

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMERICAN CAPITAL HOMES, INC., *a
Washington Corporation*; AMERICAN
PROPERTY DEVELOPMENT, INC., *a
Washington Corporation*; AMERICAN
PROPERTY DEVELOPMENT OF
NORTHERN CALIFORNIA, LLC, *a
Washington Limited Liability Company*;
ROGER KUULA, *an individual*; and GREG
BORREGO, *an individual*,

Plaintiffs,

v.

GREENWICH INSURANCE COMPANY, *a
foreign corporation*; and THE XL AMERICA
INSURANCE GROUP, *a foreign
corporation*,

Defendants.

Case No. C09-622-JCC

ORDER

This matter comes before the Court on Plaintiffs' Motion for Partial Summary Judgment (Dkt. No. 25) and Defendant Greenwich Insurance Company's Motion for Partial Summary Judgment. (Dkt. No. 55.) Having thoroughly considered both parties' arguments and the relevant record, the Court hereby DENIES Plaintiffs' motion, GRANTS IN PART Defendant's motion, and rules as follows.

1 **I. BACKGROUND**

2 This case concerns an insurance dispute that arose from a wrongful termination lawsuit
3 (the *Donovan* action). The case does not concern the underlying facts of that lawsuit, however,
4 but rather an insurance policy (the “Policy”) that was issued by Defendant to Plaintiffs to
5 provide coverage from November 23, 2006, to November 23, 2007. (*Id.* at 2.) The Policy states
6 that in the event of certain types of employment lawsuits brought against the Plaintiffs,
7 Defendant will pay some or all of an ensuing award, as well as expenses for legal
8 representation and other aspects of Plaintiffs’ defense expenses.¹ The Policy also contains a
9 pre-approved counsel endorsement, which gives Plaintiffs the right to select Littler
10 Mendelson—the law firm of Daniel Thieme, who has been providing Plaintiffs with
11 employment advice for more than 20 years—as counsel for any employment liability claims.
12 (Def.’s Mot. 2–3 (Dkt. No. 55).) The Policy also requires the two parties to allocate settlement
13 based on their “relative legal exposures” where a claim sought both covered and uncovered
14 losses. (*Id.* at 2.)

15 A month before the *Donovan* action was filed, Plaintiffs anticipated that litigation was
16 imminent and incurred \$30,548.79 in e-discovery expenses by hiring computer forensic
17 specialists to preserve information relating to the impending *Donovan* action. (Pl.’s Mot. 10
18 (Dkt. No. 25).)

19 On September 13, 2007, Plaintiffs were sued by James Donovan for wrongful
20 termination and other claims. (Pl.’s Mot. 5 (Dkt. No. 25).) The following day, Terry Edwards,
21 Plaintiffs’ broker, tendered the lawsuit to Defendant. (*Id.*) On September 18, 2007, Defendant
22 responded to Terry Edwards with a letter acknowledging the tender and notifying Plaintiffs
23 that Brian Smith would be serving as the claims adjuster for the matter. (*Id.*) In that letter,
24

25 ¹ Under the Policy, covered “Defense Expenses” means: “reasonable legal fees and expenses incurred in
26 the defense of any Claim . . . Defense Expenses will not include the Company’s overhead expenses or any
salaries, wages, or benefits of its directors, trustees, or employees.” (Pl.’s Mot. 10 (Dkt. No. 25).)

1 Defendant also stated that it would reserve all rights and defenses. (Edwards Decl. 9 (Dkt. No.
2 29-2).) Defendant restated its reservation of rights in a letter to Edwards dated October 17,
3 2007. (Edwards Decl. 11 (Dkt. No. 29-3).) Edwards did not receive this second letter, however,
4 until March 2009. (Pl.'s Mot. 5 (Dkt. No. 25).) Although the Policy requires that Defendant
5 provide Plaintiffs with direct notice of a reservation of rights, the only such notice that
6 Defendant provided was to Edwards. (*Id.* at 5–6)

7 According to Defendant's Procedures for Reporting and Billing, Defendant was
8 obligated to make quarterly payments to Littler Mendelson for its accumulated defense fees
9 and costs. (Pls.' Mot. 18 (Dkt. No. 25).) For the first 15 months of the *Donovan* action,
10 however, Defendant did not make these payments. (*Id.*) In December 2008, Defendant said that
11 it would not make payment until Littler Mendelson provide proof of compliance with certain
12 Policy guidelines. Plaintiffs provided Defendant with proof of compliance with these
13 guidelines on December 12, 2008. (*Id.* at 7.) Defendant wired the outstanding fees and costs to
14 Littler Mendelson on or about December 30, 2008. (Pl.'s Mot. 18–19 (Dkt. No. 25).)

