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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Michael Trudel et al.,
10 Plaintiffs,

No. CV-12-1208-PHX-SMM

11 v.

**MEMORANDUM OF DECISION
AND ORDER**

12 American Family Mut. Ins. Co.,
13 Defendant.
14

15 Before the Court is Defendant American Family Mutual Insurance Company's
16 ("American Family") fully briefed Motion for Partial Summary Judgement. (Docs. 57; 71;
17 75.) For the reasons that follow, the motion is denied.¹

18 **BACKGROUND**

19 Since 1995, Plaintiffs Michael Trudel's and Sandra Staples-Trudel's (the "Trudels")²
20 home in Scottsdale, Arizona has been insured by homeowners' insurance policies issued by
21 American Family. (Docs. 66 ¶ 1; 72 ¶ 3.) On October 5, 2010, several homes including the
22 Trudels' were damaged by a hail storm that moved through the Phoenix metropolitan area.
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24 ¹ The request for oral argument is denied because there was adequate opportunity to
25 present written argument, and oral argument will not aid the Court's decision. Fed. R. Civ.
26 P. 78(b); LRCiv 7.2(f); Partridge v. Reich, 141 F.3d 920, 926 (9th Cir. 1998).

27 ² While the Court would not ordinarily disregard Mrs. Staples-Trudel's hyphenated
28 surname, the Court adopts the parties' convention of referring to both Plaintiffs as the
"Trudels" for the sake of consistency.

1 (Docs. 66 ¶ 5; 72 ¶ 7.) On November 8, 2010, the Trudels filed a notice of loss for damage
2 to their home. (Docs. 66 ¶ 5; 72 ¶¶ 8-9)

3 American Family hired an independent adjusting firm, Pacesetters, to assist with
4 Trudels' claim; the Pacesetters' adjuster Randel Green ("Green") inspected the Trudels'
5 home and found hail damage to two roof tiles, the skylight, a gutter, the garage door, window
6 screens, the air conditioning unit, and a plastic dog crate. (Doc. 66 ¶¶ 6-7). Although Green
7 was a licensed adjuster in other states, he was not licensed in Arizona. (Doc. 72 ¶ 12.) At the
8 time, Green was adjusting 30 to 40 homes a week and was compensated according to the
9 number of homes he adjusted. (Id. ¶ 14.) Green would only conclude a roof tile was damaged
10 by hail if he could observe an impact mark. (Id. ¶ 22.) Since Green was unwilling to actually
11 climb on the roof because it was so fragile (id. ¶ 17),³ he only concluded a roof tile was
12 damaged if he could see an impact mark from his vantage point at the edge of the roof (id.
13 ¶¶ 22-23). American Family disputes this fact on the basis that Green's deposition testimony
14 "makes no mention of the adjusters [*sic*] 'vantage point at the edge of the roof' " (Doc. 76
15 at 2), but a finder of fact could reasonably conclude as much given the fact that Green did
16 not actually get on the roof. The Trudels did not have any questions and did not feel like
17 there was any damage that Green's estimate did not address (Doc. 66 ¶¶ 11-12), but the
18 estimate did not include damage to the stucco exterior of the Trudels' home nor did it
19 account for the number of tiles that may be broken during repair. (Docs. 58-1 at 41-48; 72
20 ¶¶ 19-21; 76 at 2.) Less deductible and depreciation, the Trudels received \$712.35. (Docs.
21 66 ¶¶ 8-10; 72 ¶ 18.)

22 The Trudels subsequently asked a local contractor for a repair estimate. (Docs. 72 ¶
23 24; 76 at 2.) The local contractor identified several additional damaged tiles, noted that the
24 particular type of tile was no longer manufactured, and suggested the entire roof needed to
25 be replaced. (Doc. 72 ¶ 25.) While American Family argues this estimate is inadmissible

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27 ³ The Court notes that the cited evidence does not support this assertion, but accepts
28 it as true because it is undisputed.

1 hearsay, the contents of the report could be admitted at trial for a purpose other than the truth
2 of the matters asserted therein, such as why the Trudels called and asked for the claim to be
3 reopened, which they did. (Doc. 66 ¶ 14.) In turn, American Family reviewed the local
4 contractor’s estimate and sent a second adjuster, also from Pacesetters, to reinspect the
5 Trudels’ home; however, no additional damage was found and American Family denied
6 additional coverage or payment consideration on the loss. (Id. ¶¶ 14-17.)

7 The Trudels subsequently requested a copy of their claim, retained counsel, and filed
8 suit in Maricopa County Superior Court alleging breach of contract and insurance bad faith.
9 (Docs. 1-1 at 5-7; 66 ¶¶ 18, 20-21.) American Family removed on the basis of diversity.
10 (Doc. 1.) During discovery, the Trudels disclosed repair estimates for their tile roof, flat roof,
11 and pool area (Doc. 66 ¶ 22), and claimed that the entire roof needed to be replaced because
12 their particular type of roof tile was no longer manufactured and their homeowners’
13 association would not allow the use of non-matching tile (Doc. 72 ¶ 26).⁴ The repair
14 estimates ranged from \$36,890.44 and \$106,199.36. (Doc. 66 ¶ 26.) Notably, the lowest
15 repair estimate is more than \$30,000 greater than the amount of ACV payments, and
16 American Family does not contend it has paid everything due, but concedes that “[t]he
17 amount American Family owes to plaintiffs on the claim” is a live issue. (Id. at 1.)

