



through FEMA or from a participating Write Your Own (WYO) insurance carrier, whose homes were damaged as a result of the hurricane, and who filed flood insurance claims.

At the November 6, 2006 hearing before this Court, Plaintiffs' counsel suggested that one "global issue" remained with respect to Plaintiffs' breach of contract claim; namely, whether FEMA had waived the proof of loss requirement for Hurricane Isabel claims. Although the factual basis for Plaintiffs' waiver claim is not entirely clear, Plaintiffs' counsel suggested at the hearing that it was based on certain documents relating to the process that FEMA implemented to review the handling of flood claims arising out of Hurricane Isabel. Since that time, Defendants repeatedly sought further clarification regarding the basis for Plaintiffs' waiver claim, but Plaintiffs have provided no information in response to these requests.<sup>2</sup> While it is difficult to see how any of the documents Plaintiffs' counsel referred to at the hearing could be construed to contain a waiver of the proof of loss requirement, they fall far short of the requirement in the flood policies themselves and the applicable federal regulations that there be "express written consent of the Federal Insurance Administrator" before any waiver can be found. Accordingly, Defendants respectfully ask this Court to follow the lead of numerous federal appellate courts, including the Fourth Circuit, which rejected similar waiver claims in the context of the proof of loss requirement. *See, e.g. 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); *Gowland v. Aetna*, 143 F.3d 951, 954 (5th Cir. 1998).

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On November 7, 2006, the day after the hearing, Defendants sent a letter to Plaintiffs' counsel asking Plaintiffs' counsel to identify the documents upon which his waiver argument was based. (A true and correct copy of the November 7, 2006 letter is attached hereto as Exhibit A.) Plaintiffs' counsel failed to respond to the request, and Defendants sent a follow-up request on December 8, 2006. (A true and correct copy of the December 8, 2006 email is attached hereto as Exhibit B.) On January 2, 2007, Plaintiffs' counsel sent a non-responsive e-mail to Defendants refusing to provide the documents requested until he files his opposition to this motion (A true and correct copy of the January 2, 2007 email is attached hereto as Exhibit C).

At the outset, it is irrelevant whether the plaintiffs' SFIPs were issued by the federal government directly, or by a WYO carrier. NFIP flood insurance claims are paid with federal funds; it does not matter who issued the policy. Every appellate court that has addressed the issue has held that the rules that govern the NFIP proof of loss requirement in cases where the policy was issued by FEMA apply with equal force and effect where the policy was issued by a private WYO carrier. *See Battle v. Seibels Bruce Insurance Company*, 288 F.3d 596 (4<sup>th</sup> Cir. 2002); *see also Suopys v. OPAC*, 404 F.3d 805 (3<sup>rd</sup> Cir. 2004); *Dawkins*, 318 F.3d 606, *cert. denied*, 539 U.S. 960, 123 S.Ct. 2653 (2003); *Gowland*, 960 F.Supp. 101; *Neuser v. Hocker*, 246 F.3d 508 (6<sup>th</sup> Cir. 2001); *Mancini v. Redland Ins. Co.*, 248 F.3d 729 (8<sup>th</sup> Cir. 2001); *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386 (9<sup>th</sup> Cir. 2000), *cert denied*, 531 U.S. 927, 121 S.Ct. 305 (2000); and *Sanz*, 328 F.3d 1314. As each of those cases held, if the Plaintiffs cannot establish timely and complete compliance with the SFIP proof of loss requirement, their claims are barred. Whether the policy was issued by the government, or by a WYO carrier, is irrelevant.

As requested by the Court, this Partial Motion for Summary Judgment is based on a legal argument. Each Defendant will address individual Plaintiffs' factual claims separately in subsequent motions as deemed appropriate by this Court after the disposition of this motion.

