for the amount declared to be reasonable, using the agreed interest rate?

(2)(b) Where intervenor insurers contesting the reasonableness of an agreed settlement amount do not challenge the objective reasonableness of an agreed judgment interest rate at a reasonableness hearing, are they deemed to have waived that challenge when the court adjusts only the principal judgment amount as the Intervenor requested?

(3) Assuming that the contract interest rate provisions of RCW 4.56.110(1) do not apply, were the claims against the Defendants in the underlying action primarily based in tort or in contract for purposes of determining the judgment interest rate?

III. STATEMENT OF THE CASE

Defendant AFE Spinnaker, LLC ("Spinnaker") was a single-asset condominium declarant established by parent company AF Evans Co. ("AFECO") for the sole purposes of converting an older apartment

complex to condominiums, and selling the units. (CP 1255, 314). The Association sued Spinnaker, its parent company AFECO, the operational arm of AFECO (AF Evans Development, Inc. (“AFED”)), and a number of corporate executives for breach of warranty, misrepresentations in a public offering statement, breach of fiduciary duty by declarant-appointed members of the Association’s board of directors, fraudulent transfers, and violations of the Consumer Protection Act. (CP 4-28).

Early in the Association’s lawsuit, an order of default was entered against Spinnaker, following a decision by AFECO executives not to defend the company. (CP 38-39; CP ____ [Sub Docket No. 282]).

Following entry of the default, AFECO, AFED, and the same corporate executive were defended by the McNaul Ebel law firm, which was hired by insurer RSUI. (CP 43-45). RSUI had issued the defendants a directors and officers liability insurance policy, the applicable limits of which were eroded by defense costs. (CP 1638-1639)⁵

The trial court also ruled early in the litigation that attempted disclaimers of the WCA warranties by Spinnaker were ineffective as a matter of law. (CP 206-208).

⁵ Steadfast refused to defend any party, on grounds which have since been held to be unreasonable as a matter of law. (See Appendix A).

Travelers inexplicably failed to defend Spinnaker and AFECO for 5 months after being tendered their defense. (CP 2150-2151).

As a consequence of both the order of default and exclusion of warranty disclaimers, Spinnaker's warranty liability was essentially a foregone conclusion. Accordingly, emphasis shifted to the remaining tort issues of misrepresentation and breach of fiduciary duty by the corporate executive defendants. Alter ego liability of AFECO and AFED, as well as declarant liability on their part, remained at issue as well.

Substantial evidence supporting the alter ego allegations, declarant liability allegations, and the tort claims was adduced (CP 993-1027; CP 1028-1105, CP ____ [Sub Docket No. 308]) after extensive and bitterly-fought discovery disputes during the initial discovery phases. (e.g., CP 212-235; CP 236-243; CP 562-589).

AFECO, AFED, and the executive defendants filed a series of dispositive motions. Specifically, the corporate defendants sought dismissal of claims for alter ego liability, dismissal of claims based on declarant status, dismissal of claims based on misrepresentation, and dismissal of claims based on violation of the Uniform Fraudulent Transfers Act. (CP 163-177; CP 181-196; CP 199-203; 260-272).

To be heard contemporaneous with the defense dispositive motions, the Association noted a hearing to reduce its order of default against Spinnaker to judgment. (CP 543-561). RSUI, apparently realizing that its insureds were at risk of alter ego liability, hurriedly hired defense

counsel for Spinnaker (CP 590-591), whom it contended it did not insure. Spinnaker's new defense counsel, after securing leave to defend, attempted to have the default against Spinnaker set aside (CP _____ [Sub Docket No. 301]), and contested the appropriateness of entering the requested judgment (CP 592-620). These motions would be heard at the same time as the defense dispositive motions, and the hearing on default judgment.⁶

While all of these motions were pending, the parties attempted to mediate the claims on May 15, 2010. (Appendix B, Deposition of Lead Defense Counsel Avi Lipman, pp. 23-24). The Association demanded \$17 million dollars. None of the defendants or their insurers made any settlement offers. (Appendix B, pp. 31-33; CP 1622-1623).

At the hearing on the pending motions the trial court refused to vacate the default, and entered judgment against Spinnaker for just over \$8 million. (CP 764-767). Interest on that default judgment was set at 12%, without objection by any party defendant. (Id.)

⁶ At about the same time, Travelers – five months after being tendered the defense – finally hired counsel to defend two of its insureds, AFECO and Spinnaker. (CP 654-656; CP 2151).

In addition, the trial court denied all of the defense dispositive motions. (CP 771-773; CP 774-778).⁷

Following what could only be described as a very bad day for the Defendants, insurance defense counsel appointed by Travelers reported his opinion that because the default against Spinnaker had not been overturned as he had hoped, liability was likely to be imposed in an amount of at least \$8.6 million against Spinnaker (CP 2336), and that AFECO and AFED were likely to be liable along with Spinnaker (CP 2334-2335). He opined that the total damages awarded with attorney fees could well exceed \$10 million. (Id.) He rested his hopes on appeal. (CP 1239).⁸

⁷ A motion to dismiss breach of fiduciary duty claims against two of the defendant executives was also heard and denied. (CP 768-770).

⁸ Defense attorney Weigel's report is the lynchpin to Intervenor's contention that defendants valued the claims was between \$800,000 and \$1.2 million. However, Intervenor ignores Weigel's testimony that those figures **assumed no default judgment**. (CP 2343). Moreover, Weigel's rosy view of how the warranty of suitability was likely to play to a jury was colored by the recent fairly low jury verdict in the *Balaton* conversion condominium defect matter. (*Balaton Condo. Ass'n v. Balaton Condo., LLC*, No. 07-2-14061-1 SEA.) However, Weigel did not know the facts of the *Balaton* case, did not realize that the verdict had in fact been thrown out for juror and defense counsel misconduct, and was not familiar with the applicable standard for warranty of habitability and suitability as set forth in *Westlake View Condo. Ass'n v. Sixth Ave. View Partners, LLC*, 146 Wn. App. 760, 193 P.3d 161 (2008). (CP 2338-2339; CP _____ [Sub Docket No. 546].

Intervenor has consistently pretended that the defense attorneys believed they would win a great victory at trial. But, in fact, aside from Weigel (who was brought in to the case very late), the opinions of defense attorneys representing AFECO, AFED and Spinnaker are not known. Intervenor merely cite their posturing in mediation briefs which are (improperly) in the record, but lead counsel for AFECO and AFED has refused

In advance of trial a total of 35 depositions were taken (including all testifying experts), and two more mediation sessions were held – at which neither insurer ever made an offer of settlement on behalf of their insureds. (CP 1622-1623; CP 1642-1643; CP 1029-1030).

The corporate defendants fired off a last volley of summary judgment motions on the eve of the dispositive motion cutoff; these were largely just re-hash of arguments they had already made and lost. (CP 907-917; CP 918-926).

After more than a year and half of hard-fought litigation, after two full day mediations at which no offers were made by the defense, and after virtually full preparation for trial by both sides, the parties reached a settlement.

to testify regarding his work product impressions of his clients' exposures. (Appendix B, Lipman Deposition, pp. 26, 30-34, 49).

Intervenors rely also on the general opinions of Attorney Steve Todd, who as matter of principal is personally opposed to the consent judgment / assignment of rights procedure. (CP 2842-2843). However, Todd did not represent AFECO, AFED or Spinnaker. (CP 2795). Tellingly, however, in a report by Todd to his clients that *predated* the entry of default judgment in excess of \$8 million and summary judgment orders denying every defense motion that had been brought, he opined that there was an approximately 1/3 chance of a verdict between 0 and \$250,000, a 1/3 chance of a verdict between \$250,000 and \$1 million, and a 1/3 chance of a verdict between \$1 million and \$7.5 million. (CP 2787).

Mr. Todd indeed may never have changed his evaluation of the reasonable value of the case from what he reported in May, as he stated in deposition. (CP 2800). But this failure to take into account the hard fact that the defendants' shell corporation was now liable as a matter of law for substantially more than the "runaway verdict" top end of Todd's scale demonstrates that his suggested value was more the product of his irrepressible optimism and fervor than it was a rational analysis of the posture of the case and the evidence. Weigel's dire warnings of a \$10 million or more verdict at the end of the day, with only a chance of reversal on appeal, were far more soberly-considered.

The parties' settlement contract called for the following key points:

- (1) Confessions of judgment by Spinnaker (in an amount approximately \$18,000 less than the default judgment), as well as AFECO and AFED (in an amount that was nearly \$1 million less than the default judgment against Spinnaker);
- (2) Interest on the judgments at 12% (which was commensurate with Spinnaker's warranty liability on default);
- (3) Partial payment by Director's and Officer's Liability insurer RSUI of \$1.5 million (which also would be credited against the consent judgments);
- (4) Release of all claims against defendant executives (as a condition of RSUI's payment from the D&O policy);
- (5) Assignment of all the defendants' rights against the Intervenor insurers and broker;
- (6) A covenant not to execute as to any assets of Spinnaker and AFED only;
- (7) An agreement that if prosecution of assigned claims resulted in the Association being made whole, then payments on the judgment by AFECO to the Association under its Chapter 11 plan would be returned to AFECO's bankruptcy estate for distribution to other general unsecured creditors;
- (8) A provision for approval of the settlement agreement in a reasonableness determination by the trial court; and
- (9) A provision whereby the judgments would be adjusted to reflect the amount determined by the court to be reasonable. (CP 1031-1063).

The text of two provisions of the settlement agreement should be considered in full. First, paragraph 2.2 of the settlement agreement provided that the confessed judgments would conform to appendices.

[U]pon determination of attorney fees, costs, and CPA penalties as described above, the A.F. Evans Defendants shall sign and deliver to the Association the Stipulated Judgment against each of them, substantially in the forms attached hereto as Appendices A, B and C, in favor of the Association...

(CP 1039). The form judgments in the appendices specified 12% interest.

(CP 1050-1063). The appendices were incorporated into the settlement agreement itself at paragraph 10. (CP 1044).

Second, and most importantly, paragraph 2.3 of the settlement agreement provided that the amount of the stipulated judgment would be adjusted to whatever amount the court found reasonable, while leaving the remaining terms of the agreement undisturbed:

At any time of the Association's choosing, the Association and the A.F. Evans Defendants shall jointly file a Motion in this Action requesting a ruling that this settlement is reasonable, pursuant to *Chausee v. Maryland Casualty Co.*, 60 Wn. App. 504, 803 P.2d 1339 (1991). **If the trial court does not agree after the reasonableness hearing that these judgment amounts are reasonable, then the Association and the A.F. Evans Defendants will stipulate to entry of judgments in an amount that the court does deem reasonable**, or which the Settling Parties believe the court will find reasonable, and to **vacating the original judgments and re-entering revised ones as necessary**. The Association and the A.F. Evans Defendants agree to repeat this process as necessary in

order to achieve Stipulated Judgment amounts that the trial court deems reasonable.

(CP 1040). (Emphasis added.)

Travelers and Steadfast procured leave to intervene, and conducted extensive discovery prior to the reasonableness determination. (CP 990-992; CP 1119-1120).

The Association began its request for reasonableness determination by observing that the settlement amount reflected a reasonable determination of the defendants' warranty liability because, among other things, the defense construction expert had applied the wrong standard to determine whether the warranty of suitability had been violated. The defense expert improperly assumed that only defective conditions which would force owners to move out would violate the warranty standard. (CP 1001-1005). When asked whether he agreed that the defective conditions present a substantial risk of future danger to the occupants, which is the correct legal standard, the defense expert agreed that they did. (CP 1008). The Association went on to point out that piercing Spinnaker's corporate veil posed the single greatest liability risk to AFECO and AFED, and would make them liable for the full \$8 million-plus in damages. (CP 1013). Moreover, because even the defense's estimates of the cost of repairs, using the scope of repairs called for by the

defense experts, resulted in \$4 million in immediate repairs to restore suitability, the settling defendants faced substantial risk that a much larger award for breach of warranty would be imposed. (CP 1023).

In opposing the reasonableness determination, the Intervenor contended that the defendants did not have adequate incentive to negotiate a reasonable settlement amount, that the Association's liability theories were weak, and that the repair figures arrived at by both the defense and plaintiff experts were too high. (CP 2005-2055; CP 1121-1155). They submitted declarations stating that the reasonable repair cost of the defects was in the range of \$3.1 million to \$4.4 million, depending on whose scope of repairs was used. (CP 2123). Travelers submitted an expert attorney opinion noting that the measure of damages for non-warranty claims should not be the full cost of repairs, but should include an evaluation of the beginning reserve funding level as compared to what should reasonably be required or expected by homeowners. (CP 2116). Travelers proposed that a reasonable settlement amount was between \$400,000 and \$1 million. (CP 2007). Steadfast proposed that it was between \$250,000 and \$1.5 million. (CP 1122).

Most importantly, **neither Intervenor contested the 12% judgment interest rate contemplated by the parties to the settlement agreement.** (CP 2005-2055; CP 1121-1155).

The trial court did not agree with the Intervenors that this was a case of no or *de minimis* liability. This is clearly so, because it found the full cost of the repairs specified in the Association's proposed scope of repair, albeit using a cost estimate for that scope generated by the Intervenors' expert Terry Eggert, to be a reasonable settlement of the damages portion of the judgment. (CP 3393; RP 37). To this \$4.4 million cost of repair amount, the court added attorney fees and CPA penalties that had been determined at a prior contested motion. (RP 38; CP 3393).

Thus, the Intervenors persuaded the trial court that a lesser cost of repair should be applied, resulting in a reduction of the total reasonable judgment amount from approximately \$8.5 million to \$5.1 million.

Contrary to claims by Travelers, the trial court did **not** find the settlement to have been the product of collusion. (RP 37-38; CP 3392-3393). Nor did it the court order that any provision of the settlement agreement, beyond the principal judgment amount, was unreasonable. (Id.) Rather, the court specifically found only the repair cost "amount" to be unreasonable because: "the settling party did not have any direct interest in the amount" and therefore "I find it an unreasonable amount." (RP 37). The court went on to say that "I believe a reasonable amount is more accurately reflected, for example, in the estimates by Eggert

[retained by Travelers to estimate the Association's scope of proposed repairs] in the range of \$4,461,594. That amount is a reasonable amount of settlement, and I so find." (RP 37). However, the court also clarified at the hearing, and by handwritten addition to the order submitted later by Travelers' counsel, that the CPA penalties and attorney fees it had previously awarded should be added to that repair cost, for a total of reasonable judgment amount of just over \$5.1 million. (CP 3393).

In due course, the settlement was also approved by AFECO's Chapter 11 bankruptcy court. (CP ____ [Sub Docket No. 593]).

In conformance with paragraphs 2.2 and 2.3 of the settlement agreement, AFECO, AFED and Spinnaker executed a stipulated judgment in the amount of the judgment the court had determined to be reasonable, with interest at 12% as provided in the settlement agreement. (CP 3729-3732).

When the Association noted the judgment for entry, the Intervenor objected. Intervenor contended initially that the settlement agreement did not contain a 12% interest term at all, and that it was primarily a judgment on tort claims. (CP 3401-3476; CP 3477- 3577). Intervenor failed to advise the court that in fact the Appendices to the CR2A settlement agreement specified a 12% interest rate. (Id.) This error was pointed out by the Association (CP 3578-3595), which also requested

an award of CR 11 sanctions. The judgment was duly entered by the court, though sanctions were denied. (CP 3729).

The Intervenors re-configured their argument regarding the interest rate in motions for reconsideration. This time, the Intervenors argued that when the “settlement” was found to be “unreasonable,” the agreed interest term somehow evaporated, and that the parties’ stipulation to judgment for the lesser, court-approved reasonable amount plus 12% interest, was somehow not based on a “written contract.” (CP 3733-3743).

No response to these motions for reconsideration was called for by the trial court. It denied Intervenors’ request to reconsider entry of the judgment with 12% interest, with the handwritten notation on the order: “The interest rate was indicated in the attachments to the settlement agreement.” (CP 3754).

IV. ARGUMENT

A. Standard of Review

The issues presented are claimed errors of law in construction of a settlement contract and application of a statute thereto, which are reviewed *de novo*. *Jackson v. Fenix Underground, Inc.*, 142 Wn. App. 141, 145, 173 P.3d 977 (2007). The issues are also subject to the rule of waiver by Intervenors’ having failed to request a factual determination as to the

reasonableness of the judgment interest rate at any stage in the proceedings.

