

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION**

**BEAUMONT PRESERVATION
PARTNERS, LLC**

v.

**INTERNATIONAL CATASTROPHE
INSURANCE MANAGERS, LLC, *et al.***

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NO. 1:10-CV-548

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This case is assigned to the Honorable Ron Clark, United States district judge, and was referred to the Honorable Earl S. Hines, United States magistrate judge, for pretrial matters pursuant to a Referral Order entered on September, 10, 2010. On August 4, 2011, the case was reassigned to United States Magistrate Judge Zack Hawthorn. Pending is Defendants’ “Motion for Partial Summary Judgment” (Docket No. 25).

I. Background

This action involves disputes arising from damage to the First City Building allegedly caused by Hurricane Ike in September 2008. The First City Building is a commercial office building located in downtown Beaumont, Texas. Plaintiff Beaumont Preservation Partners, LLC (BPP) is the owner of an interest in the First City Building.¹ BPP purchased an insurance policy (the Policy) on the building from Defendant Certain Interested Underwriters at Lloyd’s of London, Syndicate # 4242

¹ BPP is a resident of Beaumont, Texas.

(Syndicate 4242)² and/or Defendant International Catastrophe Insurance Managers, LLC (ICAT).³ Syndicate 4242 is the insurer identified on the Policy, which ICAT issued on Syndicate 4242's behalf. The Policy “provides coverage for loss or damage directly caused by wind and hail.” (Defs.’ Mot. Summ. J., Ex. 4 ICAT NPNA 204, Docket No. 25.)

BPP alleges that Hurricane Ike caused substantial damage to the First City Building on or about September 12, 2008. BPP further alleges that it submitted a timely claim against the Policy for damage caused by wind and water entering the building through wind-created openings. BPP’s claim was assigned to Defendant Boulder Claims, LLC (Boulder Claims), which is a property insurance claims administrator or adjuster.⁴ Boulder Claims retained GAB Robins North America, Inc. (GAB Robins), an independent adjusting firm, to estimate BPP’s loss.⁵ GAB Robins assigned its adjuster, Defendant Carl Vinsek, to BPP’s claim.⁶ Ultimately, Syndicate 4242 refused to pay BPP for the alleged damage to the First City Building’s concrete solar panels, concrete panel steel support structure, and brick veneer. BPP’s pending lawsuit is primarily based on Defendants’ alleged wrongful denial of its claim.

On September 20, 2011, BPP filed its stipulation of dismissal (Docket No. 65) as to GAB Robins and Karl Vinsek. BPP’s claims against Syndicate 4242, ICAT, and Boulder Claims are still pending. BPP alleges claims for fraud, conspiracy to commit fraud, violations of the Texas

² Syndicate 4242 is an insurance company incorporated in and having its principal place of business outside the United States of America.

³ ICAT is a foreign insurance company.

⁴ Boulder Claims is a foreign adjusting company.

⁵ GAB Robins is a Delaware corporation.

⁶ Mr. Vinsek resides and is domiciled in Ferdinand, Indiana.

Deceptive Trade Practices Act (DTPA), and breach of the duty of good faith and fair dealing against the three remaining Defendants. (Pl.'s Orig. Compl. 12-15, 17-18, Docket No. 1.) BPP's DTPA claims are brought pursuant to the following statutory grounds: (1) violations of the Texas Business and Commerce Code § 17.46(b)'s laundry-list; (2) breach of warranty; (3) unconscionability; and (4) violations of Chapter 541 of the Texas Insurance Code. (Id. at 15.) BPP also alleges breach of contract and violations of Chapter 542 of the Texas Insurance Code against ICAT. (Id. at 15-17.) BPP seeks recovery of actual damages, compensatory damages, statutory interest under the Texas Insurance Code, and attorneys' fees. (Id. at 19-20.) Moreover, BPP seeks recovery of punitive, treble, and exemplary damages. (Id.)

Pending is Defendants' motion for partial summary judgment (Docket No. 25). Syndicate 4242, ICAT, and Boulder Claims seek dismissal of all of the above claims, except for BPP's claim for breach of contract. Defendants' motion is premised on their interpretation of the summary judgment evidence, which purportedly shows that there is a bona fide controversy between the parties. Defendants allege that their retained experts do not believe that the First City Building's concrete solar panels, concrete panel steel support structure, and brick veneer sustained wind damage during Hurricane Ike, which contradicts the opinions of BPP's experts. Defendants argue that the existence of this bona fide controversy precludes recovery under the causes of action on which they have moved for summary judgment. Defendants further argue that even if there was no such controversy, BPP cannot recover punitive and treble damages because there is no evidence that Defendants acted knowingly or intentionally. For the reasons stated below, Defendants' motion should be granted in part and denied in part.

II. Jurisdiction; Venue

The court has subject-matter jurisdiction predicated upon diversity of citizenship and an amount in controversy in excess of \$75,000, exclusive of interest and costs. See 28 U.S.C. § 1332. Venue is proper because the events giving rise to the above claims occurred within the confines of this district. See 28 U.S.C. § 1391.

III. Standard of Review

Summary judgment shall be rendered when the movant shows that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A dispute is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is material when it is relevant or necessary to the ultimate conclusion of the case. Id.

The movant has the burden to identify “each claim or defense—or the part of each claim or defense—on which summary judgment is sought.” Fed. R. Civ. P. 56(a). “If the dispositive issue is one on which the non-moving party will bear the burden of proof at trial, the moving party may satisfy its burden by merely pointing out that the evidence in the record contains insufficient proof concerning an essential element of the nonmoving party’s claim.” Norwegian Bulk Transp. A/S v. Int’l Marine Terminals P’Ship, 520 F.3d 409, 412 (5th Cir. 2008) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). The movant must support its assertion by “citing to particular parts or materials in the record, . . . showing that the materials cited do not establish the . . . presence of a genuine dispute, or [showing] that the adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1). The citations to the summary judgment evidence should be specific. See Smith v. United States, 391 F.3d 621, 625 (5th Cir. 2004). Summary judgment must

be denied when the movant fails to meet its initial burden, regardless of the nonmovant's response. Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994).

If the movant satisfies its burden, the burden then shifts to the nonmoving party to show that specific facts exist over which there is a genuine dispute. Id. (citing Celotex, 477 U.S. at 325). Like the movant, the nonmovant must satisfy its burden through specific citations to the summary judgment evidence. See Fed. R. Civ. P. 56(c)(1); Smith, 391 F.3d at 625. “[T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.” Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150 (2000).

