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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
RENO, NEVADA

ZURICH AMERICAN INSURANCE COMPANY,	)	3:08-CV-109-ECR-RAM
	)	
Plaintiff,	)	
	)	
vs.	)	<u>Order</u>
	)	
COEUR ROCHESTER, INC.,	)	
	)	
Defendant.	)	
	)	
	)	

This diversity case arises out of a coverage dispute between an insurer and its insured. Plaintiff Zurich American Insurance Company ("Zurich") filed suit for declaratory relief after denying a claim filed by Defendant Coeur Rochester, Inc. ("Coeur") for loss or damage of Coeur's insured property, a gold and silver mine. Coeur counterclaimed, alleging breach of contract, bad faith, and unfair claims practices. Both parties have filed motions for summary judgment or partial summary judgment, and Zurich has raised several evidentiary matters.

The motions are ripe, and we now rule on them.

**I. Factual and Procedural Background**

Coeur operates the Rochester and Nevada Packard Mine ("Rochester Mine"), which consists of approximately 11,000 acres of property near Lovelock, Nevada, on which Coeur both owns patented

1 mining claims and controls unpatented mining claims. The Rochester  
2 Mine includes the open-pit mine at issue in this case (the  
3 "Rochester Pit"), which produces gold and silver ore. The usual  
4 method of mining at the Rochester Pit, like any open-pit mine,  
5 involves dynamite blasts. The blasts break ore from the ground in  
6 the pit, which is then hauled away from the blast site for  
7 processing. On September 21, 2006, a planned dynamite blast not  
8 only dislodged the expected bench<sup>1</sup> of ore on the pit floor, but also  
9 resulted in the collapse of a section of the highwall<sup>2</sup> above the  
10 bench. After the collapse, it was determined that the highwall was  
11 unstable, so that further mining of the affected area would be  
12 unsafe. Coeur later began operating the Rochester Pit again under a

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14 <sup>1</sup> In his deposition testimony, Casey Kiel, a Coeur employee,  
15 explains that mining in the Rochester Pit was conducted in sections,  
16 called "benches," measuring 25 feet in height and denoted by their  
17 lowest elevation. Thus, the "6100 bench" consisted of a section of  
18 rock with an elevation of 6100 feet at its bottom, and 6125 feet at  
19 its top. A bench is mined by drilling holes into the top of the  
20 bench, packing the holes with dynamite, setting off a blast, and then  
21 hauling away the broken and severed ore, or "muck," loosened by the  
22 explosion from ore that remained "in-wall." (See Kiel Depo. at 59:2-  
23 25 (#114-1).) This terminology appears to have been the cause of some  
24 confusion about whether the blasting on September 21, 2006, was  
25 conducted on the 6125 bench or the 6100 bench. (Compare P.'s MSJ at  
26 4 (#82) (describing the blast as conducted on the 6125 bench) with  
27 D.'s Opp. at 9 (describing the blast as conducted on the 6100 bench);  
28 see also Kiel Depo at 59:2-9 (Zurich's counsel asks "the  
blasting . . . occurred on the 6125 bench; is that correct?" and Kiel  
responds "the 6125 is the top . . . for operations we considered that  
the 6100 bench, because that's where we had mined to and that's where  
the final elevation would be of that".)) It appears to be undisputed  
that the blast that caused the highwall collapse on September 21,  
2006, was set off in holes drilled down from the 6125 foot elevation  
- there is no evidence sufficient to support a different conclusion  
in our record. This would mean the blast was on the 6100 bench, as  
Mr. Kiel and Coeur use the term, and as we will use it in this Order.

<sup>2</sup> The term "highwall" refers to the face of unexcavated rock left  
in place as mining progresses downward into the pit.

1 revised mining plan, designed to avoid the danger of the unstable  
2 highwall. This revised mining plan, however, required leaving a  
3 substantial amount of high-grade ore in place, while mining lower-  
4 grade replacement ore instead.

5 Coeur filed an insurance claim based on the policy issued to it  
6 by Zurich ("the Policy"); the claim was for a total of \$7,435,327.  
7 Coeur's calculation of its damages has since been modified.<sup>3</sup> Coeur  
8 now asserts a claim for net revenue from ore lost or damaged in the  
9 highwall collapse in the amount of \$7,010,714, a sum which includes  
10 \$8,467,068 for high-grade ore that could not be mined because of the  
11 collapse, minus \$1,456,353 in lower-grade replacement ore mined as  
12 mitigation of damages. (D.'s Opp. at 6 (#89)).<sup>4</sup> In the alternative,  
13 Coeur asserts that it is entitled to collect the \$7,010,714 under  
14 the business interruption coverage of the Policy. (D.'s Opp. at 22  
15 (#89).) Also, Coeur seeks \$51,839 in extra expenses incurred as a  
16 result of its mitigation efforts. (Id. at 26.)

17 After an investigation, Zurich denied the claim on various  
18 grounds by means of a letter dated September 20, 2007. (See Letter  
19 from Tracy Smith to Carolyn Turner (Sept. 20, 2007) ("Denial  
20 Letter"), Bithell Decl., Ex. T (#103-22).) Coeur disputed this  
21 determination, but after further investigation, on December 5, 2007,  
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24 <sup>3</sup> Zurich's objections to Coeur's evidence in support of its  
latest calculation of damages will be addressed below.

25 <sup>4</sup> We note that \$8,467,068 minus \$1,456,353 totals \$7,010,715.  
26 The discrepancy between that amount and the \$7,010,714 claimed by  
27 Coeur is apparently the result of a typo or mathematical error, or  
perhaps an artifact of rounding. (See D.'s Opp. at 6 (#89); Kiel  
Decl., Ex. 1 (#89-3).)

1 Zurich informed Coeur that it had decided to adhere to its decision  
2 to deny the claim.

3 On February 29, 2008, Zurich filed its Complaint (#1), seeking  
4 a declaratory judgment that Coeur's claim was properly denied. On  
5 June 11, 2008, Coeur filed its Answer and Counterclaim (#8), seeking  
6 damages for breach of contract, bad faith, and violation of Nevada's  
7 Unfair Trade Practices Act, Nev. Rev. Stat. § 686A.310.

8 Zurich filed the pending "Motion for Summary Judgment or, in  
9 the Alternative, Partial Summary Judgment [Plaintiff Zurich  
10 American's Claim for Declaratory Relief; Counterclaimant Coeur  
11 Rochester's Claim for Breach of Contract]" (#81) on September 1,  
12 2009. Coeur opposed (#89) the motion (#81), and Zurich replied  
13 (#98). Zurich also filed objections (#99) to certain evidence  
14 submitted by Coeur in opposition to the motion (#81). Coeur opposed  
15 (#113) Zurich's objections (#99), and Zurich replied (#125)

16 On September 28, 2009, Zurich filed a "Motion for Partial  
17 Summary Judgment [Coeur Rochester's Claims for Bad Faith, Violation  
18 of Nev. Rev. Stat. § 686A.310, Punitive Damages]" (#91). Coeur  
19 opposed (#103) the motion (#91), and Zurich replied (#115). On  
20 October 30, 2009, Zurich filed a "Motion to Exclude Evidence of  
21 Coeur's Damages Pertaining to Bad Faith, Statutory Violations Claims  
22 [FRCP 37(c)]" (#119). This motion (#119) seeks to exclude certain  
23 evidence Coeur submitted in opposition to Zurich's motion for  
24 partial summary judgment (#91). Coeur opposed (#126) the motion  
25 (#119), and Zurich replied (#127).