18 American Family retained Haag Engineering (“Haag”) to assess the damage to the
19 Trudels’ home; Haag disagreed that the pool damage was due to the storm. (Doc. 66 ¶ 23.)
20 Haag also noted that the Trudels’ estimates called for complete roof replacement and
21 disagreed that such extensive repairs were necessary. (Id. ¶¶ 24-25.) Even so, Haag found
22 hail damage to the Trudels’ home for which they were not compensated. (Docs. 72 ¶ 38; 76
23 at 4.) More than a year after receiving Haag’s report, American Family paid an additional
24 \$3,660.34 in undisputed damages to the Trudels’ home. (Docs. 72 ¶ 39; 72-9 at 5.) After
25 discovery, American Family moved for summary judgment. (Doc. 57.)

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27 ⁴ Whether the Trudels’ homeowners’ association would not allow the use of non-
28 matching tile is disputed, but there is sufficient evidence in the record to infer as much. (Doc.
72-1 ¶ 17.)

1 The policy terms that were in effect during the relevant time period (the “Policy”) are
2 the subject of dispute. According to American Family, “Arizona Amendatory Homeowners
3 Endorsement 584(C)” amended the Policy to state:

4 **Loss Payment.** We will adjust all losses with you. We will pay you unless
5 some other party is named in the policy or is legally entitled to receive
6 payment. Loss will be payable 30 days after we receive your properly
7 completed proof of loss and:

- 8 a. We reach agreement with you;
- 9 b. There is an entry of a final judgment; or
- 10 c. There is a filing of an appraisal award with us.

11 ***

12 **Matching of Undamaged Property.** We will not pay to repair or replace
13 undamaged property due to mismatch between undamaged and new material
14 used to repair or replace damaged material because of:

- 15 a. Texture, dimensional difference;
- 16 b. Color, fading, oxidation, weathering differences;
- 17 c. Wear and tear, marring, scratching, deterioration; or
- 18 d. Obsolescence or discontinuation.

19 We do not cover the loss in value to any property due to mismatch between
20 undamaged material and new material used to repair or replace damaged
21 material.

22 (Docs. 58-1 at 8; 58 ¶¶ 3-4; 66 ¶¶ 3-4). Endorsement 584(C) modified the Loss Payment
23 provision by substituting arbitration with appraisal⁵ and by adding the Matching of
24 Undamaged Property exclusion. (Compare Doc. 58-1 at 8, with Doc. 58-1 at 22.) The Trudels
25 claim they never received Endorsement 584(C) and only became aware of the amendment
26 after it was raised in the litigation. (Doc. 72 ¶¶ 63-64.) This fact is undisputed.

27 The Policy also included a “Procedures to Claim Replacement Coverage” provision
28 that, pursuant to “Gold Star Homeowners Amendatory Endorsement 587,” stated that if the
insured “received an actual cash value settlement for damaged property covered by
replacement coverage . . . [the insured] may make a further claim under this condition for

⁵ Pursuant to Endorsement 584(C), where the insured and insurer “fail to agree on the
amount of loss, either may demand an appraisal of the loss.” (Doc. 58-1 at 7.) This provision
supplanted the original arbitration provision, which provided that if the insured and insurer
“cannot agree as to the amount of liability, the controversy may be settled by arbitration” and
that either “may make this demand.” (Id. at 21.) Both before and after Endorsement 584(C),
the insurer was free to request appraisal/ arbitration without waiving its rights. (Id. at 8, 28.)

1 replacement cost, provided repairs to the damaged portion or replacement of the damaged
2 building are completed within one year of the date of loss.”⁶ (Doc. 58-1 at 10.) Endorsement
3 587 is not the subject of dispute and the original provision was more or less the same.
4 (Compare Doc. 58-1 at 10, with Doc. 58-1 at 22-23.)

5 **STANDARD OF REVIEW**

6 “The court shall grant summary judgment if the movant shows that there is no genuine
7 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
8 Fed. R. Civ. P. 56(a). “The substantive law determines which facts are material; only disputes
9 over facts that might affect the outcome of the suit under the governing law properly preclude
10 the entry of summary judgment.” Nat’l Ass’n of Optometrists & Opticians v. Harris, 682
11 F.3d 1144, 1147 (9th Cir. 2012). “One of the principal purposes of the summary judgment
12 rule is to isolate and dispose of factually unsupported claims or defenses . . .” Celotex Corp.
13 v. Catrett, 477 U.S. 317, 323-24 (1986).

14 To prove the absence of a genuine dispute, the movant must demonstrate that “the
15 evidence is such that [no] reasonable jury could return a verdict for the nonmoving party.”
16 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). “Where the non-moving party
17 bears the burden of proof at trial, the moving party need only prove that there is an absence
18 of evidence to support the non-moving party’s case.” In re Oracle Corp. Securities Litig., 627
19 F.3d 376, 388 (9th Cir. 2010). If the moving party carries that burden, then the non-moving
20 party must designate specific evidence capable of supporting a favorable verdict. Id. In
21 determining whether either or both of these burdens have been carried, “[t]he evidence of the
22 non-movant is to be believed, and all justifiable inferences are to be drawn in [that party’s]
23 favor.” Anderson, 477 U.S. at 254. An inference is justifiable if it is rational or reasonable.
24 Narayan v. EGL, Inc., 616 F.3d 895, 899 (9th Cir. 2010).