Either party may object to the summary judgment evidence on the grounds that it cannot be presented in a form that would be admissible in evidence. Fed. R. Civ. P. 56(c)(2). “The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated. There is no need to make a separate motion to strike.” Comments to 2010 Amendments to Fed. R. Civ. P. 56(c)(2). A court may not consider hearsay evidence nor may it consider unauthenticated documents. Johnson v. Spohn, 334 F.3d. Appx. 673, 677-78 (5th Cir. 2009); Martin v. John W. Stone Oil Distrib. Inc., 819 F.2d 547, 549 (5th Cir. 1987); Falk v. Wells Fargo Bank, No. 3:09-CV-678, 2011 WL 3702666, at *3 (N.D. Tex. Aug. 19, 2011).

IV. Analysis

A. BPP's Objections to the “Undisputed Facts” and “Evidence”

Local Rule CV-56(a) for the Eastern District of Texas provides that a motion for summary judgment must contain a statement of undisputed material facts with appropriate citations to proper summary judgment evidence. E.D. Tex. Local R. CV-56(a). In accordance with this rule,

Defendants' motion for partial summary judgment contains a purported statement of undisputed facts with citations to the complaint, the Policy, the affidavit of Mr. Vinsek, the affidavit of an engineer hired by Defendants to inspect the First City Building, and reports attached to the engineer's affidavit. (Defs.' Mot. Summ. J. 4-7, Docket No. 25.) In its response to the motion for partial summary judgment, BPP objects to this summary judgment evidence on the grounds that it is irrelevant to the proffered undisputed facts, not based on personal knowledge, constitutes hearsay, and is unreliable pursuant to Rule 702 of the Federal Rules of Evidence. (Pl.'s Resp. Defs.' Mot. Summ. J. 3-12, Docket No. 62.) BPP requests that the court strike the inadmissible summary judgment evidence and the undisputed facts supported by such evidence.

The undersigned will address BPP's evidentiary objections throughout this report and recommendation when the objections are relevant to the undersigned's analysis. See Johnson, 334 Fed. Appx. at 678 (finding no error where the district court overruled the objections to the summary judgment evidence as moot and relied on separate evidence to grant summary judgment). In the event that an objection is not analyzed in this report and recommendation, the objection is denied as moot.

B. Duty of Good Faith and Fair Dealing

1. Legal Standard

"Under Texas law, there is a duty on the part of the insurer to deal fairly and in good faith with an insured in the processing of claims." Higginbotham v. State Farm Mut. Auto. Ins. Co., 103 F.3d 456, 459 (5th Cir. 1997) (citing Arnold v. Nat'l Cnty. Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987)). This cause of action arises when an "insurer has no reasonable basis for denying or delaying payment of a claim or when the insurer fails to determine or delays in determining whether

there is any reasonable basis for denial.” Id. (citing Arnold, 725 at 167); accord State Farm Lloyds v. Nicolau, 951 S.W.2d 444, 448 (Tex. 1997) (citing Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 56 (Tex. 1997)). The insured must prove that the insurer failed to settle the claim even though it “knew or reasonably should have known that it was reasonably clear that the claim was covered.” Lee v. Catlin Specialty Ins. Co., 766 F.Supp.2d 812, 818 (S.D. Tex. 2011) (quoting Giles, 950 S.W.2d at 54-55). “The key inquiry is the reasonableness of the insurer’s conduct.” Kondos v. Allstate Texas Lloyds, No. 1:03-CV-1440, 2005 WL 1004720, at *10 (E.D. Tex. April 25, 2005). Even if a reasonable basis is later determined to be erroneous, the insurer will not be liable for breach of the duty of good faith and fair dealing. Higginbotham, 103 F.3d at 459.

“A bona fide controversy is sufficient reason for failure of an insurer to make a prompt payment of a loss claim.” Id. A bona fide controversy may exist when an insurer disputes liability under an insurance policy. Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 17 (1994). However, when an insurer denies a claim solely in reliance on an expert’s report, the insurer will not be shielded from liability “if there is evidence that the report was not objectively prepared or the insurer’s reliance on the report was unreasonable.” Lee, 766 F.Supp.2d at 818 (quoting Nicolau, 951 S.W.2d at 448). The reasonableness of the insurer’s conduct is determined by the facts that were available to it at the time of denial. Id. (citing Viles v. Sec. Nat’l Ins. Co., 788 S.W.2d 566, 567 (Tex. 1990)).

2. *Defendants’ Argument and Summary Judgment Evidence*

In the present case, Boulder Claims retained GAB Robins on September 17, 2008, to adjust BPP’s claim on the First City Building. (Defs.’ Mot. Summ. J., Ex. 1 2, Docket No. 25.) GAB Robins’s employee Karl Vinsek was assigned to the claim and inspected the property on September 23, 2008. (Id.) Mr. Vinsek requested that Boulder Claims retain an engineer to determine whether

there was any structural damage to the building. (Id.) Exponent Failure Analysis Associates (Exponent) was retained in September 2008 by Boulder Claims to conduct the engineering evaluation and to investigate the alleged damage to the First City Building. (Id. at Ex. 2 2.) On October 1, 2008, Exponent employees Jeff Travis, P.E., S.E. and Dennis M. McCann, Ph.D. P.E. inspected the First City Building. On November 17, 2008, Exponent issued its first report, opining that the concrete solar panels, steel structures supporting the solar panels, and brick masonry infill wall were not damaged by Hurricane Ike. (Id. at BC000647-48.) The opinions were based on site observations, review of available documentation, and engineering analysis. (Id. at BC000647.)

On April 2, 2009, Exponent re-inspected the building along with BPP's architect and engineer. (Id. at 3.) Subsequently, it provided a supplemental report on May 20, 2009, in which Exponent reaffirmed its previous opinions based on Mr. Travis's observations that the vertical steel members were measured to be plumb and that the steel corrosion and spalling of concrete was a function of aging rather than the hurricane. (Id. at BC000250-52.) Both of the reports are attached to Mr. Travis's affidavit, which states that he is the custodian of records for Exponent. (See id. at Exs. A, B.) Mr. Travis's and Mr. McCann's curriculums vitae are also attached to the affidavit. (See id. at BC000651-57.)

Mr. Vinsek issued his reports on October 2, 2008, and on November 18, 2008. (Id. at Ex. 1 3.) In the reports, he made recommendations regarding the replacement cost value of BPP's claims. (Id.) Mr. Vinsek's affidavit states that his recommendations were based on his inspection of the property and the Exponent engineers' opinions and report. (Id.) Mr. Vinsek's reports are not attached to Defendants' motion for partial summary judgment.

