

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION**

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| Thomas L. Moffett, II, et al. | : | |
| Plaintiffs | : | |
| | : | |
| | : | |
| v. | : | Civil Action No. |
| | : | PJM05CV1547 |
| | : | |
| Computer Sciences Corp., et al | : | |
| Defendants | : | |

**PLAINTIFFS’ OPPOSITION MEMORANDUM
TO DEFENDANTS’ MOTION FOR PARTIAL SUMMARY JUDGMENT
ON COUNT V OF PLAINTIFFS’ FIRST AMENDED COMPLAINT**

Now come the Plaintiffs, by their counsel, and file Plaintiffs’ Opposition Memorandum to Defendants’ Motion for Partial Summary Judgment on Count V of Plaintiffs’ First Amended Complaint, as follows:

I. INTRODUCTION AND SUMMARY JUDGMENT STANDARD

The pending motion, and this opposition, address the global issue of whether the Proof of Loss requirements contained in the Standard Flood Insurance Policy have been waived in relation to Plaintiffs’ claims.¹ Accordingly, the specific entries on each Plaintiff’s POL are not addressed herein.

Summary judgment is appropriate only where there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law. Fed R. Civ. P. 56(c). In ruling on a motion for summary judgment, the Court’s role is not to

¹ At the status Hearing on November 6, 2006, the Court stated (Transcript, p. 41): “[W]e’ll start with the defense motion for summary judgment on the proof of loss issue, and for present purposes let’s not involve the specific responses from the plaintiffs about when . . . they [submitted] their proof of loss....”

weigh the evidence and determine truth, but merely to ascertain whether there is a genuine issue for trial. *See Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The Court must view the evidence and inferences to be drawn from the underlying facts in the light most favorable to the non-moving party. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Gill v. Rollins Protective Servs. Co.*, 773 F.2d 592, 595 (4th Cir. 1985). If the evidence is such that a jury could find for the non-moving party, then summary judgment must be denied. *See Anderson*, 477 U.S. at 252. (1986).

In this case, Defendants' motion overreaches. The Court asked for briefing on the waiver issue. In response, Defendants assert that no waiver was given in the face of undisputed evidence (discussed below) from which the only conclusion can be that there was a waiver. And in further response, Defendants assert that Plaintiffs may not claim amounts not included in Plaintiffs' Proofs of Loss (hereinafter "POLs") submitted by January 16, 2004, in the face of evidence (also discussed below) that the Federal Insurance Administrator clearly authorized Plaintiffs (and all Isabel claimants) to claim amounts not included in POLs submitted by January 16, 2004.

II. WAIVER OF THE PROOF OF LOSS

A. The Waiver must be Written and Signed by the Federal Insurance Administrator

The federal case law makes clear that there are two requirements that must be met in order for a waiver of any provision of the National Flood Insurance Program's ("NFIP's") Standard Flood Insurance Policy ("SFIP") to be effective. Those requirements are: (1) the waiver must be in writing, and (2) the writing must be signed by the Federal Insurance Administrator.

For example, in *Petersen v. NFIP*, 200 F.Supp.2d 499, 505-06 (E.D.Pa. 2002), the Court wrote:

The express terms of the SFIP indicated that any modification or surrender of rights under the contract must be made in writing. Because the plaintiffs have not presented any evidence that the defendant issued such a writing and the law requires me to interpret the requirements of the contract strictly, I cannot find that the defendant excused the plaintiffs from complying with the proof of loss requirement or waived the right to demand compliance prior to litigating their claim.

In *Diamond v. FEMA*, 689 F.Supp. 163, 169 (E.D.N.Y. 1988), the Court wrote:

Article VIII, letter D of the [SFIP] states, in relevant part, that: This Standard Flood Insurance Policy cannot be amended nor can any of its provisions be waived without the express written consent of the Federal Insurance Administrator.

And in *McCrary v. FEMA*, 642 F.Supp. 544, 546 (E.D.N.C.1986), the Court wrote:

The Standard Flood Insurance Policy, of which the insureds had a copy, stated in pertinent part:

This Standard Flood Insurance Policy cannot be amended nor can any of its provisions be waived without the express written consent of the Federal Insurance Administrator....

See 44 C.F.R. Part 61 App. A(1); Article VIII, Section D of the insurance policy. Accordingly, federal law and the terms of the Standard Flood Insurance Policy explicitly preclude oral waiver or waiver by conduct.... The FEMA can waive the proof of loss requirement only by duly executing a written waiver, which it did not do in this case.