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26 ⁶ American Family’s citation to a 30 page exhibit for a single sentence falls short of
27 its obligation to cite “particular parts of materials in the record.” Fed. R. Civ. P. 56(c); accord
28 LRCiv 56.1(a) (emphasis added) (“Each material fact . . . must refer to a *specific* admissible
portion of the record where the fact finds support.”).

1 ANALYSIS

2 American Family claims it is entitled to judgment as a matter of law on the Trudels’
3 claims for breach of contract and insurance bad faith and on the issue of punitive damages.

4 **I. Breach of Contract**

5 A prima facie breach of contract claim requires the plaintiff to make three showings:
6 (1) the existence of a contract; (2) breach; and (3) resultant damages. Thomas v. Montelucia
7 Villas, LLC, 232 Ariz. 92, 96, 302 P.3d 617, 621 (2013). It is undisputed that a contract
8 exists between the Trudels and American Family. It is also undisputed that American Family
9 owes the Trudels money pursuant to that contract. Thus, the dispositive issue for the Trudels’
10 breach of contract claim is the element of breach. American Family attacks breach on two
11 fronts: the non-occurrence of conditions precedent and the exclusion for replacing
12 undamaged property.

13 *Conditions Precedent*⁷

14 Typically, breach is “a failure, without legal excuse, to perform any promise which
15 forms the whole or part of a contract.” Snow v. W. Sav. & Loan Ass’n, 152 Ariz. 27, 32, 730
16 P.2d 204, 210 (1986) (quoting 11 Williston on Contracts § 1290, at 2 (3d ed. 1968)). Breach
17 for failure to perform cannot occur until performance is due, Restatement (Second) of
18 Contracts § 235(2) & cmt. b (1981), and performance “subject to a condition cannot become
19 due unless the condition occurs,” id. § 225(1). See Yeazell v. Copins, 98 Ariz. 109, 114, 402
20 P.2d 541, 544 (1965). “A condition is an event, not certain to occur, which must occur,
21 unless its non-occurrence is excused, before performance under a contract becomes due.”
22 AROK Constr. Co. v. Indian Constr. Servs., 174 Ariz. 291, 296 n.4, 848 P.2d 870, 875 n.4
23 (App. 1993) (quoting Restatement (Second) of Contracts § 224).

24 “Whether the parties have, by their agreement, made an event a condition is
25 determined by the process of interpretation.” Restatement (Second) of Contracts § 226 cmt.

26 _____
27 ⁷ Since neither party briefs any law regarding breach, the Court decides the issue
28 based on its own determination of controlling law. See McKown v. Simon Prop. Grp. Inc.,
689 F.3d 1086, 1091 (9th Cir. 2012).

1 a. “ ‘The primary and ultimate purpose of interpretation’ is to discover [the parties’] intent
2 and to make it effective.” Taylor v. State Farm Mut. Auto. Ins. Co., 175 Ariz. 148, 152, 854
3 P.2d 1134, 1138 (1993) (quoting 3 Corbin on Contracts § 572B, at 421 (1992 Supp.)). “In
4 ascertaining the parties’ intent, the court will look to the plain meaning of the words as
5 viewed in the context of the contract as a whole.” United Cal. Bank v. Prudential Ins. Co. of
6 Am., 140 Ariz. 238, 259, 681 P.2d 390, 411 (App. 1983). “In view of the general
7 understanding that only the insurer undertakes duties” in an insurance policy, “a term
8 requiring an act to be done by the insured” will ordinarily “be interpreted as making that
9 event a condition of the insurer’s duty rather than as imposing a duty on the insured.”
10 Restatement (Second) Contracts § 227 cmt. d.

11 American Family argues that it could not have breached the Policy because the
12 conditions to its duty to pay had not occurred. (Doc. 57 at 7.) According to American Family,
13 the conditions precedent are the “Loss Payment” and/or the “Procedures to Claim
14 Replacement Coverage” provisions (respectively the “settlement” and “supplemental
15 payment” provisions/conditions). Since the Trudels did not satisfy the settlement and
16 supplemental payment conditions, American Family concludes that the Trudels “cannot bring
17 a breach of contract claim on the basis that an actual cash value (ACV) payment was too low
18 when they never invoked the policy provisions designed to address inadequate ACV
19 payments.” (Doc. 75 at 3.)

20 However, Arizona courts disfavor “construing conditional provisions in a contract”
21 as conditions precedent, Angle v. Marco Builders, Inc., 128 Ariz. 396, 399, 626 P.2d 126,
22 129 (1981), and will not do so “unless such construction is plainly and unambiguously
23 required by the language of the contract,” Realty Assocs. of Sedona v. Valley Nat’l Bank of
24 Ariz., 153 Ariz. 514, 519, 738 P.2d 1121, 1127 (App. 1986) (quoting Watson Constr. Co. v.
25 Reppel Steel & Supply, 123 Ariz. 138, 140, 598 P.2d 116, 118 (App. 1979)). American
26 Family contends the settlement provision “clearly and unambiguously states that there is no
27 obligation to pay unless there is an agreement, entry of a final judgment, or filing of an
28 appraisal award.” (Doc. 75 at 4.) The Court has some doubt about whether the phrases used

1 by the settlement provision unmistakably communicate that American Family has no duty
2 to pay unless and until there is agreement, final judgment, or an appraisal/arbitration award.
3 The Court has even more doubt about whether the parties intended for the Trudels to incur,
4 at minimum, \$30,000 in repair costs before being eligible for supplemental payment.