Defendants argue that Mr. Vinsek's affidavit, Mr. Travis's affidavit, and the Exponent reports demonstrate that Defendants had a reasonable basis for their denial of the disputed portion of BPP's claim. Defendants assert that this evidence demonstrated that all of the damage to the First City Building was not caused by Hurricane Ike.

3. BPP's Objections to Defendants' Summary Judgment Evidence

BPP objects to Mr. Vinsek's and Mr. Travis's affidavits to the extent that they purport to have knowledge of Syndicate 4242's, ICAT's, and Boulder Claims's actions and the reasons for those actions. The undersigned will only consider the affidavits to the extent that they discuss facts within Mr. Vinsek's and Mr. Travis's personal knowledge, both of whom were hired to inspect and make recommendations regarding BPP's claims. BPP also objects to Defendants' statement of the issues on the grounds that they have not properly supported the facts with appropriate citations to the affidavits. The undersigned, having cross-referenced the affidavits with the statement of facts, finds that the majority of the facts are based on the declarants' personal knowledge and are supported somewhere within the affidavits. The undersigned will only consider those facts supported by the affidavits.

Additionally, BPP objects to the Exponent reports on the grounds they are not properly authenticated and contain inadmissible hearsay because they were not written by Mr. Travis. Having reviewed the record, the undersigned agrees that Dr. McCann was the primary author of the Exponent reports (see Pl.'s Resp. Defs.' Mot. Summ. J., Ex. 5 BC001237-48); however, the undersigned also finds that the reports are properly authenticated by Mr. Travis, who is the custodian of records for Exponent (see Defs.' Mot. Summ. J., Ex. 2 4; see also Pl.'s Resp. Defs.' Mot. Summ. J., Ex. 3 163:13-163:20 (stating only that Exponent keeps its original documents in California)).

Finally, BPP objects to the reliability of the Exponent reports pursuant to Rule 702 of the Federal Rules of Evidence. BPP argues that Mr. Travis's deposition testimony demonstrates the lack of reliability in the report. Having reviewed the deposition testimony and the curriculums vitae of Mr. Travis and Dr. McCann, the undersigned finds that the reports are sufficiently reliable to be admissible under Rule 702. Both engineers have impressive professional backgrounds (see Defs. Mot. Summ. J., Ex. 2, BC000651-57), and the Exponent reports are based on the engineers' personal investigations of the First City Building (see id. at BC000644-49, 000249-52). To the extent that BPP challenges inconsistencies within the reports and with the other summary judgment evidence, such challenges go to the weight of the reports rather than their admissibility. See Fed. R. Evid. 702; Daubert v. Merrel Dow Pharms., Inc., 509 U.S. 579, 592-93 (1993); United States v. 14.38 Acres of Land, 80 F.3d 1074, 1077 (5th Cir. 1996).

4. BPP's Arguments and Summary Judgment Evidence

BPP argues that there is a genuine issue of material fact as to both the objectivity of the Exponent reports and the reasonableness of Defendants' reliance on those reports to deny the disputed portion of BPP's claim. BPP asserts that "the logs produced by Boulder⁷ . . . and an e-mail from Boulder Claims's 'Large Loss Specialist' Ken Miller . . . demonstrate that, once Boulder learned that the cost of repairing the solar screen would be in excess of \$1,000,000, all efforts were

⁷ The undersigned references the Boulder Claims logs throughout this report and recommendation. Many of the statements in the logs are ambiguous, technical, and incomplete. Because BPP is the nonmovant, the undersigned draws all reasonable inferences from this summary judgment evidence in favor of BPP. See Reeves, 530 U.S. at 150.

directed at finding a way to exclude the solar screens from coverage.”⁸ (Pl.’s Resp. Defs.’ Mot. Summ. J. 16, Docket No. 62.) BPP further asserts that the logs reveal that the Exponent reports contradicted prior statements by Mr. Travis and Boulder Claims’s adjuster.⁹ Moreover, BPP argues that Defendants have failed to produce any evidence showing that they had a procedure in place for objectively resolving contested claims.¹⁰ Finally, BPP suggests that Defendants could not have reasonably relied on the Exponent reports because the later report contradicts the earlier report and does not discuss the observations of BPP’s experts.¹¹

⁸ The log entry for September 26, 2008, at 1:19 p.m, estimated that the minimum cost to remove and replace the solar screen was at least \$500,000. (Pl.’s Resp. Defs.’ Mot. Summ. J, Ex. 2 35, Docket No. 62.) A subsequent log entry on the same date estimated that replacement costs could possibly be \$750,000 on the solar screen and \$200,000 for other damage to the building. (Id. at 34-35.) By October 8, 2008, the estimate on the solar panels increased to at least \$1,000,000. (Id. at 33.) Also, on October 8, 2008, an entry stated that the solar panels were not moved and checked from behind. (Id.) The entry for October 13, 2008, provides that Boulder Claims found no damage to the concrete supports to the solar panels but was waiting on the Exponent report before it made further comment. (Id. at 31-32.) On November 3, 2008, the entry states that “[t]he examiner should follow up with the engineer to secure his finding on the pre-cast panels.” (Id. at 31.) On November 17, 2008, Boulder Claims contacted Exponent to get a status update on the engineer’s report. (Id. at 30.) Finally, on December 1, 2008, Mr. Miller with Boulder Claims sent the following e-mail to Mr. Vinsek and Mr. Travis: “I am not convinced that we have a covered wind loss to the screen. We must establish normal settling concerns due to age & inherent vice. Remember this building went through Hurricane Rita as well. We did not insure the building at that time.” (Id. at Ex. 4.)

⁹ The log entry on September 26, 2008, states that “wind blew vents and caps” off [of the roof].” (Pl.’s Resp. Defs.’ Mot. Summ. J, Ex. 2 35, Docket No. 62.) However, the log entry on October 8, 2008, provides that, according to Mr. Travis, “the roof was in good shape, no storm related damage found.” (Id. at 33.) Mr. Miller’s log entry on October 13, 2008, reveals that he found damage to the one-story bank-teller lane roof, the two-story roof, and missing flashing on the upper level roof. (Id. at 31-32.) Finally, the log entry on October 8, 2008, incorporates an estimate for removing and replacing the solar panels (id. at 33), but Exponent’s engineers issued their reports without removing the solar panels (see Defs.’ Mot. Summ. J., Ex. 2 BC000647-49).