Each of these three cases dealt specifically with the issue of waiver of the POL.

In the instant case (as discussed below), a document exists, signed by the Federal Insurance Administrator, which comprises a waiver of the POL requirement.

B. Undisputed Facts

The following facts are not in dispute:

1. Plaintiffs suffered their flood losses from Hurricane Isabel on September 18, 2003.

2. The SFIP required POLs within 60 days of the loss (by November 17, 2003).
3. At all times pertinent hereto, Anthony Lowe was the Federal Insurance Administrator.
4. On October 28, 2003, Mr. Lowe sent a Notice #W03057,² extending the 60 day deadline for filing the POL for an additional 60 days.³ A copy of this written notice, signed by him, is attached hereto as Exhibit A.
5. On April 16, 2004, Mr. Lowe sent Notice #W04016,⁴ “implement[ing] a claim review process to ensure that NFIP policyholders who filed claims following Hurricane Isabel receive...an equitable loss settlement,” and noting that the implementation was “necessary to fully effect and administer the Standard Flood Insurance Policy to ensure compliance with Federal law.”⁵ A copy of this written notice, signed by him, is attached hereto as Exhibit B.
6. Mr. Lowe sent an original of each of these two notices to every WYO Company Principal Coordinator and to the NFIP Servicing Agent. (*See* Exhibits A and B.)
7. Mr. Lowe sent a copy of each of the notices to every NFIP Vendor, to the IBHS, to the FIPNC, to WYO Marketing Committee, and to the Government Technical Representative. (*See id.*)
8. Mr. Lowe directed each WYO to route the notices to its Claims, Data Processing, Marketing, and Underwriting Departments. (*See id.*)
9. Notice #W04016 mandated that notice of the claim review process being instituted was to be sent to every NFIP claimant who suffered flood loss

² Notice #W03057 was issued on October 28, 2003; Notice #W04016 was issued on April 16, 2004. Comparing the numbers with the dates, it is a reasonable hypothesis that #W03057 was the 57th “W” Notice sent in 2003, and that #W04016 was the 16th “W” notice sent in 2004. However, further discovery and the testimony of Mr. Lowe, or some other employee of FEMA who has personal knowledge of FEMA’s notice numbering system, is necessary to this information, and more specifically, to ascertain the meaning, if any, of the letter and number designation.

³ Defendants concede that this extension was authorized in a document written and signed by the Federal Insurance Administrator. For reasons known only to them, Defendants deny that this written and signed extension was a waiver. Indisputably, it was a waiver of the requirement that the POL be filed November 17, 2003, extending it an additional 60 days.

⁴ *See* n.2 above.

⁵ As pleaded in the Complaint, the Federal Insurance Administrator instituted the claims review process to remedy the wrongful handling of claims by the NFIP and its insurance partners, after the wrongdoing was brought to the attention of Congress, which called upon him to institute the review.

from Hurricane Isabel, a total approximating 24,000 claimants.⁶

10. It is indisputable that both Notice #W03057 and #W04016 were in writing, were signed by the Federal Insurance Administrator, and were directed in comprehensive fashion to all departments and entities engaged in the NFIP.

These ten salient facts are both undisputed and affirmatively conceded as being true by Defendants in the text of their current motion. Accordingly, in the case at bar, the two requirements that must be met in order for a waiver of an SFIP provision to be effective have been met, *i.e.*, (1) the waiver is in fact in writing, and (2) the writing was in fact signed by the Federal Insurance Administrator.

That the written document signed by the Federal Insurance Administrator, Notice #W04016, is in fact a waiver of the POL, would appear to be beyond question, despite Defendants' urging that it is not.

C. Notice #W04016, is in Fact a Waiver of the Proof of Loss

1. The SFIP POL Requirements

Satisfaction of the SFIP's POL provision requires the insured to do two things to complete the POL, unless the requirement to do those things is waived. In order to recover for an item of damage covered under the SFIP, the insured must (1) include that item in the POL's itemization of damages, including the amount to repair or replace the damaged item, and (2) deliver the POL to the insured within the time specified.⁷ Here, the time for delivering the POL to the insurer had been specified as January 16, 2004,

⁶ It is not in dispute that the 24,000 number represents all Isabel claimants insured under the NFIP.