## II. STATUTORY AND REGULATORY SCHEME

The NFIP was established pursuant to the National Flood Insurance Act of 1968, 42 U.S.C. § 4001, *et seq.* (the Act). The NFIP is a federally-subsidized program that provides flood insurance at or below actuarial rates. Congress created the program in part because of the unavailability of flood insurance on an economically feasible basis. *See* H. Rep. No. 786, 90<sup>th</sup> Congress, 2<sup>nd</sup> Sess.

(1967); S. Rep. No. 11233, 90th Congress, 1st Sess. (1967). The NFIP made flood insurance widely available to individuals and other property owners at affordable rates for the first time.

The NFIP initially was administered by the Department of Housing and Urban Development (HUD), which operated the NFIP indirectly through the National Flood Insurers Association under the authority of 42 U.S.C. §§ 4051-4056. Effective January 1, 1978, HUD assumed the administration of the NFIP under the authority of 42 U.S.C. §§ 4071 - 4072, and operated the insurance aspects of the Program that previously had been performed by the National Flood Insurers Association. (*See* revisions to Parts 61 and 62 of the Code of Federal Regulations, 42 F.R. 2570) On April 1, 1979, Executive Order 12127, 44 F.R. 19367, transferred the operation of the NFIP to FEMA by Reorganization Plan No. 3 of 1978, 43 F.R. 4193.

The NFIP currently operates under Part B of the Act. Under Part B, FEMA initially issued all flood insurance policies itself, but in 1983 FEMA exercised its authority to establish the WYO Program to assist in marketing flood insurance. 42 U.S.C. §§ 4081(a), 4071; 44 C.F.R. § 62.23-24; 48 Fed. Reg. 46789 (1983). The WYO Program allows participating private insurers (“WYO carriers”) to write flood insurance under their own names. *See* 44 C.F.R. § 62.23. As noted above, the arguments made herein apply equally to claims under SFIPs issued by FEMA and those issued by other Defendants.

The Act specifically authorizes the Director of FEMA to provide by regulation the general terms and conditions of insurability and conditions of coverage applicable to properties to be insured including the types, classes and locations of any such properties that shall be eligible for flood insurance. *See* 42 U.S.C. § 4013; *see also Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947).

The SFIP is a single-building risk insurance policy that provides coverage against "all direct physical loss by or from flood." 44 C.F.R. Pt. 61 App. A(1), Insuring Agreement and Art. II, Definitions (Definition of Policy and Flood). The SFIP requires the insured to submit a signed and sworn proof of loss. It states:

In case of a flood loss to insured property, [the insured] must:

\* \* \*

4. Within 60 days after the loss, send us a proof of loss, which is your statement of the amount you are claiming under the *policy signed and sworn to by you*, and furnishing us with the following information:
  - a. The date and time of loss;
  - b. A brief explanation of how the loss happened;
  - c. Your interest (for example, "owner") and the interest, if any, of others in the damaged property;
  - d. Details of any other insurance that may cover the loss;
  - e. Changes in title or occupancy of the covered property during the term of the policy;
  - f. Specifications of damaged buildings and detailed repair estimates;
  - g. Names of mortgages or anyone else having a lien, charge, or claim against the insured property;
  - h. Details about who occupied any insured building at the time of loss and for what purpose; and
  - i. The inventory of damaged personal property described in J.3. above.
5. In completing the proof of loss, you must use your own judgment concerning the amount of loss and justify that amount.
6. You must cooperate with the adjuster or representative in the investigation of the claim.
7. The insurance adjuster whom we hire to investigate your claim may furnish you with a proof of loss form, and she or he may help you complete it. However, this is a matter of courtesy only, and *you must still send us a proof of loss within 60 days after the loss even if the adjuster does not furnish the form or help you complete it.*
8. We have not authorized the adjuster to approve or disapprove claims or to tell you whether we will approve your claim.