¹⁰ BPP suggests that Jeff Baker’s deposition demonstrates that Defendants do not have procedures for objectively investigating contested claims. (Pl.’s Resp. Defs.’ Mot. Summ. J. 17, Docket No. 62.) Having reviewed the attached deposition, the undersigned finds that Mr. Baker was never directly asked whether Defendants had a procedure in place to resolve disputes between experts. (See id. at Ex. 8.) Accordingly, the undersigned disagrees with BPP’s characterization of this summary judgment evidence.

¹¹ The first Exponent report stated that the steel members supporting the concrete solar panels “did not display any visually discernable distress or signs of excessive movement.” (Defs.’ Mot. Summ. J., Ex. 2 BC000648, Docket No. 25.) However, the second Exponent report stated that “[t]he lower steel plate supporting the bottom panel on the first vertical member exhibited a slight bend to the north.” (Id. at BC000250.) Exponent attributed this bending to issues relating to the original construction of the building and to deterioration of the structure over time rather than to Hurricane Ike. (Id. at BC000251-52.) Finally, the second Exponent report acknowledges gaps between the precast concrete panels (id. at BC000251), but fails to discuss the conclusions of BPP’s experts, who opined that the gaps were inconsistent and wider than they were before Hurricane Ike (see id. at BC000251-52).

5. *Analysis*

BPP argues that this case is similar to *State Farm Lloyds v. Nicolau* and *State Farm Lloyds v. Johns*. (Pl.'s Resp. Defs.' Mot. Summ. J. 15, 17, Docket No. 62.) Defendants assert that this case is indistinguishable from *Lee v. Catlin Specialty Ins. Co.* (Def.'s Reply 9, Docket No. 70.)

In *Nicolau*, the plaintiffs alleged wrongful denial of their claim for foundation damage to their home. *Nicolau*, 951 S.W.2d at 446. The Texas Supreme Court considered whether there was sufficient evidence to support a finding of breach of the duty of good faith and fair dealing. *Id.* at 448-50. The insurer referred the plaintiff's claim to an adjuster, which hired an engineering company to investigate the plaintiff's claim. *Id.* at 447. The plaintiffs presented evidence that eighty to ninety percent of the engineering company's work consisted of investigations for insurance companies. *Id.* at 448. At trial, an engineer testified that he knew that the insurance company would be required to pay if his report indicated that the damage to the plaintiff's home was caused by a plumbing issue rather than the foundation shifting. *Id.* Likewise, there was evidence that the insurance company was aware of the engineering company's general view that plumbing leaks were unlikely to cause foundation damage. *Id.*

The plaintiffs also presented evidence that the insurer and the engineering company hired by it did not conduct an adequate investigation. *Id.* at 449. The evidence showed that the engineering company did not take any soil samples or check the leaking pipe at the plaintiffs' house. *Id.* Furthermore, the insurance company and the engineers did not reinspect the plaintiffs' house after receiving a report from the plaintiffs' experts showing a substantial leak under the house. *Id.* Finally, there was evidence that the insurer's own expert disagreed with conclusions in the

engineering company's report. Id. at 450. The court held that there was sufficient evidence to support the jury's finding that the plaintiffs' claim was denied in bad faith. Id.

Similarly, in *Johns*, the court held that there was sufficient evidence to support the jury's verdict in favor of the plaintiff on her claim for breach of the duty of good faith and fair dealing. See State Farm Lloyds v. Johns, No. 05-96-01039-CV, 1998 WL 548887, at *6 (Tex. App.–Dallas Aug. 31, 1998). The plaintiff presented evidence that her insurer failed to reconcile contradictory reports from two of its adjusters. Id. at *4. Moreover, there was evidence that the engineering company hired by the insurer to evaluate the plaintiff's house received the majority of its work from insurance companies and believed that foundation problems rarely occurred from plumbing leaks. Id. The plaintiff also presented evidence that the insurance company had no procedure in place for resolving opposing expert opinions. Id. at *5. After receiving the report of the engineer hired by the plaintiff, the insurer did not reinspect the plaintiff's house. Id. Accordingly, the court held that there was sufficient evidence to conclude that the insurance company's reliance on the engineer's report was unreasonable and that the insurance company denied the claim after its liability had become reasonably clear or should have known it was reasonably clear. Id.

In *Lee*, the court distinguished the facts before it from those in *Nicolau* and *Johns*. Lee, 766 F.Supp.2d at 820-21. The court held that there was insufficient evidence to persuade a reasonable jury to conclude that the insurer knew or should have known that it was reasonably clear that the plaintiff's claims for damages to the roof of its commercial building was covered. Id. at 823. There was no report in the record that conflicted with the conclusions in the engineering reports relied upon by the plaintiff's insurer. Id. at 821. The court also found that there was no evidence that the insurance adjuster was biased because the record did not indicate what percentage or portion of the adjuster's business came from insurance companies. Id. at 823. Furthermore, there was no evidence

that the investigations were outcome-oriented or that the insurance company expected to receive reports showing that the plaintiff's claim should be denied. Id. Finally, there was evidence that an independent roof consultant reinspected the commercial building at the adjuster's request. Id. For these reasons, the court held that the evidence showed no more than a bona fide dispute between the plaintiff and his insurer. Id.

Here, the majority of the evidence is closer to that in *Nicolau* and *Johns* than that in *Lee*. Like *Lee*, there is no evidence that Boulder Claims or Exponent was generally biased in favor of insurance companies, and the record demonstrates that Exponent re-inspected the First City Building after receiving the reports of BPP's engineers. See id. However, unlike *Lee*, there is sufficient evidence from which a reasonable jury could conclude that Defendants expected to receive outcome-oriented reports. See id.

The Boulder Claims logs suggest that Defendants had a motive to request outcome-oriented reports. (See Pl.'s Resp. Defs.' Mot. Summ. J, Ex. 2 30-35, Docket No. 62.) On September 26, 2008, the estimate to repair the First City Building grew from \$500,000 to \$950,000. (Id. at 34-35.) By October 8, 2008, the estimate to repair the building, including the solar panels, increased to at least \$1,000,000. (Id. at 33.) On that same date, Boulder Claims spoke with Mr. Travis, who stated that "some decorative metal panels that [BPP] installed were damaged." (Id.) The log entry further stated that Exponent would possibly request that BPP let it remove one of the solar panels to check behind it (presumptively for wind damage). (Id.) Five days later, Mr. Miller's log entry summarized his inspection of the First City Building and provided that he found no obvious cracks in the concrete solar panels to support BPP's claims. (Id. at 32.) Then, on December 1, 2008, Mr. Miller sent the following e-mail to Mr. Vinsek and Mr. Travis:

The key here would be for the “original architect” to attempt to connect THIS windstorm event to his conclusions. I am not convinced that we have a covered wind loss to the screen. We must establish normal settling concerns due to age & inherent vice. Remember, this building went through hurricane [sic] Rita as well. We did not insure the building at that time. Also, keep in mind that I have shown you a building across the street with canvass awnings still in tact. Not sure how the wind would cause such damages to a pre-cast concrete structure and not to canvass cloth awnings.