15 As the *Donovan* action approached mediation, claims adjuster Brian Smith contacted
16 Littler Mendelson to discuss the case. (Pl.'s Mot. 9 (Dkt. No. 25).) In a January 14, 2009 phone
17 conversation, Smith asked Aaron Crews, an attorney at Littler Mendelson, to provide an
18 assessment of damages for each cause of action in the complaint. (Smith Decl. ¶ 32 (Dkt. No.
19 35).) The next day, Crews responded with an email confirming that Defendant wanted an
20 analysis of claims, allocating percentages to claims based upon whether or not they were
21 covered by the Policy. (*Id.* at ¶ 33.) In an email dated January 16, 2009, Smith responded that
22 Crews had misunderstood his request: because Littler Mendelson was not acting as coverage
23 counsel, due to a conflict of interest, Smith did not want Littler Mendelson to assess whether or
24 not particular claims were covered by the Policy. (*Id.* at ¶ 34.) Rather, Smith merely sought
25 potential liability for each cause of action. (*Id.*)
26

1 On March 9, 2009, Smith offered Plaintiffs \$15,000 to settle the matter of the
2 outstanding e-discovery expenses, but Plaintiffs rejected the offer. (*Id.* at 11.)

3 On March 13, 2009, Smith left a voicemail for Crews stating his belief that a lot of
4 Plaintiffs' claims would not be covered by the Policy, and that Plaintiffs should expect to
5 "show up at the mediation with money." (Powell Decl. Ex. 10 (Dkt. No. 26-10).)

6 On March 23, 2009, Defendant learned that Plaintiffs had filed a separate lawsuit
7 against Donovan in Washington state court seeking damages for Donovan's alleged breach of
8 duty. (Def.'s Mot. 7 (Dkt. No. 55).)

9 On May 1, 2009, the parties exchanged allocation proposals for the impending
10 mediation. (*Id.* at 8.) When mediation began on May 5, 2009, Donovan's opening demand was
11 \$720,000. (*Id.*) The parties resumed their allocation discussion, and agreed to participate
12 equally in a joint counteroffer of \$100,000. (*Id.*) Donovan responded by reducing his demand
13 to \$685,000, and the mediation concluded for the day. (*Id.*)

14 The next day, relations between the parties deteriorated. Plaintiffs did not resume the
15 allocation negotiations with Defendant and filed this lawsuit. (*Id.* at 9.) Through newly retained
16 counsel, Plaintiffs accused Defendant of bad faith and of violating Washington law. (*Id.*)

17 With its negotiating partner gone, Defendant continued to seek a settlement with
18 Donovan. (*Id.*) Defendant ultimately settled with Donovan for \$410,000, an amount that fell
19 within Littler Mendelson's expected settlement range. (*Id.* at 9-10.)

20 Following the conclusion of mediation, Defendant made payment on two outstanding
21 obligations. On May 22, 2009, Defendant paid both Littler Mendelson's quarterly bill for the
22 work they had performed during the first quarter of 2009 (Pl.'s Mot. 19 (Dkt. No. 25)), and
23 Defendant paid the outstanding e-discovery expenses "in full." (*Id.* at 2.)

24 **II. PROCEDURAL HISTORY**

25 Both parties have filed claims against each other, and both parties seek summary
26 judgment on some of those claims now.