5 Even if the provisions are conditions, American Family “is not relieved of its
6 contractual liability because of” the non-occurrence of conditions precedent “unless it can
7 show that it has been prejudiced thereby.” Lindus v. N. Ins. Co. of N.Y., 103 Ariz. 160, 164,
8 438 P.2d 311, 315 (1968) (ruling in context of notice condition precedent); see Zuckerman
9 v. Transamerica Ins. Co., 133 Ariz. 139, 143-46, 650 P.2d 441, 445-48 (1982) (extending
10 Lindus to “condition[s] limiting the time for instituting legal action”); Globe Indem. Co. v.
11 Blomfield, 115 Ariz. 5, 7, 562 P.2d 1372, 1374 (1977) (“An insurer cannot withdraw
12 coverage on the ground that a condition such as notice has not been met unless the insurer
13 can show that it was prejudiced by the act of the insured.”); see also Zuckerman, 133 Ariz.
14 at 143 n.6, 650 P.2d at 445 n.6 (noting insured’s failure to comply with “cooperation clause”
15 does “not result in the forfeiture of rights arising thereunder unless the insurer establishes
16 prejudice”). The burden of proving prejudice falls on American Family, but it has not alleged
17 any facts to suggest that the non-occurrence of the appraisal condition resulted in prejudice.
18 In fact, American Family could have demanded appraisal itself but declined to do so.

19 As an aside, the Trudels complaint alleged “American Family waived its contractual
20 rights under the Policy” (Doc. 1-1 at 7), but that the argument is not raised in their responsive
21 memorandum. The Court pauses to note only that the Trudels’ assertion that they did not
22 agree because they, as lay persons, were incapable of assessing the measure of damage to
23 their home (Doc. 66 ¶ 11) is enough to allow a reasonable jury to find that the parties did not
24 “concur in opinion” about the measure of loss. Black’s Law Dictionary 81 (10th ed. 2014)
25 (defining “agree”). There is thus reason to believe that American Family’s partial
26 performance—despite the non-occurrence of any of the three putative settlement
27 conditions—was “inconsistent with an intent to assert [its] right[s]” under the Policy, Am.
28 Cont’l Life Ins. Co. v. Ranier Constr. Co., Inc., 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980).

1 Next, Arizona courts treat American Family’s argument—that non-occurrence of
2 conditions precedent precludes an action for breach—as an affirmative defense. See Porter
3 v. Empire Fire & Marine Ins. Co., 106 Ariz. 274, 280, 475 P.2d 258, 264 (1970)
4 (characterizing as an affirmative defense insurer’s argument that insured’s recovery was
5 precluded by non-occurrence of condition); Supreme Lodge of Fraternal Bhd. v. Grijalva,
6 28 Ariz. 77, 79, 235 P. 397, 398 (1925) (same). But the only affirmative defense American
7 Family raised in its Answer was failure to state a claim. (Doc. 1-2 at 16.) As a result,
8 American Family waived the argument that it now makes. See Fed. R. Civ. P. 8(c). However,
9 the Court may allow a party to argue an improperly raised affirmative defense in the absence
10 of prejudice to the opposing party. Simmons v. Navajo County, 609 F.3d 1011, 1023 (9th
11 Cir. 2010). The parties did not brief whether American Family waived the argument that it
12 now relies upon and the Trudels do not argue that the argument is prejudicial. In fact, the
13 Trudels response to the argument is meager: they argue only that acceptance of “American
14 Family’s argument would be to accept the idea that no insured could ever bring a lawsuit for
15 breach of contract against their insurance company when that company fails to pay benefits
16 due under an insurance contract.” (Doc. 71 at 8.) As American Family correctly points out,
17 the Trudels “ignore[] the agreement and filing of appraisal” provisions. (Doc. 75 at 4.) The
18 Trudels’ response also completely ignores the supplemental payment provision. For purposes
19 of deciding summary judgment, the Court assumes that the Trudels are not prejudiced by the
20 untimely conditions precedent argument. See Healy Tibbitts Constr. Co. v. Ins. Co. of N.
21 Am., 679 F.2d 803, 804 (9th Cir. 1982) (per curiam); cf. Fed. R. Civ. P. 15(a)(2).

22 Even if the settlement and supplemental payment provisions are conditions—the non-
23 occurrence of which prejudiced American Family—and assuming both that American Family
24 had not waived its rights under the contract and that it was permitted to raise its non-
25 occurrence of conditions argument, there is yet another obstacle to summary judgment. The
26 Trudels’ complaint alleged American Family committed anticipatory repudiation by
27 unconditionally denying part of their claim, thereby relieving the Trudels of “any
28 corresponding obligations.” (Doc. 1-1 at 7.) Anticipatory repudiation is “a species of contract

1 breach in which the offending party states ‘that [it] will not render the promised performance
2 when the time fixed for it in the contract arrives.’ ” United Cal. Bank, 140 Ariz. at 279-80,
3 681 P.2d at 431-32 (quoting Diamos v. Hirsch, 91 Ariz. 304, 307, 372 P.2d 76, 78 (1962)).
4 The non-breaching party bears the burden of proving anticipatory repudiation, which requires
5 proof that the repudiating party positively and unequivocally manifested that it would not
6 render promised performance when it was due. Diamos, 91 Ariz. at 307-08, 372 P.2d at 79;
7 United Cal. Bank, 140 Ariz. at 277, 681 P.2d at 429. If that burden is carried, then the non-
8 breaching party not only has a claim for damages,⁸ but is also excused from tendering
9 performance to the breaching party. Thomas, 232 Ariz. at 95, 302 P.3d at 620. Likewise, if
10 a party’s “repudiation contributes materially to the non-occurrence of a condition of one of
11 [its] duties, the non-occurrence is excused.” Restatement (Second) of Contracts § 255.