(Id. at Ex. 4.)

A reasonable jury could draw the inference from this e-mail that Mr. Miller was telegraphing Boulder Claims’s position to Exponent and suggesting that Exponent corroborate this position in a subsequent report. This inference could further be supported by Exponent’s subsequent failure to check behind the solar panels (see id. at Ex. 2 30-35), even after it received a report from BPP’s expert, dated March 4, 2009, which stated that partial disassembly of the concrete solar panels was necessary for further investigation (see id. at 30-33; Ex. 7 BPP-2946). Finally, the second Exponent report, dated May 20, 2009, failed to take a definitive stance on the cause of damage to the building. (See Defs.’ Mot. Summ. J., Ex. 2 BC000252.) The report concluded that the conditions “were *most likely* related to the original construction and deterioration of the structure over time.” (Id.) (emphasis added.) Thus, a reasonable jury could conclude that the Exponent reports were not objectively prepared. See Nicolau, 951 S.W.2d at 450; Johns, 1998 WL 548887, at *5.

Furthermore, in *Lee*, there was no report in the record that conflicted with the conclusions in the engineering reports relied upon by the plaintiff’s insurer. Lee, 766 F.Supp.2d at 821. However, in the present case, the reports of BPP’s experts contradict those of Exponent. (See Pl.’s Resp. Defs.’ Mot. Summ. J., Ex. 6 BPP-2925; Ex. 7 BPP-2946, Docket No. 62.) Vincent Hauser’s report, dated May 27, 2009, stated that the exterior of the First City Building was damaged by Hurricane Ike and that repairs would require partial disassembly of the concrete solar panels. (Id. at Ex. 6 BPP-2925.) Likewise, John Steinman’s report, dated March 4, 2009, stated that the building

experienced wind storm damage and that partial disassembly of the solar panels was necessary. (Id. at Ex. 7 BPP-2946.) This opinion was based on his observations of displacements, distress, spalls, and cracks. (Id.)

The second Exponent report, dated May 20, 2009, indicates that Exponent reinspected the building with Mr. Steinman and Mr. Hauser (Defs.' Mot. Summ. J., Ex. 2 BC000249, Docket No. 25), but the report does not attempt to reconcile the opposing conclusions as to the cause of the damage to the building (see id. at BC000249-52). Rather, the report merely reasserts Exponent's original conclusion that the damage was most likely caused by deterioration. (See id. at BC000252.) From this evidence, a reasonable jury could also conclude that the Exponent reports were not objectively prepared. See Nicolau, 951 S.W.2d at 450; Johns, 1998 WL 548887, at *5.

Finally, like *Nicalou* and *Johns*, there is evidence of unreconciled inconsistencies among Defendants' adjuster and the engineering reports relied upon by Defendants. See Nicolau, 951 S.W.2d at 450; Johns, 1998 WL 548887, at *4. For example, Boulder Claims opined that the roof was damaged, but Exponent opined that "the roof was in good shape." (See Pl.'s Resp. Defs.' Mot. Summ. J., Ex. 2 33, 35, Docket No. 62.) Likewise, Boulder Claims was aware of Exponent's potential request to inspect behind the solar panels (id. at 33), but Exponent issued its second report without ever removing the solar panels or explaining why the solar panels did not need to be removed (see Defs.' Mot. Summ. J., Ex. 2 BC000647-49). Neither inconsistency is explained by the summary judgment evidence. Accordingly, a reasonable jury could conclude that it was unreasonable for Defendants to rely upon the Exponent reports. See Nicolau, 951 S.W.2d at 450; Johns, 1998 WL 548887, at *5.

For the reasons stated above, there is legally sufficient evidence to support BPP's claim for breach of the duty of good faith and fair dealing, and Defendants' motion for partial summary judgment on this issue should be denied.

C. DTPA and Unfair Settlement Practices

Under Texas law, “[a] violation of the duty of good faith and fair dealing also constitutes an unfair insurance practice in violation of [Chapter 541 of the Texas Insurance Code, formerly Article 21.21 of the Texas Insurance Code].” Kondos, 2005 WL 1004720, at *12 (citing Performance Autoplex II Ltd.v. Mid-Continent Cas. Co., 322 F.3d 847, 860-61 (5th Cir. 2003)). “The prohibited conduct includes failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer’s liability has become reasonably clear.” Performance Autoplex II Ltd., 322 F.3d at 860-61 (internal quotations omitted). A violation of Chapter 541 of the Texas Insurance Code also constitutes a violation of the DTPA. Tex. Bus. Com. Code Ann. § 17.50(a)(4) (Vernon 2011); Kondos, 2005 WL 1004720, at *12 (citing Thrash v. State Farm Fire & Cas. Co., 992 F.2d 1354, 1357-58 & n.19 (5th Cir. 1993)). When claims under the DTPA and the Texas Insurance Code are joined with a claim for breach of the duty of good faith and fair dealing and the statutory claims “are based on the same theory which underlies the bad faith claim—namely, denial of policy benefits without a reasonable basis—then those DTPA and Insurance Code claims must fail if the bad faith claim fails.” State Farm Fire & Cas. Co. v. Woods, 925 F.Supp. 1174, 1180 (E.D. Tex. 1996); accord Higginbotham, 103 F.3d at 460; Douglas v. State Farm Lloyds, 37 F.Supp.2d 532, 544 (S.D. Tex. 1999).

BPP alleges that Defendant ICAT violated the Texas Insurance Code by engaging in the following unfair settlement practices:

- (a) Misrepresenting material facts or policy provisions relating to the coverage at issue;
- (b) Failing to promptly provide BPP with a reasonable explanation of the basis in the Policy, in relation to the facts or applicable law, for the denial of BPP's claim; and
- (c) Failing within a reasonable time to affirm or deny coverage of the claim or to submit a reservation of rights to BPP.

(Pl.'s Orig. Compl. 16-17, Docket No. 1; Pl.'s Resp. Defs.' Mot. Summ. J. 19, Docket No. 62) (citing Tex. Ins. Code Ann. §§ 541.060(a)(1)(3)(4) (Vernon 2009.)) BPP also alleges violations of the Texas Insurance Code §§ 541.060(a)(2) and (a)(7). (Pl.'s Orig. Compl. 16-17, Docket No. 1; Pl.'s Resp. Defs.' Mot. Summ. J. 19, Docket No. 62.)