1 Plaintiffs argue that Defendant breached the Policy, the Washington Administrative
2 Code (WAC) and acted in bad faith in various aspects of its handling of the case. Plaintiffs
3 argue that Defendant: (a) committed bad faith by failing to timely and properly provide notice
4 of its rights to deny coverage; (b) committed bad faith by assigning Brian Smith to handle both
5 the defense and the coverage aspects of the *Donovan* litigation, by commingling defense and
6 coverage files, and by attempting to enlist the support of Littler Mendelson in allocating
7 damages between covered and uncovered claims; (c) committed bad faith by failing to
8 promptly pay the e-discovery expenses and Littler Mendelson's fees; and (d) breached the
9 WAC by failing to promptly pay the e-discovery expenses. As a result of these bad-faith acts,
10 Plaintiffs argue, Defendant (a) should be estopped from denying coverage for any of the claims
11 in the *Donovan* litigation; (b) are liable for fees and costs and exemplary damages; and (c)
12 should not be awarded any of the costs or expenses incurred in settling the *Donovan* litigation.
13 (Pl.'s Mot. 19 (Dkt. No. 25).) As a result of breaching the WAC, and of compelling Plaintiffs
14 to file suit to recover Policy benefits, Plaintiffs argue, Defendant is liable for attorney fees and
15 costs and exemplary damages.

16 Defendant's motion seeks summary judgment dismissal of Plaintiffs' bad-faith claims.
17 (Def.'s Mot. 2 (Dkt. No. 55).) Defendant also seeks summary judgment on its counterclaim
18 that by walking away from mandatory allocation negotiations, Plaintiffs breached the contract.
19 (*Id.*)

20 **II. APPLICABLE LAW**

21 Federal Rule of Civil Procedure 56(c) mandates that a motion for summary judgment
22 be granted when "the pleadings, the discovery and disclosure materials on file, and any
23 affidavits show that there is no genuine issue as to any material fact and that the movant is
24 entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). There exists a genuine issue as
25 to a particular fact—and hence that fact "can be resolved only by a finder of fact" at trial—
26 when "[it] may reasonably be resolved in favor of either party"; conversely, there exists no

1 genuine issue when reasonable minds could not differ as to the import of the evidence.
2 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250–52 (1986). Whether a particular fact is
3 material, in turn, is determined by the substantive law of the case: “Only disputes over facts
4 that might affect the outcome of the suit under the governing law will properly preclude the
5 entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be
6 counted.” *Id.* at 248. Summary judgment, then, demands an inquiry into “whether the evidence
7 presents a sufficient disagreement to require submission to a jury or whether it is so one-sided
8 that one party must prevail as a matter of law”: if applying the relevant law to those facts about
9 which no two reasonable factfinders could disagree dictates that the moving party must prevail,
10 then a motion for summary judgment must be granted. *Id.* at 250–52.

11 **III. ANALYSIS**

12 **1. Bad Faith**

13 An insurance company has a duty of good faith to all of its policyholders. *Smith v.*
14 *Safeco Ins. Co.*, 78 P.3d 1274, 1277 (Wash. 2003). Bad faith handling of an insurance claim is
15 a tort and it is analyzed under general tort principles: duty, breach of that duty, and damages
16 proximately caused by any breach of duty. *Mut. Of Enumclaw Ins. Co. v. Dan Paulson Constr.*
17 *Co.*, 169 P.3d 1, 8 (Wash. 2007). In order to establish bad faith, an insured is required to show
18 the breach was unreasonable, frivolous, or unfounded. *Kirk v. Mt. Airy Insurance Company*,
19 951 P.2d 1124, 1126 (Wash. 1998). Harm is an essential element of an action for an insurance
20 company’s bad faith handling of a claim under a reservation of rights. *Safeco Ins. Co. v. Butler*,
21 823 P.2d 499, 506 (Wash. 1992). If the insured shows by a preponderance of the evidence the
22 insurance company breached its duty of good faith, there is a presumption of harm. *Id.* The
23 insurance company can rebut the presumption by showing by a preponderance of the evidence
24 that its breach did not harm or prejudice the insured. *Id.* If the insured prevails on the bad faith
25 claim, the insurance company is estopped from denying coverage. *Id.*

26 Plaintiffs claim that Defendant acted in bad faith in three ways.

1 **a. Reservation of Rights**

2 First, Plaintiffs argue that a delayed reservation of rights constitutes bad faith. In
3 *Transamerica Ins. Group v. Chubb & Son, Inc.*, 554 P.2d 1080 (Wash. Ct. App. 1977), the
4 court found bad faith where the insurance company's attorneys had assumed exclusive control
5 of a defense without reservation, only to withdraw after ten months and deny liability under a
6 reservation of rights. *Id.* at 1083.