12 Although there is no briefing about anticipatory repudiation, the Trudels assert facts
13 consistent with the doctrine. Specifically, the Trudels allege that American Family committed
14 breach by refusing to include in the ACV payments the costs of (1) general contractor
15 overhead and profit (“GCOP”); and (2) replacing undamaged material. (Doc. 71 at 8-11.) As
16 to the replacement of undamaged material, it is undisputed that the Trudels were unaware of
17 the exclusion until after they filed this action. (Doc. 72 ¶¶ 63-64.) It is therefore
18 chronologically impossible for American Family’s refusal to pay for matching undamaged
19 property to have been the impetus for the Trudels’ suit and could not have materially
20 contributed to the non-occurrence of either of the putative conditions. As explained below,
21 such refusal may, however, amount to non-performance of a contractual duty.

22 As to GCOP, American Family argues that its refusal to include GCOP payments was
23 based on a reasonable interpretation of the Policy. However, “anticipatory repudiation may
24 be based upon an erroneous contract interpretation just as it may be based upon a refusal to

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26 ⁸ Recovery of those damages, however, requires the non-breaching party to also “show
27 ‘that [it] would have been ready and willing to have performed the contract, if the repudiation
28 had not occurred.’ ” Thomas, 232 Ariz. at 95, 302 P.3d at 620 (quoting United Cal. Bank,
140 Ariz. at 288-89, 681 P.2d at 440-41).

1 perform for any other reason.” United Cal. Bank, 140 Ariz. at 278, 681 P.2d at 430.
2 Therefore, if American Family unequivocally refused to include GCOP in ACV payments
3 based on an erroneous interpretation of the Policy, American Family committed anticipatory
4 breach. See id. The Policy itself is silent on the matter.

5 “In attempting to discern the meaning of the policy, [Arizona courts] also look to the
6 purpose of the transaction and public policy considerations.” Tritschler v. Allstate Insurance
7 Co., 213 Ariz. 505, 515, 144 P.3d 519, 529 (App. 2006). Noting that “in buying insurance
8 an insured . . . seeks protection and security from economic catastrophe,” id. (alteration
9 omitted) (quoting Rawlings v. Apodaca, 151 Ariz. 149, 154, 726 P.2d 565, 570 (1986)), the
10 court in Tritschler found “the purpose of the transaction was to fully reimburse [the insured]
11 for covered losses, to the extent of the coverage provided by the policy,” id. Since
12 “[r]equiring payment of overhead and profit likely to be incurred if the damage is repaired
13 furthers that purpose,” Tritschler concluded GCOP should have been included in ACV. Id.

14 American Family emphasizes that the policy in Tritschler defined ACV while the
15 Trudels’ Policy does not. At most, this establishes that the Policy is silent about whether
16 GCOP should be included in ACV payments. However, the holding in Tritschler considered
17 not only the definition of ACV, but also the purpose of the transaction and public policies.
18 Id. Considering that the Policy is silent about the inclusion or exclusion of GCOP from ACV
19 payments, that the purpose of the transaction was to provide the Trudels with “protection and
20 security from economic catastrophe,” Rawlings, 151 Ariz. at 154, 726 P.2d at 570, and
21 Arizona’s long held public policy “that, in buying insurance, consumers are entitled to get
22 what they pay for,” State Farm Mut. Auto. Ins. Co. v. Wilson, 162 Ariz. 251, 256, 782 P.2d
23 727, 732 (1989), the Court finds that if “the cost to repair or replace the damaged property
24 would likely require the services of a general contractor, the contractor’s overhead and profit
25 fees should be included in determining actual cash value.” Tritschler, 213 Ariz. at 515, 144
26 P.3d at 529. Consequently, if the services of a general contractor would be required to make
27 the necessary repairs on the Trudels’ home and American Family unequivocally refused to
28 pay GCOP, it repudiated a contractual duty. If such a repudiation materially contributed to

1 the non-occurrence of a provision upon which American Family’s duty was conditioned, then
2 the non-occurrence of that condition is excused.