44 C.F.R. § 61, App. A(1), Art. VII, ¶ J (emphasis added). The SFIP also explains that an insured cannot sue the issuer of an SFIP (whether FEMA or a WYO carrier) until he/she has complied with all of the requirements of the policy. *See* 44 C.F.R. Pt. 61, App. A(1), Art. IX, ¶ R.

All flood insurance made available under the Act is subject to Federal statute, the regulations issued under the Act, the Federal Insurance Administrator's interpretations, and to the terms and conditions set forth in the SFIP. *See* 44 C.F.R. § 61.4(a); 44 C.F.R. § 61.4(b); 44 C.F.R. Part 61.5(e). The SFIP has been incorporated into the regulations at 44 C.F.R. Part 61, App. A(1), A(2) and A(3), and therefore, has the force and effect of federal law.<sup>3</sup> 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, and no action taken under the policy can constitute a waiver of the insurer's rights. *See* 44 C.F.R. Pt. 61, App. A(1), Art. VII ¶ D.

The SFIP "and all disputes arising from the handling of any claim under the policy are governed exclusively by the flood insurance regulations issued by FEMA, the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4001, *et seq.*), and Federal common law." 44 C.F.R. Pt. 61, App. A(1), Art. IX. *See also Battle*, 288 F. 3d at 607. Any claims paid under the NFIP are paid from the National Flood Insurance Fund, a fund maintained in the U.S. Treasury. *Id.* at 600; and 42 U.S.C. § 4017(d). Accordingly, all claims payments made to compensate insureds who suffered losses covered by SFIPs issued by FEMA or by WYOs (which act as "fiscal agents of

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The SFIP is published annually in October at 44 C.F.R. Pt. 61. There are three separate SFIPs found at 44 C.F.R. Pt. 61: App. A(1) Dwelling; App. A(2) General Property; and App. A(3) Residential Condominium Building Association. The SFIP at issue here is a Dwelling policy and is published at 44 C.F.R. Pt. 61, App. A(1). Because Plaintiffs seeks coverage under a SFIP providing coverage for loss occurring in September 2003, the applicable SFIP is found at 44 C.F.R. Pt. 61, App. A(1) (2002).

the United States,” 42 U.S.C. § 4071 (a) (2000)) are direct charges to the United States Treasury. *Battle*, 288 F.3d at 600.

### III. FACTUAL BACKGROUND

On October 28, 2003, Anthony Lowe, the then-Director of the Mitigation Division and the Federal Insurance Administrator, issued a written notice stating that the proof of loss deadline for Hurricane Isabel claims involving damage that occurred between September 17 and 19, 2003, would be extended for an additional sixty days beyond the normal sixty day-deadline set forth in the SFIP. (A copy of the October 28, 2003 notice is attached hereto as Exhibit D.) The notice expressly stated that “all other terms and conditions of the SFIP remain in effect.” (Ex. D at p. 2.)

On April 16, 2004, Administrator Lowe issued another notice announcing that FEMA had “implemented a claims review process to ensure that NFIP policyholders who filed claims following Hurricane Isabel received an equitable loss settlement.” (A copy of the April 16, 2004 notice is attached hereto as Exhibit E). This notice included information to be sent to policyholders regarding the review process that stated, *inter alia*, “[i]f you have not received compensation equal to your maximum policy coverage, you are being given the option to request a claim review.” *Id.* at p. 2. It went on to inform policyholders that they should complete a request for review form and return it to the NFIP if they wanted their claim to be reviewed. *Id.* The notice further stated:

As the reviews are completed, some flood insurance claims settlements will be found to be correctly evaluated. In those cases, policyholders will receive a detailed written explanation. If some claim settlements were incorrect, and more dollars should be paid, an adjustment will be made and policyholders will receive additional funds along with a detailed written response.

*Id.* The document does not mention the proof of loss requirement, nor does it refer to any waiver of the SFIP requirements.