⁷ There are other requirements, including the date and time of loss, a brief explanation of how the loss happened, the insured's interest and the interest of others in the damaged property, details of any other insurance that may cover the loss, changes in title or occupancy of the covered property during the term of the policy, names of mortgages or anyone else having a lien, charge, or claim against the insured property, and details about who occupied any insured building at the time of loss and for what purpose. All of this information was disclosed to Defendants in timely fashion. Defendants do not claim that any of this information was not disclosed to them.

per Mr. Lowe's first Notice, #W03057. In order to confirm that the second Notice, #W04016, is in fact a waiver of the POL, one need only consider whether the Federal Insurance Administrator's writings waived these two requirements

2. The Waiver of the Proof-of-Loss Requirements

That Mr. Lowe intended to, and did, waive these two requirements is evident from (a) the language of his Notice #W04016, and (b) NFIP's public announcements about his notice.

(a). The Language of Notice #W04016 Comprises Waiver.

In his Notice #W04016, Mr. Lowe "implemented a claim review process to ensure that NFIP policyholders who filed claims following Hurricane Isabel received an equitable loss settlement," without regard to whether, when or in what amount they filed a POL. Mr. Lowe's Notice #W04016 is dated April 16, 2004, long after the time specified for filing a POL had expired pursuant to Notice #W03057. In Notice #W04016, he explicitly recognized that this process was "necessary to fully effect and administer the Standard Flood Insurance Policy to ensure compliance with Federal law." *See* Exhibit B. There was no limitation in Notice #W04016 that the claim review process would not be available to those insureds who had not filed a POL on or before January 16, 2004. Indeed, the Notice was to be sent to all 24,000 claimants, many of whom did not file their POLs by January 16, 2004. Additionally, for those who did file by that date, the Notice did not indicate that the equitable loss settlement under the review process would be capped at the amount claimed on their respective POLs. By its express terms, the Notice made clear that the claim review process was to be available to "NFIP

policyholders who filed claims⁸ following Hurricane Isabel,” and that the purpose of the process was “to ensure that [they] received an equitable loss settlement”. The whole purpose of Notice #W04016 was to open up the claims process to every single NFIP claimant who had suffered an Isabel flood loss, regardless of whether or not they had filed a timely POL, and regardless of whether any timely filed POL failed to include all items of loss. The stated purpose of the second Notice was to review the entire claim of each and every claimant, not just timely filed POLs.

Finally, it should be noted that 44 C.F.R. 61.13 does not require the waiver to take any particular form.

(b). FEMA’s Public Statements about Notice #W04016 Establish that the Notice Constitutes a Waiver.

Three weeks before he issued Notice #W04016, Anthony Lowe made clear that he would arrange to allow the Isabel flood victims to revisit the NFIP and have their claims readjusted *de novo*. As reported in the Baltimore Sun on March 26, 2004:

Under pressure from U.S. Senators from Maryland and North Carolina, the head of the federal flood insurance program agreed yesterday to aggressively seek out Tropical Storm Isabel victims who feel their claims were handled unfairly and increase payments to them if their settlements were too low.

U.S. Sens. Paul S. Sarbanes and Barbara A. Mikulski of Maryland and Sen. Elizabeth Dole of North Carolina, speaking at a Senate committee hearing on reauthorization of the National Flood Insurance Program, said thousands of Isabel victims have found their flood settlements are far too low to pay for repairs to their homes....

Sarbanes told Lowe at the hearing. "It may mean extra work for you, but I think **you should go back to the communities and say, 'We have an open door,' allow people to revisit you.... You need to reach out.**"

⁸ The filing of a claim is not the same as the filing of a POL. The approximately 24,000 claimants included those who filed POLs before January 16, 2004, those who filed POLs after that date, and those who filed no POL at all.

Later, at a summit he organized for flood victims, regulators and insurance industry representatives in Virginia, **Lowe said he plans to do just that....**

(Emphasis added). A copy of the Baltimore Sun article is attached hereto as Exhibit C. The information contained in this article should resolve any doubts about Notice #W04016 and, at a minimum, raises factual issues for trial. To the extent that the article presents any hearsay concerns, such concerns can and will be properly addressed during discovery in this case and through the testimony of Mr. Lowe in deposition and at trial.⁹

In direct follow-up to his stated commitment, two weeks before he issued Notice #W04016, Anthony Lowe's agency issued Press Release #HQ-04-030FAQ on April 2, 2004, answering questions about the soon-to-be-issued Notice. The answers to the questions contained in the Press Release, taken as a whole, make it clear beyond doubt that the POL requirements were being waived. Three of the answers exemplifying the waiver appear in the press release as follows:

12. Do I need to bring my spouse/other family members/neighbors/contractors who can substantiate my losses/repair costs?

A: No. Policyholders should bring **any document** that may help to support their claims. You do not have to bring anyone else unless you choose to do so.