B. The Settlement Agreement Is A Contract, Under Which the Parties May Agree to Any Legal Judgment Interest Rate Under RCW 4.56.110(1).

Revised Code of Washington section 4.56.110(1) provides that:

Interest on judgments shall accrue as follows:

(1) Judgments founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in the contracts: PROVIDED, That said interest rate is set forth in the judgment.

Here, the interest rate is set forth in appendices A-C of the written settlement contract, and is set forth in the judgment entered thereon as well. Accordingly, subsection (1) of the statute applies.

Jackson, 142 Wn.App. at 146-147, confirms this conclusion. In *Jackson*, the plaintiff and the defendant in a tort action based on an assault entered into a settlement agreement involving a covenant judgment, after an insurer refused to make a sufficient settlement offer at mediation. The settlement agreement stated that the interest rate on the judgment would be 12%. The settlement was approved as reasonable by the trial court. The insurer requested relief from the judgment, arguing that it was founded on tortious conduct, so the tort interest rate should apply. On appeal, this Court rejected the insurer's contention, noting:

Subsection (1) [of RCW 4.56.110] plainly manifests a legislative intent to allow contracting parties the freedom to specify a different interest rate. There is no dispute that settlement agreements are contracts. *Evans & Son, Inc. v. City of Yakima*, 136 Wn. App. 471, 477, 149 P.3d 691 (2006). **Once parties have agreed to settle a tort claim, the foundation for the judgment is their written contract, not the underlying allegations of tortious conduct.**

Scottsdale argues, however, that even if judgments founded on tort claim settlements are governed by subsection (1), an exception should be carved out for covenant judgments entered after a reasonableness hearing has been held under RCW 4.22.060. . . . But it would be a strained interpretation of RCW 4.22.060 to hold that the “amount to be paid” includes only the principal amount of the settlement, and not the interest to be paid on the outstanding balance. Both principal and interest are components of the settlement. A plaintiff may be willing to accept a smaller principal amount if the interest rate on the outstanding balance is higher, and vice versa.

RCW 4.56.110(1) provides contracting parties with the freedom to choose varying interest rates depending on their individual circumstances. **Because the interest is part of the “amount to be paid” on a contract implementing a settlement of a tort suit, the court does not have authority to adjust the specified interest rate once the court has determined that the amount to be paid is reasonable.** . . . Scottsdale's motion for reconsideration was in reality a collateral attack on the reasonableness determination, which is not before us for review because Scottsdale has not appealed it.

The order granting Scottsdale's motion for reconsideration is reversed. The judgment is remanded for reinstatement of the interest rate of 12 percent.

Jackson, 142 Wn.App. at 146-147 (Emphasis added.)

As noted above, the Settlement Agreement in this case expressly set forth the prejudgment interest rate. The trial court's only finding was as to one portion of the settlement amount – the principal amount of the judgment. Once it reset that amount, without having disapproved of the interest rate, the court lacks the power adjust the agreed interest rate, *regardless of the insurer's interest*. Just as Scottsdale attempted to do in *Jackson*, Intervenor's are here merely conducting a collateral attack on a matter that has been resolved, with their participation, no less, and with no objection from them at the reasonableness hearing.

Intervenor's' attempts to distinguish *Jackson* are easily dealt with. For its part, Travelers says first that unlike in *Jackson*, “the parties here did not agree to an interest rate in the settlement agreement.” (Traveler's Brief at 23). This is a perplexing statement. The interest rate is set forth in judgments appended to and incorporated into the terms of the settlement agreement at paragraph 10 of the Agreement (“This Agreement *and its Appendices* constitute the entire agreement of the Settling Parties.”) (CP 1044). (Emphasis added.) The parties agreed to enter judgments substantially in the form of those judgments, subject only to adjustment of the amount of the settlement, as set forth in paragraph 2.3. Travelers' argument that the interest term was “not in the settlement agreement” is patent nonsense.

Secondly, Travelers says that “the settlement here was deemed “unreasonable” as a matter of law,” whereas in *Jackson* it was approved. This is a bit of sophistry at best. In fact, while the trial court below found that the amount of the repair cost portion of the damages reflected in the judgment was unreasonable as originally agreed, it specifically found also that a judgment including a smaller repair cost amount, for a total of \$5,121,009.75, was in fact reasonable. (“IT IS FURTHER ORDERED that pursuant to its obligations under RCW 4.22.060, the Court hereby rules that a reasonable settlement of all claims as to the defendants in this matter is \$4,461,592.00 in repair costs, plus the \$659,417.75 previously awarded in attorneys fees and CPA penalties, for a total of \$5,121,009.75.”) (CP 3393). Thus, this case is indistinguishable from *Jackson* in the sense that in both, the ultimate “settlement amount” was deemed reasonable.

Indeed, it appears that *Jackson* is the same as our case insofar as the *Jackson* court noted, in the penultimate paragraph, that the parties had not focused on interest terms at the time of the reasonableness hearing. 142 Wn. App. at 147. Thus just as in *Jackson*, the trial court below had no issue with the interest rate set by the settlement agreement, and simply adjusted the judgment amount, leaving the interest rate intact. *Jackson* should therefore be the end of the discussion.

Even without *Jackson*, the failure of the Intervenors to ever offer any argument as to the objective reasonableness of the interest term precludes them from being heard on the question. When “a party waives an issue by not raising it before the trial court,” the appellate court should “refrain from reviewing this argument.” *Keller v. Allstate Insurance Co.*, 81 Wn. App. 624, 635, 915 P.2d 1140 (1996). Remand for a factual determination as to the reasonableness of the agreed interest rate, that were not requested by Intervenors, would thus also be improper. See, e.g., *Ravenscroft v. Water Power Co.*, 136 Wn.2d 911, 926, 931, 969 P.2d 75 (1998).

C. The Trial Court’s Reasonableness Determination Triggered the Settlement Agreement Provision That Adjusted the Stipulated Judgment Amount to Match It, Without Changing the Agreed Interest Rate.

Steadfast takes a slightly more sophisticated tack in its approach to *Jackson*, and contends that “reliance on *Jackson* is misplaced because the Appendices’ proposed judgments never became operative given the determination that the Settlement was unreasonable.” (Steadfast Brief at 17). Of course, Steadfast is simply pretending that there was no reasonableness determination, when there plainly was.

Beyond Steadfast’s brazen effort to mislead the court about the facts, the question of whether the judgments became “operative” on the

trial court's express reasonableness determination is a question of contract construction. In this regard, Steadfast's argument makes unsupportable leaps of logic about the impact of the court's reasonableness determination on the operation of the settlement agreement. Most importantly, Steadfast ignores the fact that the settlement agreement contemplates at paragraph 2.3 that it remains operable even if the trial court should find a lesser settlement judgment amount to be reasonable. In that event, the parties agreed *in advance* to "revise" the judgments to reflect the amount determined by the court to be reasonable.⁹ That is in fact what happened.

In an extended argument toward a basically irrelevant conclusion, Steadfast goes on to argue (without applicable authority) that only by executing a "new settlement agreement" in the amount found to be reasonable could Steadfast be bound to the judgment the trial court found to be reasonable as a measure of its damages for bad faith. (Steadfast Brief at 18). Fundamentally, that is an issue for the Federal District Court in the coverage litigation, not this one.¹⁰

⁹ Intervenor makes no effort to contend that this advance agreement to be bound by the Court's reasonableness determination is in any way impermissible, improper, or unenforceable.

¹⁰ Steadfast's contention that it is not bound by the consent judgment has been debunked in the Court where it actually matters (that is, in the coverage litigation), where the Federal District court has ordered Steadfast liable for the full \$5.1 million judgment amount by virtue of its bad faith failure to defend.

Even if the question were relevant here, Steadfast's analysis is in error. The court in *Meadow Valley Owners Assn v. Meadow Valley, LLC*, 137 Wn. App. 810 (2007), the primary case Steadfast relies on, explained **that the exact procedure followed in this case is entirely appropriate to bind an insurer who acts in bad faith:**

Here, St. Paul contends the trial court violated RCW 4.22.060(3) in determining that although \$2.4 million for attorney fees was unreasonable, \$1.6 million would be a reasonable amount. Specifically, St. Paul argues the court's determination of what would be reasonable is an improper adjustment of the amount the parties agreed to pay in the settlement judgment.

St. Paul's argument ignores the plain language and intent of RCW 4.22.060(3) and the statutory requirement of RCW 4.22.060(2) that the court determine a reasonable amount. The plain language of RCW 4.22.060(3) states that the court's determination that the settlement amount is unreasonable "shall not affect the validity of the agreement" and the court cannot adjust "the amount paid between the parties to the agreement." The intent of RCW 4.22.060(3) is to prohibit the court from interfering with the settlement process and the parties' settlement agreement. And in determining a reasonable amount under RCW 4.22.060(2), the court does not impermissibly adjust the amount the parties agreed to pay. The purpose of a reasonableness hearing is to determine whether the settlement is reasonable under the *Glover/Chaussee* factors. If the court determines the settlement is unreasonable, RCW 4.22.060(2) requires the court to set a reasonable amount. In doing so, the court does not adjust the amount paid according to the agreement. RCW 4.22.060 does not prevent the parties from then independently agreeing to a different amount.

....

Here, . . . the settlement agreement expressly addresses scheduling a hearing to determine the reasonableness of the settlement. . . .

As agreed, in May 2005, the Association filed a motion to schedule a reasonableness hearing. The hearing was held in June. At the conclusion of the hearing, the trial court ruled that \$4.8 million in damages was reasonable but \$2.4 million in attorney fees was unreasonable. After taking into consideration St. Paul's objections . . . the court stated that attorney fees of \$1.6 million would be reasonable. In September 2005, the Association presented a new stipulated judgment against MVLLC and HCI for \$6.4 million, which included \$4.8 million in damages and \$1.6 million in attorney fees. On September 19, the court entered the \$6.4 million stipulated judgment.

. . . .

We conclude that after the court determines a settlement amount is unreasonable, **neither RCW 4.22.060 nor case law precludes the parties from then agreeing to entry of a new stipulated judgment in the amount the court determined would be reasonable.**

137 Wn. App. 810, 819-822. (Emphasis added).

Thus, far from supporting the notion that Steadfast is not bound unless a new settlement agreement is executed, the *Meadow Valley* opinion simply validates the notion that the parties may agree to entry of a new stipulated judgment in an amount found to be reasonable, and the insurer who has acted in bad faith may indeed be bound by that judgment. This is precisely what the parties to the settlement agreement in this case did.

Steadfast further attempts to differentiate this case from *Jackson* on the asserted grounds that the freedom of contract concerns expressed in *Jackson* do not apply here because this settlement is simply an attempt to “set up” an innocent third party insurer, and because the defendants will never pay that interest themselves. (Steadfast Brief at 19-20). But Steadfast’s assertion that none of the Defendants are liable for the interest is of course factually false, because AFECO remains fully liable on the judgment today.

But even had it managed to get the facts right, Steadfast still fails to distinguish *Jackson* on this point, because in *Jackson*, the parties entered into a covenant not to execute, and thus the defendant in *Jackson* was never going to pay the judgment interest. (“In return, Jackson covenanted not to execute on the judgment against Fenix, except for the rights against Scottsdale.” *Jackson*, 142 Wn. App.143 (2007)). Nevertheless, the *Jackson* court found that the parties’ freedom to contract for an interest rate based on their own particular circumstances trumped the insurers’ interest in not paying a high interest rate, even when the parties did not focus on the reasonableness of the interest rate at the reasonableness hearing. (“[T]he court does not have authority to adjust the specified interest rate once the court has determined that the amount to be paid is reasonable. The fact that the parties may have focused their

arguments at the hearing exclusively on the reasonableness of the principal amount does not alter this conclusion.” *Jackson*, 142 Wn. App. at 147.)¹¹

D. Even Assuming That the Contract Interest Rate Provisions of RCW 4.56.110(1) Do Not Apply, The Claims Against Each Defendant Were Primarily Based in Warranty / Contract.

Even assuming that the agreed interest rate should not apply, the claims at issue in the underlying action were still predominately warranty and contractual claims in nature, and would justify application of the contract interest rate.

The first cause of action asserted by the Association in its Complaint was for invalidation of certain “warranty disclaimers” the defendants attempted to use to shield themselves from selling a shoddy product requiring millions of dollars in immediate repairs. The second was for breach of warranty.

¹¹ From a larger perspective, Steadfast’s suggestion that it has been “set up” and should not have to pay an interest rate agreed by the parties to the dispute rings remarkably hollow, given the actual facts of the situation. Steadfast has been held as a matter of law to have breached its contract of insurance in bad faith by unreasonably refusing to defend its insureds. It had an opportunity to protect both its insureds, as it agreed to do, and itself, by appointing defense counsel as it had agreed to do. It refused, and has instead spent many months and many thousands of attorney hours delaying both justice and the legal consequence of that decision. On one hand the Court has an insurer who breach its insurance contract in bad faith, greatly delayed the process of justice, and saved itself the use value of \$5.1 million over a long period of time. On the other hand are Steadfast’s insureds, who paid premiums but received none of the benefits they were entitled to, and an Association facing the urgent need for costly repairs that has been forced into lengthy coverage litigation simply to hold Steadfast to its clear contractual obligations. In this setting, the equities strongly favor a result whereby Steadfast bears the full financial consequences of its deliberate delays in payment of the judgment.

The liability of defendant Spinnaker for breach of warranty was, from very early on in the litigation, virtually assured, or at least rendered a much less central issue, because of Spinnaker's default, and the entry of summary judgment invalidating the disclaimers. Thus, on the eve of trial, Spinnaker was in effect *already liable* for breach of warranty.

Moreover, the damages for which Spinnaker had been held liable on the default judgment were based on repair costs and diminution in value – quintessential contract damages. The damages included no offset for disclosed or anticipated reserve expenses, as might be expected if the claim was for misrepresentation of reserve requirements.

Finally, when time came for entry of default judgment, the judgment itself specifically noted that it was at least in part for warranty liability, and specified a 12% (contract) interest rate.

It was in this context that AFECO's defense counsel opined to Travelers that AFECO and AFED would likely share the same fate as Spinnaker. The trial court had, after all, declined to dismiss the alter ego allegations and the co-declarant allegations, having been presented with an extremely large catalog of evidence tending to show that Spinnaker was merely a shell established for no reason other than evading the warranty responsibility demanded of condominium declarants under Washington law, and that AFED had itself exercised declarant rights that supposedly

belonged to Spinnaker. (CP _____ [Sub Docket No. 308]).

Moreover, the defense's efforts to defend the warranty of suitability claim on the basis that owners had not been forced to move out of their units because of the defects would never have carried the day because the warranty of habitability, on which the warranty of suitability is based, requires a far less stringent showing of future danger:

The condominiums do not have to degrade to a state where they are uninhabitable for this doctrine to apply. Rather, if the violations present a substantial risk of future danger, the implied warranty of habitability is a viable claim. The homeowners do not have to wait until their windows cave in or portions of their decks rot off before the warranty applies.

Westlake View Condo. Ass'n v. Sixth Ave. View Partners, LLC, 146 Wn. App. 760, 771-772, 193 P.3d 161 (2008). See also Official Comment 3 to the Uniform Condominium Act.

When the experts for both sides were asked to apply the actual standard for violation of the warranty – substantial risk of future danger – they *agreed* that the risk of future danger was present. (CP 3343-3344).

Common sense suggests also that the tort claims of misrepresentation and fraud were not the primary focus of the Associations claims, for the simple reason that such claims, involving deliberate wrongdoing, would not result in liability likely to be covered by insurance, and insurance was the only real asset available. The tort claims

would have accomplished far less for the Association than a valid warranty liability, and thus the tort claims were in this practical sense *always* very much secondary or even tertiary in comparison to the central warranty claims.

Finally, the court should consider also the lengths of distortion and misrepresentation that the Intervenors (Travelers being by far the worst offender) have had to go to support their contention that the claims below centered on tort liability.¹² It is only by so willfully ignoring the actual facts of the case that Intervenors are able to make any kind of argument that this case about the unsuitability and extensive deterioration of the Esplanade's entry decks, shear walls, windows, roofs, and weather barrier systems was at its core a set of "tort claims."