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1 Also on September 28, 2009, Coeur filed a "Motion for Partial  
2 Summary Judgment on Liability" (#94). Zurich opposed (#106) the  
3 motion (#94), and Coeur replied (#122).

4 Zurich requested (#100) oral argument on the pending motions  
5 for summary judgment and partial summary judgment. We granted  
6 (#129) the request (#100). The parties presented their oral  
7 arguments at a hearing on June 15, 2010, after which the Court took  
8 the matter under submission.

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10 **II. Summary Judgment Standard**

11 Summary judgment allows courts to avoid unnecessary trials  
12 where no material factual dispute exists. N.W. Motorcycle Ass'n v.  
13 U.S. Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). The court  
14 must view the evidence and the inferences arising therefrom in the  
15 light most favorable to the nonmoving party, Bagdadi v. Nazar, 84  
16 F.3d 1194, 1197 (9th Cir. 1996), and should award summary judgment  
17 where no genuine issues of material fact remain in dispute and the  
18 moving party is entitled to judgment as a matter of law. FED. R.  
19 CIV. P. 56(c). Judgment as a matter of law is appropriate where  
20 there is no legally sufficient evidentiary basis for a reasonable  
21 jury to find for the nonmoving party. FED. R. CIV. P. 50(a). Where  
22 reasonable minds could differ on the material facts at issue,  
23 however, summary judgment should not be granted. Warren v. City of  
24 Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S.Ct.  
25 1261 (1996).

26 The moving party bears the burden of informing the court of the  
27 basis for its motion, together with evidence demonstrating the

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1 absence of any genuine issue of material fact. Celotex Corp. v.  
2 Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met  
3 its burden, the party opposing the motion may not rest upon mere  
4 allegations or denials in the pleadings, but must set forth specific  
5 facts showing that there exists a genuine issue for trial. Anderson  
6 v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the  
7 parties may submit evidence in an inadmissible form – namely,  
8 depositions, admissions, interrogatory answers, and affidavits –  
9 only evidence which might be admissible at trial may be considered  
10 by a trial court in ruling on a motion for summary judgment. FED.  
11 R. Civ. P. 56(c); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d  
12 1179, 1181 (9th Cir. 1988).

13 In deciding whether to grant summary judgment, a court must  
14 take three necessary steps: (1) it must determine whether a fact is  
15 material; (2) it must determine whether there exists a genuine issue  
16 for the trier of fact, as determined by the documents submitted to  
17 the court; and (3) it must consider that evidence in light of the  
18 appropriate standard of proof. Anderson, 477 U.S. at 248. Summary  
19 judgment is not proper if material factual issues exist for trial.  
20 B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir.  
21 1999). “As to materiality, only disputes over facts that might  
22 affect the outcome of the suit under the governing law will properly  
23 preclude the entry of summary judgment.” Anderson, 477 U.S. at 248.  
24 Disputes over irrelevant or unnecessary facts should not be  
25 considered. Id. Where there is a complete failure of proof on an  
26 essential element of the nonmoving party’s case, all other facts  
27 become immaterial, and the moving party is entitled to judgment as a

1 matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a  
2 disfavored procedural shortcut, but rather an integral part of the  
3 federal rules as a whole. Id.

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5 **III. Discussion**

6 Both Zurich and Coeur seek summary judgment on Zurich's  
7 declaratory judgment claim and on the issue of liability with regard  
8 to Coeur's breach of contract claim. (P.'s Mot. (#81); D.'s Mot.  
9 (#94).) In addition, Zurich seeks summary judgment on Coeur's  
10 claims for bad faith and for violation of Nevada's Unfair Trade  
11 Practices Act. (P.'s Mot. (#91).) We will discuss these matters,  
12 and the related evidentiary motions filed by Zurich, separately.

13 **A. Zurich's Objections (#99)**

14 Zurich presents several objections to evidence submitted by  
15 Coeur in support of its opposition (#89) to Zurich's motion for  
16 summary judgment (#81). Specifically, Zurich objects to a  
17 spreadsheet attached as an exhibit to the Declaration of Casey Kiel  
18 (#89-3), as well as portions of the Kiel Declaration itself. (See  
19 Objections at 2 (#99).) Zurich also objects to one paragraph of the  
20 Declaration of Alan Tattersall (#89-4). (Id.) We will consider  
21 each of these matters separately.

22 **1. Exhibit to Kiel Declaration**

23 Attached to the Kiel Declaration as Exhibit 1 is a spreadsheet  
24 describing the damages Coeur alleges it suffered because of the  
25 south highwall collapse. (Kiel Decl., Ex. 1 (#89-3).) This  
26 spreadsheet has four separate boxes, the first three of which  
27 calculate the net revenue from high-grade ore allegedly lost or  
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1 damaged as a result of the highwall collapse, while the fourth  
2 accounts for the lower-grade replacement ore that Coeur mined  
3 instead. (Id.) Zurich objects that when this document was  
4 initially disclosed to them, the fourth box was omitted, and that  
5 Coeur never disclosed the information contained therein pursuant to  
6 Federal Rule of Civil Procedure 26. As such, Zurich argues that the  
7 items described in the fourth box constitute a new damages claim not  
8 disclosed during discovery, which should be excluded from evidence  
9 pursuant to Federal Rule of Civil Procedure 37(c).

10 Coeur asserts, and Zurich does not dispute, that Coeur notified  
11 Zurich of the omitted fourth box of the spreadsheet at a discovery  
12 status conference on March 30, 2009. Coeur provided Zurich with the  
13 full, corrected version of the spreadsheet on April 1, 2009, with a  
14 letter explaining why the fourth box was omitted from the previously  
15 provided version: it seems that there was a formatting error that  
16 occurred in the conversion of the document from an Excel document to  
17 a PDF document. (See Ramirez Decl., Ex. 3 (#114-3).) Zurich's  
18 argument that the fourth box on the spreadsheet constitutes a new  
19 claim, therefore, rests on a perceived distinction between  
20 "providing" a document describing claimed damages to an opposing  
21 party and "disclosing" such a document pursuant to Federal Rule of  
22 Civil Procedure 26. (See P.'s Reply at 3 (#125).)

