

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHAD EMPEY,)	Case No. 11-00733 SC
)	
Plaintiff,)	ORDER GRANTING IN PART AND
)	DENYING IN PART DEFENDANT'S
v.)	<u>MOTION FOR SUMMARY JUDGMENT</u>
)	
ALLIED PROPERTY & CAUSALTY)	
INSURANCE COMPANY, and DOES 1 to)	
50, inclusive,)	
)	
Defendants.)	
)	

I. INTRODUCTION

Now before the Court is Defendant Allied Property and Casualty Insurance Company's ("Allied") motion for partial summary judgment regarding Plaintiff Chad Empey's ("Empey") second cause of action for breach of the implied covenant of good faith and fair dealing as well as Plaintiff's claim for punitive damages. ECF No. 19 ("MSJ"). This motion is fully briefed. ECF Nos. 65 ("Opp'n"), 112 ("Reply"). For the reasons set forth below, the motion is GRANTED in part and DENIED in part.

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1 **II. BACKGROUND**¹

2 **A. Empey's Policy Limits and Property Damage**

3 This case arises out of an insurance claim for property damage
4 that Empey filed with Allied. Empey is an experienced contractor,
5 homebuilder, and glass artist, and owns a specialty glass shop.
6 Kimura Decl.² Ex. 1 ("Empey Dep.") at 27-28, 30. He also owns a
7 home located at 12 Sundance Court in Petaluma, California, that was
8 insured by Allied. Id. at 33; Gonzalez Decl. Ex. 1 ("Policy").
9 The limits on the Policy were as follows: \$648,700 for dwelling
10 repairs; \$480,038 for contents; and 12 months for "Additional
11 Living Expenses" ("ALE"). Policy at 3345; Gonzalez Decl. ¶ 4.

12 On February 26, 2009, one of Empey's employees discovered that
13 Empey's home had been broken into and extensively vandalized while
14 Empey was out of town. Empey Decl.³ ¶¶ 2-3. Unidentified

15
16 ¹ Each party filed various objections to the other's evidence. ECF
17 Nos. 70, 113, 114. Allied alone submitted over 40 pages of
18 objections pertaining to a substantial portion of Empey's evidence,
19 including evidence which has little relevance to the arguments
20 before the Court. This practice constitutes a violation of the
page limits set forth in Civil Local Rule 7-2. The Court declines
to rule on these objections -- with a few exceptions -- because it
does not rely on the purportedly objectionable evidence in reaching
its decision.

21 ² Declarations in support of the Motion were submitted by Rebecca
22 K. Kimura ("Kimura"), Allied's attorney; David Bergamini
23 ("Bergamini"), a General Manager at Mark Scott Construction, Inc.;
Sandra Lankford ("Lankford"), a field claim specialist assigned to
Empey's claim; and Tony Gonzalez ("Gonzalez"), a field consultant
24 assigned to Empey's claim. ECF Nos. 20 ("Kimura Decl."), 21
25 ("Bergamini Decl."), 22 ("Lankford Decl."), 23 ("Gonzalez Decl."),
40 ("Kimura Supp. Decl."), 115 ("Kimura Supp. Decl."). At the
26 request of the Court, Allied filed an index clarifying and
correcting its citations to these declarations and their attached
exhibits. ECF No. 108 ("Defs.' Citation Index").

27 ³ Declarations in opposition to the Motion were submitted by Empey;
28 Donald T. McMillan ("McMillan"), Empey's attorney; and Paul
Hamilton ("Hamilton"), author of Empey's insurance claims handling
expert's report. ECF Nos. 66 ("McMillan Decl."), 67 ("Empey
Decl."), 68 ("Hamilton Decl.").

1 person(s) stole numerous items of personal property, flooded the
2 house by opening faucets and breaking a sink, smashed and destroyed
3 expensive custom specialty glass surfaces installed throughout the
4 house, poured cement into the toilet, and used hammers to damage
5 every cabinet, wall, door, counter, and fixture. Empey Decl. ¶ 3.

6 Empey notified Allied of the incident on the same day the
7 damage was discovered. Empey Decl. ¶ 4. On March 2, 2009,
8 Gonzalez, the primary adjuster on the claim, contacted Empey to
9 discuss his coverage.