¹² For example, Intervenors continue to repeat the lie that the Association's counsel "abandoned" its warranty claims at oral argument. Intervenors base this assertion on a vague hearsay recitation by defense counsel Todd. (CP 2801).

Similarly, Intervenors continue to misrepresent to this Court, as they did below, that defense attorney Weigel valued the case at between \$800,000 and \$1.2 million, when in fact he clearly testified that this valuation was based on the assumption that the default order would be vacated; his opinion was that AFECO and AFED would share Spinnaker's warranty liability, and likely end up with a verdict against them all for over \$10 million. (CP 2343).

Intervenors also continue to falsely characterize the result in the *Balaton* decision without advising the court that the verdict had been thrown out for juror and defense counsel misconduct. (CP 546).

The catalog of misstatements and distortions by Intervenors, and by Travelers in particular, could become quite lengthy; however, the value of such a discussion would tend to become marginal if carried further.

V. CONCLUSION

Intervenors' objection to entry of judgment below, and their appeal in this Court are both based on arguments that are contrary to well-settled law in *Jackson*. The motions below and these appeals are completely lacking in factual and legal merit. They should never have been brought. The trial court's entry of judgment in the amount declared reasonable pursuant to the parties' settlement agreement, including the judgment interest rate which the Intervenors never put in issue at the reasonableness hearing or otherwise, should be summarily affirmed.

RESPECTFULLY SUBMITTED this 11th day of October, 2012.

STEIN, FLANAGAN, SUDWEEKS &
HOUSER, PLLC



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Attorneys for Respondents

APPENDIX A

THE HONORABLE JOHN C. COUGHENOUR

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA, a foreign
insurer,

Plaintiff,

v.

AF EVANS COMPANY, a California
corporation, AFE SPINNAKER, a
Washington limited liability corporation,
AF EVANS DEVELOPMENT INC., a
California corporation, RICHARD BELL,
an individual, JACK ROBERTSON, an
individual, TORY LAUGHLIN
TAYLOR, an individual, and
ESPLANADE CONDOMINIUM
ASSOCIATION, a Washington non-profit
corporation,

Defendants.

CASE NO. C10-1110-JCC

ORDER GRANTING THIRD PARTY
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT;
DENYING THIRD PARTY
DEFENDANT'S MOTION FOR
LEAVE TO FILE UNDER SEAL;
AND DENYING THIRD PARTY
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ORDER GRANTING THIRD PARTY
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT; DENYING THIRD
PARTY DEFENDANT'S MOTION FOR LEAVE
TO FILE UNDER SEAL; AND DENYING THIRD
PARTY DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

1 AFE SPINNAKER, a Washington limited
2 liability corporation, AF EVANS
3 DEVELOPMENT INC., a California
4 corporation, RICHARD BELL, an
5 individual, JACK ROBERTSON, an
6 individual, TORY LAUGHLIN
7 TAYLOR, an individual, and
8 ESPLANADE CONDOMINIUM
9 ASSOCIATION, a Washington non-profit
10 corporation,

11 Third Party Plaintiffs,

12 v.

13 STEADFAST INSURANCE COMPANY,
14 a Delaware corporation, and
15 HEFFERNAN INSURANCE BROKERS,
16 a California corporation,

17 Third Party Defendants.

18 This matter comes before the Court on (1) Third Party Plaintiff Esplanade Condominium
19 Association's (the "Association") motion for partial summary judgment (Dkt. No. 78) and Third
20 Party Defendant Steadfast Insurance Company's (2) motion for leave to file documents under
21 seal (Dkt. No. 92) and (3) motion for summary judgment (Dkt. No. 81). Having thoroughly
22 considered the parties' briefing and the relevant record, the Court finds oral argument
23 unnecessary and hereby GRANTS the Association's motion for partial summary judgment (Dkt.
24 No. 78), DENIES Steadfast's motion for leave to file documents under seal (Dkt. No. 92), and
25 DENIES Steadfast's motion for summary judgment (Dkt. No. 81) for the reasons explained
26 herein.

I. BACKGROUND

This is an insurance coverage and bad faith dispute. In the underlying suit, the
Association sued, *inter alia*, Defendants AF Evans Company ("AFECO"), AFE Spinnaker
("Spinnaker"), and AF Evans Development ("AFED"). (Dkt. No. 64 Ex. 5.) AFECO had created
Spinnaker (an LLC of which AFECO and AFED were members) in 2005 to serve as the

1 “declarant” of the Esplanade Condominiums (the “Esplanade”), *i.e.*, to oversee the conversion of
2 the complex from apartments to condos and to market and sell them. (Dkt. Nos. 1 at 3 ¶ 3.30, 63
3 Ex. 3 at 5–7; *see* Wash. Rev. Code. § 64.34.020(15)(d).) The Association’s members had
4 purchased units in the Esplanade. In the underlying suit, the Association alleged, *inter alia*, that
5 “defects and deficiencies . . . both in the original construction, and in improvements to the
6 Project made or contracted for by or on behalf of the Declarant . . . resulted in physical damage
7 to the common elements . . . and units of the Project” that “render[ed] [those] units and common
8 elements unsuitable for ordinary uses,” in breach of the implied warranty of suitability under the
9 Washington Condominium Act (“WCA”). (Dkt. No. 64 Ex. 5 at 8–9 ¶¶ 4.3–4.5.) The alleged
10 physical damage included “damage caused by water intrusion into and through the building
11 envelope and its underlying components.” (*Id.* Ex. 5 at 9 ¶ 4.5; *see id.* Ex. 5 at 15 ¶ 6.9 (alleging
12 “extensive[] water damage[]” which the Declarant had failed to discover, disclose, or fix).) The
13 Association sought damages for “the cost of repairing the damage to the Project” and “correcting
14 defective conditions and damage.” (*Id.* Ex. 5 at 9 ¶ 4.6.) It also alleged that the declarant’s breach
15 of the WCA implied warranty of suitability constituted a violation of the Washington Consumer
16 Protection Act (“CPA”), for which it was entitled to damages and attorney’s fees. (*Id.* Ex. 5 at 20
17 § IX.)

18 AFECO, AFED, and Spinnaker tendered defense in the underlying suit, and claims for
19 coverage for the alleged damages, to their insurance providers. AFECO and AFED claimed
20 coverage under a January 2006 – January 2007 policy with Steadfast. (Dkt. No. 62 Exs. 1–3.)

21 That policy provides:

22 We will pay those sums that the insured becomes legally obligated to pay as
23 “damages” because of . . . “property damage” to which this insurance applies.

24

24 This insurance applies to . . . “property damage” only if . . . [t]he . . . “property
25 damage” is caused by an “occurrence” that takes place in the “coverage territory”;
26 and . . . [t]he . . . “property damage” occurs during the “policy period.”

26

1 “Damages” means money that is paid to compensate an injured party for . . .
2 “property damage”

3
4 “Occurrence” means an accident, including continuous or repeated exposure to
5 substantially the same general harmful conditions, that results in . . . “property
6 damage.”

7
8 “Property damage” means . . . [p]hysical injury to tangible property, including all
9 resulting loss of use of that property. All such loss of use shall be deemed to occur
10 at the time of the physical injury that caused it

11 (Dkt. No. 72 Ex. H at 40, 52, 54.) The policy also contains a “Residential Exclusion”:

12 This policy does not apply to any claim, “suit” or demand seeking “damages” for
13 . . . “property damage” . . . arising out of or in any way connected to . . . “your
14 work”, directly or indirectly, whether ongoing or completed . . . as respects any
15 work performed in connection with the construction, reconstruction or remodeling
16 of any “residential building.”

17 . . . “[R]esidential building” means any . . . residential condominium

18 (*Id.* Ex. H at 30.) The policy defines “your work” as follows:

19 “Your work” means:

- 20 a. Work or operations performed by you or on your behalf; and
21 b. Materials, parts or equipment furnished in connection with such work or
22 operations.

23 “Your work” includes:

- 24 a. Warranties or representations made at any time with respect to the fitness,
25 quality, durability, performance or use of “your work”; and
26 b. The providing of or failure to provide warnings or instructions in
connection with such goods or products.

(*Id.* Ex. H at 55.) Steadfast denied coverage and a defense on the ground that “the subject policy contains an express exclusion for any property damage claims or suits arising out of or in any way connected to residential projects, which includes by definition condominiums and/or condominium conversions [sic].” (Dkt. No. 62 Ex. 3 at 11–12.)

In July 2010, the parties settled: Spinnaker agreed to pay \$8 million plus attorney’s fees, costs, and CPA penalties; AFECO and AFED agreed to pay \$7.2 million plus attorney’s fees,

1 costs, and CPA penalties; and the defendants assigned their rights against their insurers to the
2 Association. (Dkt. No. 72 Ex. O at 23 ¶ 2.2, 21 ¶ 1.2.) The state court overseeing the underlying
3 suit later held a reasonableness hearing, found the stipulated settlement unreasonable under the
4 factors set forth in *Chaussee v. Maryland Casualty Co.*, 803 P.2d 1339 (Wash. Ct. App. 1991),
5 and held that a reasonable settlement was \$5,121,009, consisting of \$4,461,592 in repair costs,
6 \$514,417 in attorney’s fees, and \$145,000 in CPA penalties. (Dkt. No. 72 Exs. P at 37, S at 3.)
7 The court entered a stipulated judgment against AFECO, AFED, and Spinnaker, jointly and
8 severally, in those amounts. (*Id.* Ex. S at 3.)

9 In the instant action, the Association filed a third party complaint against Steadfast based
10 on Steadfast’s denial of coverage. The Association’s claims include breach of contract, insurance
11 bad faith and coverage by estoppel, violations of claims handling regulations and the CPA,
12 negligence, and equitable contribution. (Dkt. No. 75 at 30–34 § 3.5.)

13 **II. THE ASSOCIATION’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

14 **A. Bad-Faith Refusal to Defend**

15 The Association moves for summary judgment on its claim that Steadfast unreasonably
16 refused to defend AFECO and AFED under the 2006–2007 policy against the allegations in the
17 underlying suit that they were liable for the cost of repairing property damage caused by water
18 intrusion resulting from, *inter alia*, defects in the original construction of the condo complex.

19 “An insurer has a duty to defend when a complaint against the insured, construed
20 liberally, alleges facts which could, if proven, impose liability upon the insured within the
21 policy’s coverage.” *Woo v. Fireman’s Fund Ins. Co.*, 164 P.3d 454, 459 (Wash. 2007) (quotation
22 marks omitted). “The duty to defend is triggered if the insurance policy *conceivably* covers
23 allegations in the complaint.” *Am. Best Food, Inc. v. Alea London, Ltd.*, 229 P.3d 693, 696
24 (Wash. 2010). “The insurer is entitled to investigate the facts and dispute the insured’s
25 interpretation of the law, but if there is any reasonable interpretation of the facts or the law that
26 could result in coverage, the insurer must defend.” *Id.*; see *Truck Ins. Exch. v. VanPort Homes*,

1 *Inc.*, 58 P.3d 276, 282 (Wash. 2002) (“Only if the alleged claim is clearly not covered by the
2 policy is the insurer relieved of its duty to defend.”). In determining whether there is a duty to
3 defend, “[a]n insurer has an obligation to give the rights of the insured the same consideration
4 that it gives to its own monetary interests.” *Truck Ins. Exch.*, 58 P.3d at 282.

5 Insurers owe a statutory duty of good faith to their insureds. Wash. Rev. Code
6 § 48.01.030. A claim for breach of the duty of good faith “sounds in tort.” *St. Paul Fire &
7 Marine Ins. Co. v. Onvia, Inc.*, 196 P.3d 664, 668 (Wash. 2008) (quotation marks omitted). The
8 plaintiff must demonstrate duty, breach, causation, and harm. *Id.* “An insurer acts in bad faith if
9 its breach of the duty to defend was unreasonable, frivolous, or unfounded.” *Am. Best*, 229 P.3d
10 at 700; *see, e.g., id.* at 701 (insurer’s “refusal to defend . . . based upon an arguable interpretation
11 of its policy was unreasonable and therefore in bad faith”). Whether an insurer acted in bad faith
12 is a question of fact. *Smith v. Safeco Ins. Co.*, 78 P.3d 1274, 1277 (Wash. 2003).

13 A motion for summary judgment should be granted only when, viewing the evidence in
14 the light most favorable to the nonmoving party, there is no genuine issue as to any material fact
15 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Sony
16 Computer Entm’t Am., Inc. v. Am. Home Assurance Co.*, 532 F.3d 1007, 1011 (9th Cir. 2008).
17 The factual issue of whether an insurer acted in bad faith may be decided on a motion for
18 summary judgment “if there are no disputed material facts pertaining to the [un]reasonableness
19 of the insurer’s conduct under the circumstances,” or “reasonable minds could not differ that [the
20 insurer’s] denial of coverage was based upon [un]reasonable grounds.” *Smith*, 78 P.3d at 1277;
21 *see Michelman v. Lincoln Nat’l Life Ins. Co.*, 685 F.3d 887, 902 (9th Cir. 2012).

22 The Association’s argument is straightforward. First, it argues, the plain text of the policy
23 provides for coverage of the damages alleged in the complaint in the underlying suit. The
24 complaint alleged, *inter alia*, that “defects and deficiencies . . . in the original construction . . .
25 resulted in physical damage to the common elements . . . and units of the Project,” including
26 “damage caused by water intrusion into and through the building envelope and its underlying

1 components.” (Dkt. No. 64 Ex. 5 at 8–9 ¶¶ 4.3–4.5.) The alleged damage caused by continuous
2 “water intrusion” fits the policy definition of “property damage” caused by an “occurrence.” And
3 by virtue of the complaint’s allegation that the damage occurred because of “defects . . . in the
4 original construction,” the complaint alleged that the damage at least might have occurred in part
5 during the policy period—after the complex’s original construction. Furthermore, the policy’s
6 “Residential Exclusion” does not apply because the alleged damage caused by the water
7 intrusion that resulted from original construction defects cannot reasonably be understood as
8 “arising out of or in any way connected to” (1) “[w]ork or operations performed by [AFECO or
9 AFED] or on [AFECO’s or AFED’s] behalf” “in connection with the construction,
10 reconstruction or remodeling of any ‘residential building’” or (2) AFECO’s or AFED’s
11 “[w]arranties or representations” concerning such work. (Dkt. No. 72 Ex. H at 30, 55.) To the
12 contrary, this alleged damage arose out of structural defects in the complex that preexisted any
13 “work” done by AFECO or AFED. Thus, “the insurance policy *conceivably* covers allegations in
14 the complaint” and so Steadfast’s “duty to defend [wa]s triggered” when AFECO submitted its
15 claim. *Am. Best*, 229 P.3d at 696. Steadfast therefore breached its duty to defend.

16 Moreover, the Association argues, Steadfast’s determination that the policy did not
17 conceivably cover AFECO’s and AFED’s claim was “unreasonable” and so in bad faith. *Id.* at
18 700. That is because Steadfast ignored the plain language of the policy in denying the claim. In
19 its denial of coverage letter, Steadfast asserted that the policy excluded coverage for “any
20 property damage claims or suits arising out of or in any way connected to residential projects”
21 (Dkt. No. 62 Ex. 3 at 11), when in fact the plain language of the policy excludes coverage only
22 for property damage claims “arising out of or in any way connected to . . . [AFECO’s or
23 AFED’s] *work performed in connection with the construction, reconstruction or remodeling*” of
24 residential projects. (Dkt. No. 72 Ex. H at 30 (emphasis added).) Thus, Steadfast’s interpretation
25 of the policy was worse than “arguable”—and thus its denial of coverage based on that
26 interpretation was even more unreasonable than that of the insurer in *American Best*, which the

1 Washington Supreme Court found to have acted in bad faith by “refus[ing] to defend . . . based
2 upon a[] [merely] arguable interpretation of its policy.” 229 P.3d at 701.