16. Can I still attend the Community Outreach Teams' one-on-one sessions if my claim has been paid and funds used, but I am still dissatisfied or have questions?

A: Yes, if you feel that you have received an unfair settlement amount or poor service. The outreach teams will need to see **some documentation (a contractor's estimate)** to determine if you have been paid fairly and equitably.

⁹ Plaintiffs' counsel has appropriately refrained from interviewing Mr. Lowe *ex parte* to obtain his affidavit for the reasons discussed in Section D below and in the attached Affidavit of Counsel.

17. What if NFIP has already reviewed my case, may I still visit and discuss my case with the outreach teams?

A: Yes. **You should bring documents to show why you think you were not treated fairly and equitably.**

(Emphasis added). A copy of FEMA Press Release #HQ-04-030FAQ is attached hereto as Exhibit D. This FAQ (frequently asked questions) sheet, as provided by FEMA in its own Press Release, resolves any doubt that Notice #W04016 constitutes a waiver for all Hurricane Isabel claimants. And to the extent there remains any questions regarding the waiver, the Press Release necessarily raises a fact question for trial.

On April 23, 2004, one week following issuance by Mr. Lowe of Notice #W04016, the Baltimore Sun reported:

Homeowners can have their Tropical Storm Isabel insurance claims reviewed by federal officials Wednesday in Queen Anne's County and Thursday in Edgewater.

During the meetings, **National Flood Insurance Program claims specialists will gather information and documentation from property owners to compare with case files from private insurance companies.** The specialists may also order a reinspection of the damaged property.

Claims specialists will summarize their findings in written statements. **If specialists find that the original settlement was unfair, residents will also receive an adjusted settlement from their insurance company.**

(Emphasis added). A copy of this Baltimore Sun article is attached hereto as Exhibit E. Along with FEMA's own Press Release and Mr. Lowe's statement at the summit following the Congressional Hearing (as reported by the Baltimore Sun on March 26, 2004), the information contained in this article only further reinforces the conclusion that Notice #W04016 constituted a waiver and, at a minimum, raises factual issues for trial. As with the March 26, 2004 article, any hearsay concerns can and will be properly addressed in discovery and through the testimony of Mr. Lowe.

As is evident from the above public dissemination of information, the NFIP was intent on carrying out the written, signed mandate of the Federal Insurance Administrator, by a *de novo* review to be offered to all 24,000 Isabel claimants, based upon documentation they could produce without regard to amounts entered in POLs or the January 16, 2004 deadline for filing a POL. As it happened, even though the review process ultimately was conducted improperly after Mr. Lowe was relieved of his post (as discussed in Section III below), the claims were in fact reviewed without regard to the contents of the POLs filed on or before January 16, 2004. See exemplar Affidavit of Lori Healan, paragraphs 2-4. Accordingly, as evidenced by (i) the language of Notice #W04016, (ii) the signature of the Federal Insurance Administrator on Notice #W04016, and (iii) the public dissemination of information relating to Notice #W04016, including the FEMA Press Release, this Court should rule that the POL requirement was waived and accordingly deny the Defendants' Motion.

3. Defendants' Argument that No Waiver Exists Lacks Merit.

Defendants ask the Court "to follow the lead of numerous federal appellate courts, including the Fourth Circuit, which rejected similar waiver claims in the context of the POL requirement". Defendants rely upon *Dawkins v. James Lee Witt*, 318 F.3d 606, 611 (4th Cir. 2003); *Sanz v. U.S. Sec. Ins. Co.*, 328 F.3d 1314, 1319 (11th Cir. 2003); and *Gowland v. Aetna*, 143 F.3d 951, 954 (5th Cir. 1998). The problem Defendants face in asking the Court to follow these cases is that they most decidedly do **not** involve similar waiver claims.