10 **B. Repair Estimates for the Property Damage**

11 Soon after Empey filed his dwelling claim (i.e., his claim for
12 property repairs), disputes arose concerning the cost to repair the
13 property. Allied presented Empey with a preliminary repair
14 estimate of \$32,000 on March 10, 2009 and a revised preliminary
15 estimate of \$34,000 on May 8, 2009. Gonzalez Decl. Ex. 7; Empey
16 Decl. Ex. 3. Empey complains that both estimates were based on
17 work performed by Mark Scott Construction, Inc. ("MSC"), which gets
18 95 percent of its work from insurance companies and is one of
19 Allied's preferred vendors. Opp'n at 2. Empey also contends that
20 the estimates excluded a number of items, including marble
21 countertops, wood cabinets, replacement of matching tile throughout
22 his home, and carpeting, among other things. Id. ¶ 7. Based on
23 the May 2009 estimate, Allied made an advance payment to Empey of
24 \$30,964.38. Gonzalez Decl. ¶ 21.

25 Neither the March nor the May estimate included the cost to
26 replace Empey's specialty glass. See Gonzalez Decl. ¶¶ 18, 20.
27 Gonzalez repeatedly contacted Empey about the pricing information
28 for the glass between April and December 2009, but Empey did not

1 provide the requested information until January 2010. See id. ¶¶
2 18, 20-30. Empey declares that he started the process of finding a
3 glass contractor in the spring of 2009 but was delayed because
4 there are only a limited number of companies in the Bay Area
5 capable of doing the type of work needed. Empey Decl. ¶¶ 10, 12,
6 14. Empey ultimately decided to create his own quote with the
7 assistance of his father's company, Emp's Graphic Eye ("Emp's"),
8 and received "final information" from Emp's in late summer 2009.
9 Id. ¶¶ 4, 10, 14. Empey's subcontract bid for the specialty glass
10 totaled \$172,339. Id. ¶ 15.

11 On January 6, 2010, Empey sent Allied an estimate for dwelling
12 repairs put together by his own general contractor, Ireland,
13 Robinson & Hadley ("IRH"). Gonzalez Decl. ¶ 30. The IRH estimate
14 totaled \$559,995.40, and included Empey's \$172,339 subcontract bid
15 for glass work. Gonzalez Decl. Ex. 23 ("IRH Estimate").⁴

16 On March 24, 2010, Empey, Gonzalez, McMillan (Empey's
17 attorney), and representatives from MSC and IRH met for about an
18 hour at Empey's home to discuss the differences between the MSC and
19 IRH estimates. Id. ¶ 35; Empey Decl. ¶ 18. The parties' accounts
20 of the meeting are different but not inconsistent. Gonzalez claims
21 that he agreed to add some items to Allied's scope of repair and
22 verified that all damages had been addressed. Gonzalez Decl. ¶ 35.
23 Empey claims that Gonzalez promised to get him a revised estimate
24 from MSC within 7 to 10 days. McMillan Decl. Ex. 2.

25 The revised MSC estimate was not sent to Empey until August
26 31, 2010, over five months after the March 24, 2010 meeting. Empey

27 _____
28 ⁴ Empey claims that he informed Gonzalez in October 2009 that the
IRH quote would be in the \$559,000 range. Empey Decl. ¶ 16
Gonzalez allegedly responded: "We have a problem." Id.

1 Decl. ¶¶ 19-20. MSC's final written estimate for dwelling repairs
2 was \$297,859.63. Empey Decl. Ex. 7 ("MSC Estimate"). The estimate
3 contained a bid for specialty glass at a cost of \$165,141, and
4 excluded items left open such as the central vacuum system, solar
5 system, HVAC unit, alarm system. Id. In an October 15, 2010
6 letter to Gonzalez, McMillan pointed out that there was a
7 difference of \$154,485 between the MSC and IRH estimates.⁵
8 McMillan Ex. 6 (Oct. 15, 2010 McMillan Ltr.) at 2.

9 The largest divergence in the repair estimates was for "tile"
10 replacement; MSC's bid was \$1,123 and IRH's was \$40,328. Id.
11 Empey claims that Allied only intended to replace the tile in the
12 front entry hall of the house (where tile had been damaged by
13 vandals), as opposed to replacing all of the tile in Empey's home.
14 Id. Empey insisted that the tile in every room in his house should
15 be exactly the same, just as it had been prior to the vandalism.
16 Id. Allied takes issue with this characterization of the MSC bid.
17 See Reply at 9.