3 The Court agrees.

4 **1. Steadfast’s “Plain Language” Argument**

5 Steadfast asserts that “the plain terms of Steadfast’s polic[y] expressly exclude coverage
6 for condominiums and conversion projects” (Dkt. No. 99 at 1; *see* Steadfast’s Motion for
7 Summary Judgment (Dkt. No. 81) at 14 (“The policy does not provide coverage for an insured’s
8 liability that is in any way connected to construction, remodeling or conversion of
9 condominiums.”).) That is not what the policy says. The residential exclusion is limited to
10 property damage claims connected to the insured’s *work* performed in connection with the
11 construction, reconstruction, or remodeling of condo projects. By its terms, it does not apply to
12 all property damage claims arising out of the insured’s condo projects.

13 Steadfast argues that “the *Esplanade* Complaint asserted claims against Evans were [sic]
14 for its ‘work,’ *i.e.*, for participation as ‘Declarant Alter Egos,’ in converting, marketing and
15 selling the Esplanade Condominiums. Because this work was performed in connection with the
16 conversion of a condominium the [residential] exclusion applies, and Steadfast had no duty to
17 defend under the 2006-07 policy.” (Dkt. No. 99 at 13; *see* Dkt. No. 81 at 14–15 (same).) It is true
18 that the complaint asserted such claims. But it *also* asserted a claim for damages for property
19 damage caused by water intrusion resulting from defects in the condo complex’s original
20 construction—property damage which, under no ordinary meaning of the phrase, was “connected
21 to” AFECO’s or AFED’s alleged condo conversion, marketing, and sales work. *See* Steadfast’s
22 Motion for Summary Judgment (Dkt. No. 81) at 8 (conceding that “the Complaint included
23 allegations of property damage caused by water intrusion”). It was unreasonable for Steadfast to
24 determine that the policy did not conceivably cover that claim.

25 **2. Steadfast’s Intent Argument**

26 Steadfast argues that, regardless of what the policy *says*, “the parties’ mutual *intent* was

1 for the Steadfast polic[y] . . . not to cover residential risks such as condominiums and
2 conversions.” (Dkt. No. 99 at 1 (emphasis added).) In support, Steadfast points to extrinsic
3 evidence outside the four corners of the contract.

4 Steadfast’s extrinsic evidence is inadmissible to alter the plain meaning of the policy
5 language.

6 The criteria for interpreting insurance contracts in Washington are well settled.
7 We construe insurance policies as contracts. We consider the policy as a whole,
8 and we give it a fair, reasonable, and sensible construction as would be given to
9 the contract by the average person purchasing insurance. Most importantly, if the
policy language is clear and unambiguous, we must enforce it as written; we may
not modify it or create ambiguity where none exists.

10 *Quadrant Corp. v. Am. States Ins. Co.*, 110 P.3d 733, 737 (Wash. 2005) (internal citations and
11 quotation marks omitted); see Steadfast’s Motion for Summary Judgment (Dkt. No. 81) at 14
12 (“Clear and unambiguous policy language is to be enforced as written, and a court may not
13 attempt to create ambiguity where none exists.”) (citing *American Nat’l Fire Ins. Co. v. B&L*
14 *Trucking & Constr. Co., Inc.*, 951 P.2d 250, 256 (1998)). “[I]n Washington the expectations of
15 the insured [or the insurer] cannot override the plain language of the contract.” *Quadrant*, 110
16 P.3d at 737. Finally, “exclusionary clauses are construed strictly against the insurer.” *Moeller v.*
17 *Farmers Ins. Co.*, 267 P.3d 998, 1002 (Wash. 2011).

18 Here, the policy language, given a fair, reasonable, and sensible construction, is clear and
19 unambiguous. The residential exclusion applies only to property damage “arising out of or in any
20 way connected to . . . [AFECO’s or AFED’s] *work performed in connection with construction,*
21 *reconstruction or remodeling* of any . . . residential condominium.” (Dkt. No. 72 Ex. H at 30
22 (emphasis added).) The exclusion clearly does not apply to *all* condo-related property damage.
23 Steadfast’s “expectations” to the contrary “cannot override” this plain language. *Quadrant*, 110
24 P.3d at 737. Because the policy language is clear, it “must [be] enforce[d] . . . as written”—and
25 Steadfast was required to interpret it “as written” in determining whether it had a duty to defend.
26 *Id.*

1 Steadfast argues that this Court should consider its extrinsic evidence because such
2 “evidence is admissible as to the entire circumstances under which the contract was made to aid
3 in ascertaining [the] intent” of the parties. (Dkt. No. 99 at 10 (citing *Berg v. Hudesman*, 801 P.2d
4 222 (Wash. 1990)).) The role of extrinsic evidence in contract interpretation in Washington is far
5 more limited than Steadfast suggests:

6 [P]arol evidence is not admissible for the purpose of adding to, modifying, or
7 *contradicting* the terms of a written contract, in the absence of fraud, accident, or
8 mistake. . . . [P]arol evidence is admissible to show the situation of the parties and
9 the circumstances under which a written instrument was executed, for the purpose
10 of ascertaining the intention of the parties and properly construing the writing.
11 Such evidence, however, is admitted, *not for the purpose of importing into a*
12 *writing an intention not expressed therein*, but with the view of elucidating the
13 meaning of the words employed. Evidence of this character is admitted for the
14 purpose of aiding in the interpretation of what is in the instrument, and *not for the*
15 *purpose of showing intention independent of the instrument*. It is the duty of the
16 court to declare the meaning of what is written, and not what was intended to be
17 written.

14 *Berg*, 801 P.2d at 229–30 (quoting *J. W. Seavey Hop Corp. v. Pollock*, 147 P.2d 310, 316 (Wash.
15 1944)) (emphasis added); see *Lynott v. Nat’l Union Fire Ins. Co.*, 871 P.2d 146, 149 (Wash.
16 1994) (emphasizing this language in the *Berg* holding); *Nationwide Mut. Fire Ins. Co. v. Watson*,
17 840 P.2d 851, 857 (Wash. 1992) (same).

18 The 2006–2007 policy expresses a clear intention for coverage of property damage at
19 condo projects, subject only to the specific, limited exclusion for property damage “arising out of
20 or in any way connected to . . . [AFECO’s or AFED’s] *work performed in connection with*
21 *construction, reconstruction or remodeling of*” such projects. (Dkt. No. 72 Ex. H at 30 (emphasis
22 added).) Steadfast fails to point to any specific term or clause of the policy whose interpretation
23 is aided by the extrinsic evidence on which it relies. The evidence is inadmissible to prove the
24 meaning of the exclusion because it “contradict[s] the terms of [the] written contract” and
25 because Steadfast seeks to admit it “for the [improper] purpose of importing into a writing an
26 intention not expressed therein.” *Berg*, 801 P.2d at 229–30 (quoting *Pollock*, 147 P.2d at 316).

1 The 2006–2007 policy conceivably covers at least some of the damages alleged in the
2 Association’s complaint. Steadfast’s determination to the contrary was unreasonable because it
3 was based on an interpretation of the policy that finds no support in the policy text.
4 “[R]easonable minds could not differ that [Steadfast’s] denial of coverage was based upon
5 [un]reasonable grounds.” *Smith*, 78 P.3d at 1277. Summary judgment for the Association on its
6 bad-faith claim against Steadfast is granted.

7 The Court’s holding, that Steadfast’s refusal to defend under the 2006–2007 policy
8 constituted bad faith, is sufficient to support its grant of summary judgment to the Association on
9 its claim that Steadfast denied a defense in bad faith. The Court need not—and does not—
10 consider the Association’s arguments that Steadfast also acted in bad faith by refusing to defend
11 under the January 2002 – January 2006 policies and by allegedly misrepresenting the coverage
12 provided by the policies in violation of the CPA.

13 **B. Coverage by Estoppel and Measure of Harm**

14 The Association also moves for summary judgment on its claim that Steadfast, by reason
15 of its bad faith, is estopped from asserting any coverage defenses, that the presumptive measure
16 of harm caused by Steadfast’s bad faith is the \$5,121,009 stipulated judgment, and that Steadfast
17 is liable to the Association for that amount.

18 **1. Choice of Law**

19 Steadfast asserts that a conflict exists between Washington and California law, in that
20 “Washington imposes coverage by estoppel while California law does not” and “California does
21 not have the same procedure for binding an insurer to an underlying covenant judgment that
22 Washington follows,” and that California law applies. (Dkt. No. 99 at 16–17 (footnotes
23 omitted).) A federal court sitting in diversity applies the forum state’s choice-of-law rules.
24 *Patton v. Cox*, 276 F.3d 493, 495 (9th Cir. 2002). Under Washington law, when parties dispute
25 choice of law, there must be an actual conflict between the law of Washington and the law of
26 another state before the court will engage in a conflict-of-laws analysis. *Erwin v. Cotter Health*

1 *Ctrs.*, 167 P.3d 1112, 1120 (Wash. 2007); *Seizer v. Sessions*, 940 P.2d 261, 264 (Wash. 1997).
2 An actual conflict exists when the result of the issue is different under the law of the two states.
3 *Seizer*, 940 P.2d at 264. Absent an actual conflict, Washington law applies. *Id.*

4 Steadfast devotes all of one sentence and two cryptic footnotes to its attempted showing
5 of a conflict between Washington and California law. (Dkt. No. 99 at 16–17 & nn.69–70.)
6 Steadfast cites to only two California cases, both of which stand for the undisputed proposition
7 that in California—as in Washington—“[t]here is no duty to defend where there is no potential
8 coverage under the policy.” *Modern Dev. Co. v. Navigators Ins. Co.*, 4 Cal. Rptr. 3d 528, 535
9 (Cal. Ct. App. 2003); see *Horsemen’s Benevolent & Protective Ass’n, Inc. v. Ins. Co. of N. Am.*,
10 271 Cal. Rptr. 838, 841 (Cal. Ct. App. 1990) (same). The Court declines to address this grossly
11 under-briefed issue of whether there is a conflict between California and Washington law as to
12 coverage by estoppel or the binding of an insurer to an underlying covenant judgment. Even if
13 there is such a conflict, Washington law applies, for the reasons set forth below.

14 In the presence of a conflict of tort law, Washington courts follow section 145 of the
15 Restatement (Second) of Conflict of Laws to determine which state’s law governs. *Rice v. Dow*
16 *Chem. Co.*, 875 P.2d 1213, 1217 (Wash. 1994). Section 145(1) directs the court to determine the
17 state with the most significant relationship to the occurrence and the parties under the general
18 principles stated in Restatement section 6. The most important section 6 factors for torts claims
19 are “the needs of the interstate and international systems, the relevant policies of the forum, the
20 relevant policies of other interested states and particularly of the state with the dominant interest
21 in the determination of the particular issue, and ease in the determination and application of the
22 law to be applied.” Restatement § 145 cmt. b. In making the most-significant-relationship
23 determination, the court takes into account the following four contacts: (a) the place where the
24 injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile,
25 residence, nationality, place of incorporation, and place of business of the parties; and (d) the
26 place where the relationship, if any, between the parties is centered. *Id.* § 145(2). “These contacts

1 are to be evaluated according to their relative importance with respect to the particular issue.” *Id.*

2 Steadfast argues that California law applies because “Evans are California companies,”
3 “[t]he policies were issued to Evans at California addresses and were negotiated between Evans’
4 California broker and Steadfast’s California underwriter,” “[t]he claim was tendered by Evans in
5 California,” and “all claims activities took place in California by a Steadfast claims handler
6 based in California.” (Dkt. No. 99 at 17 (footnotes omitted).) These items go primarily to the
7 relatively minor fact that AFECO and AFED are incorporated in California. *See Rice*, 875 P.2d
8 at 1219 (“The fact that one of the parties is domiciled in a given state will usually carry little
9 weight of itself.”) (quoting Restatement § 145 cmt. e) (quotation marks and indications of
10 alteration omitted). Meanwhile, consideration of the other section 145(2) contacts militates in
11 favor of applying Washington law. First, the injury suffered by AFECO and AFED as a result of
12 Steadfast’s bad-faith failure to defend occurred in Washington, where they incurred the costs of
13 defending themselves against the Association’s claims, and where the Washington Superior
14 Court entered a stipulated judgment against them. And, of course, the Association’s complaint
15 asserted declarant liability under Washington’s Condominium Act, for property damage that
16 occurred in Washington. As for the second section 145(2) contact, the “conduct causing the
17 injury” was Steadfast’s refusal to defend. If that “conduct” can be said to have “occurred”
18 anywhere, it is in Washington, the state in whose court Steadfast failed to defend AFECO and
19 AFED. As to the third section 145(2) contact—domicil, residence, nationality, place of
20 incorporation, and place of business of the parties—while AFECO and AFED are incorporated in
21 California, Steadfast is incorporated in Delaware (not California), and in its letter to AFECO
22 denying coverage, Steadfast listed Illinois (not California) as the address of its “Claims”
23 business. (Dkt. No. 62 Ex. 3 at 10.) The only connection to California Steadfast has shown is that
24 the claims adjustor who handled AFECO’s claim was based in California. (*Id.* Ex. 3 at 20.) The
25 final contact is “the place where the relationship, if any, between the parties is centered.”
26 Restatement § 145(2)(d). Steadfast believes that the parties’ insurance relationship is centered in

1 California because “[t]he policies were issued to Evans at California addresses and were
2 negotiated between Evans’ California broker and Steadfast’s California underwriter,” “[t]he
3 claim was tendered by Evans in California,” and “all claims activities took place in California by
4 a Steadfast claims handler based in California.” (Dkt. No. 99 at 17.) But those events occurred in
5 California because AFECO is incorporated there and Steadfast’s claims adjustor was based there.
6 In other words, the occurrence of those events in California has no significance apart from its
7 bearing on the third section 145(2) contact, already discussed. For the fourth section 145(2)
8 contact to have any independent significance, it must turn on something different from the third.
9 The Court will not double-count the fact of AFECO’s incorporation in California and the
10 presence there of Steadfast’s claims adjustor.

11 In addition, one section 6 factor in particular—the “relevant policies of the forum,”
12 Restatement § 145 cmt. b—weighs strongly in favor of the application of Washington law: “The
13 state of Washington has a strong interest in protecting insureds who must resort to litigation to
14 establish coverage.” *Tilden-Coil Constructors, Inc. v. Landmark Am. Ins. Co.*, 721 F. Supp. 2d
15 1007, 1015 (W.D. Wash. 2010) (quoting *Axess Int’l Ltd. v. Intercargo Ins. Co.*, 30 P.3d 1, 8
16 (Wash. Ct. App. 2001)). Washington’s law of coverage by estoppel serves precisely this interest.
17 In Washington, “where an insurer acts in bad faith . . . , the insurer is estopped from denying
18 coverage . . . even where an otherwise good policy defense exists.” *Safeco Ins. Co. of Am. v.*
19 *Butler*, 823 P.2d 499, 505 (Wash. 1992); *see, e.g., Mut. of Enumclaw Ins. Co. v. Dan Paulson*
20 *Const., Inc.*, 169 P.3d 1, 13 (Wash. 2007) (“[I]n this third-party reservation of rights situation in
21 which [the insurer’s] bad faith interfered in its defense of [the insureds], [the insurer] did not
22 rebut the presumption of harm [from its bad faith]. As a result, . . . [the insurer] is estopped from
23 denying coverage.”); *Kirk v. Mt. Airy Ins. Co.*, 951 P.2d 1124, 1128 (Wash. 1998) (“When the
24 insurer breaches the duty to defend in bad faith, the insurer should be held liable not only in
25 contract for the cost of the defense, but also should be estopped from asserting the claim is
26 outside the scope of the contract and, accordingly, that there is no coverage.”). The Washington

1 Supreme Court has consistently emphasized the policy reasons behind this rule: “An estoppel
2 remedy . . . gives the insurer a strong disincentive to act in bad faith [and] . . . better protects the
3 insured against the insurer’s bad faith conduct”; “[i]f the only remedy [for bad faith] available
4 were the limits of the contract, then there would be no distinction between an action for an
5 insurer’s wrongful but good faith conduct, and an action for its bad faith conduct. An insurer
6 could act in bad faith without risking any additional loss.” *Butler*, 823 P.2d at 505–06; *see Kirk*,
7 951 P.2d at 1128 (“Without coverage by estoppel and the corresponding potential liability, an
8 insurer would never choose to defend with a reservation of rights when a complete failure to
9 defend, even in bad faith, has no greater economic consequence than if such refusal were in good
10 faith. The requirement of acting in good faith cannot be rendered meaningless.”).