At the conclusion of the claims review process, insureds typically received a letter providing them with the results of the review. (Representative samples from Plaintiffs' claim files are attached hereto as Exhibit F). Although these letters varied slightly depending on the results of the review, none of them refer to or evidence any waiver of the proof of loss requirement. If it were determined that an insured was eligible for additional compensation, a new proof of loss was provided only as to the additional authorized amount. Plaintiffs were not permitted to modify the supplemental proof of loss. The letters did not provide any relief from compliance with all policy requirements.

#### IV. ARGUMENT

##### A. Legal Standard For Summary Judgment Motion.

Defendants are entitled to summary judgment if there exists “no genuine issues of material fact” and the Court determines that the Defendants are “entitled to judgment as a matter of law.” *Dawkins*, 318 F. 3d at 610; *see also Flick*, 205 F. 3d at 390. Summary judgment is appropriate where the complaint and all other filings before the court demonstrate that “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

##### B. FEMA Did Not Waive the 60-Day Proof of Loss Requirement and Failure to File a Timely, Complete Proof of Loss Should Result in Dismissal of a Claim

Plaintiffs who fail to properly file a proof of loss should have their claims dismissed for failure to comply with the terms of the policy. The SFIP requires Plaintiffs to submit a sworn proof of loss within 60-days following their flood loss, *see* 44 C.F.R. Pt. 61, App. (A)(1), Art. 9, ¶ J(4). On October 28, 2003, pursuant to Article IX, ¶ D of the SFIP, FEMA made a limited waiver of the proof of loss timing requirement by granting a 60-day extension for policyholders to file proofs of loss for States affected by Hurricane Isabel between September 17 and 19, 2003. *See* Attachment D. FEMA did not waive the requirement that an insured file a proof of loss – only the time period was extended. *See Harris v. State Farm Fire & Cas. Co.*, 2006 U.S. Dist. LEXIS 1585, 31 (E.D. Va. January 11, 2006). (In a case examining the identical limited waiver of the proof of loss requirement at issue here, the Court concluded "at no time did FEMA ever waive the requirement to submit the Proof of Loss; it was only the deadline for doing so that was extended").

Although the basis of Plaintiffs' waiver claim is not entirely clear, Plaintiffs appear to contend that notices issued by Administrator Lowe, and possibly the letters sent to policyholders at the conclusion of the claims review process, somehow constitute a waiver of FEMA's proof of loss requirements. Nov. 6, 2006 Tr. at pp. 18-19, 25. Plaintiffs seem to acknowledge that (a) they have already been paid any amounts they claimed in timely submitted proofs of loss and (b) if FEMA did not waive the proof of loss requirement, their claims in this lawsuit for additional amounts are precluded.

The law is clear that the SFIP requires an insured to notify the insurer of the loss and submit a signed and sworn proof of loss setting out the nature, cause, and value of the loss, as well as their interest in the property. *Dawkins*, 318 F.3d at 608; *Harris*, 2006 U.S. Dist. LEXIS at 24. The proof of loss requirement is strictly construed and applied. *Forman v. FEMA*, 138 F.3d 543, 545 (5<sup>th</sup> Cir. 1998). Furthermore, the insured bears the responsibility for filing a timely proof of loss. "The insurance policy specifically requires a claimant to file a proof of loss within 60 days to receive coverage regardless of the circumstances of the claim." *Dawkins*, 318 F.3d at 612; *see also Wagner v. FEMA*, 847 F.2d 515 (9<sup>th</sup> Cir. 1988); *Gowland*, 143 F.3d at 953 ("[A]n insured's failure to provide a complete, sworn proof of loss statement, as required by the flood insurance policy, relieves the federal insurer's obligation to pay what otherwise might be a valid claim.").