23 Rule 26 requires that "a party must . . . provide to the other  
24 parties . . . a computation of each category of damages claimed by  
25 the disclosing party." FED. R. CIV. P. 26(a)(1)(A)(iii). Rule 26  
26 further requires that such a disclosure must be supplemented "in a  
27 timely manner if the party learns that in some material respect the

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1 disclosure or response is incomplete or incorrect, and if the  
2 additional or corrective information has not otherwise been made  
3 known to the other parties during the discovery process or in  
4 writing." FED. R. CIV. P. 26(e)(1)(A). Here, Coeur learned that its  
5 initial disclosure was incorrect because of the formatting problem  
6 that caused the omission of the fourth box of the spreadsheet. By  
7 providing the corrected document to Zurich, together with an  
8 explanation of the reason for the correction, Coeur effectively  
9 supplemented its initial disclosure. Furthermore, even accepting  
10 for the sake of argument Zurich's perceived distinction between  
11 "provide" and "disclose" – a distinction that is dubious at best, in  
12 light of the appearance of the former word in the text of Rule  
13 26(a) – it is undisputed that the additional or corrective  
14 information was made known to Zurich during the discovery process.  
15 As such, Zurich's argument that Coeur failed to comply with Rule 26  
16 is without merit.

17       Moreover, Zurich's contention in its Reply (#125) that "Rule  
18 37(c) mandates the exclusion of evidence that that [sic] has not  
19 been disclosed 'as required by Rule 26(a) or (e)'" is a false  
20 statement of the rule. (P.'s Reply at 3 (#125).) Rule 37(c)  
21 requires exclusion only if the failure to disclose was not  
22 "substantially justified or harmless," and even then sanctions other  
23 than exclusion are available. See FED. R. CIV. P. 37(c)(1)(A-C).  
24 Coeur does not contend that there was any justification for the  
25 omission, it was simply an error. It appears, however, that the  
26 error was entirely harmless. Coeur informed Zurich of the missing  
27 fourth box of the spreadsheet during discovery, and provided Zurich

1 with the corrected spreadsheet. If Zurich required additional  
2 discovery based on the newly provided information, it could have  
3 requested it, either by stipulation or by motion.<sup>5</sup> The information  
4 in the fourth box of the spreadsheet does not describe an additional  
5 damages claim, but rather Coeur's attempt to mitigate its damages,  
6 which reduced Coeur's claim against Zurich by \$1,456,353. As such,  
7 even if Coeur's actions with regard to the spreadsheet were to  
8 constitute a violation of Rule 26 – which they do not – sanctions  
9 pursuant to Rule 37 would be inappropriate.<sup>6</sup>

## 10 2. Kiel Declaration

11 Zurich objects to paragraph 6 of the Kiel declaration, which  
12 reads in full: "A portion of Coeur's claim is for the loss of ore  
13 that had been broken and severed from the 6100 bench by the blast  
14 just prior to the collapse." (Kiel Decl. ¶ 6 (#89-3).) Zurich  
15 argues that this statement contradicts Mr. Kiel's deposition

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17 <sup>5</sup> It is worth noting that at Mr. Kiel's deposition on May 22,  
18 2009, he was questioned about the incomplete version of the  
19 spreadsheet even though Zurich had been provided the version  
20 containing the initially omitted fourth box on April 1, 2009.  
21 Zurich's counsel's comments during the deposition confirm that he was  
22 aware that there were several versions of the document. Mr. Kiel  
23 asked to see "that net rev, the four box deal, the final net rev," to  
24 assist him in answering a question. (Kiel Depo. at 65-66 (#85-25).)  
25 Zurich's counsel responded: "Well, let's see. I have one version of  
26 it," referring to the three-box version, and then proceeded to  
27 question Mr. Kiel about that version. (Id. at 66.) Zurich's counsel  
28 thus had an opportunity to depose Mr. Kiel about the complete version  
of the spreadsheet, and chose not to make use of that opportunity.

<sup>6</sup> Not only are Rule 37 sanctions inappropriate, Zurich's  
objections to the spreadsheet attached as an exhibit to the Kiel  
Declaration are so profoundly lacking in merit that the Court has been  
forced to consider whether to require counsel for Zurich to show cause  
why they should not be sanctioned for violation of Federal Rule of  
Civil Procedure 11(b)(2). We have decided not to do so at this time.  
Counsel for Zurich are cautioned, however, that we may decide  
differently if they engage in further conduct of a similar nature.

1 testimony. Zurich asserts that Mr. Kiel testified that Coeur's  
2 claim for "loss" of ore did not include any such broken and severed  
3 ore, or "muck." Zurich asserts on this basis that paragraph 6 of  
4 Mr. Kiel's declaration should be excluded from consideration on  
5 summary judgment as a sham affidavit. (Mot. at 2 (#99).) We  
6 disagree.

7 At summary judgment, a district court may "disregard 'sham'  
8 affidavits that contradict deposition testimony submitted solely to  
9 generate [an] issue of fact for summary judgment purposes." Adler  
10 v. Fed. Republic of Nigeria, 107 F.3d 720, 728 (9th Cir. 1997)  
11 (citing Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266-67 (9th  
12 Cir. 1991)). A contradictory affidavit, however, is not necessarily  
13 a sham affidavit. Rather, the court must make a "factual  
14 determination that the contradiction was actually a 'sham,'" as  
15 opposed to an attempt to explain certain aspects of confused  
16 deposition testimony, for example. Id. In making this  
17 determination, the Court must consider, among other things, whether  
18 "the party submitting the affidavit or declaration provides a  
19 sufficient explanation for the contradiction." Martinez v. Marin  
20 Sanitary Servs., 349 F. Supp. 2d 1234, 1242 (N.D. Cal. 2004).

21 During the portion of Mr. Kiel's deposition at issue, he was  
22 being questioned by Zurich's counsel about the damages spreadsheet  
23 discussed above – specifically, the version that was initially  
24 disclosed, missing the fourth section describing Coeur's mitigation  
25 efforts. Zurich correctly notes that Mr. Kiel stated that "[t]here  
26 is no muck included on this spreadsheet." (Kiel Depo. at 67:21-22  
27 (#85-25).) In context, however, Zurich's interpretation of Mr.

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1 Kiel's statement is unpersuasive. Zurich's counsel asked Mr. Kiel  
2 to show him where on the spreadsheet was "set forth the amount of  
3 muck that was left in the Coeur Rochester pit." (Id. at 66:4-6.)  
4 Mr. Kiel indicated the box for the 6100 bench – containing the  
5 number 100,749, representing tons of ore in that bench – but Mr.  
6 Kiel conceded that not this entire amount was muck. (Id. at 66:14-  
7 18, 67:5.) Zurich's counsel pressed the matter, stating "I'm trying  
8 to find out where on this spreadsheet is it stated the amount of  
9 muck that was left in the Coeur Rochester pit." (Id. at 67:16-18.)  
10 In response to this comment by Zurich's counsel, Mr. Kiel stated  
11 that there "is no muck included on this spreadsheet." (Id. at  
12 67:21-22.)