3 Finally, American Family’s position in this case relies on a similar case from this
4 District that dealt with analogous settlement and supplemental payment provisions, which
5 is unsurprising as American Family was the insurer in that case as well. Bond v. Am. Family
6 Mut. Ins., No. CV-06-1249-PHX-DGC, 2008 WL 477873 (D. Ariz. Feb. 19, 2008) (cited
7 with approval by Echanove v. Allstate Ins. Co., 752 F. Supp. 2d 1105, 1108-09 (D. Ariz.
8 2010)). However, the insureds in Bond, unlike the Trudels, did not allege that American
9 Family waived any of its contractual rights, see Complaint, Bond, ECF No. 1-1, at 2-6, and
10 American Family raised the affirmative defense of breach in Bond, Answer, Bond, ECF No.
11 2, but not in this case. Moreover, while the insureds in Bond and the Trudels both failed to
12 avail themselves of the settlement and supplemental payment provisions, see 2008 WL
13 477873, at *3, the factual similarity ends there. Unlike the insureds in Bond who completed
14 their home repairs after receiving ACV payments, the Trudels’ repairs are not only
15 unfinished, but have yet to begin. The principal reason for the delay is that, unlike the
16 insureds in Bond whose repair costs did not exceed the amount of ACV payments, id. at *2,
17 it is undisputed that the actual cost of repairing the Trudels’ home exceeds the amount of
18 ACV payments they received (Doc. 57 at 1.) The court in Bond was concerned that the
19 insureds were “gam[ing] the system by accepting an [ACV] payment, repairing the property
20 for less than the payment, and then seeking to recover more money by challenging the
21 reasonableness of the [ACV] payment,” Bond, 2008 WL 477873, at *3, but that concern is
22 absent here, especially considering the difference between ACV payments and the range of
23 estimated repair costs. Hence, Bond is readily distinguished from the present case.

24 Notably, the court in Bond, although construing a policy that defined ACV, also
25 denied American Family summary judgment on breach as to GCOP reasoning that the
26 “[d]efendant should have included [GCOP] in its [ACV] payments” because the policy did
27 “not exclude contractor overhead and profit from the universe of expenses that may
28 constitute part of [ACV]” and the plaintiffs would likely “be required to pay for a general

1 contractor's services." 2008 WL 477873, at *4. Likewise, the Trudels' Policy does not
2 exclude GCOP from the universe of ACV. In this regard, Bond suggests American Family's
3 failure to include such costs was a failure to perform a contractual promise, provided that the
4 services of a general contractor were required to repair the Trudels' home.

5 *Exclusion for Replacing Undamaged Property*

6 American Family argues that its refusal to pay for replacing undamaged property
7 cannot constitute breach given the exclusion therefor in Endorsement 584(C). The Trudels
8 respond that the exclusion is unenforceable because they never received it and, alternatively,
9 that it violates their reasonable expectations. As to the former argument, American Family
10 does not dispute that the Trudels were not aware of Endorsement 584(C) until after the
11 instant action had been filed. Insurance policies, like other contracts, cannot be unilaterally
12 modified by one party; rather, modification requires the trinity of offer, acceptance, and
13 consideration. Demasse v. ITT Corp., 194 Ariz. 500, 506, 984 P.2d 1138, 1144 (1999) (ruling
14 in context of implied-in-fact term in employment contract). An offer cannot be accepted
15 unless the offeree knows that the offer exists. As there is evidence from which a jury could
16 reasonably conclude that the Trudels did not know Endorsement 584(C) existed (Doc. 72 ¶¶
17 63-64), the applicability of Endorsement 584(C) presents a question for the jury.

18 Contrary to American Family's belief, the rule of reasonable expectations is not a
19 different theory of relief, but is an interpretive doctrine in which "a contract term is not
20 enforced if one party has reason to believe that the other would not have assented to the
21 contract if it had known of that term." Action Acquisitions, LLC, 218 Ariz. at 400, 187 P.3d
22 at 1113. "One of the basic principles which underlies [the doctrine] is simply that the
23 language in the portion of the instrument that the customer is not ordinarily expected to read
24 or understand ought not to be allowed to contradict the bargain made by the parties." Averett
25 v. Farmers Ins. Co., 177 Ariz. 531, 533, 869 P.2d 505, 507 (1994). As the Trudels would bear
26 the burden of proving that the doctrine applied at trial, State Farm Fire & Cas. In. Co. v.
27 Grabowski, 214 Ariz. 188, 190, 150 P.3d 275, 277 (App. 2007), American Family bears the
28 burden of proving at summary judgment the absence of evidence supporting the doctrine.

1 American Family’s summary judgment motion fails to establish the absence of a
2 genuine dispute regarding whether the Trudels would have purchased the Policy if they had
3 known of the exclusion for replacing undamaged property, nor does American Family
4 foreclose on the possibility that it had reason to believe the Trudels would have assented to
5 the exclusion if they had known of its presence. Therefore, even assuming the Trudels
6 received and assented to Endorsement 584(C), it is for the jury to decide whether the
7 exclusion for matching property falls within one of the four limited categories of
8 circumstances in which Arizona courts will not enforce unambiguous insurance terms. See
9 Philadelphia Indem. Ins. Co. v. Barerra, 200 Ariz. 9, 13-17, 21 P.3d 395, 399-403 (2001).

10 *Summary*

11 Even if the settlement and/or supplemental payment provisions are conditions,
12 American Family failed to show it was prejudiced by the non-occurrence thereof. Moreover,
13 even if non-occurrence was prejudicial, American Family and cannot show the absence of
14 evidence from which a jury could reasonably conclude that it was breached the Policy.
15 Therefore, American Family is not entitled to summary judgment on breach.