Plaintiffs' waiver claim fails for the simple reason that they have not and cannot come forward with a single written document that expressly waives the proof of loss requirement for Hurricane Isabel claims. Federal courts have repeatedly held that the provisions of an SFIP, including the proof of loss requirement, are to be strictly construed. *See Dawkins*, 318 F.3d at 611; *West Augusta Development Corp. v. Giuffrida*, 717 F.2d 139 (4<sup>th</sup> Cir. 1983); *Sanz*, 328 F.3d at 1318; *Mancini*, 248 F.3d at 733; *Neuser v. Hocker*, 246 F.3d 508, 510 (6<sup>th</sup> Cir. 2000); *Gowland*,

143 F.3d at 954. As a result, “an insured’s failure to provide a complete, sworn proof of loss statement, as required by the flood insurance policy, relieves the federal insurer’s obligation to pay what otherwise might be a valid claim.” *Gowland*, 143 F.3d at 954; *Sanz*, 328 F.3d at 1319 (holding that insured’s failure to file a proof of loss within sixty days without obtaining written waiver of this requirement “eliminates the possibility of recovery”). “A claimant under a standard flood insurance policy may not avoid strict enforcement of the 60 day sworn proof of loss requirement, except through a valid waiver by the Federal Insurance Administrator.” *Flick*, 205 F.3d at 391.

Courts have rejected claims where insureds failed to submit timely proofs of loss and there had been no express written waiver of the proof of loss requirement by the Federal Insurance Administrator. *See, e.g., Dawkins*, 318 F.3d at 611; *West Augusta Development*, 717 F.2d at 141; *Sanz*, 328 F.3d at 1319; and *Gowland*, 143 F.3d at 954. For example, the Fourth Circuit rejected an insured’s claim of waiver even though FEMA had accepted and paid one proof of loss after the expiration of the proof of loss deadline and an agent informed the insured that FEMA would not enforce the 60-day requirement. The waiver claim was rejected because, *inter alia*, it was undisputed that the Federal Insurance Administrator had not provided “an express written waiver of the 60 day requirement.” *Dawkins*, 318 F.3d at 610. Waiver claims have also been rejected in situations where the insurer re-opened claims files after the deadline for submitting a proof of loss had past, *Gowland*, 143 F.3d at 954, and where the insurer repeatedly informed the insured that all necessary forms had been filed and continued to process his claims even though the insured had not submitted a proof of loss, *Sanz*, 328 F.3d at 1318-19.

As in *Dawkins*, *Gowland* and *Sanz*, Plaintiffs’ claims here fail because they have not come forward with an express written waiver of the proof of loss requirement. The notices upon

which Plaintiffs base their waiver claim are clearly insufficient to constitute waiver under the terms of the SFIPs. The October 28, 2003, notice merely extended the deadline for filing proofs of claim for Hurricane Isabel claims for an additional sixty days. It expressly stated that “all other terms and conditions of the SFIP remain in effect.” (Ex. C at p. 2.) No waiver can be found under such circumstances. *See, e.g. Gowland*, 143 F.3d at 954 (rejecting claim of waiver where “letter sent by [insurer] expressly stated that it was not waiving any rights or defenses under the policy,” stating “[i]t is therefore beyond peradventure that [insurer’s] letter may not be interpreted as an express written waiver”).

Similarly, the April 16, 2004, notice announcing a claims review process to review the Hurricane Isabel claims files could not constitute an express written waiver of the proof of loss requirement. The notice did not even mention the proof of loss requirement. To the contrary, it merely informed Plaintiffs that they could submit their claims for additional review. The same is true of the letters that some insureds received at the conclusion of the claims review process. Nothing in these letters can be construed as an express --or even tacit-- waiver of the proof of loss requirement.

Accordingly, Plaintiffs may not claim in this lawsuit any amounts that were not included in proper proofs of loss submitted within 120 days of their loss.

C. Defendants Are Not Estopped From Asserting the Failure to File a Proof of Loss as an Affirmative Defense.

As discussed above, the Administrator did not waive the requirement for submitting a sworn proof of loss after Hurricane Isabel. Further, FEMA and the WYOs cannot be estopped to accept a late claim because 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.