Simply stated, in *Dawkins*, *Sanz* and *Gowland*, there was no document signed by the Federal Insurance Administrator waiving POL requirements. In *Dawkins*, 318 F.3d,

at 611, “the plaintiffs...produced no express written waiver from the Federal Insurance Administrator.” Likewise, in *Sanz*, 328 F.3d, at 1318-1319, “Sanz admits...that...he did not receive written notice from the Federal Insurance Administrator that the proof of loss requirement was waived.” And in *Gowland*, 143 F.3d, at 954, “the federal regulations provide that no provision of the policy may be altered, varied, or waived without the *express* written consent of the Federal Insurance Administrator. It is clear that no such waiver was sought or obtained herein.” In each of these three cases, unlike the situation present here, there simply was nothing in writing signed by the Federal Insurance Administrator that excused the POL requirements.

In the instant case, on the other hand, the Federal Insurance Administrator signed off on a waiver of POL requirements, and made available to all 24,000 claimants a second and completely *de novo* claim review process, regardless of whether, when and to what extent the claimants had filed their POLs. As far as Plaintiffs have been able to determine, Notice #W04016 represents the first time that FEMA has taken such action, and it did so in the manner contemplated by the SFIP and in the NFIP regulations.

For these reasons, the cases cited by Defendants are fundamentally different than the case at bar, and therefore are wholly inapposite. The Defendants’ argument that the Court must not deviate from the “long line” of cases that did not find waiver simply lacks merit when one compares those cases with the particular facts of the instant case.

Moreover, at page 6 of their supporting memorandum, Defendants recognize that the SFIP and the NFIP regulations provide for a waiver as was given here:

Provisions of the SFIP cannot be waived without the express written consent of the Administrator. *See* 44 C.F.R. § 61.13(d) and (e). The SFIP reiterates that requirement and its terms cannot be amended or provisions waived without the Administrator’s written consent.

In the absence of Mr. Lowe's Notice #W04016, one would need to examine the date and content of each Plaintiff's POL to determine whether the POL requirements were met. However, such an examination is not required here since, for the first time ever, the Federal Insurance Administrator took action which applied to every victim of Hurricane Isabel, allowing for a *de novo* review and equitable settlement of all 24,000 claims regardless of POL filings, through a process put in place in a writing signed by the Federal Insurance Administrator. Accordingly, the Defendants' motion for partial summary judgment should be denied.

D. To the Extent that there Remains Unresolved Questions Regarding Notice #W04016, Such Questions can only be Resolved through Fact Discovery.

F.R.C.P. 56(f) states:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Based upon the matters and facts set forth in section II.C and this section II.D., and also in footnotes 2,4, and 9 of this memorandum, Plaintiffs submit herewith and incorporate herein the affidavit of their counsel Martin H. Freeman, who states that Plaintiffs cannot conduct an *ex parte* interview of, and obtain the affidavit of, Anthony Lowe or any other present or former employee of FEMA with personal knowledge of those matters and facts, because (1) they were employees of FEMA at pertinent times, (2) counsel for FEMA has instructed Plaintiffs' counsel to refrain from speaking with FEMA employees, and (3) the rules of professional conduct preclude such contact. *See*

Annotated Model Rules of Professional Conduct Rule 4.2 legal background (1996) (noting that “[i]f the former employee has had extensive exposure to privileged information, ex parte contact may be limited”); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-359 (1991) (“With respect to any unrepresented former employee, of course, the potentially-communicating adversary attorney must be careful not to seek to induce the former employee to violate the [attorney-client] privilege.”).

Based upon the content of the Federal Insurance Administrator Anthony Lowe’s Notice #W04016, FEMA’s own Press Release, and related newspaper accounts, it is clear that Notice #W04016 constitutes the requisite written waiver of the POL deadline. However, the extent that there remains any doubt regarding the waiver issue, the Notice along with the corresponding Press Release and related newspaper articles, at the very least, raise factual questions that necessarily overcome summary judgment on the issue. Any dispute by the Defendants concerning these documents can only be resolved through formal discovery, and in particular, the testimony of the former Federal Insurance Administrator and other persons who may have first-hand knowledge of Notice #W04016, the Press Release, and the information reported in the newspapers.

III. BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

In federal common law, as elucidated by the 4th Circuit, breach of the covenant of good faith and fair dealing is not a distinct cause of action, and may not be pleaded as such. Instead, the covenant is implied in every contract, and thus its breach is part and parcel of a breach of contract action. In this case, that is exactly how Plaintiffs have pleaded it.¹⁰

¹⁰ In the Fifth Cause of Action in the Complaint, Plaintiffs claim breach of the SFIP contract. In paragraph 32 of the Complaint, expressly incorporated into the Fifth Cause of Action, they allege that “wrongful

The case law substantiates that this is the correct manner in which to plead the implied covenant of good faith and fair dealing. In *Battle v Seibels Bruce Insurance Company*, 288 F.3d 596 (4th Cir. 2002), the Court, as is the case here, had under review a breach of contract action involving the NFIP's Standard Flood Insurance Policy. The *Battle* Court stated:

[W]e hold...that such a claim [for breach of the implied covenant of good faith and fair dealing] would be a "su[*it*] to recover money under" Battle's SFIP as stated in Article 9(R) of Battle's SFIP.... Logic dictates that any possible implied covenant of good faith and fair dealing on the part of SCIC that may be recognized by the district court on remand would be a contractual covenant implied by federal common law, and thus, a covenant "under" Battle's SFIP.

Id., at 608. In the instant case, Plaintiffs claim breach of the SFIP contract. The covenant of good faith and fair dealing is implied by law in that contract, and is expressly alleged in the First Amended Complaint. In an effort to correct a breach of that covenant, the Federal Insurance Administrator Anthony Lowe instituted a process allowing for a *de novo* review of all 24,000 NFIP insureds who claimed flood damage from Hurricane Isabel.¹¹

Thus, independent of the question of whether the claim review process constitutes a POL waiver, if the process is shown (through evidence obtained in discovery) to have been implemented in a manner that amounts to a continuation (and not a correction) of the Defendants' bad faith and unfair dealing as alleged in the First Amended Complaint,

conduct...includes but is not limited to...the breaches of the SFIP [and] of the implied covenant of good faith...carried out by or sanctioned by...the WYOs".

¹¹ As stated in paragraph 59 of the First Amended Complaint: "On each of two occasions when a FEMA official made known his intent to rectify the NFIP wrongdoing, the official's tenure came to an end shortly thereafter. Upon information and belief, the leaving of office by these two NFIP officials was to halt the official's attempts to rectify the wrongdoing." One of those two FEMA officials was Mr. Lowe, following his issuance of Notice #W04016.

then the Defendants' conduct constitutes a continuing breach of the SFIP contract, permitting recovery of damages measured by the difference between what was actually paid and the total recoverable damages covered under the SFIP. Notably, the Defendants' make no argument in their moving papers and provide no supporting documentation to support a finding by this Court on summary judgment that their conduct and actions during the claim review process did not constitute a breach of the SFIP. Accordingly, regardless of whether Notice #W04016 constitutes a waiver of the POL requirement, the Plaintiffs are entitled to obtain discovery regarding the Defendants' actions in carrying out Mr. Lowe's claim review mandate as set forth in the Notice, and, ultimately, to their day in court to prove the breach and their respective damages caused thereby.

IV. EQUITABLE ESTOPPEL

Defendants also are equitably estopped by Notice #W04016 from declining to pay the shortfall due Plaintiffs for flood-damaged items covered under their SFIPs. Notice #W04016 expressly states that the purpose of the *de novo* claim review process is "to ensure that NFIP policyholders who filed claims following Hurricane Isabel received an **equitable** loss settlement."

Ignoring the Notice, Defendants state at page 11 of their motion: "estoppel is precluded against FEMA and the WYOs to require payment of a flood insurance claim where the loss claimed in litigation has not been claimed in a proof of loss."

Contrary to Defendants' suggestions, the Supreme Court has explicitly refused to hold that the doctrine of estoppel never applies to claims against the United States, recognizing that there may be cases "in which the public interest in ensuring that the

Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor and reliability in their dealings with the Government.” *Heckler v. Community Health Services of Crawford, Inc.*, 467 U.S. 51, 60-61 (1984).