18 Empey also claims that the MSC estimate omitted repairs
19 necessary to return the sheetrock walls to their original "laser
20 finish." Opp'n at 16. Empey insisted that this would require
21 installation of 5/8 inch sheet rock and the application of three
22 coats of "mud." Id. Empey claims MSC's estimate only called for
23 1/2 inch sheet rock and one coat of mud. Id.; see McMillan Decl.
24 Ex. 29 ("Bergamini Dep.") at 121-22. Allied responds that the MSC
25 estimate did call for 5/8 inch sheetrock and that there is no
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28 ⁵ It is unclear how McMillan arrived at this figure as the MSC bid
was \$297,859.63 and the IRH bid was \$559,995.40. In any event,
neither party disputes the accuracy of McMillan's math.

1 evidence that Empey's walls ever had laser finish. See MSJ at 11;
2 Gonzalez Decl. Ex. 40.

3 Between October 2010 and January 2011, the parties conferred
4 several more times about the differences between the MSC and IRH
5 estimates, but, evidently, they did not reach any resolution on the
6 issue. See Gonzalez Decl. ¶¶ 47-50. In January 2011, Allied and
7 MSC agreed that MSC would perform the work described in its bid for
8 the amount stated. Id. at 49-50.

9 **C. Personal Contents Claim**

10 Empey was also dissatisfied with Allied's handling of his
11 personal contents claim. Soon after the property damage was
12 discovered, Allied arranged for ServiceMaster to remove damaged
13 items and pack-up and store cleanable items so as to protect them
14 from water-damage. Lankford Decl.⁶ ¶ 9. On March 2, 2009,
15 Gonzalez requested that, within 60 days, Empey complete and return
16 a sworn statement in proof of loss ("Proof of Loss") in connection
17 with his contents loss. Gonzalez Decl. ¶¶ 5-6, Ex. 2. Empey was
18 subsequently granted an extension of time to complete the form.
19 Lankford Decl. ¶ 12. In March of 2009, before Empey submitted his
20 Proof of Loss, Allied made advance payments of \$5,000 and \$26,801
21 to Empey towards his contents loss. Id. ¶¶ 9, 11.

22 On July 30, 2010, Empey provided Allied with his Proof of
23 Loss, claiming a total combined contents loss of \$260,580.
24 Lankford Decl. Ex. 21 ("Proof of Loss"). Empey claims that his
25

26 ⁶ Empey objects to the entire Lankford Declaration on the grounds
27 that it is not based on Lankford's personal knowledge. ECF No. 70
28 at 2. The objection is overruled. Lankford's declaration almost
exclusively deals with Allied's handling of Empey's personal
contents claim. Lankford clearly had personal knowledge of these
facts as she was assigned to the claim and fully reviewed the claim
file. See Lankford Decl. ¶ 3.

1 Proof of Loss was delayed because Allied failed to provide an
2 inventory of the items collected from his house in a timely manner.
3 See Empey Decl. ¶¶ 21, 24-26. Empey states that he attempted to
4 obtain a complete list in the spring of 2009, but he had technical
5 difficulties opening the electronic files sent by Allied. Id. ¶
6 23. The parties dispute exactly when Empey received or could have
7 received the list of inventory compiled by ServiceMaster in a
8 useable format. Compare id. with Empey Decl. ¶ 24.

9 Allied determined that the Proof of Loss was incomplete since
10 it failed to include a number of requested items, such as dates of
11 ownerships and receipts. Gonzalez Decl. ¶ 28. On August 10, 2009,
12 Gonzalez informed Empey that he needed to provide additional
13 information and that his Proof of Loss would be held in abeyance
14 until the matter could be resolved. Id. Ex. 23. Empey provided
15 additional receipts on August 24, 2010, but explained that many
16 receipts were missing because they had been stored in a box which
17 ServiceMaster had either misplaced or thrown out. Empey Decl. Ex.
18 11. Allied and Empey exchanged a number of communications
19 concerning the contents claim in the subsequent months, during
20 which time each party accused the other of being non-responsive.
21 See Lankford Decl. ¶¶ 34-37; McMillan Exs. 16, 22, 17, 26, 33.

22 On March 16, 2011, Lissa Cooley ("Cooley") provided an
23 appraisal report for the replacement values of certain of Empey's
24 items. Lankford Decl. ¶ 39. Empey complains that Allied failed to
25 provide Cooley with information pertaining to replacement cost
26 quotes which had been included in his Proof of Loss. McMillan Ex.