11 Washington also has a strong policy interest in using “the amount of a covenant judgment
12 [a]s the presumptive measure of an insured’s harm caused by an insurer’s tortious bad faith if the
13 covenant judgment is reasonable under the *Chaussee* criteria”:

14 This approach promotes reasonable settlements and discourages fraud and
15 collusion. Furthermore, using the amount of a covenant judgment to measure tort
16 damages in this context makes sense in light of our long standing requirement that
17 such settlements be reasonable. If a reasonable and good faith settlement amount
18 of a covenant judgment does not measure an insured’s harm, our requirement that
19 such settlements be reasonable is meaningless. Finally, the *Chaussee* criteria
protect insurers from excessive judgments especially where, as here, the insurer
has notice of the reasonableness hearing and has an opportunity to argue against
the settlement’s reasonableness.

20 *Besel v. Viking Ins. Co.*, 49 P.3d 887, 891–92 (Wash. 2002).

21 Washington, not California, is the state with the most significant relationship to the
22 parties and the occurrence—Steadfast’s commission of the tort of bad faith. It was in a court in
23 Washington—a state with a strong policy of protecting insureds—that Steadfast (a Delaware, not
24 California, corporation) refused to defend AFECO, against a suit alleging declarant liability for
25 damages under the Washington Condominium Act, for property damage that occurred in
26 Washington. AFECO’s and AFED’s incorporation in California, the fact that Steadfast’s claims

1 adjustor was based there, and AFECO's using a California broker as a middleman between them
2 do not outweigh these considerations. Washington law applies.

3 **2. Coverage by Estoppel and Measure of Harm**

4 "[A]n insurer that refuses or fails to defend in bad faith is estopped from denying
5 coverage." *Truck Ins. Exch.*, 58 P.3d at 281. "[T]he amount of a covenant judgment is the
6 presumptive measure of an insured's harm caused by an insurer's tortious bad faith if the
7 covenant judgment is reasonable under the *Chaussee* criteria." *Besel*, 49 P.3d at 891. "Once [it
8 is] determined [that] the covenant judgment was reasonable, the burden shift[s] to [the insurer] to
9 show the settlement was the product of fraud or collusion." *Id.* at 892. "Absent such a showing,
10 the insurer is liable even beyond the limits of the insurance policy because through its bad faith,
11 the insurer has voluntarily forfeited its ability to protect itself against an unfavorable settlement."
12 *Mut. of Enumclaw*, 169 P.3d at 13 (quotation marks omitted); see *Kirk*, 951 P.2d at 1128 ("harm
13 is assumed, the insurer is estopped from denying coverage, and the insurer is liable for the
14 judgment").

15 Steadfast does not dispute that "Washington imposes coverage by estoppel" or that "in
16 Washington . . . a reasonable covenant judgment is the presumptive measure of damages." (Dkt.
17 No. 99 at 16–17 & n.70 (quotation marks omitted).) Its only argument that coverage by estoppel
18 does not apply here is that "Evans' own lack of good faith precludes any estoppel remedy. . . . If
19 Evans wanted Steadfast to underwrite its condominium and conversion risks, it should not have
20 consistently represented the opposite through its brokers and should have paid a premium for
21 such coverage." (*Id.* at 23–24.) But the Association (standing in AFECO's and AFED's shoes) is
22 not claiming that the policy covers *all* condo project risks. To the contrary, it acknowledges that
23 the policy does not cover damage connected to AFECO's and AFED's *work* performed in
24 connection with the construction, reconstruction, or remodeling of condo projects. It is precisely
25 that lack of coverage under the policy that justified calculation of the premium without reference
26 to AFECO's and AFED's projected condo construction costs. That Steadfast failed to appreciate

1 that the policy, by its plain terms, could cover declarant liability under the WCA does not show
2 unclean hands on the part of AFECO or AFED.

3 Steadfast is estopped from asserting coverage defenses because it refused to defend
4 AFECO and AFED in bad faith. The Washington Superior Court determined that \$5,121,009 in
5 damages was a reasonable settlement of the Association's claims against AFECO, AFED, and
6 Spinnaker under the *Chaussee* criteria. Steadfast has produced no evidence or argument that
7 \$5,121,009 is not the presumptive measure of damages caused by its bad-faith failure to defend,
8 or that the settlement is the product of fraud or collusion. Steadfast is thus liable to the
9 Association for \$5,121,009.

10 C. Motions to Strike

11 Steadfast has moved to strike the expert report of J. Kay Thorne (Dkt. No. 72 Ex. CC at
12 30–49.) The Court did not consider this report in ruling on the Association's motion. Steadfast's
13 motion to strike is therefore moot.

14 The Association moves to strike paragraphs x and xi from the declaration of Steadfast's
15 expert, Jack Farrell (Dkt. No. 102 at 5–6 ¶¶ x & xi) and the declaration of Steadfast underwriter
16 Carolina Calvo-Betdashtoo and the exhibits thereto (Dkt. No. 103). The Court reviewed this
17 evidence and nevertheless granted the Association's motion for partial summary judgment. The
18 Association's motions to strike are therefore moot.

19 III. STEADFAST'S MOTION FOR LEAVE TO FILE UNDER SEAL

20 Steadfast moves for leave to file under seal three pages of documents that were
21 subpoenaed from AmWINS Insurance Brokerage of California and that the parties agreed to
22 keep confidential. (Dkt. No. 92.) "There is a strong presumption of public access to the court's
23 files. With regard to dispositive motions, this presumption may be overcome only on a
24 compelling showing that the public's right of access is outweighed by the interests of the public
25 and the parties in protecting the court's files from public review." Local Rules W.D. Wash. CR
26 5(g)(2). A motion to seal must provide "a clear statement of the facts justifying sealing and

1 overcoming the strong presumption in favor of public access.” *Id.* CR 5(g)(4).

2 Steadfast argues that granting its motion is necessary to “honor[] the intent of the
3 confidentiality agreement.” (Dkt. No. 92 at 3.) However, the confidentiality agreement provides
4 that “[a]ny party to this suit may request, and AmWINS may agree, that the provisions of this
5 Agreement be waived as to one or more of the AmWINS Confidential Documents.” (Dkt. No. 93
6 Ex. 4 at 38 ¶ 11.) Steadfast has made no showing that it attempted to obtain AmWINS’ waiver of
7 the provisions of the agreement for the three pages it wishes to file under seal. Moreover,
8 Steadfast filed—in a different exhibit to the same declaration, and not under seal—an exact
9 duplicate of one of the three purportedly “confidential” pages. (*Id.* Ex. 2 at 23.) This calls into
10 question Steadfast’s assertion that the other two pages are truly confidential and in need of
11 protection from public view. Steadfast’s motion for leave to file under seal is denied.

12 **IV. STEADFAST’S MOTION FOR SUMMARY JUDGMENT**

13 Steadfast’s motion for summary judgment (Dkt. No. 81) repeats the same arguments that
14 appear in its opposition to the Association’s motion for partial summary judgment. For the
15 reasons outlined above, the motion is denied.

16 **V. CONCLUSION**

17 The Association’s motion for partial summary judgment (Dkt. No. 78) is GRANTED;
18 Steadfast’s motion for leave to file documents under seal (Dkt. No. 92) is DENIED; and
19 Steadfast’s motion for summary judgment (Dkt. No. 81) is DENIED.

20 //
21 //
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DATED this 19th day of September 2012.

A handwritten signature in black ink, reading "John C. Coughenour". The signature is written in a cursive style and is positioned above a solid horizontal line.

John C. Coughenour
UNITED STATES DISTRICT JUDGE

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APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

THE ESPLANADE CONDOMINIUM)	
ASSOCIATION, a Washington)	
non-profit corporation,)	
)	
Plaintiff,)	No. 08-2-41943-6 SEA
)	
vs.)	
)	
APE SPINNAKER, LLC, a)	
Washington limited liability)	
corporation; AF EVANS COMPANY,)	
a California corporation;)	
AF EVANS DEVELOPMENT INC., a)	
California corporation, RICHARD)	
BELL, an individual, JACK)	
ROBERTSON, an individual, TORY)	
LAUGHLIN TAYLOR, an individual,)	
and)	
)	
Defendants,)	
)	
and additional party,)	
)	
TRAVELERS PROPERTY CASUALTY)	
COMPANY OF AMERICA,)	
)	
Intervenor.)	
)	

DEPOSITION UPON ORAL EXAMINATION OF
AVI J. LIPMAN
Wednesday, November 10, 2010

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

THE ESPLANADE CONDOMINIUM)
ASSOCIATION, a Washington)
non-profit corporation,)

Plaintiff,) No. 08-2-41943-6 SEA

vs.)

AFE SPINNAKER, LLC, a)
Washington limited liability)
corporation; AF EVANS COMPANY,)
a California corporation;)
AF EVANS DEVELOPMENT INC., a)
California corporation, RICHARD)
BELL, an individual, JACK)
ROBERTSON, an individual, TORY)
LAUGHLIN TAYLOR, an individual,)
and)

Defendants,)

and additional party,)

TRAVELERS PROPERTY CASUALTY)
COMPANY OF AMERICA,)

Intervenor.)

DEPOSITION UPON ORAL EXAMINATION OF
AVI J. LIPMAN
Wednesday, November 10, 2010

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EXHIBITS

No.	Description	Id'd
1	3-page email string between Avi Lipman and Leonard Flanagan, Subject: Esplanade, dated 11/23/09	11
2	2-page Northern District of California Bankruptcy Court Order Granting The Esplanade Condominium Association's Motion for Relief from Automatic Stay in re A.F. Evans Company, Inc.	19
3	2-page email string between Leonard Flanagan and David Ziff, Subject: Esplanade, dated 3/25/10	21
4	20-page Confidential Mediation Letter addressed to Tom Harris from Levin & Stein, Re: Mediation on Saturday, May 15, 2010 from 9:00 a.m. to 5:00 p.m. at Karr Tuttle, 1203 3rd Ave, Suite 2900, Seattle, dated 5/12/10	25

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EXHIBITS - (Continuing)

No.	Description	Id'd
5	59-page letter to Thomas Harris from Avi Lipman, Re: The Esplanade Condominium Association v. AFE Spinnaker, LLC et al. May 15, 2010 mediation, dated 5/12/10	26
6	2-page letter to Avi Lipman, Douglas Weigel, and Stephen Todd from Leonard Flanagan, Re: The Esplanade Condominium Association v. AFE Spinnaker, LLC et al., dated 5/19/10	30
7	4-page letter to Avi Lipman, Douglas Weigel, Stephen Todd, and Michaelanne Ehrenberg from Leonard Flanagan, Re: The Esplanade Condominium Association v. AFE Spinnaker, LLC et al., dated 5/19/10	32
8	65-page letter to Thomas Harris from Avi Lipman, Re: The Esplanade Condominium Association v. AFE Spinnaker, LLC et al. July 9, 2010 mediation, dated 7/8/10	37
9	30-page CR2A Settlement Agreement, dated 7/22/10	41

1 BE IT REMEMBERED that on Wednesday, November 10,
2 2010, at 9:42 a.m., at the law offices of Cole, Lether,
3 Wathen, Leid & Hall, 1000 Second Avenue, Suite 1300,
4 Seattle, Washington, appeared the aforementioned witness
5 before Carolyn L. Coleman, CCR, RPR.

6 WHEREUPON, the following proceedings were had, to
7 wit:

8
9 AVI J. LIPMAN, having been called as a witness
10 by the Intervenor, was duly
11 sworn and testified as follows:

12 EXAMINATION

13 BY MR. NEAL:

14 Q Can you state your name, spelling your last name for
15 the record.

16 A Avi Lipman; L-I-P, as in Paul, M-A-N.

17 Q Mr. Lipman, have you been deposed before in regard to
18 a case in which you've been involved?

19 A I have not.

20 Q Have you been deposed before at all?

21 A I have not.

22 Q Because you're an attorney, I'm going to spare you the
23 usual speeches. If you want to take a break at any
24 time, just let me know. Otherwise we'll jump right
25

1 A I can't. I don't remember.

2 Q And for the record, you were defense counsel assigned
3 by an insurance company called RSUI, correct?

4 A That's correct.

5 Q Do you know when you were first retained?

6 A I believe it was around September of 2009.

7 Q Before we get into too much substance of the
8 testimony, just for the record, you and I know each
9 other, correct?

10 A Yes.

11 Q We've worked together in the past?

12 A Yes.

13 Q Are we social friends?

14 A No.

15 Q Do you and I have any relationship other than the few
16 times we have run across each other professionally?

17 A No.

18 Q Any animosity towards me or my firm?

19 A No.

20 Q Any particular bias in favor of me or my firm?

21 A No.

22 Q Also, one last little clarification for the record.

23 We're here today to discuss the settlement that
24 happened within the confines of the Court's protective
25 order. This is not a deposition regarding Travelers'

1 in.

2 You understand that we're here today in regard to
3 a settlement that was reached in the matter of
4 Esplanade versus AF Evans Company, Inc., et al.?

5 A Yes.

6 Q And you were one of the attorneys of record in that
7 case, correct?

8 A Yes.

9 Q And still are, actually, correct?

10 A That's correct.

11 Q Who is it that you represent?

12 A AF Evans Development, AF Evans Company, and Richard
13 Bell.

14 Q Has that always been the case throughout the course of
15 your involvement in the litigation that we're here
16 about?

17 A No. At one point we also represented the two other
18 individual defendants.

19 Q Tory Laughlin-Taylor and John Robertson?

20 A That's correct. He goes by Jack Robertson.

21 Q But at some point you withdrew as counsel of record
22 for them and someone else substituted in?

23 A Robertson and Laughlin-Taylor were and continue to be
24 represented by Steve Todd of Todd & Wakefield.

25 Q Can you tell me roughly when that happened?

1 coverage case, the pending declaratory judgment action
2 or anything related to coverage.

3 For the record, we offered to conduct one
4 deposition of each witness and you happened to be used
5 in both actions. However, that offer was declined, so
6 we're just here today to talk about the one issue, and
7 that is the settlement in the underlying action.
8 That's consistent with your understanding of why we're
9 here today?

10 MR. FLANAGAN: Object to form.

11 MR. HOLLON: Join.

12 THE WITNESS: I don't know that I have an
13 understanding either way about that.

14 Q (By Mr. Neal) Fair enough. Now, once you were
15 retained and assigned to defend the various defendants
16 that you were assigned to represent, what was the
17 status of the case when you got involved?

18 MR. HOLLON: Object to the form of the
19 question.

20 THE WITNESS: I don't know that I understand
21 your question.

22 Q (By Mr. Neal) When you filed your notice of
23 appearance, what did you understand to have been the
24 activity in the case prior to your involvement?