7 Even if Defendant did breach its obligations by delaying its reservation of rights,
8 triggering the presumption of harm, Plaintiffs' claims fail because Defendant has rebutted that
9 presumption. In *Transamerica*, the primary support for the Court's finding of prejudice was the
10 fact that the insured had not been able to select its own counsel; here, Littler Mendelson
11 attorney Daniel Thieme has represented Plaintiffs for more than 20 years, and had advised
12 Plaintiffs on the agreements that gave rise to the *Donovan* action. (Def.'s Mot. 2–3 (Dkt. No.
13 55).) A more analogous case, therefore, is *Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins.*
14 *Co.*, 206 P.3d 1255 (Wash. Ct. App. 2009). There, the court held that plaintiff was represented
15 at all times by competent counsel who aggressively defended plaintiff's interests and with
16 whom plaintiff never expressed dissatisfaction. *Id.* at 1261. The court went on to affirm the
17 trial court's denial of bad faith damages due to an absence of harm. *Id.*

18 Plaintiffs received the full benefit of the Policy: they selected a law firm they had had
19 worked with for many years and in whom they expressed no dissatisfaction, were aggressively
20 represented (Pl.'s Mot. 13 (Dkt. No. 25)), and arrived at a settlement fully funded by
21 Defendant. (Def.'s Mot. 12 (Dkt. No. 55).) Accordingly, regardless of whether or not
22 Defendant's reservation of rights was in bad faith, Defendant has shown by a preponderance of
23 the evidence that Plaintiffs were not harmed or prejudiced.

24 Though a presumption of harm is inappropriate, Plaintiffs attempt to show specific
25 examples of harm in several ways. These efforts are equally unsuccessful. Plaintiffs contend,
26 for example, that: (1) they would have behaved differently in the *Donovan* litigation; (2)

1 Defendant's delay increased the difficulty of the mediation effort; (3) they had no idea of the
2 need to employ independent coverage counsel; (4) they were unaware of the conflict of interest
3 facing their counsel; (5) they were unaware that Defendant had a conflict of interest; and (6)
4 Defendant's failure to pay Littler Mendelson may have resulted in less aggressive defense.
5 (Pl.'s Mot. 17 (Dkt. No. 25).)

6 Plaintiffs cannot point to a dollar lost or to a case in support of their contention that
7 these speculative losses amount to actual harm. The Court recognizes it is an "almost
8 impossible" burden for an insured to prove that he or she is demonstrably worse off because of
9 the insurance company's actions. *Safeco Ins. Co. v. Butler*, 823 P.2d 499, 504 (Wash. 1992).
10 Without showing that the insurance company acted in bad faith, however, this is the burden
11 that an insured must meet. Plaintiffs fail to meet it.

12 No reasonable finder of fact could determine that Plaintiffs were harmed by
13 Defendant's reservation of rights. Accordingly, Plaintiffs bad-faith claims relating to the
14 reservation of rights are DISMISSED.

15 **b. Commingling Coverage and Defense Functions**

16 Second, Plaintiffs argue that by commingling coverage and defense functions, Defendant
17 breached its duty. (Pl.'s Mot. 20 (Dkt. No. 25).) This assertion has no support in Washington
18 law. Plaintiffs cite to THOMAS V. HARRIS, WASHINGTON INSURANCE LAW 14-1 (2d ed. 2006)
19 for the proposition that an insurance company acting in good faith "must make certain that its
20 claims department does not commingle information from the tort-defense and coverage-dispute
21 files." But a review of this source reveals that the sole support for this proposition is the
22 following line from *Safeco v. Butler*: "[t]he Butlers assert the following acts are evidence of
23 Safeco's bad faith . . . Safeco attempted to use the Butlers' attorney to obtain statements for use
24 in the coverage action . . ." 823 P.2d 499, 506 (Wash. 1992). The *Safeco* court never returned
25 to the Butler's contention to affirm that any such duty to avoid commingling existed. Plaintiffs'
26

1 authority is rooted in the summary of a party's arguments, not a judicial holding. As such, it is
2 not persuasive.