13 In context, it is apparent that Mr. Kiel was not disclaiming  
14 any amount of muck as an element of Coeur's claimed damages in this  
15 case, as Zurich would have it. Rather, Mr. Kiel was acknowledging  
16 that the total amount of claimed lost or damaged ore from the 6100  
17 bench in the third section of the spreadsheet, 100,749 tons, was not  
18 broken out anywhere on the spreadsheet into a separate section for  
19 "muck" and a separate section for ore that remained "in-wall" as of  
20 the time of the highwall collapse. In his declaration, Mr. Kiel  
21 answers a question that Zurich's counsel never asked him: how much  
22 of the ore listed at the 6100 bench consisted of muck? Mr. Kiel  
23 states in his declaration that "a portion of Coeur's claim is for  
24 loss of ore that had been broken and severed from the 6100 bench by  
25 the blast just prior to the collapse," and specifies that this  
26 amount was 89,768 tons, with a value of \$348,787. (Id. ¶¶ 6-7.)  
27 Thus, Mr. Kiel does not contradict his deposition testimony in his  
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1 declaration, but rather explains it by expanding upon it. To the  
2 extent that Mr. Kiel's deposition testimony could be interpreted to  
3 contradict his declaration, Coeur has provided a sufficient  
4 explanation for the contradiction. Paragraph six of the Kiel  
5 Declaration is not a "sham," and Zurich's objection to it will be  
6 overruled.

7 Zurich also objects to paragraph 8 of Mr. Kiel's declaration,  
8 which reads in full as follows: "Some of the broken and blasted ore  
9 at the 6100 bench sustained direct physical damage by being covered  
10 up by the slide material after the collapse." (Id. ¶ 8.) Zurich  
11 objects to the use of the phrase "direct physical damage"; Zurich  
12 argues that Mr. Kiel's characterization constitutes a legal  
13 conclusion or an opinion about an ultimate issue in the case, which  
14 should be excluded. (P.'s Mot. at 3-4.)

15 Zurich's apparent point in raising this objection is well  
16 taken: Mr. Kiel's use of the phrase "direct physical damage" is not  
17 probative of the meaning of the phrase "direct physical damage" as  
18 that term is used in the Policy, nor is it probative of whether any  
19 ore suffered such damage as a result of the highwall collapse.  
20 Nevertheless, Coeur does not offer Mr. Kiel's declaration as  
21 evidence for that purpose (see D.'s Opp. at 10-11), nor will we  
22 consider it for that purpose. The remainder of paragraph 8 is  
23 essentially a gloss on what Mr. Kiel means by the phrase: he saw  
24 broken and blasted ore covered up by slide material. As a lay  
25 observation of what happened during the slide, this statement is  
26 unobjectionable. Moreover, for reasons that will become apparent  
27 below, the issue is moot: our rulings on the pending dispositive

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1 motions do not turn on the issue of whether there was "direct  
2 physical damage" to the ore or not. Zurich's objection, therefore,  
3 will be overruled.

### 4 3. Tattersall Declaration

5 Zurich objects to paragraph 7 of Mr. Tattersall's declaration,  
6 which reads in part as follows: "On September 21, 2006, Coeur  
7 conducted a production blast on the 6100 bench of the Rochester  
8 Mine. The blast broke and severed ore from the 6100 bench." Zurich  
9 contends that Mr. Tattersall testified at his deposition that  
10 blasting was conducted on the 6125 bench on the day of the slide,  
11 and that his declaration to the contrary should be stricken.

12 Mr. Tattersall's deposition testimony identifying the 6125  
13 bench as the site of blasting on September 21, 2006, appears to have  
14 been the result of a failure of memory. Though he answered Zurich's  
15 counsel's questions referring to blasting on the 6125 bench on the  
16 day of the highwall collapse, Mr. Tattersall also testified that he  
17 did not recall for certain what bench was being worked on, and  
18 suggested that Mr. Kiel, whose deposition was to be taken the next  
19 day, would be a better source of information on that issue. (See  
20 Tattersall Depo. at 274-275 (#85-24).) As noted above, Mr. Kiel  
21 explained in his deposition testimony that blasts set off in holes  
22 drilled down from the 6125 foot elevation are on the 6100 shelf  
23 according to the designations used by Coeur. To the extent that Mr.  
24 Tattersall's declaration contradicts his deposition testimony, Coeur  
25 provides a sufficient explanation for the contradiction, and we are  
26 convinced the declaration is not a sham designed solely to generate  
27 an issue of fact for summary judgment purposes.

1           Moreover, Zurich has not pointed out, nor have we discovered,  
2 any issue now pending before the Court, the resolution of which  
3 changes as a result of striking or not striking this portion of Mr.  
4 Tattersall's declaration. As such, Zurich's objection is moot and  
5 would be overruled on that basis, even if it did not fail on its  
6 merits.

7           **B. Zurich's Liability under the Policy**

8           Both Zurich and Coeur have moved for summary judgment on the  
9 issue of Zurich's liability under the Policy. Zurich contends that  
10 it has no liability under the Policy; Coeur contends that Zurich is  
11 liable for the entire value of the high grade ore that now cannot be  
12 mined as a result of the highwall collapse, minus the value of  
13 lower-grade ore mined in mitigation of those damages, but plus extra  
14 expenses incurred as a result of those mitigation efforts. (See  
15 P.'s Mot. (#81); D.'s Mot. (#94).) For the reasons stated below,  
16 Zurich has the better side of this dispute.

17           In diversity actions, federal courts apply substantive state  
18 law. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); Nitco  
19  Holding Corp. v. Boujikian, 491 F.3d 1086, 1089 (9th Cir. 2007).  
20 Under Nevada law, "[a]n insurance policy is a contract that must be  
21 enforced according to its terms to accomplish the intent of the  
22 parties." Farmers Ins. Exch. v. Neal, 64 P.3d 472, 473 (Nev. 2003).  
23 When the facts are not in dispute, contract interpretation is a  
24 question of law. Grand Hotel Gift Shop v. Granite State Ins. Co.,  
25 839 P.2d 599, 602 (Nev. 1992). The language of the insurance policy  
26 must be viewed "from the perspective of one not trained in law," and  
27 we must "give plain and ordinary meaning to the terms." Farmers

1 Ins. Exch., 64 P.3d at 473 (internal quotation marks omitted).  
2 “Unambiguous provisions will not be rewritten; however, ambiguities  
3 are to be resolved in favor of the insured.” Id. (footnote  
4 omitted); see also Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co., 184  
5 P.3d 390, 392 (Nev. 2008) (“In the insurance context, we broadly  
6 interpret clauses providing coverage, to afford the insured the  
7 greatest possible coverage; correspondingly, clauses excluding  
8 coverage are interpreted narrowly against the insurer.”) (internal  
9 quotation marks omitted); Capitol Indemnity Corp. v. Wright, 341 F.  
10 Supp. 2d 1152, 1156 (D. Nev. 2004) (noting that “a Nevada court will  
11 not increase an obligation to the insured where such was  
12 intentionally and unambiguously limited by the parties”).

13       The Policy is an “all-risk” policy: rather than providing  
14 coverage by reference to “enumerated perils,” as in a typical  
15 liability policy, an all-risk policy covers against any fortuitous  
16 loss or damage to covered property, while specific exclusions  
17 “generally are the limitations on coverage.” Jackson v. State Farm  
18 Fire & Cas. Co., 835 P.2d 786, 789 n.4 (Nev. 1992) (citing Garvey v.  
19 State Farm Fire & Casualty Co., 770 P.2d 704, 711 (Cal. 1989)).  
20 Thus, the Policy covers “all risks of direct physical loss or damage  
21 . . . from any external cause, except as specifically excluded.”  
22 (Policy at 2, 6 (#89-16).) The property covered by the Policy is  
23 also described in broad terms, including, among other things, “[t]he  
24 interest of [Coeur] in all Real and Personal Property owned by  
25 [Coeur] . . . comprising a part of and/or appertaining to their  
26 operations” at any location listed on a separate schedule, which the  
27 parties agree includes the Rochester Pit. (Id. at 6.)