25 A I still don't understand the question.

1 Q Did you understand there was a default order that had
 2 been entered against one of the defendants, not one of
 3 your clients but one of the defendants, prior to your
 4 getting involved?
 5 A I did understand that.
 6 Q Now, of the defendants that you were retained to
 7 represent, am I correct that you were not retained to
 8 represent AFE Spinnaker, LLC?
 9 A That's correct.
 10 Q At any point in time did you represent AFE Spinnaker?
 11 A No.
 12 Q Throughout the course of your work in defending your
 13 clients, at any time did you take actions to defend
 14 AFE Spinnaker?
 15 A AFE Spinnaker was not our client.
 16 Q Now, at the time that you got involved in the case, at
 17 that initial point, were there any settlement
 18 discussions that you're aware of?
 19 A I'm not sure I know what you mean. At the point we
 20 were retained were there active settlement
 21 negotiations?
 22 Q When you first got involved in the case, was there any
 23 talk of an early settlement?
 24 A Not that I recall.
 25 Q Do you recall any discussions about getting the

1 at that copy?
 2 MR. HOLLON: Yeah, let's go off the record
 3 for a moment.
 4 (Discussion held off the record.)
 5 MR. NEAL: We can go back on the record.
 6 Q (By Mr. Neal) Mr. Lipman, I've handed you what's been
 7 marked as Exhibit No. 1 to your deposition. Do you
 8 recognize this document?
 9 A It appears to be an email exchange between myself and
 10 Leonard Flanagan, and some other lawyers are cc'd.
 11 Q While we were off the record, did you have an
 12 opportunity to review this document?
 13 A I did.
 14 Q Do you have an independent recollection, having
 15 reviewed this, of this discussion occurring via email?
 16 A I don't. I'm able to read what it says but I don't
 17 have an independent recollection of writing or reading
 18 these emails.
 19 Q This indicates for the record, to summarize, one of
 20 the issues that's being discussed here is
 21 Mr. Flanagan's encouragement that your client retain
 22 separate coverage counsel, correct?
 23 A It appears to, yes.
 24 Q Do you remember specifically that issue coming up,
 25 there being some discussion about Mr. Flanagan

1 insurance companies on board and trying to, you know,
 2 hold off the case to set up a mediation, anything like
 3 that?
 4 A At some point there was a mediation in the case.
 5 Q I'm aware of that. I'm still trying to talk about
 6 what your recollection is in the initial stages when
 7 you first got involved in the case.
 8 A Can you be a little more specific as to time?
 9 Q Sure. September, October of 2009, when you first
 10 entered a notice of appearance and began defending
 11 your clients, were there any settlement discussions
 12 coming from Levin & Stein, did you make any overtures
 13 towards Levin & Stein, those types of discussions?
 14 A I don't recall all of the communications but I can
 15 tell you to the best of my recollection we did not
 16 discuss with plaintiff's counsel mediation during
 17 September, October of 2009.
 18 Let me also add to that answer that if there is a
 19 document or email that refers to that from that time
 20 period, I'm certainly willing to look at that or
 21 consider it.
 22 Q Fair enough. I'm just asking for your recollection.
 23 (Exhibit No. 1 marked for identification.)
 24 MR. HOLLON: Do you have a copy for me?
 25 MR. NEAL: No. My apologies. Can you look

1 recommending coverage counsel for your client?
 2 MR. FLANAGAN: Object to form.
 3 THE WITNESS: I didn't remember that until I
 4 read this document that you put in front of me.
 5 Q (By Mr. Neal) Do you know if it came up at any point
 6 other than what might be in the written record at any
 7 point in the future?
 8 A You mean did I have any communications with
 9 Mr. Flanagan about this issue after this email
 10 exchange?
 11 Q Yes, that you can recall.
 12 A Not that I can recall.
 13 Q At this point in November of 2009, did your client
 14 retain separate coverage counsel?
 15 A At a later time, Mr. Bell had separate counsel.
 16 Q Who was --
 17 A I'm not quite done. And I believe AFED and AFECO, and
 18 by those acronyms, I'm referring to AF Evans
 19 Development and AF Evans Company, may have consulted
 20 with counsel, but I don't remember how that worked.
 21 Q Do you know who Mr. Bell's separate counsel was?
 22 A Yes. Geoff Knudsen at Smith & Hennessey.
 23 Q Do you know who the separate counsel is that the
 24 AF Evans entities consulted with?
 25 A Yeah. I think it was Dale Kingman.

1 **Q** When the mediations occurred in May and July of this
 2 year, were Mr. Knudsen or Mr. Kingman in attendance?
 3 **A** Kingman was not. Knudsen participated by phone. And
 4 I don't recall whether he participated in both of them
 5 or not. I believe there were actually three mediation
 6 sessions, two with large groups and then one that was
 7 smaller. Knudsen never appeared in person.
 8 **Q** Do you know if Spinnaker or any of the other
 9 defendants consulted with or retained separate
 10 coverage counsel?
 11 **A** I don't.
 12 **Q** Returning to Exhibit No. 1, there is a discussion in
 13 here about Mr. Flanagan apparently was contacted by a
 14 representative of Travelers and he had asked, I guess,
 15 whether you had an objection to him returning that
 16 telephone contact. Do you recall that issue coming
 17 up, Mr. Flanagan asking you about contact with
 18 Travelers?
 19 **A** Not outside of this email exchange.
 20 **Q** Did you understand at that point that one of your
 21 clients, AF Evans Company, may have had an insurance
 22 policy with Travelers?
 23 **A** At which point? When I was writing these emails?
 24 **Q** Correct. At this point in time in November of 2009.
 25 **A** I knew that Travelers was a potential source of

1 answer?
 2 MR. HOLLON: Can I have just one second?
 3 MR. NEAL: Yes.
 4 MR. HOLLON: I believe it calls for work
 5 product and I'm going to instruct the witness not to
 6 answer.
 7 THE WITNESS: And I'll take Mr. Hollon's
 8 advice on that.
 9 **Q** (By Mr. Neal) As of the time that you first began
 10 representing AF Evans Company, it's true that that
 11 company was in bankruptcy in the Northern District of
 12 California, correct?
 13 **A** Yes. I don't remember exactly when the bankruptcy was
 14 filed but, yes, I believe that's right.
 15 **Q** At some point, at least based on this email, you know
 16 that yourself and Mr. Flanagan had an email discussion
 17 about the fact that AF Evans Company was in
 18 bankruptcy, correct?
 19 **A** Sure. I mean, that's one of the things that appears
 20 to be discussed in the email exchange.
 21 **Q** At that point in time, November of 2009, was there any
 22 discussion about whether the parties could move
 23 forward with litigation, given the pendency of that
 24 bankruptcy?
 25 MR. HOLLON: Discussion with opposing

1 coverage for one or more of the parties.
 2 **Q** Had you had any contact at that point with anybody at
 3 Travelers about coverage for any of your clients?
 4 **A** I don't remember.
 5 **Q** Once again, sticking with Exhibit No. 1, on the bottom
 6 of the first page, this is an email from you to
 7 Mr. Flanagan. It indicates--there's kind of a bullet
 8 point here--that there was a notice of bankruptcy that
 9 was going to be forwarded to Mr. Flanagan.
 10 **A** Correct. We were intending to file a notice with the
 11 Court, and we eventually did.
 12 **Q** At this point, do you know if Mr. Flanagan was aware
 13 prior to your email about the pending AF Evans
 14 bankruptcy?
 15 MR. FLANAGAN: Objection; calls for
 16 speculation.
 17 THE WITNESS: I have no idea what
 18 Mr. Flanagan knew.
 19 **Q** (By Mr. Neal) Do you know why you indicated to
 20 Mr. Flanagan that you "would prefer" that he not
 21 contact Travelers?
 22 MR. FLANAGAN: Objection; calls for work
 23 product.
 24 MR. HOLLON: Join.
 25 MR. NEAL: Is that an instruction not to

1 counsel?
 2 MR. NEAL: Yes.
 3 THE WITNESS: You mean discussion beyond
 4 this email exchange?
 5 **Q** (By Mr. Neal) Yeah. I'm asking now for your
 6 recollection beyond what may be contained in the
 7 written record. Do you recall discussing with
 8 opposing counsel the issue of whether you could move
 9 forward with litigation?
 10 MR. FLANAGAN: Object to form. The written
 11 record is not complete.
 12 THE WITNESS: I don't recall specific phone
 13 calls. I know we didn't have a meeting about it. I
 14 may have spoken to someone from Levin & Stein about it
 15 on the phone.
 16 Certainly, there's email exchange here. There's
 17 probably additional email exchanges. We filed with
 18 the Court notice of the bankruptcy, and our position
 19 in doing so was that the case could not proceed
 20 against AF Evans Company. That's the best I can
 21 recall.
 22 **Q** (By Mr. Neal) Was it your belief, though, that -- I'm
 23 sorry. I don't want to ask for your belief. I don't
 24 want to get into work product and stuff like that.
 25 Was there any discussion between yourself and

1 opposing counsel about proceeding with the litigation
 2 as against the nondebtor defendants?
 3 **A We did not take the position with Levin & Stein or the**
 4 **Court that the case could not proceed against the**
 5 **other defendants.**
 6 **Q Do you recall anybody taking the position that the**
 7 **case could not proceed against the other defendants?**
 8 **A No.**
 9 **Q Did anyone take the position that the other AF Evans**
 10 **entities, Spinnaker and AF Evans Development, were**
 11 **essentially inextricably linked to AF Evans to the**
 12 **point that they were actually part of the bankruptcy?**
 13 MR. FLANAGAN: Object to form.
 14 THE WITNESS: I don't know that I entirely
 15 understand your question. The best answer I can give
 16 you is we did not take the position that the case
 17 could not proceed against the other defendants.
 18 **Q (By Mr. Neal) To your recollection, did Levin & Stein**
 19 **ever take the position that the case couldn't proceed**
 20 **as against the other defendants?**
 21 **A I don't recall them stating that to us or taking that**
 22 **position in court.**
 23 **Q Nonetheless, the record reflects the case did proceed,**
 24 **correct? There was discovery that was undertaken at**
 25 **that point?**

1 **Q (By Mr. Neal) Right.**
 2 **(Exhibit No. 2 marked for identification.)**
 3 **Q I've handed you what's been marked as Exhibit No. 2 to**
 4 **your deposition. Do you recognize this document?**
 5 **A I do.**
 6 **Q For the record, this is a true and correct copy of the**
 7 **Bankruptcy Court for the Northern District of**
 8 **California's order granting the Esplanade Condominium**
 9 **Association's motion for relief from automatic stay in**
 10 **the AF Evans bankruptcy, correct?**
 11 **A I can't verify it's a true and correct copy but that's**
 12 **what it looks like.**
 13 **Q According to the document at least, this was signed by**
 14 **the Court on April 9 of 2010. It's actually on the**
 15 **front of the document.**
 16 **A It appears to have been, yes.**
 17 **Q And this order, assuming it's an accurate copy, grants**
 18 **relief from the stay as of June 24th of 2010, correct?**
 19 **A It appears to, yes.**
 20 **Q Do you recall if you were provided with a copy of that**
 21 **order? I don't have the benefit of having reviewed**
 22 **your file.**
 23 **A At some point I got a copy of it.**
 24 **Q Now, this order was signed in April, but at some point**
 25 **in the interim there was a motion filed to reduce the**

1 **A There was discovery that proceeded with regard to the**
 2 **other defendants.**
 3 **Q Right. In the months that followed your initial**
 4 **retention up through into the spring of 2010, is it**
 5 **your position that all of the activity in the case --**
 6 **I'm trying to get the dynamic here. Was all of the**
 7 **activity in the case activity related to litigation of**
 8 **the nondebtor defendants?**
 9 MR. FLANAGAN: Object to form.
 10 THE WITNESS: I'm sorry, Eric. I don't know
 11 that I understand that question.
 12 **Q (By Mr. Neal) When you were undertaking a deposition,**
 13 **were you somehow separating out your representation of**
 14 **AF Evans Company from the questions that were being**
 15 **asked in that deposition? Do you understand what I'm**
 16 **trying to get at?**
 17 MR. FLANAGAN: Object to form.
 18 THE WITNESS: I think so. Given the fact
 19 that there was a stay in the trial court imposed by
 20 the bankruptcy of AF Evans Company, we did our very
 21 best to segregate out AF Evans Company from the case
 22 until the point that the stay was lifted, and it was
 23 eventually lifted sometime in the spring of 2010. I
 24 believe it may have been June but I don't recall
 25 exactly.

1 default order against Spinnaker to a default judgment,
 2 correct?
 3 **A Yes. And I think that was filed the month before,**
 4 **sometime in March. That's the best of my**
 5 **recollection.**
 6 **Q Again, for the record, you didn't have anything to do**
 7 **with defending Spinnaker in regard to that motion?**
 8 **A Spinnaker was not our client.**
 9 **Q Right. Spinnaker did make an appearance, however, at**
 10 **some point thereafter, correct?**
 11 **A After what?**
 12 **Q After the filing of the motion for entry of judgment.**
 13 **A I don't recall exactly when they did appear in the**
 14 **case but they did appear.**
 15 **Q Sure. At what point, if you can recall, does the --**
 16 **relative to any point in time when the -- for**
 17 **instance, when the motion for default judgment was**
 18 **filed or whatever, at what point did the parties first**
 19 **begin settlement discussions or discussions about**
 20 **getting the case into mediation?**
 21 **A I don't remember.**
 22 **Q Do you know if it was before or after the motion for**
 23 **entry of default was filed?**
 24 **A I don't remember.**
 25 **Q Do you know if it was before or after counsel appeared**

1 on behalf of Spinnaker?
 2 A I don't remember.
 3 Q Do you recall there being any difficulties in getting
 4 agreements on when mediation should take place?
 5 A I don't recall that.
 6 Q Do you recall when it was that you got the first
 7 settlement demand from the plaintiff?
 8 A I don't.
 9 Q Setting aside when it may or may not have happened, do
 10 you recall what their first settlement demand was?
 11 A No.
 12 (Exhibit No. 3 marked for identification.)
 13 MR. FLANAGAN: Let's go off the record.
 14 (Discussion held off the record.)
 15 MR. NEAL: Back on the record.
 16 Q (By Mr. Neal) Have you had an opportunity to review
 17 what's been marked as Exhibit 3 to your deposition?
 18 A I have.
 19 Q Do you recall these emails being exchanged in March of
 20 2010?
 21 A I have no independent recollection of them but I see
 22 that -- I see what they are.
 23 Q So you don't have recollection of the subject matter
 24 that is contained in these emails coming up?
 25 A There were a number of things discussed in these

1 A Yes.
 2 Q Do you know when that agreement took place?
 3 A No.
 4 Q Do you recall there being a situation where there were
 5 various motions pending and depositions scheduled
 6 and -- I could walk through all of the documents but I
 7 just kind of want to get your recollection in terms of
 8 what it took to get the parties into mediation.
 9 MR. FLANAGAN: Object to form.
 10 THE WITNESS: Your question is what did it
 11 take to get the parties into mediation?
 12 Q (By Mr. Neal) Were there concessions made by the
 13 parties in terms of scheduling and moving motions and
 14 depositions and whatnot in order to accommodate the
 15 mediation?
 16 MR. HOLLON: Object to the form of the
 17 question. You can answer.
 18 THE WITNESS: That generally rings a bell
 19 but I don't remember the precise situation or the
 20 logistics at issue.
 21 Q (By Mr. Neal) In any event, in May of this year, there
 22 was an initial mediation?
 23 A That sounds right.
 24 Q Does it conform with your memory that mediation
 25 occurred on May 15th of this year at WAMS with Tom

1 emails. Some of the subjects I remember, some I
 2 don't. But I don't remember these precise
 3 communications except by reading the document.
 4 Q Do you recall if there were any further discussions,
 5 telephone conversations, face-to-face discussions,
 6 following up on the subject matter of these emails?
 7 MR. FLANAGAN: Object to form.
 8 THE WITNESS: I'm going to have to ask you
 9 to clarify what you mean by the subject matter.
 10 Q (By Mr. Neal) Well, the first email, if you turn to
 11 Page 2, indicates -- it's from Mr. Flanagan, and it
 12 speaks for itself but essentially it states that
 13 there's a willingness to enter into a stipulation
 14 regarding the effect of any default judgment. And
 15 then the second email is your response asking for
 16 clarification, or actually the response of one of your
 17 associates. And then in the third email, Mr. Flanagan
 18 clarifies what his thoughts were.
 19 And my question is, beyond these three emails, do
 20 you have a recollection of there being further
 21 discussion on that subject matter?
 22 A I don't recall, no.
 23 (Exhibit No. 4 marked for identification.)
 24 Q Now, ultimately, the parties did agree to go to
 25 mediation, correct?

1 Harris?
 2 A I don't remember the exact date, but looking here at
 3 Exhibit 4, that appears to be the date that's set
 4 forth in Levin & Stein's letter and I don't have any
 5 reason to disagree with it.
 6 MR. HOLLON: Eric, at this point, I would
 7 like to just lodge a standing objection to mediation
 8 communications and the use of them under RCW 7.07. I
 9 believe they're not properly the subject of discovery
 10 or use. I see you've marked a mediation letter as an
 11 exhibit to this deposition and I'm just going to lodge
 12 a standing objection. You can continue on but I
 13 believe it's improper.
 14 MR. FLANAGAN: I'll join.
 15 Q (By Mr. Neal) Your mediator was Tom Harris?
 16 A Correct.
 17 Q Do you recall attending the first mediation?
 18 A Yes.
 19 Q Do you recall who else was there?
 20 A Not off the top of my head.
 21 Q Do you recall who else might have been there
 22 representing your particular clients?
 23 A I believe at the first mediation, the lawyers from my
 24 firm were myself and Mike Helgren.
 25 Q Was personal counsel present, Mr. Knudsen?