3 Plaintiffs also rely on *Ellwein v. Hartford Accident and Indemnity Company*, but it, too,
4 fails to support Plaintiffs' claim that commingling constitutes bad faith. *Ellwein* concerned an
5 insurance company that used an accident reconstruction expert to its advantage after originally
6 hiring the expert to defend the uninsured motorist (UIM). 15 P.3d 640 641–42, 646 (Wash.
7 2001). Unlike the insurance company in *Ellwein*, however, Defendant never attempted to use
8 Littler Mendelson to its own advantage. After the misunderstanding between Aarons Crews
9 and Brian Smith about coverage, Defendant immediately clarified that it was not asking Littler
10 Mendelson to perform coverage work. (Smith Decl. ¶ 34 (Dkt. No. 35).) Plaintiffs cannot
11 plausibly claim that a brief and harmless misunderstanding by *their own* attorneys, which
12 Defendant corrected, amounts to bad faith on the part of Defendant.

13 Accordingly, Defendant did not act in bad faith when it assigned a single adjuster to
14 defense and coverage functions. Plaintiffs' commingling claims are DISMISSED.

15 **c. Delayed Reimbursement**

16 Plaintiffs argue the manner in which Defendant handled the e-discovery expenses and
17 Littler Mendelson's bills also amounts to bad faith. But Plaintiffs fail to show that Defendant
18 breached an obligation in a manner that was unreasonable, frivolous, or unfounded. *Kirk*, 951
19 P.2d at 1126.

20 With respect to delayed payment of Littler Mendelson's bills, Defendant argues that
21 payment was delayed because Littler Mendelson and Plaintiffs had failed to satisfy two Policy
22 guidelines. (Def.'s Resp. 6 (Dkt. No. 33).) First, Littler Mendelson was obligated to provide
23 Defendant with a preliminary report and budget within 45 days of its retention as counsel in the
24 *Donovan* action. (*Id.*) Second, Plaintiffs were obligated to contribute a \$35,000 deductible
25 towards defense costs. (*Id.* at 6–7.) Plaintiffs provided Defendant with proof of compliance
26 with these Guidelines on December 12, 2008. (*Id.* at 7.) Defendant wired the outstanding fees

1 and costs to Littler Mendelson on or about December 30, 2008. (Pl.'s Mot. 18–19 (Dkt. No.
2 25).)

3 Plaintiffs argue first that Defendant could have paid the fees before receiving
4 confirmation of payment of the deductible. (Pl.'s Reply 10 (Dkt. No. 37).) Plaintiffs' cannot
5 merely state what Defendant could have done, however, but must show that what Defendant
6 did was unreasonable, unfounded or frivolous. It is reasonable that before an insurance
7 company pays close to \$200,000 in legal fees, it would seek confirmation that the insured is
8 willing to meet its own obligations. Plaintiffs further argue that Defendant cannot prove that it
9 requested a budget and report prior to December 2008. (*Id.*) Plaintiffs cannot show, however,
10 that Defendant was obligated to make such a request. Plaintiffs do not dispute that the Policy
11 required production of a report within 45 days. It is the duty of Plaintiffs and Littler Mendelson
12 to comply with the Policy, not the duty of Defendant to request compliance. Plaintiffs have
13 failed to present a genuine issue of material fact with respect to whether Defendant's payment
14 of Littler Mendelson's fees was in bad faith.

15 Plaintiffs' claims regarding payment of the e-discovery expenses are no stronger.
16 Defendant explains that the invoices related to the e-discovery expenses were submitted
17 without explanation. (Def.'s Resp. 23 (Dkt. No. 33).) The only information Defendant had
18 about the expenses is that they had been incurred without prior approval, possibly before the
19 *Donovan* action was filed. (*Id.*) In these circumstances, Defendant argues, it was reasonable to
20 deny the claim until further review was conducted regarding whether or not the expenses were
21 covered by the Policy. (*Id.*) When Defendant had reviewed the expenses, it approved the claim
22 and paid the outstanding amount in full. (Pl.'s Mot. 2 (Dkt. No. 25).)