*Dawkins*, 318 F.3d at 612; *West Augusta Development*, 717 F.2d at 140-41; *see also Forman*, 138 F.3d 545-46. "As far as monetary claims, it is enough to say that this Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds." *Dawkins*, 318 F.3d at 611, *citing Office of Personnel Mgmt v. Richmond*, 496 U.S. 414, 434 (1990). Any argument Plaintiffs may raise for estoppel fails.

V. CONCLUSION

For the foregoing reasons, Defendants' motion for partial summary judgment pursuant Fed. R. Civ. P. 56 should be granted and the Court should make a determination that the proof of loss requirement for Hurricane Isabel claims was not waived. Accordingly, Plaintiffs' breach of contract claims should be barred to the extent they failed to submit proofs of loss for the amounts claimed within 120-days of their loss.

Respectfully submitted this \_\_\_\_ day of January, 2007.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing:

1. Motion for Partial Summary Judgment;
2. Memorandum of Law in Support of the Motion; and
3. Draft Order

were served by first-class U.S. Mail, postage prepaid, this \_\_\_\_ day of January, 2007 to Plaintiffs' attorney:

Martin H. Freeman  
Freeman & Freeman, P.C.  
One Church Street, Suite 200  
Rockville, Maryland 20850

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JAMIE M. BENNETT  
Assistant United States Attorney

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
Southern Division**

<b>THOMAS L. MOFFETT, II, ET AL.</b>	)	
	)	
<b>Plaintiffs,</b>	)	<b>Civil Action No. 8:05-CV-01547</b>
	)	<b>Hon. Peter J. Messitte</b>
v.	)	
	)	
<b>COMPUTER SCIENCES CORPORATION, ET AL.</b>	)	
	)	
<b>Defendants.</b>	)	
	)	
	)	
<hr style="border: 0.5px solid black;"/>		

This matter having come before the Court on Defendants’ Motion for partial Summary Judgment, the Court, upon consideration of the Motion, supporting Memorandum of Law, any opposition thereto, and the entire record herein, hereby

ORDERS that FEMA’s Motion for partial Summary Judgment is GRANTED. The Court finds as a matter of law based on undisputed facts that there was no waiver of the proof of loss requirement in the Standard Flood Insurance Policy for Hurricane Isabel claims other than the extension of the deadline from sixty days to one hundred twenty days.

IT IS SO ORDERED.

Dated: \_\_\_\_\_

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
Southern Division**

<b>THOMAS L. MOFFETT, II, ET AL.</b>	)	
	)	
<b>Plaintiffs,</b>	)	<b>Civil Action No. 8:05-CV-01547</b>
	)	<b>Hon. Peter J. Messitte</b>
<b>v.</b>	)	
	)	
<b>COMPUTER SCIENCES CORPORATION, ET AL.</b>	)	
	)	
<b>Defendants.</b>	)	
	)	
	)	
	)	

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**DEFENDANTS’ MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT V OF  
PLAINTIFFS’ SECOND AMENDED COMPLAINT**

The United States of America on behalf of the Federal Emergency Management Agency, by and through its undersigned attorneys, and on behalf of all of the remaining Defendants herein,<sup>1</sup> hereby moves this Honorable Court for summary judgment pursuant to Fed. R. Civ. P. 56(b). The Motion is supported by the Memorandum of Law submitted simultaneously herewith, and the entire record herein.

A proposed Order is attached for the convenience of the Court.

Respectfully Submitted,

ROD J. ROSENSTEIN  
UNITED STATES ATTORNEY

\_\_\_\_\_  
JAMIE M. BENNETT (08468)  
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<sup>1</sup> Pursuant to the Court’s Order of November 7, 2006, defendants have agreed that FEMA, as the Federal agency charged by Congress to administer the National Flood Insurance Program, should file the joint motion for partial summary judgment on their behalf.

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