16 **II. Bad Faith and Punitive Damages**

17 *Bad Faith*

18 “[A]n insurance company’s duty of good faith [means] an insurer must deal *fairly* with
19 an insured, giving equal consideration *in all matters* to the insured’s interests.” Rawlings,
20 151 Ariz. at 157, 726 P.2d at 573 (quoting Tank v. State Farm Fire & Cas. Co., 715 P.2d
21 1133, 1136 (Wash. 1986)). “An insurer acts in bad faith when it unreasonably investigates,
22 evaluates, or processes a claim (an ‘objective’ test), and either knows it is acting
23 unreasonably or acts with such reckless disregard that such knowledge may be imputed to
24 it (a ‘subjective’ test).” Nardelli v. Metro. Grp. Prop. & Cas. Ins. Co., 230 Ariz. 592, 597-98,
25 277 P.3d 789, 794-95 (App. 2012); accord Miel v. State Farm Mut. Auto. Ins. Co., 185 Ariz.
26 104, 110, 912 P.2d 1333, 1339 (App. 1995). “Negligent conduct which results solely from
27 honest mistake, oversight, or carelessness does not necessarily create bad faith liability even
28 though it may be objectively unreasonable.” Trus Joist Corp. v. Safeco Ins. Co. of Am., 153

1 Ariz. 95, 104, 735 P.2d 125, 134 (App. 1986). Thus, an insurer can defend against the second
2 prong of bad faith on the basis it was not “conscious” that its conduct was unreasonable
3 because the insured’s claim was “fairly debatable.” Id. The issue should go to the jury where
4 there is “sufficient evidence . . . from which a jury could find that [the insurer] acted
5 unreasonably and knew it.” Zilisch v. State Farm Mut. Auto. Ins. Co., 196 Ariz. 234, 238,
6 995 P.2d 276, 280 (2000). “Where coverage is not contested but the amount of the loss is
7 disputed, the insurer is under a duty to pay any undisputed portion of the claim promptly.
8 Failure to do so amounts to bad faith.” Voland v. Farmers Ins. Co. of Ariz., 189 Ariz. 448,
9 452, 943 P.2d 808, 812 (App. 1997) (quoting Borland v. Safeco Ins. Co. of Am., 147 Ariz.
10 195, 200, 709 P.2d 552, 557 (App. 1985)); accord Filasky v. Preferred Risk Mut. Ins. Co.,
11 152 Ariz. 591, 597, 734 P.2d 76, 82 (App. 1987).

12 American Family argues not that its conduct was objectively reasonable under the first
13 prong, but that the amount it owes the Trudels was “fairly debatable” under the second prong
14 because the repair estimates varied so widely. (Doc. 66 ¶ 26.) “[W]hile fair debatability is
15 a necessary condition to avoid a claim of bad faith, it is not always a sufficient condition,”
16 Zilisch, 196 Ariz. at 238, 995 P.2d at 280, and the insurer’s “belief in fair debatability ‘is a
17 question of fact to be determined by the jury,’ ” id. at 237, 995 P.2d at 279 (quoting Sparks
18 v. Republic Nat’l Life Ins. Co., 132 Ariz. 529, 539, 647 P.2d 1127, 1137 (1982)). Thus, even
19 assuming that American Family had proven the Trudels’ claim was “fairly debatable,”
20 summary judgment on bad faith is inappropriate because American Family failed to prove
21 the absence of genuine dispute as to its belief in fair debatability.

22 While Voland declined to extend Borland, which considered stolen property, and
23 Filasky, which considered lost wages, to claims that are “unique and generally not divisible
24 or susceptible to relatively precise evaluation or calculation,” Voland, 189 Ariz. at 452, 943
25 P.2d at 812, the damage to the Trudels’ home was “susceptible to relatively precise
26 evaluation or calculation.” Indeed, the nature of the appraisal condition evidences the
27 susceptibility of property damage to meaningful measurement. American Family claims to
28 have paid the Trudels the undisputed amounts by its own estimates and asserts that the

1 Trudels failed to present evidence that the cost of repairs exceeded ACV payments, but
2 American Family does not claim that it has paid the Trudels everything to which they are
3 entitled under the Policy. Rather, American Family acknowledges that even if the Court
4 granted its summary judgment motion, “[t]he amount American Family owes to plaintiffs on
5 the claim would remain at issue.” (Doc. 57 at 1.) This acknowledgment is by itself enough
6 to permit the inference that American Family consciously—as opposed to negligently—
7 disregarded the absence of a reasonable basis for its conduct. Cf. Trus Joist Corp., 153 Ariz.
8 at 102, 735 P.2d at 132 (finding reasonableness of withholding benefits in a contested
9 coverage personal injury action presented question for the jury); Filasky, 152 Ariz. at 597,
10 734 P.2d at 82; Borland, 147 Ariz. at 200, 709 P.2d at 557.

11 The Trudels designate additional evidence from which a jury could reasonably
12 conclude that American Family did not believe the Trudels’ claim was fairly debatable. For
13 example, that American Family knew the investigation performed by Pacesetters was
14 inadequate because the training American Family provides to vendor adjustors like those
15 from Pacesetters does not teach recognition of hail damage nor does it focus on tile roofs
16 (Doc. 72 ¶¶ 15-16); that American Family inexplicably waited more than a year to make the
17 second undisputed ACV payment (id. ¶¶ 39-40); that American Family knew the ACV
18 payments were inadequate because it excluded GCOP even though refusal to pay GCOP
19 violated American Family’s best practices, which is tantamount to breaching the Policy (id.
20 ¶¶ 48-51); and that American Family acknowledged “matching considerations” before
21 reversing its position and relying on the exclusion for denying payment for matching
22 undamaged property (id. ¶ 30).