1 Zurich contends that Coeur's claim for lost or damaged high-  
2 grade ore was properly rejected because, inter alia, it falls under  
3 several specific exclusions.<sup>7</sup> We agree. Property specifically  
4 excluded from coverage under the Policy includes "[c]urrency, deeds,  
5 evidence of debt or title, notes, jewelry, precious stones, furs,  
6 fine arts, gold, silver, platinum and other precious alloys or  
7 metals except as provided elsewhere in this policy." (Id.) Though  
8 Coeur frames its claim as one for high-grade ore, rather than for  
9 gold or silver, the ore's only value is that of the precious metals  
10 contained therein, less the cost of extraction. (See Depo. of  
11 Carolyn Turner at 78:17-79:3 (#85-13); Depo. of Elizabeth Druffel at  
12 46:25-49:1, 49:22-50:9 (#85-18); Kiel Decl., Ex. 1 (#89-3).) The  
13 gold and silver in the ore is not transformed or changed during  
14 processing; it is only separated from the rock in which it was  
15 previously embedded.<sup>8</sup> As such, based on the plain language of this  
16 exclusion, the gold and silver contained in the claimed high-grade  
17 ore is not property covered under the Policy.

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20 <sup>7</sup> Coeur has not asserted any right to recover on the basis of  
21 direct physical damage to the Rochester Pit itself from the highwall  
22 collapse, though it would seem that the collapse would constitute  
23 direct physical damage to real property. It may be that Coeur only  
24 holds an unpatented mining claim for the real estate at issue, and  
25 therefore does not have own any interest in the land itself, so as to  
26 potentially trigger coverage on that basis. Our record, however, is  
27 silent on this specific question. (See D.'s Countercls. ¶ 1 (#8)  
(stating that Couer both owns patented mining claims and controls  
unpatented mining claims in the area referred to as the Rochester  
Mine).) In any case, at every stage of this dispute, Coeur has sought  
to recover for allegedly lost or damaged ore, and we will consider its  
claim on that basis.

27 <sup>8</sup> Thus, the analogy suggested by Coeur at oral argument to wine  
28 produced from grapes or sugar from sugar beets is imprecise.

1 Coeur invokes the doctrines of noscitur a sociis and ejusdem  
2 generis, arguing that the exclusion is better read to apply only to  
3 coins made of precious metals or "items of personal adornment," as  
4 opposed to precious metals that remain unextracted from ore. (D.'s  
5 Opp. at 17-18 (#89).) At oral argument, Coeur refined this argument  
6 somewhat, suggesting that the exclusion applies to items of personal  
7 property, which can easily be removed or stolen. Coeur's arguments,  
8 however, are not persuasive. "Currency, deeds, evidence of debt or  
9 title, notes" and "fine arts" are neither coins nor items of  
10 personal adornment, and precious stones and precious metals are only  
11 sometimes used for such purposes. Similarly, fine arts, gold,  
12 silver, and other precious metals are only sometimes in forms that  
13 can be considered personal property, easily removed or stolen.  
14 Moreover, Coeur's arguments do not account for the last clause of  
15 the exclusion: ". . . except as provided elsewhere in this policy."  
16 The Policy specifically provides elsewhere for \$2 million limit on  
17 coverage for "Precious Metals (Coverage provided only while Precious  
18 Metals situated in Pour Room at Lovelock, NV location)." (Policy at  
19 2 (#89-16).) This provision suggests that it is not the form that  
20 the precious metals are in, but rather their location that  
21 determines whether or not they are excluded from coverage under the  
22 Policy – or, more precisely, whether they are excepted from  
23 exclusion from coverage. We conclude, therefore, that Coeur's claim  
24 for lost or damaged high-grade ore was properly denied under the  
25 Policy's exclusion for gold, silver, and other precious metals.

26 Zurich also could have properly denied all, or at least most,  
27 of Coeur's claim for loss or damage to high-grade ore under the  
28

1 exclusion for "[c]rude oil, natural gas, coal or other minerals  
2 prior to recovery above ground." (Id. at 6.) Coeur argues that  
3 this exclusion does not apply to open-pit mines, but only to  
4 underground mines. (D.'s Opp. at 20-21 (#89).) This argument,  
5 however, is unsupported by the plain language of the exclusion,  
6 which makes no distinction between underground mines and open-pit  
7 mines. Furthermore, even in an open-pit mine, the minerals that are  
8 being extracted are underground, in the plain and ordinary meaning  
9 of the term, until they are recovered – hence the need to drill down  
10 from the surface of the pit into a bench of ore and set off dynamite  
11 blasts to sever it from deeper benches. Coeur has a plausible  
12 argument that this exclusion does not apply to ore from the 6100  
13 bench that was blasted and severed from the underlying benches  
14 immediately prior to the south highwall collapse. On this view, the  
15 ore in the 6100 bench was recovered above ground, at least  
16 momentarily, before being covered by debris from the highwall  
17 collapse.<sup>9</sup> Nevertheless, only a small percentage of Coeur's total  
18 claim is for ore that had been broken and severed from the 6100  
19 bench. (See Kiel Decl. ¶ 5-7 (#89-3).) And, as discussed above,  
20 the claim for even that small portion of the ore was properly denied  
21 under the exclusion for gold, silver, and other precious metals.  
22 Thus, Coeur's entire claim for \$7,010,714 based on the value of gold

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24 <sup>9</sup> Zurich argues that "recovery above ground" does not occur until  
25 the broken and blasted ore is lifted off of the ground by loaders for  
26 placement in trucks; until then, the ore has merely been "loosened"  
27 from the underlying layers of ore. (P.'s Reply at 12-13 (#98).) In  
28 light of the requirement that ambiguous provisions be interpreted "to  
afford the insured the greatest possible coverage," Fed. Ins. Co., 184  
P.3d at 392, Zurich has the weaker argument here.

28

1 and silver contained in allegedly lost or damaged ore was properly  
2 denied pursuant to specific exclusions in the Policy.<sup>10</sup>

3 Coeur also asserts, in the alternative, that it is entitled to  
4 recover on its claim pursuant to the business interruption  
5 provisions of the Policy. The Policy provides coverage "against  
6 loss resulting directly from the necessary interruption of business  
7 caused by direct physical damage to or destruction of real or  
8 personal property, except finished stock, by the peril(s) insured  
9 against, during the term of this policy, on premises occupied by the  
10 Insured and situated as described under the Property Insured."  
11 (Policy at 15 (#89-16).) Business interruption coverage does not  
12 apply, however, until the period of the interruption exceeds 360  
13 hours. Zurich's liability is further limited to 100% of "gross  
14 earnings," as that term is defined in the Policy, that would have  
15 been earned during the twelve months immediately following the date  
16 of the interruption, no matter how long the interruption continues.  
17 (Policy at 3, 5 (#89-16).)