The elements of equitable estoppel that a claimant must establish are straightforward: (1) Defendants must be aware of the facts; (2) Defendants must intend that Plaintiffs act upon Defendants’ affirmative conduct; (3) Plaintiffs did not have knowledge of the facts; (4) Plaintiffs relied upon Defendants’ conduct to Plaintiffs’ substantial injury; and (5) imposition of liability against Defendants will not unduly damage the public interest. *Gowland v. Aetna*, 143 F.3d 951, 955 n. 6 (5th Cir. 1998); *Harris v. State Farm & Casualty Co.*, No. 4:05cv5, 2006 U.S. Dist. LEXIS 1585, at *32 (E.D. Va. Jan. 11, 2006); *Furcron v. United States*, 626 F. Supp. 320 (D. Md. 1986). Where these conditions are met, estoppel does lie against the government.

Here, Plaintiffs can establish each of the elements of estoppel. First, Defendants were aware of the facts. Notice #W04016 was intended to afford the SFIP policyholders a *de novo* claims review, to correct improper processing of their claims. As discussed above, Mr. Lowe sent an original of each of the notice to every WYO Company Principal Coordinator and to the NFIP Servicing Agent, and a copy of the notice to every NFIP Vendor, to the IBHS, to the FIPNC, to the WYO Marketing Committee, and to the Government Technical Representative. *See* Exhibit B. Moreover, he directed each WYO to route the notices to its Claims, Data Processing, Marketing, and Underwriting Departments. *See id.* As alleged in the First Amended Complaint, Defendants had

engaged in, and were aware of, a systematic deprivation of insurance benefits to the Plaintiffs, including the systematic evisceration of the *de novo* claims review process.

Second, it is undisputed that Defendants intended that Plaintiffs act upon Defendants' affirmative conduct. Incorporated in and made a part of Notice #W04016 is the form notice entitled "Notice to Policyholders of Flood Insurance Claim Review Process", which Mr. Lowe directed be sent to all 24,000 Isabel flood-loss claimants. *See id.*, at page 2.

Third, Plaintiffs did not have knowledge of the facts. As alleged in the Complaint, they were unaware when they purchased the SFIP that the Defendants had no intention of paying them the amounts to which they were entitled under the terms of the SFIP, nor were they aware that the *de novo* claims review process would be eviscerated by the Defendants. *See* Affidavit of Lori Healan, at paragraph 5.

Fourth, Plaintiffs relied upon Defendants' conduct to Plaintiffs' substantial injury. They purchased their SFIPs believing, as they had a right to believe, that they would be paid the items of damage covered under the SFIP. *See id.*, at paragraph 6.

They signed proofs of loss prepared by Defendants' adjusters while submitting other materials supporting their claims for higher losses, as they were advised they had a right to do.,¹² Affidavit of Lori Healan, paragraph 7. Finally, they submitted materials pursuant to Notice #W04016 and the claim form appended to it. *See id.*, at paragraph 3.

Fifth, imposition of liability against Defendants will not unduly damage the public interest. In the Fifth Cause of Action, Plaintiffs seek only contract damages

¹² The SFIP permits an insured to submit supplemental proofs of loss where additional damages are later discovered, or where the cost of repair is substantially higher than originally estimated.

within policy limits for losses that are documented and fall within the terms of the SFIP. Payment of such damages is contemplated under the NFIP and its implementing regulations, including the SFIP. Moreover, Plaintiffs paid insurance premiums for their SFIPs; indeed, most of the Plaintiffs had paid flood insurance premiums for years without ever filing a claim.

Accordingly, the Defendants are equitably estopped from now asserting the position that FEMA and the WYOs may decline payment of a flood insurance claim where the loss claimed in litigation has not been claimed in a proof of loss.

V. CONCLUSION

WHEREFORE, for the above stated reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion for Partial Summary Judgment on Count V of Plaintiffs' First Amended Complaint and issue a Scheduling Order for the commencement of discovery in this case. Alternatively, prior to ruling on Defendants Motion, Plaintiffs request that this Court enter an order pursuant to F.R.C.P. 56(f) authorizing Plaintiffs to depose Anthony Lowe and other present or former FEMA employees to confirm the waiver and/or resolve any open questions that this Court may have.

Respectfully submitted,
FREEMAN & FREEMAN, P.C.

By: /s/ Martin H. Freeman /s/
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and

MARCARI RUSSOTTO & SPENCER, PC

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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Plaintiffs' Opposition Memorandum to Defendants' Motion for Partial Summary Judgment on Count V of Plaintiffs' First Amended Complaint, supporting affidavit and exhibits, and proposed orders, were served, via electronic case filing, on all counsel of record this 9th day of March, 2007.

/s/ Martin H. Freeman /s/
Martin H. Freeman