23 The Court finds there is sufficient evidence from which a jury could reasonably find
24 that American Family acted unreasonably and knew it.

25 *Punitive Damages*

26 Recovery of punitive damages requires clear and convincing evidence that the insurer
27 engaged in “aggravated and outrageous conduct” with an “evil mind.” Linthicum v.
28 Nationwide Life Ins. Co., 150 Ariz. 326, 332, 723 P.2d 675, 681 (1986); see State v. King,

1 158 Ariz. 419, 422 763 P.2d 239, 242 (1988) (approving of “highly probable” as the clear
2 and convincing burden of proof). An “evil mind” can be established by evidence from which
3 a jury can reasonably infer that the insurer intended to injure plaintiff, or that the insurer
4 deliberately “pursued a course of conduct knowing that it created a substantial risk of
5 significant” injury to plaintiff. Rawlings, 151 Ariz. at 162, 726 P.2d at 578. Whether conduct
6 involves an element of outrage is a flexible fact-specific inquiry, but some generally
7 intolerable categories of conduct include fraud, “ ‘deliberate, overt and dishonest dealings,’
8 ‘oppressive conduct’ and ‘insult and personal abuse.’ ” Id. at 163, 726 P.2d at 579 (quoting
9 Farr v. Transamerica Occidental Life Ins. Co., 145 Ariz. 1, 8-9, 699 P.2d 376, 383-84 (App.
10 1984)). Summary judgment on punitive damages must be denied if “there is a reasonable
11 view of the evidence that will support punitive damages.” Thompson v. Better-Bilt
12 Aluminum Prods. Co., Inc., 171 Ariz. 550, 558, 832 P.2d 203, 211 (1992) (quoting Borland,
13 147 Ariz. at 200, 709 P.2d at 557).

14 American Family asserts that “no reasonable jury could find American Family’s
15 conduct was aggravated, outrageous, malicious, or fraudulent” because its investigation,
16 evaluation, and coverage decisions were not groundless. (Doc. 57 at 13.) The Trudels
17 respond that the laundry list of conduct that precludes summary judgment on bad faith
18 permits the inference that American Family’s conduct “evinced a conscious disregard of a
19 substantial risk of harm[ing]” the Trudels. (Doc. 71 at 16.) The Trudels also designate
20 evidence in the record that American Family engages in oppressive conduct such as “putting
21 pressure on the customer with . . . penalties for not accepting the offer” (Doc. 72-11 at 2); for
22 example, threatening an insured whose vehicle had been towed and was being stored with
23 having to pay storage fees if he or she did not accept a settlement offer (Doc. 72-12 at 2).
24 Other evidence explains “the power of the checkbook” leverages the insured’s knowledge
25 that the adjuster “control[s] the amount of money that he or she will receive and when he or
26 she gets it,” and emphasizes such power “is a very strong bargaining tool.” (Doc. 72-13 at
27 2.) The documents purport on their face to be from American Family’s “Education Division”
28 and were recognized as such by American Family’s corporate deponents. (Docs. 72-3 at 13;

1 72-4 at 16-17; 72-11 at 2; 72-12 at 2; 72-13 at 2.)

2 While American Family disputes this evidence as irrelevant because an “American
3 Family employee testified in a deposition that [this] document[] [is] not used to train vendor
4 adjustors like the two who handled plaintiffs’ claim” (Doc. 76 at 5), the deponent testified
5 that the training program “is designed to familiarize adjusters with the American Family way
6 of doing business,” (Doc. 72-3 at 12). American Family also argues that the documents are
7 irrelevant because there is no evidence that the “pressure close” or “power of the checkbook”
8 tactics were used on the Trudels. However, given the length of delay in supplemental
9 payment and the difference in ACV payments from the minimum estimate of repair cost, the
10 documents have some tendency to affect the likelihood that American Family disregarded
11 an unjustifiable risk of significant injury to the Trudels. The documents are therefore
12 relevant. See Fed. R. Evid. 401. The degree to which the documents represent American
13 Family’s “way of doing business” goes to their weight, not their admissibility. Since the
14 documents would be admissible at trial, the Court may consider them. See Fed. R. Civ. P.
15 56(c)(2); Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 987 (9th Cir. 2006).

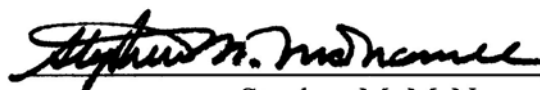
16 In light of the foregoing, the Court finds that the question of punitive damages is not
17 susceptible of summary judgment because the evidence is such that a jury could reasonably
18 find it “highly probable” that American Family “was ‘aware of and consciously disregard[ed]
19 a substantial and unjustifiable risk that’ significant harm would” befall the Trudels.
20 Rawlings, 151 Ariz. at 162, 726 P.2d at 578 (quoting Ariz. Rev. Stat. § 13-105(5)(c)).

21 Accordingly,

22 **IT IS HEREBY ORDERED denying** Defendant’s Motion for Partial Summary
23 Judgement. (Doc. 57.)

24 **IT IS FURTHER ORDERED** that the Final Pretrial Conference will be set in a
25 subsequent order.

26 DATED this 15th day of August, 2014.

27
28 

Stephen M. McNamee
Senior United States District Judge