18 It is undisputed that Coeur's employees and equipment were put  
19 back to work on other portions of the Rochester Mine shortly after  
20 the highwall collapse, well within the 360 hour deductible. Coeur's  
21 argument, however, is that the highwall collapse permanently  
22 interrupted its business by requiring abandonment of its previous

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23  
24 <sup>10</sup> We need not address the parties' further arguments relating to  
25 other exclusions in the Policy, or the question of whether there was  
26 a "direct physical loss or damage" of the ore, in the meaning of the  
27 policy. We also emphasize that our analysis is based solely on the  
28 language of the policy itself and the undisputed facts: the parties'  
arguments regarding the meaning of the Policy based on evidence other  
than the language of the Policy itself are irrelevant, and were not  
considered.

1 mining plan. This resulted in a reduction of gross earnings,  
2 measurable by the difference between the value of ore that would  
3 have been mined under the old mining plan, minus the value of lower-  
4 grade ore mined instead under the revised mining plan – in other  
5 words, the same \$7,010,714 as Coeur claims under the physical damage  
6 provisions of the policy.

7 Business interruption insurance does not provide a guarantee  
8 that the insured's business plan will be fully implemented as hoped,  
9 as Coeur would have it. On its own terms, the Policy provides  
10 coverage for losses resulting "directly from the necessary  
11 interruption of business," that is, the interruption of mining  
12 operations, not interruption of work pursuant to any particular  
13 mining plan. See, e.g., Winters v. State Farm Fire & Cas. Co., 73  
14 F.3d 224, 228-29 (9th Cir. 1995) (citing Pac. Coast Eng'g Co. v. St.  
15 Paul Fire & Marine Ins. Co., 88 Cal. Rptr. 122 (Cal. Ct. App. 1970),  
16 for the proposition that "business interruption insurance provides  
17 coverage only for losses directly resulting from interruption of  
18 business and not merely from interruption of work on a particular  
19 product"); Buxbaum v. Aetna Life & Cas. Co., 126 Cal. Rptr. 2d 682,  
20 691-692 (Cal. Ct. App. 2002) (rejecting law firm's claim under  
21 business interruption policy because the policy provided coverage  
22 "only for losses resulting directly from interruption of the  
23 business, i.e., operation of the firm, and not merely from  
24 interruption of the work being done on a particular client matter at  
25 the time of the occurrence of a peril insured against") (quoting

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27

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1 Pac. Coast Eng'g Co., 88 Cal. Rptr. at 124.<sup>11</sup> Business interruption  
2 coverage is only available under the Policy when the "determined  
3 period of interruption" of mining operations "exceeds 360 hours."  
4 (Policy at 3 (#89-16).) Here, there was no such interruption of  
5 greater than 360 hours; though mining operations had to be moved to  
6 other, apparently less productive areas of the Rochester Mine,  
7 Coeur's employees and equipment from the area affected by the  
8 highwall collapse were back in business shortly after the collapse.  
9 Thus, Coeur is not entitled to recover under the business  
10 interruption provisions of the Policy.

11 Several courts have been sympathetic to the view espoused by  
12 Coeur that such a conclusion in essence punishes Coeur for  
13 attempting to mitigate its damages in a timely manner. See Maher v.  
14 Cont'l Cas. Co., 76 F.3d 535, 539 n.1 (4th Cir. 1996); Am. Med.  
15 Imaging Corp. v. St. Paul Fire & Marine Ins. Co., 949 F.2d 690, 692-  
16 93 (3d Cir. 1991). We disagree. "If the insured continues to  
17 operate despite physical damage, business interruption coverage does  
18 not apply." Buxbaum, 126 Cal. Rptr. 2d at 693-94. An insured "is  
19 not 'punished' by continuing business at a lower level following an

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20  
21 <sup>11</sup> As noted above, Nevada law applies in this case. Nevada case  
22 law interpreting business interruption clauses, however, is sparse.  
23 Where the Nevada Supreme Court has not addressed an issue, "we must  
24 use our best judgment to predict how that court would decide it."  
25 Capital Dev. Co. v. Port of Astoria, 109 F.3d 516, 519 (9th Cir. 1997)  
26 (quoting Allen v. City of L.A., 92 F.3d 842, 847 (9th Cir. 1996)). In  
27 the context of interpreting insurance policy terms, the Nevada Supreme  
28 Court has often looked to persuasive precedent from other  
jurisdictions, especially California. See, e.g., Fed. Ins. Co., 184  
P.3d at 395 (beginning a discussion of authority from other  
jurisdictions with analysis of California appellate court decision);  
Jackson, 835 P.2d at 789 n.4 (citing California appellate court  
decision regarding all-risk policies). We shall take a similar  
approach here.

1 event causing a physical loss or damage because, if in fact the  
2 insured is able to continue business following the event, the  
3 business interruption coverage never applied in the first place.”  
4 Id. at 694. Here, Coeur was forced to interrupt its business for a  
5 short period of time, but was able to resume operations well within  
6 the 360 hour deductible that applies to its business interruption  
7 coverage. As such, the business interruption coverage of the Policy  
8 never applied, and Coeur’s claim on that basis was properly  
9 rejected.

10 Coeur’s claim for extra expenses associated with mitigating its  
11 damages depends on Coeur having a viable claim under either the  
12 physical damage provisions or the business interruption provisions  
13 of the Policy. (See D.’s Opp. at 27 (#89) (arguing that the “Extra  
14 Expense Coverage is contained in a separate section of the policy  
15 and applies to losses under both the property damage and business  
16 interruption coverage provisions”).) Zurich disputes Coeur’s  
17 interpretation of the Policy with regard to extra expenses, arguing  
18 that the extra expense coverage applies only to claims under the  
19 business interruption provisions of the Policy, and not to the  
20 physical damage provisions. (See D.’s Mot. at 31 (#82).) We have  
21 concluded, however, that Coeur is not entitled to recover under  
22 either theory. As such, there is no basis for Coeur to recover its  
23 claimed extra expenses, and we need not resolve the dispute between  
24 the parties regarding the applicability of the extra expense  
25 provisions of the Policy.

26 In short, Coeur’s claims under the Policy were properly  
27 rejected by Zurich. Coeur’s claim for lost or damaged ore falls  
28

1 under one or more specific exclusions from coverage. The business  
2 interruption provisions of the Policy were not triggered, because  
3 Coeur's business was not interrupted for a period longer than the  
4 applicable 360 hour deductible. Coeur's claim for extra expenses  
5 fails because Coeur has no valid claim under either the physical  
6 damage provisions or business interruption provisions of the Policy.  
7 As such, Zurich is entitled to summary judgment in its favor on the  
8 issue of liability under the Policy.

9 **C. Coeur's Bad Faith Claim**

10 Zurich seeks summary judgment in its favor on Coeur's second  
11 claim for relief for bad faith breach of an insurance contract.  
12 Under Nevada law, bad faith is "an actual or implied awareness of  
13 the absence of a reasonable basis for denying benefits of the  
14 insurance policy." Allstate Ins. Co. v. Miller, 212 P.3d 318, 324  
15 (Nev. 2009) (citing U.S. Fid. v. Peterson, 540 P.2d 1070, 1071  
16 (1975)). Here, as discussed above, Zurich had a reasonable basis  
17 for denying Coeur's claims, namely, Coeur is not entitled to recover  
18 under the terms of the Policy. As such, Zurich is entitled to  
19 summary judgment in its favor on this claim for relief.

20 **D. Coeur's Claim Pursuant to Nev. Rev. Stat. § 686A.310.**

21 Zurich also seeks summary judgment on Coeur's claim for relief  
22 pursuant to Nev. Rev. Stat. § 686A.310 regarding the manner in which  
23 Zurich processed its claim. Our conclusions regarding the propriety  
24 of Zurich's denial of the claim and lack of bad faith are not  
25 dispositive of this issue. Unlike a cause of action for bad faith,  
26 the provisions of Nev. Rev. Stat. § 686A.310 "address the manner in  
27 which an insurer handles an insured's claim whether or not the claim



1 is denied." Schumacher v. State Farm Fire & Cas. Co., 467 F. Supp.  
2 2d 1090, 1095 (D. Nev. 2006) (citing Pioneer Chlor Alkali Co., Inc.  
3 v. Nat'l Union Fire Ins. Co., 863 F. Supp. 1237, 1243 (D. Nev.  
4 1994)). Coeur argues that Zurich breached six subsections of Nev.  
5 Rev. Stat. § 686A.310. We will analyze each of these arguments  
6 separately.

7 1. NEV. REV. STAT. § 686A.310(1)(a)

8 Coeur argues that Zurich violated the subsection that defines  
9 "misrepresenting to insureds or claimants pertinent facts or  
10 insurance policy provisions relating to any coverage at issue" to be  
11 an "unfair practice." NEV. REV. STAT. § 686A.310(1)(a). Coeur  
12 points to two alleged misrepresentations of pertinent facts in  
13 particular, both from the September 20, 2007, letter in which Zurich  
14 denied Coeur's claim. (See Denial Letter (#103-22).) In each case,  
15 Coeur complains that Zurich misrepresents Coeur's claims. First is  
16 a passage that reads as follows:

17 [the claimed lost ore] has not itself suffered any "direct  
18 physical" loss or damage. Nor is Coeur presenting a claim  
19 for any such 'direct physical' loss or damage' to that ore  
20 itself. Instead, Coeur is seeking to recover the lost  
21 mining value because of the ore's inaccessibility in the  
step-out and the berm. The mere detrimental economic  
22 impact because of Coeur's lost mining capacity does not  
23 present a claim for "direct physical" loss or damage to  
24 property . . . ."

22 (Id. at 16-17.) Coeur argues that, to the contrary, it has asserted  
23 precisely a claim for "direct physical loss or damage to that ore  
24 itself." Second, Coeur objects to the letter's next paragraph, in  
25 which Zurich finds that, even if there were direct physical loss or  
26 damage, such loss or damage would be properly denied pursuant to an  
27 exclusion for damage resulting from "faulty workmanship," "faulty  
28

1 methods of construction," and/or "faulty errors or omissions in  
2 design." (Id. at 17.) Coeur argues that this assertion amounts to  
3 a misrepresentation of Coeur's claim because Coeur never made a  
4 claim for damage to the highwall, so as to trigger the provisions of  
5 the Policy that could relate to the design or construction of the  
6 highwall, but only made a claim for lost ore.

7 Coeur has not pointed out, nor have we discovered, any  
8 authority supporting the notion that such statements could  
9 constitute a violation of Nev. Rev. Stat. § 686A.310(1)(a). This  
10 subsection prohibits such malfeasance as an insurer misrepresenting  
11 the terms of an insurance policy to its insured, or misrepresenting  
12 to its insured facts that are within the insurer's knowledge that  
13 could give rise to coverage. See, e.g., Albert H. Wohlers & Co. v.  
14 Bartgis, 969 P.2d 949, 961 (Nev. 1998) (insurer misrepresented to  
15 the insured that a policy was similar to the insured's previous  
16 policy and unilaterally inserted provisions into the policy without  
17 disclosing their effect to the insured); Stalberg v. W. Title Ins.  
18 Co., 282 Cal Rptr. 43, 50 (Cal. Ct. App. 1991) (under similar  
19 provision of California law, finding substantial evidence of  
20 violation where insurer created and recorded "wild" deeds containing  
21 fictitious easements, and concealed this fact from its insured).  
22 Zurich's characterizations of Coeur's claim in the Denial Letter are  
23 not misrepresentations of the terms of the Policy or of pertinent  
24 facts relating to coverage, but rather constitute Zurich's analysis  
25 of the Policy and the facts pertinent to Coeur's claim. An  
26 insurer's analysis of an insured's claim in a letter denying  
27 coverage need not necessarily be framed in the manner that the

1 insured would prefer. As such, Zurich is entitled to summary  
2 judgment on Coeur's claim pursuant to Nev. Rev. Stat.  
3 § 686A.310(1)(a).

4 2. NEV. REV. STAT. § 686A.310(1)(c)

5 Coeur argues that Zurich violated the subsection that defines  
6 "[f]ailing to adopt and implement reasonable standards for the  
7 prompt investigation and processing of claims arising under  
8 insurance policies" to be an "unfair practice." NEV. REV. STAT.  
9 § 686A.310(1)(c). Coeur's claim under this subsection relates  
10 primarily to the qualifications and performance of the people  
11 conducting the investigation of Coeur's claim.<sup>12</sup> Coeur concedes  
12 that Zurich did adopt and implement best practices guidelines in  
13 April 2007. (D.'s Opp. at 27-28 (#103).) Coeur's argument is only  
14 that Zurich's employees or agents violated those standards, which is  
15 perhaps a subspecies of failure to implement reasonable standards,  
16 though Coeur does not present, and we have not discovered, any  
17 authority in support of that proposition. Moreover, there is no  
18 indication that the qualifications or performance of the people  
19 conducting the investigation of Coeur's claim had any bearing on the  
20 outcome or timing of Zurich's coverage decision. Zurich did not  
21 fail to investigate Coeur's claim appropriately; rather, Zurich  
22 rejected Coeur's reasoning in support of its claim. Cf. Pioneer  
23 Chlor Alkali, 863 F. Supp. at 1249 (finding genuine issue of fact  
24 regarding section 686A.310(c) claim where there was some evidence  
25 that the insurance company did not investigate all claimed theories

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26  
27 <sup>12</sup> Coeur also repeats arguments that primarily relate to Nev. Rev.  
28 Stat. § 686A.310(1)(d). We will address these arguments below.

1 regarding cause of loss). As such, Zurich did not violate this  
2 subsection, and is entitled to summary judgment in its favor on this  
3 issue.

4 3. NEV. REV. STAT. § 686A.310(1)(d)

5 Coeur argues that Zurich violated the subsection that defines  
6 “[f]ailing to affirm or deny coverage of claims within a reasonable  
7 time after proof of loss requirements have been completed and  
8 submitted by the insured” to be an “unfair practice.” NEV. REV.  
9 STAT. § 686A.310(1)(d). Coeur argues that its claim was submitted  
10 on December 1, 2006, and that “detailed documentation” of the claim  
11 was submitted in January 2007. The “detailed documentation” to  
12 which Coeur refers, however, is only a brief letter summarizing  
13 Coeur’s understanding of the facts, and a brief summary of the  
14 claim; it is not “detailed documentation” of the claim. In fact,  
15 the first paragraph of the letter indicates that if Zurich were to  
16 “desire more detail,” Coeur would “attempt to accommodate [Zurich’s]  
17 request.” (See Letter from Carolyn Turner to Joe Bauer (January 24,  
18 2007), Bithell Decl., Ex. L (#103-14).) In the following months  
19 Coeur submitted certain documentation in support of the revised  
20 claim, but did not immediately complete its proof of loss  
21 requirements; the evidence in the record supports Zurich’s  
22 contention that the proof of loss requirements were not completed  
23 until July 11, 2007.<sup>13</sup> (See D.’s Mot. at 27 (#92); Framson Decl.,  
24 Ex. 23 (## 95-24) (summary of dates on which documentation from

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25  
26 <sup>13</sup> Contrary to Coeur’s assertion, presented at oral argument, it  
27 was perfectly appropriate for Zurich to wait for a complete assessment  
28 regarding the cause of the highwall collapse before affirming or  
denying coverage on Coeur’s claim.

1 Coeur was received).) As noted above, Zurich denied Coeur's claim  
2 on September 20, 2007. Thus, there was a delay of just over two  
3 months, from July 11, 2007, until September 20, 2007, between Coeur  
4 completing its proof of loss requirements and Zurich's decision  
5 regarding the claim. There is no authority in support of the notion  
6 that such a short delay could support a claim under Nev. Rev. Stat.  
7 § 686A.310(d), especially with regard to a large claim involving  
8 relatively complex technical questions. Cf. Estate of Lomastro ex  
9 rel Lomastero v. Am. Family Ins. Group, 195 P.3d 339, 351-52 (Nev.  
10 2008) (finding genuine issue of material fact as to whether ten-  
11 month delay without affirming or denying coverage on a claim  
12 involving a single-vehicle rollover accident was unreasonable). As  
13 such, Zurich is entitled to summary judgment in its favor on this  
14 claim.

15 4. NEV. REV. STAT. § 686A.310(1)(e)

16 Coeur argues that Zurich violated the subsection that defines  
17 "[f]ailing to effectuate prompt, fair and equitable settlements of  
18 claims in which liability of the insurer has become reasonably  
19 clear" to be an "unfair practice." NEV. REV. STAT. § 686A.310(1)(e).  
20 As discussed above, Zurich is not liable here. Thus, Coeur's  
21 arguments relating to this subsection fail.

22 5. NEV. REV. STAT. § 686A.310(1)(f)

23 Coeur argues that Zurich violated the subsection that defines  
24 "[c]ompelling insureds to institute litigation to recover amounts  
25 due under an insurance policy by offering substantially less than  
26 the amounts ultimately recovered in actions brought by such  
27 insureds, when the insureds have made claims for amounts reasonably

1 similar to the amounts ultimately recovered" to be an "unfair  
2 practice." NEV. REV. STAT. § 686A.310(1)(f). Again, Coeur's claims  
3 under the Policy were properly rejected, so Zurich did not violate  
4 this subsection.

5 6. NEV. REV. STAT. § 686A.310(1)(n)

6 Coeur argues that Zurich violated the subsection that defines  
7 "[f]ailing to provide promptly to an insured a reasonable  
8 explanation of the basis in the insurance policy, with respect to  
9 the facts of the insured's claims and the applicable law, for the  
10 denial of his claim or for an offer to settle or compromise his  
11 claim" to be an "unfair practice." NEV. REV. STAT. § 686A.310(1)(n).  
12 As discussed above, Zurich's denial of Coeur's claim was reasonably  
13 timely. Furthermore, the September 20, 2007, denial letter is a  
14 detailed explanation of Zurich's basis for denying the claim,  
15 examining in detail the Policy, the facts of Coeur's claim and the  
16 applicable law. (Denial Letter, (#103-22).) Though the letter's  
17 analysis reaches the same conclusion we have by means of somewhat  
18 different reasoning, there is nothing inherently unreasonable or  
19 absurd about Zurich's analysis. In short, there is no evidence in  
20 the record that could support Coeur's claim that Zurich violated  
21 this subsection.

22 **D. Zurich's Motion to Exclude (#119)**

23 Zurich has moved to exclude certain evidence relating to  
24 damages submitted by Coeur in support of its opposition to Zurich's  
25 motion for summary judgment regarding Coeur's bad faith claim and  
26 claim pursuant to Nev. Rev. Stat. § 686A.310. For the reasons  
27 stated above, Zurich is entitled to summary judgment in its favor on  
28

1 those claims, whether or not Coeur's evidence is excluded. As such,  
2 Zurich's motion (#119) is moot, and will be denied on that basis.

3  
4 **IV. Conclusion**

5 Zurich properly denied Coeur's claims under the Policy because  
6 the alleged property damage was specifically excluded from coverage  
7 and Coeur suffered no business interruption longer than the Policy's  
8 360 hour deductible. Thus, Coeur's causes of action for breach of  
9 contract and bad faith fail. Further, the evidence in the record is  
10 insufficient to support any of Coeur's allegations under Nevada's  
11 Unfair Trade Practices Act, Nev. Rev. Stat. § 686A.310. Zurich is  
12 therefore entitled to summary judgment in its favor on its claim for  
13 declaratory relief, and with regard to all of Coeur's counterclaims.

14  
15 **IT IS, THEREFORE, HEREBY ORDERED THAT** Zurich's "Objections to  
16 Evidence Submitted by Coeur Rochester in Opposition to Zurich  
17 American's Motion for Summary Judgment" (#99) are **OVERRULED**.

18  
19 **IT IS FURTHER ORDERED THAT** Zurich's "Motion to Exclude Evidence  
20 of Coeur's Damages Pertaining to Bad Faith, Statutory Violations  
21 Claims [FRCP 37(c)]" (#119) is **DENIED** as moot.

22  
23 **IT IS FURTHER ORDERED THAT** Zurich's "Motion for Summary  
24 Judgment or, in the Alternative, Partial Summary Judgment [Plaintiff  
25 Zurich American's Claim for Declaratory Relief; Counterclaimant  
26 Coeur Rochester's Claim for Breach of Contract]" (#81) is **GRANTED**.

1           **IT IS FURTHER ORDERED THAT** Zurich's "Motion for Partial Summary  
2 Judgment [Coeur Rochester's Claims for Bad Faith, Violation of Nev.  
3 Rev. Stat. § 686A.310, Punitive Damages]" (#91) is **GRANTED**.

4  
5           **IT IS FURTHER ORDERED THAT** Coeur's "Motion for Partial Summary  
6 Judgment on Liability" (#94) is **DENIED**.

7  
8           The Clerk shall enter judgment accordingly.

9  
10  
11 DATED: June 24, 2010.

12   
13 UNITED STATES DISTRICT JUDGE