Additionally, BPP alleges that Defendant ICAT violated the following sections of the DTPA's laundry list: (b)(1), (b)(2), (b)(3), (b)(5), (b)(9), (b)(12), (b)(13), and (b)(20). (Pl.'s Orig. Compl. 14, Docket No. 1; Pl.'s Resp. Defs.' Mot. Summ. J. 19, Docket No. 62) (citing Tex. Bus. Com. Code Ann. § 17.46(b)) BPP alleges further DTPA violations for breach of warranty, unconscionability, and violations of Chapter 541 of the Texas Insurance Code. (Pl.'s Orig. Compl. 14-15, Docket No. 1; Pl.'s Resp. Defs.' Mot. Summ. J. 19, Docket No. 62) (citing Tex. Bus. Com. Code Ann. §§ 17.50(a)(2)(3)(4.))

Defendants argue that BPP cannot assert viable claims under the DTPA and Texas Insurance Code because they are entitled to summary judgment on BPP's claim for breach of the duty of good faith and fair dealing. (Defs.' Mot. Summ. J. 16, Docket No. 25.) Defendants do not address whether BPP's statutory claims are independent of its claim for breach of the duty of good faith and fair dealing. (See id.) Defendants also fail to identify any specific summary judgment evidence supporting their argument. (See id.) Defendants merely reassert that their evidence challenging BPP's claim for breach of the duty of good faith and fair dealing is also sufficient to challenge BPP's statutory claims. (See id.) BPP responds by asserting that its statutory claims are independent of its common law claim for breach of the duty of good faith and fair dealing. (Pl.'s Resp. Defs.'

Mot. Summ. J. 20, Docket No. 62.) BPP does not support its argument with any summary judgment evidence either. (See id.)

The undersigned finds that Defendants only challenge BPP's statutory claims on the grounds that there is insufficient evidence to support BPP's claim for breach of the duty of good faith and fair dealing. The undersigned, having already recommended that the court deny Defendants' motion for partial summary judgment on BPP's claim for breach of the duty of good faith and fair dealing, also recommends that Defendants' motion be denied with respect to BPP's claims for violations of the DTPA and Chapter 541 of the Texas Insurance Code. Cf. Woods, 925 F.Supp. at 1180 (granting summary judgment on the statutory claims because summary judgment was granted on the claim for breach of the duty of good faith and fair dealing). Furthermore, to the extent that BPP's statutory claims are independent of its common law claim for breach of the duty of good faith and fair dealing, as suggested by BPP, Defendants have not satisfied their burden under Rule 56 to point out insufficient proof of any element to BPP's statutory claims. See Fed. R. Civ. P. 56(a); Norwegian Bulk Transp. A/S, 520 F.3d at 412. Accordingly, Defendants' motion for partial summary judgment on BPP's claims under the DTPA and Chapter 541 of the Texas Insurance Code should be denied.

D. Prompt Payment of Claims

Chapter 542 of the Texas Insurance Code, formerly Article 21.55, "requires the prompt payment or resolution of claims according to a defined timetable." Kondos, 2005 WL 1004720, at *14 (quoting DeLeon v. Lloyd's London, Certain Underwriters, 259 F.3d 344, 354 (5th Cir. 2001)). To prevail under Chapter 542, the insured party must establish: "(1) a claim under an insurance policy; (2) for which the insurer is liable; and (3) that the insurer has not followed one or more sections of [Chapter 542] with respect to the claim." Salinas v. State Farm Lloyds, 267 Fed. Appx. 381, 388 (5th Cir. 2008) (quoting Allstate Ins. Co. v. Bonner, 51 S.W.3d 289, 291 (Tex. 2001)).

The sole basis for finding liability under [Chapter 542], then, is that the requisite time has passed and the insurer was ultimately found liable for the claim.” Performance Autoplex II Ltd., 322 F.3d at 861. If an insurer fails to timely pay a claim, it runs the risk of paying an eighteen-percent statutory fee and reasonable attorneys’ fees. Tex. Ins. Code Ann. § 542.060; Higginbotham, 103 F.3d at 461. “[A]n insurance company’s good faith assertion of a defense does not relieve the insurer of liability for penalties for tardy payment, as long as the insurer is finally adjudged liable.” Kondos, 2005 WL 1004720, at *15.

Section 542.055 provides that an insurer shall (1) “acknowledge receipt of the claim,” (2) “commence any investigation of the claim,” and (3) “request from the claimant all items, statements, and forms that the insurer reasonably believes, at that time, will be required from the claimant” within fifteen days of receiving notice of the claim. Tex. Ins. Code Ann. § 542.055. BPP alleges that Defendant ICAT violated this section by “[f]ailing to acknowledge receipt of [BPP’s claim], commence investigation of [its claim], and/or request from BPP all items, statements, and forms that [ICAT] reasonably believed would be required within the time constraints provided by [Chapter 542].” (Pl.’s Orig. Compl. 17, Docket No. 1; Pl.’s Resp. Defs.’ Mot. Summ. J. 21, Docket No. 62.)

Section 542.056 provides that an insurer generally must notify a claimant in writing of the acceptance or rejection of a claim, and the underlying reasons for a rejection, within fifteen business days of receiving all items, statements, and forms that are required for the insurer to secure final proof of loss. Tex. Ins. Code Ann. §§ 542.056(a)(c). The insurer may notify the claimant within the same time frame that it needs additional time, but the insurer must accept or reject the claim within forty-five days of the date of the additional-time notification. Id. at § 542.056(d). BPP alleges that Defendant ICAT violated this section by “[f]ailing to notify BPP in writing of its acceptance or

rejection of [BPP's claim] within the applicable time constraints provided by [Chapter 542]." (Pl.'s Orig. Compl. 17, Docket No. 1; Pl.'s Resp. Defs.' Mot. Summ. J. 21, Docket No. 62.)

Section 542.058 provides that an insurer is liable for statutory damages if, after receiving all items, statements, and forms reasonably requested and required, it delays payment of the claim for a period exceeding the period specified by other applicable statutes or, if other statutes do not specify a period, for more than sixty days. Tex. Ins. Code Ann. § 542.058(a). BPP alleges that Defendant ICAT violated this section by "[d]elaying payment of [BPP's claim] following [ICAT's] receipt of all items, statements, and forms reasonably requested and required, longer than the amount of time provided by [Chapter 542]." Pl.'s Orig. Compl. 17, Docket No. 1; Pl.'s Resp. Defs.' Mot. Summ. J. 21, Docket No. 62.)