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1 26 ("Lankford Dep.") at 137-38. It is unclear what impact these
2 documents would have had on Cooley's ultimate appraisal.⁷

3 Finally, on June 15, 2011, Lankford informed Empey that Allied
4 had completed an undisputed inventory for contents that were
5 damaged or stolen and provided him with a check for \$95,835.80.
6 Lankford Decl. ¶ 40.

7 **D. Additional Living Expenses ("ALE")**

8 Empey's Allied policy also provided coverage for twelve months
9 of ALE. Policy at 3345. ALE covers any "necessary increase in
10 living expenses incurred" so that a "household can maintain its
11 normal standard of living" when a covered loss renders a property
12 "not fit to live in." Id. at 3353. Gonzalez informed Empey of his
13 ALE coverage when he first spoke with him, only a few days after
14 the property damage was first discovered. Gonzalez Decl. ¶ 6.
15 Gonzalez also sent Empey a letter explaining various aspects of his
16 ALE coverage -- the letter did not include any information on the
17 twelve month limit on ALE. See Empey Decl. Ex. 12. In the months
18 after the property damage, Empey rented temporary housing while his
19 property was being repaired. Empey Decl. ¶ 32.

20 The parties dispute when Empey's ALE coverage expired. Empey
21 complains that Allied did not notify him that there was a 12 month
22 limit to his ALE coverage until March 15, 2010, almost a year after
23 the property damage. Empey Decl. ¶ 30. Around this time, McMillan
24 informed Allied that it was estopped from terminating ALE coverage
25

26 ⁷ Empey also complains that the staffing turnover on his contents
27 claim delayed the entire process. Four contents adjusters were
28 assigned to the claim -- (1) Jennifer Schultz ("Schultz"), (2)
Gonzalez, (3) Jill Rankin ("Rankin"), and (4) Lankford. When
Lankford replaced Rankin on the claim in December 2010, she noted
"I will have to start from scratch." McMillan Ex. 22 at 1512.

1 because it failed to provide Empey with written notice of the
2 applicable limits. See Gonzalez Decl. ¶ 36. Allied stated that it
3 disagreed, but approved a payment of \$12,425 for 90 days of
4 additional ALE coverage, effectively extending the coverage to June
5 15, 2010. Id. ¶¶ 37-38. Empey later demanded ALE for the period
6 after June 15, 2010, but Allied refused. See Gonzalez Decl. Ex.
7 39.

8 **E. Empey's Lawsuit**

9 On January 20, 2011, Empey filed suit against Allied in
10 California Superior Court. ECF No. 1 ("Not. of Removal") Ex. A
11 ("Compl."). The Complaint alleged claims for (1) breach of
12 contract, (2) breach of the implied covenant of good faith and fair
13 dealing ("bad faith claim"), and (3) declaratory relief. Id. For
14 his second claim for bad faith, Empey sought general, special, and
15 punitive and exemplary damages. Id. at 10. Allied subsequently
16 removed to federal court on diversity grounds. Not. of Removal. ¶
17 6. Allied now moves for partial summary judgment on Empey's bad
18 faith claim as well as his claim for punitive damages.

19
20 **III. LEGAL STANDARD**

21 **A. Summary Judgment**

22 Entry of summary judgment is proper "if the movant shows that
23 there is no genuine dispute as to any material fact and the movant
24 is entitled to judgment as a matter of law." Fed. R. Civ. P.
25 56(a). Summary judgment should be granted if the evidence would
26 require a directed verdict for the moving party. Anderson v.
27 Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). Thus, "Rule 56[]
28 mandates the entry of summary judgment . . . against a party who

1 fails to make a showing sufficient to establish the existence of an
2 element essential to that party's case, and on which that party
3 will bear the burden of proof at trial." Celotex Corp. v. Catrett,
4 477 U.S. 317, 322 (1986). "The evidence of the nonmovant is to be
5 believed, and all justifiable inferences are to be drawn in his
6 favor." Anderson, 477 U.S. at 255. However, "[t]he mere existence
7 of a scintilla of evidence in support of the plaintiff's position
8 will be insufficient; there must be evidence on which the jury
9 could reasonably find for the plaintiff." Id. at 252. "When
10 opposing parties tell two different stories, one of which is
11 blatantly contradicted by the record, so that no reasonable jury
12 could believe it, a court should not adopt that version of the
13 facts for purposes of ruling on a motion for summary judgment."
14 Scott v. Harris, 550 U.S. 372, 380 (2007).