1 **A No. As I stated earlier, I don't believe Mr. Knudsen**
 2 **ever attended in person. I don't even know if he had**
 3 **been retained at that point. I just don't remember**
 4 **what Mr. Knudsen's status was, but so far as I recall,**
 5 **to the extent he ever participated, it was only ever**
 6 **by phone.**
 7 **Q The document that I have handed to you as Exhibit**
 8 **No. 4 to your deposition is Levin & Stein's mediation**
 9 **letter to Mr. Harris. The body of that letter**
 10 **indicates that it was not sent to defense counsel, and**
 11 **so my very basic first question is, do you recall ever**
 12 **seeing this document?**
 13 MR. HOLLON: Again, I'm just going to renew
 14 my objection. If you're agreeable to a standing
 15 objection, I won't have to make it.
 16 MR. NEAL: Yeah, I understand your
 17 objection. You don't have to make it.
 18 MR. HOLLON: Thanks.
 19 THE WITNESS: I don't recall seeing it.
 20 **Q (By Mr. Neal) Do you know if prior to the mediation**
 21 **you received a demand from Levin & Stein?**
 22 **A Are you asking about the first mediation on May 15th?**
 23 **Q Correct.**
 24 **A I don't recall.**
 25 **(Exhibit No. 5 marked for identification.)**

1 **Q (By Mr. Neal) When you submitted this document to**
 2 **Mr. Harris, was it your intent to mislead him?**
 3 MR. FLANAGAN: Objection; calls for work
 4 product.
 5 MR. HOLLON: Join. I'll instruct you not to
 6 answer on your thought processes behind the mediation.
 7 I believe it's well under the statute that all
 8 mediation communications are immune from discovery.
 9 The statute specifically states that. So I'm
 10 agreeable to giving you some leeway to talk about the
 11 process, but when we get to the communications and the
 12 substance of them, I think it's a proper basis for an
 13 instruction not to answer, so I would like to just
 14 proceed carefully at this point.
 15 THE WITNESS: And I'll take Mr. Hollon's
 16 advice.
 17 **Q (By Mr. Neal) In this mediation brief, at Page 12**
 18 **under Heading E, you indicate that plaintiff is**
 19 **seeking over \$8 million in diminution of value and**
 20 **\$7 million in repair costs. Do you recall that being**
 21 **the case at that point in time?**
 22 **A What's written here on Page 12 is consistent with my**
 23 **memory, yes.**
 24 **Q And do you recall asserting a position with regard to**
 25 **the merits of those damage claims?**

1 MR. HOLLON: Eric, I assume that my standing
 2 objection can carry on and apply to this mediation
 3 communication as well?
 4 MR. NEAL: Yes.
 5 MR. HOLLON: Thanks.
 6 MR. FLANAGAN: Join.
 7 **Q (By Mr. Neal) Mr. Lipman, I've handed you what's been**
 8 **marked as Exhibit No. 5 to your deposition. Do you**
 9 **recognize this document?**
 10 **A Yes. This is a letter we submitted to Mr. Harris.**
 11 **Q Setting forth your client's mediation position,**
 12 **correct?**
 13 **A Yes.**
 14 **Q Did you draft this document?**
 15 **A Yes.**
 16 **Q This document, at the time you were drafting it, does**
 17 **this reflect a true and accurate view, from your**
 18 **standpoint, of the merits of the claims and defenses**
 19 **in the case?**
 20 MR. FLANAGAN: Objection; calls for work
 21 product.
 22 MR. HOLLON: Object to the form of the
 23 question. I'm going to instruct you not to answer.
 24 It calls for work product.
 25 THE WITNESS: I'll take Mr. Hollon's advice.

1 MR. HOLLON: In mediation or elsewhere?
 2 MR. NEAL: In mediation, in court, anywhere.
 3 MR. HOLLON: If it's in mediation, I'm going
 4 to instruct you not to answer. If it's in court, I
 5 think it's fair game.
 6 MR. NEAL: I've allowed you to make your
 7 standing objection. We're not litigating the
 8 underlying case here. We are here for purposes of
 9 dealing with the reasonableness of a settlement. I
 10 think I get to inquire about the thought processes and
 11 what happened in developing the settlement agreement.
 12 That's my position. I reserve the right to
 13 re-call the deposition at some point if it becomes
 14 necessary, and if we have to litigate the question of
 15 whether we get to ask these questions or not, we may
 16 be reconvening.
 17 **Q (By Mr. Neal) At this mediation, May 15 of 2010, did**
 18 **your clients make any settlement offers?**
 19 MR. HOLLON: Object to the form of the
 20 question. I think you can answer that narrowly. It's
 21 a yes-or-no question.
 22 THE WITNESS: I believe so.
 23 **Q (By Mr. Neal) Do you know what those offers were?**
 24 **A No. I don't remember.**
 25 **Q Do you know if your clients made an offer to settle**

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1 the case -- did they make a cash offer?

2 A I really don't recall the details of the negotiations
3 of the first mediation.

4 Q Do you know what the initial demand of the plaintiff
5 was?

6 A No.

7 Q Do you know if there was discussion at that first
8 mediation about -- I mean discussion amongst the
9 parties, about conducting -- or about entering into a
10 consent judgment, assignment of rights, covenant not
11 to execute?

12 MR. FLANAGAN: Objection to the extent it
13 calls for attorney-client privilege.

14 THE WITNESS: Can I have a moment with
15 Mr. Hollon?

16 Q (By Mr. Neal) Sure.

17 (Discussion held off the record between
18 the witness and Mr. Hollon.)

19 MR. HOLLON: Can you please read that
20 question back?

21 (Question on Page 29, Lines 7 through 11
22 read by the court reporter.)

23 MR. HOLLON: Eric, I really don't want to be
24 difficult and I do want to give you as much leeway as
25 possible to get you your discovery you need for the

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1 Q (By Mr. Neal) Is this the first time in your
2 recollection that this issue came up, that this type
3 of settlement offer was made?

4 A I don't remember.

5 Q Again, do you have any recollection of there being any
6 cash settlement offers made at the initial mediation?

7 MR. FLANAGAN: Objection; asked and
8 answered.

9 MR. HOLLON: I'll object to the form of the
10 question.

11 THE WITNESS: As I said earlier, I don't
12 remember the specifics of those negotiations.

13 Q (By Mr. Neal) This letter, Exhibit No. 6 to your
14 deposition, this proposes a confession judgment in the
15 amount of \$11 million against two of your clients,
16 AF Evans Company and AF Evans Development, correct?

17 A It appears to, yes.

18 Q Do you recall what your response was to that offer?

19 A My clients did not accept this offer.

20 Q Can you tell me why your clients didn't accept the
21 offer?

22 MR. HOLLON: Object to the form of the
23 question. I think that calls for attorney-client
24 communications. I'll instruct you not answer unless
25 you can do so without revealing attorney-client

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1 case.

2 At the same time, I feel obligated to preserve
3 our position with respect to the confidentiality and
4 the statutory protections afforded to communications
5 in mediation, so I feel compelled to object to that
6 question and instruct the witness not to answer. I
7 think it calls for the substance of communications in
8 the mediation. And I believe the statute clearly
9 states -- we can pull it out and look at it again if
10 necessary, but it clearly states that those
11 communications are not subject to discovery.

12 THE WITNESS: I'll take Mr. Hollon's advice
13 on that.

14 (Exhibit No. 6 marked for identification.)

15 Q (By Mr. Neal) Handing you what's been marked as
16 Exhibit 6 to your deposition, do you recognize this
17 document?

18 A I do.

19 Q For the record, this is a May 19, 2010, letter from
20 Mr. Flanagan to yourself and co-counsel presenting a
21 settlement offer; is it not?

22 MR. HOLLON: From whom?

23 MR. NEAL: From Mr. Flanagan to Mr. Lipman,
24 Mr. Weigel and Mr. Todd.

25 THE WITNESS: Yes.

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1 communications.

2 THE WITNESS: I don't believe I can. I'll
3 take Mr. Hollon's advice on that.

4 Q (By Mr. Neal) Were there any settlement negotiations
5 that occurred between the parties that you're aware of
6 between the first mediation and the second mediation?

7 A I just don't recall that. I'm sorry.

8 Q Other than what may be in the written record, you
9 don't recall any telephone conferences or meetings
10 that were set up or anything where the parties sat
11 down and said -- you know, discussed any elements of a
12 potential settlement?

13 A I don't believe that we did that.

14 (Exhibit No. 7 marked for identification.)

15 Q Handing you what's been marked as Exhibit 7 to your
16 deposition, this is a July 7, 2010, letter from
17 Levin & Stein to yourself and co-counsel for the
18 defense. Do you recall receiving this letter?

19 A I don't have an independent recollection of receiving
20 this letter but I don't have any reason to deny I did
21 it.

22 Q It's dated July 7, 2010, and my understanding is this
23 would have come in immediately before the second
24 mediation. Does that jive with your recollection?

25 A I don't remember the date of the second mediation.

1 Q I understand you don't recall specifically receiving
 2 the letter, but do you recall this settlement offer
 3 being made to your clients?
 4 A Why don't you give me a minute, if you could. I'll
 5 read through it.
 6 Q Sure.
 7 A (Reviews document.) Eric, before we get to the
 8 question you just asked, I noticed that in the letter,
 9 Mr. Flanagan, who I believe is the author of this,
 10 refers to having received no settlement offers from or
 11 on behalf of any of the defendants, and I just want to
 12 state in response -- or a supplemental response to
 13 some questions you asked earlier. That may be
 14 correct. I just don't -- I just don't remember.
 15 So to the extent there were negotiations or there
 16 were offers or there weren't offers made, I just don't
 17 recall what happened very well at the first mediation,
 18 so I can't say whether Mr. Flanagan's representation
 19 is correct or not, but it may well be in this letter
 20 on that subject. I'll just continue reading through
 21 the rest of the letter.
 22 Q You're a step ahead of me.
 23 A (Reviews document.) Okay, I've had a chance to look
 24 through it.
 25 Q Do you recall in the days prior to the second

1 Q (By Mr. Neal) And that would assume an assignment of
 2 rights and covenant not to execute as set forth in the
 3 document itself, correct?
 4 A It includes whatever is in here.
 5 Q Right. Returning to the first page, where there is
 6 that paragraph there that you alluded to earlier, do
 7 you have any reason to disagree with Mr. Flanagan's
 8 statement here that there were no settlement offers
 9 made?
 10 A If you're referring to the paragraph that states "At
 11 mediation on May 15, 2010, we received no settlement
 12 offers from or on behalf of any defendants," I do not
 13 have any reason to disagree with that.
 14 Q Was RSUI present at the first mediation?
 15 A RSUI participated in the first mediation and, yes,
 16 coverage counsel, I believe, was there.
 17 Q That would have been David Tartaglio?
 18 A Correct.
 19 Q Again, trying to get the dynamic, and this may draw an
 20 objection. I don't know. Were you ever provided with
 21 settlement authority from RSUI or were the settlement
 22 negotiations being handled by Mr. Tartaglio?
 23 A The final settlement that was reached in this case in
 24 its final form was negotiated chiefly by Mr. Tartaglio
 25 and counsel for Mr. Bell, Mr. Knudsen.

1 mediation this demand being served on your clients?
 2 A Again, I don't recall the exact date of the second
 3 mediation but I don't have any reason to think that's
 4 inaccurate.
 5 Q Do you know if your clients responded to this demand?
 6 A I know that it wasn't -- well, let me say this. I
 7 don't believe it was accepted in its exact form, but I
 8 just don't remember. There were a lot of negotiations
 9 in this case. I don't remember exactly how we
 10 responded to this but I don't believe the settlement
 11 that was eventually reached is in precise conformance
 12 with this.
 13 Q Right. In looking at this letter, you'll agree with
 14 me that on Page 3 Levin & Stein begins setting forth
 15 what their proposal actually is, correct?
 16 A Correct.
 17 Q The first two pages are essentially them stating the
 18 reasons why they think your client should agree to
 19 settlement and then they start on Page 3 setting forth
 20 what it is they propose.
 21 A Right.
 22 Q And here they're asking for again a consent judgment,
 23 this time in the amount of \$8,081,152, correct?
 24 A Correct.
 25 MR. FLANAGAN: Object to form.

1 Q At the initial mediation, did RSUI provide you with
 2 settlement authority?
 3 A I don't remember.
 4 Q At any point in time, did RSUI provide you with
 5 settlement authority?
 6 A Mr. Tartaglio was involved on behalf of RSUI
 7 throughout, so it's a little difficult for me to
 8 answer that question.
 9 Q Right. You know, every attorney has been down this
 10 road. You go into mediation and sometimes you are
 11 authorized to negotiate up to a certain dollar amount
 12 by your client's insurance carrier and sometimes the
 13 insurance carrier doesn't give you money and says,
 14 "You make the case, we'll negotiate the deal."
 15 So I'm trying to again get the dynamic here. At
 16 any point in time did RSUI say to you, "If you get a
 17 deal done for X dollars, then get the deal done"?
 18 A Let me have a moment, if I could.
 19 (Discussion held off the record between
 20 the witness and Mr. Hollon.)
 21 MR. FLANAGAN: I'm going to interpose an
 22 objection to the line of questioning as immaterial to
 23 the issues in this case and not reasonably calculated
 24 to lead to admissible evidence.
 25 THE WITNESS: To the best of my

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1 recollection, and frankly it's fuzzy on this subject,
 2 I don't believe that we ever had authority of the type
 3 that you're describing from RSUI. In other words,
 4 Mr. Tartaglio and RSUI were always a part of each step
 5 of the negotiations.
 6 (Exhibit No. 8 marked for identification.)
 7 MR. HOLLON: Eric, as you might expect, I'm
 8 going to reassert my objection to all of the mediation
 9 communications. I understand that you feel like you
 10 need to explore the mediation communications, but
 11 again, absent some further instruction from the Court
 12 on that, I feel compelled to assert the objection.
 13 MR. NEAL: I'll restate my position. I
 14 think the Court's order says we get to ask about
 15 settlement communications. These are settlement
 16 communications. And to the extent that we get further
 17 guidance from the Court, I reserve the right to bring
 18 Mr. Lipman back in for a further deposition.
 19 MR. HOLLON: Fair enough.
 20 MR. FLANAGAN: I'll join in the objection.
 21 THE WITNESS: Can we go off the record for a
 22 moment?
 23 MR. NEAL: Sure.
 24 (Recess taken from 10:38 to 10:45 a.m.)
 25 MR. NEAL: We'll go back on the record.

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1 EXAMINATION - (Continuing)
 2 BY MR. NEAL:
 3 Q Mr. Lipman, when we went off the record, we had just
 4 gotten to marking Exhibit No. 8 to your deposition,
 5 and can you, for the record, identify that document.
 6 A Yes. This is a letter that we submitted to Mr. Harris
 7 in connection with the mediation of this case.
 8 Q And on the first page there, under the re line
 9 indicates "July 9, 2010 mediation." Does that refresh
 10 your recollection?
 11 A That sounds like the date we mediated for the second
 12 time.
 13 Q And your letter is dated July 8, 2010?
 14 A Correct.
 15 Q When you drafted this document, Mr. Lipman, was it
 16 your intent to present a fair and accurate portrayal
 17 of your client's position regarding the claims and
 18 defenses in this case?
 19 MR. HOLLON: Again I object for the same
 20 reason as before. I think it invades attorney work
 21 product and I'm going to instruct the witness not to
 22 answer.
 23 THE WITNESS: I'll take Mr. Hollon's advice
 24 on that.
 25 MR. HOLLON: I'll just reiterate our

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1 standing objection to the mediation communications. I
 2 know I've done that before but I want to make sure
 3 that tracks through on the record.
 4 Q (By Mr. Neal) Were you present at the July 9, 2010,
 5 mediation?
 6 A Yes.
 7 Q Did the case settle on July 9th at the mediation?
 8 A To the best of my recollection, the general terms of
 9 the settlement were agreed to but we met again, I
 10 believe, some of the lawyers and Mr. Harris, to hammer
 11 out precise details.
 12 Q So at the second mediation, what is your recollection
 13 of the general agreement that was reached?
 14 A Oh, I can't recite for you each of the terms of the
 15 settlement from memory.
 16 Q Was it a cash settlement and a release for all
 17 parties?
 18 A There was cash involved, there were releases involved,
 19 there were other terms involved.
 20 Q Did any cash come directly from any of your clients?
 21 A No.
 22 Q Do you know if any of the cash consideration for the
 23 settlement came from any party other than RSUI?
 24 A No. There was no cash from any party other than -- or
 25 from any party. The only cash that was paid was from

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1 RSUI.
 2 Q Do you know the amount of cash that RSUI agreed to pay
 3 in the initial settlement agreement?
 4 A To the best of my recollection, it was \$1.5 million.
 5 Q At the time of the July 9 mediation, when the general
 6 terms were agreed to, was there also an agreement that
 7 there would be a consent judgment entered against your
 8 clients?
 9 A Yes. That was part of the general agreement reached
 10 at the second mediation and then the details of which
 11 were sorted out later.
 12 Q What was the amount of the consent judgment that your
 13 clients agreed to have entered against them?
 14 A The amounts were undetermined at that point because
 15 there remained an additional hearing to take place, to
 16 the best of my recollection. That was regarding
 17 attorneys' fees and CPA damages. That was in
 18 connection with the default judgment. I think that is
 19 right. So my recollection is that we left the exact
 20 amounts of the consent judgments to be determined.
 21 Q Was there an agreement at that time that the consent
 22 judgments would be in a particular amount plus
 23 whatever the Court added to it?
 24 A Yes.
 25 Q What were the particular amounts that were agreed to?