Defendants' motion for partial summary judgment does not address BPP's prompt payment claims. (See Defs.' Mot. Summ. J. 10-20, Docket No. 25.) Rather, Defendants group together all of BPP's claims under the Texas Insurance Code, arguing that BPP cannot prevail under the Texas Insurance Code because there is insufficient evidence of Defendants' alleged bad faith denial of BPP's claim. (See id. at 14-16.) Nonetheless, BPP responds by arguing that there is a genuine issue of material of fact with respect to its claims under Chapter 542. BPP relies on Kent Chambers's expert report, which outlines the manner in which Defendants received written notice of BPP's claim and other necessary materials from BPP but failed to comply with Chapter 542's deadlines. (See Pl.'s Resp. Defs.' Mot. Summ. J., Ex. 9 1018-28, Docket No. 62.) BPP further argues that summary judgment on this issue is premature because Defendants' potential liability under the Policy will not be resolved until trial. Defendants reply by reasserting their argument with respect to the lack of evidence supporting BPP's claim for breach of the duty of good faith and fair dealing and by arguing

that Mr. Chambers's report is inadmissible because it is not sworn, constitutes inadmissible hearsay, and is unreliable.

The undersigned finds that Defendants only challenge to BPP's prompt payment claims is on the grounds that there is insufficient evidence to support BPP's claim for breach of the duty of good faith and fair dealing. (See Defs.' Mot. Summ. J. 14-20, Docket No. 25.) Having already found that there is legally sufficient evidence to support BPP's claim for breach of the duty of good faith and fair dealing, the undersigned need not address Defendants' challenge to BPP's prompt payment claims on those grounds, and therefore, Defendants' motion for partial summary judgment on the prompt payment claims should be denied.

Even if the undersigned were to assume that Defendants challenged the prompt payment claims on other grounds, which the undersigned does not, Mr. Chambers's expert report still raises a genuine issue of material fact with respect to the claims. See Fed. R. Civ. P. 56(c)(1); Little v. Liquid Air Corp., 37 F.3d at 1075. Mr. Chambers is an attorney in Magnolia, Texas, who is experienced in cases involving insurance disputes. (See Pl.'s Resp. Defs.' Mot., Ex. 9 1029-35, Docket No. 62.) Based on Mr. Chambers's review of documents produced by Defendants, the expert report establishes the dates on which Defendants received the relevant materials under Chapter 542 and details the manner in which Defendants subsequently acted or failed to act.¹² (See id. at 1016-28.) Thus, the expert's opinions are sufficiently reliable to constitute proper summary judgment evidence. See Fed. R. Evid. 702; Daubert, 509 U.S. at 592-93, 596. Defendants' assertion that the expert report is inadmissible because it constitutes hearsay is also of no avail because an expert report may be based on inadmissible hearsay evidence. See Fed. R. Evid. 703; United States

¹² The undersigned ignores the expert's legal conclusions. See Fed. R. Evid. 704 advisory committee note; Owen v. Kerr-McGee Corp., 698 F.2d 236, 240 (5th Cir. 1983).

v. Dixon, 413 F.3d 520, 524 (5th Cir. 2005). Finally, under Rule 56, as amended in 2010, the expert report need not be sworn because, Mr. Chambers's proffered testimony would be otherwise admissible during trial. See Fed. R. Evid. 56(c)(2); comments to 2010 Amendments to Fed. R. Evid. 56(c)(2). Accordingly, Defendants' motion for summary judgment on BPP's prompt payment claims should be denied.

E. Punitive and Treble Damages

Under the DTPA, a consumer may recover treble damages upon a showing that the defendant acted "knowingly." Tex. Bus. Com. Code Ann. § 17.50(b)(1). The Texas Insurance Code also allows for treble damages if the trier of fact determines that the defendant acted knowingly. Tex. Ins. Code. § 541.152(b). "'Knowingly' means actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim" Tex. Bus. Com. Code Ann. § 17.49(b). "In other words, a person must think to himself at some point, "Yes, I know this is false, deceptive, or unfair to him, but I'm going to do it anyway." St. Paul Ins. v. Dal-Worth Tank Co., 974 S.W.2d 51, 53-54 (Tex. 1992). BPP asserts that it is entitled to treble damages under the DTPA and Insurance Code because Defendants "*knowingly and intentionally* failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement of BPP's claim" (Pl.'s Resp. Defs.' Mot. Summ. J. 23, Docket No. 62.)

Under Texas law, a plaintiff can recover punitive damages for breach of the duty of good faith and fair dealing only when the insurer is: (1) liable for bad faith; and (2) there is malicious, intentional, fraudulent, or grossly negligent conduct. Giles, 950 S.W.2d at 54. Under the second prong, the plaintiff must prove "the insurer was actually aware that its action would probably result in extraordinary harm not ordinarily associated with breach of contract or bad faith denial of a claim—such as death, grievous physical injury, or financial ruin." Id. (internal quotations omitted).

BPP seeks recovery of exemplary damages under its claim for breach of the duty of good faith and fair dealing.¹³ (Pl.'s Orig. Compl. 20, Docket No. 1.)

Defendants argue that there is no evidence showing that they knowingly acted within the meaning of the DTPA and Texas Insurance Code. Defendants further argue that BPP may not recover punitive damages for its claim for breach of the duty of good faith and fair dealing because there is insufficient evidence showing that they denied BPP's claim in bad faith. Even if there is such evidence, Defendants assert that there is no evidence demonstrating that their conduct was malicious, intentional, fraudulent, or grossly negligent. BPP responds that the evidence submitted with its response to the motion for partial summary judgment establishes that it is entitled to treble and punitive damages. BPP does not support its argument with any citation to the summary judgment evidence.