15 **B. Bad Faith**

16 California law recognizes in every contract, including
17 insurance policies, an implied covenant of good faith and fair
18 dealing. Wilson v. 21st Century Ins. Co., 42 Cal. 4th 713, 720
19 (Cal. 2007). In the insurance context, the implied covenant of
20 good faith and fair dealing requires the insurer to refrain from
21 injuring its insured's right to receive the benefits of the
22 insurance agreement. Egan v. Mutual of Omaha Ins. Cos., 24 Cal. 3d
23 809, 818 (Cal. 1979). In order to state a claim for bad faith, a
24 plaintiff has the burden of showing that (1) the insurer withheld
25 policy benefits, and (2) that the withholding was unreasonable and
26 without proper cause. Love v. Fire Ins. Exch., 221 Cal. App. 3d
27 1136, 1151 (Cal. Ct. App. 1990).

28

1 Under the "genuine dispute rule," "an insurer's denial or
2 delay in paying benefits only gives rise to tort damages if the
3 insured shows the denial or delay was unreasonable." Wilson, 42
4 Cal. 4th at 723. Thus, denial or delay of benefits due to the
5 existence of a genuine dispute may give rise to liability for
6 breach of contract, but not bad faith. Id. "A genuine dispute
7 exists only where the insurer's position is maintained in good
8 faith and on reasonable grounds." Id. "The reasonableness of an
9 insurer's claims-handling conduct is ordinarily a question of
10 fact." Amadeo v. Principal Mut. Life Ins. Co., 290 F.3d 1152, 1161
11 (9th Cir. 2002). The genuine dispute rule only allows a district
12 court to grant summary judgment on bad faith claims where it is
13 undisputed that the basis for the insurer's decision was
14 reasonable. Id. "On the other hand, an insurer is not entitled to
15 judgment as a matter of law where, viewing the facts in the light
16 most favorable to the plaintiff, a jury could conclude that the
17 insurer acted unreasonably." Id. at 1162.

18
19 **IV. DISCUSSION**

20 Allied argues that it is entitled to summary judgment on
21 Empey's bad faith claim because any denial or delay in benefits was
22 due to a genuine dispute concerning Empey's coverage under the
23 Policy. Allied contends that the undisputed facts show that it had
24 a reasonable basis for its decisions concerning Empey's coverage
25 for (1) repair costs, (2) ALE, and (3) loss of personal contents.
26 Allied also contends that there is no clear and convincing evidence
27 of malice, oppression, or fraud to support Empey's claim for
28 punitive damages.

1 **A. Dwelling Claim**

2 The Court finds that triable issues of fact exist as to
3 whether Allied acted in bad faith in handling Empey's dwelling
4 claim. Allied ultimately adopted a repair estimate which was
5 approximately \$154,485 lower than the estimate prepared by Empey's
6 general contractor. Compare MSC Estimate with IRH Estimate. At
7 this stage, the Court cannot determine which of these estimates was
8 right, let alone whether Allied had a reasonable basis for choosing
9 the lower estimate.

10 Further, triable issues of fact exist as to whether all
11 necessary and covered repairs were included in the lower estimate
12 chosen by Allied. For example, Empey contends that the lower
13 estimate did not include the cost to replace all of the custom tile
14 in his home. See Oct. 15, 2010 McMillan Ltr.⁸ Allied disagrees.
15 See Reply at 9. Based on the evidence presented, the Court cannot
16 determine who is right without making a credibility determination,
17 which would be inappropriate on a motion for summary judgment.⁹ If
18 these repairs were in fact excluded from Allied's estimate, it is
19 unclear whether Allied had a reasonable basis for its decision.

20
21 _____
22 ⁸ Allied objects to the October 15, 2010 McMillan letter based on
23 Federal Rules of Evidence 401, 402, 602, and on "asserted privilege
24 at deposition." ECF No. 113 at 6. The Court overrules these
25 objections to the extent they apply to the portions of the letter
26 concerning the contents of the MSC bid.

27 ⁹ Allied does not point to anything in the MSC estimate which
28 indicates that the estimate called for the replacement of all of
the tile in Empey's home. Deposition testimony by Randy Seiz
("Seiz"), an MSC contractor, indicates that a document from August
21, 2009 included "a proposal to replace all of the tile in the
house." See Kimura Supp. Decl. Ex. A ("Seiz Dep.") at 136-137. It
is unclear whether Seiz was referring to the MSC proposal. Even if
he was, the Court lacks sufficient information to determine whether
his interpretation of the proposal is correct.