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1 A I don't remember off the top of my head.
 2 Q Do you know if the amounts were different than what
 3 was ultimately signed off on the CR2A agreement?
 4 A I don't know that I entirely understand the question.
 5 I believe the CR2A agreement, without having it in
 6 front of me, described the scenario I just testified
 7 to, whereby the consent judgments would be finalized
 8 later.
 9 (Exhibit No. 9 marked for identification.)
 10 Q Handing you Exhibit 9 to your deposition, this is the
 11 CR2A agreement that has been produced to Travelers
 12 reflecting the settlement amongst the various parties
 13 in this case. Do you recognize this document as being
 14 that CR2A agreement?
 15 A Well, looking at Pages 11 and 12, this document is not
 16 executed by any of the parties, so unfortunately --
 17 Q Actually, if you turn to the very last pages of the
 18 exhibit --
 19 A Oh, I see. Okay. So I see the final pages of the
 20 exhibit appear to be the signature pages of the
 21 various parties.
 22 Without going through the document and comparing
 23 it to what's in our file, I can't say for certain that
 24 it's the exact agreement that was reached among the
 25 parties, but if you tell me that Levin & Stein

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1 produced this to you and represented it as such, I
 2 don't have any reason to disagree.
 3 Q I'll represent as well that I believe this is the
 4 exact document that was submitted to the Bankruptcy
 5 Court down in the Northern District of California for
 6 approval, so I assume this is the agreement of the
 7 parties.
 8 A We had nothing to do with submitting that, so all I
 9 can tell you is I don't have any reason to disagree
 10 that it's, in fact, the settlement agreement.
 11 Q If you turn to Page 5 of 12, under Paragraph 2.2
 12 there's an indication that your clients, AF Evans
 13 Company and AF Evans Development, agreed to a
 14 \$7.2 million consent judgment to be entered against
 15 them, correct?
 16 A Right. And just as I testified a moment ago, that was
 17 to be supplemented with attorneys' fees, costs and CPA
 18 penalties, which at that point had not been
 19 determined.
 20 Q Now, going back to my original question, this document
 21 was executed on July 22 of 2010, pursuant to the first
 22 line of the first page.
 23 A Right. The agreement is dated July 22, 2010. I can't
 24 tell you exactly when everybody signed it.
 25 Q Right.

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1 A But it is dated July 22, 2010.
 2 Q Now, going back to July 9, 2010, in the mediation, you
 3 testified that there was an agreement in general that
 4 consent judgment in a particular amount plus whatever
 5 the Court did would be entered against your client.
 6 Was that \$7.2 million or was the number different
 7 on July 9th than what it ended up being in this CR2A?
 8 A You know what? I just don't recall that. I don't
 9 recall whether the numbers were finalized on July 9 or
 10 not.
 11 Q Was it you negotiating the \$7.2 million figure or
 12 Mr. Tartaglio or some other attorney you're not aware
 13 of?
 14 MR. FLANAGAN: Object to form.
 15 THE WITNESS: To the best of my
 16 recollection, those numbers were worked out,
 17 negotiated by Mr. Tartaglio and counsel for Mr. Bell.
 18 Q (By Mr. Neal) Do you know where the \$7.2 million
 19 figure comes from?
 20 A No.
 21 Q Did you have any role in negotiating the \$7.2 million
 22 figure?
 23 A Well, I certainly played a role in the settlement
 24 negotiations throughout as one of the lawyers for
 25 several of the parties. I just don't recall, and, in

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1 fact, I don't believe that I was part of the
 2 discussion that finalized those figures.
 3 Q Did you have any role whatsoever in the negotiations
 4 relating to Spinnaker having an \$8 million consent
 5 judgment entered against it?
 6 A I did not represent Spinnaker at that time and I never
 7 have.
 8 Q So the answer is no, correct?
 9 A Correct.
 10 Q The trial date in this case was set for August 16,
 11 2010; is that accurate?
 12 A That sounds right.
 13 Q Were you prepared to take the case to trial?
 14 A Sure, if it didn't settle.
 15 Q You mentioned that you believed there was a follow-up
 16 meeting after the July 9th mediation. Do you know
 17 when that occurred?
 18 A I don't remember the date. It was attended by
 19 Mr. Flanagan, Mr. Todd and myself at the offices of
 20 Mr. Harris, I believe. Well, I know it took place in
 21 Mr. Harris's office, and I believe the lawyers I just
 22 identified were the ones who were there.
 23 Q Was personal counsel for Mr. Bell present?
 24 A No.
 25 Q Did anybody get him on the phone at any point, to your

1 recollection?
 2 **A I think at one point I spoke to him.**
 3 **Q How about counsel for RSUI? Were they present at the**
 4 **meeting?**
 5 **A Not physically present, but again, I believe I spoke**
 6 **to Mr. Tartaglio, and Mr. Todd may also have spoken to**
 7 **Mr. Tartaglio.**
 8 **Q One of the things I'm still trying to wrap my head**
 9 **around is how this settlement came to fruition, and**
 10 **that's where my next line of questioning is going to**
 11 **be going.**
 12 **Were there any direct cash negotiations between**
 13 **your clients and Levin & Stein in order to resolve the**
 14 **case absent a consent judgment?**
 15 MR. FLANAGAN: Object to form.
 16 MR. HOLLON: I join.
 17 THE WITNESS: I'm not sure I understand that
 18 question.
 19 **Q (By Mr. Neal) Let me ask you this: Did Levin & Stein**
 20 **ever present to you a demand and said, "Pay us a**
 21 **certain amount of dollars and we will release**
 22 **everybody and go away"?**
 23 **A I believe there was a demand at some point prior to**
 24 **the mediations but I don't remember what the contours**
 25 **of it were.**

1 point where any further questioning is going to
 2 continue to run into instructions not to answer based
 3 upon the various privileges that have been asserted.
 4 For the record, I believe that I'm entitled to
 5 make inquiries about the settlement negotiations,
 6 including what happened during the course of
 7 mediation. My intent was to ask questions concerning
 8 those negotiations on subjects such as whether there
 9 were cash offers made, whether there were cash demands
 10 made, whether the parties exchanged information or
 11 expressed positions concerning the collectability of
 12 any judgments against the various parties, the
 13 pendency of the bankruptcy and its effect on potential
 14 value of the case or the claims, the merits of the
 15 claims and defenses and the damage positions taken by
 16 the parties, as well as the individual assessments by
 17 counsel as to the likely jury verdict range if the
 18 case had gone to jury versus what was ultimately
 19 agreed to in the CR2A agreement.
 20 I intended to ask about the consideration that
 21 was given for the agreements to allow consent
 22 judgments to be entered as well as any appeal rights,
 23 potential fault of third parties or claims against
 24 third parties, including claims against any of the
 25 attorneys that were involved in the initial stages,

1 **Q At any point in time did your clients come up with a**
 2 **settlement fund? Whether it be from insurance dollars**
 3 **or whatever the dollars came from, I don't care. Did**
 4 **they ever put a settlement fund together and say to**
 5 **Levin & Stein, to Esplanade, "Here's what we will**
 6 **offer you in order to release us from all claims"?**
 7 **A Are you asking now about communications outside the**
 8 **context of the mediation?**
 9 **Q I'm talking about at any point did anybody put any**
 10 **money on the table and say, "We will give you this**
 11 **amount of money in exchange for full and complete**
 12 **releases?**
 13 MR. HOLLON: I think if it's outside the
 14 context of the mediation, you can answer the question,
 15 but I instruct you not to answer on the communications
 16 in the mediation, pursuant to the statute.
 17 THE WITNESS: So taking Mr. Hollon's advice
 18 in answering the question as to communications outside
 19 the context of the mediations, I don't believe so.
 20 MR. NEAL: Can we go off the record for a
 21 moment?
 22 (Discussion held off the record.)
 23 MR. NEAL: We can go back on the record. In
 24 discussing this matter with counsel off the record,
 25 we've essentially determined that we've come to a

1 including the bankruptcy attorney in California,
 2 Mr. Nyberg.
 3 I believe I'm entitled to inquire about all of
 4 those. I believe that's incorporated into the Court's
 5 order. And that's my record.
 6 MR. FLANAGAN: Our position regarding the
 7 subject matters that Mr. Neal wishes to examine the
 8 witness on are as follows: Regarding expressed
 9 positions at mediation regarding collectability,
 10 pendency of bankruptcy, merits of the defense and
 11 other positions taken by the parties, we would have no
 12 objection to his continuing with the line of
 13 questioning to evaluate what actual communications
 14 between counsel for the parties took place at
 15 mediation. We might object to its admissibility, but
 16 for purposes of this proceeding, we would have no
 17 objection.
 18 Inquiry into individual assessments we would
 19 believe is work product, but that would be subject to
 20 a waiver if counsel for Mr. Lipman believes that's
 21 appropriate or Mr. Lipman believes it's appropriate.
 22 Same goes to individual assessments as to jury
 23 verdict range. I'm not sure I quite understand what
 24 Mr. Neal's questions regarding consideration given for
 25 agreements to allow the consent judgments to be

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1 entered involves, but I don't think that I have any
 2 objection to inquiry into those matters.
 3 And I'm not quite sure what was meant by appeal
 4 rights and faults of third parties. If the line of
 5 questioning is about counsel's assessment of those
 6 matters, again, that would be a matter for Mr. Lipman
 7 or his counsel to object to and it's up to them.
 8 MR. HOLLON: And as we've made clear during
 9 the course of the deposition this morning, I've got no
 10 objection to communications between counsel concerning
 11 settlement. I am objecting and will continue to
 12 object to counsel's assessments of the case as work
 13 product or counsel's communications with clients
 14 concerning the case, which are, of course, subject to
 15 the attorney-client privilege.
 16 I think our hang-up presently is on
 17 communications within the context of the mediation. I
 18 think those are statutorily privileged. I don't
 19 believe -- it's not clear to me that the order has
 20 overcome that statutory privilege, and absent some
 21 further direction from the Court, I feel obligated to
 22 assert that privilege pursuant to RCW 7.07. If the
 23 Court determines that the communications within the
 24 mediation are subject to discovery, we'll be, of
 25 course, happy to comply with the Court's directions

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1 and appear for further questioning by counsel.
 2 MR. NEAL: Thank you.
 3 MR. FLANAGAN: I have some follow-up
 4 questions.
 5
 6 EXAMINATION
 7 BY MR. FLANAGAN:
 8 **Q Mr. Lipman, Exhibit 3 is a email exchange dated**
 9 **3/25/2010. And just to refresh your recollection,**
 10 **there is an offer to stipulate that the default**
 11 **judgments not be binding on certain parties under**
 12 **certain circumstances. Was that offer declined by**
 13 **your clients?**
 14 **A I believe it was.**
 15 **Q The second mediation on July 9, 2010, do you recall**
 16 **receiving at the close of that mediation two**
 17 **alternative settlement proposals, one involving a**
 18 **potential consent judgment by AFECO and AFED with a**
 19 **cash payment component from RSUI and the second**
 20 **involving the association proceeding to trial against**
 21 **the individual defendants represented by Mr. Todd?**
 22 **A Yes, that rings a bell.**
 23 **Q Given that there were two alternative settlement**
 24 **demands on the table at the close of mediation on**
 25 **July 9, 2010, is your prior testimony that a**

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1 **preliminary settlement agreement was reached at that**
 2 **mediation mistaken?**
 3 **A It may be. I remember the third session with**
 4 **Mr. Harris that I described earlier as one at which we**
 5 **worked out the final details of the agreement itself.**
 6 **The general contours of the agreement were, to the**
 7 **best of my recollection, agreed to prior to that third**
 8 **session, but it may not have been at the second**
 9 **mediation session, it may have been by telephone. I**
 10 **just don't recall.**
 11 **Q Okay. Is it your understanding that the final**
 12 **settlement reflected in Exhibit 9 involves a consent**
 13 **judgment that remains contingent on approval of the**
 14 **bankruptcy court enforceable against AFECO?**
 15 **A I believe that's right.**
 16 MR. FLANAGAN: No further questions.
 17 MR. NEAL: That's it. Thank you.
 18 (Signature reserved.)
 19 (Deposition concluded at 11:09 a.m.)
 20
 21
 22
 23
 24
 25

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1 CERTIFICATE
 2
 3 I, Carolyn L. Coleman, Washington Certified Court
 4 Reporter, pursuant to RCW 5.28.010 authorized to administer
 5 oaths and affirmations in and for the State of Washington,
 6 do hereby certify: That I reported the deposition of AVI J.
 7 LIPMAN, commencing on Wednesday, November 10, 2010. That
 8 prior to being deposed, the witness was duly sworn by me to
 9 testify to the truth.
 10 That I thereafter transcribed my said shorthand
 11 notes into typewriting and that the typewritten transcript
 12 is a complete, true and accurate transcription of my said
 13 shorthand notes prepared pursuant to Washington
 14 Administrative Code 308-14-135, the transcript preparation
 15 format guideline, and to the best of my ability.
 16
 17 I further certify that I am not a relative or
 18 employee of counsel of any of the parties, nor a relative
 19 or employee of the parties involved in said action, nor a
 20 person financially interested in the action.
 21 I further certify that each witness before
 22 examination was by me duly sworn to testify the truth, the
 23 whole truth and nothing but the truth.
 24 IN WITNESS WHEREOF, I have set my hand in my
 25 office in the County of King, State of Washington, this
 15th day of November, 2010.

 Carolyn L. Coleman, CCR, RPR
 WA CCR License No. 2577

No. 68117-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA;
STEADFAST INSURANCE COMPANY; and
HEFFERNAN INSURANCE BROKERS, INC.

Appellants;

v.

THE ESPLANADE CONDOMINIUM ASSOCIATION, AFE
SPINNAKER, LLC, AF EVANS COMPANY, AF EVANS
DEVELOPMENT INC., RICHARD BELL, JACK ROBERTSON AND
TORY LAUGHLIN TAYLOR,

Respondents.

2012 OCT 12 PM 2:11
COURT OF APPEALS
STATE OF WASHINGTON
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CERTIFICATE OF SERVICE

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ORIGINAL

The undersigned hereby certifies that on this day I caused to be served a true and correct copy of the foregoing on the parties mentioned below via U.S. mail (postage prepaid):

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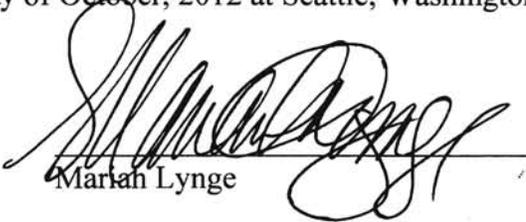
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I certify under penalty of perjury under the laws of the State of
Washington and the United States that the foregoing is true and correct.

Dated this 11th day of October, 2012 at Seattle, Washington.



Mariah Lyng