23 Plaintiffs do not explain why Defendant's initial decision was unreasonable. Plaintiffs'
24 primary argument against the reasonableness of Defendant's handling of the claim is that
25 Defendant reversed its determination with no further submission of evidence and only after
26 Plaintiffs had filed this suit. (Pl.'s Mot. 2 (Dkt. No. 25).) This argument cannot stand. If the

1 Court were to hold that Defendant's change of position was a per se indication of
2 unreasonableness, future insurance companies would be discouraged from changing coverage
3 positions in favor of their insureds for fear that such a change would be perceived as an
4 admission of error. Plaintiffs remaining argument is that the claim was "obviously" covered by
5 the Policy, but offer no evidence that would allow the Court to arrive at the same conclusion.
6 (Pl.'s Reply 10 (Dkt. No. 37).)

7 No reasonable finder of fact could determine that it was unreasonable or frivolous for
8 Defendant to conduct a thorough review of Plaintiffs' e-discovery and legal expenses.
9 Accordingly, Plaintiffs bad-faith claims relating to delayed reimbursement are DISMISSED.

10 **2. Washington Administrative Code Claims**

11 Plaintiffs bring a string of vaguely supported WAC claims, which fall into three
12 categories.

13 First, Plaintiffs argue that Defendant's explanation that the e-discovery expenses were
14 uncovered "corporate expenses" was a misrepresentation of policy provisions—in violation of
15 WAC 284-30-330(1)—because the Policy contains no exclusion for corporate expenses. (Pl.'s
16 Mot. 22 (Dkt. No. 25).) Plaintiffs' misreading of the Policy is exasperating. Section II(E) of the
17 Policy clearly states that "Defense Expenses will not include the Company's overhead
18 expenses." (Powell Decl. Ex. 1 at 12 (Dkt. No. 26).) Defendant did not misrepresent Policy
19 provisions.

20 Second, Plaintiffs claim that Defendant violated WAC 284-30-337(7) by compelling
21 Plaintiffs to initiate litigation to recover amounts due by offering substantially less than the
22 amounts ultimately recovered. (Pl.'s Mot. 23 (Dkt. No. 25).) From the facts of the case, it does
23 not appear that Plaintiffs required any compulsion to initiate litigation. Rather, Defendant was
24 engaged in a claims adjustment process, which the Court has found to be reasonable and in
25 good faith, when Plaintiffs walked away from the negotiation table and filed suit. Plaintiffs
26 have offered no evidence that these tactics were necessary to recover their expenses. As

1 mentioned above, the fact that Defendant increased their offering to Plaintiffs after the
2 commencement of litigation does not prove that such litigation was necessary, and for this
3 Court to hold that it did prove this claim would only discourage future good-faith resolution of
4 disputes.

5 Third, Plaintiffs list several WAC provisions requiring an insurance company to handle
6 a claim in a reasonable way and to resolve a claim quickly when liability has become
7 reasonably clear. (WAC 284-30-330(2)–(4), (6), (12), (13).) As discussed above, Defendant
8 handled Plaintiffs claims in a reasonable manner and settled the claim “in full” when liability
9 was established. The central issue in the dispute over e-discovery expenses was whether or not
10 the Policy excludes coverage for corporate overhead expenses. Plaintiffs maintain that there is
11 no such exclusion. They are wrong. (*See Powell Decl. Ex. 1 at 12 (Dkt. No. 26).*) Defendant’s
12 characterization of the Policy provisions is accurate, and its attempts to verify Plaintiffs’ claims
13 were consistent with the clear language of the Policy.

14 Plaintiffs have failed to present a genuine issue of material fact with respect to their
15 WAC claims. Accordingly, these claims are DISMISSED.

16 **3. Olympic Steamship**

17 Plaintiffs argue that because they were forced to file suit to obtain the benefit of their
18 insurance contract, the ruling in *Olympic S.S. Co. v. Centennial Ins. Co.*, 811 P.2d 673, 675
19 (Wash. 1991) entitles them to attorney fees from Defendant. “*Olympic Steamship* stands for the
20 proposition that ‘[w]hen insureds are forced to file suit to obtain the benefit of their insurance
21 contract, they are entitled to attorneys’ fees.’” *Butzberger v. Foster*, 89 P.3d 689, 699 (Wash.
22 2004). For the reasons discussed above, however, Plaintiffs have failed to present a genuine
23 issue of material fact with respect to whether they were forced to file suit to recover the e-
24 discovery expenses. Plaintiffs’ argument that litigation was necessary to compel Defendant to
25 pay Littler Mendelson’s fees is also unconvincing. Plaintiffs do not allege that Defendant ever
26 denied an obligation to pay Littler Mendelson’s fees and costs. Rather, Plaintiffs allege that