1 Triable issues of fact also exist as to whether Allied
2 unreasonably delayed processing the dwelling claim. The undisputed
3 evidence suggests certain delays were due to Empey's failure to
4 provide Allied with requested information, such as information
5 pertaining to his custom glass works. However, the Court declines
6 to find that the total amount of time Allied took to process the
7 claim was reasonable as a matter of law. This is an issue for the
8 jury.

9 Accordingly, the Court DENIES Allied's motion for partial
10 summary judgment with respect to Empey's dwelling claim.

11 **B. Personal Contents Claim**

12 The Court also finds that triable issues of fact exist with
13 respect to Empey's personal contents claim. For example, it is
14 unclear from the record whether Allied's delay in processing
15 Empey's personal contents claim was reasonable. Empey submitted
16 his sworn proof of loss statement to Allied on July 30, 2010, but
17 Allied did not provide Empey with a final payment for his contents
18 claim until nearly a year later. Proof of Loss; Lankford Decl. ¶
19 40. This delay was due in part to the complexity of Empey's claim
20 as well as Empey's failure to provide Allied with documentation of
21 his loss. However, other factors may have also contributed.
22 Whether or not this delay was reasonable is ultimately a question
23 for the jury. Further, the evidence suggests that Allied neglected
24 to provide the drafter of Empey's appraisal report with potentially
25 pertinent information that had been included in Empey's proof of
26 loss statement. See Lankford Dep. at 137-38 There is a triable
27 issue of fact as to whether excluding such evidence from the
28 appraisal report was reasonable.

1 Accordingly, the Court DENIES Allied's motion for partial
2 summary judgment with respect to Empey's personal contents claim.

3 **C. Additional Living Expenses ("ALE")**

4 Summary judgment is appropriate with respect to Empey's claim
5 for ALE because he received all that he was entitled to under his
6 Allied policy. The undisputed facts show that Empey received
7 coverage for 15 months of ALE, see Gonzalez Decl. ¶¶ 37-38, even
8 though the Policy only provided coverage for 12 months, Policy at
9 3345. Empey contends that he was entitled to more than 15 months
10 coverage under the California Administrative Code ("the
11 Administrative Code") because Allied failed to provide proper
12 notice of the twelve month cap on ALE. See Opp'n at 19-20. This
13 argument lacks merit.

14 The Administrative Code provides, in relevant part: "Every
15 insurer shall disclose to a first party claimant or beneficiary all
16 benefits, coverage, time limits or other provisions of any
17 insurance policy issued by that insurer that may apply to the claim
18 presented by the claimant." Cal. Code Regs. tit. 10 § 2695.4(a).
19 The Administrative Code further provides "every insurer shall
20 provide written notice of any statute of limitation or other time
21 period requirement upon which the insurer may rely to deny a claim.
22 . . . not less than sixty (60) days prior to the expiration date."
23 Id. § 2695.7(f). Here, Empey admits that he was notified of the 12
24 month ALE time limit in a telephone conversation on March 15, 2010
25 and by letter dated April 14, 2010. Opp'n at 19-20. Empey also
26 admits that the April 14, 2010 letter notified him that his
27 coverage had been extended to June 15, 2010. Id. at 20. Thus, in
28 accordance with the Code, Allied notified Empey of the time limits

1 for his ALE over 60 days prior to their expiration. Empey appears
2 to argue that Allied was precluded from ever terminating his ALE
3 benefits because it purportedly failed to notify him of the time
4 limits "at the inception of his loss." See Opp'n at 19-20.
5 However, the Administrative Code does not impose such a requirement
6 and Empey cites no other authority to support his position.

7 For these reasons, the Court GRANTS Allied's motion for
8 partial summary judgment with respect to Empey's claim that his ALE
9 claim was handled in bad faith.

10 **D. Punitive Damages**

11 Allied also argues that Empey's claim for punitive damages
12 fails because (1) Empey has presented no evidence of malice,
13 oppression, or fraud; and (2) no officer, director, or managing
14 agent of Allied ratified any malicious, oppressive, or fraudulent
15 conduct. The Court agrees. The standard for establishing
16 liability for punitive damages is much higher than the standard for
17 bad faith. Empey has not come remotely close to meeting his burden
18 with respect to punitive damages.