The undersigned finds that Defendants have satisfied their burden under Rule 56 to point out insufficient proof of elements of BPP's claims for punitive and treble damages. See Fed. R. Civ. P. 56(a); Norwegian Bulk Transp. A/S, 520 F.3d at 412. On the other hand, BPP has failed to satisfy its burden under Rule 56 to show that specific facts exist over which there is a genuine dispute. See Fed. R. Civ. P. 56(c)(1); Little v. Liquid Air Corp., 37 F.3d at 1075. BPP asserts that *all* of the summary judgment evidence that it provided in the previous sections of its response demonstrates that there is a genuine dispute with respect to these damages issues. (Pl.'s Resp. Defs.' Mot. Summ. J. 23, Docket No. 62.) However, BPP does not provide a single citation to the summary judgment

¹³ BPP also seeks exemplary damages under Chapter 41 of the Texas Civil Practices and Remedies Code for its fraud claim. (Pl.'s Orig. Compl. 20, Docket No. 1.) The undersigned need not address these purported damages because the undersigned recommends in the section entitled "F. Fraud and Conspiracy to Commit Fraud" that Defendants' motion for partial summary judgment should be granted on those causes of action. See Tex. Civ. Prac. Rem. Code Ann. § 41.001(6), 41.004(a) (Vernon 2011).

evidence nor does it apply any evidence to the relevant law under the DTPA and Texas Insurance Code. (See id.) Thus, BPP has not satisfied its burden under Rule 56. See Smith, 391 F.3d at 625.

Furthermore, even if the undersigned were to consider all of BPP's summary judgment evidence, the evidence would not demonstrate that Defendants acted knowingly (within the meaning of the DTPA or the Texas Insurance Code) or that their conduct was intentional, malicious, fraudulent, or grossly negligent. When viewed in the light most favorable to BPP, the summary judgment evidence previously discussed by the undersigned magistrate judge merely raises a genuine dispute as to whether Defendants' reliance on their expert reports was reasonable. See infra Part B. That finding by the undersigned does not *a fortiori* amount to a finding of a genuine dispute as to whether Defendants' denial of the disputed portion of BPP's claim was also "knowing" or "intentional" as defined by the DTPA. It was incumbent upon BPP to cite to the relevant summary judgment evidence showing a genuine dispute as to *these claims* and to apply the evidence to the relevant statutory provisions in the DTPA and the Texas Insurance Code. See Fed. R. Civ. P. 56(c)(1); Little v. Liquid Air Corp., 37 F.3d at 1075. For these reasons, Defendants' motion for partial summary judgment on BPP's claims for punitive, treble, and exemplary damages should be granted.

F. Fraud and Conspiracy to Commit Fraud

To prevail on a cause of action for fraud under Texas law, a plaintiff must prove: (1) the defendant made a representation to the plaintiff; (2) the representation was material; (3) the representation was false; (4) when the defendant made the representation, the defendant knew the representation was false, or made the representation recklessly without knowledge of its truth; (5) the defendant made the representation with the intent that the plaintiff act on it; (6) the plaintiff relied on the representation; and (7) the representation caused the plaintiff's injury. In re FirstMerit Bank,

52 S.W.3d 749, 758 (Tex. 2001). BPP alleges that Defendants misrepresented to BPP that the Policy would provide protection against loss, such as that caused by Hurricane Ike, but “did not disclose to BPP that they would resort to obtaining unreliable and incorrect expert reports to deny coverage under the policy.” (Pl.’s Resp. Defs.’ Mot. Summ. J. 23, Docket No. 62.)

To prevail on a cause of action for civil conspiracy under Texas law, the plaintiff must prove: (1) the defendant was a member of a combination of two or more persons; (2) the object of the combination was to accomplish an unlawful purpose or a lawful purpose by unlawful means; (3) the members had a meeting of the minds on the object or course of action; (4) one of the members committed an unlawful, overt act to further the object or course of action; and (5) the plaintiff suffered injury as a proximate result of the wrongful act. Chon Tri. v. J.T.T., 162 S.W.3d 552, 556 (Tex. 2005). BPP argues that “Defendants had a ‘meeting of the minds’ to pursue the coordinated effort of taking money for no return and the ‘experts’ lined up to accomplish that purpose.” (Pl.’s Resp. Defs.’ Mot. Summ. J. 23, Docket No. 62.)

Defendants argue that BPP cannot prevail on its claim for fraud because there is no evidence showing that they made any false representations nor is there evidence showing that BPP relied on any representation to its detriment. For these reasons, Defendants further argue that there is no evidence to support BPP’s claim of conspiracy to commit fraud. BPP responds by asserting that the summary judgment evidence supports its claims. BPP does not support its response with any citation to the summary judgment evidence.

The undersigned finds that Defendants have satisfied their burden under Rule 56 to point out insufficient proof of elements of BPP’s claims for fraud and civil conspiracy. See Fed. R. Civ. P. 56(a); Norwegian Bulk Transp. A/S, 520 F.3d at 412. BPP, however, has failed to satisfy its burden under Rule 56 to show that specific facts exist over which there is a genuine dispute. See Fed. R.

Civ. P. 56(c)(1); Little v. Liquid Air Corp., 37 F.3d at 1075. As discussed in the previous section, BPP's attempt to raise a genuine dispute by pointing to the summary judgment evidence, as a whole, is insufficient. See Smith, 391 F.3d at 625. Even if the undersigned were to consider all of BPP's summary judgment evidence, which the undersigned does not, there is no evidence supporting BPP's fraud claim—that Defendants made a false representation upon which BPP detrimentally relied—nor is there is evidence supporting BPP's civil conspiracy claim—that Defendants combined to accomplish an unlawful purpose and at least one of the defendants committed an unlawful act. Accordingly, Defendants' motion for partial summary judgment on BPP's claims for fraud and civil conspiracy should be granted.

V. Conclusion

For the reasons stated above, Defendants' "Motion for Partial Summary Judgment" (Docket No. 25) should be granted in part and denied in part. The motion should be granted with respect to BPP's claims for punitive, treble, and exemplary damages. The motion should also be granted with respect to BPP's claims for fraud and civil conspiracy. The motion should be denied on BPP's claims for breach of the duty of good faith and fair dealing, violations of the DTPA, and violations of Chapters 541 and 542 of the Texas Insurance Code.

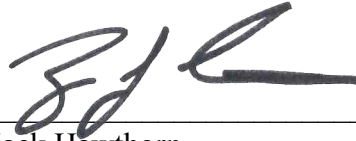
VI. Objections

Objections must be: (1) specific, (2) in writing, and (3) served and filed within fourteen (14) days after being served with a copy of this report. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 1(a), 6(b), 72(b).

A party's failure to object bars that party from: (1) entitlement to de novo review by a district judge of proposed findings and recommendations, see Rodriguez v. Bowen, 857 F.2d 275, 276-77 (5th Cir. 1988), and (2) appellate review, except on grounds of plain error of unobjected-to factual

findings and legal conclusions accepted by the district court, see Douglass v. United Servs. Auto. Ass'n., 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc).

SIGNED this 6th day of October, 2011.

A handwritten signature in black ink, appearing to read 'Zack Hawthorn', written over a horizontal line.

Zack Hawthorn
United States Magistrate Judge