1 Defendant's late payments and requests for information before paying indicate an
2 unwillingness to pay. (Pl.'s Mot. 13–14 (Dkt. No. 25).) Plaintiffs filed suit on May 6, 2009.
3 (Dkt. No. 1.) At this point, pursuant to Defendant's quarterly billing cycle, Littler Mendelson's
4 fees for the first quarter of 2009 were one month overdue. (Def.'s Resp. 25–26 (Dkt. No. 33).)
5 Defendant had already indicated its willingness to pay Littler Mendelson, having paid
6 approximately \$197,862 in fees to Littler Mendelson for legal work done during 2008. (*Id.* at
7 13.) Plaintiffs have produced no evidence that a one month delay is so unreasonable as to
8 require filing suit and merit an award of attorney fees.

9 Accordingly, Plaintiffs' claims for Olympic Steamship fees are DISMISSED.

10 **4. Plaintiffs' Affirmative Litigation**

11 Plaintiffs claim that Defendant should be responsible for the costs incurred by Plaintiffs
12 in the suit they initiated against Donovan in Washington state court. (Def.'s Mot. 22 (Dkt. No.
13 55).) (*Id.*) Plaintiffs rely on *Nordstrom, Inc. v. Chubb & Son*, 820 F. Supp. 530 (W.D. Wash.
14 1992) and *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 186 P.3d 1188 (Wash. Ct. App. 2008) for the
15 proposition that because the prosecution of affirmative claims against Donovan in Washington
16 was directly beneficial to the defense of the original *Donovan* action, the costs of the
17 affirmative action should be covered under the Policy. (Pl.'s Opp. 10 (Dkt. No. 59).) There is
18 no support in these cases for Plaintiffs' arguments. In *Nordstrom*, the court held that an
19 insurance company could not allocate expenses to the insured where the expenses were
20 incurred in the *defense* of non-covered claims that were reasonably related to the defense of
21 covered claims. 820 F. Supp. at 536. *Bordeaux*, too, dealt solely with uncovered defense costs
22 that were related to covered defense costs. 186 P.3d at 1193. Neither opinion supports
23 Plaintiffs' overreaching assertion that an insurance company should be required to cover the
24 expenses for an affirmative lawsuit. Accordingly, Plaintiffs' claims seeking recovery of these
25 costs are DISMISSED.

26 **5. Plaintiffs' Failure to Contribute Towards Settlement**

1 Defendant also seeks summary judgment on its counterclaim for Plaintiffs' alleged
2 breach of contract. After the May 5, 2009 mediation, Defendant claims that Plaintiffs refused
3 to negotiate or contribute to the settlement of the *Donovan* action. (Def.'s Mot. 24 (Dkt. No.
4 55).) This refusal, Defendant argues, violates the Policy requirement that the parties allocate
5 between covered and uncovered losses. (*Id.*) Defendant concedes that the question of what the
6 exact allocation should have been is beyond the scope of this motion, but insists that *some*
7 allocation was required. (*Id.*) Plaintiffs respond that Defendant is estopped from denying
8 coverage due to bad faith, that defense counsel justified the settlement paid by Defendant, and
9 that there is no proof that Donovan's uncovered claims increased the settlement value. (Pl.'s
10 Resp. 12 (Dkt. No. 59).) Defendant says that Littler Mendelson assigned at least some risk to
11 every single one of Donovan's claims, some of which were not covered by the Policy. (Def.'s
12 Reply 9–10 (Dkt. No. 61). Defendant's arguments fail. Even if Littler Mendelson assigned
13 some *risk* to each of Donovan's uncovered claims, it does not follow that the final settlement
14 amount was driven in part by those claims. Defendant has failed to establish that there is no
15 genuine issue of material fact with respect to Plaintiffs' alleged breach of contract, and
16 Defendant's motion for summary judgment on this claim is DENIED.

17 IV. CONCLUSION

18 For the forgoing reasons, Plaintiffs' motion for partial summary judgment is DENIED.
19 (Dkt. No. 25.) Defendant's motion for partial summary judgment is GRANTED IN PART.
20 (Dkt. No. 55.)

21 DATED this 30th day of August, 2010.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE