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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT TACOMA

7 TODD and KAREN BRANDT,

8 Plaintiffs,

9 v.

10 AMERICAN BANKERS INSURANCE
11 COMPANY OF FLORIDA,

12 Defendant.

CASE NO. C08-5760BHS

ORDER DENYING PARTIAL
SUMMARY JUDGMENT

13 This matter comes before the Court on Defendant's ("American Bankers") motion
14 for summary judgment on Plaintiffs' (the "Brandts") contractual claims. Dkt. 69. The
15 Court has already made rulings and reserved rulings on the instant motion. Dkt. 100. This
16 order concerns the reserved summary judgment ruling on the issue of whether the Brandts
17 have produced evidence in the record regarding the Actual Cash Value ("ACV") of loss
18 in this matter.¹ The Court has considered the pleadings filed in support of and in
19 opposition to the motion and the remainder of the file and hereby denies American
20 Bankers' motion for summary judgment on this issue for the reasons stated herein.

21 **I. FACTUAL AND PROCEDURAL HISTORY**

22 For a more thorough procedural and factual history of this case see the Court's
23 prior orders on summary judgment and order to set aside default judgment (Dkts. 41,
24 100). In short, this case arises out of the Brandts' breach of contract claim against
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27 ¹During the pretrial conference, the Court made several rulings. This order expounds only
28 on the reasoning regarding the Court's denial of American Bankers' summary judgment motion
based on the theory that the Brandts failed to establish ACV in this matter.

1 American Bankers for the alleged failure to pay all claims owed under a Standard Flood
2 Insurance Policy (“SFIP”).

3 II. DISCUSSION

4 On June 2, 2010, the Court conducted the pretrial conference in this matter. During
5 the conference, the Court addressed American Bankers’ theory that the Brandts’ claims
6 are precluded on the basis that they failed to establish the ACV of loss of their additional
7 SFIP claims pursuant to the terms of their policy. *See* Dkt. 100 at 6-7 (discussing this
8 issue).

9 At the conference, the Court concluded that the Brandts bear the burden of proving
10 every aspect of their claim. Also at the hearing, the Brandts conceded they are entitled to
11 recover only the ACV of their additional claims as no repairs to the Brandts’ home post-
12 flood were made. *See Hess v. North Pacific, Ins. Co.*, 122 Wn.2d 180, 185 (holding that
13 repair/replacement cost may not be sought absent actual repairs or replacement but that
14 ACV may still be recovered). The SFIP part II(B)(2) defines ACV as “the cost to replace
15 an insured item of property at the time of loss, less the value of its physical depreciation.”
16 Therefore, to survive summary judgment the Brandts must establish a material question of
17 fact as to whether ACV was established as part of the Brandts’ insurance claim.

18 The parties agree that there is no evidence of a depreciation calculation in the
19 record with respect to the Brandts’ additional claims. However, in opposition to summary
20 judgment on this issue, the Brandts argue they have met their burden of establishing their
21 loss by asserting that the replacement cost is equal to ACV. The Brandts intend to call
22 Todd Brandt to testify that the ACV and the repair/replacement cost pertaining to the
23 additional claims are equivalent. *See* Dkt. 86 at 3. Although the Court remains skeptical
24 of Mr. Brandt’s ability to credibly establish ACV at trial, credibility is not an issue to be
25 weighed on summary judgment. Mr. Brandt, as a home owner, is entitled to testify to the
26 value of his home. Mr. Brandt’s affidavit is sufficient to survive the summary judgment
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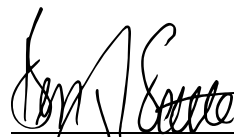
1 stage as it presents a material question of fact when viewed in the light most favorable to
2 the Brandts. Whether Mr. Brandt's testimony will ultimately support the Brandts' claim
3 that ACV equals the repair/replacement cost of the items in their additional claims
4 remains for trial.

5 Therefore, summary judgment on this issue is denied.

6 **III. ORDER**

7 Therefore, it is hereby **ORDERED** that, as discussed herein, summary judgment is
8 **DENIED** on American Bankers' theory that the Brandts' claims fail because they did not
9 determine the ACV of loss;

10 DATED this 4th day of June, 2010.

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13 BENJAMIN H. SETTLE
14 United States District Judge