19 The California Civil Code provides that a plaintiff is
20 entitled to punitive damages "where it is proven by clear and
21 convincing evidence that the defendant has been guilty of
22 oppression, fraud, or malice." Cal. Civ. Code § 3294(a). Malice
23 is defined as "conduct which is intended by the defendant to cause
24 injury to the plaintiff or despicable conduct which is carried on
25 by the defendant with a willful and conscious disregard of the
26 rights or safety of others." Id. § 3294(c)(1). "'Oppression'
27 means despicable conduct that subjects a person to cruel and unjust
28 hardship in conscious disregard of that person's rights." Id. §

1 3294(c)(2). Summary judgment on the issue of punitive damage is
2 only proper "when no reasonable jury could find the plaintiff's
3 evidence to be clear and convincing proof of malice, fraud, or
4 oppression." Hoch v. Allied-Signal, Inc., 24 Cal. App. 4th 48, 60-
5 61 (Cal. App. Ct. 1994).

6 In the instant action, no reasonable jury could find by clear
7 and convincing evidence that Allied is guilty of despicable conduct
8 or oppression, fraud, or malice. The undisputed evidence shows
9 that Allied: responded to Empey's claim almost immediately; agreed
10 to pay for almost \$300,000 in dwelling repairs; paid out over
11 \$100,000 on Empey's personal contents claim; made a number of
12 advance payments to Empey before he had submitted information
13 required to verify his claim; and granted Empey an additional 90
14 days of ALE coverage. Allied asserts, and Empey does not dispute,
15 that Allied has paid Empey a total of \$576,160.29 for his vandalism
16 claim. The current value of Empey's home is only \$402,000. While
17 there were delays in the processing of Empey's claims, they were
18 due in large part to Empey's failure to provide requested
19 information. In light of these facts, Empey's failure to produce
20 any direct evidence establishing fraud, malice, or oppression, and
21 the high standard for establishing punitive damages, Empey's claim
22 for punitive damages must fail.

23 The California Civil Code also provides that a corporate
24 entity, such as Allied, may not be held liable for punitive damages
25 unless an officer, director, or managing agent¹⁰ of the corporation
26 authorizes or ratifies an act of oppression, fraud, or malice.
27 Cal. Civ. Code § 3294(b). Empey argues that Gonzalez's decisions

28 ¹⁰ A managing agent is an employee with "broad discretion" who
"determines corporate policy." Egan, 24 Cal. 3d at 822-23.

1 regarding his dwelling claim were ratified by Teresa Mitchell
2 ("Mitchell"), Property Claims Director, and Chad Zierke ("Zierke"),
3 Assistant Vice President. Opp'n at 14. This argument is
4 unpersuasive. According to the evidence offered by Empey, Mitchell
5 and Zierke's involvement with the dwelling claim was almost
6 exclusively limited to authorizing an increase in the amount Empey
7 could potentially recover for his claim. See McMillan Exs. 14 at
8 18-20, 24 at 49. Mitchell testified that her job responsibilities
9 include periodically reviewing files and ensuring claims managers
10 follow procedures, but there is no evidence that she had any
11 knowledge of wrongdoing in connection with Empey's claim. See id.
12 Ex. 24 at 49. Empey's claim that Mitchell and Zierke somehow
13 ratified or authorized oppression, fraud, or malice by increasing
14 the reserve on his account strains credulity.¹¹

15 Accordingly, the Court GRANTS Allied's motion for partial
16 summary judgment with respect to Empey's claim for punitive
17 damages.

18
19 **V. CONCLUSION**

20 For the foregoing reasons, the Court GRANTS in part and DENIES
21 in part Defendant Allied Property & Insurance Company's motion for
22 partial summary judgment. The Court DISMISSES Plaintiff Chad
23 Empey's claim for breach of the implied covenant of good faith and
24 fair dealing as it applies to Empey's insurance claim for
25 Additional Living Expenses. The Court also DISMISSES Empey's claim

26
27 ¹¹ Empey also contends that Mitchell was aware of disputes
28 concerning his ALE claim. Opp'n at 24. However, as discussed in
Section IV.C supra, there is no evidence that Allied engaged in bad
faith, let alone fraud, malice, or oppression, in connection with
this claim.

1 for punitive damages. Empey's other claims for relief remain
2 undisturbed.

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4 IT IS SO ORDERED, ADJUDGED, AND DECREED.

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6 Dated: January 12, 2012

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UNITED STATES DISTRICT JUDGE

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